

IQBAL, PROCEDURAL MISMATCHES, AND
CIVIL RIGHTS LITIGATION

by
Howard M. Wasserman*

Understanding the twin pleading cases of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal from the vantage point of only a few months (or even years) requires as much prediction as explanation. Early confusion is a product of the long-heralded link between substance and procedure. What we are seeing now may be less about Court-imposed changes to procedure as about changes to substantive law and a “mismatch” between new substance and the old procedure of the Federal Rules. Much of the current business of federal courts involves constitutional litigation under 42 U.S.C. § 1983 and Bivens, a species of civil action unheard of when the Federal Rules and the system of notice pleading and broad, wide-ranging discovery were created in 1938. That pleading system arguably does not work with such “modern” litigation and Iqbal reflects the Court’s effort to make federal pleading and discovery rules more consistent and more functional with this particularly vulnerable area of new federal substance. Unfortunately, the greater detail demanded by the new pleading rules may be impossible in many civil rights cases, where plaintiffs cannot know or plead essential information with particularity at the outset without the benefit of discovery—discovery that Iqbal stands to deny to plaintiffs who fail to plead with the necessary detail. The predictable result, illustrated by one Ninth Circuit decision just two months after Iqbal, will be a significant decrease in enforcement and vindication of federal constitutional and civil rights.

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* Associate Professor of Law, FIU College of Law. Thanks to John Parry and the editors of *Lewis & Clark Law Review* for inviting me to participate in this symposium. © 2010 Howard M. Wasserman.

I. INTRODUCTION

Understanding the twin pleading cases of *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² from the vantage point of only a few months (or even years) requires as much prediction as explanation. We just do not know much right now. Most commentators are not encouraged.³ At least some members of Congress seem eager to become involved.⁴ Assuming no legislative intervention, early developments under the new regime offer some hints as to where pleading doctrine is and where it is going.

By its terms, *Iqbal* creates a two-step analysis for evaluating the sufficiency of a complaint in deciding a motion to dismiss under Rule 12(b)(6). First, the court may disregard all conclusory or bald allegations, declining to afford such allegations a presumption of truth.⁵ This is so even for allegations for which the plaintiff could not know or add further detail at the outset and without a chance for discovery.⁶ Second, the court examines the remaining allegations, according them a presumption of truth, to determine whether the allegations are plausible and whether they plausibly suggest a violation of the application of substantive rights.⁷ In determining plausibility, courts seem free to impose their own views of what facts are plausible and what conclusions are plausible (or most

¹ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007).

² *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

³ See, e.g., Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010) (manuscript at 39), available at <http://ssrn.com/abstract=1467799>; Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014 (2009); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 6–7 (2009) [hereinafter Spencer, *Understanding Pleading*]; A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 103 (2008) [hereinafter Spencer, *Civil Rights*]; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010) (manuscript at 3), available at <http://ssrn.com/abstract=1442786>; Symposium, *Pondering Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010); but see Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 62, 98 (2007).

⁴ See, e.g., Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); see also *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) [hereinafter *Limited Court Access*].

⁵ *Iqbal*, 129 S. Ct. at 1949–50; Bone, *supra* note 3 (manuscript at 9–10); Steinman, *supra* note 3 (manuscript at 24).

⁶ *Iqbal*, 129 S. Ct. at 1950; Bone, *supra* note 3 (manuscript at 27, 33); Epstein, *supra* note 3, at 70–71; Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217, 1262 (2008); Steinman, *supra* note 3 (manuscript at 64).

⁷ *Iqbal*, 129 S. Ct. at 1950; Bone, *supra* note 3 (manuscript at 9–10); Steinman, *supra* note 3 (manuscript at 24).

plausible) from the facts pled.⁸ At bottom, *Iqbal* is about increased judicial discretion to inquire into and parse the details of complaints, almost certainly producing more 12(b)(6) dismissals, as well as wide variance from case to case, even within the same court.⁹ And *Iqbal* and *Twombly* together inextricably link pleading and discovery—the motivation for the apparent move to strengthen pleading as a threshold hurdle was the perceived need to protect defendants from wide-ranging, expensive, burdensome, and distracting discovery.¹⁰

The uncertain state of pleading demonstrates anew the long-heralded link between substance and procedure.¹¹ What we are seeing now may be less about changes to procedure than about changes to substantive law and what Thomas Main describes as a “mismatch” between substance and procedure.¹² In the face of a mismatch, either substance or procedure must evolve to keep them from undermining one another. *Iqbal* reflects an effort by the Court to make federal pleading and discovery rules function in one particularly vulnerable area of federal substance—constitutional litigation against federal officials. Arguably, however, that effort will have the opposite substantive effect.

The paradigm of federal litigation when the Federal Rules of Civil Procedure took effect in 1938 was diversity-jurisdiction tort, contract, debt, and other business disputes, as well as patent claims.¹³ The litigation regime established by the Rules and *Conley v. Gibson*¹⁴—skeletal, limited-detail “notice” pleading and broad wide-ranging, party-controlled, cooperative factual discovery viewed as systemic benefits¹⁵—made sense in these relatively straightforward, single-occurrence, few-party cases.

⁸ *Iqbal*, 129 S. Ct. at 1950; Bone, *supra* note 3 (manuscript at 23); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 115, 118 (2009).

⁹ *Compare* Moss v. U.S. Secret Serv., 572 F.3d 962, 965 (9th Cir. 2009) (reversing denial of motion to dismiss) *with* al-Kidd v. Ashcroft, 580 F.3d 949, 952 (9th Cir. 2009) (affirming denial of motion to dismiss in claim by detainee against former attorney general); *and* Padilla v. Yoo, 633 F. Supp. 2d 1005, 1011 (N.D. Cal. 2009) (denying dismissal in claim against former Office of Legal Counsel attorney).

¹⁰ *Iqbal*, 129 S. Ct. at 1953–54; Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965–67 (2007); Bone, *supra* note 3 (manuscript at 11); Burbank, *supra* note 8, at 117; Hoffman, *supra* note 6, at 1231.

¹¹ See Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. (forthcoming 2010) (manuscript at 17–18), available at <http://ssrn.com/abstract=1113916>.

¹² *Id.* (manuscript at 27–28); see also Epstein, *supra* note 3, at 66–67.

¹³ Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 896 (2009); Epstein, *supra* note 3, at 62; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986); Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 802 (2003).

¹⁴ 355 U.S. 41, 47 (1957).

¹⁵ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); Epstein, *supra* note 3, at 69–70; Richard L. Marcus, *The Story of Hickman: Preserving Adversarial Incentives While Embracing Broad Discovery*, in CIVIL PROCEDURE STORIES 323, 323–24 (Kevin M. Clermont ed., 2d ed. 2008).

Modern civil rights litigation (along with modern antitrust, securities, and other complex litigation) was unheard of in 1938; this is substantive law created and developed—in Congress, the courts, or both—only in the past fifty years and well after introduction of the Federal Rules. But these cases now form a substantial portion of federal civil litigation.¹⁶ It is no accident that the Supreme Court formally (if not forthrightly¹⁷) changed direction first in a complex antitrust class action¹⁸ and followed quickly in a *Bivens* action¹⁹ against high-level policymaking federal officers (the former Attorney General of the United States, John Ashcroft, and former Director of the FBI, William Mueller) asserting a defense of qualified immunity.²⁰ This is the new paradigmatic federal substance, mismatched with old procedure; the new judicially imposed stricter pleading was designed to correct this precise mismatch.

Civil rights claims possess five important traits distinguishing them from the original federal-litigation paradigm.²¹ These differences arguably support Richard Epstein's argument that the 1938 litigation model is "not well suited to the complexities of modern litigation."²² Discovery becomes a defect in the system in these cases—too broad, too costly, too burdensome, and too distracting, especially for high-ranking government defendants expected to carry out the business of governing and protecting the public well-being.²³ Discovery thus should be reserved only for those cases that appear, at first glance, to have some merit. Pleading provides that initial measure of merit—it performs a meaningful weeding-out point, in which only claims appearing from the outset to have merit should pass into discovery and the chance to really learn what happened. Epstein praises *Twombly* for bringing procedure into line with new substantive realities.²⁴

Civil rights is one substantive area in which *Iqbal* will empower courts to increase scrutiny over pleadings, a prediction already bearing out in the early days of the new pleading regime.²⁵ And we can expect a

¹⁶ JAMES C. DUFF, ADMIN. OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR 143–45 tbl. C-2 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>.

¹⁷ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (“[W]e do not require heightened fact pleading of specifics . . .”).

¹⁸ *Id.* at 1961.

¹⁹ See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

²⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009) (citing *Bivens*, 403 U.S. 388).

²¹ *Infra* Part II.B.

²² Epstein, *supra* note 3, at 66.

²³ Epstein, *supra* note 3, at 70–71; Marcus, *supra* note 15, at 355; see also *Iqbal*, 129 S. Ct. at 1953; *Twombly*, 127 S. Ct. at 1967.

²⁴ Epstein, *supra* note 3, at 98.

²⁵ Bone, *supra* note 13, at 932; Bone, *supra* note 3 (manuscript at 33); Seiner, *supra* note 3, at 1014; Spencer, *Civil Rights*, *supra* note 3, at 103; see also Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, AM. U. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1487764>; Kendall W.

continued willingness among courts in civil rights and constitutional cases to wield their new discretion to dig into the details of complaints, to parse the complaint as a whole and particular allegations within it, to disregard insufficiently detailed allegations, and to decide what allegations and conclusions are most plausible; all of which makes pleading a significant veto-gate through which all claims must pass before the opportunity for discovery, with its attendant costs, burdens, and distractions, opens.²⁶

The predictable result will be a significant decrease in enforcement and vindication of federal constitutional and civil rights, and of the values and principles underlying those rights. But that decrease comes not from changes to substantive constitutional law and not necessarily from evidence of events on the ground demonstrating that no violation occurred. Rather, it comes from altering procedure, imposing on plaintiffs an obligation to present substantial factual detail at the outset of litigation, even detail they do not and cannot know without discovery, and empowering courts to form their own conclusions based on their interpretations of factual allegations.

This Essay considers the evolution of substantive federal law (of which the rise of civil rights litigation is a significant part) and how that evolution produces (or is perceived as producing) substance-procedure mismatches, requiring the current shift in procedural rules. This evolution, more than any conscious consideration of an overall procedural framework, explains the new (or affirmed) pleading-and-discovery regime of *Twombly* and *Iqbal*. This Essay then examines *Moss v. U.S. Secret Service*,²⁷ decided in the Ninth Circuit just two months after *Iqbal*, as illustrating how lower courts may wield this new pleading regime in civil rights cases and as predicting the future of civil rights pleading.

II. SUBSTANTIVE EVOLUTION AND SUBSTANCE-PROCEDURE MISMATCHES

A. *Procedural Mismatches*

The substance-procedure link cuts in two directions. On one hand, procedure is inherently substantive. Procedure and substance are inseparable—procedural rules affect litigation behavior, create winners and losers, and affect substantive outcomes and the overall enforcement of substantive rights and policies.²⁸ Changes to procedural rules, such as heightened pleading, become problematic precisely because they

Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1836–37 (2008) (finding a “pronounced change” in the rate of dismissals of civil rights claims under *Twombly*).

²⁶ *Infra* Part II.B.

²⁷ 572 F.3d 962 (9th Cir. 2009).

²⁸ Main, *supra* note 11 (manuscript at 17–18, 21).

undermine plaintiffs' ability to vindicate substantive rights.²⁹ Civil rights claims uniquely demonstrate this link, being the consistent substantive target of procedural law; past procedural reform efforts have been criticized for their disparate negative impact on this "disfavored" class of federal litigation.³⁰ Many commentators expect civil rights claims to be a particular target of the new pleading regime.³¹

On the other hand, Thomas Main recently demonstrated that the converse of the substance-procedure link also is true: "the construction of substantive law necessarily entails making assumptions about how that law ultimately will be enforced" in the existing procedural regime.³² Procedure is not only necessary to effectuate substantive law; procedure is an underlying assumption for which substantive rule-makers account (or should account) in creating substantive law.³³ Whether procedure undermines or reinforces substance depends on the procedural assumptions made in enacting that substance. As Main argues: "a heightened pleading standard for civil rights cases does not undermine substantive law that was drafted in anticipation of a heightened pleading standard. Indeed, to apply a liberal pleading standard to that law instead could lead to over-enforcement of the substantive mandate."³⁴ The risk is what Main calls a "mismatch scenario" between substance and procedure, in which failure to account for procedure in creating substance yields the costly consequence of either over- or under-enforcement of substantive rights.³⁵

Putting Main's insight into operation turns on several underlying concerns. First, much depends on the source of the applicable substantive and procedural rules—whether legislatively enacted, judicially interpreted and construed, or judicially created in the first instance. The risk of a mismatch arguably decreases where the same rule-maker defines both substance and procedure;³⁶ it increases as different

²⁹ Bone, *supra* note 13, at 913; *see also* Main, *supra* note 11 (manuscript at 20) ("[P]rocedural reforms can have the effect of denying substantive rights without the transparency, safeguards and accountability that attend public and legislative decision-making."); *id.* (manuscript at 18–19) (identifying procedural devices whose substantive effects have been analyzed).

³⁰ Burbank, *supra* note 8, at 117–18; Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2182 (1989); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 471 (1986); Spencer, *Civil Rights*, *supra* note 3, at 159; Wasserman, *supra* note 13, at 804.

³¹ *See supra* note 25.

³² Main, *supra* note 11 (manuscript at 2).

³³ *Id.* (manuscript at 20–21).

³⁴ *Id.* (manuscript at 28).

³⁵ *Id.* (manuscript at 27–29); *see* Bone, *supra* note 13, at 876; Bone, *supra* note 3 (manuscript at 33); Epstein, *supra* note 3, at 98 ("Some calibration of the scales of error is needed . . .").

³⁶ *Cf.* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1040 (1993) (arguing that the Court should

rule-makers create and modify different rules at different points, via different methods, and over time. Of course, the Court has disclaimed any power to rewrite procedural rules under the guise of interpreting them.³⁷

Second, we must view this at a macro level. Substantively, this means thinking of “federal law” as a whole, rather than on the level of individual substantive legal rules. It also means considering the procedural regime as a whole, as by considering the link between strict or liberal pleading and broad or narrow discovery as part of one coherent, integrated procedural regime. A procedural scheme might match predominant substantive law in the jurisdiction at one point in time, but as new substantive law is created (legislatively, judicially, or both), the predominant substance changes, producing a mismatch with existing procedure.

Third, Main focuses primarily on mismatches created by applying new procedures to older or preexisting substantive laws.³⁸ But current controversies over pleading rules involve the opposite—mismatches caused by new substantive law (for our purposes, civil- and constitutional-rights claims) litigated under old or preexisting procedural rules.

Fourth, neither substance nor procedure is static; both evolve over time, especially as different rule-makers place their imprint on the body of legal rules. Thus, we cannot think only of mismatches between new substance and existing procedure or vice versa. We also must consider mismatches that develop as each evolves. Procedure may be created with one category of predominant existing substance in mind, but new and different substance is created in light of existing procedure. And judicial interpretation and construction of substance and procedure, new and old, is ongoing.³⁹ Matches and mismatches erupt from this dynamic process.

Fifth, mismatches often arise at the level of underlying values and policies. Changes to procedural rules—especially through judicial construction and interpretation—become necessary precisely to prevent mismatches and diminution of the values underlying substance. This perhaps explains the Supreme Court’s sudden switch from unanimous insistence that changes to pleading rules for civil rights cases must go through the rulemaking process of the Rules Enabling Act (REA) to *Iqbal*’s explicitly policy-based, case-based ratcheting of pleading standards.⁴⁰

take a more activist role in interpreting Federal Rules that Congress has empowered the Court to enact).

³⁷ *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

³⁸ Main, *supra* note 11 (manuscript at 27).

³⁹ *Cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–51 (2009) (describing new developments as “construction” of Rule 8).

⁴⁰ *Compare Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) and *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) with *Iqbal*, 129 S. Ct. at 1950–51; see also Bone, *supra* note 13, at

Finally, whether a substance-procedure mismatch exists is not value-neutral; whether there is a mismatch, and the steps necessary to avoid or remedy a mismatch, depends on the values the court or rule-maker adopts and emphasizes. Conscious efforts to avoid a mismatch may, in fact, produce one—it depends on the values we emphasize. In trying to keep substance and procedure in step on one view of the legal rules and their underlying values and purposes, rule-makers create a mismatch under different views of those legal rules and their underlying values and purposes. *Iqbal* was driven by the majority's focus on particular values at issue in civil rights law—freeing government officials to vigorously pursue the public interest without fear of the cost, burden, and distraction of civil litigation⁴¹—that, in its view, were mismatched to the 1938 Rules regime of liberal pleading and broad discovery. In doing so, however, it created a mismatch with competing substantive policies, similarly central to civil rights law—court access, victim compensation, deterring official misconduct and vindication of constitutional liberties.⁴²

The link between underlying policy values and substance-procedure mismatches supports arguments by several commentators that case-by-case adjudication in the Supreme Court—the process used to create the new regime in *Twombly* and *Iqbal*—is not the optimal forum for designing a stricter pleading rule.⁴³ Strict pleading can be justified only by cost-benefit balancing of the cost of meritless litigation, the difficulties for plaintiffs in accessing essential pre-filing information, the impact of litigation expenses on government actors, and considerations of the moral component of the rights to be litigated—empirical analysis that the Court is not institutionally competent to conduct.⁴⁴ If we must resolve underlying policy issues to determine the substance-procedure match, those policy decisions should be made in a formal process for creating prospective policy—either through Congress or the REA rulemaking process (in which Congress plays a role).⁴⁵

876–77; (arguing that case-by-case imposition of a pleading scheme is inappropriate); Bone, *supra* note 3 (manuscript at 37–38) (same).

⁴¹ *Iqbal*, 129 S. Ct. at 1953–54; Bone, *supra* note 13, at 914; Bone, *supra* note 3 (manuscript at 34).

⁴² Bone, *supra* note 13, at 875–76; Bone, *supra* note 3 (manuscript at 33); Burbank, *supra* note 8, at 113; Hillel Y. Levin, *Iqbal*, *Twombly*, and *the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 145 (2010); *see also* Bone, *supra* note 13, at 914 (emphasizing that the moral weight of constitutional rights creates a right to litigate a meritorious claim).

⁴³ Bone, *supra* note 13, at 876; Burbank, *supra* note 8, at 116.

⁴⁴ Bone, *supra* note 13, at 876–77, 932; Bone, *supra* note 3 (manuscript at 37–38); Burbank, *supra* note 8, at 116.

⁴⁵ Bone, *supra* note 3 (manuscript at 38); *but see* Moore, *supra* note 36, at 1108–09 (arguing for the Court to adopt a more activist approach to interpreting the Rules, given its role in creating the Rules and underlying policies); *cf.* Limited Court Access, *supra* note 4.

B. Civil Rights Litigation and Procedural Mismatches

Main provides a helpful explanatory model for the pleading confusion in which we find ourselves—for *Twombly*, *Iqbal*, and the ratcheting of pleading; for the evolution of the business of federal courts under the Federal Rules, particularly as to civil rights claims; and for the interaction of both phenomena.

When the Federal Rules of Civil Procedure took effect in 1938, federal courts mostly were occupied with tort, contract, debt, and other two-party business disputes, as well as federal patent claims.⁴⁶ This paradigm is reflected in the Forms appended to the Rules—short sample complaints, deemed sufficient under the Rules, demonstrating how pleadings should look in the paradigmatic federal-court cases.⁴⁷ These cases tended to be relatively straightforward procedurally and substantively. They were dyadic disputes between just two or a small number of parties, involving retrospective application of legal rules and principles and retrospective remedies, usually damages.⁴⁸ Parties often were similarly situated individuals or business entities, just on opposite sides of a legal and factual dispute. Parties were interchangeable and their positions might change from case to case; an individual might as easily be a tort plaintiff as a defendant, and a corporate entity might as easily sue for breach of contract or patent infringement as be sued.⁴⁹

The liberal pleading regime of Rule 8(a)(2), given life in *Conley*, as well as the system of broad factual discovery that went with it, made sense in this substantive regime.⁵⁰ Plaintiffs possessed the information necessary to plead the basic elements required for these claims under the illustrative Forms; the plaintiff knew (or could know) at the outset what happened at the intersection, whether her allegedly infringed-upon patent was valid, or whether the debt had been paid. The visible consequences of the conduct—a collision between a car and a pedestrian and injuries to the latter—raise the inference of actionable misconduct. A plaintiff could more easily plead a few pieces of information, known or knowable first-hand, in skeletal fashion, and give the defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests” and the court a sense of the claim’s basic validity.⁵¹ Moreover, it was unlikely that discovery would be particularly wide-ranging, extensive, time-consuming, or expensive in these cases because they usually focused

⁴⁶ Epstein, *supra* note 3, at 62; Resnik, *supra* note 13, at 508; Wasserman, *supra* note 13, at 802; *see also* Bone, *supra* note 13, at 896.

⁴⁷ FED. R. CIV. P. 84; FED. R. CIV. P. Forms 10–21.

⁴⁸ Bone, *supra* note 13, at 896; Jay Tidmarsh, *Pound’s Century, and Ours*, 81 NOTRE DAME L. REV. 513, 531 (2006); Wasserman, *supra* note 13, at 802.

⁴⁹ Judith Resnik, *The Domain of Courts*, 137 U. PA. L. REV. 2219, 2225 (1989); Wasserman, *supra* note 13, at 807.

⁵⁰ *See Conley v. Gibson*, 355 U.S. 41, 47 (1957); *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

⁵¹ *Conley*, 355 U.S. at 47.

on discreet one-time deals or actions and few factual details likely were in dispute.⁵² There was no need to make true merit determinations too early in the process; waiting until discovery and later pre-trial processes, primarily summary judgment, did not produce unreasonable delay, cost, or burden.⁵³ Nor was there uniform opposition to liberal pleading and discovery from one group of litigants; because one might be plaintiff in one case and defendant in the next, there were no repeat players always on one side of litigation pushing for rules that systematically benefit that side.

Federal social legislation and public-law litigation beginning in the 1960s and '70s changed the substantive paradigm of federal litigation, and we have been struggling since with the degree to which federal procedure must change to avoid a mismatch with its new substance.

The substantive change has been a joint venture of Congress and the courts. Congress took the lead with legislation prohibiting discrimination because of race, sex, national origin, disability, age, and other characteristics in employment, public accommodations, housing, and institutions receiving federal funds.⁵⁴ Congress and the courts together have made such statutes privately enforceable, recognizing the public benefit of private litigation.⁵⁵ The Court itself ushered in the era of serious constitutional litigation when it resuscitated 42 U.S.C. § 1983, a long-moribund provision of the Reconstruction Era, and turned it into a meaningful and powerful vehicle for enforcing federal constitutional rights.⁵⁶ The Court expansively interpreted the statutory requirement of action “under color” of state law so the Constitution would reach misconduct by all public officials acting randomly and individually even if in violation of state law—officials who misuse power through conduct made possible only because the official was “clothed with the authority” of state law.⁵⁷ The Court also recognized that otherwise private entities may be subject to constitutional liability for engaging in forms of joint

⁵² Bone, *supra* note 13, at 896; *see also* Epstein, *supra* note 3, at 70.

⁵³ Marcus, *supra* note 30, at 484.

⁵⁴ Title VII of The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-4 (2006)); Title IX of the Educational Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-88 (2006)); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-81 (2006)).

⁵⁵ *See, e.g.*, Cannon v. Univ. of Chi., 441 U.S. 677, 688-89 & n.9 (1979); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 401-02 (1968).

⁵⁶ 42 U.S.C. § 1983 (2006); Monroe v. Pape, 365 U.S. 167, 187 (1961); Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering “Custom” in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 23-25 (2000); Wasserman, *supra* note 13, at 803.

⁵⁷ *Monroe*, 365 U.S. at 184-85 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941) and citing *Screws v. United States*, 325 U.S. 91, 108 (1945)); Gilles, *supra* note 56, at 25.

action with government.⁵⁸ And the Court alone created constitutional damages litigation against federal officers when it recognized an implied right of action in the Bill of Rights itself.⁵⁹

Civil rights litigation was virtually unheard of in 1938, but (together with complex antitrust, securities, and environmental cases) now forms the new “predominant” federal substantive law and the new paradigm of federal civil litigation.⁶⁰ Much of this substance was created in the shadow of the 1938 Federal Rules, *Conley*, and the regime of liberal pleading and broad discovery. Thus, on Main’s model, *Iqbal*’s creation of more rigid pleading (and concomitant limits on discovery) actually produces a procedure-substance mismatch with § 1983 and constitutional litigation.

But rule-makers, particularly courts, have identified a mismatch in the opposite direction—significant differences between the 1938 private-litigation paradigm and the new public-law, civil rights litigation paradigm demonstrate the dissonance between the existing liberal pleading regime and the new substance.⁶¹ Old procedure is “not well suited” to the new substantive constitutional litigation.⁶² The values and principles underlying the new, evolved substance are undermined by the preexisting procedural regime, even if the new substance was created against the backdrop of that regime. Procedure had to change to prevent a mismatch that would diminish and defeat substantive values—and it had to change through the immediate act of judicial interpretation and construction, rather than via the longer route of prospective rulemaking. On this view, *Iqbal*’s ratcheting pleading and limiting discovery was necessary to prevent a dangerous mismatch between seventy-year-old procedure and newer substance.

Five features of civil rights (particularly constitutional) litigation render it a mismatch with the procedural regime of *Conley* and the 1938 Rules. And these features perhaps explain *Iqbal* and *Twombly*, as well as the political and ideological controversy that now surrounds pleading.

First, public-law litigation is often less about discrete individual unlawful acts on the ground (although such acts certainly must have occurred), than about the content and enforcement of government policy and violations of rights caused by that policy through individual

⁵⁸ *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295–96 (2001); *West v. Atkins*, 487 U.S. 42, 50–51 (1988); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723–25 (1961).

⁵⁹ *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 397 (1971); *see also* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948 (2009); *Wilkie v. Robbins*, 127 S. Ct. 2588, 2597 (2007); *cf.* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 121 (2009) (arguing that Congress has preserved and ratified the *Bivens* remedy to make it routinely available for constitutional claims against federal officers).

⁶⁰ *Cf.* Epstein, *supra* note 3, at 66 (suggesting that the 1938 Federal Rules of Civil Procedure are not well suited to modern litigation, especially antitrust suits); *and supra* note 16.

⁶¹ Epstein, *supra* note 3, at 70–71.

⁶² *Id.* at 66.

acts of enforcement. Policy causes harm over a longer period of time and to a potentially larger number of people. Constitutional litigation targets not only actors on the ground, but also supervisory officers and government entities who enact policy and guide officers in their enforcement. This is of a piece with the general evolution of substantive law away from precise rules into more complex general standards and principles, which has reduced the overall utility of pleading.⁶³

Discovery in these actions is presumed to be broader, more burdensome, and costlier than in the earlier world of contracts, debts, and traffic accidents.⁶⁴ Discovery now must inquire into written and unwritten policies and customs of executive departments and agencies or into high-level meetings and conversations about such policies, not to mention into the minds of government officials. Such wide-ranging discovery threatens to hinder the business of government and socially beneficial conduct by tying up officials in litigation over claims that will and should ultimately fail, distracting and chilling officials from vigorous exercise of public office.⁶⁵

Second is the problem of “information asymmetry” at the pleading stage. This is a common structural feature of modern federal litigation, particularly civil rights, where key relevant information is uniquely in defendants’ hands, unknown to the plaintiff at the time of pleading and unknowable without opportunity for discovery.⁶⁶ In fact, post-*Twombly* and *Iqbal*, courts have incentive to deny all discovery until the complaint survives a 12(b)(6) motion testing the sufficiency of the pleading.⁶⁷ And if the complaint cannot survive—a more likely result under a stricter pleading regime—the plaintiff never will have an opportunity to truly test the merits of the claim.⁶⁸

The two most notable pieces of information that are beyond plaintiff’s reach at the outset are evidence of defendants’ subjective state of mind and evidence of defendants’ private, behind-closed-doors conduct.⁶⁹ As to the former, defendants’ intent is an element for individual liability, supervisory liability, and governmental liability as to a range of constitutional rights; what officials intended or what high-ranking officials knew about the conduct of underlings is essential for establishing liability and obtaining a remedy.⁷⁰ Indeed some

⁶³ Marcus, *supra* note 30, at 459–60.

⁶⁴ Bone, *supra* note 13, at 896–97.

⁶⁵ *Iqbal*, 129 S. Ct. at 1953–54; Bone, *supra* note 13, at 914; Bone, *supra* note 3 (manuscript at 34).

⁶⁶ Bone, *supra* note 3 (manuscript at 27, 33); Hoffman, *supra* note 6, at 1261–62; Marcus, *supra* note 30, at 468; Steinman, *supra* note 3 (manuscript at 21–22).

⁶⁷ See, e.g., *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 966–67 (9th Cir. 2009); but see Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010) (manuscript at 44) available at <http://ssrn.com/abstract=1452875>.

⁶⁸ Steinman, *supra* note 3 (manuscript at 22–23).

⁶⁹ Bone, *supra* note 3 (manuscript at 33).

⁷⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1948–49 (2009) (supervisory liability for racial, ethnic, and religious discrimination under the First and Fifth Amendments);

governmental conduct is entirely lawful unless committed for an improper purpose. Facts about state of mind obviously rests with defendant officers and are discoverable only if there is an opportunity to depose the officers in discovery. This is why, even under true heightened pleading for allegations of fraud and mistake under Rule 9(b), state of mind still can be alleged “generally,” that is, without factual detail.⁷¹ Alternatively, to the extent a challenge is to formal or informal governmental or agency policies and practices, information about the process and purpose in making those policies is necessary and only gained through some court-supervised discovery. Plaintiffs must be able to learn about particular meetings and conversations, which individuals were involved, when and where meetings occurred, what was discussed, and, ultimately, who knew what, when, and why.

We thus confront the paradox of civil rights pleading. Discovery cannot be had until the plaintiff drafts, files, and serves a sufficient complaint.⁷² But because wide-ranging discovery poses a greater risk of hindering socially beneficial conduct, pleading must serve as a meaningful hurdle in civil rights actions and Rule 12 must provide meaningful review to ensure that government defendants are not subjected to the burdens except in seemingly meritorious cases.⁷³ From plaintiff’s standpoint, however, skeletal and conclusory pleading is even more necessary in these cases precisely because the information needed to sufficiently plead essential factual details demanded by *Iqbal* as a condition of getting to discovery is impossible without discovery.⁷⁴ And there are no mechanisms within the Federal Rules for formal pre-filing investigative discovery.⁷⁵

Fair pleading rules should eliminate the paradox; *Iqbal* just draws us further into it.

One response is that plaintiffs can engage in informal pre-filing discovery outside the Rules to gather information enabling them to produce a more-than-conclusory complaint. Complaints can be drafted based on publicly available materials—statements by executive-branch

County of Sacramento v. Lewis, 523 U.S. 833, 849–50 (1998) (substantive due process requiring “conscience-shocking” activity taken with deliberate indifference to constitutional rights); Bd. of County Comm’rs v. Brown, 520 U.S. 397, 407–08 (1997) (municipal liability); Washington v. Davis, 426 U.S. 229, 240 (1976) (intentional race discrimination by government actor required under Fourteenth Amendment claim); *Moss*, 572 F.3d at 970 (individual liability for viewpoint-discriminatory arrest under the First Amendment); see *infra* text accompanying note 97.

⁷¹ FED. R. CIV. P. 9(b).

⁷² Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Pursuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 225 (2007); but see Hartnett, *supra* note 67 (manuscript at 44).

⁷³ Bone, *supra* note 13, at 897; Epstein, *supra* note 3, at 71–72.

⁷⁴ Bone, *supra* note 3 (manuscript at 33); Hoffman, *supra* note 6, at 1262–63; Spencer, *Civil Rights*, *supra* note 3, at 160; Steinman, *supra* note 3 (manuscript at 21–22, 64).

⁷⁵ Hoffman, *supra* note 72, at 226–28.

officials to Congress, media reports of public statements and conduct, and governmental investigations and reporting of underlying events, policies, and activities. In fact, pleadings in several constitutional damages challenges to War on Terror policies have relied, in whole or in part, on material already in the public record.⁷⁶ But for many plaintiffs and plaintiffs' attorneys, that process may be prohibitively expensive. More problematic, the public record will not reveal information about non-public internal workings, thoughts, and actions of government agencies and officials, information that *Iqbal* nevertheless demands plaintiffs plead at the outset.

Plaintiffs also might use the Freedom of Information Act (FOIA) (federal or state counterparts)⁷⁷ as a discovery tool as to policies, policy discussions, and memoranda of public agencies, although delays inherent in those procedures may prevent plaintiffs from obtaining needed information within the necessary limitations window for filing a claim.⁷⁸ And, of course, FOIA does nothing to enable plaintiffs to uncover or allege discriminatory intent of individual officials (other than, perhaps, by inferences that the court may feel free to reject).

Iqbal demonstrates how the absence of discovery undermines plaintiffs at the first step. By denying a presumption of truth to bald, conclusory allegations, courts can disregard allegations going to state of mind and other facts about which the plaintiff cannot know enough to plead in detail or other than through a general allegation. For example, the *Iqbal* majority ignored the following allegations: 1) that Ashcroft and Muller "knew of, condoned, and willfully and maliciously agreed to subject [plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin;'" 2) that Ashcroft was the "principal architect" of the discriminatory detention policy; and 3) that Mueller was "instrumental" in adopting and executing that policy.⁷⁹ The court found these allegations deficient because they did not identify, even in most general terms, the content of the policy or agreement to which the officers were party; they identified the consequences of that alleged policy (the plaintiff was detained and suffered abuse at the hands of on-the-ground officers), but not the necessary intent in anything more than a "formulaic recitation."⁸⁰

⁷⁶ See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949, 975–76 (9th Cir. 2009); *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1019–20 (N.D. Cal. 2009); see also Epstein, *supra* note 3, at 81 (proposing standard for evaluating complaints in which plaintiffs rely exclusively on public sources).

⁷⁷ 5 U.S.C. § 552 (2006); Hoffman, *supra* note 72, at 246.

⁷⁸ See Mark H. Grunewald, *E-FOIA and the "Mother of All Complaints: Information Delivery and Delay Reduction*, 50 ADMIN. L. REV. 345, 345 (1998).

⁷⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (quoting First Amended Complaint and Jury Demand at ¶ 10–11, 96, *Elmaghraby v. Ashcroft*, No. 04 CV 1809 (JG)(JA), 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)).

⁸⁰ *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

There is an argument that these allegations are not, in fact, bald and conclusory.⁸¹ More troubling, it is not clear what else plaintiff could have said at the point of drafting the complaint—what other language could he use to allege that two high government officials had designed and implemented a policy with discriminatory intent other than a statement saying so? Plaintiffs cannot identify the content of an agreement or conversation to which they were not party or privy until they gain access to documents and information about relevant conversations. Plaintiffs cannot know “what Ashcroft and Mueller actually did vis-à-vis Iqbal”⁸² until they can inquire into past events (meetings, conversations, etc.) at which plaintiffs were not present. Plaintiffs cannot know what defendants intended by some conduct until they can ask them, in the formal setting of a deposition taken under oath. Knowledge of these past events and individual thoughts only can be gained through the discovery process. Prior to that point, the plaintiff only can plead what he sees—the consequences of the policy.

Third, discovery plays a unique role in civil rights litigation, even functioning as an end in itself. This is somewhat inherent in the U.S. civil justice system as a whole. Absent the vigorous regulatory and compensatory mechanisms existing elsewhere, the United States relies on civil litigation to expose, remedy, and deter wrongdoing, and to enforce (and, where necessary, reform) legal and social norms.⁸³ Fact investigation is essential to that process, which is why discovery is necessarily broader in the United States than in other legal systems.⁸⁴ Civil rights plaintiffs (and their lawyers) operate as private attorneys general, complementing government investigation and enforcement of federal law and ensuring accountability for official misconduct, thereby furthering the public good.⁸⁵ Although compensation certainly is a significant goal for damages plaintiffs, available damages are often quite limited for constitutional claims, especially those not involving physical injuries, loss of property, or the consequences of arrest or incarceration.⁸⁶ It is logical that these private attorneys general litigate in furtherance of

⁸¹ Or at least no more so than other allegations that the majority accepted and accorded a presumption of truth. *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting).

⁸² Steinman, *supra* note 3 (manuscript at 46).

⁸³ Bone, *supra* note 13, at 875; Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 561; Marcus, *supra* note 15, at 324; Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 310–11 (2002).

⁸⁴ Subrin, *supra* note 83, at 311.

⁸⁵ *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986); Patrick Higginbotham, *Forward*, 49 ALA. L. REV. 1, 4–5 (1997); Pamela S. Karlan, *Disarming the Private Attorney General*, 2003 U. ILL. L. REV. 183, 186–87; Marcus, *supra* note 30, at 471–72; Wasserman, *supra* note 13, at 801.

⁸⁶ *City of Riverside*, 477 U.S. at 574; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306–07 (1986).

an equally important goal—detering future government misconduct by exposing it.⁸⁷

Court-supervised discovery is essential to exposing and deterring official misconduct.⁸⁸ Private attorneys general lack the free-standing investigative and subpoena authority that the real attorney general possesses. A private attorney general cannot enforce federal rights and deter wrongdoing absent a genuine opportunity to investigate and uncover unconstitutional behavior. That investigation demands the judicial hammer to enforce government defendants' discovery obligations and third-party subpoenas. Those obligations (and court supervision of those obligations) are triggered only after successful initiation of litigation.

Clearly this is a different model of discovery than what Justice Murphy sanguinely praised in *Hickman v. Taylor*.⁸⁹ And it is a model that the *Iqbal* Court clearly rejected while setting pleading standards so that fewer cases reach judicially enforced discovery. This reveals widespread distaste for discovery and support for according increased protection for government officials (i.e., defendants in constitutional actions) against the distraction of having to litigate and submit to discovery at the cost of being able to focus on their public offices.⁹⁰ As Justice Scalia inimitably put it during *Iqbal* arguments: "Well, I mean, that's lovely, that—that the—the ability of the Attorney General and Director of the FBI to—to do their jobs without having to litigate personal liability is dependent upon the discretionary decision of a single district judge."⁹¹

Fourth, and related, government defendants are entitled to official defenses, notably absolute legislative, prosecutorial, and judicial immunities⁹² and (more commonly) the default executive qualified immunity at issue in *Iqbal*.⁹³ All are defined as granting protection not only from liability, but from litigation itself and from having to incur the

⁸⁷ *City of Riverside*, 477 U.S. at 575; Karlan, *supra* note 85, at 187; William B. Rubinstein, *On What a "Private Attorney General" Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2171–72 (2004).

⁸⁸ Marcus, *supra* note 15, at 323–24.

⁸⁹ 329 U.S. 495, 507 (1947) ("[T]he deposition-discovery rules are to be accorded a broad and liberal treatment. . . . Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.").

⁹⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

⁹¹ Transcript of Oral Argument at 35–36, *Iqbal*, 129 S. Ct. 1937 (comment of Justice Scalia); *but see id.* at 60 (comment of Justice Stevens) (stating, to laughter, that he did not believe there was a rule that government officials need not testify at proceedings when he wrote the opinion for the unanimous Court in *Clinton v. Jones*, allowing civil litigation to go forward against a sitting President).

⁹² *Van de Kamp v. Goldstein*, 129 S. Ct. 855, 859–60 (2009) (absolute prosecutorial immunity); *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998) (absolute legislative immunity); *Mireles v. Waco*, 502 U.S. 9, 11 (1991) (absolute judicial immunity).

⁹³ *Iqbal*, 129 S. Ct. at 1945–46; *Pearson v. Callahan*, 129 S. Ct. 808, 815–16 (2009); *Mitchell v. Forsyth*, 472 U.S. 511, 525–26 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

cost, burden, and distraction of being parties.⁹⁴ Immunity enables government officials to act vigorously on behalf of the public, without fear of personal liability chilling the exercise of their best judgment or dissuading them from seeking public service in the first place.⁹⁵ This means getting the defendant out of the action as early as possible and protecting him from broad-ranging discovery, particularly having to sit for a deposition or other inquiries into private conduct and state of mind.⁹⁶ Liberal pleading and broad discovery thus are seen as uniquely inconsistent with constitutional litigation under *Bivens* and § 1983, given the potential burden on government-officer defendants.

On the other hand, the relevant facts in these cases make detailed pleading impossible and discovery inevitable. Defendants' subjective state of mind, the quintessential fact known and knowable only to the defendant at the outset of litigation, is an element of many constitutional violations.⁹⁷ Supervising officers are not liable on a respondeat superior liability theory, but only for their actual misconduct, which requires allegations and proof of some state of mind.⁹⁸ *Iqbal* adds the further twist that the claims were not only against supervisory officers, but against two officials at the very top of the Department of Justice (Attorney General and Director of the FBI) with responsibility for creating all manner of federal law-enforcement policy and entitled to even greater judicial respect and greater judicial caution before imposing on them litigation and discovery. Moreover, the case involved policies aimed at combating terrorism and protecting national security in the wake of September 11th, a "national and international security emergency unprecedented in the history of the American Republic,"⁹⁹ prompting an ever-more heightened degree of judicial deference for executive decision-making and for officials' immunity from the burden and expense of discovery. Indeed, one arguable limit on *Iqbal* might have been that it was so linked to the underlying policies of qualified immunity and protecting the highest-level cabinet officials that its heightened pleading ought not be applicable in cases where those policy concerns are not in play—such as non-civil rights claims or civil rights claims against ground-level, non-policy-making, non-cabinet-level officials.¹⁰⁰

⁹⁴ *Iqbal*, 129 S. Ct. at 1946 (citing *Mitchell*, 472 U.S. at 526).

⁹⁵ *Mitchell*, 472 U.S. at 525 (citing *Harlow*, 457 U.S. at 819); Bone, *supra* note 13, at 914.

⁹⁶ *Pearson*, 129 S. Ct. at 815.

⁹⁷ See *supra* note 70 and accompanying text.

⁹⁸ *Iqbal* has thrown the precise state of mind standard into flux. Compare *Iqbal*, 129 S. Ct. at 1948–49, with *id.* at 1958 (Souter, J., dissenting) (citing range of lower-court standards for supervisory liability, most of which require less than intent).

⁹⁹ *Id.* at 1953 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 179 (2d Cir. 2007)); Bone, *supra* note 3 (manuscript at 36).

¹⁰⁰ See, e.g., *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir. 2009) (Posner, J.) (emphasizing context of qualified immunity in suggesting *Iqbal* might not be applicable in basic fraud case).

Alternatively, procedural rules should be more forgiving of civil rights claims, to ensure that substantive policies in enforcing constitutional rights against government officials are vindicated. There is, Robert Bone suggests, a moral component to civil rights claims; pleading rules that screen out valid constitutional claims and thus prevent vindication of those rights must be measured in moral terms to strike the appropriate rule-pleading balance.¹⁰¹ More generally, procedural rules should support, rather than undermine, plaintiffs who act as private attorneys general and seek to enforce the Constitution, ensure government accountability, and benefit the public at large.¹⁰²

We return to the non-neutral nature of mismatches.¹⁰³ On one view, *Iqbal* created a substance-procedure mismatch by establishing a pleading regime inconsistent with a substantial category of substantive federal law. But on a different view, the Court avoided a substance-procedure mismatch—between subjecting government defendants to litigation and discovery that comes with liberal pleading, the substantive policies of official immunity, and limited supervisory liability that demands a quick and easy exit for constitutional defendants. The divide over *Iqbal*, then, is which policies—vindication of constitutional rights by private attorneys general, or protecting government-officer defendants from discovery in (potentially) weak or non-meritorious litigation at the earliest possible moment—should be emphasized and which should define and yield to the procedural mismatch.

The further divide is whether the value and policy choices and empirical analysis inherent in creating and avoiding substance-procedure mismatches should be left to a prospective rulemaking process (whether the REA or Congress), rather than to case-based adjudication before the Court.¹⁰⁴ At least some in Congress want policy choice left to them—and vocal forces prefer to return to a pre-*Twombly*/*Iqbal* regime, better matched to substantive civil rights law.¹⁰⁵ This suggests that substantive civil rights law had previously been sufficiently in sync (not mismatched) with *Conley*'s looser pleading regime, and the Court and *Iqbal* created the procedural mismatch. At a minimum, Stephen Burbank argues, we should return to the *status quo* prior to *Twombly* until Congress or the REA process can make those value judgments and identify and enact the best pleading regime.¹⁰⁶

¹⁰¹ Bone, *supra* note 13, at 914, 932; Bone, *supra* note 3 (manuscript at 33).

¹⁰² Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501, 1502 (1992); Wasserman, *supra* note 13, at 804–05.

¹⁰³ See *supra* notes 41–45 and accompanying text.

¹⁰⁴ Bone, *supra* note 13, at 876–77; Bone, *supra* note 3 (manuscript at 38); Burbank, *supra* note 8, at 116.

¹⁰⁵ See Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009); Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Limited Court Access, *supra* note 4.

¹⁰⁶ Limited Court Access, *supra* note 4, at 22 (statement of Stephen B. Burbank), available at <http://judiciary.senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf>.

III. WHAT *IQBAL* HATH WROUGHTA. *Pleading After Iqbal*

At this early stage, there are as many predictions as to *Iqbal*'s future effect (assuming it is not abrogated by legislation or an amended rule) as there are predictors.

Perhaps *Iqbal* will be (or should be) confined to civil rights claims, given the centrality of qualified immunity and the particular (perceived) inconsistency between relaxed pleading/broad discovery and a defense to even having to participate in litigation. Perhaps *Iqbal* is unique even among *Bivens* actions, since the target there was cabinet-level policymaking officials promulgating and enforcing national-security policy in the wake of the trauma of September 11th.¹⁰⁷ Of course, nothing in *Iqbal* so limits the holding.¹⁰⁸

Alternatively, perhaps *Iqbal* did not change much, even as to constitutional litigation. Civil rights claims long have been dismissed as “disfavored claims” of which procedural rules should be less solicitous.¹⁰⁹ In fact, *Iqbal* is merely the latest volley in an ongoing back-and-forth among the Supreme Court, lower courts, and commentators about the proper pleading standard for civil rights claims. The Supreme Court twice sought to pull back the reins on lower courts, insisting emphatically, explicitly, and unanimously that *Conley* and notice pleading remained good law and barred lower courts from heightening the pleading rules in municipal liability and employment discrimination cases.¹¹⁰ Lower courts responded to these decisions in a variety of ways—some following the command, others limiting the precedents to their contexts, others seeming to ignore the Court entirely.¹¹¹ And when the Supreme Court initially opened the door to heightened pleading by introducing the plausibility requirement in *Twombly*, lower courts pounced most readily in civil rights cases.¹¹² *Iqbal* and *Twombly* may act as little more than an invitation or confirmation to lower courts to do precisely what they had been doing all along.¹¹³

¹⁰⁷ See *Iqbal*, 129 S. Ct. at 1953; Bone, *supra* note 3 (manuscript at 36); and *supra* notes 98–100 and accompanying text.

¹⁰⁸ Bone, *supra* note 3 (manuscript at 34) (“[T]he *Iqbal* Court does not confine its holding to qualified immunity cases.”).

¹⁰⁹ Marcus, *supra* note 30, at 471; Spencer, *Civil Rights*, *supra* note 3, at 158–59; Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 300 (1989).

¹¹⁰ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512–13 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); Steinman, *supra* note 3 (manuscript at 9–11); Spencer, *Civil Rights*, *supra* note 3, at 114–18.

¹¹¹ See Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 583–90 (2002); Spencer, *Civil Rights*, *supra* note 3, at 118–20.

¹¹² See Spencer, *Civil Rights*, *supra* note 3, at 126, 158–59.

¹¹³ See *id.* at 158; *supra* note 25 and accompanying text.

Adam Steinman has a uniquely sanguine view of *Iqbal*. He argues that, because *Iqbal* did not purport to overturn either *Swierkiewicz* or *Leatherman*, all three cases remain good law and lower courts must reconcile them.¹¹⁴ Steinman proposes a two-step approach to doing so that maps onto *Iqbal*'s two-step. First, Steinman argues for a narrow, transaction-based definition of conclusory, thus limiting the sorts of allegations that can be disregarded or denied a presumption of truth at the 12(b)(6) stage. An allegation is not conclusory merely because it lacks detail or supporting information and evidence, because *Swierkiewicz* makes clear that detail is not required.¹¹⁵ Instead, an allegation is not conclusory so long as it identifies an "adequate transactional narrative," a tangible act or event that has occurred, or some real-world transaction or occurrence that took place.¹¹⁶ The complaint must identify the "core content" of a particular transaction, what the defendants actually did, even without detail or explanation of how or why an event is characterized some way.¹¹⁷ And all such non-conclusory allegations must be accepted as true.¹¹⁸

Second, having provided only (or mostly) non-conclusory allegations as to each element, the complaint necessarily survives the second-step plausibility inquiry. Steinman insists "a complaint that *does* provide non-conclusory allegations on every element of a claim, by definition, exceeds the threshold of *plausibly* suggesting an entitlement to relief for purposes of *Iqbal* step two."¹¹⁹

There is much to recommend Steinman's approach to pleading as a normative matter, particularly in civil rights actions, given information asymmetries and plaintiffs' general inability to know or plead necessary details at the outset.¹²⁰ But it is descriptively out of step with *Iqbal* and with what lower courts have done in quickly embracing *Iqbal* (and *Twombly*) and exercising an enhanced power to review and reject complaints.

In particular, Steinman pays insufficient weight to judicial power at step two to closely examine the conduct alleged in non-conclusory fashion and to impose its own best subjective explanation for what happened based on her "judicial experience and common sense."¹²¹ Of course, even pre-*Twombly* courts recognized that a pleading must do more than blandly assert that "Defendant violated Plaintiff's rights" and

¹¹⁴ Steinman, *supra* note 3 (manuscript at 29–32).

¹¹⁵ *Id.* (manuscript at 52–53); *see also Swierkiewicz*, 534 U.S. at 511; *but see* Spencer, *Understanding Pleading*, *supra* note 3, at 16 (arguing that additional allegations suggesting a wrongful termination are necessary, *contra Swierkiewicz*).

¹¹⁶ Steinman, *supra* note 3 (manuscript at 50).

¹¹⁷ *Id.* (manuscript at 46, 52–53).

¹¹⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009); Steinman, *supra* note 3 (manuscript at 54, 61).

¹¹⁹ Steinman, *supra* note 3 (manuscript at 26).

¹²⁰ *Id.* (manuscript at 21–22, 63–64); *see supra* Part II.B.

¹²¹ *Iqbal*, 129 S. Ct. at 1950; *see also Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1970 (2007) (considering "common economic experience" in evaluating antitrust allegations).

courts would disregard truly outlandish or fanciful allegations (such as allegations about alien abduction). *Iqbal* cedes even more authority. The point is that judges no longer are obligated, in accepting non-conclusory facts as true, to read those facts together and as a coherent whole in the light most favorable to the plaintiff; they instead enjoy broad discretion to parse the complaint and individual allegations and to screen aggressively for a story that resonates with them.¹²² Judges may accord less deference to the plaintiff's pled version of events in favor of a different (not unlawful) explanation that (in the court's view) makes more sense. That judicial explanation may be based on baseline assumptions about the world that each different judge brings to bear based on her own underlying experiences; this in turn affects the result of her wielding experience and common sense in evaluating what is the "plausible" explanation for some events and actions.¹²³

Twombly and *Iqbal* together suggest that courts may look not for a conclusion of liability that is plausible, but for whether that conclusion is the more (or most) plausible one. The *Twombly* Court insisted that a complaint is not plausible, and thus not sufficient, if there is a lawful explanation consistent with the facts alleged; neutral allegations do not state a plausible entitlement to relief.¹²⁴ Thus, where the nub of the antitrust complaint was parallel conduct that does not (without more) violate substantive antitrust law, the complaint did not plausibly suggest a violation of federal law.¹²⁵ *Iqbal* went one step further. Faced with two explanations for a policy of seizing and detaining Arab and Muslim illegal immigrants after September 11th—"the purposeful, invidious discrimination respondent asks us to infer," or a merely logical (if disparate) result of seeking to protect the United States from those who had potential connections to those who committed the September 11th terrorist attacks—the Court accepted the latter inference, even though it was not the one pled (and even though it is hardly an irrational conclusion) and held that discrimination was not a plausible explanation for the conduct and policies described in the complaint.¹²⁶ And this

¹²² Burbank, *supra* note 8, at 115; Bone, *supra* note 13, at 889; Bone, *supra* note 3 (manuscript at 22–23) (arguing that the complaint "must be interpreted as a coherent whole, and the sufficiency of its allegations must be evaluated in a holistic way").

¹²³ Burbank, *supra* note 8, at 118; Hartnett, *supra* note 67 (manuscript at 35); Steinman, *supra* note 3 (manuscript at 22 & n.119).

¹²⁴ *Twombly*, 127 S. Ct. at 1965–66; *see also* Bone, *supra* note 13, at 878 (arguing that the new pleading rules require "no more than that the allegations describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type"); Spencer, *Understanding Pleading*, *supra* note 3, at 15–16 (distinguishing between allegations that suggest wrongdoing and those that are neutral as to wrongdoing).

¹²⁵ *Twombly*, 127 S. Ct. at 1970–71.

¹²⁶ *Iqbal*, 129 S. Ct. at 1951–52.

conclusion as to plausibility perhaps flowed from the shared common sense and executive-branch experience of the majority justices.¹²⁷

Finally, lower courts have not limited use of this new power only to the *Iqbal* paradigm. Rather, they have increased demand for greater facts in all manner of complaints, beyond civil rights¹²⁸ and certainly as to run-of-the-mill civil rights actions.¹²⁹ The unfortunate result will be a higher, often-insurmountable pleading burden for plaintiffs, increased use of Rule 12(b)(6) as a costly litigation tool,¹³⁰ and increased defendant success in using that tool to defeat claims that can be properly evaluated only after discovery.

The substantive consequence will be a significant decrease in vindication of federal constitutional and civil rights, and of the values and principles underlying those rights. We can predict less private attorney general activity, less exposure of governmental wrongdoing, less enforcement of constitutional and civil rights, and less opportunity to even make a serious inquiry into the underlying facts and events for failure to clear the pleading hurdle.

Importantly, this decrease in substantive enforcement stems from procedure—from imposing burdens on plaintiffs to present substantial factual detail at the outset of litigation, even detail they do not and cannot know, and from empowering courts to form their own conclusions about alleged misconduct based on factual allegations. It stems, in other words, from a judicially created mismatch between current pleading procedure and this category of substantive federal law.

B. *Iqbal in Action: Moss v. U.S. Secret Service*

A good illustration of the consequences of this new regime—and what lower courts can, and perhaps often will, do with their newly found (or newly reenergized) discretion—comes from the Ninth Circuit in *Moss v. U.S. Secret Service*,¹³¹ decided just two months after *Iqbal*. The case is more of a typical *Bivens* action, lacking the unique elements that warranted increased scrutiny of pleadings in *Iqbal* itself—no cabinet-level policymaking officers, no challenge to War on Terror policies (although national security was an underlying issue), and the primary targets were directly responsible, on-the-scene officers. It also was a First Amendment case, for which courts often show greater solicitude.

¹²⁷ Hartnett, *supra* note 67 (manuscript at 34).

¹²⁸ See, e.g., *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009) (applying *Iqbal* and *Twombly* to dismiss complaint in slip-and-fall for failing to allege how liquid came to be on floor).

¹²⁹ *Infra* Part III.B.

¹³⁰ Posting of Jonathan Siegel to Concurring Opinions, *Iqbal Empirics*, <http://www.concurringopinions.com/archives/2009/09/iqbal-empirics.html> (Sept. 9, 2009, 6:50 AM).

¹³¹ 572 F.3d 962 (9th Cir. 2009).

But in dismissing the complaint as insufficient, the court applied an analysis and reached an outcome that demonstrates the difficulties civil rights plaintiffs likely will face in a broad range of cases under this new, mismatched pleading paradigm. The court explicitly recognized the significant change wrought by *Iqbal* and its far-reaching implications.¹³² And the court put those changes into action—going to great lengths to find some allegations too conclusory and to ignore the pled explanations for events, to find lawful explanations for non-conclusively alleged conduct, and to reject the alleged First Amendment violation as implausible on the facts.

The plaintiffs were part of a group who in 2004 sought to protest across the street from an inn in Oregon where President George W. Bush was eating.¹³³ The Secret Service agents on the scene ordered local police to move the protesters away from the inn and one block to the east; local police actually pushed them more than two blocks away.¹³⁴ A group of counter-protesters, supportive of the President, had set up a block west of the inn (interactions between the groups were cordial), but were not moved, screened, or otherwise inconvenienced.¹³⁵ Plaintiffs brought First Amendment claims against the two Secret Service agents on the scene, the former director of the Service, and the Service itself. The basic claims were that plaintiffs were moved because they were speaking against the President and that this was in keeping with a *sub rosa* viewpoint-discriminatory Secret Service policy of suppressing speech critical of the President.¹³⁶ The district court stayed discovery pending resolution of the Rule 12(b)(6) motion, meaning the plaintiffs never had an opportunity to uncover facts and evidence.¹³⁷

The Ninth Circuit followed the two-step approach mandated by *Iqbal*. The court first disregarded as bald, conclusory, and not entitled to a presumption of truth allegations that 1) the on-the-scene agents acted with an impermissible viewpoint-discriminatory motive, and 2) the Service had a *sub rosa* policy of discriminating against anti-Bush protesters based on their anti-Bush viewpoints.¹³⁸ The court's analysis demonstrates the problem with increased scrutiny of conclusory allegations. There is nothing more plaintiffs could have said at this point to allege viewpoint-discriminatory intent by the agents, other than a direct allegation that the agents acted with that impermissible intent. They could not point to and describe any "tangible act or event" giving rise to the inference of intent, any real-world transaction or occurrence revealing intent, because they were not present when the act—the order to move them—took place. They lacked first-hand knowledge of that intent, since state of

¹³² *Id.* at 972.

¹³³ *Id.* at 965.

¹³⁴ *Id.*

¹³⁵ *Id.* at 965–66; *see also id.* at 975 app. (providing map of area).

¹³⁶ *Id.* at 966.

¹³⁷ *Id.* at 966–67.

¹³⁸ *Id.* at 970.

mind obviously rests with the defendant and is unknowable without discovery. The plaintiffs formed a belief based on a consequence—the known fact that they were ordered to move—that the reason was viewpoint discrimination, and they alleged that in the only way possible. They can prove that conclusion only after an opportunity to depose the defendants.

Similarly, prior to an opportunity to inquire into the policies and workings of the agency, plaintiffs lacked any way to allege the existence of Service policy in greater detail; they could not know what events, meetings, or conversations occurred among which actors in the agency to put this unofficial policy into place. Perhaps they could have pled other examples of similar Service handling of protesters, if other examples were publicly known. But pleading (and proving) a policy still requires that supervisory officials knew about those other incidents and intended to allow such viewpoint discrimination as a matter of custom and policy; this again requires facts as to defendants' subjective state of mind, which are impossible to allege in a non-conclusory manner pre-discovery. Finally, while FOIA might be useful as a pre-filing discovery tool for uncovering formal and official agency policies and memoranda, the allegation here was of a *sub rosa* policy—a widely accepted custom not reduced to writing or formal rule—not likely to be uncovered other than through depositions and close review of agency files, which do not occur through FOIA.

This brought the court to *Iqbal's* second step and whether the remaining, non-conclusory allegations, accorded a presumption of truth, plausibly gave rise to an entitlement to relief.¹³⁹ We then see a court willing to aggressively screen, to find a pleading not plausible based on judicially identified alternative explanations for the conduct alleged, explanations that are, on the court's subjective "experience and common sense," more plausible.¹⁴⁰ Indeed, *Moss* illustrates the lengths that courts may go to avoid plaintiff-favorable inferences.

One non-conclusory allegation in *Moss* was that only anti-Bush protesters were moved from in front of the inn but not the supporting counter-protesters on the west side, which plaintiffs alleged raised the inference of viewpoint discrimination.¹⁴¹ But the court said the agents' order was to move the protesters to a point of comparable distance from the inn as the counter-protesters were standing—one block away, on opposite sides of the building.¹⁴² The result was viewpoint neutral—all

¹³⁹ *Id.* at 970–71.

¹⁴⁰ Steinman, *supra* note 3 (manuscript at 20) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)); *id.* (manuscript at 22 & n.19).

¹⁴¹ *Moss*, 572 F.3d at 971.

¹⁴² *Id.* That the anti-Bush protesters ended up much farther than one block away was due not to the agents' orders, but the actions of local police who carried out the move-along order and apparently went beyond it. Local police were not named in the original complaint, although they were named in an amended complaint. *Id.*; *see*

points of view an equal distance away from the President—which the court insisted did not plausibly show a First Amendment violation.

The problem is that the complaint still alleged that anti-Bush protesters occupied a spot on a public sidewalk lawfully because they got there first and that they were moved. Absent some explanation for the move, it is plausible to conclude that the (or a) reason for moving them was the protesters' speech. By ordering only the anti-Bush speakers to move, the agents took action against only one group. Even if the Secret Service's goal was to place pro- and anti-Bush demonstrators equidistant from the inn (a seemingly viewpoint neutral goal), balancing the relative location of competing speakers is not, as a matter of law, an appropriate government purpose when achieved by moving one point of view from a lawfully occupied spot. This is not the only plausible conclusion, of course, but *Iqbal* and *Twombly* do not require the plaintiffs allege the only conclusion—only a plausible one, based on the allegations read as a whole in the light most favorable to the plaintiff.

Second, the court insisted that the allegation that the protesters were ordered one block away did not support the conclusion that the agents' motivation was suppressing the anti-Bush message. The protesters still could be heard; if the goal had been to silence the protest, agents would have removed them from the scene entirely, or at least to a location from which they could not be heard at all.¹⁴³ But even if they still could be heard, they were farther away, probably less audible, and certainly less visible to their target audience and to anyone coming in and out of the building. The free speech question is not only whether they could be heard, but whether their speaking position (and theirs alone) was disadvantaged or diminished—and it clearly was.¹⁴⁴

Third, plaintiffs alleged that diners and guests inside the inn were permitted to remain in close proximity to the President without security screening.¹⁴⁵ The court said this allowed no inference about the agents' motive in moving the plaintiffs; the question of whether the order was viewpoint discriminatory only could be given meaning by reference to the pro-Bush counter-protesters, not to non-protesting inn guests.¹⁴⁶

But according to the non-conclusory allegations in the pleading, the stated reason for moving the protesters away from the sidewalk in front of the inn was to keep them out of "handgun or explosive" range of the President.¹⁴⁷ That concern is belied by the pled (and accepted as true for Rule 12(b)(6) purposes) fact that people inside the inn would have

Second Amended Complaint at ¶ 1, 3, *Moss v. U.S. Secret Serv.*, No. 06-3405-CL (D. Or. Oct. 15, 2009) (on file with *Lewis & Clark Law Review*).

¹⁴³ *Moss*, 572 F.3d at 971.

¹⁴⁴ TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 71–72 (2009) (emphasizing speakers' need to be within visual and listening distance of the target audience).

¹⁴⁵ *Moss*, 572 F.3d at 971.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 965.

remained within range of the President, but were not screened. In other words, the Secret Service's stated reason was pretext, suggesting the motivation behind the move order was something else. Combining this with the fact that only anti-Bush protesters were moved and it certainly seems plausible that the real, non-pretextual reason for the move was the protesters' speech—that is, if the court properly looks at the complaint as a coherent whole in the light most favorable to the plaintiff. That the court ignored this inference reveals much about how courts view the task of determining plausibility at step two—it looked for what it saw as the more (or most) plausible explanation, not simply whether the plaintiffs' pled explanation was, in fact, plausible.

Finally, it is notable that the court granted the plaintiffs leave to replead.¹⁴⁸ The court did this in part because the action was filed in 2006, prior to *Twombly* and *Iqbal* changing the law of pleading under the Federal Rules.¹⁴⁹ Granting opportunity to replead is a common remedy for factual-insufficiency dismissals, one suggested as appropriate in *Iqbal* itself¹⁵⁰ and one that we can expect to see with greater frequency. In fact, the argument that *Iqbal* will impose costs at the pleading stage rests on this likelihood. We can predict multiple rounds of complaint/motion to dismiss/amended complaint/motion to dismiss until the plaintiff finally crosses the plausibility threshold or the court finds further amendment futile.¹⁵¹ Of course, futility may come sooner than we expect. It is difficult to imagine what more the *Moss* plaintiffs could say in an amended pleading that will satisfy the court. It is not clear that the two conclusory allegations, given their substance, could be redrafted in a non-conclusory fashion; how else can a plaintiff say that the defendants acted with an impermissible motive other than by saying so? Nor is it clear what else the plaintiffs could say about the move-along order, given the court's willingness to ignore plaintiff-friendly inferences and rely on its own conclusions as to the better (and lawful) explanation for the events described.

The result, in the end, is that a potentially significant (if monetarily less significant¹⁵²) violation of First Amendment liberties goes unremedied. But it goes unremedied not because consideration of the

¹⁴⁸ *Id.* at 972.

¹⁴⁹ *Id.*

¹⁵⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (leaving to the Court of Appeals the question of whether to remand to the District Court for plaintiff to seek an opportunity to replead).

¹⁵¹ See Posting of Jonathan Siegel, *supra* note 130.

¹⁵² Plaintiffs also sought an injunction against the alleged Secret Service policy of suppressing anti-President speech, although it is not clear these plaintiffs would be able to establish standing to obtain prospective relief based on past violations of their First Amendment liberty during a protest against a former President. See Second Amended Complaint, *supra* note 142, at ¶ 3; *Cf. City of L.A. v. Lyons*, 461 U.S. 95, 102 (1983) (“[P]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief.” (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495 (1974))).

facts on the ground as described by witnesses and documents showed no violation. And it goes unremedied not because of judicial consideration of the law of the First Amendment and the substantive liberty to protest in the most advantageous position on public sidewalks. Rather, the result is ordained by the limited information plaintiffs have or can have at the outset of this type of case, and without an opportunity for discovery, about the inner workings of government agencies and the inner minds of government officials. And it is ordained by courts' new willingness to rethink the plausibility of the plaintiffs' allegations, rather than adopting a favorable view of the complaint taken as a coherent whole.

IV. CONCLUSION

At this stage, we only can predict where *Iqbal* will take federal pleading, although commentators are not optimistic.¹⁵³ But if past is prologue, *Moss* suggests that courts will be quite willing to exercise their newfound discretion in determining plausibility and quite stingy in what satisfies Rule 8(a)(2). The result is a disconnect between *Iqbal*'s rigid pleading regime and substantive constitutional and civil rights laws that depend on looser pleading and broader discovery for proper vindication of underlying substantive policies of exposing and deterring governmental misconduct and of holding public officials accountable for constitutional violations.

The result, in other words, is a judicially created mismatch between the procedural scheme and predominant federal substantive law. The question going forward is how lower courts, the Supreme Court, Congress, and litigators handle and undo the mismatch.

¹⁵³ See *supra* note 4.