

SILLY JURIST, TWIQBAL’S FOR CLAIMS: PLEADING JURISDICTION AFTER *TWOMBLY* AND *IQBAL*

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Plaintiffs seeking to institute a civil action in federal court must plead the grounds for the court’s subject-matter jurisdiction over their claim; if they cannot adequately do so, their claim will be dismissed. Recently, courts have started to apply the plausibility rule announced in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal—which requires plaintiffs to plead facts plausibly showing their entitlement to relief—to the pleading of subject-matter jurisdiction. This Note argues that such a novel shift in how jurisdiction is pleaded is neither supported nor necessitated by Twombly and Iqbal and is fundamentally incompatible with long-settled jurisdictional doctrine. It therefore recommends that district court judges redouble their attention to the articulation of procedural rules of decision (eschewing reliance upon boilerplate) and desist from imposing heightened pleading of subject-matter jurisdiction without considering the question as a matter of first impression.

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INTRODUCTION

In 2007¹ and 2009,² the Supreme Court imposed a heightened pleading requirement in federal court by abrogating the landmark case *Conley v. Gibson* and its liberal “no set of facts” standard.³ Following these two decisions—*Twombly* and *Iqbal* (or “*Twiqbal*,” for short)—plaintiffs must plead facts sufficient to “state a claim to relief that is plausible on its face”⁴ in order to avoid prediscovery dismissal for failure to state a claim.⁵ This plausibility standard makes it more difficult for plaintiffs to draft a complaint that satisfies the requirements of Rule 8 of the Federal Rules of Civil Procedure,⁶ especially for causes of action that are characterized by information asymmetry between the parties, such as antitrust actions. Some scholars and practitioners have applauded this shift,⁷ and many have criticized it.⁸

¹ Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

² Ashcroft v. Iqbal, 556 U.S. 662 (2009).

³ 355 U.S. 41, 45–46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

⁴ *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

⁵ See FED. R. CIV. P. 12(b)(6) (providing for the motion to dismiss for failure to state a claim).

⁶ Specifically, Federal Rule of Civil Procedure 8(a)(2) requires that the complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”

⁷ See, e.g., Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187, 189 (“Stated otherwise, what *Twombly* and *Iqbal* suggest between them is that the operation of the civil justice system runs better if some investigation is done unilaterally by the plaintiff without any aid from the legal system.”); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1067 (2009) (“*Twombly* thus presents a welcome clarification of modern pleading standards that is likely to increase the efficiency and fairness of civil proceedings.”); see also Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN. ST. L. REV. 1191, 1194 (2010) (finding that *Conley* and *Iqbal* both “create flawed systems,” and suggesting the grant of targeted prediscovery as a means of moderating between *Conley* and *Iqbal*); Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 455–56, 488–89 (2010) (arguing that *Twombly* and *Iqbal* did not significantly alter pleading, but suggesting increased use of Rule 11 to limit the filing of frivolous complaints).

⁸ See, e.g., Kevin M. Clermont, *Three Myths About Twombly-Iqbal*, 45 WAKE FOREST L. REV. 1337, 1345–48 (2010) (criticizing plausibility pleading as more onerous than fact pleading because it denies plaintiffs the opportunity to plead facts on information and belief, and cautioning against a wider gatekeeping role for pleading); Sybil Dunlop & Elizabeth Cowan Wright, *Plausible Deniability: How the Supreme Court Created a Heightened Pleading Standard Without Admitting They Did So*, 33 HAMLINE L. REV. 205,

Almost all agree, however, that the new pleading regime under *Twombly* and *Iqbal* has significantly altered the federal litigation landscape by filtering out more claims earlier in the litigation process and thereby narrowing access to discovery.⁹

Concurrent with this shift in pleading standards, lower courts have started to apply the *Twombly/Iqbal* plausibility approach to the pleading of subject-matter jurisdiction,¹⁰ increasing the burden on plaintiffs above that required by the common formulation that a plaintiff must plead “facts sufficient to show” the existence of jurisdiction.¹¹ Thus far, commentators have paid little attention to this innovative extension of *Twombly* and *Iqbal*,¹² cases that discussed only the Rule 12(b)(6) motion to dismiss for failure to state a claim.¹³

238–40 (2010) (criticizing the new standard for discouraging the prosecution of meritorious suits by increasing plaintiffs’ costs); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18–22 (2010) (cautioning that the cases have brought the return of fact pleading and give judges too much discretion); see also *id.* at 15–16 & nn.52 & 55 (collecting and summarizing scholarship critical of *Twombly* and *Iqbal*).

⁹ See, e.g., Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal’s Impact on 12(b)(6) Motions*, 46 U. RICH. L. REV. 603, 609 (2012) (concluding empirically that 12(b)(6) motions to dismiss are granted at a higher rate post-*Iqbal* than they were pre-*Twombly*); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270, 2277 (2012) (isolating “discovery-prevented cases” which would have reached discovery but for the application of the *Twombly/Iqbal* plausibility standard). But see JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (finding no statistically significant increase in grants of motions to dismiss without leave to amend in the two years following *Iqbal*); A. Benjamin Spencer, *Pleading and Access to Civil Justice: A Response to Twiqbal Apologists*, 60 UCLA L. REV. 1710, 1713–15 & nn.10–12 & 17–18 (2013) (collecting articles arguing that *Twombly* and *Iqbal* are consistent with practice under the *Conley* regime).

¹⁰ See, e.g., *infra* notes 78, 100 (collecting cases).

¹¹ 61A AM. JUR. 2D *Pleading* § 503 (2010). Although the nature of the jurisdictional inquiry is highly contextual, see *infra* notes 59–65 and accompanying text, plausibility imposes a higher bar in nearly all circumstances.

¹² The few articles that mention this substantial shift in pleading doctrine do so only in passing. See, e.g., Clermont, *supra* note 8, at 1361 & n.122 (“There is no reason thus far, on the basis of the Supreme Court’s pronouncements, to think that *Twombly* and *Iqbal* apply to jurisdiction or other threshold matters.”); Miller, *supra* note 8, at 101 (“Equally uncertain is the applicability of *Twombly* and *Iqbal* to pleading the ‘grounds’ for a district court’s subject matter jurisdiction under Rule 8(a)(1) . . .”). A recent student note—which attempted a serious treatment of plausibility pleading in subject-matter jurisdiction—focused primarily on *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), and its progeny circumscribing the elements of a claim understood to be jurisdictional and left much undiscussed. See James E. von der Heydt, Note, *Ripple Effects: The Unintended Change to Jurisdictional Pleading Standards After Iqbal*, 60 CLEV. ST. L. REV. 799 (2012).

¹³ See *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009) (“This case . . . turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established

Recent Supreme Court precedent neither supports nor necessitates this novel shift in the pleading standard.¹⁴ The policy rationales that justify the *Twombly/Iqbal* heightened pleading standard¹⁵ do not support applying the new standard in this context, given the significant differences in how courts assess jurisdiction as compared to merits questions.¹⁶ Extending *Twombly* and *Iqbal* to the pleading of jurisdiction alters the balance of interests between plaintiffs and defendants,¹⁷ and is therefore a step that should not be taken lightly.

Unfortunately, judges have undertaken this significant shift in pleading with little explanation.¹⁸ Boilerplate restatements of legal standards—utilized in many areas of the law¹⁹—are especially common in the context of procedural law²⁰ (perhaps because of its

constitutional rights.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007) (“This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.”).

¹⁴ See *infra* Part II.A (explaining the uncritical way courts have implemented these cases).

¹⁵ See *infra* Part II.A (articulating the policy rationales of *Twombly* and *Iqbal*).

¹⁶ See *infra* Parts I.A–B (discussing pleading a claim for relief and pleading subject-matter jurisdiction).

¹⁷ See S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 574 (2010) (discussing the role of pleading standards in balancing the interests of litigants); see also Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 DUKE L.J. 561, 593–94 (2001) (identifying normative metagoals of procedural law as “(1) decisionmaking accuracy; (2) adjudicatory efficiency; (3) political legitimacy; (4) maintenance of the substantive-procedural balance; (5) predictability; and (6) fundamental fairness”); *infra* Part II (providing examples of changes wrought by this shift in pleading).

¹⁸ For example, the first Eighth Circuit case to require the plausible pleading of subject-matter jurisdiction includes no discussion of the new pleading standard and is supported only by a naked citation to *Twombly* (in which the Court did not discuss subject-matter jurisdiction). *Stalley ex rel. United States v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (“The plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right.”).

¹⁹ See Charles E. Daye, *Judicial Boilerplate Language as Torts Decisional Litany: Four Problem Areas in North Carolina*, 18 CAMPBELL L. REV. 359, 360–61 (1996) (criticizing, in the context of tort law, the use of the “decisional litany . . . [which is] the practically verbatim repetition of language from prior cases in subsequent judicial opinions without sufficient inquiry into the adequacy and appropriateness of the language as applied to the case at hand”); Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153, 169 (2012) (“[I]t is quite common for a judge to borrow liberally from his or her own previous opinions; readers can easily find paragraphs stating, say, the standard for summary judgment, qualified immunity, or *McDonnell Douglas* burden-shifting repeated verbatim in a given judge’s many opinions employing those standards.”).

²⁰ See, e.g., *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) (“In reviewing a facial attack, the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.”); *Robbins v. UGI Utils./Cent. Penn Gas*, No. 3:12cv626, 2012 WL 4434147, at *2 (M.D. Pa. Sept. 24, 2012) (quoting *Gould*’s boilerplate language); *Machon v. Pa. Dep’t of Public Welfare*, 847 F. Supp. 2d 734, 743 (E.D. Pa. 2012) (same); *Knauss v. U.S. Dep’t of*

ostensible transsubstantivity).²¹ While reliance on procedural boilerplate undoubtedly aids judicial efficiency and increases systemic uniformity, it also has allowed for the speedy propagation of a new, heightened pleading standard for subject-matter jurisdiction—one *not* prescribed by the Court or the rulemakers—throughout the lower courts.²²

This Note therefore seeks to begin a conversation about the applicability of *Twombly* and *Iqbal* to the pleading of subject-matter jurisdiction, considering this question as a matter of first impression rather than a foregone conclusion. It proceeds in three parts. Part I provides necessary background on judicial construction of Rule 8, which governs pleading, and demonstrates key differences between motions to dismiss for failure to state a claim²³ and motions to dismiss for lack of subject-matter jurisdiction.²⁴

Part II then examines the lower courts' extension of *Twombly* and *Iqbal* to the pleading of subject-matter jurisdiction. It first argues that neither the text nor the animating policy rationales of these landmark cases compel courts to impose a plausibility requirement on the pleading of subject-matter jurisdiction. It then assesses opinions that have adopted such a requirement and identifies gaps in reasoning that led to this outcome. Finally, it explores the potential impacts of the uniform adoption of heightened pleading of subject-matter jurisdiction on plaintiffs and defendants, using as a lens two areas of 12(b)(1) motion practice: the availability of jurisdictional discovery and the amount-in-controversy requirement of diversity jurisdiction.

Drawing on this analysis, Part III recommends that district court judges redouble their attention to the articulation of procedural rules of decision (eschewing reliance on boilerplate) and stop applying *Twombly* and *Iqbal* to the pleading of subject-matter jurisdiction without considering the question as a matter of first impression. Concurrently, in light of the instability in pleading doctrine wrought by

Justice, No. 10-cv-2636, 2012 WL 176685, at *1 (E.D. Pa. Jan. 20, 2012) (same); *PAPCO, Inc. v. United States*, 814 F. Supp. 2d 477, 484 (W.D. Pa. 2011) (same); *Hollander v. Etymotic Research, Inc.*, 726 F. Supp. 2d 543, 546–47 (E.D. Pa. 2010) (same); *Byers v. Intuit, Inc.*, 564 F. Supp. 2d 385, 397 (E.D. Pa. 2008) (same); *see also* David M. Roberts, *Fact Pleading, Notice Pleading, and Standing*, 65 CORNELL L. REV. 390, 399 (1980) (attributing “the appalling casualness” with which courts approach pleading doctrine to their “unstated premise that problems of pleading are self-answering, too trivial to warrant careful analysis”).

²¹ FED. R. CIV. P. 1 (“These rules govern the procedure in *all* civil actions and proceedings”) (emphasis added).

²² *See infra* Part II.B (discussing the accidental ways in which the new pleading standard has propagated through the lower courts).

²³ FED. R. CIV. P. 12(b)(6).

²⁴ FED. R. CIV. P. 12(b)(1).

Twombly and *Iqbal*, the Advisory Committee on Civil Rules should propose a revised Rule 8(a)(1) that appropriately weighs the balance of interests between plaintiffs and defendants.

I

PLEADING MERITS AND JURISDICTION

This Part provides necessary civil procedure background and explains the basic concepts and differences between pleading a claim for relief under *Twombly* and *Iqbal* and pleading subject-matter jurisdiction.

Before *Twombly*, the complaint notified the defendants of the claims against them; today, it is also used (for better or for worse) to assess the strength and validity of those substantive claims at the outset of litigation. The courts have also traditionally used the complaint as a starting point to determine the “grounds for the court’s jurisdiction,”²⁵ although judges have had significant latitude in deciding when, with what tools, by which standard, and even whether to determine the existence of subject-matter jurisdiction. This Part demonstrates the uncomfortable fit that arises when courts purport to apply the *Twombly/Iqbal* plausibility standard to challenges to subject-matter jurisdiction.

A. *Pleading the Claim for Relief*

1. *Code and Notice Pleading*

Before the adoption of the Federal Rules of Civil Procedure, the institution of a federal action was governed by “code” or “fact” pleading. In order to maintain an action, a plaintiff needed to plead all of the ultimate facts that constituted a cause of action. Under the codes a pleading’s form took precedence over its substance, forcing the successful litigant to walk a tightrope between the overvagueness of conclusory allegations and the overspecificity of “pleading evidence.”²⁶

Recognizing that the formalism of fact pleading had proven cumbersome and unworkable,²⁷ the rulemakers promulgated Rule 8, which requires that the complaint include “a short and plain statement

²⁵ FED. R. CIV. P. 8(a)(1).

²⁶ See Clermont, *supra* note 8, at 1341 (describing the historical development of code pleading); see also 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218 (3d ed. 2004) (“Unfortunately, as was amply demonstrated by years of frustrating experience, it was difficult, if not impossible, to draw meaningful and consistent distinctions between or among ‘evidence,’ ‘ultimate] facts,’ and ‘conclusions.’”).

²⁷ See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990 (2003) (“The drafters of the Federal Rules, chiefly Charles E. Clark, wanted a sharp break

of the claim showing that the pleader is entitled to relief.”²⁸ As articulated by the Supreme Court in *Conley v. Gibson*, the vision of the new “notice pleading” was that a complaint should provide the defendant fair notice of a plaintiff’s claim and its basis.²⁹ A motion to dismiss for failure to state a claim under Rule 12(b)(6) would therefore only be granted if “it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief.”³⁰ By setting a low bar for the institution and maintenance of a federal action, the rulemakers and the Court created a plaintiff-protective regime that relied upon broad discovery from both parties rather than the plaintiff’s pleadings alone for pretrial issue formulation.³¹

2. *Plausibility Pleading*

In 2007, the Court in *Twombly* abrogated *Conley*³² and replaced it with what was widely understood to be a heightened pleading standard.³³ In 2009, the Court decided *Iqbal*, which made clear that the decision in *Twombly* applied to all motions under Rule 12(b)(6) and

from the former common law and code pleading regimes.”); Miller, *supra* note 8, at 4–6 (discussing the policy objectives animating the Federal Rules of Civil Procedure).

²⁸ FED. R. CIV. P. 8(a)(2).

²⁹ 355 U.S. 41, 47–48 (1957). See generally Miller, *supra* note 8, at 1–17 (discussing the history of notice pleading under *Conley*).

³⁰ *Conley*, 355 U.S. at 46–47; see also Fairman, *supra* note 27, at 992 (“[A] motion to dismiss for failure to state a claim . . . does not provide an avenue for defendants to challenge the underlying merits [R]ather, Rule 12(b)(6) is designed to raise legal challenges to a claim, typically based on the inclusion within a complaint of allegations that cause the claim to self-destruct.”); Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 652–53 (2005) (“The question is whether there is some legal (as opposed to factual) defect in the plaintiff’s claim that makes trial by a finder of fact unnecessary and the action one that can be resolved by the court pre-trial.”). The burden lies on the movant (typically the defendant) to make this showing. 5B WRIGHT & MILLER, *supra* note 26, § 1357.

³¹ See *Conley*, 355 U.S. at 47–48 (“Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”); Fairman, *supra* note 27, at 993 (observing that the discovery rules “serve the vital function of factual development that once overburdened pleading practice”); Miller, *supra* note 8, at 18 (“The Rules, it was thought, were designed to keep cases in court at the pleading stage, rather than to exclude them.”).

³² See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562–63 (2007) (stating that the *Conley* “no set of facts” standard “is best forgotten” and “has earned its retirement”).

³³ See *Dunlop & Wright*, *supra* note 8, at 208 (noting that after *Twombly* and *Iqbal*, courts have applied a “heightened pleading standard”); Miller, *supra* note 8, at 53 (same). But see *Twombly*, 550 U.S. at 570 (“[W]e do not require heightened fact pleading of specifics . . .”). For in-depth analysis of the plausibility standard articulated in these cases, see generally Stephen R. Brown, *Correlation Plausibility: A Framework for Fairness and Predictability in Pleading Practice After Twombly and Iqbal*, 44 CREIGHTON L. REV. 141 (2010), and *Dunlop & Wright*, *supra* note 8.

was not limited to the antitrust context of the earlier case.³⁴ All plaintiffs must now plead “enough facts to state a claim to relief that is plausible on its face.”³⁵

This plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.”³⁶ Plaintiffs must plead “enough fact to raise a reasonable expectation that discovery will reveal evidence of” the alleged wrongdoing.³⁷ An “unadorned, the-defendant-unlawfully-harmed-me accusation” does not suffice.³⁸

This sea change in pleading was motivated by the concern that notice pleading had moved too far from its original goal and made it too easy for plaintiffs to institute and maintain an action. A plaintiff with a transparently weak case could nevertheless cause a corporate defendant to incur “the potentially enormous expense of discovery.”³⁹ The Court therefore reinterpreted Rule 8 to create (or resurrect) a gatekeeping function for the complaint, “unlock[ing] the doors of discovery” only for those plaintiffs who might plausibly succeed on the merits.⁴⁰

As an illustration of the impact of plausibility pleading, consider Patricia Grove and Ramona Dejesus. Each woman sued her employer under the Fair Labor Standards Act.⁴¹ Each woman alleged in her complaint that she had worked more than forty hours per week and had not been paid overtime.⁴² Clearly, both complaints sufficed to put

³⁴ *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (“Our decision in *Twombly* expounded the pleading standard for ‘all civil actions’” (quoting FED. R. CIV. P. 1)).

³⁵ *Twombly*, 550 U.S. at 570.

³⁶ *Iqbal*, 556 U.S. at 678.

³⁷ *Twombly*, 550 U.S. at 556.

³⁸ *Iqbal*, 556 U.S. at 678.

³⁹ *Twombly*, 550 U.S. at 559; see also *infra* notes 86–89 and accompanying text (discussing the “discovery abuse” rationale of *Twombly*). The decision as to the strength or weakness of a case is inherently subjective, and the *Twombly/Iqbal* standard has therefore been criticized as strengthening implicit judicial bias. See Miller, *supra* note 8, at 26–28 (criticizing *Iqbal*’s “highly ambiguous and subjective” standard); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 205–07 (2013) (finding a statistically significant increase in the grant rate of motions to dismiss claims of race-based discrimination or harassment by black plaintiffs in the two years following *Iqbal*).

⁴⁰ *Iqbal*, 556 U.S. at 678; see also Dunlop & Wright, *supra* note 8, at 229–31 (collecting and analyzing early appellate decisions applying *Iqbal*); Miller, *supra* note 8, at 51 & n.200 (noting that “plausibility pleading employs a gatekeeping function at a case’s genesis” and cautioning that “[t]he pleading stage is far too early for courts to make reasoned decisions on the cost-benefit value of proceeding to discovery in many cases”).

⁴¹ *Grove v. Skylyne Mach. & Supply, Inc.*, No. 06cv01309(LTB)(MJW), 2006 WL 2982634, at *1 (D. Colo. Oct. 17, 2006); *Dejesus v. HF Mgmt. Servs., LLC*, 726 F.3d 85, 86 (2d Cir. 2013).

⁴² Complaint at 2, *Grove v. Skylyne Mach. & Supply, Inc.*, No. 06cv01309(LTB)(MJW) (D. Colo. Oct. 17, 2006), 2006 WL 2377690, at *1; Complaint at 4, *Dejesus v. HF Mgmt.*

the employers on notice of the allegations against them—each company could check its records to determine whether its employee had been paid overtime and what defenses might be available. But Grove's case began in 2006, before *Twombly*, while Dejesus's case was filed in 2012, well after *Iqbal*.

As a result, Grove's judge (applying *Conley*) denied the motion to dismiss her case.⁴³ Grove proceeded to discovery and apparently later settled the case for an undisclosed sum.⁴⁴ Dejesus's complaint, unlike Grove's, was measured against the new *Iqbal* pleading standard.⁴⁵ Affirming the district court, the Second Circuit dismissed Dejesus's case because she had not included in the complaint her hourly wage or an estimate of her weekly hours.⁴⁶ Because her clear and plain statement that she had worked overtime without compensation was "conclusory" and merely "repeat[ed] the language of the statute," Dejesus was denied her day in court.⁴⁷

Unlike the plaintiff-protective notice pleading regime that benefited Grove, plausibility pleading requires plaintiffs to plead with greater particularity—a resource-intensive practice⁴⁸ at best and a bar to recovery⁴⁹ (as when the necessary information is within the exclusive control of the defendant) at worst.

Servs., LLC, No. 1:12-CV-1298 (ERK)(RML) (E.D.N.Y. Oct. 23, 2012), 2012 WL 4848374, at *1.

⁴³ *Grove*, 2006 WL 2982634 at *3 ("Plaintiff has alleged that she was employed by Defendants and that during that employment she worked in excess of forty hours in a week, but was not paid overtime for those excess hours. Therefore, her complaint survives dismissal under [Rule] 12(b)(6).").

⁴⁴ Order of Dismissal at 1, *Grove v. Skyline Mach. & Supply, Inc.*, No. 06cv01309(LTB)(MJW), 2006 WL 2982634 (D. Colo. Oct. 17, 2006), ECF No. 24.

⁴⁵ See *Dejesus*, 726 F.3d at 87–88 (citing *Iqbal* as the governing legal standard).

⁴⁶ *Id.* at 88–89; see also *Dejesus v. HF Mgmt. Servs., LLC*, No. 1:12-CV-1298 (ERK)(RML), 2012 WL 5289571, at *2 (E.D.N.Y. Oct. 23, 2012) ("[P]laintiff fails to set forth the precise position she held, any approximation of the number of unpaid overtime hours worked, her rate of pay, or any approximation of the amount of wages due."), *aff'd*, 726 F.3d 85 (2d Cir. 2013).

⁴⁷ *Dejesus*, 726 F.3d at 89. Cf. FED. R. CIV. P. 84, app. form 11 (providing that a complaint for negligence that conclusively states "the defendant negligently drove a motor vehicle against the plaintiff" is sufficient under the Federal Rules of Civil Procedure).

⁴⁸ See *Dunlop & Wright*, *supra* note 8, at 238–40 (discussing the ways in which *Twombly* and *Iqbal* increase plaintiffs' litigation costs, such as by "forc[ing] [them] to incur discovery costs independently").

⁴⁹ See *Miller*, *supra* note 8, at 105–06 (discussing the problem of information asymmetry under *Twombly* and *Iqbal*). Dismissal for failure to state a claim is a disposition on the merits and carries claim-preclusive effect—just as if a jury had heard the plaintiff's case and decided against her. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981). A plaintiff who is unable to meet her pleading burden is therefore denied a judicial remedy for her alleged harm.

B. Pleading Subject-Matter Jurisdiction

Federal courts are courts of limited jurisdiction. While Article III provides nine bases of subject-matter jurisdiction,⁵⁰ the provision is not self-executing and Congress has chosen to grant jurisdiction over only a subset of cases listed therein.⁵¹

A court without subject-matter jurisdiction over a particular dispute lacks constitutional authority to take any action regarding that dispute.⁵² Unlike personal jurisdiction, subject-matter jurisdiction is nonwaivable; it may not be established by consent of the parties.⁵³ Therefore, plaintiffs are required to plead the jurisdictional grounds for every suit filed in federal court.⁵⁴

Unlike the merits of a case, which the finder of fact (often a jury) formally determines at trial,⁵⁵ judges decide the existence of jurisdiction as a question of law.⁵⁶ Parties may challenge the court's subject-matter jurisdiction by bringing a motion under Rule 12(b)(1), and even if a motion is not brought, the court is nevertheless required to assure itself of its own jurisdiction and may raise the question of jurisdiction *sua sponte*.⁵⁷ For this reason the judge may ground a finding of jurisdiction on a basis the plaintiff failed to raise in her pleading, so long as the facts alleged are sufficient to support jurisdiction.⁵⁸

⁵⁰ U.S. CONST. art. III, § 2, cl. 1.

⁵¹ See, e.g., 28 U.S.C. § 1332 (2012) (granting federal subject-matter jurisdiction over disputes between citizens of different states only when the amount in controversy is in excess of \$75,000, even though the Article III grant is not conditioned on a minimum amount in controversy).

⁵² E.g., *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 101–02 (1998); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) (“Without jurisdiction the court cannot proceed at all in any cause.”); see also Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 649 (2005) (framing the jurisdictional question as whether “the dispute over real-world facts and obligations can be resolved in this particular court between these particular parties at this particular time”).

⁵³ See, e.g., *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“[S]ubject-matter jurisdiction . . . is nonwaivable”); 5B WRIGHT & MILLER, *supra* note 26, § 1350 (“Since an objection to subject matter jurisdiction goes to the power of the court to hear and decide the case, it is a cardinal rule upheld by countless federal cases that the parties may not create or destroy jurisdiction by agreement or by consent.”).

⁵⁴ FED. R. CIV. P. 8(a) (“A pleading that states a claim for relief must contain: . . . a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support”).

⁵⁵ U.S. CONST. amend. VII.

⁵⁶ *Gilbert v. David*, 235 U.S. 561, 568 (1915) (“[I]t was the privilege of the court, if it saw fit, to dispose of the issue [of jurisdiction]”); see also 5B WRIGHT & MILLER, *supra* note 26, § 1350.

⁵⁷ See, e.g., *Filer v. Donley*, 690 F.3d 643, 646 (5th Cir. 2012) (“[I]t is the duty of a federal court first to decide, *sua sponte* if necessary, whether it has jurisdiction before the merits of the case can be addressed.”).

⁵⁸ See *Hamdi ex rel. Hamdi v. Napolitano*, 620 F.3d 615, 620, 624 (6th Cir. 2010) (holding that the court had subject-matter jurisdiction because the plaintiff had pleaded a

If jurisdiction is challenged, the party seeking to establish federal jurisdiction bears the burden of proving that jurisdiction exists.⁵⁹ A challenge may be *facial*, asserting that the facts, as pleaded, are insufficient to support jurisdiction, or *factual*, asserting that the pleading is inaccurate about a fact (such as a party's citizenship for purposes of diversity or alienage jurisdiction). While a judge deciding a 12(b)(1) motion that mounts a facial challenge must assume the truth of all facts as pleaded (as in a 12(b)(6) motion), on a factual challenge the judge is free to consider evidence outside the pleadings and make findings of fact necessary to resolve the 12(b)(1) challenge.⁶⁰

Unlike Rule 12(b)(6), there is no uniform standard for deciding 12(b)(1) motions.⁶¹ Instead, courts apply one of a number of tests according to the asserted basis for jurisdiction.⁶²

claim arising under the Constitution sufficient for jurisdiction under 28 U.S.C. § 1331, even though the complaint erroneously asserted only statutory grounds for jurisdiction). It is for this reason that notice pleading is particularly suitable for alleging jurisdiction. The plaintiff is manifestly not an expert on federal jurisdiction. Only the court is competent to assure itself of the propriety of jurisdiction over the case. By contrast, no one is as qualified as the plaintiff to identify her specific injury and the course of conduct that allegedly led to that injury. She is theoretically competent to plead facts sufficient to plausibly show that the alleged course of conduct gave rise to her injury. *See, e.g.,* *Molina v. New York*, 956 F. Supp. 257, 259 (E.D.N.Y. 1995) (noting that, even for a pro se plaintiff, judges are not free to consider arguments and legal claims not made in the complaint). Imposing a requirement on litigants that exceeds the scope of their competence does nothing to benefit the court. Because notice pleading of jurisdiction continues to serve the purpose for which it was instituted by the advisory committee, it should be retained.

⁵⁹ 5B WRIGHT & MILLER, *supra* note 26, § 1350 (“[T]he extensive case law on the subject makes clear that the burden of proof on a Rule 12(b)(1) motion is on the party asserting that subject matter jurisdiction exists.”). *But see* *Healy v. Ratta*, 292 U.S. 263, 271 (1934) (allocating the burden of showing the insufficiency of the amount in controversy to the defendant in the context of certain orders and contracts).

⁶⁰ *E.g.,* *Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (recognizing that district courts are “free to” weigh evidence when determining the existence of jurisdiction), *overruled on other grounds by* *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012); *Gould Elecs. Inc. v. United States*, 220 F.3d 169, 176–77 (3d Cir. 2000) (finding no reversible error in the district court’s consideration of evidence beyond the pleadings when reviewing a factual attack on jurisdiction); *see also* 5B WRIGHT & MILLER, *supra* note 26, § 1350.

⁶¹ *Cf. Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 55 n.6 (1976) (Brennan, J., concurring) (citing *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 742 n.1 (1976)) (arguing in dicta that the *Conley* standard “is applicable in testing the sufficiency of the complaint for subject-matter jurisdiction”).

⁶² Although the requirements for pleading the factual predicates of subject-matter jurisdiction vary contextually, plaintiffs must ultimately establish the existence of subject-matter jurisdiction by a preponderance of the evidence. *See, e.g., United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199 (9th Cir. 2009) (applying this standard in a *qui tam* action).

For example, plaintiffs claiming diversity jurisdiction⁶³ must show complete diversity⁶⁴ and that the amount in controversy exceeds the statutory minimum.⁶⁵ Yet courts afford considerably less deference to plaintiffs' allegations of citizenship of the parties than to their amount-in-controversy allegations. For the amount in controversy, the plaintiff need only satisfy a good-faith standard: So long as the court cannot determine "to a legal certainty" that the plaintiff cannot recover the jurisdictional amount, it must accept the plaintiff's allegation.⁶⁶ By contrast, a district court analyzing citizenship must mount an independent inquiry as to the propriety of the plaintiff's alignment of the parties, even if realignment according to "collision of interests" would destroy diversity.⁶⁷

Courts assessing the propriety of federal-question jurisdiction apply yet another standard⁶⁸: A plaintiff must show that the federal question is raised squarely by her claim⁶⁹ and is sufficiently substantial and central.⁷⁰ This standard is less deferential than the "legal cer-

⁶³ 28 U.S.C. § 1332(a)–(b) (2012).

⁶⁴ *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806) (requiring complete diversity).

⁶⁵ 28 U.S.C. § 1332(a) (establishing the amount-in-controversy requirement).

⁶⁶ *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

⁶⁷ *Indianapolis v. Chase Nat'l Bank of N.Y.*, 314 U.S. 63, 69 (1941) (quoting *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 181 (1905)) ("Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants."); *see also, e.g., In re Digimarc Corp. Derivative Litig.*, 549 F.3d 1223, 1234 (9th Cir. 2008) (explaining and applying this approach). This distinction reflects a pragmatic fairness concern—it is substantially easier to assess the identity of the parties than to project a specific damages award at the pleading stage. *See* 14AA CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3702 (3d ed. 2008) (describing the *Saint Paul Mercury* test as reflecting "a sound balance that takes into account both concerns of judicial efficiency and the integrity of the judicial process").

⁶⁸ 28 U.S.C. § 1331 (2012).

⁶⁹ *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) ("[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."); *see also Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 830 (2002) (holding that an issue implicated by a compulsory counterclaim may not be the basis of federal-question jurisdiction).

⁷⁰ 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3562 (3d ed. 2008); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 513 & n.10 (2006) (noting in dicta that a claim arising under federal law must be "colorable"). While the well-pleaded complaint rule is relatively bright-line, the factors of substantiality and centrality are more nebulous. For example, a complaint may be dismissed for lack of substantiality if the underlying federal claim is "wholly insubstantial and frivolous," *Bell v. Hood*, 327 U.S. 678, 682–83 (1946), or has "no plausible foundation," *Moore v. Lafayette Life Ins. Co.*, 458 F.3d 416, 444 (6th Cir. 2006) (quoting *Williamson v. Tucker*, 645 F.2d 404, 416 (5th Cir. 1981)). Because the substantiality test goes to the merits, its use has been rigorously circumscribed by the Court. Nevertheless, it is useful in ensuring that courts do not impermissibly

tainty” test applied to the amount in controversy, but it is more deferential than review of diversity of citizenship.

Precisely because judges ascertaining the existence of subject-matter jurisdiction apply one of several appropriately tailored standards as opposed to a uniform pleading rule, it is far from clear what the effects would be of a blanket imposition of *Twombly/Iqbal* plausibility pleading on subject-matter jurisdiction.⁷¹

As a formal matter, it is uncertain whether heightened pleading could even be applied to factual challenges to jurisdiction (which are more akin to motions for summary judgment or directed verdict than to judgment on the pleadings), let alone what effect this application would have.⁷² While the standard could be applied to most (if not all) facial challenges,⁷³ public policy counsels against making such a change.⁷⁴

In spite of these significant conceptual difficulties, courts have nonetheless applied the heightened pleading standard from *Twombly* and *Iqbal* to subject-matter jurisdiction challenges under Rule 12(b)(1). The next Part will argue that this approach, as justified by the courts that have adopted it, is misguided.

II

JUDICIAL (MIS)INTERPRETATIONS OF *TWOMBLY* AND *IQBAL*

This Part argues that lower courts are wrong to apply the heightened *Twombly* and *Iqbal* standard for pleading a claim for relief to

exercise supplemental jurisdiction over state-law claims arising from the same transaction or occurrence alleged in an utterly meritless federal-law action. 13D WRIGHT ET AL., *supra* § 3564.

⁷¹ See *infra* Part II.B (discussing potential impacts on several areas of jurisdictional doctrine).

⁷² For example, consider the following statement: “Defendant is a resident of the State of New York.” Applying *Iqbal* to a facial challenge to jurisdiction, a court might deem this a conclusory allegation and require that additional facts showing residence (the defendant’s address, for example) be pleaded. A defendant mounting a factual challenge, however, is arguing not that the *pleading* has failed to make a plausible case that he lives in New York, but rather that he, *in fact*, does not live in New York; he therefore brings evidence (affidavits, utility bills, tax returns, etc.) supporting his claim. In considering such a challenge, the quantum of facts pleaded by the plaintiff is irrelevant. Even if she had pleaded pages of “facts” about the defendant’s life and times in New York, if these “facts” are all demonstrably false the court cannot take jurisdiction no matter how plausible the jurisdictional allegations are.

⁷³ See, e.g., *Doe v. Holy See*, 557 F.3d 1066, 1074 (9th Cir. 2009) (“Under notice pleading rules, we require only ‘a short and plain statement’ of the grounds for jurisdiction and the claim for relief.” (quoting FED. R. CIV. P. 8(a)(1))).

⁷⁴ See *infra* Part II.A.1 (arguing that the policy rationales animating *Twombly* and *Iqbal* are not applicable to the context of jurisdictional pleading).

the pleading of subject-matter jurisdiction. Part II.A first criticizes the many courts that have adopted plausibility pleading of jurisdiction through the uncritical application of procedural boilerplate and other dicta, and also warns against a reflexive adoption of the case-specific reasoning from the few courts to have meaningfully considered the question as one of first impression. Part II.B then argues against the transsubstantive adoption of plausibility pleading for subject-matter jurisdiction by demonstrating the concrete, adverse consequences it would have on representative areas of jurisdictional doctrine.

A. *Lower Courts Have Not Shown That Twombly and Iqbal Should Extend to Jurisdiction*

Courts have justified the application of *Twombly* and *Iqbal* to the pleading of subject-matter jurisdiction in a number of different ways, none of which are persuasive. Some courts provide only a citation to either *Twombly* or *Iqbal*.⁷⁵ Others have “applied” boilerplate language that facial challenges are reviewed under the same standard as Rule 12(b)(6) motions, or otherwise have mistaken procedural boilerplate for binding circuit precedent.⁷⁶ Last, several courts have recognized the novelty of the issue and drafted reasoned opinions in support of their holdings.⁷⁷ On the whole, however, this shift in pleading doctrine has gone largely unexplained, with few judges willing to dedicate judicial resources to the resolution of a significant question for both private and public litigants. This Part demonstrates the overall failure of all of these courts to consider and justify this critical shift in pleading doctrine in any sort of comprehensive manner, and will now consider each of the three approaches courts have taken in turn.

1. *Naked Citations to Twombly/Iqbal*

A number of courts have justified the imposition of the plausibility standard on the pleading of subject-matter jurisdiction by means of a naked citation to *Twombly* or *Iqbal*.⁷⁸ In a typical case, the Dis-

⁷⁵ See *infra* Part II.A.1.

⁷⁶ See *infra* Part II.A.2.

⁷⁷ See *infra* Part II.A.3.

⁷⁸ *E.g.*, *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009); *Cassirer v. Spain*, 580 F.3d 1048, 1052 n.2 (9th Cir. 2009), *rev'd in part on other grounds en banc*, 616 F.3d 1019 (9th Cir. 2010); *Gerard v. Lee*, No. 4:12-2516-RBH-TER, 2012 WL 6727372, at *5 (D.S.C. Nov. 15, 2012); *Rodríguez-Vallejo v. MVM, Inc.*, 621 F. Supp. 2d 21, 24 (D.P.R. 2009); see also *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008) (noting that “under Rule 12(b)(1) the court may find a plausible set of facts by considering” matters outside the pleadings); *Brown v. Herbert*, 850 F. Supp. 2d 1240, 1244–45 (D. Utah 2012) (citing to *Iqbal* for the standard under Rule 12(b)(1) but not explicitly requiring plausibility);

strict Court for the Southern District of California stated that whether it construed the defendant's motion to dismiss as arising under Rule 12(b)(1) or 12(b)(6), the pleading must satisfy the *Iqbal* plausibility standard.⁷⁹ *Twombly* and *Iqbal*, however, cannot be fairly read to stand for the proposition that subject-matter jurisdiction must be plausibly pleaded, and they certainly cannot be cited as though this application of their holdings is clear enough to require no explanation. Neither opinion explicitly addresses jurisdiction, and the Court's animating policy rationale in the two cases is inapplicable in the context of subject-matter jurisdiction. Moreover, the differences between jurisdiction and merits make heightened pleading particularly unavailing in this context.

Plainly, both *Twombly* and *Iqbal* addressed only motions to dismiss for failure to state a claim.⁸⁰ Indeed, the question presented in *Twombly* was predicated on the propriety of federal-question jurisdiction under section 1 of the Sherman Act.⁸¹ In both opinions the Court specifically addressed the requirements of Rule 8(a)(2) (governing the "statement of the claim"),⁸² using its language to find a textual anchor for the abrogation of *Conley*.⁸³ Conclusory allegations do not "possess enough heft to 'sho[w] that the pleader is entitled to relief'" and so

Skillman v. Suffolk Jewelers & Pawnbrokers, No. 10-11407-PBS, 2010 WL 5099365, at *5 (D. Mass. Dec. 7, 2010) (citing no authority directly for the proposition that plausibility is required); *United States ex rel. Howard v. Urban Inv. Trust, Inc.*, No. 03 C 7668, 2009 WL 2252252, at *2 (N.D. Ill. July 29, 2009) (noting similarity to Rule 12(b)(6) without quoting boilerplate).

⁷⁹ *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1261 (S.D. Cal. 2012) (dismissing Thirteenth Amendment complaint of plaintiffs, five performing orcas, for lack of standing). Because redressability is a prong of the standing inquiry, the question of whether the Thirteenth Amendment protects nonhumans went both to jurisdiction and to the merits of the underlying suit.

⁸⁰ See *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) ("Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy . . ."); see also *Petition for Writ of Certiorari at i, Iqbal*, 556 U.S. 662 (No. 07-1015) (identifying the question presented as the sufficiency of the complaint in stating a claim). Although the Court in *Iqbal* assessed the propriety of subject-matter jurisdiction on the appeal, its analysis was limited to the collateral-order doctrine and did not extend to the jurisdictional grounds for the underlying suit. See *Iqbal*, 556 U.S. at 671.

⁸¹ *Petition for a Writ of Certiorari at i, 2, Twombly*, 550 U.S. 544 (No. 05-1126).

⁸² *Iqbal*, 556 U.S. at 677-78; *Twombly*, 550 U.S. at 555.

⁸³ In relevant part, the Rule reads: "A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction . . . ; (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . ." FED. R. Civ. P. 8(a).

are insufficient to state a claim.⁸⁴ Rule 8(a)(1), governing the pleading of jurisdiction, is not discussed in either opinion and does not contain the “showing” requirement underlying the plausibility standard.⁸⁵ If the plausibility requirement is to be extended to subject-matter jurisdiction, it cannot be done through a direct application of the Court’s construction of Rule 8 in *Twombly* and *Iqbal*.

Second, the Court’s stated and implicit goals for imposing the plausibility requirement on federal pleading are less applicable in the context of subject-matter jurisdiction. Aside from fealty to the text of the Rule, both decisions are chiefly concerned with the high cost of what the Court referred to as “discovery abuse.”⁸⁶ Although inflation-adjusted litigation costs in the mine-run of cases have remained level over the past several decades, the consensus within the legal community holds that recent discovery reforms have failed to constrain excessive costs.⁸⁷ Notice pleading under *Conley* was presumed to allow plaintiffs too much latitude in compelling defendants to comply with costly discovery orders, unfairly increasing leverage in obtaining *in terrorem* settlements on fundamentally meritless claims.⁸⁸ A heightened pleading requirement, therefore, was thought to conserve defendant and systemic resources by allowing for prediscovery disposition of a greater proportion of claims.⁸⁹

Imposing a plausibility requirement on the pleading of subject-matter jurisdiction does little to advance the policy goal of reducing litigation costs. Jurisdiction may be challenged at any point in the liti-

⁸⁴ *Twombly*, 550 U.S. at 557 (alteration in original) (quoting FED. R. CIV. P. 8(a)(2)); see also *id.* at 555 n.3 (“Rule 8(a)(2) . . . requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief.”).

⁸⁵ See *Iqbal*, 556 U.S. at 682 (requiring that the complaint “contain facts plausibly showing” defendants’ unlawful discrimination); Clermont, *supra* note 8, at 1361 (“There is no reason thus far, on the basis of the Supreme Court’s pronouncements, to think that *Twombly* and *Iqbal* apply to jurisdiction or other threshold matters.”); cf. Miller, *supra* note 8, at 101–02 (noting that Rule 8(a)(1) does not require a showing, “but that is not conclusive” in determining whether *Twombly* and *Iqbal* apply).

⁸⁶ *Twombly*, 550 U.S. at 559; see *Iqbal*, 556 U.S. at 684–86 (discussing the role of qualified immunity in shielding government officials from litigation costs including “disruptive discovery” (quoting *Siebert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment))); Miller, *supra* note 8, at 53, 61–71 (criticizing the Court’s “one-sided” emphasis on defendants’ litigation costs and questioning both the existence of discovery abuse and the utility of heightened pleading in reducing costs).

⁸⁷ See Emery G. Lee III & Thomas E. Willging, *Defining the Problem of Cost in Federal Civil Litigation*, 60 DUKE L.J. 765, 769–70 (2010) (contrasting the perceived conventional wisdom with the authors’ empirical study of litigation costs).

⁸⁸ See *Twombly*, 550 U.S. at 557–58. *But see* Spencer, *supra* note 9, at 1729–31 (arguing that the *Twombly* Court failed to show the existence of discovery abuse, and that plausibility pleading is therefore “a solution in search of a problem”).

⁸⁹ See *Twombly*, 550 U.S. at 558–59 (discussing the high costs of antitrust discovery and the failure of judicial management in “checking discovery abuse”).

gation—even after significant private and judicial resources have been expended in adjudicating the claim.⁹⁰ Even if brought before the start of broad substantive discovery, a Rule 12(b)(1) motion permits consideration of facts outside the pleadings and can still subject a defendant to limited (but potentially expensive) jurisdictional discovery.⁹¹ Moreover, a potentially meritorious claim dismissed for want of jurisdiction may be reinstated in state court, where the defendant (who was unable to prevail on his 12(b)(6) motion) is likely to be subject to pretrial discovery.⁹² Precisely because it goes to the suitability of the forum rather than the viability of the substantive legal claim, the 12(b)(1) motion makes a poor screening mechanism for strike suits.⁹³

Third, the direct application of the *Twombly/Iqbal* plausibility pleading standard to subject-matter jurisdiction collapses the distinction between jurisdiction and merits, in contravention of constitutional mandate and congressional policy. Theoretically, the line between jurisdiction and merits is clear—without jurisdiction, a court cannot consider the merits of a claim.⁹⁴ The Constitution separates

⁹⁰ See, e.g., *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 508, 510 (2006) (noting that subject-matter jurisdiction may be challenged after entry of judgment against the defendant, even though doing so is “unfair and a waste of judicial resources” (quoting *Arbaugh v. Y & H Corp.*, No. 01-3376, at 3 (E.D. La. Dec. 27, 2002))); 13 *WRIGHT ET AL.*, *supra* note 70, § 3522 (citing *Nguyen v. Dist. Dir.*, 400 F.3d 255, 260 (5th Cir. 2005)) (noting that subject-matter jurisdiction may be challenged for the first time on appeal).

⁹¹ See generally Strong, *supra* note 17, at 555–57 (discussing jurisdictional discovery in practice). Although to preserve consistency with *Twombly* and *Iqbal* courts may curtail the availability of jurisdictional discovery, see *infra* Part II.B.1, it is by no means certain that this will occur.

⁹² See generally Thomson Reuters, *Depositions and Interrogatories*, in 50 *STATE STATUTORY SURVEYS: CIVIL LAWS: CIVIL PROCEDURE* (2014), available at Westlaw 0020 SURVEYS 3 (describing state discovery procedures).

⁹³ Two areas of jurisdiction jurisprudence—frivolousness in federal-question cases and standing—both consider the underlying merits. The frivolousness inquiry already explicitly incorporates a plausibility analysis. See *Olivares v. Martin*, 555 F.2d 1192, 1195 (5th Cir. 1977) (finding dismissal for lack of jurisdiction appropriate for “a claim that has no plausible foundation”).

⁹⁴ See Wasserman, *supra* note 30, at 671–72 (“Merits ask whether the defendant’s conduct was legally constrained (by the Constitution or by act of Congress); jurisdiction asks whether a federal court has the power to enforce that legal constraint on the defendant’s conduct.”). In limited circumstances, however, a judge may find a plaintiff’s complaint so frivolous and without merit on its face as to deprive the court of subject-matter jurisdiction. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (recognizing that a complaint’s failure to state a valid cause of action does not implicate jurisdiction *except* when the claim “is wholly insubstantial and frivolous” (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946))). The jurisdiction/merits distinction is also muddled by the existence of statutory and contractual preconditions to suit, see *Arbaugh*, 546 U.S. at 514–16 (holding that courts should only deem preconditions like the Title VII employee-numerosity requirement jurisdictional upon a clear statement from Congress), and by cases in which the jurisdictional question arises from the same statute as the substantive claim and can only be resolved on summary judgment, see *Murgia v. Reed*, 338 F. App’x 614, 616

Congress's power to proscribe conduct⁹⁵ from its power to make the federal courts available to remedy harm caused by proscribed conduct,⁹⁶ and it may exercise each independently.⁹⁷ The jurisdiction/merits distinction also reflects the important difference between constitutional limits on congressional *power* to create causes of action and congressional *will* to exercise the full extent of that power. The Title VII employee-numerosity requirement represents a congressional policy choice and therefore goes to the merits.⁹⁸

The clear theoretical distinction between jurisdiction and merits supports the presumption, expressly recognized by the Supreme Court in *Arbaugh*, that Congress and the courts treat each issue separately and on its own terms.⁹⁹ The language of the opinions in *Twombly* and *Iqbal* are insufficient to overcome this presumption, and courts that assume their applicability to the pleading of subject-matter jurisdiction collapse two distinct concepts without justification.

(9th Cir. 2009) ("This jurisdictional issue . . . is clearly intertwined with the merits of the *Bivens* action; whether the defendants were tribal or federal actors is crucial not only to the issue of sovereign immunity, but also to the *Bivens* claim itself.").

⁹⁵ U.S. CONST. art. I, § 1 (vesting the legislative power in Congress); *id.* art. I, § 8, cl. 3 (granting Congress the power to regulate interstate commerce); *id.* art. I, § 8, cl. 18 (granting Congress the power to enact laws necessary and proper for the execution of its enumerated powers).

⁹⁶ *Id.* art. I, § 8, cl. 9 (granting Congress the power to create inferior federal courts); *id.* art. III, § 2, cl. 2 (granting Congress the power to limit the appellate jurisdiction of the Supreme Court).

⁹⁷ See John Harrison, *Jurisdiction, Congressional Power, and Constitutional Remedies*, 86 GEO. L.J. 2513, 2514 (1998) (proposing the utility of distinguishing between Congress's structural powers to establish courts and determine access, and substantive powers to create causes of action and thereby prohibit conduct); cf. Wasserman, *supra* note 30, at 672 ("For our purposes, Congress has made [merits and jurisdiction] distinct and courts must respect that distinction."). Although Congress chose to make available a federal forum for state-law tort plaintiffs through diversity jurisdiction, it made a policy choice to do so only in certain circumstances. Dismissal of a suit because the plaintiff prayed for less than the minimum required amount in controversy is manifestly not a judgment on the merits of the underlying cause of action. *But see* Evan Tsen Lee, *The Dubious Concept of Jurisdiction*, 54 HASTINGS L.J. 1613, 1620–23 (2003) (arguing that there is no reason to preserve a formal distinction between jurisdiction and merits because both ultimately go to the legitimacy of a court's decision).

⁹⁸ *Arbaugh*, 546 U.S. at 514. A federal court may, under its federal-question jurisdiction, hear a Title VII discrimination suit brought against an employer with only three employees; but because Congress chose not to create a cause of action for discrimination by very small employers, the suit will fail on the merits.

⁹⁹ See *Arbaugh*, 546 U.S. at 515–16 (holding that courts should construe a precondition to suit as germane to subject-matter jurisdiction only when "the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional").

2. *Procedural Boilerplate and Copy-Paste Precedent*

Many courts importing a plausibility pleading requirement into the jurisdictional inquiry over the past several years have done so by copying and pasting district or circuit precedent.¹⁰⁰ However, when the procedural boilerplate quoted is not the product of reasoned decisionmaking nor central to the holding of the case in which it originated, its precedential value is suspect. Discussions of procedural standards of review are particularly susceptible to the influence of what a commentator has termed “copy-paste precedent.”¹⁰¹ As language from sometimes-unpublished opinions repeatedly gets copied into subsequent opinions, this “copy-paste precedent can sometimes have even *more* influence than a circuit’s precedential opinions on the same subject.”¹⁰² The primary advantage of boilerplate—conserving judicial resources¹⁰³—also poses significant problems for litigants who do not benefit from the court’s full attention.¹⁰⁴

The motion-to-dismiss context presents several additional challenges for the use of boilerplate. First, contrary to the promise and vision of the rulemakers, the same standard cannot be applied in every instance, both because of the multiplicity of Rule 12(b)(1) standards and the murky border between jurisdiction and merits, espe-

¹⁰⁰ See, e.g., *Clarex Ltd. v. Natixis Secs. Am. LLC*, No. 12 Civ. 0722 (PAE), 2012 WL 4849146, at *5 (S.D.N.Y. Oct. 12, 2012) (quoting *Amidax Trading Grp. v. S.W.I.F.T. SCRL*, 671 F.3d 140, 146 (2d Cir. 2011)); *Nebraska ex rel. Bruning v. U.S. Dep’t of Health & Human Servs.*, 877 F. Supp. 2d 777, 790 (D. Neb. 2012) (quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)); *In re McNeil Consumer Healthcare*, 877 F. Supp. 2d 254, 269–70 (E.D. Pa. 2012) (quoting *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012)).

¹⁰¹ Soucek, *supra* note 19, at 153. In this vein, Judge Leval notes that judges, motivated by a “desire . . . to appear erudite,” “gratuitously recite standards of law that are not in dispute and have no effect on the judgment”—a frequently indulged temptation in the context of procedure. Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1267 (2006).

¹⁰² Soucek, *supra* note 19, at 153–54.

¹⁰³ *Id.* at 156 (“Supporters of unpublished opinions cite . . . the inability of judges to give precedent-worthy consideration to so many cases . . .”).

¹⁰⁴ See 13D WRIGHT ET AL., *supra* note 70, § 3562 (noting “the tendency of some courts to repeat—quite uncritically—language from earlier decisions as a substitute for analysis of the case that is actually before them”); Gerald Lebovits et al., *Ethical Judicial Opinion Writing*, 21 GEO. J. LEGAL ETHICS 237, 302 (2008) (criticizing judicial use of boilerplate as a “quick, cheap substitute for knowledge and independent thinking” (quoting DAVID MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 101 (1982))); Leval, *supra* note 101, at 1255 (“[C]ourts are more likely to exercise flawed, ill-considered judgment, more likely to overlook salutary cautions and contraindications, [and] more likely to pronounce flawed rules, when uttering dicta than when deciding their cases.”); Soucek, *supra* note 19, at 166–71 (critiquing copy-paste precedent as promoting only efficiency while doing “nothing to give notice, promote reliance, foster courts’ legitimacy, or assure fairness,” and noting that it can be “harder to overrule than real precedent”).

cially with respect to standing.¹⁰⁵ Second, briefing on standards of review is likely to be spotty or absent,¹⁰⁶ which deprives the court of “salutary adversity” that aids in decisionmaking.¹⁰⁷ Third, because the procedural litany courts recite in each case is only sometimes related to the legal question at issue, the language used is infrequently outcome determinative and, therefore, infrequently subject to appeal.¹⁰⁸ Fourth, and finally, the ubiquity of statements of procedural rules leads to an incremental “progressive distortion,” in which bit by bit “a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.”¹⁰⁹ Therefore, a district court that uncritically quotes a jurisdictional standard from an appellate decision cannot ensure that it is fairly applying the law of the circuit.

For an egregious example of the pitfalls inherent in copy-paste precedent, consider the Fifth Circuit’s opinion in *Castro v. United States*.¹¹⁰ Monica Castro sued the government under the Federal Tort Claims Act (FTCA) following the wrongful deportation of her infant daughter.¹¹¹ Although the United States as sovereign is generally immune from suit, it has consented to certain suits sounding in tort through the FTCA.¹¹² Courts lack jurisdiction over suits to which the sovereign has not consented.¹¹³ The government’s ultimately successful motion to dismiss—arguing that the conduct of the agents in question remained immune from suit under an exception to the FTCA—was therefore a facial challenge to subject-matter jurisdiction under Rule 12(b)(1).¹¹⁴

In articulating a standard of review, the circuit court panel reversed the district court (which applied the pre-*Twombly* stan-

¹⁰⁵ Cf. Leval, *supra* note 101, at 1267 (“When we thoughtlessly copy a statement of law from a prior opinion in a manner that determines nothing in the case before us, we risk misunderstanding the context and getting it wrong, introducing confusion and error.”).

¹⁰⁶ See 5B WRIGHT & MILLER, *supra* note 26, § 1347 (noting that courts will disregard a litigant’s mischaracterization of her own motion and decide according to the substance of the motion).

¹⁰⁷ Leval, *supra* note 101, at 1261.

¹⁰⁸ Cf. *id.* at 1262 (“[N]o party has a motive to try to get the bad proposition corrected. No party will even ask the court to reconsider its unfortunate dicta.”).

¹⁰⁹ *Id.* at 1269 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting)).

¹¹⁰ 560 F.3d 381 (5th Cir. 2009), *rev’d per curiam en banc*, 608 F.3d 266 (5th Cir. 2010).

¹¹¹ *Id.* at 385.

¹¹² *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

¹¹³ *Id.* (“Sovereign immunity is jurisdictional in nature. Indeed, the ‘terms of [the United States’] consent to be sued in any court define that court’s jurisdiction to entertain the suit.’” (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941))).

¹¹⁴ See *Castro*, 560 F.3d at 386 (identifying the sole issue on appeal as whether or not the district court erred in dismissing the claim for lack of subject-matter jurisdiction).

ard)¹¹⁵ by holding that “[a] motion under 12(b)(1) should be granted only if it appears certain that the plaintiff cannot prove a plausible set of facts that establish subject-matter jurisdiction.”¹¹⁶ This holding was not the product of thoughtful inquiry. Rather, the *Castro* court supported its novel holding only by quoting a previous panel in *Lane v. Halliburton*: “[U]nder Rule 12(b)(1), the court may find a plausible set of facts *supporting subject matter jurisdiction* by considering any of the following [matters in addition to the complaint].”¹¹⁷

This support is plainly inadequate. The *Lane* court never wrote the language attributed to it—the *Castro* panel manufactured the phrase “supporting subject matter jurisdiction” out of whole cloth, inserting it without brackets to clarify an otherwise ambiguous passage.¹¹⁸ Moreover, in *Lane* the court was considering a challenge under the political-question doctrine, a heavily merits-dependent inquiry analogous to standing.¹¹⁹ Rather than consider the unique procedural posture of *Lane* or its position at the margins of 12(b)(1) practice, the *Castro* panel copied and pasted a novel holding on an unbriefed issue,¹²⁰ denying litigants in the Fifth Circuit the opportunity for meaningful review of a significant change to pleading requirements. A subsequent panel of the Fifth Circuit copied and pasted once

¹¹⁵ *Castro v. United States*, No. C-06-61, 2007 WL 471095, at *4 (S.D. Tex. Feb. 9, 2007).

¹¹⁶ *Castro*, 560 F.3d at 386.

¹¹⁷ *Castro*, 560 F.3d at 386 (emphasis added) (quoting *Lane v. Halliburton*, 529 F.3d 548, 557 (5th Cir. 2008)). The original quote in *Lane* read: “However, under Rule 12(b)(1), the court may find a plausible set of facts by considering any of the following” *Lane*, 529 F.3d at 557.

¹¹⁸ Compare *Lane*, 529 F.3d at 557, with *Castro*, 560 F.3d at 386. Although responding to a Rule 12(b)(1) motion, the *Lane* court’s articulation of the proper standard of review made several references to Rule 12(b)(6), and there is significant daylight between “may find a plausible set of facts” and “*must* find a plausible set of facts.” See *Lane* 529 F.3d at 557.

¹¹⁹ See *id.* (“Political questions are labeled ‘nonjusticiable’ because there is an undeniable difference between finding no federal jurisdiction at the outset of a case and declaring that a particular matter is inappropriate for judicial resolution only after *some consideration of the merits*.” (emphasis added) (citing *Baker v. Carr*, 369 U.S. 186, 198 (1962)). It is far from clear that a nonjusticiable political question deprives a court of jurisdiction under Article III. 13C WRIGHT ET AL., *supra* note 70, § 3534.3.

¹²⁰ In her brief, *Castro* quoted the Fifth Circuit’s then-controlling statement that a 12(b)(1) motion should be granted “only if it appears certain that the plaintiff cannot prove any set of facts in support of [her] claim.” Brief for Appellant at 9, *Castro*, 560 F.3d 381 (No. 07-40416) (alteration in original) (quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)). The government cited no jurisdictional standard at all. See Brief for Appellee, *Castro*, 560 F.3d 381 (No. 07-40416).

more,¹²¹ and “plausible set of facts” has since entered the circuit’s procedural boilerplate.¹²²

Many courts, like the Fifth Circuit in *Castro*, have adopted heightened pleading of subject-matter jurisdiction through copying.¹²³ Other courts have done so through the erroneous application of pre-*Twombly* procedural boilerplate. Courts commonly state that a facial attack under Rule 12(b)(1) is considered under the same standard as a motion under Rule 12(b)(6).¹²⁴ The district court in one influential case, *Sanchez v. United States*, framed it prescriptively: “In order to rule upon an [sic] motion to dismiss under Rule 12(b)(1), the court shall apply the same standard of review which is applicable to motions under Rule 12(b)(6).”¹²⁵ To the extent that courts considering either motion must accept the plaintiff’s allegations as true and look only within the four corners of the complaint, this is an accurate and useful shorthand.¹²⁶ It cannot, however, be understood literally.¹²⁷ To wit, a

¹²¹ *Davis v. United States*, 597 F.3d 646, 649 (5th Cir. 2009) (per curiam) (citing *Castro*, 560 F.3d at 386).

¹²² *See, e.g.*, *Sawyer v. Wright*, 471 F. App’x 260, 261 (5th Cir. 2012) (per curiam) (citing *Davis*, 597 F.3d at 649); *McKinney v. United States*, 950 F. Supp. 2d 923, 926 (N.D. Tex. June 12, 2013) (same); *S. Cent. Reg’l Med. Ctr. v. Press Ganey Assocs., Inc.*, 923 F. Supp. 2d 897, 900 (S.D. Miss. 2013) (same); *Thibeaux v. Merit Energy Co.*, 920 F. Supp. 2d 706, 708 (W.D. La. 2013) (same); *Roberts v. Am. Bank & Trust Co.*, 835 F. Supp. 2d 183, 195 (E.D. La. 2011) (same).

¹²³ *See supra* note 100 and accompanying text.

¹²⁴ *See, e.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 n.1 (3d Cir. 2006); *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 698 (8th Cir. 2003); *Rosa v. AIDS Healthcare Found., Inc.*, No. 10-60595-Civ., 2010 WL 3008827, at *2 (S.D. Fla. July 27, 2010); *Fin. Fusion, Inc. v. Ablaise Ltd.*, No. C-06-2451 PVT, 2006 WL 2792872, at *2 (N.D. Cal. Sept. 28, 2006); *Mitchell v. Union Pac. R.R.*, No. 05 C 3834, 2006 WL 756069, at *1 (N.D. Ill. Mar. 22, 2006); *Bricker v. Stouchburg Nursery & Garden Ctr., Inc.*, No. Civ.A.03-6483, 2004 WL 1576642, at *1 (E.D. Pa. July 14, 2004).

¹²⁵ 707 F. Supp. 2d 216, 225 (D.P.R. 2010) (emphasis added) (citing *Negron-Gaztambide v. Hernandez-Torres*, 35 F.3d 25, 27 (1st Cir. 1994)), *aff’d sub nom. Sánchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 89 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 1631 (2013). The case to which the court cited for this proposition held only that “for purposes of [the] appeal” it was unnecessary to determine whether a motion should have been brought under Rule 12(b)(1) or 12(b)(6), suggesting that at least in some instances it will be necessary to make such a distinction. *Negron-Gaztambide*, 35 F.3d at 27. *But see Sánchez*, 671 F.3d at 106 (Torruella, J., dissenting) (“This standard is the same as is applied on a Rule 12(b)(6) motion.”).

¹²⁶ *See Excellence Mgmt. Audits & Realty Corp. v. United States*, 812 F. Supp. 2d 126, 129 (D.P.R. 2011) (citing *Sanchez*, 707 F. Supp. 2d at 225); *Muwwakil-Davis v. Wilmington Fin., Inc.*, No. 3:10cv563, 2011 WL 63868, at *4 (E.D. Va. Jan. 11, 2011) (citing *Sanchez*, 707 F. Supp. 2d at 226); *RHJ Med. Ctr., Inc. v. City of DuBois*, 754 F. Supp. 2d 723, 733 (W.D. Pa. 2010) (“The Court should apply the standard recognized in *Sanchez*.”); *Amiri v. Gelman Mgmt. Co.*, 734 F. Supp. 2d 1, 2 (D.D.C. 2010) (citing *Sanchez*, 707 F. Supp. 2d at 226–27).

¹²⁷ It seems possible, in fact, that the “same standard” language erroneously supplanted the earlier and more widespread “similar standard” language (which more accurately reflects the relationship between the two standards). *See, e.g.*, *Price v. Socialist People’s*

motion to dismiss arguing that the diversity-jurisdiction amount-in-controversy requirement has not been met will be assessed as to whether the *defendant* can prove his assertion to a legal certainty,¹²⁸ not whether any set of facts (plausibly) supports the *plaintiff's* jurisdictional allegations. Yet courts like the Eighth Circuit in *Stalley v. Catholic Health Initiatives* do just that, holding that “[t]he plaintiff must assert facts that affirmatively and *plausibly* suggest that the pleader has the right he claims (here, the right to jurisdiction),” relying on the preexisting “same standard” boilerplate.¹²⁹ Such a shortcut, which primarily describes only one commonality between Rules 12(b)(1) and 12(b)(6)—and even then is applicable only to facial and not factual attacks—cannot be rationally relied upon to support the proposition that *Twombly* and *Iqbal* extend to the pleading of subject-matter jurisdiction.

3. *Question of First Impression*

Finally, at least one court has adopted plausibility pleading of subject-matter jurisdiction on the basis of a deliberately reasoned (but still flawed) opinion.¹³⁰ In considering an environmental impact suit,

Libyan Arab Jamahiriya, 294 F.3d 82, 93 (D.C. Cir. 2002) (noting that the standard for reviewing a facial attack is “similar to” the standard for reviewing a Rule 12(b)(6) motion); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (same); *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) (same); *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981) (same); *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977) (same); *Totten v. W. Blasting Techs., Inc.*, No. C-03-2250, 2003 WL 24010952, at *2 (N.D. Cal. Nov. 3, 2003) (same); *United States v. Suffolk Constr. Co.*, No. 95 CIV. 9363 (SS), 1996 WL 391875, at *1 (S.D.N.Y. July 12, 1996) (same); *cf. Suzette M. Malveaux, Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 117–18 & n.308 (2010) (noting differences between the motions).

¹²⁸ See *supra* note 66 and accompanying text.

¹²⁹ 509 F.3d 517, 521 (8th Cir. 2007) (emphasis added); see also *Nebraska ex rel. Bruning v. U.S. Dep’t of Health & Human Servs.*, 877 F. Supp. 2d 777, 790 (D. Neb. 2012) (quoting *Stalley*, 509 F.3d at 521); *Collazo-Rosado v. Univ. of P.R.*, 775 F. Supp. 2d 376, 379–80 (D.P.R. 2011) (“In order to rule upon a motion to dismiss under Rule 12(b)(1), the court applies the same standard of review which is applicable to motions under Rule 12(b)(6).”); *Lynch v. City of Phila.*, No. 08-4780, 2009 WL 1424489, at *1 (E.D. Pa. May 20, 2009) (citing *Twombly* in discussion of the standard of review for a Rule 12(b)(1) motion asserting affirmative defenses of immunity and preclusion); *Arrigoni Enters., LLC v. Town of Durham*, 606 F. Supp. 2d 295, 297 (D. Conn. 2009) (requiring the plaintiff’s jurisdictional allegations to meet the *Twombly/Iqbal* standard because “[t]he standards for dismissal under [Rules] 12(b)(1) and 12(b)(6) are identical”); *Katin v. Nat’l Real Estate Info. Servs., Inc.*, No. 07-10882-DPW, 2009 WL 929554, at *2 (D. Mass. Mar. 31, 2009) (“The applicable standard for [a facial] challenge to standing is the same as the standard for a motion to dismiss under Rule 12(b)(6) . . .”).

¹³⁰ For a view that this is improper, see Strong, *supra* note 17, at 570 n.372, which argues that pursuant to the Rules Enabling Act, it would be inappropriate for a court other than the Supreme Court to extend the plausibility requirement to Rule 8(a)(1).

the District Court for the Eastern District of California determined that the *Twombly/Iqbal* plausibility requirements ought to be imposed on standing for two reasons: the preexisting relevance of Rule 12(b)(6) to Rule 12(b)(1), and the somewhat-heightened pleading already required by standing doctrine.¹³¹ While the Rule 12(b)(6) analogy is more compelling in the standing context than in other jurisdictional contexts (such as pleading diversity jurisdiction), the court supports it with a misleading attribution to a Ninth Circuit case¹³² that, while citing to *Iqbal*, failed to consider the sufficiency of the complaint.¹³³ The court also failed to expressly cabin its holding to the context of standing, risking the possibility that its language will be quoted (or copied and pasted) in other 12(b)(1) contexts.¹³⁴ Most significantly, the court fails to directly discuss either the textual basis for its decision or the policy implications arising therefrom—both of which are vital to any meaningful analysis of the impact of *Twombly* and *Iqbal* on jurisdictional pleading.

Two other cases discuss the appropriate standard for resolving attacks on jurisdiction in contexts other than Rule 12(b)(1). In *RHJ Medical Center, Inc. v. City of DuBois*, the district court considered the appropriate standard for reviewing a motion for judgment on the pleadings under Rule 12(c).¹³⁵ It argued that the uniform application of *Twombly/Iqbal* across Rule 12 motions actually “helps to maintain the status quo” by preserving the preexisting relationships between possible motions and discouraging gamesmanship.¹³⁶ While this is sensible with respect to the distinction between motions for failure to state a claim and for judgment on the pleadings,¹³⁷ as to jurisdiction it

¹³¹ *Coal. for a Sustainable Delta v. FEMA*, 711 F. Supp. 2d 1152, 1158–59 (E.D. Cal. 2010).

¹³² *Id.* at 1158 (citing *Cassirer v. Spain*, 580 F.3d 1048, 1052 n.2 (9th Cir. 2009), *rev'd in part on other grounds en banc*, 616 F.3d 1019 (9th Cir. 2010)).

¹³³ *See Cassirer*, 580 F.3d at 1051–62 (interpreting the Foreign Sovereign Immunities Act and determining that the district court had jurisdiction over the sovereign defendant but erred in failing to “conduct a prudential exhaustion analysis” of foreign judicial remedies). The court cited *Iqbal* for the proposition that on motions to dismiss (here, a facial and factual challenge to subject-matter jurisdiction) the plaintiff’s allegations are accepted as true. *Id.* at 1052 & n.2. Setting aside the fact that this proposition is incorrect with respect to factual challenges, the court in *Cassirer* at no point considered the sufficiency of the plaintiff’s complaint.

¹³⁴ *See Roberts*, *supra* note 20, at 411–13 (noting that the Court’s standing jurisprudence reflects a “departure from *Conley*” and a move in the direction of fact pleading).

¹³⁵ 754 F. Supp. 2d 723, 730–33 (W.D. Pa. 2010).

¹³⁶ *Id.* at 732.

¹³⁷ The only meaningful difference between the two is that a motion for failure to state a claim must be made before an answer is filed; they are otherwise “largely interchangeable.” *Id.*; *see also* 5C WRIGHT & MILLER, *supra* note 26, § 1369 (“[The] essential function [of the Rule 12(c) motion], that of permitting the summary disposition of

only reaches those defects that may be challenged under either Rule 12(b)(1) or 12(b)(6).¹³⁸ The court's corollary argument that the "burden of proof on the Plaintiff should increase at each stage of litigation"¹³⁹ is reasonable but inapposite in the context of subject-matter jurisdiction, which is to be determined as early as possible.¹⁴⁰

B. *Extending Twombly and Iqbal Conflicts with Settled Doctrine*

Most courts adopting the plausibility language of *Twombly/Iqbal* in the context of jurisdiction have quoted the standard without specifically analyzing the plausibility of the plaintiff's jurisdictional allegations.¹⁴¹ When they have analyzed plausibility, it has infrequently proven outcome determinative (that is, complaints that failed under the new standard would have failed under the old).¹⁴² Nevertheless, in a system that values procedural uniformity, it is likely that, as courts continue to adopt plausibility,¹⁴³ either the Supreme Court or the

cases that do not involve any substantive dispute that justifies a full trial, can be handled more effectively under the summary judgment procedure or, on occasion, the Rule 12(b)(6) motion.").

¹³⁸ See 5B WRIGHT & MILLER, *supra* note 26, § 1350 (including defects like failure to exhaust administrative claims or failure to arbitrate).

¹³⁹ *RHJ*, 754 F. Supp. 2d at 732.

¹⁴⁰ *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998) (rejecting the practice of assuming jurisdiction for the purpose of determining a more straightforward merits question because "jurisdiction [must] be established as a threshold matter").

¹⁴¹ See, e.g., *Yates v. LeBlanc*, No. 12-0193-BAJ-MJU, 2012 WL 6694066, at *2 (M.D. La. Dec. 21, 2012) (construing the complaint of a pro se plaintiff liberally to state an Eighth Amendment claim against state actors and therefore invoke the court's federal-question jurisdiction, even though the "plaintiff does not specifically invoke the Eighth Amendment"); *Muldrow v. U.S. Army*, C/A No. 4:12-1003-RBH-TER, 2012 WL 6761422, at *6–8 (D.S.C. Dec. 12, 2012) (finding that a pro se plaintiff "fail[ed] to allege sufficient facts to establish any plausible claim which falls within this court's subject matter jurisdiction" because jurisdiction was clearly foreclosed by the Tucker Act and the FTCA); *Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259, 1261–62 (S.D. Cal. 2012) ("[W]hether Plaintiffs . . . [have standing] turns on whether the Thirteenth Amendment affords *any* legal protection to Plaintiffs." (emphasis added)); *Ohio Valley Envtl. Coal., Inc. v. Patriot Coal Corp.*, No. 3:11-0115, 2011 WL 6101921, at *10 (S.D. W. Va. Dec. 7, 2011) (holding that the "[p]laintiffs have made allegations sufficient to state a claim of standing that is plausible on its face" without providing any reasoning).

¹⁴² See, e.g., *Zanders v. Swanson*, 573 F.3d 591, 594–95 (8th Cir. 2009) (applying *Twombly* in affirming the dismissal of the plaintiffs' claim for lack of standing); *United States v. City of New Orleans*, No. 12-2011, 2012 WL 6085081, at *6 (E.D. La. Dec. 6, 2012) (holding that a pleading that provided "specific examples" of the municipality offending the Fair Housing Act had "establishe[d] a plausible set of facts" sufficient to survive the defendant's 12(b)(1) motion); *Farm-to-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 690 (N.D. Iowa 2010) (finding it "more than plausible," even "likely and reasonable," that challenged regulations will cause injury in fact to the plaintiffs and that the plaintiffs have standing to sue).

¹⁴³ To date, panels of the Second, Third, Fifth, Eighth, Ninth, and Eleventh Circuits have adopted *Twombly/Iqbal* in the context of subject-matter jurisdiction. *Amidax Trading Grp.*

advisory committee will be compelled to step in and resolve the conflict.¹⁴⁴

However it occurs, the widespread application of *Twombly/Iqbal* to the pleading of subject-matter jurisdiction would sweep up more marginal cases, come into conflict with the full panoply of jurisdiction doctrines, and significantly reshape the balance of interests between plaintiffs and defendants. As the examples of jurisdictional discovery and the amount-in-controversy requirement will illustrate, heightened pleading of subject-matter jurisdiction is fundamentally incompatible with settled doctrine. This change will create substantial costs for lawyers, litigants, and courts, which will lose the benefits of well-developed case law without gaining any benefits for parties or the system.

1. *Curtailment or Elimination of Jurisdictional Discovery*

The Court in *Twombly* and *Iqbal* expressed particular concern over a plaintiff's ability, under notice pleading, to gain access to costly discovery on the basis of a flimsy complaint bespeaking an ultimately meritless claim.¹⁴⁵ Although the Rules do not provide for an automatic stay of predissmissal discovery,¹⁴⁶ most commentators believe that, especially following *Iqbal*, "discretionary" motions to stay discovery are granted as a matter of course.¹⁴⁷ On factual challenges to

v. S.W.I.F.T. SCRL, 671 F.3d 140, 145 (2d Cir. 2011); *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012); *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009) (per curiam); *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007); *Cassirer v. Spain*, 580 F.3d 1048, 1052 n.2 (9th Cir. 2009), *rev'd in part on other grounds en banc*, 616 F.3d 1019 (9th Cir. 2010); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260–61 (11th Cir. 2011), *abrogated on other grounds by* *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702 (2012).

¹⁴⁴ Cf. Edward H. Cooper, *Restyling the Civil Rules: Clarity Without Change*, 79 NOTRE DAME L. REV. 1761, 1769 (2004) ("A rule may be made to say what it has come to mean in practice, no matter how at odds practice may be with the apparent meaning of present text.").

¹⁴⁵ See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) ("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("[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 in [ultimately meritless] cases . . ."); see also *supra* notes 86–89 and accompanying text (describing the discovery-abuse rationale for heightened pleading).

¹⁴⁶ As an exception to this general rule, securities suits governed by the special pleading rules of the Private Securities Litigation Reform Act are subject to an automatic stay of predissmissal discovery. 15 U.S.C. § 77z-1(b)(1) (2012).

¹⁴⁷ See, e.g., Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the Conley-Iqbal Dilemma*, 114 PENN ST. L. REV. 1191, 1194 (2010) (noting that *Iqbal* limits access to discovery); Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 71 n.1, 82–83 (2012) (stating that several courts have interpreted *Iqbal* as supporting stays of predissmissal discovery, but noting that empirical data is lacking);

jurisdiction (where the facts themselves are disputed), courts have historically had discretion to order limited predismissal discovery on the sole question of jurisdiction.¹⁴⁸ However, if substantive discovery is now only available for complaints adjudged plausible (as the *Twombly* Court surely assumed),¹⁴⁹ some courts might erroneously conclude that jurisdictional discovery can only occur after the disposition of a Rule 12(b)(1) motion.¹⁵⁰ This would make jurisdictional discovery practically unavailable.

Already, courts are citing to *Twombly* and *Iqbal* to justify denying access to jurisdictional discovery.¹⁵¹ In *Dichter-Mad Family Partners, LLP v. United States*, the plaintiffs alleged that the Securities and Exchange Commission (SEC) was negligent in failing to stop Bernie Madoff's Ponzi scheme and brought suit under the FTCA.¹⁵² Because the government argued that the SEC's investigative and enforcement decisions were protected under the discretionary-

Malveaux, *supra* note 127, at 123 (“[I]f a judge grants a 12(b)(6) motion, he has concluded that the plaintiff has failed to state a claim, so any subsequent discovery would be to develop a claim not pleaded, an impermissible approach under the rules.”); Miller, *supra* note 8, at 107–10 & n.423 (arguing that, despite the *Iqbal* Court's opposition to discovery when the plausibility standard is not met, judges should grant targeted predismissal discovery, but providing only one example of a court that has done so); Gelbach, *supra* note 9, at 2320–21 (estimating that motions to dismiss filed under *Twombly/Iqbal* block plaintiffs' access to discovery in fifteen to twenty-one percent of cases). *But see* Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 507 & n.149 (2010) (“While the opinions in *Twombly*, as well as most commentators, seem to assume that surviving a 12(b)(6) motion is a prerequisite to discovery, this is simply not the case.” (footnote omitted)); Gideon Mark, *Federal Discovery Stays*, 45 U. MICH. J.L. REFORM 405, 408 (2012) (“Contrary to recent suggestions by some commentators and the United States Supreme Court, discovery may proceed while motions to dismiss are pending in federal litigation” (footnotes omitted)).

¹⁴⁸ See, e.g., *Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) (articulating the judicial economy rationale for jurisdictional discovery); see also *Strong*, *supra* note 17, at 555–57 (providing examples demonstrating the utility of predismissal discovery in resolving factual disputes predicate to the existence of jurisdiction).

¹⁴⁹ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (arguing that the only way “we can hope to avoid the potentially enormous expense of discovery” in meritless cases is to assess the plausibility of the complaint before granting discovery).

¹⁵⁰ See *Strong*, *supra* note 17, at 567 (noting that if *Twombly/Iqbal* “were extended to matters involving Rule 8(a)(1), . . . it might affect the availability of jurisdictional discovery in a wide variety of cases”).

¹⁵¹ See, e.g., *Dichter-Mad Family Partners, LLP v. United States*, 709 F.3d 749, 751 (9th Cir. 2013) (“A plaintiff seeking will discovery must allege ‘enough fact to raise a reasonable expectation that discovery will reveal’ the evidence he seeks.” (quoting *Twombly*, 550 U.S. at 556)); see also *Sánchez ex rel. D.R.-S. v. United States*, 671 F.3d 86, 92, 98–99 (1st Cir. 2012) (holding that the district court, which had applied *Iqbal* to the pleading of subject-matter jurisdiction, did not abuse its discretion in declining to order jurisdictional discovery where the plaintiff's request included some documents with “no apparent relationship to jurisdictional questions”).

¹⁵² 707 F. Supp. 2d 1016, 1018 (C.D. Cal. 2010), *aff'd*, 709 F.2d 749 (9th Cir. 2013).

function exception to the FTCA,¹⁵³ the plaintiffs sought jurisdictional discovery of internal policies and guidelines that would reveal mandatory rules violated by the SEC in failing to adequately regulate Madoff.¹⁵⁴ In denying their request, the district court found that the plaintiffs' vague and conclusory allegations were insufficient to plausibly (as required by *Iqbal*) show that the documents existed.¹⁵⁵ Notwithstanding the Ninth Circuit's permissive standard for granting jurisdictional discovery,¹⁵⁶ the court read *Twombly* and *Iqbal* as antagonistic toward discovery and decided the case accordingly.

However, rather than screening out meritless claims and reducing the cost of defending, this change would actually increase systemic waste. The existence of jurisdiction often hinges on facts specific to the defendant, such as state of citizenship. It therefore makes little sense as a cost-saving measure to bounce plaintiffs who cannot immediately prove such facts to state court and force both sides to expend time and money relating to the reinstatement of the action.¹⁵⁷ Moreover, without the mechanism of jurisdictional discovery, a district judge who, in her "judicial experience and common sense,"¹⁵⁸ believes that the plaintiff has a meritorious claim will likely be inclined to stay the motion to dismiss for lack of jurisdiction until summary judgment or trial.¹⁵⁹ This would in turn raise the risk that years of pretrial work would be rendered useless by the production of dispositive jurisdic-

¹⁵³ *Id.* at 1041.

¹⁵⁴ *Id.* at 1051.

¹⁵⁵ See *id.* at 1052 (citing *Twombly* and *Iqbal* for the proposition that "the Rule 8 pleading requirements prevent parties from filing complaints in order to conduct aimless fishing expeditions in the hope that some helpful evidence might possibly be uncovered").

¹⁵⁶ *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977) ("[R]efusal [to order jurisdictional discovery] is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction.").

¹⁵⁷ Cf. Martin H. Redish, *Pleading, Discovery, and the Federal Rules: Exploring the Foundations of Modern Procedure*, 64 FLA. L. REV. 845, 870–71 (2012) (arguing that the denial of predismissal discovery is "fundamentally unfair" and "a disruption of the enforcement of the applicable substantive law"). But see Strong, *supra* note 17, at 556 (noting that questions of corporate citizenship are complex and that some courts therefore impose a heightened standard for granting jurisdictional discovery on the citizenship of a defendant).

¹⁵⁸ *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

¹⁵⁹ See *Augustine v. United States*, 704 F.2d 1074, 1077–79 (9th Cir. 1983) (reversing the district court's dismissal for lack of subject-matter jurisdiction and remanding for "determination of the relevant factual issues at trial" because the jurisdictional question was intertwined with the merits of the case). Although the case law recommends such deferral when the jurisdictional question is intertwined with the merits, *id.* at 1077, it is far from clear that a court would be prohibited from deferring whenever the jurisdictional question cannot be adequately resolved on the basis of the pleadings.

tional facts that could easily have been developed much earlier in the litigation—a wasteful outcome.¹⁶⁰

2. *Abrogation of the Saint Paul Mercury Rule—Amount in Controversy and Pleading*

Although a plaintiff generally bears the burden of proving the existence of subject-matter jurisdiction, this is not always the case. The district court will presume the correctness of a plaintiff's allegation of the amount in controversy so long as the defendant is unable to show to "a legal certainty" that the statutory minimum cannot be reached on the plaintiff's alleged facts.¹⁶¹ Courts applying this test have declined to require particularized pleading by plaintiffs.¹⁶² Imposing a uniform plausibility standard on Rule 8(a)(1) would therefore abrogate the *Saint Paul Mercury* legal-certainty test—which, contrary to *Iqbal*, accepts plaintiffs' "mere conclusory statements"¹⁶³ as true—and force a clear merits determination based solely on the pleadings.¹⁶⁴

¹⁶⁰ See Lynch, *supra* note 147, at 94 (noting that courts grant jurisdictional discovery so as not to "expend[] resources on merits discovery until it will clearly be relevant").

¹⁶¹ St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 288–89 (1938) ("[T]he sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."). To avoid a facial attack on subject-matter jurisdiction, a plaintiff must, in her complaint, pray for relief in excess of the statutory minimum. See Schlesinger v. Councilman, 420 U.S. 738, 744 n.9 ("[A] complaint under § 1331 is fatally defective unless it contains a proper allegation of the amount in controversy . . ."). For a discussion of the rationales for diversity jurisdiction and the use of an amount-in-controversy requirement, see Russell G. Murphy, "Common Sense Legal Reform" and Bell's Toll: Eliminating Punitive Damage Claims from Jurisdictional Amount Calculations in Federal Diversity Cases, 84 Ky. L.J. 71, 73–82 (1995).

¹⁶² See, e.g., Kopp v. Kopp, 280 F.3d 883, 885 (8th Cir. 2002) (holding that the court has jurisdiction so long as some "fact finder might legally conclude" that damages would be greater than the jurisdictional amount); Del Vecchio v. Conseco, Inc., 230 F.3d 974, 978 (7th Cir. 2000) ("Generally, we give plaintiffs the benefit of the doubt in [determining the amount in controversy] . . ."); Kurtz v. Draur, 434 F. Supp. 958, 961 & n.3 (E.D. Pa. 1977) (finding a bare-bones complaint alleging damages "in a sum presently unknown, but greatly exceeding [the statutory amount]," to be sufficient under Rule 8(a)(1)); see also FED. R. CIV. P. app. form 7 ("The amount in controversy, without interest and costs, exceeds the sum or value specified by 28 U.S.C. § 1332."). But see Am. Econ. Ins. Co. v. T.J. Copy Prods., Inc., No. 04 C 107, 2004 WL 842510, at *1 (N.D. Ill. Apr. 20, 2004) (requiring the plaintiff to submit "[c]ompetent proof . . . to a reasonable probability" that the amount in controversy exceeds the jurisdictional minimum (quoting Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1218 (7th Cir. 1995))).

¹⁶³ *Iqbal*, 556 U.S. at 678.

¹⁶⁴ See, e.g., Mallgren v. Microsoft Corp., 975 F. Supp. 2d 451, 456 (S.D.N.Y. 2013) (dismissing a pro se complaint sua sponte for lack of diversity jurisdiction because its allegations of damages were "conclusory and contradictory statements" that did not meet the *Iqbal* requirement); Wood v. Maguire Auto., LLC, No. 5:09-CV-0640 (GTS/GHL), 2011 WL 4478485, at *2–3 & n.5 (N.D.N.Y. Sept. 26, 2011) (finding that *Iqbal* requires

The contrary rule would require a judge to hold a trial on the merits at the motion-to-dismiss stage,¹⁶⁵ or else consistently defer decision on a Rule 12(b)(1) motion asserting insufficient amount in controversy until trial. Neither of these options comports with the purpose of the amount-in-controversy requirement as a threshold screening mechanism to keep the federal courts from “fritter[ing] away their time in the trial of petty controversies.”¹⁶⁶

While liquidated and statutory damages are relatively straightforward to assess, judges are ill equipped to determine the punitive damages a jury may award a plaintiff before discovery and from the pleadings alone.¹⁶⁷ Even if this predictive determination could consistently be made correctly, expending the effort to do so would not serve the Rule’s animating purpose of decreasing burdens on the federal judiciary.¹⁶⁸ The current allocation of burdens is sufficient to protect the interests of the defendant and the court in ensuring the existence of jurisdiction at the commencement of an action, and importing the *Twombly/Iqbal* plausibility standard would do little to help.

As the examples of jurisdictional discovery and the amount-in-controversy requirement have shown, a blanket extension of *Twombly* and *Iqbal* will have consequences in every aspect of jurisdiction doctrine, and the full extent of that impact is beyond the scope of this Note.¹⁶⁹ In some instances, it may become harder to plead jurisdic-

courts to only apply the *Saint Paul Mercury* presumption when “the face of the complaint alleges facts plausibly suggesting the existence of claims aggregating over the jurisdictional minimum amount in controversy”), *aff’d*, 508 F. App’x 65 (2d Cir. 2013).

¹⁶⁵ Such a mini-trial on the pleadings is not in the interest of justice. *See* *Deutsch v. Hewes St. Realty Corp.*, 359 F.2d 96, 100 (2d Cir. 1966) (“If access to federal district courts is to be further limited it should be done by statute and not by court decisions that permit a district court judge to prejudge the monetary value of an unliquidated claim.”).

¹⁶⁶ *Jurisdiction of Federal Courts Concerning Diversity of Citizenship: Hearing on H.R. 2516 and H.R. 4497 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 85th Cong. 8 (1957) (statement of Rep. Thomas Ludlow Ashley).

¹⁶⁷ *Cf.* *Muwakil-Davis v. Wilmington Fin., Inc.*, No. 3:10cv563, 2011 WL 63868, at *1, *4 (E.D. Va. Jan. 7, 2011) (finding the plaintiff’s prayer for punitive damages “up to and including \$350,000” conclusory under *Iqbal* and rejecting the defendant’s asserted removal jurisdiction).

¹⁶⁸ *See supra* notes 165–66 and accompanying text (describing additional inefficiencies invited by abandoning the *Saint Paul Mercury* rule); *see also* *Zunamon v. Brown*, 418 F.2d 883, 887 (8th Cir. 1969) (holding that the district court was not required to hold a “full-scale pre-trial evidentiary hearing” on the amount in controversy, in part because diversity jurisdiction is not defeated if a jury ultimately grants recovery below the jurisdictional minimum (emphasis omitted)).

¹⁶⁹ For example, applying a heightened pleading standard will only further muddy standing doctrine—itself an already complex (and arguably incoherent) amalgam of jurisdiction and merits. In light of doctrinal ambiguity as to what constitutes a sufficient administrative complaint, exhaustion requirements will be similarly confused (at the expense of the most vulnerable litigants, whose day in court can be delayed or denied on those grounds). Both of these issues, however, merit fuller treatment in future work.

tion. In others, the apparent unfairness may push judges toward staying or denying valid motions to dismiss. It should be clear, then, that a one-size-fits-all pleading requirement is improper in the context of jurisdiction. Even if it were not, the questions raised are complex enough to warrant far more than the cursory treatment they have been afforded so far by judges and scholars.

III

PROCEDURAL SOLUTIONS FOR PROCEDURAL PROBLEMS

Twombly and *Iqbal* do not mandate the imposition of a heightened pleading standard for jurisdiction. Nevertheless, as demonstrated above, federal courts across the country have begun applying the plausibility standard articulated in *Twombly* and *Iqbal* to the pleading of jurisdiction without even recognizing the potential for doctrinal conflict and inconsistency with precedents like the *Saint Paul Mercury* rule. The resulting confusion makes it difficult for litigants to comply with federal pleading rules or predict the outcome of pretrial motions, creating instability. In order to restore clarity to the institution of federal actions, either courts or—ideally—the advisory committee must step in and reaffirm that Rule 8 requires notice pleading of jurisdictional grounds.

Ordinarily, a shift in procedural law will occur in one of several ways: the promulgation of a new rule¹⁷⁰ or rule revision¹⁷¹ by the Advisory Committee on Civil Rules, as authorized by the Rules Enabling Act;¹⁷² the enactment of a federal law;¹⁷³ or a disruptive judicial

¹⁷⁰ See, e.g., FED. R. CIV. P. 44.1 advisory committee's note (discussing the promulgation of Rule 44.1, a new rule governing the determination of foreign law).

¹⁷¹ See, e.g., FED. R. CIV. P. 23 advisory committee's note (discussing the amendment of Rule 23 to modernize the class action).

¹⁷² 28 U.S.C. § 2072(a) (2012) (delegating to the Supreme Court the "power to prescribe general rules of practice and procedure . . . for cases in the United States district courts"). The Act delegates rulemaking authority to the Supreme Court, which has delegated it to the Judicial Conference of the United States (chaired by the Chief Justice), which in turn has delegated it to the Standing Committee on Rules of Practice and Procedure, which has delegated it to five advisory committees, one of which is the Advisory Committee on Civil Rules. It is this committee that solicits proposals for rule amendments, circulates proposed amendments for public comment, and submits proposed amendments up the chain to the Judicial Conference and the Supreme Court, which promulgates the new amendments. See Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–19 (2002) (outlining the current process of rules promulgation and its historical development); see also John D. Bates, *Overview for the Bench, Bar, and Public*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/rules/about-rulemaking/how-rulemaking-process-works/overview-bench-bar-public.aspx> (last visited June 10, 2014) (discussing the procedure for considering new amendments and listing the current chairs and reporters of the five advisory committees and the standing committee).

decision interpreting an existing rule or statute.¹⁷⁴

The two legislative or quasi-legislative options—promulgating a new rule and enacting a statute—have several advantages. As with administrative notice-and-comment rulemaking, the rulemaking process allows for broad public input from the judiciary, public and private attorneys, and other interest groups, both through written comments and at public hearings.¹⁷⁵ The proceedings of the committee and of Congress are also transparent, furthering the goal of public involvement.¹⁷⁶ The expertise and relative political independence of the members of the advisory committees improve the quality of promulgated regulations, while the notice provisions aid Congress in intervening should the committee step too far outside the mainstream of public opinion.¹⁷⁷

By contrast, judicial revision of duly promulgated federal rules (as happened with *Twombly* and *Iqbal*) affords none of these bene-

The Act, as construed by the Supreme Court, affords the rulemakers broad discretion in determining the scope of their own authority. See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (“[W]e have rejected every statutory challenge to a Federal Rule that has come before us.”).

¹⁷³ For an example of such a federal statute, see Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.). The Act inserted new definitional sections and amended the diversity-jurisdiction statute, 28 U.S.C. § 1332 (2012), to grant federal jurisdiction over class actions in which the amount in controversy exceeds \$5 million, even in the absence of complete diversity (contrary to the general rule in *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806), requiring complete diversity of citizenship). Class Action Fairness Act §§ 3–4, 119 Stat. at 5–6, 9–12.

¹⁷⁴ See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (clarifying that Rule 23(a)(2) requires plaintiffs to prove at the class-certification stage that their claims are in fact susceptible to classwide resolution); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557, 562–63 (2007) (abrogating *Conley v. Gibson*, 355 U.S. 41 (1957), and interpreting FED. R. CIV. P. 8(a)(2)); *Strawbridge*, 7 U.S. at 267 (interpreting the federal diversity statute as requiring complete diversity).

¹⁷⁵ See Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1667–71 (1995) (enumerating the ways in which the advisory committees seek public participation in the rulemaking process).

¹⁷⁶ See *id.* at 1670–71 (describing the public hearings and records involved in the rulemaking process). Even the 2007 restyling of the Federal Rules of Civil Procedure, which purported to “improve style and clarity without changing meaning,” was the culmination of a fifteen-year project that was significantly influenced by outside academics and practitioners. Jeremy Counsellor, *Rooting for the Restyled Rules (Even Though I Opposed Them)*, 78 MISS. L.J. 519, 520, 538 (2009).

¹⁷⁷ Cf. Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166, 171, 173–74 (1984) (arguing that the growth of the administrative state and accompanying public participation strengthens rather than weakens congressional oversight); Matthew Warren, Note, *Active Judging: Judicial Philosophy and the Development of Hard Look Doctrine in the D.C. Circuit*, 90 GEO. L.J. 2599, 2624 (2002) (discussing Judge Bazelon’s belief that the best decisions are “made in a way that promotes both peer review by other experts and participation by the general public”).

fits.¹⁷⁸ Litigation, unlike the rulemaking process, does not “encourage participation by a broad segment of the community.”¹⁷⁹ Judicial opinions construing rules lack “the essential attributes of deliberativeness present in statutes,”¹⁸⁰ and often obscure the policy considerations that the advisory committee brings to the forefront.

Pending clarification by the rulemakers or the Supreme Court, however, district courts must redouble their efforts to avoid the use of procedural boilerplate and to separate circuit dicta from precedent.¹⁸¹ When defendants argue that jurisdiction must be pleaded with plausibility, courts should consider it as a question of first impression.

In doing so, they might look to *Haley Paint Co. v. E.I. Dupont De Nemours & Co.* as a model.¹⁸² In *Haley Paint*, the District Court for the District of Maryland considered the application of *Twombly/Iqbal*

¹⁷⁸ See Struve, *supra* note 172, at 1136 (“Compared with the other rulemaking bodies, however, the Court appears less representative, less knowledgeable, and perhaps more liable to engraft erroneous policy choices on the Rules.”); see also Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 333–34 (2013) (“The Court essentially rewrote Rule 8 without anyone’s assistance or any pretense of honoring the statutorily prescribed—and far more transparent and democratic—rulemaking process.”). Struve argues that, because the final text of promulgated rules is approved by both Congress and the Court, significantly altering the meaning of a rule by “judicial fiat” may exceed the Court’s authority under the Rules Enabling Act. Struve, *supra* note 172, at 1102, 1129–30. *But see* Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (advocating “a more activist role” for the Court in interpreting promulgated rules on the basis of authority delegated by the Rules Enabling Act).

¹⁷⁹ H.R. REP. NO. 99-422, at 26 (1985). Standing doctrine limits federal courts to consideration of live controversies between parties properly before the court, and while courts accept and consider briefs by interested amici, a court cannot properly sit as a sort of superlegislature. See Leval, *supra* note 101, at 1259–60 (discussing the impermissibility of a court, “without any filed dispute between parties, . . . publish[ing] a tract entitled *In re Securities Litigation*, in which [it] promulgated a compendium of rules to govern securities cases”).

¹⁸⁰ *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 951 (D.C. Cir. 1987) (Starr, J., concurring in part and dissenting in part) (discussing agency rulemaking under the Administrative Procedure Act).

¹⁸¹ Even in circuits in which the court of appeals has apparently weighed in on the question, the district court may find that the jurisdictional statement was superfluous to the case’s ultimate disposition and, therefore, nonbinding dictum. See Leval, *supra* note 101, at 1256 (“A dictum is an assertion . . . of a proposition of law which does not explain why the court’s judgment goes in favor of the winner. . . . [It is] a comment on how the court would decide some other, different case, and has no effect on its decision of the case before it.”).

¹⁸² See 775 F. Supp. 2d 790, 798–99 (D. Md. 2011) (discussing the applicability of *Twombly* and *Iqbal* to jurisdictional pleading requirements). Unsurprisingly, this discussion is responsive to litigants’ briefing of the issue. *Id.* at 797–98. Although courts have erred in their treatment of post-*Twombly* pleading standards, lawyers can aid courts in developing the law in an unstable area by raising and briefing such questions rather than relying on internal motion boilerplate.

to the pleading of personal jurisdiction.¹⁸³ The court first noted that the two Supreme Court decisions “did not specifically address the pleading requirements for jurisdiction” and that this is an “issue of first impression.”¹⁸⁴ It then considered persuasive precedent from other circuits.¹⁸⁵ Finally, it looked to both the text of Rule 8 and policy arguments in reaching a result.¹⁸⁶

This sort of deliberative process, in which courts weigh relevant precedent and competing policy considerations, is preferable to unthinking reliance upon boilerplate.

Better still would be for the Advisory Committee on Rules of Civil Procedure to take corrective action and propose a clarifying amendment to Rule 8.¹⁸⁷ This outcome is admittedly unlikely: After all, despite significant scholarly opposition in the seven years since *Twombly*,¹⁸⁸ the rulemakers have yet to produce even a draft change to Rule 8(a)(2).¹⁸⁹

¹⁸³ While the applicability of *Twombly* and *Iqbal* to the pleading of personal jurisdiction is beyond the scope of this Note, for a general treatment of the topic see Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627 (2009), arguing that the policy arguments in *Twombly* underlying a heightened pleading requirement also demand the heightened pleading of facts supporting personal jurisdiction.

¹⁸⁴ *Haley Paint*, 775 F. Supp. 2d at 798.

¹⁸⁵ See *id.* (citing decisions of the Sixth and Tenth Circuit Courts of Appeals and the District Court for the Eastern District of New York that applied a heightened standard for the pleading of personal jurisdiction).

¹⁸⁶ *Id.* at 799. The court’s conclusions, however, are flawed. It reasoned first that *Twombly* and *Iqbal* should apply because the language of Rules 8(a)(1) and 8(a)(2) are similar, *id.*, despite the lack of the word “showing” in Rule 8(a)(1). See *supra* notes 80–85 and accompanying text (discussing the connection between *Twombly/Iqbal* and Rule 8(a)(2)’s “showing” requirement). Second, ignoring both the multiplicity of pleading standards traditionally applied to personal jurisdiction and the text of the rule itself, the court reasoned that it would be “incongruous to require separate pleading standards for two subsections of the same rule.” *Haley Paint*, 775 F. Supp. 2d at 799. Finally, the court reasoned that because personal jurisdiction and the merits “more often than not” hinge on some of the same facts, they should be considered under the same standard. *Id.* This conclusion is inconsistent with the opportunity to consider evidence outside the complaint in deciding a Rule 12(b)(2) motion, but not a Rule 12(b)(6) motion, and is therefore invalid. Cf. *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996) (“[O]nce a defendant has raised a jurisdictional defense, a plaintiff bears the burden of proving by affidavits or other competent evidence that jurisdiction is proper.”); 5B WRIGHT & MILLER, *supra* note 26, § 1351 (discussing the use of affidavits and other evidence in deciding motions to dismiss under Rule 12(b)(2)).

¹⁸⁷ See *supra* notes 175–77 and accompanying text (discussing these advantages).

¹⁸⁸ See *supra* note 8 (collecting articles).

¹⁸⁹ See Lonny Hoffman, *Rulemaking in the Age of Twombly and Iqbal*, 46 U.C. DAVIS L. REV. 1483, 1486 (2013) (“Yet, after five years of deliberation and study, no proposals for rule reform have been forthcoming.”). Hoffman concludes (upon an exhaustive study of the advisory committee’s deliberations) that the rulemakers have failed to act because they both hope that judicial prudence will soften the hard edges of the new pleading regime and fear that the Supreme Court will reject a rule that attempts to abrogate *Twombly* and

To maximize the likelihood of adoption, a proposed amendment to Rule 8 should leave *Twombly/Iqbal* in place for merits pleading, perhaps by explicitly adding a plausibility requirement (“a short and plain statement *plausibly* showing”) to Rule 8(a)(2). The new Rule 8(a)(1) could then simply omit “plausibly,” underscoring the difference in pleading standards between the two rules. Alternatively, Rule 8(a)(1) could be amended to require “a short and plain statement *constituting a prima facie case* for the court’s jurisdiction,” to more clearly reflect that the existence of jurisdiction cannot always be settled on the pleadings.¹⁹⁰

Whatever approach the advisory committee might adopt, the promulgation of an amended rule would chasten district courts in their eagerness to apply *Twombly* and *Iqbal* broadly to pretrial proceedings.¹⁹¹ By slowing the pace of change and providing necessary contours to guide the intellectual debate currently playing out in courtrooms across the country, the advisory committee can help ensure that any changes to jurisdictional doctrine prompted by *Twombly* and *Iqbal* are necessary and deliberate.

CONCLUSION

Especially in law, the most efficient path is not always the most prudent. By recopying boilerplate recitations of the procedural rules for motions to dismiss, district courts have unintentionally wrought a significant, unwarranted shift in jurisdictional doctrine. Until either the Supreme Court or rulemakers determine otherwise, Rule 8(a)(1) does not require anything today that it did not require before *Twombly* was decided. Only by treating these procedural questions with the same rigor afforded to questions of substantive law will courts ensure that the balance of interests between plaintiffs and defendants is not improperly or arbitrarily altered.

Iqbal. *Id.* at 1489. These barriers to reform may be lower in the case of jurisdiction, as the changes to be cabined are outliers that lack the imprimatur of the Court.

¹⁹⁰ See *supra* note 60 and accompanying text (noting that courts may consider evidence beyond the pleadings in deciding a 12(b)(1) motion).

¹⁹¹ The Supreme Court, of course, may still weigh in to further “clarify” the language of Rule 8. If a sufficient number of Justices wish to impose a heightened pleading standard for subject-matter jurisdiction, the particulars of the wording chosen by the advisory committee will not make much of a difference.