

IQBAL AS JUDICIAL RORSCHACH TEST: AN EMPIRICAL STUDY OF DISTRICT COURT INTERPRETATIONS OF *ASHCROFT V. IQBAL*

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INTRODUCTION

Establishing a federal pleading standard is a high-stakes game for both courts and prospective litigants. If the standard is too stringent, then courts risk throwing out potentially meritorious claims and denying injured plain-

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tiffs any opportunity to be compensated for their losses. If the standard is too lenient, courts risk being overloaded with frivolous lawsuits that expose potentially innocent defendants to costly and burdensome discovery.

Defining the contours of the pleading standard implicates policy considerations and values at the core of our procedural system. When the merits of a complaint are unclear, do we err on the side of judicial accuracy by allowing all plaintiffs the opportunity to uncover evidence in support of their claims? Or do we err on the side of judicial efficiency and dismiss the claim?

The Supreme Court threw federal pleading doctrine into flux with its seminal decision in *Bell Atlantic Corp. v. Twombly*.¹ After officially “retir[ing]”² the prevailing “no set of facts” standard for analyzing the factual sufficiency of a complaint,³ the Court instituted a new requirement that a complaint state “a claim to relief that is plausible on its face.”⁴ Because the Court did not provide a concrete definition of “plausibility,” however, lower courts and scholars were confused regarding the intended scope and content of the new standard.⁵

The Supreme Court recently attempted to clean up the *Twombly* mess by revisiting the issue of general federal pleading standards in *Ashcroft v. Iqbal*.⁶ This Note conducts an empirical analysis to study whether the Court has finally succeeded in creating a workable pleading standard that can be applied uniformly across the circuits. This analysis first tracks whether lower courts have cited the two-pronged analytical approach suggested by *Iqbal*.⁷ Among the opinions that *did* cite the test, the analysis further examines whether the courts used each of the two prongs to analyze the suffi-

¹ 550 U.S. 544 (2007).

² *Id.* at 563.

³ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

⁴ *Twombly*, 550 U.S. at 570.

⁵ Some scholars and judges believed that *Twombly* instituted a heightened pleading standard for all causes of action. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432 (2008) (describing *Twombly* as “decidedly tighten[ing]” the federal pleading standard). Others confined *Twombly*’s approach to antitrust cases. See, e.g., *Kersenbrock v. Stoneman Cattle Co.*, No. 07-1044-MLB, 2007 WL 2219288, at *2 n.2 (D. Kan. July 30, 2007) (“[*Twombly*] deals *only* with pleading requirements in the highly complex context of an antitrust conspiracy case. It does not announce a general retreat from the notice pleading requirement of Fed.R.Civ.P. 8(a).”); *Lewis v. Marriot Int’l, Inc.*, 527 F. Supp. 2d 422, 424 n.1 (E.D. Pa. 2007) (noting that the applicability of *Twombly* to non-Sherman Act cases is “unknown”). A third group of scholars and judges argued that despite its explicit “retiring” of the “no set of facts” standard, *Twombly* would have little practical effect on the outcomes of motions to dismiss. See, e.g., *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (describing *Twombly* as imposing two “easy-to-clear hurdles” that plaintiffs must surmount); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 889 (2009) (“Understood relative to a baseline, *Twombly*’s plausibility standard should have only a minor impact on notice pleading as a practical matter.”). For a more detailed discussion of the confusion surrounding the *Twombly* decision, see *infra* Part I.C.

⁶ 129 S. Ct. 1937 (2009).

⁷ See *infra* Part IV.A.

ciency of the complaint.⁸ Finally, the analysis identifies two potential definitions of plausibility that could be derived from the *Iqbal* opinion and tracks which of these definitions is actually used in the opinions of lower courts.⁹ By using these measures, this Note seeks to determine whether the lower courts have articulated a consistent pleading standard in the wake of *Iqbal*.

In light of the confusion created by *Twombly*, empirical work provides valuable insight for litigants and scholars into how the *Iqbal* decision is actually affecting pleading practice. Indeed, three valuable, though preliminary, findings emerge from the sample of cases studied here. First, the majority of courts have not even cited the two-pronged *Iqbal* test, let alone applied it. Second, even those courts that have cited the test often did not apply the first prong, which requires the separation of “conclusions of law” from “factual allegations.” Finally, the majority of courts across almost every circuit have adopted a “common sense” approach to evaluating plausibility, rather than relying on a “checklist approach,”¹⁰ which involves matching the factual allegations in the complaint with each element of the legal claim.

The study reveals that *Iqbal* had served as a judicial Rorschach test¹¹ for lower courts, with each individual judge using the Court’s dicta to craft the pleading standard that the judge feels to be most appropriate. Judges who value judicial efficiency and judges who are sympathetic to defendants’ concerns about costly discovery have used the rigorous combination of the two-pronged test and the checklist approach to plausibility to dismiss claims they feel are frivolous. On the other hand, judges sympathetic to the idea that, in close cases, courts should err in favor of providing plaintiffs with their day in court have employed a more lenient standard by ignoring the two-pronged test and defining plausibility as the application of “judicial experience and common sense”¹² to the facts presented in the complaint. Either of these approaches represents a reasonable interpretation of *Iqbal*, but they can yield dramatically different results for litigants. The results of this Note’s analysis suggest that the Court’s effort to clarify federal pleading standards has failed, and that the *Twombly* and *Iqbal* opinions have ac-

⁸ See *infra* Part IV.B.

⁹ See *infra* Part IV.C.

¹⁰ See *infra* Part II.C (defining the “checklist approach” and the “common sense gloss”).

¹¹ The Rorschach test, also known as the “inkblot test,” is a psychological test in which subjects’ perceptions of ambiguously shaped inkblots are used to examine the subjects’ personality characteristics and emotional functioning. For an overview of the test, see ROBERT M. ALLEN, *STUDENT’S RORSCHACH MANUAL* 11 (1966); *About the Test*, INT’L SOC’Y OF THE RORSCHACH & PROJECTIVE METHODS, <http://www.rorschach.com/pages/rorschach-test/about-the-test.html> (last visited Jan. 23, 2011). For a discussion of the theoretical foundation of the Rorschach test, see generally ALLEN, *supra*, at 3–8.

¹² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

tually created more inconsistency in the federal pleading standards across (and even within) the circuits.

This Note proceeds in four parts. Part I describes the evolution of the federal pleading standards. Part II analyzes the *Iqbal* opinion, identifying the two distinct ways in which the Court attempted to clarify *Twombly*. This Part also notes two different interpretations of “plausible” that one could potentially synthesize from the sprawling dicta of the opinion. Part III describes the empirical study, and Part IV presents and analyzes the results.

I. THE *TWOMBLY* MESS

Pleading standards are not merely a procedural hurdle that litigants must surmount to proceed to discovery. On a deeper level, they reflect the policy choices underlying our litigation system. Pleading standards recently shifted in response to concerns about increasing discovery costs and crowded federal dockets, resulting in substantial doctrinal confusion among lower courts and scholars.

A. *Enactment of the Federal Rules and the Rise of “No Set of Facts”*

Prior to the enactment of the Federal Rules of Civil Procedure in 1938, courts and legislators failed to create a pleading standard that struck a stable balance between judicial efficiency and adjudicative accuracy.¹³ During the nineteenth century, legislators drafted pleading codes in an attempt to abrogate the rigid and esoteric common law pleading rules, which often caused potentially meritorious claims to be dismissed due to technical deficiencies.¹⁴ Code pleading was premised on a single requirement: that plaintiffs plead “facts” rather than “legal conclusions.”¹⁵ This distinction, however, proved extremely difficult to apply in practice because a complaint could very rarely present a coherent retelling of the events giving rise to the dispute without using *some* legal language.¹⁶ Courts were thus required to draw an arbitrary line along a generality–specificity continuum.¹⁷ Although

¹³ See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1753 (1998) (“[B]ecause pleading practice was littered with arcana, by the early nineteenth century it seemed often to produce decisions entirely unrelated to the merits.”).

¹⁴ See Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1111–12 (2010) (explaining common law pleading and describing it as “a confining labyrinth of formality”).

¹⁵ Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 862 (2010).

¹⁶ *Id.* at 863–64; see also Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260–68 (1926) (questioning the viability of the distinction between “law” and “fact”).

¹⁷ See Bone, *supra* note 15, at 864 (arguing that the distinction between legal conclusions and factual allegations depends on the degree of factual specificity); see also Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 421–22 (1921) (arguing that

code pleading was intended “to promote greater clarity and uniformity in pleading requirements, prevent unfair surprise to parties, and reduce costs,”¹⁸ it ultimately failed to render the pleading process more accessible to plaintiffs.¹⁹ As a result, adjudicatory accuracy was often compromised because plaintiffs with meritorious claims were unable to navigate the complex and strictly enforced rules of the pleading process.²⁰

The drafters of the Federal Rules of Civil Procedure discarded the unworkable fact–conclusion distinction and implemented a dramatically simplified pleading system.²¹ Rule 8(a)(2) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”²² Although Rule 12(b)(6) allows the defendant to file a motion to dismiss for “failure to state a claim upon which relief can be granted,” the plain text of Rule 8 appeared to establish quite a low bar for plaintiffs. The broad and permissive language of the new standard, which would come to be called “notice pleading,” revealed an implicit value judgment by the drafters of the rules that cases should be decided on the merits after an opportunity for discovery and that parties should not be barred from court based on the pleadings.²³

Despite its deceptively simple language, Rule 8(a)(2) contained some significant ambiguities that required clarification by the courts. There was no precise, objective understanding of what a “short” or “plain” statement had to contain, or what a plaintiff had to do to “show[] . . . entitle[ment] to relief.”²⁴ The Supreme Court first attempted to articulate a workable pleading standard in *Conley v. Gibson*, declaring that a complaint should not be dismissed at the pleading stage “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.”²⁵ As commentators subsequently pointed out, the Court might not have intended that lower court judges should apply this statement literally and thus allow all but the most patently frivolous suits to proceed to discovery.²⁶ Rather, the standard was more logically viewed as a codifica-

courts “confuse[] ‘statements of evidence’ with what are really statements of the ‘ultimate facts’ but in specific rather than in generic form”).

¹⁸ Schwartz & Appel, *supra* note 14, at 1114.

¹⁹ *See id.* at 1116.

²⁰ *See id.* (“Thus, on balance, the Field Code left in place a system that still inhibited rather than promoted the resolution of claims on the merits.”).

²¹ *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (“Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era . . .”).

²² FED. R. CIV. P. 8(a)(2).

²³ *See* Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958) (“What we require [in Rule 8] is a general statement of the case We do not require detail.”).

²⁴ FED. R. CIV. P. 8(a)(2).

²⁵ 355 U.S. 41, 45–46 (1957).

²⁶ *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1304 (2010) (quoting *Twombly*’s “retirement” of *Conley*’s “no set of facts” language to show the Court feared a focused and literal reading of it).

tion of one of the fundamental values of the federal procedural system: potentially valid complaints should not be thrown out because the plaintiffs cannot allege all of the relevant facts prior to discovery.²⁷

In the decades following the *Conley* decision, lower courts continually attempted to impose heightened pleading standards for certain classes of cases.²⁸ Judicial concern over the rise in potentially frivolous civil rights litigation led courts to require plaintiffs to plead facts, often relating to the defendant's state of mind, without first having the benefit of discovery.²⁹ The Court rebuffed these attempts, however, emphasizing that the purpose of notice pleading was the facilitation of a "proper decision on the merits."³⁰ By simplifying the initial stages of the litigation process, the Court ensured that plaintiffs would have the opportunity to uncover evidence in support of their claims even if those plaintiffs could allege little more than suspicious activity prior to discovery.

B. *Twombly and the Plausibility Standard*

After a series of unequivocal affirmations of both *Conley* and the systemic importance of adjudicating claims on the merits *after* opportunity for discovery,³¹ the Court appeared to have entrenched a very lenient pleading standard. In 2007, however, the Court expressly "retire[d]" the venerable "no set of facts" language from *Conley*, replacing it with a requirement that a complaint be plausible, not merely probable.³² *Twombly* constituted a substantial shift away from protecting plaintiffs' interests in obtaining access to the discovery process and toward protecting defendants from the expenses associated with frivolous litigation.

²⁷ See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433 (1986) (describing *Conley* as the Court's "th[rowing] its weight decisively behind the new liberal ethos" underlying the Federal Rules of Civil Procedure).

²⁸ See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993); see also Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (noting the tendency of some lower federal courts to "impose non-Rule-based heightened pleading in direct contravention of notice pleading doctrine"); Marcus, *supra* note 27, at 436 ("[F]ederal courts are insisting on detailed factual allegations more and more often . . .").

²⁹ Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 552 (2002); see also Fairman, *supra* note 28, at 1011–59 (conducting a "micro-analysis" of pleading practices across different areas of substantive law, including antitrust, CERCLA, RICO, negligence, and conspiracy).

³⁰ *Swierkiewicz*, 534 U.S. at 514 (internal quotation marks omitted) (quoting *Conley*, 355 U.S. at 48).

³¹ See, e.g., *Swierkiewicz*, 534 U.S. at 514 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."); *Leatherman*, 507 U.S. at 168–69 (noting that under the current "notice pleading system," federal courts can use control of discovery and summary judgment, rather than heightened pleading requirements, to weed out nonmeritorious claims).

³² *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 563 (2007).

Bell Atlantic Corp. v. Twombly was a massive class action lawsuit filed on behalf of all subscribers to local telephone and high-speed internet services from 1996 to 2007.³³ The plaintiffs alleged that four of the nation's largest telecommunications companies (Incumbent Local Exchange Carriers, or ILECs) had violated section 1 of the Sherman Act³⁴ by conspiring to restrain trade in two ways, both of which allegedly led to higher fees for local telephone and high-speed internet services.³⁵ Aside from a general statement made by the Chief Executive Officer of one of the ILECs, the plaintiffs could offer no factual allegations showing the existence of such a conspiracy.³⁶ Instead, they asked the court to *infer* that the ILECs had entered into such an agreement based on the absence of any meaningful effort by the ILECs to enter each other's markets and the identical tactics ILECs employed to undermine the upstart "Competitive Local Exchange Carriers" (CLECs).³⁷

The district court concluded that allegations of parallel business conduct did not adequately state a claim for conspiracy and subsequently dismissed the complaint for failure to state a claim.³⁸ The Second Circuit reversed.³⁹ Echoing the seminal statement in *Conley v. Gibson*, the panel reasoned that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."⁴⁰ The Supreme Court "granted certiorari to address the

³³ *Id.* at 550.

³⁴ 15 U.S.C. §§ 1–7 (2006).

³⁵ *Twombly*, 550 U.S. at 550. First, the plaintiffs alleged that the ILECs had "engaged in parallel conduct in their respective service areas to inhibit the growth" of their competitors. *Id.* (internal quotation marks omitted). Second, the complaint alleged that the ILECs had also conspired (and ultimately pledged) to refrain from competing with each other by deciding not to expand beyond their regional bases. *Id.* at 551.

³⁶ The closest the plaintiffs came to evidence of a conspiracy was a statement by Richard Notebaert, Chief Executive Officer of one of the ILECs, that encroaching upon the market of another ILEC "might be a good way to turn a quick dollar but that doesn't make it right." *Id.* at 551.

³⁷ *Id.* CLECs were communications companies founded after the 1984 divestiture of AT&T's local telephone services. *Id.* at 549. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), imposed a host of duties on the ILECs, most of which were intended to facilitate the CLECs' entry into the market for local telephone service. *Twombly*, 550 U.S. at 549.

³⁸ *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 189 (S.D.N.Y. 2003), *vacated*, 425 F.3d 99 (2d Cir. 2005), *rev'd*, 550 U.S. 544. The court reasoned that the defendants' behavior could be fully explained by the completely lawful and economically rational impulse to defend their original territories. *Id.*

³⁹ *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 119 (2d Cir. 2005) (emphasis added), *rev'd*, 550 U.S. 544.

⁴⁰ *Id.* at 114 (emphasis added). The court acknowledged that while the complaint must state facts that render a conspiracy plausible, "plus factors" showing more than parallel conduct (which is not illegal under the Sherman Act) are not required at the pleading stage. *Id.*

proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁴¹

Justice Souter, writing for the majority, began the *Twombly* opinion’s analysis by reiterating one of the fundamental tenets of federal pleading practice: the longstanding *Conley* principle that a complaint need only provide “fair notice” to the defendant.⁴² Despite this initial nod to the governing precedent, however, the Court proceeded to alter its interpretation of Rule 8(a)(2) dramatically. In *Conley* and its progeny, the Court based its analysis of the factual sufficiency of the complaint on Rule 8(a)(2)’s requirement of a “short and plain” statement,⁴³ which implies that a plaintiff need not supply much factual detail to survive a motion to dismiss.

By contrast, the *Twombly* majority focused on the Rule’s requirement that claimants “show” and state the grounds for their entitlement to relief.⁴⁴ Adequately doing so, the Court reasoned, requires the complaint to provide *some* degree of factual detail beyond mere “labels and conclusions”; a “formulaic recitation of the elements of a cause of action will not do.”⁴⁵ The Court emphasized the need to provide sufficient factual allegations to “raise a right to relief above the speculative level.”⁴⁶ The Court’s new interpretation stood in stark contrast to the earlier “no set of facts” standard, under which a complaint should have been deemed sufficient if there was *any* possibility that the allegations were true.

Recognizing the irreconcilable conflict between the “no set of facts” language and its more stringent analysis of the *Twombly* complaint, the Court dropped a bombshell. Justice Souter declared that, after nearly fifty years of extensive use,⁴⁷ the “no set of facts” phrase had “earned its retirement” and was “best forgotten as an incomplete, negative gloss on an accepted pleading standard: *once a claim has been stated adequately*, it may be supported by any set of facts consistent with the allegations in the complaint.”⁴⁸ By doing so, the Court discarded the only language in the *Conley* opinion that offered a serviceably specific standard by which lower courts could assess the sufficiency of complaints.

⁴¹ *Twombly*, 550 U.S. at 553. The narrow framing of the question presented might have been one of the sources of judicial and scholarly confusion regarding the applicability of the plausibility standard to all civil actions. *See infra* Part I.C.

⁴² *Twombly*, 550 U.S. at 555.

⁴³ *See Conley v. Gibson*, 355 U.S. 41, 47 (1957) (“[A]ll the Rules require is ‘a short and plain statement of the claim’ . . .” (quoting FED. R. CIV. P. 8(a)(2))); *see also Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

⁴⁴ FED. R. CIV. P. 8(a)(2); *see also Twombly*, 550 U.S. at 555.

⁴⁵ *Twombly*, 550 U.S. at 555.

⁴⁶ *Id.*

⁴⁷ According to Westlaw’s KeyCite service, as of October 31, 2010, federal courts had cited *Conley v. Gibson* 49,988 times.

⁴⁸ *Twombly*, 550 U.S. at 563 (emphasis added).

The Court, however, did provide a replacement standard: to survive a motion to dismiss, a complaint must contain “enough facts to state a claim to relief that is plausible on its face.”⁴⁹ Although *Twombly* concluded by reassuring lower courts (and litigants) that the new pleading standard did not require “heightened fact pleading of specifics,”⁵⁰ the opinion did not purport to establish any concrete definition of “plausibility.” Rather, it provided lower courts with only a few abstract statements describing what type of complaint would *not* pass muster under the new standard. For example, a plausible claim, as noted above, cannot be “speculative,”⁵¹ and a plaintiff must provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”⁵² Lower courts, however, should not mistake plausibility for a probability requirement involving an assessment of the likelihood that the suit would survive summary judgment or succeed at trial.⁵³ A valid complaint must simply provide enough facts to “raise a reasonable expectation that discovery will reveal evidence of illegal [conduct].”⁵⁴

Applying the new plausibility test, the Court reversed the Second Circuit,⁵⁵ holding that facts alleging conscious parallel conduct without any showing of agreement or conspiracy did not state a plausible claim for relief under the Sherman Act.⁵⁶ The Court did not, however, rest its decision entirely on the sufficiency of the facts contained in the complaint. Justice Souter also noted the massive expenditure of time and money involved in antitrust discovery.⁵⁷ Requiring plaintiffs to provide facts plausibly suggesting conspiracy at the pleading stage would avoid inflicting on defendants “the potentially enormous expense of discovery in cases with no reasonably

⁴⁹ *Id.* at 570.

⁵⁰ *Id.*; see also *id.* at 555 (“[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . .”).

⁵¹ *Id.* at 555.

⁵² *Id.*

⁵³ *Id.* at 556.

⁵⁴ *Id.*

⁵⁵ *Id.* at 553.

⁵⁶ See *id.* at 548–49, 556.

⁵⁷ See *id.* at 558. Any court that strictly construed the “no set of facts” language in *Conley* would essentially be mandated to allow such a case to proceed to discovery, *even if* the allegations contained therein were facially implausible. The *Twombly* Court feared that the lenient *Conley* standard, combined with the threat of expensive discovery, would encourage defendants to settle “even anemic cases” early in the litigation process. *Id.* at 559. The Court noted that the threat was obvious in the instant case, as the plaintiffs represented a class consisting “of at least 90 percent of all subscribers to local telephone or high-speed Internet services” in the United States, the defendants were the country’s largest telecommunications firms, and the antitrust violations allegedly occurred over the course of seven years. *Id.*

founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim.”⁵⁸

Twombly did much more than change the standard for evaluating the sufficiency of pleadings. On a broader scale, *Twombly* reflected a policy judgment as to the appropriate ordering of the core values underlying the pleading system.⁵⁹ According to *Conley* and its progeny, the purpose of the notice pleading standard, and the procedural system in general, was to facilitate judgments on the merits *after* all parties had the opportunity to uncover the full scope of the facts relevant to their cases.⁶⁰ *Twombly* implied that such an ideal is outdated under the modern realities of our legal system. With the advent of enormous class action suits and the expansion of discovery costs, courts can no longer realistically hope to manage every case filed in federal court.⁶¹ As a result, the Court implicitly elevated the goal of judicial efficiency and docket reduction over the goal of accurate adjudication on the merits. By explicitly imposing a threshold screening requirement, the Court now seemed willing to sacrifice a few potentially meritorious claims to save defendants the cost of litigating the (presumably many) frivolous ones. This policy choice reflected the heart of the historical debate surrounding pleading doctrine and enhanced its contemporary salience.

⁵⁸ *Id.* at 559 (alteration in original) (internal quotation marks omitted) (citing *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). The Court rejected the plaintiffs’ contention that the district courts could effectively regulate the discovery process, and it instead mandated that a safeguard be incorporated into the federal pleading standard. *Id.* at 559 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through ‘careful case management,’ given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” (citation omitted)).

⁵⁹ For discussions of the policy implications of the *Twombly* decision, see generally Bone, *supra* note 5, which argues that a pleading requirement along the lines of *Twombly*’s plausibility standard might be justified by a process-based theory of fairness; Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010), which argues that the Court destabilized the entire civil litigation system without adequate warning or thought; 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 (2008), which argues that awareness of the linkages between pleading, summary judgment, and removal law will lead to the establishment of meaningful constraints on the exercise of judicial power in the pleading stage; Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rules of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604 (2006), which suggests a pleading template that differentiates between three related but distinct pleading principles and defending *Twombly* in terms of the proposed pleading template; Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, which argues that courts should be more cautious when using the plausibility standard to dismiss employment discrimination claims early in the proceedings; and Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90 (2009), which argues that bifurcating pleading standards along cost-disparity lines will curtail economic gamesmanship in civil litigation.

⁶⁰ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002).

⁶¹ See *Twombly*, 550 U.S. at 559.

C. Confusion in the Wake of *Twombly*

The *Twombly* opinion clearly abrogated the “no set of facts” standard and replaced it with the requirement that a complaint state a claim for relief that is “plausible on its face.”⁶² Courts and scholars were confused, however, regarding when and how the *Twombly* standard should be applied. Some judges and scholars argued that the radical change in pleading standards applied only to the substantive area of antitrust law, or at most to discovery-intensive cases in general.⁶³ These commentators pointed to the narrow question presented in *Twombly*,⁶⁴ the continued validity of the conclusory form complaints in the appendix of the Federal Rules,⁶⁵ and the Court’s short, per curiam opinion in *Erickson v. Pardus*,⁶⁶ which was issued two weeks after the Court decided *Twombly*. In *Erickson*, the Court reversed the Tenth Circuit’s determination that the claim of a federal prisoner was “too conclusory” to survive a motion to dismiss without mentioning the plausibility standard established by *Twombly*.⁶⁷ In fact, *Erickson* cited *Twombly* to affirm the central tenet of notice pleading established by *Conley*: the “short and plain statement” required by Rule 8(a)(2) “need only ‘give the defendant fair notice of what the . . . claim is and the grounds

⁶² *Id.* at 570.

⁶³ See, e.g., *Morgan v. Hanna Holdings, Inc.*, 635 F. Supp. 2d 404, 407 (W.D. Pa. 2009) (noting that *Twombly* “required a heightened degree of fact pleading in an anti-trust case”). But see *Kasten v. Ford Motor Co.*, No. 09-11754, 2009 WL 3628012, at *1 (E.D. Mich. Oct. 30, 2009) (referring to *Twombly* as an “antitrust case” but explaining that *Iqbal* declared that the *Twombly* standard would “henceforth apply to ‘all civil actions’”); Spencer, *supra* note 5, at 431 (declaring that “[n]otice pleading is dead” after *Twombly*).

⁶⁴ See *Twombly*, 550 U.S. at 548–49 (“The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action.”).

⁶⁵ For example, Form 11 allows the plaintiff to allege, in relevant part, that “On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff.” FED. R. CIV. P. Form 11. The plaintiff may alter the “drove a motor vehicle” element as well as the date and place. Forms 12 through 21 provide similarly sparse form complaints for various causes of action, including conversion of property and patent infringement. These forms are rendered automatically valid by Federal Rule 84. As the *Twombly* dissenters and subsequent scholars have pointed out, however, the crux of this complaint—that the defendant drove “negligently”—is indisputably a legal conclusion. See *Twombly*, 554 U.S. at 576 (Stevens, J., dissenting) (noting that the bare allegation of “negligence” in the form complaint suffices under the notice pleading standard, even though it would have been called a “conclusion of law” under code pleading). See Ides, *supra* note 59, at 633 (“[I]t is difficult if not impossible to distinguish between the supposedly sufficient ‘negligently drove’ allegation in [former] Form 9 [now Form 11], where no specific facts of negligence are alleged, and the supposedly inadequate, ‘fact-deficient’ allegation of an antitrust conspiracy (or any other type of conspiracy) . . .”).

⁶⁶ 551 U.S. 89 (2007). In *Erickson*, a federal prisoner filed a § 1983 claim alleging that prison officials had acted with deliberate indifference to his medical needs. *Id.* at 90.

⁶⁷ *Id.* at 94 (“The case cannot, however, be dismissed on the ground that petitioner’s allegations of harm were too conclusory to put these matters in issue.”).

upon which it rests.”⁶⁸ Some lower courts, unsure whether the Court intended *Erickson* to supersede or restrict the applicability of *Twombly*, reasoned that the preliminary requirement of plausibility should only be imposed in certain cases, particularly those involving potentially costly or time-consuming discovery.⁶⁹

Not only were courts confused as to when *Twombly* should apply, but they also struggled with the application of the standard itself.⁷⁰ If a court decided that *Twombly* provides the governing standard, how would it begin to apply a test for plausibility? At most, Justice Souter’s opinion provided guideposts by which the courts could determine what plausibility is *not*—it is not a “probability requirement,” nor is it a requirement that a plaintiff provide “detailed factual allegations.”⁷¹ But there is significant gray area between a literal reading of the “no set of facts” standard and an outright imposition of fact pleading. Some courts interpreted plausibility as imposing a heightened pleading standard,⁷² while others, relying on the Court’s assurance that Rule 8 does not require a plaintiff to plead “in detail,”⁷³ reasoned that the Court had not appreciably changed the pleading standard.⁷⁴

⁶⁸ *Id.* at 93–94 (quoting *Twombly*, 550 U.S. at 555–56). Because the plaintiff in *Erickson* proceeded *pro se*, however, it remained unclear how much impact the Court intended this opinion to have on general pleading doctrine. *See id.* at 94 (“The Court of Appeals’ departure from the liberal pleading standards set forth by Rule 8(a)(2) is even more pronounced in this particular case because petitioner has been proceeding, from the litigation’s outset, without counsel. A document filed *pro se* is ‘to be liberally construed,’ and ‘a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.’” (citation omitted)).

⁶⁹ *See, e.g.,* Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) (“[W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”), *rev’d sub nom.* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009); *Ides, supra* note 59, at 638–39 (arguing that the “rapidly prepared and issued *Erickson* opinion” was issued as a “reassurance that the *Bell Atlantic* decision had not altered Rule 8(a)(2) pleading principles”).

⁷⁰ *See* Jason Bartlett, Comment, *Into the Wild: The Uneven and Self-defeating Effects of Bell Atlantic v. Twombly*, 24 ST. JOHN’S J. LEGAL COMMENT. 73, 89 (2009) (arguing that the plausibility standard promotes disparate and inconsistent results).

⁷¹ *Twombly*, 550 U.S. at 555.

⁷² *See, e.g.,* Goldstein v. Pataki, 488 F. Supp. 2d 254, 286–87 (E.D.N.Y. 2007) (requiring that a plaintiff essentially plead a *prima facie* case in order to avoid a motion to dismiss since the judge found it was unlikely that, based on the complaint, the plaintiffs would ever be able to show no public benefit from the defendants’ actions). *See generally* Bartlett, *supra* note 70, at 85–106 (describing the varying interpretations of *Twombly* across courts).

⁷³ *Twombly*, 550 U.S. at 570 (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”).

⁷⁴ *See, e.g.,* Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) (“[T]he Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley*’s ‘no set of facts’ language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework.”); *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 780 (7th Cir. 2007) (interpreting plausibility as the reaffirmation of the principle that plaintiffs may not disguise the nature of their claims).

Empirical studies tracking the percentages of claims dismissed under *Conley* and *Twombly* showed a slight but statistically significant increase in the percentage of 12(b)(6) motions granted.⁷⁵ Recently, Professor Patricia Hatamyar conducted an empirical study that analyzed and compared dismissal rates under the *Conley*, *Twombly*, and *Iqbal* pleading standards.⁷⁶ Her sample included 1039 cases, including approximately 440 from the two-year period preceding *Twombly*, 422 from the two-year period after *Twombly*, and 173 from the three-month period following the *Iqbal* decision.⁷⁷ In coding the cases, she tracked the courts' rulings and categorized the cases based on the underlying area of substantive law.⁷⁸ Her analysis revealed a statistically significant increase in overall dismissal rates under the *Twombly* and *Iqbal* standards,⁷⁹ although motions that were granted with leave to amend accounted for much of the increase.⁸⁰

II. *IQBAL* AS JANITOR: CLEANING UP THE *TWOMBLY* MESS

The Supreme Court moved quickly to corral the confusion that arose among the lower courts in the wake of *Twombly*. Less than two years after it introduced the plausibility standard in *Twombly*, the Court clarified its interpretation of Rule 8(a) in *Ashcroft v. Iqbal*.⁸¹ The case resolved some of most glaring ambiguities of the *Twombly* decision by establishing that the plausibility standard applies to all civil cases⁸² and by precluding courts from lowering the Rule 8(a) standard in favor of allowing limited discovery on certain factual issues.⁸³ More importantly, it offered two levels of guidance—"analytical" and "substantive"—to aid lower courts in determining whether a complaint contains sufficient factual detail to survive a motion to dismiss.

This Part analyzes the *Iqbal* decision. It begins with a brief description of the facts and basic reasoning of the case. Second, it argues that *Iqbal* makes two distinct contributions to pleading doctrine by providing both an *analytical* and a *substantive* clarification of the plausibility standard. This analysis forms the basis of the empirical questions analyzed in Parts III and IV.

⁷⁵ See, e.g., Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010).

⁷⁶ *Id.*

⁷⁷ *Id.* at 601.

⁷⁸ *Id.* at 590–93 (describing how Hatamyar categorized the cases in her sample).

⁷⁹ *Id.* at 599.

⁸⁰ *Id.*

⁸¹ 129 S. Ct. 1937 (2009).

⁸² *Id.* at 1953.

⁸³ *Id.* In *Twombly*, the respondents proposed a plan of "phased discovery" limited to the issues of alleged conspiracy and class certification. Justice Stevens cited this plan approvingly in dissent. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593–94 (2007) (Stevens, J., dissenting).

A. Background

In *Ashcroft v. Iqbal*, a Pakistani Muslim brought a *Bivens* action⁸⁴ against various federal officials—including then-Attorney General John Ashcroft and Director of the Federal Bureau of Investigation (FBI) Robert Mueller—related to his detention by the FBI during a post-9/11 investigation.⁸⁵ The complaint alleged that Ashcroft and Mueller violated Iqbal’s First and Fifth Amendment rights by designating him a “person of high interest” based on his race, religion, or national origin.⁸⁶ The relevant part alleged the following:

[T]he Federal Bureau of Investigation . . . , under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11. . . . The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.⁸⁷

The pleading described Ashcroft as the “principal architect” of the policy and alleged that Mueller was “instrumental in [its] adoption, promulgation, and implementation.”⁸⁸

Ashcroft and Mueller filed a Rule 12(b)(6) motion to dismiss the claim for failure to state sufficient facts to show their involvement in unconstitutional conduct.⁸⁹ The district court, ruling on the motion before the Supreme Court decided *Twombly*, denied the motion under *Conley*’s lenient “no set of facts” standard.⁹⁰ The defendants filed an interlocutory appeal with the Second Circuit, and *Twombly* was decided during the pendency of that appeal.⁹¹ The Second Circuit affirmed in part the ruling of the district court, reasoning that *Twombly* established a “flexible plausibility standard” under which certain types of lawsuits (such as antitrust) require “amplification” of the factual allegations to render the claim “plausible.”⁹² Discrimination claims, it found, were not one of “those contexts” in which the law

⁸⁴ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389 (1971) (holding that the violation of constitutional rights by a federal agent acting under color of his authority gives rise to an action for damages).

⁸⁵ *Iqbal*, 129 S. Ct. at 1943–44.

⁸⁶ *Id.* at 1944.

⁸⁷ First Amended Complaint and Jury Demand at ¶¶ 47, 69, *Elmaghraby v. Ashcroft*, No. 04-CV-1809 (JG)(JA) (E.D.N.Y. Sept. 30, 2004), 2004 WL 3756442.

⁸⁸ *Iqbal*, 129 S. Ct. at 1944.

⁸⁹ *Id.* In their response, the defendants pleaded the affirmative defense of qualified immunity. *Id.* at 1942.

⁹⁰ See *id.* at 1944.

⁹¹ *Id.*

⁹² *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d sub nom.* *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

required additional factual specificity.⁹³ In his concurring opinion, Judge Cabranes requested that the Supreme Court address the issue of the appropriate standard in cases involving a defense of qualified immunity.⁹⁴

Rather than confining its analysis to the narrower qualified immunity issue, however, the Supreme Court used *Ashcroft v. Iqbal* as an opportunity to clarify the general pleading standard on two distinct levels. On an analytical level, *Iqbal* established a two-pronged test for the application of the plausibility standard. Meanwhile, it also provided a substantive clarification that sought to provide a positive explanation of what degree of factual detail is necessary to render a claim “plausible on its face.”⁹⁵

B. Analytical Clarification: Establishing a Two-Pronged Test for Determining the Adequacy of a Complaint

This section describes *Iqbal*’s analytical clarification of the pleading standard and presents the empirical questions used in Parts III and IV to evaluate the success of the Court’s clarification. *Iqbal*’s first major doctrinal contribution consists of a two-pronged test designed to provide a concrete, accessible method by which lower courts could apply the rather arcane plausibility requirement. At the outset of *Iqbal*’s sufficiency analysis, Justice Kennedy, writing for the majority, identified two “working principles” underlying the Court’s decision in *Twombly*.⁹⁶ First, although a court must accept all factual allegations as true for the purpose of a motion to dismiss, it should not extend that tenet to legal conclusions.⁹⁷ Second, a complaint must state a “plausible” claim for relief to survive a motion to dismiss.⁹⁸ In articulating these principles, the Court noted that while Rule 8 certainly marks a “notable and generous” departure from the “hyper-technical” requirements of the prior code pleading regime, it “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.”⁹⁹

Iqbal derived a two-pronged test from *Twombly*’s working principles and suggested, rather than mandated, its application by lower courts. The first prong says that “a court considering a motion to dismiss *can choose* to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”¹⁰⁰ The second prong says that once the court jettisons these legal conclusions, it must assume the veracity of the remaining well-pleaded factual allegations and “determine

⁹³ *Id.* at 174.

⁹⁴ *Id.* at 178 (Cabranes, J., concurring).

⁹⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁹⁶ *Iqbal*, 129 S. Ct. at 1949.

⁹⁷ *Id.* at 1949–50.

⁹⁸ *Id.* at 1950.

⁹⁹ *Id.*

¹⁰⁰ *Id.* (emphasis added).

whether they plausibly give rise to an entitlement to relief.”¹⁰¹ This test represents *Iqbal*'s unique, positive contribution to pleading doctrine, as *Twombly* did not endeavor to establish any rigid analytical framework through which courts could assess the factual sufficiency of complaints.¹⁰²

The test represented a major doctrinal shift because it transformed the plausibility inquiry from a nebulous interpretive standard into a mechanistic two-part inquiry that should theoretically lead to a more uniform application of the federal pleading standard. It instructed the lower courts as to which type of legal allegations to disregard (“[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements”¹⁰³) and which type of facts to evaluate under the plausibility standard.¹⁰⁴

But in the immediate aftermath of the *Iqbal* decision, have the lower courts actually applied the new test? The permissive language of the opinion, specifically the recommendation that a court “can choose” to begin its analysis of a pleading with the first prong of the test, means that the uniform usage of *Iqbal*'s analytical clarification is far from a foregone conclusion.

The first two questions posed in this Note's empirical study related to the application of the two-pronged test. How often do lower courts cite the test in their summations of relevant pleading doctrine?¹⁰⁵ And more importantly, if they do cite it, do they explicitly apply it in their opinions?¹⁰⁶ These preliminary inquiries will give litigants and scholars some idea of whether or not the lower courts find this analytical clarification of the plausibility standard to be a useful doctrinal contribution. Also, these empirical

¹⁰¹ *Id.*

¹⁰² Other scholars agree that the distinction between facts and conclusions departs sharply from the Court's reasoning in *Twombly*. See Bone, *supra* note 15, at 869. To be sure, the Court attempted to couch the two-pronged test as virtually indistinguishable from the reasoning of *Twombly*, asserting that in *Twombly*, the Court *implicitly* determined that the plaintiffs' assertion of an unlawful agreement was a “legal conclusion” and thus not entitled to an assumption of truth. *Iqbal*, 129 S. Ct. at 1950. Absent that allegation, the complaint failed to pass the plausibility threshold because the telecommunications companies' actions were more likely explained by lawful, free-market explanations. *Id.* It is important to note, however, that the *Twombly* court never differentiated between legal conclusions and well-pleaded facts. Rather, it analyzed the complaint holistically en route to a determination that the defendants' parallel conduct, assessed under the totality of the circumstances, did not seem suspicious. The two-pronged test represented the majority's *interpretation* of the reasoning *behind Twombly*, not a reshaping or clarification of the expressed reasoning used to reach that holding.

¹⁰³ *Iqbal*, 129 S. Ct. at 1949.

¹⁰⁴ The test itself does not clarify the “plausibility standard” but rather provides a framework through which courts can apply the standard to the appropriate type of allegations. I argue that *Iqbal* presents a further *substantive* clarification of plausibility by describing it in terms more accessible to courts. See *infra* Part II.C.

¹⁰⁵ See *infra* Part IV.A and Figure 1.

¹⁰⁶ The “explicit application” question of this empirical study tracked whether courts designate particular parts of the complaint as “legal conclusions not entitled to the assumption of truth,” as suggested by the first prong of the test, before they evaluate the plausibility of the claim. See *infra* Part IV.B and Table 1.

measures will indicate whether the *Iqbal* decision has indeed helped the lower courts move toward the uniform application of a pleading standard.

*C. Substantive Clarification of Plausibility: The Checklist Approach
Versus the Common Sense Gloss*

While *Iqbal*'s analytical clarification attempted to establish a uniform method of application across the circuits, its "substantive clarification" of the plausibility requirement sought to establish a more concrete standard regarding how much detail a complaint must contain to "nudge[] [it] across the line from conceivable to plausible."¹⁰⁷ The language of the opinion, however, has given rise to at least two distinct but equally viable interpretations of the contours of plausibility. The first interpretation, which I refer to as the "checklist approach," suggests that each element of the legal claim must be supported by factual allegations. The second, by contrast, suggests that a complaint need only provide sufficient factual detail to trigger a judge's common sense determination that the defendant likely behaved wrongfully. I call this interpretation the "common sense gloss." This section discusses each of these interpretations in turn and explains how the empirical portion of this Note evaluates which of these potential substantive clarifications have been used by lower courts.

Iqbal strongly suggested that the level of plausibility of the complaint is directly correlated with the level of factual detail provided by the plaintiff. The checklist approach to plausibility demands "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."¹⁰⁸ Moreover, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."¹⁰⁹ While legal conclusions may provide the "framework" for the complaint, each of them "must be supported by factual allegations."¹¹⁰ The empirical portion of this Note tracks lower courts' citations of statements that are emblematic of the checklist approach to determine whether courts are indeed assessing the plausibility of complaints by matching particular factual details to each element of the legal claim.

On the other hand, the Court also seemed to endorse a "common sense" gloss on plausibility. Certain statements in the *Iqbal* opinion urged judges not to focus on the *number* of facts required but rather to use their "judicial experience and common sense"¹¹¹ to draw "reasonable inference[s]" regarding whether there was unlawful conduct afoot.¹¹² In its initial description of the plausibility principle underlying *Twombly*, the Court

¹⁰⁷ Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

¹⁰⁸ *Iqbal*, 129 S. Ct. at 1949.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1950.

¹¹¹ *Id.*

¹¹² *Id.* at 1949.

acknowledged that determining whether a complaint states a plausible claim is necessarily “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹¹³ A plausible claim will contain facts that allow the court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.”¹¹⁴ This Note’s empirical study also tracked judges’ citations of two representative descriptions of the “common sense gloss” to determine the level of traction that this interpretation has gained among the district courts and to compare its use to that of the checklist approach.

In most cases, application of the checklist approach and the common sense gloss should lead to the same result, as a complaint generally must contain more than conclusory allegations to trigger the judge’s common sense determination that the defendant might indeed be liable for the alleged illegal behavior. At the margins, however, the two standards could lead to different results. As other scholars have noted, the checklist approach might render certain types of claims, such as antitrust or employment discrimination, particularly susceptible to dismissal at the pleading stage because, without discovery, plaintiffs would not be able to provide sufficient factual support for *all* elements of their claims.¹¹⁵ If a judge uses the common sense gloss, however, his visceral instinct that the conduct reeks of wrongdoing would necessitate the denial of a motion to dismiss *even if* the complaint did not provide facts supporting each element of the claim. The potential divergence is particularly problematic in two types of cases: (1) enormous class actions and other cases with high discovery costs, like *Twombly*, in which courts might be motivated to impose a higher pleading standard to avoid burdensome discovery;¹¹⁶ and (2) civil rights cases, which make up a disproportionately large percentage of the federal docket¹¹⁷ and which are sometimes already subject to threshold screening requirements.¹¹⁸

Thus, although *Iqbal* purported to offer substantive clarification of the definition of “plausibility,” it instead created a type of judicial Rorschach test. Courts can seize on one of two different definitions of the term, which

¹¹³ *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

¹¹⁴ *Id.* at 1949.

¹¹⁵ See Bone, *supra* note 15, at 878–79 (noting that civil rights claims and other cases involving state-of-mind elements face disproportionately adverse effects under *Iqbal*); Seiner, *supra* note 59, at 1015 (arguing that courts should be more cautious in applying the two-pronged *Iqbal* test to employment discrimination cases because the test often poses an insurmountable barrier for even meritorious suits).

¹¹⁶ See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

¹¹⁷ See Hatamyar, *supra* note 75, at 604 (finding that civil rights cases overall comprise 44% of her representative database of federal cases).

¹¹⁸ For example, plaintiffs proceeding *in forma pauperis* must survive a sua sponte motion to dismiss. See 28 U.S.C. § 1915 (e)(2)(B)(ii) (2006) (establishing that in proceedings filed by plaintiffs proceeding *in forma pauperis*, “the court shall dismiss the case at any time if the court determines that . . . the action or appeal . . . fails to state a claim on which relief may be granted”).

could result in markedly different results for certain types of claims. The third empirical question addressed by this Note seeks to determine which of the two interpretations of plausibility have gained the most traction among the lower courts and whether there is any identifiable variability among the circuits. Answering this question will help litigants draft claims that are more likely to survive motions to dismiss (or to identify claims susceptible to challenge at this stage). It will also help to direct scholarly attention to the *actual* changes that *Iqbal* has wrought on our system so that further study can spell out the implications of the *Twombly*–*Iqbal* standard.

III. HOW DISTRICT COURTS INTERPRET *IQBAL*

The empirical questions presented in this Note analyze which portions of *Iqbal* judges choose to cite in their opinions. As my discussions of the analytical and substantive clarifications make clear, *Iqbal* is, in some sense, a judicial Rorschach test. In crafting their statements of the governing pleading doctrine, judges pick and choose which statements to use (and which statements to ignore) to define the relevant standard.

The empirical portion of this Note tackles three distinct questions. First, this study measured whether federal district courts have cited the two-pronged *Iqbal* test when they analyzed the factual sufficiency of complaints. Put another way, were they actually using the analytical clarification offered by the Court? Second, building on the first question, this study measured whether the courts that did cite the two-pronged test explicitly applied both elements of that test in their analysis of the complaint. In answering this question, the study asks whether the opinion articulated which elements of the complaint were “legal conclusions” (and thus not entitled to an assumption of truth) and which elements were “facts” subject to the plausibility analysis of the second prong. If these courts were applying this two-part analytical framework, then perhaps the Court’s attempt to clarify its opinion in *Twombly* has indeed resulted in the application of a uniform standard across all of the circuits.

While the first two questions pertain to the analytical clarification offered by the two-pronged test, the third question evaluates the substantive clarification of the meaning of “plausibility.” Far from creating one readily identifiable definition of plausibility, *Iqbal* offered multiple potential “clarifications” of the doctrine, ranging from a checklist approach resembling fact pleading to a potentially more lenient common sense approach that would enable suspicious but factually deficient allegations to proceed to discovery. Because it is important for litigants to know the standard by which courts will measure their complaints for plausibility, this study tracked courts’ citations of four statements from the *Iqbal* opinion, two of which encapsulate the checklist approach and two of which are emblematic

of the common sense gloss.¹¹⁹ The goal of the third question, then, is to determine whether the substantive contours of plausibility, i.e., what a complaint must contain to survive a motion to dismiss, have remained constant across district courts within the various circuits.

A. Contents of Sample

The study analyzed 10% of the federal district court cases that cited *Ashcroft v. Iqbal* and were decided in the first six months following the establishment of the new test.¹²⁰ The 10% sample size was large enough to result in generalizable findings but still small enough to allow the level of in-depth analysis of the decisions necessary to determine whether or not a court “applied” the *Iqbal* test. A search on the commercial legal database Westlaw indicated that *Iqbal* was cited 1592 times between May 18, 2009, and November 18, 2009.¹²¹ Each circuit had equal proportional representation within the 196-case sample, which allowed me to assess whether the application of the analytical and substantive clarifications varied by circuit.¹²²

¹¹⁹ The two statements representing the checklist approach are (1) “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations,” *Iqbal*, 129 S. Ct. at 1950, and (2) Rule 8 demands “more than an unadorned, the-defendant-unlawfully-harmed-me accusation,” *id.* at 1949. The two statements representing the common sense gloss are (1) “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” *id.*, and (2) “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense,” *id.* at 1950.

¹²⁰ *Iqbal* was decided on May 18, 2009, so I limited the search for district court cases to those decided on or before November 18, 2009.

¹²¹ To arrive at this figure, I first searched for federal cases citing “*Ashcroft v. Iqbal*” and “12(b)(6),” which yielded approximately 4100 cases. I then searched for cases citing “*Ashcroft v. Iqbal*,” “12(b)(6),” and “pro se,” and subtracted those cases from the total. I did not include pro se litigants in the empirical study because pro se complaints are assessed under a more lenient standard than are complaints written by attorneys. See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Other empirical studies tracking dismissal rates under the *Twombly*, *Conley*, and *Iqbal* standards also excluded pro se plaintiffs from their data. See, e.g., Hatamyar, *supra* note 75, at 585 (excluding reviews of complaints submitted with an application to proceed *in forma pauperis*), Kendall W. Hannon, Note, *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, 1832–33 (2008).

¹²² In this case, sampling by circuit is preferable to a completely random sample because the number of cases citing *Iqbal* varies dramatically by circuit. For example, the Ninth Circuit cited *Iqbal* 401 times as of October 5, 2009, while the Tenth Circuit cited it only 80 times during the same period. A 10% random sample of the entire body of cases citing *Iqbal* might have led to underrepresentation of the smaller circuits. On the other hand, the “random” element might have caused the sample to swing the other way and proportionally overrepresent them. Sampling by circuit prevented such skewing of the data and allows for identification of trends within the different circuits.

The study focused on district court cases¹²³ and excluded circuit court opinions because district court judges are “on the front line” of applying the relevant standards.¹²⁴ Their day-to-day applications of the test and its accompanying standards will determine the ultimate effectiveness of the Supreme Court’s attempt to clean up the *Twombly* mess. Put bluntly, the district courts can render the Supreme Court’s efforts meaningless by simply declining to apply either, or both, of *Iqbal*’s purported clarifications of the pleading standard. Moreover, while district courts are technically bound by the opinions of their circuit courts, they are not directly supervised.¹²⁵ Although a small percentage of cases might come before the circuit court and might be subject to reversal for their failures to undertake the correct analysis,¹²⁶ the vast majority of district court rulings represent the final say on a motion to dismiss.¹²⁷

B. Method of Selection

I retrieved cases from Westlaw by conducting a “Citing References” search, which returns all decisions citing a particular legal conclusion. From there, I limited the results to federal district court cases and further limited the cases by circuit. Within each circuit, I used a random number

¹²³ This study used both reported and unreported opinions. Although the latter are not published, their reasoning still provides guidance to the individual litigants as to the level of factual sufficiency required to survive a motion to dismiss. As such, their reasoning is still valuable for purposes of evaluating how the lower courts have interpreted *Iqbal*.

¹²⁴ Hatamyar, *supra* note 75, at 584.

¹²⁵ For example, the Third Circuit mandated the use of the two-pronged test in *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009). The data in this study show, however, that lower courts have been inconsistent in even citing the test, let alone rigorously applying it. See *infra* Part IV.

¹²⁶ For example, according to a Westlaw “Citing References” search conducted on October 24, 2010, the Second Circuit had cited *Ashcroft v. Iqbal* 128 times. During the same time period, the district courts within that circuit had cited *Ashcroft v. Iqbal* 1611 times. According to these figures, the Second Circuit reviewed only 7.9% of the decisions citing *Iqbal*. Admittedly, this figure is a rather rough estimate of the number of decisions that receive appellate review at the pleading stage. The actual percentage could be much smaller because most district court orders are never published. See Hatamyar, *supra* note 75, at 584 n.198 (noting that, according to one estimate, only 3% of all district court orders are available on Westlaw and Lexis). On the other hand, the actual figure could be larger because the “Citing References” search did not account for the (potentially large) number of cases that were pending review by the Second Circuit. The imprecision of the measurement does not, however, undercut the more general point that it illustrates: the circuit courts review a relatively small percentage of district court rulings on motions to dismiss.

¹²⁷ It should also be noted that litigants are barred from appealing the *denial* of a motion to dismiss by the Final Judgment Rule, 28 U.S.C. § 1291 (2006), unless they can show that their appeal falls within one of the exceptions established by the collateral order doctrine. See, e.g., *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1946 (2009) (finding that the district court’s denial of the defendant’s motion to dismiss was immediately appealable under the collateral order doctrine because it “turned on an issue of law and rejected the defense of qualified immunity”).

generator to select cases.¹²⁸ Every state within each circuit is represented by at least one opinion.¹²⁹ All selections were made before I read the opinions.

As I read the selected opinions, I eliminated any cases that involved (1) analysis of the sufficiency of a complaint under Rule 9(b), which imposes a fact pleading standard in cases of fraud or mistake;¹³⁰ (2) analysis of a Rule 15 motion to amend the complaint;¹³¹ or (3) cases that cite *Iqbal* for purposes of discussing the doctrine of respondeat superior.¹³² I then selected replacement cases using the random number generator.¹³³

C. Analysis of the Sample

The first question addressed by the study was whether the lower courts have cited the analytical clarification offered by *Iqbal*. After selecting the cases, I checked each opinion for a reference to the two-pronged test.¹³⁴ Cases that cited the test, either in full or in part, were coded “1.” Cases that did not were coded “0.”

The second question of the study, whether courts have applied both prongs of the analytical test, required a more in-depth reading of each case. If the case cited the two-pronged test, I read the court’s opinion to determine whether or not the court had applied the test and then looked at the court’s application of each prong individually. For the first prong, I looked

¹²⁸ RANDOM.ORG, <http://www.random.org> (last visited Oct. 24, 2010) (generating true random numbers).

¹²⁹ If the sample created by the random number generator did not include a representative of a particular state, I discarded the last number on the list and generated a new one. I repeated this process until all states were represented.

¹³⁰ FED. R. CIV. P. 9(b).

¹³¹ *Id.* 15(a). Although Rule 15(a)(2) urges courts to “freely give leave” to amend a complaint “when justice so requires,” courts are not required to allow an amendment if doing so would be futile. Many circuits define “futility” as an inability to satisfy the Rule 12(b)(6) pleading standard. *See, e.g., Grant W. Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 175 (3d Cir. 2010) (“The standard for assessing futility is the ‘same standard of legal sufficiency as applies under [Federal] Rule [of Civil Procedure] 12(b)(6).’” (alteration in original) (quoting *Shane v. Fauver*, 213 F.3d 113, 155 (3d Cir. 2000))); *Riverview Health Inst. v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010) (“A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss.” (quoting *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (internal quotation marks omitted))); *Lucente v. IBM*, 310 F.3d 243, 258 (2d Cir. 2002) (“An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).”).

¹³² *See, e.g., Stanley v. Landers*, No. 09-cv-52-PB, 2009 WL 2242676, at *8 (D.N.H. July 23, 2009).

¹³³ Because these cases did count toward the total number of cases citing *Iqbal* (in the Westlaw search), however, my sample might encompass slightly more than 10% of the cases citing *Iqbal*.

¹³⁴ The specific quotation is as follows: “[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. . . . When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

for an explicit delineation of some elements of the claim as “factual allegations” and some as legal conclusions “not entitled to the presumption of truth.”¹³⁵ If the court categorized some allegations as “conclusory” and thus not entitled to the assumption of truth or if the court described certain allegations as “factual support” for the elements of the claim, I coded the case “1.” If the court did not explicitly distinguish between “facts” and “legal conclusions,” I coded the case “0.”

For the second prong, I looked for either a reference to a common sense evaluation of the remaining factual allegations¹³⁶ or an application of the checklist approach wherein the court matched the remaining facts with each element of the claim.¹³⁷ If the court used either of these approaches to evaluate the sufficiency of the factual allegations contained in the complaint, I coded the case “1”; if not, I coded it “0.”

The third question focused on the substantive clarification of the meaning of “plausibility,” measuring how often courts cited the checklist approach and the common sense gloss. The two statements representing the checklist approach are:

- (1) “While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations”;¹³⁸
- (2) Rule 8 demands “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”¹³⁹

¹³⁵ See *id.* For examples of courts applying the first prong, see, for example, *Boy Blue, Inc. v. Zomba Recording, LLC*, No. 3:09-CV-483-HEH, 2009 WL 2970794, at *3 (E.D. Va. Sept. 16, 2009), stating that “[t]hese allegations are simply sterile legal conclusions that are ‘not entitled to the assumption of truth.’ Stripped of such legal incantation, these allegations provide no factual support for the remaining elements” (citation omitted); *United States v. Lloyds TSB Bank PLC*, 639 F. Supp. 2d 326, 340–41 (S.D.N.Y. 2009), stating, “I approach that question by following the *Iqbal* protocol and first identifying those allegations that, because they are no more than conclusions, are not entitled to the presumption of truth. . . . An example appears in ¶ 6: ‘Lloyds entered into a broad and ongoing conspiracy with the primary goals of defrauding AremisSoft’”; and *Estate of Allen v. CCA of Tenn., LLC*, No. 1:08-cv-0774-SEB-TAB, 2009 WL 2091002, at *2 (S.D. Ind. July 14, 2009), noting that “some allegations in the complaint are conclusory and not entitled to the assumption of truth.”

¹³⁶ See, e.g., *Natural Miracles, Inc. v. Team Nat’l, Inc.*, No. 09-cv-01379-WDM-KMT, 2009 WL 3234386, at *3 (D. Colo. Oct. 1, 2009) (“These facts, viewed in the light most favorable to Plaintiff, easily support the inference that National disclosed Plaintiff’s formula to Nature’s Blend in violation of the non-disclosure agreements and other legal duties.”); *FTC v. Innovative Mktg., Inc.*, 654 F. Supp. 2d 378, 387 (D. Md. 2009) (“These allegations suggest that D’Souza was deeply involved in a closely-run Enterprise, and permit the reasonable inference that D’Souza either had actual knowledge of the unlawful conduct, or at least exhibited reckless disregard for the truth.”).

¹³⁷ See, e.g., *Dewey v. Lauer*, No. 08-cv-01734-WYD-KLM, 2009 WL 3234276, at *4 (D. Colo. Sept. 30, 2009) (“Because plaintiffs have alleged the nine elements of fraud, I find that they have satisfied the first element of mail and wire fraud”); *Fletcher v. Philip Morris USA, Inc.*, No. 3:09CV284-HEH, 2009 WL 2067807, at *6 (E.D. Va. July 14, 2009) (“Plaintiff’s Amended Complaint falls short of plausibility, however, because it is devoid of any specific factual allegations that similarly situated employees, who are not members of a protected class, received more favorable treatment”).

¹³⁸ *Iqbal*, 129 S. Ct. at 1950.

¹³⁹ *Id.* at 1949.

The two statements representing the common sense gloss are:

- (1) “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”.¹⁴⁰
- (2) “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹⁴¹

Citations of each of these statements were tracked separately. A case was coded as “1” if it quoted one of the statements and “0” if it did not.

IV. RESULTS AND ANALYSIS OF DATA

The data lead to three distinct conclusions. First, the majority of courts did not even cite, let alone apply, the two-pronged test offered by *Iqbal*. Second, among the courts that did cite the two-pronged test, the majority did not explicitly apply the first prong of the test in their analysis of the sufficiency of the complaint. Finally, courts cited the common sense gloss on the plausibility standard much more often than they cited the checklist approach. This Part discusses the results supporting each of these findings and then presents a normative analysis of the implications of each.

A. Lack of Consistent Use of the Two-Pronged Test

To say that the *Iqbal* test has been inconsistently utilized might be a bit of an understatement. Overall, less than 50% of the district court cases in the sample cited the two-pronged *Iqbal* test.¹⁴² When the data were broken down among the circuits, most of the data points fell within the 30%–40% range. Only the Fourth and Tenth Circuits cited the test in more than 50% of the sampled cases.¹⁴³ At this early stage, it appears that *Iqbal* has only generated more confusion over pleading standards because it proposed a

¹⁴⁰ *Id.*

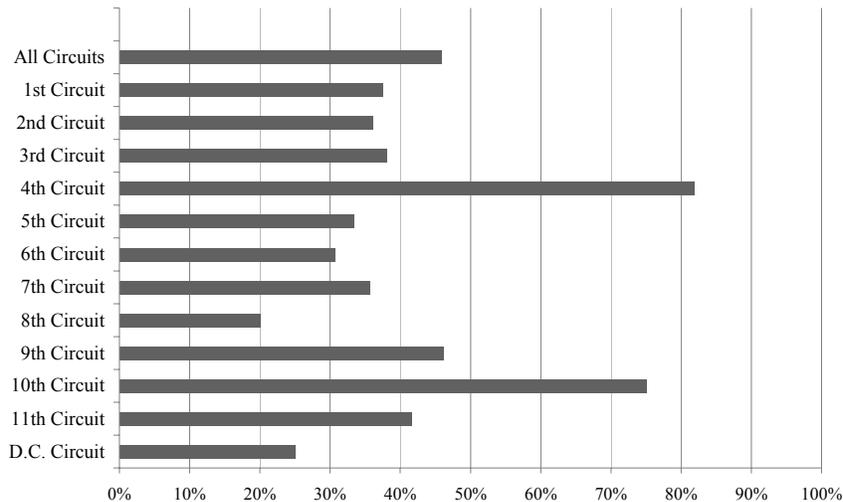
¹⁴¹ *Id.* at 1950. Each of these four statements comes from a different paragraph in the opinion.

¹⁴² To be clear, every case in the sample cited to *some* portion of the *Iqbal* decision. *See supra* Part III.B (explaining method of case selection). The 50% of cases that did not cite the two-pronged test cited different elements of the Court’s explanation of the pleading standard, including the four statements tracked in question three of this study. *See infra* Part IV.C.

¹⁴³ Professor Hatamyar’s study contains an offhand mention that only a few cases in her database cited the two-pronged test, but her study did not explicitly track this data. *See Hatamyar, supra* note 75, at 582 (“Perhaps I am magnifying the importance of the ‘two-pronged approach.’ Only a minority of district courts citing *Iqbal* in the Database I constructed even mentioned the ‘two-pronged approach.’”). Hatamyar’s study did not, however, focus on which portions of the *Iqbal* opinion were relied upon by lower courts. She focused instead on tracking dismissal rates across various areas of substantive law under the *Conley*, *Twombly*, and *Iqbal* standards. *See id.* at 589–96 (describing how Hatamyar coded the cases in her database).

test that has been cited by less than half the circuits and has been rigorously applied by an even smaller fraction.¹⁴⁴

FIGURE 1: BAR GRAPH OF PERCENTAGE OF CASES CITING TWO-PRONGED TEST



This reluctance to apply the test might change over the coming months (or even years), particularly if circuit courts choose to endorse the test. By November 2009, the last month covered by this study's sample, all but one of the circuits had issued opinions that analyzed the *Iqbal* standard at length.¹⁴⁵ However, only the Third Circuit mandated the use of the two-pronged test by lower courts.¹⁴⁶ Although it never explicitly ordered district courts to apply the test, the Fourth Circuit implicitly endorsed the two-pronged approach by citing and applying it in two of its decisions.¹⁴⁷ Two other circuits have issued mixed messages, citing and applying the two-pronged test in at least one opinion while relying solely on the common

¹⁴⁴ See *infra* Figure 1. Often, cases simply cited the test at the outset and made no further mention of either separating and discarding legal conclusions or determining the plausibility of the remaining facts. See *infra* Part IV.B.

¹⁴⁵ The First Circuit did not issue its first analysis of the *Iqbal* pleading standard until December 2009. See *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 48–51 (1st Cir. 2009). The court described the two-pronged test as a “suggested” approach. See *id.* at 49.

¹⁴⁶ See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009).

¹⁴⁷ See *Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, Inc.*, 591 F.3d 250, 256–60 (4th Cir. 2009) (citing and stringently applying the two-pronged test); *Francis v. Giacomelli*, 588 F.3d 186, 193–97 (4th Cir. 2009) (citing and applying the two-pronged test without mentioning the “common sense” gloss). The Tenth Circuit cited the two-pronged test but noted that the Supreme Court had merely “suggested” that lower courts follow this approach. See *Hall v. Wittman*, 584 F.3d 859, 863 (10th Cir. 2009).

sense gloss in one or more other opinions.¹⁴⁸ The remaining circuits have not mentioned the two-pronged test and have simply relied on the common sense definition of plausibility to guide their decisions.¹⁴⁹

Moreover, it is unclear exactly how much impact circuit court mandates actually have on district court judges. For example, in an opinion issued on August 18, 2009, the Third Circuit clearly told district courts that they “should” apply the two-pronged *Iqbal* test whenever they were called to analyze a motion to dismiss for failure to state a claim.¹⁵⁰ Within the Third Circuit sample, my study analyzed eleven district court cases decided more than ten days after the Court of Appeals issued its opinion.¹⁵¹ Of these cases, only five cited the test, and only one rigorously applied it.¹⁵²

Although circuit decisions might technically be binding on the district courts, lower court judges have a long history of recalcitrance in applying the pleading standards designated by appellate courts. *Leatherman v. Tarrant County* and *Swierkiewicz v. Sorema* are the best illustrations of this assertion: both cases involved district court judges imposing an artificially heightened pleading standard that streamlined the adjudicatory process by weeding out obviously unmeritorious claims at the earliest possible stage.¹⁵³ The reverse seems to have happened with *Iqbal*; now that the pendulum of the Supreme Court’s pleading jurisprudence has swung in the opposite direction, district courts may fear that a stringent application of the *Iqbal* test would freeze out potentially meritorious claims. Interestingly, by reverting to a more lenient pleading standard, the courts are acting against their own interest in reducing their dockets. The Supreme Court has handed district

¹⁴⁸ Within the Second Circuit, compare *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010), which describes the two-pronged test as “suggested,” with *Arar v. Ashcroft*, 585 F.3d 559, 569 (2d Cir. 2009), which does not cite the two-pronged test. In the Fifth Circuit, compare *Rhodes v. Prince*, 360 F. App’x 555, 558–60 (5th Cir. 2010), which cites and applies the two-pronged test, with *Floyd v. City of Kenner*, 351 F. App’x 890, 893 (5th Cir. 2009), which cites the “reasonable inference” standard only.

¹⁴⁹ See *Waters Edge Living, LLC v. RSUI Indem. Co.*, 355 F. App’x 318, 323 (11th Cir. 2009); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009); *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609–11 (6th Cir. 2009); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009); *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *Brown v. JP Morgan Chase Bank*, 334 Fed. App’x 758, 759 (7th Cir. 2009); *Atherton v. D.C. Office of Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009).

¹⁵⁰ *Fowler*, 578 F.3d at 210–11.

¹⁵¹ I omitted one case decided on August 20, 2009, on the assumption that the court had already drafted its opinion before the Third Circuit issued its decision. This case neither cited nor applied the *Iqbal* test. See *Scholz Design Inc. v. Skatell*, No. 09cv0896, 2009 WL 2595660 (W.D. Pa. Aug. 20, 2009).

¹⁵² *Goldsmith Assocs. v. Del Frisco’s Rest. Grp.*, No. 09-1359, 2009 WL 3172752, at *5 (E.D. Pa. Oct. 1, 2009) (“Goldsmith’s allegations related to whether the defendant’s enrichment was ‘unjust’ constitute the sort of ‘legal conclusion’ or ‘naked assertion’ that must be disregarded under *Iqbal*. . . . In order to avoid dismissal of the unjust enrichment claim, Goldsmith must allege in its complaint facts showing that the defendants specifically requested benefits or misled Goldsmith.”).

¹⁵³ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165 (1993).

court judges a massive club with which to pummel all complaints that lack sufficient factual support at the pleading stage, and they have instead chosen to use a scalpel to carve out only those claims that are facially implausible or profoundly lacking in factual support.

Assuming that this infrequent use of the two-pronged test represents the beginning of a long-term trend rather than a bit of initial recalcitrance, one must ask *why* district courts would choose not to apply it. One obvious reason is that the test, in practice, might result in overly aggressive screening at the pleading stage.¹⁵⁴ Perhaps the district courts aptly recognize that the two-pronged test potentially screens out claims that seem facially suspicious but cannot provide much more than an unadorned accusation because the plaintiffs do not have access to the requisite information prior to discovery. As some scholars have noted, allowing the district courts the flexibility to *infer* potential wrongdoing is absolutely essential to facilitate enforcement of some areas of underlying substantive law.¹⁵⁵ In particular, enforcement of employment discrimination, constitutional civil rights, and conspiracy claims would be particularly difficult if courts insisted on disregarding all legal conclusions at the outset.¹⁵⁶ If the trend of inconsistent application of the test does continue, the question of whether the use of the test varies according to the underlying substantive law would be a worthwhile subject for a future empirical study.

B. Courts' Failures to Apply Prong One of the Iqbal Test

The second finding also illustrates that *Iqbal's* analytical clarification of the pleading standard—its two-pronged test—has not succeeded in instituting a uniform analytical method for evaluating the sufficiency of pleadings. The first prong of the *Iqbal* test requires the court to separate “legal conclusions” from “factual allegations,” whereas the second step involves an analysis of the plausibility of the remaining “factual allegations.”¹⁵⁷ The data show that even when courts cited the two-pronged test, they often did not apply the first prong in their opinions. Only 51.67% (31 out of 60) of the district court opinions that cited the *Iqbal* test expressly designated cer-

¹⁵⁴ Judge Alsup opined that “[a] good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court.” *Ibrahim v. Dep’t. of Homeland Sec.*, No. C 06-00545 WHA, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009).

¹⁵⁵ See *Seiner*, *supra* note 59, at 1043 (proposing a new analytical framework for employment discrimination claims to allow plaintiffs the requisite latitude to allege intent).

¹⁵⁶ See *Hatamyar*, *supra* note 75, at 607 (finding that the percentage of Rule 12(b)(6) motions granted in overall civil rights cases grew from 50% under *Conley* to 53% under *Twombly* to 58% under *Iqbal*); *Hannon*, *supra* note 121, at 1837 fig.3 (showing an increase in the grant and denial rates of 12(b)(6) motions in civil rights claims during the time between the *Conley* and *Twombly* cases).

¹⁵⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). See *supra* Part IV.A.

tain elements of the claim as “facts” and others as “conclusions” for purposes of conducting the subsequent plausibility analysis.

TABLE 1: CASES CITING AND APPLYING TWO-PRONGED TEST BY CIRCUIT

| | <i>Total Cases</i> | <i>Citing Two-Pronged Test</i> | <i>Applying Prong One</i> | <i>Applying Prong Two</i> |
|--------------|--------------------|--------------------------------|---------------------------|---------------------------|
| All Circuits | 159 | 73 (45.91%) | 30 (18.87%) | 37 (23.27%) |
| 1st Circuit | 8 | 3 (37.50%) | 2 (25.00%) | 4 (50.00%) |
| 2nd Circuit | 25 | 9 (36.00%) | 5 (20.00%) | 5 (20.00%) |
| 3rd Circuit | 21 | 8 (38.10%) | 4 (19.04%) | 3 (14.29%) |
| 4th Circuit | 11 | 9 (81.81%) | 3 (27.27%) | 6 (54.55%) |
| 5th Circuit | 12 | 4 (33.33%) | 1 (8.33%) | 1 (8.33%) |
| 6th Circuit | 13 | 4 (30.76%) | 0 (0.00%) | 1 (7.69%) |
| 7th Circuit | 14 | 6 (35.71%) | 4 (28.57%) | 4 (28.57%) |
| 8th Circuit | 5 | 1 (20.00%) | 0 (0.00%) | 0 (0.00%) |
| 9th Circuit | 26 | 12 (46.15%) | 4 (15.38%) | 4 (15.38%) |
| 10th Circuit | 8 | 6 (75.00%) | 3 (37.50%) | 3 (37.50%) |
| 11th Circuit | 12 | 5 (41.67%) | 3 (25.00%) | 5 (41.67%) |
| D.C. Circuit | 4 | 1 (25.00%) | 1 (25.00%) | 1 (25.00%) |

The observed lack of rigor is likely attributable to a number of factors. First (and perhaps foremost), after two years of struggling with *Twombly*, judges have likely become accustomed to applying the plausibility standard in a holistic manner. This approach allows the judge to read the complaint as a coherent retelling of the events underlying the dispute rather than as a laundry list of individual factual allegations carefully isolated from legal

language.¹⁵⁸ Rigid application of the first prong might actually undermine the court's ability to apply the second, as the removal of the "legal conclusions" linking together the events in question might leave the judge with an incomplete picture of the events. For judges who adjudicate motions to dismiss on a regular basis and who have already become comfortable with assessing the plausibility of the entire complaint, the imposition of an additional analytical step likely seems both burdensome and unhelpful.¹⁵⁹

Moreover, judges have likely *always* tacitly disregarded at least the baldest conclusory assertions. The empirical data from studies of *Twombly* have repeatedly shown that Rule 12(b)(6) dismissal rates under *Conley* are higher than one might expect if courts were applying the "no set of facts" standard literally.¹⁶⁰ For example, one study found that courts citing *Conley* as the governing pleading standard dismissed 36.8% of the 2212 sampled claims.¹⁶¹ The courts issued mixed rulings (granted-in-part and denied-in-part) in another 29.1% of the sampled cases.¹⁶² These studies suggest that pleading has always served as a preliminary gatekeeper to weed out potentially frivolous claims.¹⁶³ Indeed, courts have long recognized that even the more lenient notice pleading standard was not intended to allow inherently dubious allegations to proceed to discovery simply because the plaintiff could dream up *some* scenario in which the defendant would be liable.¹⁶⁴ Perhaps lower courts have interpreted the first prong of the *Iqbal* test as a mandate to continue to conduct the same level of preliminary screening.

The much-maligned first prong of the *Iqbal* test is not helped by the fact that it is incredibly difficult to apply in a principled, formalistic manner. The *Iqbal* decision itself fails to offer a cogent explanation of why certain allegations in the complaint were "conclusory" while others were not.¹⁶⁵

¹⁵⁸ Bone, *supra* note 15, at 868–69.

¹⁵⁹ Professor Bone agrees and argues that the second prong should be the only component of the plausibility test. *See id.* at 869.

¹⁶⁰ *See, e.g.*, Hatamyar, *supra* note 75, at 601 tbl.2 (finding that out of 444 cases citing *Conley*, 215 were dismissed and 123 received mixed holdings).

¹⁶¹ Hannon, *supra* note 121, at 1835.

¹⁶² *Id.*; *see also* Hatamyar, *supra* note 75, at 601 tbl.2.

¹⁶³ *See* Hatamyar, *supra* note 75, at 599 (finding, in an empirical analysis of a representative sample of federal cases, that courts using the *Conley* standard granted nearly half (46%) of all motions to dismiss); Hannon, *supra* note 121, at 1835.

¹⁶⁴ *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) ("[A] good many judges and commentators have balked at taking the literal terms of the *Conley* ['no set of facts'] passage as a pleading standard."); *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) (noting that the "exceedingly forgiving attitude toward pleading deficiencies" embodied by *Conley v. Gibson* "has never been taken literally").

¹⁶⁵ Bone, *supra* note 15, at 859–62. The Court dismissed as conclusory the complaint's allegations that Ashcroft was the "principal architect" of the discriminatory policy and that Mueller was "instrumental" in its adoption and execution. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009). These are not, however, "legal conclusions" in the traditional sense, particularly when compared to the other allegations that the defendants "knew of, condoned, and willfully and maliciously agreed to subject" *Iqbal* to harsh conditions of confinement based on his race, religion, or national origin. *Id.* The latter

Scholars have rather cynically posited a reason for that logical omission—no principled way exists to establish a threshold level of specificity that an allegation must reach to be afforded a presumption of truth.¹⁶⁶ The “conclusory” nature of an allegation can only be determined in the context of a particular case,¹⁶⁷ and a judicial determination that a particular allegation is “conclusory” can be decisive.¹⁶⁸ Courts might be uncomfortable applying this difficult test to a decision (dismissal of a pleading) with such high stakes for both parties.

Moreover, the “law–fact” distinction was the central reason that the drafters of the Federal Rules discarded code pleading in favor of the more lenient and accessible standard of Rule 8(a)(2).¹⁶⁹ Now, however, the *Iqbal* majority appears to have written that hazy distinction back into federal pleading standards. It is no surprise that courts have been reluctant to embrace it. While it might be relatively easy to toss out an allegation of “negligence” or “recklessness,” at the margin, the difference is best viewed on a continuum rather than as a bright line, formalistic determination.¹⁷⁰

One cannot blame a district court for not wanting to wade into this mess. When faced with one of these marginal cases, the more prudent course appears to involve steering clear of the first prong of the *Iqbal* test and relying upon the more holistic plausibility approach undertaken by the *Twombly* court. This allows the court to evade the equally unattractive options of either providing tortured reasoning to explain its decision to disregard certain elements as “conclusory” or providing no reasoning whatsoever to support the distinction. It also allows some plaintiffs to proceed to discovery even if they do not have access to all of the relevant facts supporting their claims at the pleading stage.

statement involves terms that double as elements of the cause of action, while the former do not. Rather, the former allegations implicate the defendants’ *actual* roles in the events that unfolded in the wake of the September 11 attacks. If we borrow Professor Steinman’s “transactional” definition of a nonconclusory allegation—one that describes the overt and visible aspects of the real-world events underlying the dispute—these allegations seem to be *factual*, rather than legal. Steinman, *supra* note 26, at 1334. Justice Souter, writing in dissent, agreed that these statements are nonconclusory. *See Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting).

¹⁶⁶ Bone, *supra* note 15, at 861 (“There is no obvious way to draw a line along the generality-specificity continuum, and the *Iqbal* majority offers nothing to guide the analysis in a sensible way.”); *see also* Hatamyar, *supra* note 75, at 566 (“The problem is that one person’s ‘conclusion’ is another person’s ‘fact.’”).

¹⁶⁷ Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 492–93 (2010) (“Put somewhat differently, what is ‘conclusory’ depends on the right of action on which the claimant seeks relief and the conclusions that are necessary to relief under that right of action.”).

¹⁶⁸ Bone, *supra* note 15, at 861.

¹⁶⁹ *See id.* at 864 (“Inspired by the legal realist critique and committed to liberalizing pleading practice, the drafters of the Federal Rules of Civil Procedure eliminated the code distinction between facts and legal conclusions.”).

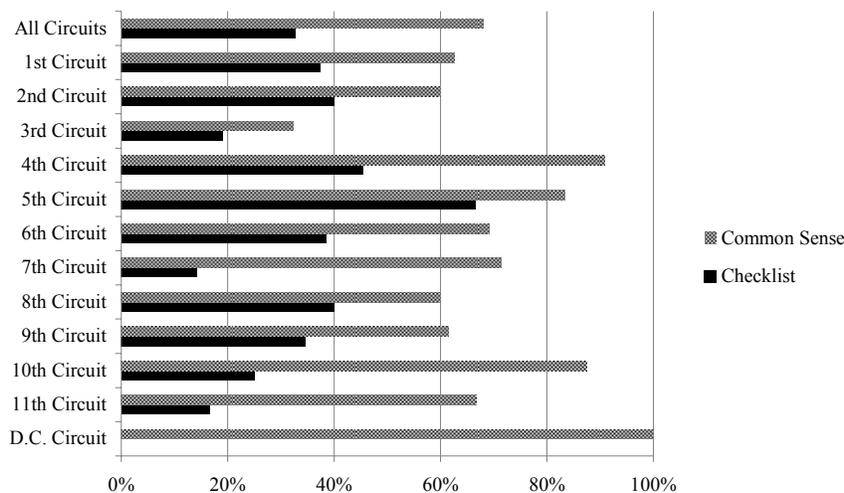
¹⁷⁰ Hartnett, *supra* note 167, at 492–93.

C. Popularity of Common Sense Gloss on Plausibility

Thus far, the data show that lower courts have mostly ignored the existence of the *Iqbal* test and that even the courts who cited it did not rigorously apply its first prong. When faced with the combination of this data and the wealth of scholarly criticism of the decision, one might think that *Ashcroft v. Iqbal* is best forgotten as an incomplete, negative gloss on the *Twombly* version of the plausibility standard.

The third question of this Note's empirical study focuses on the *Iqbal* Court's substantive clarification of the contours of the plausibility standard. The decision itself offers two equally viable definitions of plausibility: the checklist approach and the common sense gloss.¹⁷¹ The study found that not only do more lower courts seem to prefer the common sense gloss to the checklist approach but that this gloss has attained widespread acceptance across the circuits. Overall, 68% of the cases cited the common sense gloss, as compared to 33% that cited the checklist approach. Moreover, in every circuit except the Third, at least 60% of the cases cited to one or both of the statements embodying the common sense gloss.¹⁷²

FIGURE 2: COMPARISON OF CHECKLIST APPROACH AND COMMON SENSE GLOSS BY CIRCUIT (BY PERCENTAGE)



In retrospect, these findings do not seem particularly surprising considering that judges are certainly accustomed to using their experience to draw reasonable inferences from sets of facts. In fact, judges do so every time

¹⁷¹ See *supra* Part II.C.

¹⁷² The Appendix to this Note, *infra*, contains two tables detailing the precise number of times each of the four statements was cited.

they decide a “hard case” for which there are no precedents directly on point. But *Iqbal*, and to a lesser extent, *Twombly*, represent the first time that the Supreme Court has declined to impose a rigid (or rigid-sounding) pleading standard and instead explicitly asked the lower courts to *intuit* the existence of wrongdoing. *Twombly* certainly moved in this direction by killing the hyperbolic “no set of facts” language and by examining the facts in light of “common economic experience.”¹⁷³

Iqbal pushed the standard a little further, explicitly allowing judges to account for context when deciding whether a claim is plausible. The common sense gloss echoes Professor Stephen Burbank’s suspicion that the ambiguity of the *Twombly* opinion might have been strategically designed to empower lower courts to vary pleading requirements based on perceived differences in substantive contexts.¹⁷⁴ The *Iqbal* common sense gloss on plausibility, particularly when read in isolation from the two-pronged test, can be interpreted to do just that.

Of course, as more skeptical commentators have pointed out, widespread application of such a gloss could send pleading standards careening off the cliff of absolute subjectivity.¹⁷⁵ Some scholars fear that judges will interpret the common sense gloss as a license to apply heightened pleading standards, particularly in those areas of substantive law that necessarily entail costly and time-consuming discovery or occupy a large percentage of the federal docket.¹⁷⁶ Too flexible a pleading standard could allow judges effectively to bar the doors to the courthouse, frustrating the enforcement of entire areas of substantive law. Taken to the extreme, a pleading standard based entirely on the presiding judge’s common sense might prevent litigants from being able to determine *ex ante* what level of factual sufficiency they will have to provide to survive a motion to dismiss.

At this point, it is impossible to tell what, if any, effect the widespread application of the common sense gloss will have on pleading practice. To be sure, we do not yet have much empirical data on dismissal rates after *Iqbal*. The limited data analyzed thus far, however, indicate little overall change in the number of complaints dismissed without leave to amend.¹⁷⁷ Interestingly, Professor Hatamyar’s study noted a dramatic post-*Iqbal* jump in the number of complaints dismissed with leave to amend, which suggests

¹⁷³ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565 (2007).

¹⁷⁴ Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 553–54.

¹⁷⁵ Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIGATION, Spring 2009, at 1, 2.

¹⁷⁶ See Bone, *supra* note 15, at 878–79 (noting that the dismissal rates of civil rights claims and other cases involving state-of-mind elements have disproportionately increased under *Iqbal*); Seiner, *supra* note 59, at 1015 (arguing that employment discrimination cases should be reviewed under a special pleading standard that would relieve the often-insurmountable burden created by the two-pronged *Iqbal* test).

¹⁷⁷ See, e.g., Hatamyar, *supra* note 75, at 598 tbl.1.

that courts are allowing litigants greater opportunity to adapt to this new standard.¹⁷⁸

Judicial “common sense” is a flexible notion, potentially subject to influence by persuasive advocates. *Twombly* can also be read as inviting attorneys to present information to change the judge’s opinion of what is standard business practice and what is not.¹⁷⁹ Thus, while the common sense standard almost certainly frustrates attorneys by precluding any precise rule governing the factual sufficiency of complaints, it can also be interpreted as empowering both lower courts and plaintiffs.

Common sense also provides for flexibility across various areas of substantive law, allowing judges to adjust the specific requirements, or even the standards themselves, according to the specific elements of the alleged claim.¹⁸⁰ As such, courts can adjust requirements for cases in which plaintiffs don’t have access to the facts or in cases alleging a state of mind. Moreover, judges with different life experiences might view plausibility differently than other judges based on their own perceptions of what is reasonable, natural, and commonplace.¹⁸¹ This potential divergence of opinions gives plaintiffs whose claims are dismissed at the trial level a modicum of hope in an appeal; the judges on an appellate panel might have a different baseline for their common sense and thus might reach a different conclusion.

CONCLUSION

This Note undertook a preliminary evaluation of district courts’ interpretations of the federal pleading standard after *Iqbal*. The results revealed that, far from creating a uniform standard, *Iqbal* has functioned as a judicial Rorschach test, allowing individual judges to pick and choose various dicta to create widely divergent pleading standards. The study found that relatively few (less than 50%) of district courts have applied the two-pronged test suggested in *Iqbal*. Even fewer courts (approximately 50% of the courts that cited the test) rigorously applied both of its prongs. By far, the most popular interpretation of this inkblot of a standard has been a holistic approach that rejects formal categories and adopts a common sense gloss on the substantive meaning of “plausibility.”

¹⁷⁸ *Id.* at 600.

¹⁷⁹ Hartnett, *supra* note 167, at 500. Professor Hartnett notes that in *Twombly* itself, the Court relied on the particular history of the telecommunications industry to determine whether the plaintiffs’ allegations were plausible. *Id.* at 501.

¹⁸⁰ *Id.* at 496–97 (noting that plausibility is easier to find in claims of negligence involving car accidents or claims of deliberate indifference involving denial of medical treatment than in antitrust).

¹⁸¹ *Id.* at 499. Professor Hartnett notes that four of the five Justices who joined the *Iqbal* majority had experience in the Executive Branch. Of the four dissenting Justices, only one, Justice Breyer, had such experience, and his federal executive experience included service as a special Watergate prosecutor. *Id.* at 500. Professor Hartnett then suggests that these experiences shaped the relevant Justices’ “common sense” understanding of what is “natural” for a high-level federal executive. *Id.*

The two-pronged *Iqbal* test and the Court's "reasonable inference" dicta are somewhat strange bedfellows. The former is mechanistic and rigid, requiring judges to carefully parse complaints to determine which allegations merit further analysis. The latter is fluid, contextual, respectful of the fact that judges have ruled on tens, hundreds, maybe thousands of these motions and likely have a finely tuned radar for identifying complaints for which discovery is likely to uncover supporting evidence. In retrospect, it seems to be no surprise at all that so many judges have used this language in their opinions.

The danger is that the language of the *Iqbal* opinion sweeps so broadly that it can potentially lead to widely divergent interpretations based on the judge or judges charged with applying the decision. This potential for divergent standards makes empirical work like this study absolutely critical because only empirical work can help scholars and judges see how the decision is being interpreted—and how pleading standards are being framed—at the ground level. It also helps litigants to make informed choices on whether to challenge the factual sufficiency of complaints or even whether to bring complaints at all.

APPENDIX

TABLE 2: CASES CITING CHECKLIST APPROACH BY CIRCUIT

| | <i>Total Cases</i> | <i>Cited MTU</i> ¹⁸² | <i>Cited FW</i> ¹⁸³ | <i>Cited Both</i> | <i>Cited One</i> |
|--------------|--------------------|---------------------------------|--------------------------------|-------------------|------------------|
| Overall | 159 | 36 | 20 | 4 | 48 |
| 1st Circuit | 8 | 3 | 0 | 0 | 3 |
| 2nd Circuit | 25 | 7 | 4 | 1 | 9 |
| 3rd Circuit | 21 | 3 | 2 | 1 | 3 |
| 4th Circuit | 11 | 4 | 1 | 0 | 5 |
| 5th Circuit | 12 | 5 | 4 | 1 | 7 |
| 6th Circuit | 13 | 3 | 2 | 0 | 5 |
| 7th Circuit | 14 | 2 | 0 | 0 | 2 |
| 8th Circuit | 5 | 1 | 1 | 0 | 2 |
| 9th Circuit | 26 | 6 | 4 | 1 | 8 |
| 10th Circuit | 8 | 0 | 2 | 0 | 2 |
| 11th Circuit | 12 | 2 | 0 | 0 | 2 |
| D.C. Circuit | 4 | 0 | 0 | 0 | 0 |

¹⁸² MTU refers to the “more than an unadorned . . . accusation” gloss. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (“[Rule 8] demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.”); *supra* Part III.C.

¹⁸³ FW refers to the “framework” gloss. See *Iqbal*, 129 S. Ct. at 1950 (“While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.”); *supra* Part III.C.

TABLE 3: CASES CITING COMMON SENSE GLOSS BY CIRCUIT

| | <i>Total Cases</i> | <i>Cited RI</i> ¹⁸⁴ | <i>Cited CS</i> ¹⁸⁵ | <i>Cited Both</i> | <i>Cited One</i> |
|--------------|--------------------|--------------------------------|--------------------------------|-------------------|------------------|
| All Circuits | 159 | 91 | 51 | 34 | 74 |
| 1st Circuit | 8 | 2 | 4 | 1 | 4 |
| 2nd Circuit | 25 | 13 | 10 | 8 | 7 |
| 3rd Circuit | 21 | 11 | 1 | 1 | 10 |
| 4th Circuit | 11 | 10 | 5 | 5 | 5 |
| 5th Circuit | 12 | 9 | 4 | 3 | 7 |
| 6th Circuit | 13 | 7 | 5 | 3 | 6 |
| 7th Circuit | 14 | 9 | 1 | 0 | 10 |
| 8th Circuit | 5 | 2 | 2 | 1 | 2 |
| 9th Circuit | 26 | 12 | 6 | 2 | 14 |
| 10th Circuit | 8 | 5 | 6 | 4 | 3 |
| 11th Circuit | 12 | 7 | 6 | 5 | 3 |
| D.C. Circuit | 4 | 4 | 1 | 1 | 3 |

¹⁸⁴ RI refers to the “reasonable inference” gloss. *See Iqbal*, 129 S. Ct. at 1949 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”); *supra* Part III.C.

¹⁸⁵ CS refers to the “context-specific” gloss. *See Iqbal*, 129 S. Ct. at 1950 (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”); *supra* Part III.C.