A RETREAT FROM DECISION BY RULE IN *Ashcroft v. Iqbal*, 129 S. CT. 1937 (2009)

Federal Rule of Civil Procedure 8 requires only that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[1] In 1957, the Supreme Court in *Conley v. Gibson* held that a complaint survives a motion to dismiss under this Rule "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."[2] The goal of the pleading requirements, the Court explained, is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[3] This type of liberal notice pleading persisted until at least 2007, when the Court abandoned *Conley*'s "no set of facts" language in *Bell Atlantic Corp. v. Twombly*.[4] *Twombly*, which dealt with an alleged antitrust conspiracy, required that a complaint have "enough facts to state a claim to relief that is plausible on its face."[5] In so holding, the Court maintained that an unspecified, conclusory allegation of conspiracy did not "supply facts adequate" to meet this burden.[6] The plausibility standard "d[id] not impose a probability requirement," but seemingly required something more than a "mere possibility."[7] Following *Twombly*, there remained significant uncertainty about the reach of the plausibility standard and how much it diverged from prior doctrine.[8]

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

2. 355 U.S. 41, 45–46 (1957).

3. *Id.* at 47.

4. 550 U.S. 544, 562 (2007) ("*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough.").

5. *Id.* at 570.

6. *Id.* at 557.

7. *Id.* at 556–57. Also important to the Court in *Twombly* was the unique and vast expense of antitrust discovery. *See id.* at 559 ("[I]t is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery.").

8. *See* Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 2007 NW. U. L. REV. 117 (noting the view that *Twombly* "did not rework pleading rules across the board"); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1065 (2009) (arguing that the Court's decision did not, in fact,

Last Term, the Court addressed this uncertainty in *Ashcroft v. Iqbal*,[9] laying out a two-step test for applying the plausibility standard to all civil cases. First, a reviewing court must identify any legal conclusions in a pleading, which are not entitled to a presumption of truth. Second, the court must look at the factual allegations, take them as true, and determine whether the complaint states a plausible claim of relief.[10] Plaintiffs' lawyers, consumer groups, and civil rights advocates have criticized *Iqbal* for unfairly imposing a more burdensome pleading standard on plaintiffs, thereby denying them access to the courts.[11] But there are more basic objections to *Iqbal* based on formalist principles not typically associated with parties like the plaintiffs' bar.[12] Formalism embodies the notion of decision by clear rule and has been touted for promoting uniformity, neutrality, and predictability.[13] By moving pleading standards further away from decision by rule, the Supreme Court in *Iqbal* improperly undermined the virtues of formalism.

In November 2001, agents of the Federal Bureau of Investigation (FBI) and the Immigration and Naturalization Services arrested Javaid Iqbal "on charges of fraud in relation to identification documents and conspiracy to defraud the United States."[14] As part of a post-September 11 investigative sweep, authorities designated Iqbal a "person 'of high interest'" and placed him in a highly restrictive maximum security prison unit.[15] After serving his prison term, Iqbal was removed to Pakistan, where he filed a *Bivens* action in the United States

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limit the holding "to the antitrust context, to complex cases, or by prior or subsequent precedent"); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 432 (2008) ("Several questions emerge in the wake of such a remarkable departure from established doctrine.").

9. 129 S. Ct. 1937 (2009).

10. *Id.* at 1950.

11. Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court's 'Iqbal' Ruling*, NAT'L L.J., Sept. 21, 2009, http://www.law.com/jsp/article.jsp?id=1202433931370.

12. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 542 (1988) (explaining that "[b]ecause rule-bound decisionmaking is inherently stabilizing, it is inherently conservative, in the nonpolitical sense of the word").

13. *See id.* at 510; *see also* Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 350 (1992); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989).

14. *Iqbal*, 129 S. Ct. at 1943 (citing Iqbal v. Hasty, 490 F.3d 143, 147–48 (2d Cir. 2007)).

15. *Id.*

District Court for the Eastern District of New York.[16] The complaint—filed under the pre-*Twombly* regime—centered on Iqbal's treatment during his confinement, and alleged that Attorney General John Ashcroft and FBI Director Robert Mueller had "willfully and maliciously" subjected him to harsh conditions "on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[17] Specifically, Iqbal alleged that Ashcroft was the "principal architect" of the discriminatory policy and that Mueller was "'instrumental' in adopting and executing it."[18]

Ashcroft and Mueller filed a motion to dismiss for failure to state a claim, but the district court, relying on *Conley*'s "no set of facts" language, denied the motion.[19] The defendants then appealed to the Second Circuit, and while their appeal was pending, the Supreme Court handed down its opinion in *Twombly*. When ruling on Ashcroft and Mueller's appeal, the Second Circuit interpreted *Twombly* as adopting "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*."[20] The court determined that Iqbal's claim was not one of these contexts and affirmed the district court's denial of the motion to dismiss.

The Supreme Court reversed, setting out a defined framework to apply the plausibility standard in all cases. Writing for a majority of five, Justice Kennedy first discussed the underlying substantive law necessary to state a claim of unconstitutional discrimination against a government official under the First and Fifth Amendments.[21] The Court required actual discriminatory purpose; neither knowledge of a policy's effects nor the doctrine of respondeat superior could provide a basis for relief.[22] The majority then addressed the sufficiency of Iqbal's complaint under *Twombly*'s interpretation of Rule 8.

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16. *Id.*

17. *Id.* at 1944 (alteration in original).

18. *Id.* at 1951 (quoting Complaint ¶¶ 10–11, Elmaghraby v. Ashcroft, No. 04CV01809J6SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) [hereinafter *Iqbal Complaint*]).

19. *Id.* at 1944.

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

21. Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined the opinion.

22. *Iqbal*, 129 S. Ct. at 1948–49.

The Court made clear that the *Twombly* plausibility standard was not flexible, explicitly recognizing that the standard applied in *all* civil actions.[23] The Court then put the *Twombly* standard in terms of a defined framework. First, a reviewing court should identify all the legal conclusions in a pleading, which are not entitled to a presumption of truth.[24] Next, if the complaint contains "more than [mere] conclusions," the court should examine all factual allegations, taken as true, and "determine whether they plausibly give rise to an entitlement to relief." [25] In enunciating the second step, the majority constructed a new layer of analysis over the *Twombly* framework, stating that the plausibility determination was "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[26]

The majority determined that under this framework, Iqbal's complaint failed to satisfy Rule 8. First, the Court deemed conclusory Iqbal's allegation that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions . . . solely on account of [his] religion, race, and/or national origin."[27] Similarly, it found conclusory Iqbal's claims that Ashcroft was the "principal architect" of the policy and that Mueller was "'instrumental' in adopting and executing it."[28] These allegations, therefore, were not entitled to a presumption of truth.

Taking as true the factual allegations that the FBI detained thousands of Arab Muslim men following September 11 and that Ashcroft and Mueller approved the policy, the Court determined that Iqbal's claim was nevertheless implausible. Despite citing *Twombly*'s assertion that plausibility does *not* equal a probability standard, the Court noted that "given more likely explanations" Iqbal's factual allegations did not "plausibly establish" the necessary discriminatory purpose.[29] The more likely explanation was that Ashcroft and Mueller crafted a policy "directing law en-

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23. *Id.* at 1953.

24. *Id.* at 1949–50.

25. *Id.* at 1950.

26. *Id.*

27. *Id.* at 1951 (citing *Iqbal Complaint*, *supra* note 18, ¶ 96) (alterations in original) (citation omitted) (internal quotation marks omitted).

28. *Id.* (citing *Iqbal Complaint*, *supra* note 18, ¶¶ 10–11).

29. *Id.*

forcement to arrest and detain individuals because of their suspected link to the [September 11] attacks."[30] Though this policy "would produce a disparate, incidental impact on Arab Muslims, . . . the purpose of the policy was to target neither Arabs nor Muslims."[31] The majority also maintained that subjecting government officials to discovery would "exact[] heavy costs in terms of efficiency and expenditure of valuable time and resources."[32]

In dissent, Justice Souter agreed with the majority's analytical framework.[33] He even agreed that, based solely on the two factual statements recognized by the majority, Iqbal did not state a plausible claim for relief.[34] But these statements were not "the only significant, nonconclusory statements in the complaint."[35] According to Justice Souter, the "knew of, condoned, and willfully and maliciously agreed" allegation and the "principal architect" and "instrumental" allegations were factual allegations, not legal conclusions.[36] The dissent distinguished these allegations from the general assertion of conspiracy in *Twombly*. Here, Iqbal did not allege that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject him" to some "undefined" discrimination.[37] Nor did he allege that "Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation."[38] To the contrary, there was a "particular, discrete, discriminatory policy detailed in the complaint."[39] Classifying these allegations as factual, and therefore entitled to a presumption of truth, Justice Souter had little difficulty concluding that Iqbal met the plausibility standard.[40]

In expounding on the plausibility standard in *Iqbal*, the Supreme Court did little to resolve *Twombly*'s uncertainty and si-

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30. *Id.*

31. *Id.*

32. *Id.* at 1953.

33. *Id.* at 1960 (Souter, J., dissenting) ("I do not understand the majority to disagree with this understanding of 'plausibility' under *Twombly*."). Justices Stevens, Ginsburg, and Breyer joined Justice Souter.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1961 (citation omitted) (internal quotation marks omitted).

38. *Id.*

39. *Id.*

40. *Id.*

multaneously confounded what little clarity *Twombly* had preserved.[41] As a result, pleading doctrine has moved away from decision by rule and toward a highly discretionary standard. There is a basic tension between this sort of discretionary standard and formalism. Formalism promotes the values of uniformity, neutrality, and predictability through decision by clear rule.[42] Concededly, these values may come at the expense of individual cases in which departing from the rule may yield more desirable results.[43] Ultimately, though, "a legal system should make the choice between rules and rulelessness on the basis of a contextual inquiry into the aggregate level of likely errors and abuses."[44] *Iqbal* undercuts the benefits of formalism while reaping few of the benefits of discretion.[45]

Despite the appearance of a well structured, two-step inquiry, the *Iqbal* framework amounts to weakly constrained judicial discretion. With respect to the first step of the *Iqbal* framework, the Court enlarged *Twombly*'s domain of conclusory allegations with little direction. *Twombly* stated that "formulaic recitation[s] of the elements of a cause of action will not do."[46] Accordingly, alleging a conspiracy completely divorced from any factual context was insufficient. Under this formulation, courts had at least some guidance to determine what was conclusory. For example, it would likely be conclusory if Iqbal asserted only that Ashcroft and Mueller had acted with discriminatory purpose. But Iqbal alleged more; he alleged that Ashcroft and Mueller had acted with discriminatory purpose by designing and implementing a specific policy that subjected him to harsh conditions because of his race, religion, or national origin. It is true that Iqbal's allegations implicated the

41. *See Has the Supreme Court Limited Americans' Access to Courts? Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 12 (2009) (statement of Stephen B. Burbank, David Berger Professor for the Administration of Justice, Univ. of Pa.) [hereinafter *Burbank Testimony*], *available at* http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf ("[I]n *Iqbal* the Court was at sea . . . ."); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 NOTRE DAME L. REV. 849, 859 (2010) ("The majority in *Iqbal* is extremely unclear . . . .").

42. *See* Scalia, *supra* note 13, at 1179.

43. *See* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 995 (1995).

44. *Id.* at 1012.

45. *See* Scalia, *supra* note 13, at 1177 ("[E]very rule of law has a few corners that do not quite fit. It follows that perfect justice can only be achieved if courts are unconstrained by such imperfect generalizations.").

46. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2006).

elements of the cause of action, but he offered much more than a "[t]hreadbare recital[]"; he explained how the defendants unlawfully harmed him.[47] The expansion of the conclusory sphere gives judges much more discretion to classify allegations as such. As seen in *Iqbal*, this initial determination can have a decisive effect on the ultimate plausibility determination.

The Court also declined to give greater definition to the meaning of plausibility in *Iqbal*'s second step, instead choosing simply to restate *Twombly*'s imprecise language.[48] If anything, by characterizing plausibility analysis as "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense," the Court approved the standard's highly discretionary nature.[49] This expression of the role of the judiciary suggests that plausibility is not meant to be guided by clear principles, but instead by the wisdom of judges.

The looseness of the *Iqbal* test allows for a disparate range of interpretations about what is conclusory and what is plausible. The brief experience with *Iqbal* in the lower courts thus far illustrates this arbitrariness. For example, in a disability discrimination case, the Third Circuit characterized as factual an allegation that the plaintiff believed that the defendant's actions "were based on her disability."[50] It is difficult to square this characterization with the Supreme Court's treatment of Iqbal's discriminatory intent allegation, as both arise in the context of facts that could be consistent with discrimination. It may be, as one district court has suggested, that "[a]llegations be-

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47. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009).

48. *See Burbank Testimony*, *supra* note 41, at 12 ("*Iqbal* thereby confirmed the view that *Twombly* was an invitation to the lower courts to make ad hoc decisions, often reflecting buried policy choices, and with little fear of reversal because of the impotence of federal appellate review to police discretionary decision-making.").

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

50. Fowler v. UPMC Shadyside, 578 F.3d 203, 212 (3d Cir. 2009) (The court in *Fowler* took as true: "(1) that [the plaintiff] was injured at work and that, because of this injury, her employer regarded her as disabled within the meaning of the Rehabilitation Act; (2) that there was an opening for a telephone operator at UPMC, which was available prior to the elimination of her position and for which she applied; (3) that she was not transferred to that position; (4) that UPMC never contacted her about the telephone operator position or any other open positions; and *(5) that Fowler believed UPMC's actions were based on her disability*" (emphasis added)); *see also* Al-Kidd v. Ashcroft, 580 F.3d 949, 969 (9th Cir. 2009) (taking as true al-Kidd's allegation that he was "arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained").

come 'conclusory' where they recite only the elements of the claim *and*, *at the same time*, the court's commonsense credits a far more likely inference from the available facts."[51] But this variable view of conclusory allegations conflates the two steps of *Iqbal* and makes the conclusory-factual distinction even hazier.[52]

On the second prong of the *Iqbal* test, the lower courts have disagreed on the nature of the plausibility standard, with some treating it as a heightened standard, and others clinging to the more lenient concept of notice pleading.[53] This variation is particularly manifest in discrimination cases, in which the lower courts have reached different conclusions about plausibility when considering similar types of allegations. These allegations include the plaintiff's beliefs about discriminatory intent,[54] verbal statements suggesting discriminatory intent,[55] and circumstances surrounding termination of employment.[56] These

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51. Chao v. Ballista, 630 F. Supp. 2d 170, 177 (D. Mass. 2009) (emphasis added).

52. Under this view, an otherwise factual allegation could become conclusory simply because a judge finds it to be so, even though this inquiry is supposed to be part of the second prong. The first prong then becomes a function of the second prong, suggesting that the classification of conslusory allegations is merely a pretext for an already-made judicial opinion of the claim.

53. *Compare Fowler*, 578 F.3d at 210 ("[P]leading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading . . . ."), *with Chao*, 630 F. Supp. 2d at 177 ("Notice pleading, however, remains the rule in federal courts . . . .").

54. *Compare Fowler*, 578 F.3d at 212 (deeming the claim plausible because "Fowler believed UPMC's actions were based on her disability"), *with* Adams v. Lafayette College, No. 09-3008, 2009 WL 2777312, at *1 (E.D. Pa. Aug. 31, 2009) (deeming the claim implausible because the "allegations [were] based solely on Adams' belief").

55. *Compare* Riley v. Vilsack, No. 09-cv-308-bbc, 2009 WL 3416255, at *10 (W.D. Wis. Oct. 21, 2009) (stating that an age discrimination claim was plausible because of "ambiguous statements that could be interpreted as showing a preference for younger workers"), *with* Raja v. Englewood Cmty. Hosp., No. 8:08-cv-2521-T-23TGW, 2009 WL 3429805, at *5 (M.D. Fla. Oct. 21, 2009) (stating that a race discrimination claim was implausible despite allegations of disparaging racial remarks toward East Indians, including alleged reference to a white doctor as "The Great White Hope").

56. *Compare* Orozco v. City of Murfreesboro, No. 3:09-cv-00752, 2009 WL 4042586, at *3 (M.D. Tenn. Nov. 19, 2009) (claim found plausible based on allegations that an Hispanic man was fired because of race and replaced by a white man after seven years of employment), *with* King v. United Way of Cent. Carolinas, Inc., No. 3:09CV164-MR-DSC, 2009 WL 2432706, at *9 (W.D.N.C. Aug. 6, 2009) (racial and gender discrimination claim found implausible despite allegations that plaintiff, an African-American woman, was fired by an all-male committee due to community discomfort with race, and was replaced by a man).

sorts of inconsistencies are not limited to discrimination cases and further illustrate the subjectivity of the *Iqbal* standard.

Furthermore, the arbitrariness inherent in *Iqbal*'s new standard threatens to increase partiality in judicial decision making. By providing a clear rule, formalism constrains the operation of ideology and other psychological variables that have an effect on judicial decision making.[57] The *Iqbal* Court's invocation of judicial experience and common sense, however, accepts as legitimate the presence of these variables, making it more likely that they might influence a judge's decision, even if only subconsciously.[58] Already, one federal appellate judge has rebuked his colleagues for "us[ing] the pleading rules to keep the market unregulated."[59] These policy rifts only exacerbate the uncertainty of *Iqbal*.[60]

For litigants, the upshot of *Iqbal* is tremendous unpredictability, which is exemplified in how the form pleadings in the Federal Rules of Civil Procedure interact with *Iqbal*. These forms purportedly "illustrate the simplicity and brevity that the[] rules contemplate," and courts are bound to accept them under Rule 84.[61] In *Twombly*, the Court approved the form pleading for negligence, which merely states that on a specific date and at a specific place, "the defendant negligently drove a motor vehicle against the plaintiff."[62] For the Court, the specificity of the date and time made the form pleading distinguishable, despite the seemingly conclusory allegation of negligence.[63] Lack-

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57. *See* RICHARD A. POSNER, HOW JUDGES THINK 98 (2008); Sheldon Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 504 (1975); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 25 (Amy Gutmann ed., 1997) ("Long live formalism. It is what makes a government a government of laws and not of men."); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 818 (1995).

58. POSNER, *supra* note 57, at 98.

59. *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 914 (6th Cir. 2009) (Merritt, J., dissenting).

60. *See id.* ("The uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims.").

61. FED. R. CIV. P. 84.

62. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 565 n.10 (2007); *see also* FED. R. CIV. P., Form 11.

63. *Twombly*, 550 U.S. at 565 n.10. Arguably, Iqbal's allegations were much more particular in detailing the specifics of discrimination than the form pleading, which alleged mere negligent driving. *See* Bone, *supra* note 41, at 14.

ing even the specificity of the negligence pleading is the form pleading for patent infringement, which only provides that "[t]he defendant has infringed and is still infringing the Letters Patent by making, selling, and using *electric motors* that embody the patented invention."[64] It is difficult to see how this apparently conclusory pleading would satisfy the *Iqbal* standard if not for the requirement that courts accept it under Rule 84.[65] As such, plaintiffs will likely fall short of the *Iqbal* standard if they use the form pleadings as a guide for drafting complaints. When even the form pleadings find no principled home in the *Iqbal* framework, it is clear that pleading doctrine is in disarray.

All these detriments might be tolerable if *Iqbal* provided some appreciable benefit. Conceptually, this benefit might be the dismissal of meritless claims before they impose significant litigation costs. Indeed, this consideration seemed central to the Court in both *Twombly* and *Iqbal*.[66] But even if the *Iqbal* standard achieved this result in these two cases, it likely will not when applied across the federal civil litigation system. The Federal Rules of Civil Procedure already provide a structure that encourages parties to present claims only when there is a sufficient factual basis for the complaint. For example, Rule 11(b)(3), backed by the threat of sanctions, requires attorneys to warrant that the claim's "factual contentions have evidentiary support."[67] Similarly, the threat of a Rule 12(e) motion for a more definite statement for pleadings that are "so vague or ambiguous" serves the purpose of ensuring well-grounded claims.[68] The number of cases in which *Iqbal* could make a difference is thus relatively small. A clear and lenient interpretation of Rule 8, as in *Conley*, makes more sense given the structure of the rules.

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64. FED. R. CIV. P., Form 18.

65. *See* Elan Microelectronics Corp. v. Apple, Inc., No. C 09-01531 AS, 2009 WL 2972374, at *2 (N.D. Cal. Sept. 14, 2009) ("That form, which provides an example for alleging *direct* patent infringement, requires essentially nothing more than conclusory statements. It is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*.").

66. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."); *Twombly*, 544 U.S. at 558 ("[P]roceeding to antitrust discovery can be expensive.").

67. FED. R. CIV. P. 11(b)(3).

68. FED. R. CIV. P. 12(e).

Moreover, in light of the unpredictable nature of the *Iqbal* standard, even in the small class of cases where it might be beneficial, there is little reason to believe courts will consistently reach the right outcome. A discretionary system might have achieved some level of consistency had the Supreme Court provided judges with factors to guide that discretion.[69] But by relying on judicial experience and common sense, different outcomes on similar facts are inevitable, which means that the optimal outcome will only be achieved in a fraction of similar cases. At the same time, litigants with meritorious claims face a significant risk of having their claims unduly dismissed, imposing on litigants significant costs of error.[70]

From an interpretive perspective, the result in *Iqbal* is striking, given the ideological split on the Court. Justices typically associated with formalism strayed from it, and Justices often critical of formalism found support in it.[71] *Iqbal* may convince critics of formalism of the stabilizing values of decision by rule, values that are not exclusive to the pleadings context. At the same time, *Iqbal* challenges the proponents of formalism with the pitfalls of allowing pragmatic considerations to supplant a clear rule. Ultimately, the legitimacy of formalism depends on adherence to decision by rule in spite of countervailing policy concerns. A clear rule was both feasible and desirable in the pleadings context, yet the Court chose to further increase judicial discretion, largely on pragmatic grounds. Discretion is inevitable in a legal system, but "the *Rule* of Law, the law of *rules*, [should] be extended as far as the nature of the question allows."[72]

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69. *See* Sunstein, *supra* note 43, at 1000 ("Rules provide consistency; but a system based on factors aspires to do the same.").

70. *See id.* at 1014. Professor Sunstein suggests that, generally, rules are "more likely to be unacceptable when the costs of error in particular cases are very high." *Id.* Here, however, a lenient rule would likely minimize the cost of error by subjecting only a small class of unmeritorious cases to proceed in error. Under *Iqbal*, a larger class of meritorious claims is subject to improper dismissal.

71. *Compare* SCALIA, *supra* note 57, at 25 ("Long live formalism."), *with* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 127 (2005) ("[T]he advantages of legal rules can be overstated. Rules must be interpreted and applied. Every law student whose class grade is borderline knows that the benefits that rules produce for cases that fall within the heartland are often lost in cases that arise at the boundaries.").

72. Scalia, *supra* note 13, at 1187.