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## Ripple Effects: The Unintended Change to Jurisdictional Pleading Standards After Iqbal

James E. von der Heydt

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# RIPPLE EFFECTS: THE UNINTENDED CHANGE TO JURISDICTIONAL PLEADING STANDARDS AFTER *IQBAL*

JAMES E. VON DER HEYDT\*

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This Note is dedicated to the Honorable James A. von der Heydt, United States District Court for the District of Alaska (1966 – present).

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#### INTRODUCTION

The Federal Rules of Civil Procedure set mechanical requirements, rather than general guidelines, to determine whether a plaintiff can access the system of federal courts. Because the rules are automatic and familiar, they free up the court's mental resources for proper attention to specific facts, for clashes between important values, and for the application of substantive law to unwieldy real-life situations. Thanks to the Rules, a clerk can safely "cut and paste" from any previous case the judge's ground rules for analysis of the pending motion. The values of this system—predictability, efficiency, and the kinds of fairness that go with them—are threatened when standards of applying the Rules change, as they did after the watershed 2009 ruling in *Ashcroft v. Iqbal*.<sup>1</sup> When such a change happens, the strength of a mechanistic, rules-based system can become its weakness.

In 2007 and 2009, the Supreme Court altered the governing interpretation of the Federal Rules' pleading standards under Rule 8(a)(2).<sup>2</sup> In *Bell Atlantic v. Twombly* and in *Iqbal*, it authorized federal district courts to act more readily to shield defendants from the ordeal of the discovery process. The cases set a higher threshold for a plaintiff to withstand a so-called Rule 12(b)(6) motion to dismiss. Under the new standard, courts should dismiss factually sketchy complaints when alternative explanations make liability implausible.<sup>3</sup> Courts are encouraged to ignore "threadbare recitations" of the elements of a claim, and to set aside "conclusory" assertions unlinked to factual allegations.<sup>4</sup> The associated interpretation of Rule 8(a)(2) takes seriously the requirement that the complaint's "short and plain statement" truly "show" how the plaintiff is entitled to relief.<sup>5</sup>

<sup>1</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>2</sup> *Id.* at 678-79; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

<sup>3</sup> *Twombly*, 550 U.S. at 570.

<sup>4</sup> *Iqbal*, 556 U.S. at 678.

<sup>5</sup> FED. R. CIV. P. 8(a)(2).

In summer 2009, in response to *Iqbal*, every federal court redrafted its boilerplate presumptions about facts in 12(b)(6) dismissal rulings. The Court intended this result, but there have also been ripple effects<sup>6</sup> it did not foresee. In particular, it did not anticipate that the interpretive change to Rule 8(a)(2) would also change Rule 8(a)(1).

In any written order of operations—including a judge’s procedure for analyzing pleadings—a change in one place can cause unexpected problems elsewhere. It may mean that other instructions need adjusting merely in order to maintain their previous significance. What if the old rule was cross-referenced elsewhere, in a different set of boilerplate instructions for judicial decision-making?<sup>7</sup> How much thought should a court put into the ongoing validity of that cross-reference—especially when a primary purpose of the Rules is to reduce the need for abstract procedural thinking?

This Note describes a little-observed<sup>8</sup> ripple effect of the new pleading standard announced in *Iqbal*, the antiterrorism case whose holding swept broadly and changed the ground rules for considering allegations in so-called 12(b)(6) motions for all civil cases.<sup>9</sup> The 12(b)(6) motion allows the defendant to seek dismissal because the document initiating the case—the complaint—fails to allege the elements required by the statute it is trying to invoke. Over the decades before *Iqbal*, many federal courts had come to use part of the procedure for evaluating a 12(b)(6) motion in the context of an entirely different kind of ruling. Courts were always (before *Iqbal*) justified in deploying the 12(b)(6) factual standard for reading complaints in a different scenario: a so-called facial 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction.<sup>10</sup> Even though the former situation involved Rule 8(a)(2) and the

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<sup>6</sup> See *Animal Sci. Prods. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 334 (D.N.J. 2010) (“it appears logical for the Supreme Court’s guidance in *Iqbal* to have at least a ripple effect on the standard [for subject-matter jurisdiction]”), discussed *infra* at notes 174-78 and accompanying text; *Haley Paint Co. v. E.I. DuPont de Nemours & Co.*, 775 F. Supp. 2d 790, 798-99 (D. Md. 2011) (it is “logical” to “appl[y] the pleading standards [of *Iqbal*] to the jurisdictional allegations in the complaint as opposed to the factual allegations”), discussed *infra* at note 179-80, note 216 and accompanying text. This Note argues that district courts are wrong to make these “apparently logical” extrapolations from *Iqbal* to the jurisdictional context. See *infra* Part IV.

<sup>7</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (“Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)’s simplified notice pleading standard.”).

<sup>8</sup> *But see* Jordan Shepherd, *When Sosa Meets Iqbal: Plausibility Pleading in Human Rights Litigation*, 95 MINN. L. REV. 2318, 2318-51 (2011) (examining effects of the new standard on 12(b)(1) subject-matter jurisdiction rulings in international human-rights litigation under the Alien Torts Statute (ATS), and contending that “plausibility does not and need not have a huge impact in ATS litigation”).

<sup>9</sup> See FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted); see also FED. R. CIV. P. 8(a)(2) (requiring a plaintiff’s complaint to include “a short and plain statement of the claim *showing* that the pleader is entitled to relief” (emphasis added)).

<sup>10</sup> See FED. R. CIV. P. 12(b)(1) (motion to dismiss for lack of subject-matter jurisdiction); see also FED. R. CIV. P. 8(a)(1) (requiring a plaintiff’s complaint to include “a short and plain statement of the grounds for the court’s jurisdiction”).

latter involved Rule 8(a)(1), the difference did not matter: the same generous treatment of facts applied to both. Under *Iqbal*, that is no longer true.

Because of the longstanding cross-reference, when the Supreme Court changed the 12(b)(6) standard, it unwittingly changed the approach many district courts would take in 12(b)(1) motions as well. There is ample reason to believe the Court did this unwittingly, and will move to correct district courts that maintain the outdated cross-reference.<sup>11</sup>

Although it solved one procedural problem by requiring plausibility in the complaint, the *Iqbal* Court created new problems in another area of the law. These difficulties are in an unrelated area of doctrine (subject-matter jurisdiction), and are of an entirely different order than the ones *Twombly* and *Iqbal* sought to address. Unwittingly, in taking the keys to discovery away from speculative plaintiffs,<sup>12</sup> the Court gave permission for federal judges to borrow the keys to a new vehicle: heightened plausibility standards for subject-matter jurisdiction. Emerging as a result is a new kind of “drive-by jurisdictional ruling”<sup>13</sup> of the kind the Court has often sought to end.

This Note examines the interplay between the *Twombly/Iqbal* doctrine and federal courts’ practical approach to subject-matter jurisdiction. Part II describes the background jurisprudence on subject-matter jurisdiction, including the sharp line the Supreme Court has consistently re-drawn between claims lacking merit and those lacking jurisdictional basis, from *Bell v. Hood* through *Arbaugh v. Y & H Corp.* The consistent theme of this jurisprudence is that courts should not conflate merits and jurisdictional questions, and that judges should readily activate the court’s jurisdiction in response to a simple allegation in the complaint. Part III then describes the recent change to pleading standards on the merits of a claim. It explains the origins, factual context, and doctrinal bases of the altered pleading standard introduced in *Iqbal* and *Twombly*. These rationales do not, in most cases, apply to motions to dismiss for lack of subject-matter jurisdiction.

In Part IV, lower-court case law reveals that since 2009, in practice, the *Iqbal* standard has been interfering with the agenda of *Arbaugh*, in a way that the Supreme Court did not intend. Federal judges, in their eagerness to apply the novel pleading standard of *Iqbal*, have neglected the jurisdictional teachings of the Supreme Court

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<sup>11</sup> In the terminology of computer programming, the *Iqbal* Court altered a subroutine (“factual pleading standard”) without considering all the contexts in which that subroutine is triggered. The debugging approach called a “stack trace” operates partly by flagging such troublesome cross-references when code is altered. See DORIAN ARNOLD ET AL., INT’L PARALLEL & DISTRIB. PROCESSING SYMPOSIUM, STACK TRACE ANALYSIS FOR LARGE SCALE DEBUGGING (Mar. 2007), available at <ftp://ftp.cs.wisc.edu/paradyn/papers/Arnold06STAT.pdf> (recommending a debugging approach that distinguishes the contexts in which subroutines are invoked because “functions invoked via different call paths . . . may demonstrate different application semantics to the user that would not be visible without this distinction”). Such a tool would have indicated to the Court that 12(b)(1) “algorithms” often invoke the “factual pleading standard” subroutine, and hence that changes to that subroutine could alter 12(b)(1) outputs as well as 12(b)(6) outputs. The Court did not anticipate this result, so its instructions for applying the Federal Rules need debugging after the fact.

<sup>12</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions”).

<sup>13</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998).

in the *Arbaugh* line of cases. As a result, since *Iqbal* an erroneous 12(b)(1) standard has propagated rapidly through circuit and lower courts.

If the application of *Iqbal* to jurisdictional pleadings is an error, as this Note maintains and as recent Supreme Court reaffirmations of *Arbaugh* suggest, it may prove difficult to eradicate. Part V addresses the ineffectiveness of circuit courts and the rules-based system in correcting such mistakes. Indeed, in recent years, the Supreme Court continued to reaffirm (as it has for two decades) the importance of accepting subject-matter jurisdiction<sup>14</sup>—even while the rest of the federal system increasingly deployed *Iqbal* to make it more difficult to invoke the power of the courts.

The leakage of *Iqbal* plausibility requirements into rulings on subject-matter jurisdiction exemplifies the problem of unintended consequences in civil-procedure jurisprudence. Since 2009, federal courts have faced a doctrinal dilemma. The teaching of *Twombly* and *Iqbal* is that cases should be more readily dismissed before discovery for failure to state a claim.<sup>15</sup> And yet, for at least fifteen years, the Supreme Court has consistently urged lower courts to grant *fewer* dismissals before discovery for lack of subject-matter jurisdiction.<sup>16</sup> These two mandates push in opposite directions, and reconciling them requires judges to master the elusive distinction between a complaint's legal sufficiency and its jurisdictional basis. Without guidance from the Supreme Court in a case squarely presenting the question of *Iqbal* and subject-matter jurisdiction, the error is likely to persist.

#### I. GETTING INTO COURT: FROM *BELL* AND *CONLEY* TO *ARBAUGH*

The pre-*Iqbal* pleading standards for both 12(b)(1) and 12(b)(6) motions can be traced to the same case, *Conley v. Gibson*.<sup>17</sup> That case underscored the remarkable leniency the Rules mandated in reading the complaint: a plaintiff simply needed to allege the factual presence of each of the elements of the cause of action.<sup>18</sup> The court would then assume all the alleged facts were true.<sup>19</sup> Such pure credulity was

<sup>14</sup> See *Union Pac. R.R. v. Bhd. of Locomotive Eng'rs*, 130 S. Ct. 584, 590 (2009), discussed *infra* Part V.

<sup>15</sup> *Iqbal*, 556 U.S. at 679 (complaint is inadequate, and case should be dismissed, “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct”).

<sup>16</sup> *Steel Co.*, 523 U.S. at 89 (jurisdictional dismissal is “proper *only when* the [federal] claim is so insubstantial . . . as not to involve a federal controversy”) (emphasis added) (citation omitted).

<sup>17</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>18</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.”) (citing *Conley*, 355 U.S. at 48); see also *Pressed Steel Car Co. v. Union Pac. R. Co.*, 241 F. 964, 966 (D.N.Y. 1917) (Hand, J.) (earlier in the trend toward more lenient pleading standards, noting that under the “new rules,” “the pleadings shall contain no evidence, but the ‘ultimate facts’”).

<sup>19</sup> See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (dismissal should not be granted even if “[i]t may appear on the face of the pleadings that a recovery is very remote and unlikely. . . . [T]he allegations of the complaint should be construed favorably to the pleader.”).

required of judges at this phase under the premise that the complaint served only to give the defendant notice as to what conduct was at issue.<sup>20</sup> The court would be entitled to activate its skepticism after discovery.

In *Conley*, lower courts had dismissed a discrimination lawsuit railway workers had brought against their own union.<sup>21</sup> In a now-famous formula reinstating the suit, the Supreme Court described the “notice pleading” standard district courts were to use henceforward in ruling on 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted: “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.”<sup>22</sup> Through 2008, the case would be directly cited for this proposition 18,539 times.<sup>23</sup>

Notably, however, *Conley* itself was not decided by this reasoning. The Court issued its famous “no set of facts” formula—explaining Rule 12(b)(6) and its associated pleading guideline, Rule 8(a)(2)—as dictum.<sup>24</sup> The actual holding in *Conley* hinged on a jurisdictional question and a motion to dismiss under Rule 12(b)(1). In the lower courts the case had been dismissed for lack of jurisdiction, not because the plaintiffs had failed to state a cause of action. The defendant union’s winning argument below had been that a federal statute assigned railroad labor disputes in the first instance to the National Railroad Adjustment Board (NRAB), and that therefore the federal courts lacked subject-matter jurisdiction over the conflict under Rule 8(a)(1).<sup>25</sup> Reversal by the Supreme Court meant that federal court was the right place for the conflict, since it was not a dispute between labor and management, as NRAB cases were, but between a union and its own members.<sup>26</sup>

*Conley*, then, was a jurisdictional decision that became famous for defining the requirements for pleadings on the merits. In this muddled double identity it is the shared ancestor for two opposed, increasingly urgent, and often conflated strands of legal doctrine that emerged in the Supreme Court over the last thirty years. One line of precedents has to do with jurisdiction, a court’s *power to decide* a case; the second has to do with proper invocation of a law, which establishes the court’s *duty in deciding* a case. In the first line of precedents, following in the footsteps of *Conley*,

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<sup>20</sup> *Conley*, 355 U.S. at 48 (“The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome.”).

<sup>21</sup> *Id.* at 44.

<sup>22</sup> *Id.* at 46; *see also id.* at 47-48 (such leniency in evaluating the complaint “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”); *cf.* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (requiring “enough fact to raise a reasonable expectation that discovery will reveal evidence” to substantiate the claim).

<sup>23</sup> Lexis “Restrict by Headnote” Search, Lexis Advance, [advance.lexis.com](http://advance.lexis.com) (Search *Conley v. Gibson*, 355 U.S. 41 (1957); then Shepardize by Headnote 3, restricting prior to year 2009).

<sup>24</sup> Alana C. Jochum, *Pleading in Ohio After Bell Atlantic v. Twombly and Ashcroft v. Iqbal*, 58 CLEV. ST. L. REV. 495, 502 n.47 (2010).

<sup>25</sup> *Conley*, 355 U.S. at 43-44.

<sup>26</sup> *Id.* at 45.

the Court urges lower courts to accept federal subject-matter jurisdiction, rather than looking for reasons to abjure their power. This tradition culminated with *Arbaugh v. Y & H Corp.*, which held that legal shortcomings in a complaint should rarely be regarded as destroying the court's jurisdiction.<sup>27</sup> In the second line of precedents, however, the Supreme Court has sought to make federal courts stricter in evaluating whether the plaintiff has adequately stated a claim. This doctrine culminated in the rulings of *Twombly* and *Iqbal*, which led every federal district to revise its boilerplate. Through these two strands of doctrine, the Supreme Court has simultaneously, and laudably, advanced two distinct agendas: to broaden the power of the federal judiciary, and to narrow its duty.

*A. Lenient Standards for Jurisdiction Before Discovery*

The operative reasoning in *Conley* explained why federal courts were the appropriate places to decide the dispute between the railway workers and their own union.<sup>28</sup> Like all jurisdictional questions, this was primarily a question of law, hinging on interpretation of a Congressional act—but like all jurisdictional questions, it also depended on seeing the facts properly. The essence of the lower court's ruling had been that the plaintiffs were ignoring Congress's requirements by bringing a railway labor dispute to the federal courts.<sup>29</sup> Since Congress had given jurisdiction over railway labor disputes to a specially created body, the National Railroad Adjustment Board, the lower courts dismissed the case before discovery.<sup>30</sup> The Supreme Court, however, determined that Congress had not intended to strip federal courts of jurisdiction for all disputes involving railway labor unions, only those between unions and the railways themselves.<sup>31</sup> From one perspective, the Court's decision was purely legal, since it interpreted the statute. From another perspective, though, the decision required the Court to make a factual determination that the dispute in *Conley* was truly intramural, and not merely a reframing of a conflict between the plaintiffs and their employer.<sup>32</sup>

Such factual determinations are delicate matters when presented as threshold questions, before a case is properly underway. In *Conley*, the Railroad was not a party to the case, so in hindsight it seems clear that the case was not a labor dispute of the sort Congress intended to assign to the Adjustment Board. But the defendant union argued that the Railroad should have been joined as a party,<sup>33</sup> and this

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<sup>27</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 504 (2006).

<sup>28</sup> *Conley*, 355 U.S. at 44-45.

<sup>29</sup> *Id.* at 43.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 44-45.

<sup>32</sup> *Cf.* *United Transp. Union v. Gateway W. Ry.*, 78 F.3d 1208, 1213-1214 (7th Cir. 1996) (The Railway Labor Act requires that “when the precise character of the dispute is in doubt . . . a federal court should not proceed, for the [National Mediation Board] has primary jurisdiction to determine whether it has exclusive jurisdiction over the dispute.”) (quoting *United Transp. Union v. United States*, 987 F.2d 784, 789 (D.C. Cir. 1993) (internal quotation marks omitted)). The Adjustment Board involved in *Conley* is an arm of the Mediation Board created by the Railway Labor Act. *See* 45 U.S.C.S. § 153(w) (LexisNexis 2011).

<sup>33</sup> *Conley*, 355 U.S. at 45.

argument was not frivolous. Most of the plaintiffs' allegations were not about the union's treatment of the plaintiffs: they alleged, instead, that the Railroad was administering the union contract in a discriminatory way, "with the active or tacit consent of the union."<sup>34</sup> The Supreme Court saw no basis in the record yet for a joinder of the Railroad (although it had to acknowledge such a basis might emerge).<sup>35</sup> This ruling on the slim factual record, leaving the Railroad out of the case, deactivated what would otherwise have been a classic jurisdictional paradox. The contrary determination—that the Railroad was a necessary defendant in the case—would arguably have stripped the federal courts of the power to make any finding at all, since the NRAB would then have had exclusive jurisdiction.<sup>36</sup> In such a scenario, a federal court might decide a question at issue only to learn as a result, retroactively, that it was not the right body to decide questions in the case. Fearing entanglement in such paradoxes, many courts in similar cases struggle to define the basis for dismissal, sometimes calling it jurisdictional and sometimes calling it failure to state a claim upon which relief can be granted.<sup>37</sup>

The Court in *Conley* reversed the district court's jurisdictional dismissal and instructed it to take the case. Because the facts did not point to necessary joinder of the Railroad, *Conley* was able to follow the lead of a slightly older case, *Bell v. Hood*, which not only set the standard for a finding of jurisdiction but also sought to minimize occasions for the jurisdictional paradox just described:

Where the complaint, as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court . . . must entertain the suit . . . . The reason for this is that the court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief as well as to determine issues of fact arising in the controversy.<sup>38</sup>

In other words, the legal sufficiency of the complaint—its success in stating a claim—defines the court's duty. But regardless of whether the court has a duty to offer relief, it must first determine whether it has power to hear the question: hence, the jurisdictional determination is distinct from and precedent to the merits question.<sup>39</sup> The standard is lenient: if federal law is properly invoked, jurisdiction should be declined only if the Rule 8(a)(1) statement is "wholly insubstantial and

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<sup>34</sup> *Id.* at 46.

<sup>35</sup> *Id.* at 45 ("This is not a suit, directly or indirectly, against the Railroad. . . . If an issue does develop which necessitates joining the Railroad either it or the respondents will then have an adequate opportunity to request joinder.").

<sup>36</sup> See *Bhd. of Locomotive Eng'rs & Trainmen v. CSX Transp., Inc.*, 455 F.3d 1313, 1316 (11th Cir. 2006) (NRAB findings cannot be reviewed in federal court unless they overstep the Board's jurisdictional mandate).

<sup>37</sup> See generally Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643 (2005).

<sup>38</sup> *Bell v. Hood*, 327 U.S. 678, 681-82 (1946) (emphasis added).

<sup>39</sup> See generally *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998) (insisting on the priority of determining plaintiff's standing, which enables subject-matter jurisdiction, and insisting that courts should so do so in an analysis distinct from adjudging whether the complaint properly alleges the elements required by the statute).

frivolous.”<sup>40</sup> This teaching of *Bell* is affirmed in a distinct and nearly undisturbed line of cases<sup>41</sup> in which the Court sought to lay to rest what seems to be a perennial confusion between a court’s power and its duty. This tradition culminates with *Arbaugh v. Y. & H. Corp.*,<sup>42</sup> a unanimous ruling that sought to lay down a clear mandate: afterward, the Court hoped, the distinction between jurisdiction and merits would be easy to discern and maintain.<sup>43</sup> But the jurisdictional facts are not always resolved as easily as they were in *Conley*. Even with a bright-line rule, courts have continued to struggle with this issue.<sup>44</sup>

### B. Statutory Requirements are Rarely Jurisdictional

Unlike the aggrieved employees in *Conley*, the plaintiff in *Arbaugh v. Y & H Corp.* had a simple statutory basis for her federal claim: she alleged, and proved to a jury, that she had been sexually harassed at her place of employment, the Moonlight Cafe. The federal statute known as Title VII establishes that such sexual harassment claims can be brought to federal court.<sup>45</sup> But the facts were more complicated than

<sup>40</sup> *Bell*, 327 U.S. at 682-83 (“[The only] exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.”).

<sup>41</sup> See, e.g., *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996); *Fed. Election Comm’n v. Nat’l Rifle Ass’n Political Victory Fund*, 513 U.S. 88, 97 (1994); *Northwest Airlines, Inc. v. Cnty. of Kent*, 510 U.S. 355, 365 (1994) (“The question whether a federal statute creates a claim for relief is not jurisdictional.”); *Duke Power Co. v. Carolina Env’l Study Grp.*, 438 U.S. 59, 70 (1978); *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 667 (1974) (courts should find jurisdiction unless federal claim is “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy”); *Hagens v. Lavine*, 415 U.S. 528, 542 n.10 (1974) (“Once a federal court has ascertained that a plaintiff’s jurisdiction-conferring claims are not insubstantial on their face, no further consideration of the merits of the claims is relevant to a determination of the court’s jurisdiction of the subject matter.”) (citations and quotation marks omitted); *Powell v. McCormack*, 395 U.S. 486, 512-16 (1969); *Baker v. Carr*, 369 U.S. 186, 198-204 (1962); *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 359 (1959). But see *Bowles v. Russell*, 551 U.S. 205, 214 (2007) (“the timely filing of a notice of appeal in a civil case is a jurisdictional requirement”); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 67 (1987) (Scalia, J., dissenting) (contending that majority decision “misreads statute to create a peculiar new form of subject-matter jurisdiction”). *Bowles* appears to have been confined to its particular context. See *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1250 (2010) (Ginsberg, J., concurring) (attempting to reconcile *Arbaugh* and *Bowles* on the principle of *stare decisis*). Compare *Bowles*, 551 U.S. at 214 (statutory limit on appeal of ordinary civil case is jurisdictional) with *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (statutory limit on appeal of benefits decision to Veterans Court is not jurisdictional, and is subject to equitable tolling). See generally Howard Wasserman, *The Demise of “Drive-by Jurisdictional Rulings,”* 105 NW. L. REV. 184-202 (2011).

<sup>42</sup> *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 511 (2006) (“On the subject-matter jurisdiction/ingredient-of-claim-for-relief dichotomy, this Court and others have been less than meticulous.”).

<sup>43</sup> *Steel Co.*, 523 U.S. 83 (1998).

<sup>44</sup> See *infra* discussion in Part IV.

<sup>45</sup> 42 U.S.C. § 2000e-5(f)(3) (2006).

the law: it emerged after the trial was over that because of its payroll structure, the Moonlight Cafe did not, under the technical definition of “employee,” actually have enough employees to be subject to the statute.<sup>46</sup> The defendant discovered that this argument was available only after the trial was over. It was too late to assert that Arbaugh had failed to state a claim for which relief could be granted, in a 12(b)(6) motion.<sup>47</sup> The issue had not been preserved for appeal. The defendant would have to pay the \$40,000 initially ordered by the federal court, even though Congress had not intended it to be reached by the law. Two weeks after the verdict, however, the employer made a different motion, which is allowed at any time, even after trial: a motion to dismiss for lack of subject-matter jurisdiction.<sup>48</sup> According to this argument, the cafe, employing fewer than fifteen people, had not had its conduct as an employer placed under the jurisdiction of the federal courts.<sup>49</sup> The entire case should be undone, not because of an error of law, but because that error meant it had come to the wrong court.

*Arbaugh* presented very clearly the classic problem of distinguishing between jurisdiction and merits—one that had created a circuit split with regard to Title VII<sup>50</sup>—and also an indication of why the difference matters. A court that lacks jurisdiction must forswear all its power over a controversy, even after it has already ruled, whereas a claim that misreads the law or fails to satisfy its prerequisites nonetheless comes under the court’s power because it “arises under” a federal statute.<sup>51</sup> Usually, the plaintiff loses before federal discovery either way, but in this instance, the Supreme Court faced a true controversy on the question of *why* she should have lost. Did the trial court lack the power to issue its verdict, or only the duty? If dismissal should have occurred for 12(b)(1) reasons of judicial power, the error would be corrected and the plaintiff sent away to try her luck in state court; if it should have been for 12(b)(6) reasons of judicial duty, the erroneous (but just) verdict would be upheld.

Arbaugh won. A statute’s inapplicability does not alter the jurisdiction of a federal court to decide whether it applies. Justice Ginsburg, writing for a unanimous court, overruled the Fifth Circuit’s precedents<sup>52</sup> that had established the employee-numerosity requirement of Title VII as jurisdictional:

[W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in

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<sup>46</sup> *Arbaugh*, 546 U.S. at 509 (citing 42 U.S.C. § 2000e(b) (2006)).

<sup>47</sup> See FED. R. CIV. P. 12(h)(2) (specifying “at trial” as the last opportunity for such a motion).

<sup>48</sup> *Arbaugh*, 546 U.S. at 506 (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”) (quoting FED. R. CIV. P. 12(h)(3)).

<sup>49</sup> *Id.* at 504.

<sup>50</sup> See *Da Silva v. Kinsho Int’l Corp.*, 229 F.3d 358, 364-66 (2d Cir. 2000) (listing conflicting cases in different circuits, and holding correctly that “the threshold number of employees for application of Title VII is not a jurisdictional issue”).

<sup>51</sup> See 28 U.S.C. § 1331 (2006) (granting federal courts jurisdiction for all civil disputes properly invoking a federal law).

<sup>52</sup> See, e.g., *Greenlees v. Eidenmuller Enters., Inc.*, 32 F.3d 197, 198 (5th Cir. 1994).

character. Applying that readily administrable bright line to this case, we hold that the threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue.<sup>53</sup>

In settling this question, the Court not only laid down a clear rule for federal district courts to follow; it also made clear its intent with regard to the distinct character of subject-matter jurisdiction. The *Arbaugh* ruling punctuated the series of cases in which the Supreme Court voiced its disapproval of quick dismissals that interpret a statute while purporting to invoke Rule 12(b)(1)—what the Court has repeatedly called “‘drive-by jurisdictional rulings’ that should be accorded ‘no precedential effect.’”<sup>54</sup> Repeatedly over the last two decades, the Supreme Court has expressed its frustration with federal courts declining jurisdiction when they should instead dismiss cases on the merits.<sup>55</sup> Correct doctrine, the Court insists, requires a sharp distinction to be maintained. There is a qualitative difference between what a federal court can do, but should not (on the merits); and what it arguably should do, but cannot (for lack of jurisdiction).

Unless Congress clearly specifies otherwise, a law is activated in federal court whenever it is invoked, and the court must take jurisdiction even if the complaint misreads the law. In holding to this effect, *Arbaugh* seems on its face to lay to rest for lower courts the distinction between jurisdiction and merits.<sup>56</sup> But the same might have been said about the resounding logical victory of Justice Scalia over Justice Stevens in 1996,<sup>57</sup> or *Bell v. Hood* itself, or an equally confident and assertive explanation laid down by Justice Holmes in 1908.<sup>58</sup> The problem of distinguishing jurisdiction from merits seems to be passed from generation to generation.<sup>59</sup>

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<sup>53</sup> *Arbaugh*, 546 U.S. at 516.

<sup>54</sup> *Id.* at 511 (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998)).

<sup>55</sup> See generally *Steel Co.*, 523 U.S. at 88-102 (holding that federal court must decide first whether there was any injury to establish standing of plaintiffs, and therefore jurisdiction of court, in claim against a steel and pickling company tardy in complying with the environmental-records requirement of 42 U.S.C. § 11046 (2006), before the court decides whether the statute's creation of a private cause of action against noncompliant entities allowed for such retroactive suits) (emphasis added).

<sup>56</sup> See also *United States v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999) (denying 12(b)(1) motion because “while the merits and jurisdictional questions are not identical, they are so closely related that the jurisdictional issue is not suited for resolution in the context of a motion to dismiss for lack of subject matter jurisdiction”) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)).

<sup>57</sup> *Steel Co.*, 523 U.S. at 118-119 (Stevens, J., dissenting) (“*Bell* demonstrates that the Court has the power to decide whether a cause of action exists even when it is unclear whether the plaintiff has standing”) (citing *Bell v. Hood*, 327 U.S. 678, 685 (1946)); see also *id.* at 119 n.9 (professing to see no “fundamental difference between arguing: (1) plaintiff's complaint does not allege a cause of action because the law does ‘not provide a remedy’ for the plaintiff's injury; and (2) plaintiff's injury is ‘not redressable’ [for standing purposes]”); *id.* at 96 (Scalia, J.) (“[n]ot only is this not true, but the whole point of *Bell* was that it is not true,” because money damages would have provided redress if they had not been disallowed on the merits).

<sup>58</sup> *Fauntleroy v. Lum*, 210 U.S. 230, 234-35 (1908). (“No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to power, the other only to the duty of

*C. Determining Power Before Determining Duty: Progress in Eliminating “Drive-by Jurisdictional Rulings”*

Steadily, over time, the Court’s persistent rejection of jurisdictional grounds for dismissals on the merits had the desired effect in lower courts.<sup>60</sup> The teaching of *Arbaugh* and other cases in the same vein was being heeded in the years leading up to *Iqbal*.<sup>61</sup> In the Sixth Circuit, for example, in January 2006, a panel reasoning by analogy heeded Supreme Court decisions from 2004 and 2005 and “departed from [its] usual rule that one panel may not overrule a prior panel.”<sup>62</sup> The issue was whether a necessary dismissal in the district court should have been characterized as a jurisdictional problem or a failure to state a claim,<sup>63</sup> and, as in *Arbaugh*, there was something riding on the outcome.

The defendants in the case, a couple named Gunter, had had their medical costs covered by a tortfeasor, and then had been sued for reimbursement by their health plan to prevent a windfall.<sup>64</sup> The parties did not realize that the statute apparently authorizing the suit had been interpreted in 2002 to create injunctive relief only, and not to allow for awards of money.<sup>65</sup> Moreover, the Sixth Circuit had found, based on dicta in two dissenting opinions, that this was a jurisdictional issue,<sup>66</sup> and the District Court accordingly should have dismissed the case for lack of subject-matter jurisdiction. Instead, it heard the case and found that as a factual matter the Gunters were entitled to keep all the money in question, roughly \$75,000. In the process, however, the Gunters racked up attorney’s fees of \$67,000; they petitioned the court for reimbursement in turn from the health plan, under a pertinent Employee

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the court. . . . Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense.”).

<sup>59</sup> See Wasserman 2011, *supra* note 41, at 201-02 (“The Court apparently is not finished undoing profligate and non-meticulous use of the concept of jurisdiction, moving towards a sharper distinction between judicial adjudicative authority on the one hand and merits or procedure on the other.”).

<sup>60</sup> See, e.g., *Montez v. Dep’t of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) (“[W]here issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits.”).

<sup>61</sup> See, e.g., *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (“The district court erred by conflating the issue of Braden’s Article III standing with his potential personal causes of action under ERISA.”). See generally Howard M. Wasserman, *Jurisdiction, Merits, and Substantiality*, 42 TULSA L. REV. 579, 580-84 (2007).

<sup>62</sup> *Primax Recoveries, Inc. v. Gunter*, 433 F. 3d 515, 516 (6th Cir. 2006).

<sup>63</sup> See *id.* at 517 (“Generations of jurists have struggled with the difficulty of distinguishing between Rules 12(b)(1) and 12(b)(6) in federal question cases.”) (quoting *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1188 (2d Cir. 1996)).

<sup>64</sup> *Id.* at 516-17.

<sup>65</sup> See *id.* at 517 (citing *Great W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 221 (2002)); see also *Knudson*, 534 U.S. at 222, 224 (dissenting Justices Stevens and Ginsberg characterizing the outcome in that case as a jurisdictional one).

<sup>66</sup> *Id.* (citing *QualChoice, Inc. v. Rowland*, 367 F. 3d 638, 642 (6th Cir. 2004) and *Community Health Plan of Ohio v. Mosser*, 347 F.3d 619 (6th Cir. 2003)).

Retirement Income Security Act (ERISA) provision for successful defendants.<sup>67</sup> With admirable chutzpah, the plaintiff then pointed out correctly that it should have lost not on the merits, but for jurisdictional reasons, without a trial. In response, the district court held that it had never had jurisdiction over the case and therefore could not award the attorney's fees.<sup>68</sup> The Gunters pressed the question in the Sixth Circuit, pointing out two intervening Supreme Court decisions.

Even though those decisions seemed to have nothing to do with the Gunters' case, they were utterly persuasive to the Sixth Circuit panel. In them, as in *Arbaugh*, the Supreme Court had continued to fight the good fight against jurisdictional treatments of legal defects in the pleadings. One ruling had held that a defense arising from a certain Bankruptcy Rule was a merits defense, not a jurisdictional one, and therefore could not be raised after trial.<sup>69</sup> The other had held that the time limit in Federal Rule of Criminal Procedure 33 had the same nonjurisdictional status, giving the state an argument that had to be raised up front, and not as a collateral attack on jurisdiction.<sup>70</sup>

From these unrelated high-court rulings on matters of bankruptcy and criminal procedure, the *Primax* Court got the message about Rule 12(b)(1).<sup>71</sup> The Court changed the Circuit standard on the jurisdictional character of the original error, vacated the District Court's disavowal of subject-matter jurisdiction, and awarded attorney's fees to the Gunters: "Our application of *Eberhart* and *Kontrick* to the instant case faithfully adheres to the Supreme Court's jurisprudence where, as here, both the court's subject-matter jurisdiction and the substantive claim for relief are based on the same federal statute."<sup>72</sup> Accepting jurisdiction and deciding what the law permits are separate matters. An initial error of law should not be compounded with an error of doctrine.

Having taken a case and created an outcome, a court should not itself later disavow its own power to do what it did, as if the bell of litigation can be unrung. *Primax* demonstrates that even before *Iqbal*, there were practical reasons behind the Supreme Court's consistent urgings that courts should accept their subject-matter jurisdiction. Now those reasons have been augmented, because the Court has created different standards for evaluating jurisdiction and legal sufficiency.

## II. STATING A CLAIM: FROM *CONLEY* TO *IQBAL*

Whereas Rule 12(b)(1) regulates the proper invocation of a federal court's power, Rule 12(b)(6) is concerned with the threshold a complaint must then clear to "state a claim," allowing the plaintiff to issue subpoenas and discovery requests. For constitutional and practical reasons, this gate to the discovery process is being guarded more and more zealously. First, more-conservative justices, under the aegis of "restraint," are increasingly inclined to turn plaintiffs away while invoking the

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<sup>67</sup> 29 U.S.C. § 1132(g) (2006).

<sup>68</sup> *Primax Recoveries, Inc. v. Gunter*, 433 F.3d 515, 517 (6th Cir. 2006).

<sup>69</sup> *Kontrick v. Ryan*, 540 U.S. 443, 455-56 (2004).

<sup>70</sup> *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam).

<sup>71</sup> *Primax*, 433 F.3d at 519.

<sup>72</sup> *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)).

constitutional imperative of federal courts' limited jurisdiction.<sup>73</sup> Second, and more relevant here, courts are becoming more aware that clearing the 12(b)(6) obstacle enables plaintiffs to subject their adversaries to the machinery of civil litigation itself.<sup>74</sup> In recent years, the Supreme Court decided to make that machinery more difficult to activate.

*A. Twombly Dismissals Prevent Speculative Discovery Proceedings*

With the growth of organizations of all kinds,<sup>75</sup> the improvement of record-keeping technology,<sup>76</sup> and the increased generosity of tort law both as to liability and as to damages,<sup>77</sup> litigation itself, as a process and a prospect, has become a powerful weapon. As discovery has become more expensive, motions to dismiss before discovery for failure to state a claim have become more important. The rulings in *Twombly* and *Iqbal* were the culmination of a steadily increasing awareness in the higher courts that discovery should, in some cases, be more difficult to initiate. To allege the basis for a cause of action, plaintiffs should not simply name, or break down into its elements and recite, the law they wanted to invoke: they needed to allege *facts*.<sup>78</sup>

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<sup>73</sup> See, e.g., *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1560-61 (D.C. Cir. 1984) (en banc) (Scalia, J., joined by Bork and Starr, JJ., dissenting from remand for factual development) ("Having ignored one jurisdictional restraint and distorted another, the majority proceeds to treat the merits of this case with what seems to me an incomprehensible disregard of traditional principles of equitable discretion, bordering on if not surpassing the constitutional limits established by the principle of separation of powers."), *vacated for reconsideration in light of Congressional action*, 471 U.S. 1113 (per curiam); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 586 (2004) (Thomas, J., dissenting) (citing the *de Arellano* dissent and arguing that "judicial interference in domains [of antiterrorism] destroys the purpose of vesting primary responsibility in a unitary Executive").

<sup>74</sup> See *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 742-43 (1975) ("[T]he mere existence of an unresolved lawsuit has settlement value to the plaintiff . . . because of the threat of extensive discovery.").

<sup>75</sup> Compare *The Fortune 100: 1957*, CNNMONEY (2012), [http://money.cnn.com/magazines/fortune/fortune500\\_archive/full/1957/index.html](http://money.cnn.com/magazines/fortune/fortune500_archive/full/1957/index.html) (indicating that the total 1957 revenues for the one-hundred largest U.S. companies was \$115 billion, the equivalent in 2007 dollars of \$869 billion), with *The Fortune 100: 2007*, CNNMONEY (2012), [http://money.cnn.com/magazines/fortune/fortune500/2007/full\\_list/index.html](http://money.cnn.com/magazines/fortune/fortune500/2007/full_list/index.html) (indicating that the total 2007 revenues for the one-hundred largest U.S. companies was \$6,088 billion). See also *Inflation Calculator*, DOLLARTIMES (2012), <http://www.dollartimes.com/calculators/inflation.htm>.

<sup>76</sup> See *Rowe Entm't, Inc. v. William Morris Agency, Inc.*, 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (noting in dispute over costs of electronic discovery that when "the costs of storage are virtually nil . . . [i]nformation is retained not because it is expected to be used, but because there is no compelling reason to discard it. And, even if data is retained for limited purposes, it is not necessarily amenable to discovery.").

<sup>77</sup> See, e.g., *Thing v. La Chusa*, 771 P.2d 814, 816 (Cal. 1989) (tracing "the development of common law recognition of a protectable interest in individual peace of mind.").

<sup>78</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007); see Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL'Y 61, 94 (2007) (arguing that *Twombly* was correct, because courts can capably adjudge pleadings implausible based on "a full account of all public information").

For many decades this commonsense doctrine<sup>79</sup> did not enter the common law at the highest levels, with one important exception. Over a sustained period, circuit courts adopted a heightened pleading standard for allegations of conspiracy, which is a crime or tort likely to develop (if at all) behind closed doors, and therefore to be pled based on speculation. On the circuit level, the common law developed to require judges to cast a skeptical eye on allegations of conspiracy, even before discovery.<sup>80</sup> For many decades, circuit courts' special treatment of conspiracy "was a narrow exception to the notice-pleading standard of Rule 8 of the civil rules—a rare example of a judicially imposed requirement to plead facts in a complaint governed by Rule 8."<sup>81</sup> This tradition with regard to conspiracy claims would inform the Supreme Court's eventual reinterpretation of pleading standards in *Twombly* and *Iqbal*.

The heart of the *Twombly* doctrine is that a complaint's allegations about illegal conduct behind closed doors must be plausible inferences from conduct the plaintiff knows about.<sup>82</sup> If all the facts shown in a pleading can be very readily explained, as a matter of basic common sense, without any wrongdoing involved, the "doors of discovery" should not be unlocked for the plaintiff to peruse the defendant's files.<sup>83</sup> Hence, cases should be ended at the motion-to-dismiss stage when all the facts plaintiff can allege leave the court unconvinced that there is any "reason to infer that [the defendants] had agreed among themselves to do what was only natural anyway."<sup>84</sup> The doctrine prevents antitrust litigation that amounts to a shakedown, using discovery rather than the prospect of an actual judgment to create leverage.<sup>85</sup>

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<sup>79</sup> See, e.g., *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (court need not accept as true legal conclusions couched as factual allegations); *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994) (same).

<sup>80</sup> See *Slotnick v. Staviskey*, 560 F.2d 31, 33 (1st Cir. 1977) ("It has long been the law in this and other circuits that complaints cannot survive a motion to dismiss if they contain conclusory allegations of conspiracy but do not support their claims with references to material facts."); *accord Loubser v. Thacker*, 440 F.3d 439, 443 (7th Cir. 2006); *Walker v. Thompson*, 288 F.3d 1005, 1007-08 (7th Cir. 2002); *Boddie v. Schnieder*, 105 F.3d 857, 862 (2d Cir. 1997); *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972); *Fletcher v. Hook*, 446 F.2d 14, 15-16 (3d Cir. 1971); *Jackson v. Nelson*, 405 F.2d 872, 874 (9th Cir. 1968); *Powell v. Workmen's Comp. Bd.*, 327 F.2d 131, 137 (2d Cir. 1964). See generally Brian Z. Tamanaha, *The Realism of Judges Past and Present*, 57 CLEV. ST. L. REV. 77 (2009) (outside the context of particular cases, judges generally concede readily the truth of the "realist" doctrine that they use their individual judgment and common sense, and "make law").

<sup>81</sup> *Cooney v. Rossiter*, 583 F.3d 967, 970 (7th Cir. 2009) (Posner, J.).

<sup>82</sup> *Twombly*, 550 U.S. at 566-67 (holding "allegations of parallel conduct" inadequate to state a claim for antitrust conspiracy).

<sup>83</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

<sup>84</sup> *Twombly*, 550 U.S. at 566; see also *Tam Travel, Inc. v. Delta Airlines, Inc.*, 583 F.3d 896, 909 (6th Cir. 2009) ("[T]he plausibility of plaintiffs' conspiracy claim [stemming from price cuts] is inversely correlated to the magnitude of defendants' economic self-interest in making the cuts.") (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (summary judgment context)).

<sup>85</sup> See Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 930 (2009) (arguing that different pleading standards for different kinds of

The complexity of antitrust discovery was an important factor spurring the Court to “retire” the *Conley* pleading standard.<sup>86</sup> Writing for the Court, Justice Souter spent two paragraphs on the high costs of discovery, and remarked that additional caution was called in very large cases, since litigation itself would be so expensive.<sup>87</sup> In a way, the spirit of *Twombly* reflects a growing sense that corporate litigation itself was absorbing too many national resources.<sup>88</sup>

Antitrust was a perfect context for the court to affirm a stricter understanding of Rule 8(a)(2).<sup>89</sup> In this context, the court could draw on the background circuit-court tradition of rejecting unsupported, conclusory allegations in conspiracy cases, while also looking to the future, which held the prospect that antitrust discovery would grow more expensive as corporations grew larger.<sup>90</sup> Justice Souter noted that other procedural safeguards were already in place specifically for antitrust,<sup>91</sup> because innocent parallel conduct so often resembled anticompetitive conspiracies: hence, in a way, the holding of *Twombly* was simply that “an allegation of parallel conduct and a bare assertion of conspiracy will not suffice . . . in order to make a [Sherman

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cases would allow for better screening of frivolous cases, “sensitive to the different reasons for meritless filings”); see also *Tam Travel*, 583 F.3d at 914 (Merritt, J., dissenting) (expressing dire concern that excessive application of *Twombly* in dissimilar cases is “slowly eviscerating antitrust enforcement under the Sherman Act,” leading to widening class inequality).

<sup>86</sup> *Twombly*, 550 U.S. at 563.

<sup>87</sup> *Id.* at 559 (observing that “plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America’s largest telecommunications firms.”). *But see* Edward D. Cavanagh, *Twombly, the Federal Rules of Civil Procedure and the Courts*, 82 ST. JOHN’S L. REV. 877, 882-89 (2008) (arguing that the Court underestimated the extent to which discovery can be managed to contain costs); Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 64 (2010) (same).

<sup>88</sup> See Saritha Komatireddy Tice, *A “Plausible” Explanation of Pleading Standards*, 31 HARV. J.L. & PUB. POL’Y 827, 830 (2008) (“[*Twombly*] reflects a significant shift away from the litigation-promoting mindset embodied in *Conley* and instead solidifies what has been a growing hostility toward litigation.”); see also *id.* at n.81 (citing Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEX. L. REV. 1097, 1097 (2006)).

<sup>89</sup> See also *Baim & Blank, Inc. v. Warren-Connelly Co.*, 19 F.R.D. 108, 109 (S.D.N.Y. 1956) (“The modern ‘notice’ theory of pleading is not sufficient when employed in a complaint under the anti-trust laws.”).

<sup>90</sup> *Cf. Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976) (“[I]n antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators,’ dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.” (quoting *Poller v. Columbia Broad.*, 368 U.S. 464, 473 (1962) (in turn citing *Conley*, 355 U.S. at 45-46))).

<sup>91</sup> *Twombly*, 550 U.S. at 556.

Act] § 1 claim.”<sup>92</sup> It was not immediately clear whether the plausibility standard should even be applied outside the antitrust context.<sup>93</sup>

*B. Iqbal Dismissals Prevent Litigation of Conspiracy Theories*

Two years later, in *Iqbal*, the Supreme Court made clear that it was not only for massive corporations that claims of liability must be found “plausible.”<sup>94</sup> Again, however, the context was important: the defendants were highly placed members of the executive branch of the U.S. government. In such a context, the doctrine of qualified immunity reflects courts’ concern about subjecting defendants to the discovery process on the basis of an inadequately specific complaint.<sup>95</sup> Qualified immunity is intended to protect public officials from the litigation process by allowing summary dismissal when the constitutional right allegedly violated was not clearly established, even if the plaintiff’s version of events is true.<sup>96</sup> Like the *Twombly* context, this situation was a fitting one for a reinterpretation of the pleading standard: both antitrust actions and citizen lawsuits against officials exact high perceived costs from defendants, regardless of their liability, and might be brought speculatively.<sup>97</sup> In both scenarios, because the target is such a prominent one, courts feel an additional duty to observe the principle that “The issue is not

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<sup>92</sup> *Id.* at 556-557; *see also id.* at 561 n.7 (“neither parallel conduct nor conscious parallelism, taken alone, raise[s] the necessary implication of conspiracy”).

<sup>93</sup> *See* Jochum, *supra* note 24, at 511 (describing pre-*Iqbal* “discussion among scholars that [*Twombly*] was limited to the realm of antitrust cases”).

<sup>94</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (rejecting plaintiff’s attempt to confine *Twombly* to the antitrust context: “[o]ur decision in *Twombly* expounded the pleading standard for ‘all civil actions’” (quoting *Twombly*, 550 U.S. at 555-56)).

<sup>95</sup> *Id.* at 672 (qualified immunity is “both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation” (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985))); *see also* *Siegert v. Gilley*, 500 U.S. 226, 235-36 (Kennedy, J., concurring) (“There is tension between the rationale of *Harlow* [requiring qualified immunity determinations as early in a case as possible] and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it.”).

<sup>96</sup> *See Iqbal*, 556 U.S. at 685 (“Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.”); *see also* *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) (Cabranes, J., concurring) (“The Supreme Court’s recognition in *Bell Atlantic* that ‘proceeding to . . . discovery can be expensive’ has particular resonance where, as here, discovery would not only result in significant cost but would also deplete the time and effectiveness of current officials and the personal resources of former officials.” (citing *Twombly*, 127 S. Ct. at 1967)); *Sharratt v. Murtha*, 437 F. App’x 167, 168, 170 (3d Cir. 2011) (citing *Iqbal* in dismissing on qualified immunity grounds lawsuits against former Congressman John Murtha “for statements Murtha had made to the press relating to Sharratt and other Marines’ culpability for the deaths of several Iraqis in 2005”).

<sup>97</sup> *See Iqbal*, 556 U.S. at 670 (central issue of case as balance between liberal pleading rules and “qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure” (quoting *Hasty*, 490 F.3d at 178 (Cabranes, J., concurring))).

whether plaintiff will prevail, but whether he is entitled to [develop and] offer evidence to support his claims.”<sup>98</sup>

The plaintiff in the 2009 case, *Javida Iqbal*, alleged religious and racial discrimination in the decision to place him under high-security conditions after his arrest on immigration charges in the wake of the September 11 attacks.<sup>99</sup> He alleged that all Muslims arrested at that time pursuant to Federal Bureau of Investigations (FBI) investigations in the region were flagged as “high interest,” even without individuated suspicion of links to terrorism.<sup>100</sup> The Supreme Court took judicial notice of a Department of Justice (DOJ) Inspector General’s report, indicating that in fact only 184 out of 762 of those arrested after FBI questioning had been flagged as “high interest” and subjected to harsh solitary confinement, as *Iqbal* had been.<sup>101</sup> While noting that the allegations of mistreatment by prison guards clearly stated a civil-rights claim,<sup>102</sup> the Court went on to dismiss *Iqbal*’s complaint as to the cabinet-level officials he accused of formulating and implementing discriminatory policies, because no such policies were needed to explain his injury. The Court asserted, “[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”<sup>103</sup> The Court set aside *Iqbal*’s allegations of discriminatory policy-making, noting that “the Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.”<sup>104</sup> In such a scenario, when innocent conduct can explain bad outcomes, defendants with important jobs to do should be protected not just from liability but from the discovery process.<sup>105</sup> The ruling expressly extended *Twombly* to all civil actions, and created ripple effects through the conduct of U.S. civil litigation.<sup>106</sup>

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<sup>98</sup> *United States v. Yale New Haven Hosp.*, 727 F. Supp. 784, 786 (D. Conn. 1990) (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

<sup>99</sup> *Iqbal*, 556 U.S. at 666.

<sup>100</sup> *Id.* at 669.

<sup>101</sup> *Id.* at 667 (citing Inspector General’s report online “as visited May 14, 2009,” four days before issuance of the ruling, and “available in Clerk of Court’s case file”).

<sup>102</sup> *Id.* at 682.

<sup>103</sup> *Id.*; cf. Ramzi Kassem, *Iqbal and Race: Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1474-75 (2010) (because plausibility is subjectively determined by judges often lacking minority perspective, “*Iqbal* raises the concern that Muslim and other minority plaintiffs asserting discrimination claims may fare poorly unless pleading standards are readjusted”).

<sup>104</sup> *Iqbal*, 556 U.S. at 686.

<sup>105</sup> See *Iqbal v. Hasty*, 490 F.3d 143, 152 (2d Cir. 2007) (“Qualified immunity is an immunity from suit and not just a defense to liability.” (citing *Saucier v. Katz*, 533 U.S. 194, 200 (2001))).

<sup>106</sup> See, e.g., *Doe v. Bd. of Regents*, 280 Neb. 492, 506 (Neb. 2010) (adopting *Twombly/Iqbal* standard as its own interpretation of NEB. CT. R. PLDG. § 6-1108(a)(2)). But see *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 431 (Tenn. 2011)

The procedural holdings of *Twombly* and *Iqbal* altered the ground rules for virtually all disputes in all federal courts, but they should be understood in context. The goal in each case was to protect preoccupied defendants from expensive factfinding: conspiracy theorizing should not on its own open enormous corporate file vaults or overcome qualified immunity. *Twombly* was about two corporate entities that made similar decisions, and whether there was any reason at all to suppose them collaborators. *Iqbal* was about the policymakers John Ashcroft and Robert Mueller, and whether there was any reason at all to suppose they initiated *Iqbal*'s discriminatory treatment. As the Eighth Circuit later explained, the gist of each ruling was simply that “[a]n inference pressed by the plaintiff is not plausible if the facts he points to are precisely the result one would expect from lawful conduct in which the defendant is known to have engaged.”<sup>107</sup>

In each case, the Court believed a lawful explanation, much simpler than conspiracy, was more than enough to account for the plaintiff's harm.<sup>108</sup> Corporations are by nature ruthless in competition; antiterrorism dragnets are by nature (according to the five-justice majority in *Iqbal*) liable to capture the innocent. A plaintiff's misfortune does not imply a dastardly cause. Plaintiffs who are, by the light of “judicial experience and common sense,”<sup>109</sup> clearly just victims of circumstance should not be encouraged to waste social resources trying to prove policy wrongdoing—or allowed to extract settlements with onerous discovery requests. Hence, the problem with each complaint was not really that it had disobeyed pleading rules, but that, for a majority of the Court, it disintegrated at even a touch of Occam's Razor.<sup>110</sup>

*Iqbal* and *Twombly* are true to their circuit-court roots in heightened pleading standards for conspiracy claims.<sup>111</sup> Both rulings purport to dismiss conspiracy

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(declining to apply *Iqbal* to state rules of civil procedure); Jochum, *supra* note 24, at 521-27 (arguing that Ohio should not adopt the standard).

<sup>107</sup> Braden v. Wal-Mart Stores, Inc., 588 F.3d 585, 597 (8th Cir. 2009).

<sup>108</sup> See also Swanson v. Citibank, N.A., 614 F.3d 400, 411 (7th Cir. 2010) (Posner, J., dissenting) (explaining the new pleading standard as part of the reason to uphold a dismissal: “[W]hen a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible”); cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 326 (2007) (holding that under the heightened “strong inference” pleading standards of the Private Securities Litigation Reform Act, a claim of fraudulent intent (scienter) was well pled if “a reasonable person [would] deem the inference of scienter at least as strong as any opposing inference”).

<sup>109</sup> *Iqbal*, 556 U.S. at 679 (citing *Hasty*, 490 F.3d. at 157-58).

<sup>110</sup> Occam's Razor is the principle that the simplest explanation will be the most plausible until evidence is presented to prove it false. Cf. *Iqbal*, 556 U.S. at 680 (explaining that allegation about defendants in *Twombly* was “not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior” (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007))).

<sup>111</sup> See *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (readily applying heightened *Iqbal* pleading standards, despite lack of antitrust or immunity issues, because instant case, involving plaintiff diagnosed with Munchausen syndrome by proxy, bore earmarks of “paranoid *pro se* litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy”), *cert. denied*, 2010 U.S. LEXIS 4191 (May 24, 2010).

theorizing.<sup>112</sup> To point out this policy context is not to question the decisions' precedential value. The Court certainly knew that it was altering how Federal Rule of Civil Procedure 8(a)(2) would be interpreted in every court in every case in the country.<sup>113</sup> Conspiracy theories had never been enough in conspiracy cases, and henceforth they would not be enough in any case.<sup>114</sup> After *Iqbal*, the Court knew, entitlement to relief would have be "shown," as Rule 8(a)(2) says, and not merely stated as a legal conclusion. But the shared feature of these two cases—conspiracy claims—is instructive. The Court's agenda was not simply to heighten all pleading standards, regardless of their procedural context.<sup>115</sup>

The Court said nothing in specific about altering pleading standards for statements of subject-matter jurisdiction. Nonetheless, *Twombly* and *Iqbal* would be taken by many courts to alter the interpretation of Rule 8(a)(1) as well as Rule 8(a)(2). This extension of the doctrine, almost never explained, ignores the fact that (a)(1), unlike (a)(2), requires no "showing"—only a statement of the court's jurisdiction—and the fact that jurisdiction is quite different from entitlement to relief. And the reinterpretation is doubly strange in light of the *Arbaugh* line of cases in which the Court had striven to emphasize the distinction between 12(b)(1) and 12(b)(6) contexts. Nonetheless, in part because of cross-references and habits that courts had developed for analyzing 12(b) motions, *Iqbal* is now being used to make plaintiffs' jurisdictional statements, like their conspiracy theories, into objects of skepticism.

### III. THE NATURE OF THE ERROR: JURISDICTIONAL PLEADING AND THE PLAUSIBILITY STANDARD

Considerable attention has been paid to the question of whether *Twombly* and *Iqbal* "heightened pleading standards": the purpose of a complaint, since the middle of the twentieth century, had simply been to put the defendant on notice about its alleged wrongdoing, so the defendant would know what the suit was about.<sup>116</sup>

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<sup>112</sup> See *McCauley v. City of Chicago*, No. 09-3561, 2011 U.S. App. LEXIS 21179, at \*40 (7th Cir. Oct. 20, 2011) (Hamilton, J., dissenting) (urging liberal grants of leave to amend complaints after *Iqbal*, because "[i]mplausible pleadings do harm primarily by failing to ground themselves sufficiently in reality such that defendants can know what is claimed"). The opportunity to amend a facially implausible complaint allows plaintiffs with reasonable theories of official wrongdoing to distinguish themselves from conspiracy theorists.

<sup>113</sup> See *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (bemoaning the Court's choice to "rewrite the nation's civil procedure textbooks").

<sup>114</sup> Compare *Iqbal*, 556 U.S. at 683 (noting that once theorizing was set aside, the "only factual allegation against petitioners accuses them of adopting a policy approving restrictive conditions of confinement for . . . suspected terrorists," and not of any wrongdoing), with *Collins v. Miller*, 338 F. App'x. 34, 35 (2d Cir. 2009) (summary order affirming dismissal of habeas petition that alleged due process violation, because plaintiff "has not plausibly pleaded that secret in-chambers proceedings . . . actually occurred," and because court docket showed no proceedings on date in question).

<sup>115</sup> Accord *Bone*, *supra* note 85, at 890 (placing *Twombly* in its factual context to argue that generalized "aggressive screening through stiff pleading is not what the Supreme Court intended").

<sup>116</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (reaffirming liberal "notice pleading" standard); *Leatherman v. Tarrant Cnty. Narcotics Intelligence &*

Perhaps, after *Twombly*, this was no longer the point of a complaint, and perhaps plaintiffs needed to engage in “pre-discovery” on their own to sleuth out extra facts to make their case seem substantial and “plausible” on the face of the pleadings. It is now generally understood that this interpretation is wrong.<sup>117</sup> The court must still assume that concrete facts and sensible inferences<sup>118</sup> are true.

The Court took care to forestall misunderstanding of the plausibility standard by issuing a strong reaffirmation of notice pleading just a few weeks after *Twombly*, in *Erickson v. Pardus*.<sup>119</sup> There, a prisoner’s allegations about denial of medical treatment were held to be ample even without specifics, and the Court deplored the Tenth Circuit’s “departure from the liberal pleading standards set forth by Rule 8(a)(2).”<sup>120</sup> Most courts carefully noted the juxtaposition of the two cases<sup>121</sup> and strove to understand the elusive distinction between plausibility and proof—the first now required under *Twombly*, and the second still not required.<sup>122</sup> As a result few courts require abundant detail in allegations in the 12(b)(6) context, and *Twombly* has been received as the Supreme Court intended.<sup>123</sup> In another area, however, the effects of these watershed cases were not so carefully managed.

#### A. How *Iqbal* is Misread to Alter Jurisdictional Pleading Standards

Even though they touched on matters of corporate accountability to law and of fundamental civil rights, the *Twombly* and *Iqbal* rulings hinged on their close reading of one of the clauses of Rule 8(a) of the Federal Rules of Civil Procedure. Justice Souter, in *Iqbal*, was reinterpreting only Rule 8(a)(2): the requirement of plausibility, he wrote, stemmed directly from the “the threshold requirement of Rule

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Coordination Unit, 507 U.S. 163, 168 (1993) (same). See generally Peter Julian, Note, *Charles E. Clark and Simple Pleading: Against a “Formalism of Generality,”* 104 Nw. U. L. REV. 1179 (arguing that *Twombly* and *Iqbal* are true to the doctrinal balance of rigidity and flexibility advocated by the principal architect of the Federal Rules).

<sup>117</sup> See, e.g., *Arista Records LLC v. Doe*, 604 F.3d 110, 119 (2d Cir. 2010) (rejecting the notion that “*Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, [or] declarations from the persons who collected the evidence”).

<sup>118</sup> See *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting) (explaining the ruling in *Twombly* and the level of implausibility—“claims about little green men”—that should trigger dismissal).

<sup>119</sup> *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting FED. R. CIV. P. 8(a)(2)).

<sup>120</sup> *Id.* at 94.

<sup>121</sup> See Jochum, *supra* note 24, at 509-10 (proposing that the Court in *Erickson* “wished to strategically reinforce that notice pleading under *Conley* had not been eliminated”).

<sup>122</sup> See also *Hamilton v. Palm*, 621 F.3d 816, 818 (8th Cir. 2010) (following *Arbaugh*, albeit without citing it, to consider under 12(b)(6) “how the general principles of *Twombly* and *Iqbal* apply to the pleading of . . . whether a party was an employee,” and holding the allegation of employee status sufficient).

<sup>123</sup> See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (finding that through August 2009 “the rate at which [12(b)(6)] motions were granted increased from *Conley* to *Twombly* to *Iqbal*, although grants with leave to amend accounted for much of the increase”).

8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’<sup>124</sup> In like fashion, Justice Kennedy held in *Iqbal* that when a complaint offers only legal conclusions, with the defendant’s name inserted, “the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”<sup>125</sup> Both justices emphasize that 8(a)(2) requires some factual predicate, to enable the complaint to “show” the basis for relief. But Rule 8(a)(1), unlike Rule 8(a)(2), does not require such a “showing”—only a “clear and plain *statement* of the grounds for the court’s jurisdiction.”<sup>126</sup> On the face of the law, then, *Twombly* and *Iqbal* do not apply to jurisdictional challenges under Rule 12(b)(1).<sup>127</sup>

Both rulings ground their analysis in Rule 8(a)(2), and Justice Souter, in *Twombly*, was careful to limit the effect of the opinion’s reasoning to Rule 12(b)(6): the issue was narrowly whether a *claim had been stated* against Bell Atlantic. In *Iqbal*, however, Justice Kennedy in one place omitted the key qualifier: “To survive a motion to dismiss [*sic*], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.”<sup>128</sup> These words were quoted by federal courts 1,853 times in 2010 alone, and 2,475 times in

<sup>124</sup> Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (quoting FED. R. CIV. P. 8(a)(2)).

<sup>125</sup> Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (quoting FED. R. CIV. P. 8(a)(2)).

<sup>126</sup> FED. R. CIV. P. 8(a)(1) (emphasis added).

<sup>127</sup> *But see* FED. R. CIV. P. 9(a)(1) (“Except when required to *show that the court has jurisdiction*, a pleading need not allege a party’s capacity to sue or be sued; a party’s authority to sue or be sued in a representative capacity; or the legal existence of an organized association of persons that is made a party.”) (emphasis added). Although it contains the word “show,” Rule 9(a)(1) has been construed to mean simply that in the narrow class of cases in which jurisdiction is implicated by the “capacity” in which parties appear, plaintiffs must state the proper role for each party in the litigation. *See* Wells v. Brown, 891 F.2d 591, 594 (6th Cir. 1989) (dismissing suit because complaint failed to specify that it was against state official “in personal capacity,” to satisfy the jurisdictional requirement of 42 U.S.C. § 1983), *overruled*, Moore v. City of Harriman, 272 F.3d 769, 774 (6th Cir. 2001) (en banc) (capacity can be determined from any part of the course of proceedings that puts the defendant on notice, and even a response to a motion to dismiss can “clarify any remaining ambiguity”).

The requirement to state each party’s capacity is enforced only loosely; indeed, the Supreme Court brushed the issue aside even in a case in which subject-matter jurisdiction was in question and the complaint was defective. *Compare* Hafer v. Melo, 502 U.S. 21, 24 (1991) (“Because this issue is not properly before us, we simply reiterate the Third Circuit’s view that it is obviously preferable for the plaintiff to be specific in the first instance to avoid any ambiguity.”) (internal quotation marks omitted), *with* Kontrick v. Ryan, 540 U.S. 443, 455 (2004) (Supreme Court should raise *sua sponte* any possible deficiency in subject-matter jurisdiction (quoting Mansfield, C. & L. M. R. Co. v. Swan, 111 U.S. 379, 382 (1884))). Nonetheless, on the face of the Rules it is arguable that *Iqbal* should apply in such cases. *See, e.g.*, Local 153 Health Fund v. Express Scripts, Inc., No. 4:05-cv-00862, 2007 U.S. Dist. LEXIS 90470, at \*27 (E.D. Mo. Dec. 7, 2007) (six months after *Twombly*, threatening to dismiss ERISA action for lack of jurisdiction in light of Rule 9(a)(1) because “aside from the unsubstantiated statement that Plaintiff is a trustee, Plaintiff’s complaint does not allege any facts to establish its status as a fiduciary” to satisfy jurisdictional requirement of 29 U.S.C. § 1132(a)—but granting two weeks to amend the complaint and add a fiduciary party).

<sup>128</sup> *Iqbal*, 556 U.S. at 678 (internal quotations and citation omitted).

2011.<sup>129</sup> Although the sentence includes the phrase “state a claim,” its first phrase seems to suggest that it should apply to any motion to dismiss. Courts have not been slow to read it that way. Indeed the sentence has often been quoted in contexts unrelated to the adequacy of the pleadings under Rules 8(a)(2) and 12(b)(6).<sup>130</sup> Only a few highly attentive courts have properly doctored the sentence’s opening phrase to make it precise.<sup>131</sup>

Even without this misleading sentence, lower federal courts were highly likely to apply *Iqbal* in the context of 12(b)(1) motions, because over the years many courts had gotten used to invoking 8(a)(2) standards to define 8(a)(1) standards. This equation made sense, despite the teaching of *Bell*, because the mechanical requirements and assumptions in handling facts for the two motions were the same. The assertion was embedded in the boilerplate language of countless federal courts: “The standards applied to a [facial] Rule 12(b)(1) motion to dismiss are the same as those that apply to a Rule 12(b)(6) motion to dismiss for failure to state a claim.”<sup>132</sup> This statement—though it appears in various forms in countless binding circuit precedents—is no longer true.

*Twombly* and *Iqbal* created a split between the threshold for factual grounding for a well-stated claim under Rule 8(a)(2) and the (unchanged) threshold for a

<sup>129</sup> Lexis search of federal-court rulings for first thirteen words of quoted language (search conducted Jan. 10, 2012).

<sup>130</sup> In fact this sentence has been cited in virtually every conceivable Rule 12 context. *See* Cisco Sys. v. United States, No. 04-135, 2011 Ct. Intl. Trade LEXIS 141, at \*\*5 (Ct. Intl. Trade Nov. 18, 2011) (quoting the sentence in a judgment on the pleadings for lack of jurisdiction, Rules 12(c) and 8(a)(1)); *White v. Green*, 382 F. App’x 199, 201 (3d Cir. 2010) (per curiam) (quoting the sentence in affirming grant of motion to dismiss for insufficient service of process, Rule 12(b)(5)); *Alperin v. Vatican Bank*, 360 Fed. App’x 847, 849 (9th Cir. 2009) (in affirming dismissal due to the jurisdictional bar of the Foreign Sovereign Immunity Act, Rule 12(b)(1)); *Vivendi SA v. T-Mobile USA, Inc.*, 586 F.3d 689, 694 (9th Cir. 2009) (in affirming dismissal on grounds of *forum non conveniens*, Rule 12(b)(3)); *Kaplan v. Evans*, No. 4:11-CV-00153, 2011 U.S. Dist. LEXIS 147227, at \*2 (E.D. Mo. Dec. 22, 2011) (in dismissing RICO claims for failure to allege fraud with particularity under the special pleading requirements of Rule 9(b), Rule 12(b)(6)); *see also* *Acute Care Specialists II, Ltd. v. United States*, No. 11-C-465, 2011 U.S. Dist. LEXIS 144155, at \*13 (N.D. Ill. Dec. 14, 2011) (applying *Iqbal* in evaluating status of parties to determine that the court “lacks subject matter jurisdiction” due to jurisdictional requirements for tax claims, Rule 12(b)(1)); *Risktimetry Analytics, LLC v. Altaira, LLC*, 752 F. Supp. 2d 141, 142 (D. Mass. 2010) (applying *Iqbal* in considering motion to dismiss for lack of personal jurisdiction, Rule 12(b)(2)).

<sup>131</sup> *See, e.g.*, *Fournerat v. Wis. Law Review*, 420 F. App’x 816, 819 (10th Cir. 2011) (“To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter . . .” (brackets in original) (quoting *Iqbal*, 556 U.S. at 678)); *Van Tassel v. Lawrence Cnty. Domestic Relations Section*, 659 F. Supp. 2d 672, 687 (W.D. Pa. 2009) (same).

<sup>132</sup> *E.g.*, *Bishop v. Crawford*, No. 1:11-CV-11, 2011 U.S. Dist. LEXIS 137227, at \*4-5 (E.D. Mo. Nov. 30, 2011) (citing *Vankempen v. McDonnell Douglas Corp.*, 923 F. Supp. 146, 147 (E.D. Mo. 1996) (in turn citing *Satz v. ITT Fin. Corp.*, 619 F.2d 738, 742 (8th Cir. 1980)); *see also, e.g.*, *Tucker v. Am. Int’l Grp.*, 745 F. Supp. 2d 53, 57 (D. Conn. 2010) (“The standards for dismissal under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) are ‘substantively identical.’”) (quoting *Kroposki v. Fed. Aviation Admin.*, No. 08-CV-01519, 2009 U.S. Dist. LEXIS 76084, at \*3 (D. Conn. Aug. 26, 2009) (in turn citing *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 138 (2d Cir. 2003))).

statement of jurisdiction under Rule 8(a)(1).<sup>133</sup> In the context of a challenge to the legal (i.e., facial) adequacy of a jurisdictional statement, the Federal Rules continue to require, as before, total deference to the facts as alleged in the complaint.<sup>134</sup> Erroneously, though, lower courts have taken to applying the “plausibility” standard to such facts.

*B. Plausibility Standards Are Unnecessary for the 12(b)(1) Motion*

The facial 12(b)(1) ruling traditionally required total credulity of the judge in reading the complaint’s facts; in this it always resembled the 12(b)(6) ruling. Now, though, judges must require the complaint in 12(b)(6) analyses to be plausible. It might seem sensible to require the same in evaluating jurisdiction. It might be argued, indeed, that total deference to plaintiff’s version of the facts is less, not more, appropriate when jurisdiction is at stake. After all, a court that wrongly assumes jurisdiction over a case commits a more significant error than one that allows discovery in a lawsuit of dubious substantive merit. But standard procedural doctrine already allows a defendant—or a court itself—to contest the factual predicate of the basis for jurisdiction, and to call for discovery on that issue alone, as a question of fact.<sup>135</sup>

Courts have, indeed, consistently recognized that there are two kinds of 12(b)(1) motions to dismiss: the “facial” and the “factual” challenges.<sup>136</sup> A plaintiff has always been given the benefit of any factual doubt in the former case, when a 12(b)(1) motion challenges the plaintiff’s legal understanding of the situation. In the latter case, however, when the truth of the predicate facts is questioned, the court resolves the factual dispute, calling for a limited form of discovery, and satisfies

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<sup>133</sup> See Shepherd, *supra* note 8, at 2329-30 (“Although a Rule 12(b)(1) facial attack and a Rule 12(b)(6) challenge to the claim have similar procedural requirements, this similarity does not dictate the wholesale importation of the Rule 12(b)(6) standard into the Rule 12(b)(1) context.”). *But cf.* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 569 (2010) (arguing in favor of “extending the plausibility standard to include jurisdictional facts under Rule 8(a)(1) and then applying that standard to motions to dismiss for lack of jurisdiction under Rule 12(b)(1) or 12(b)(2)”).

<sup>134</sup> This deference does not excuse plaintiffs from stating a prima facie case for personal and subject-matter jurisdiction. *See, e.g.*, RSM Prod. Corp. v. Fridman, 643 F. Supp. 2d 382, 402 (S.D.N.Y. 2009) (“Plaintiffs’ ‘expectation’ that discovery will uncover additional evidence of Browne’s general contacts with New York as well as of Browne’s New York-based acts with respect to the alleged conspiracy, is, in fact, an ‘unfounded fishing expedition,’ and does not adequately support its request for jurisdictional discovery.” (citations omitted)); *see also id.* at 393-94 (distinguishing standards of review for jurisdictional challenges from *Twombly* standard for 12(b)(6) motion).

<sup>135</sup> *See, e.g.*, LeBlanc v. Cleveland, 198 F.3d 353, 356 (2d Cir. 1999) (“[W]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings.”).

<sup>136</sup> *See, e.g.*, Ohio Nat’l Life Ins. Co. v. United States, 922 F.2d 320, 325 (6th Cir. 1990) (explaining the two types of 12(b)(1) motions); Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir. 1981) (“The district court . . . has the power to dismiss for lack of subject matter jurisdiction on any one of three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court’s resolution of disputed facts.” (emphasis added)).

itself that the realities of the situation actually create jurisdiction.<sup>137</sup> With notable exceptions,<sup>138</sup> *Iqbal* has not altered courts' approach to classic factual challenges to jurisdiction.

The facial 12(b)(1) challenge, like the traditional 12(b)(6) challenge, simply calls into question the adequacy of the pleadings. It is this challenge that has traditionally been described as affording the plaintiff the same procedural safeguards as the 12(b)(6) motion. Using that old description, many courts since *Iqbal* have begun applying its reinterpreted 12(b)(6) standard to facial jurisdiction challenges. Such application defies the teaching of *Bell* and *Arbaugh* that Rules 8(a)(1) and 8(a)(2) serve different purposes and set different kinds of requirements. At some point it will become necessary for the Court to prevent further erosion in lower courts' handling of the doctrine by clarifying that *Iqbal* does not apply to the 12(b)(1) motion. The error is both an effect and a cause of a threatened erosion of the jurisdiction/merits doctrine in lower courts. When this erosion began, improved understanding of that doctrine had continued to filter into the lower courts since *Arbaugh*.<sup>139</sup> More importantly, however, the same doctrine has been followed through at the Supreme Court level.

*C. Iqbal Did Not Alter the Supreme Court's Insistence on Leniency in Deciding Subject-Matter Jurisdiction*

Since jurisdictional and merits issues are sometimes intertwined, it might be questioned whether application of *Iqbal* to 12(b)(1) motions is in fact an error at all.<sup>140</sup> It is certainly possible, despite the focus on Rule 8(a)(2) in *Twombly*, that in 2007 and 2009 the Supreme Court in fact intended to make subject-matter jurisdiction harder to establish under Rule 8(a)(1), hence mandating reading of complaints that are generally more skeptical.<sup>141</sup> This would mean that *Iqbal* should

<sup>137</sup> See generally Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 975 (describing and justifying "a lower standard of proof [that] prevails for jurisdictional purposes" on any question of fact that overlaps merits and jurisdiction). See also Strong, *supra* note 133, 497-508, 523-33.

<sup>138</sup> See discussion of *Animal Sci. Prods.*, *infra* note 174-78 and accompanying text.

<sup>139</sup> See, e.g., *Ayyash v. Bank Al-Madina*, No. 04-cv-9201, 2006 U.S. Dist. LEXIS 9677, at \*11 n.2 (S.D.N.Y. Mar. 9, 2006) (noting "significant consequences" that can result from the error in categorization, and remarking that "the Supreme Court's decision in *Arbaugh* may require that the Court of Appeals review its treatment of the question of RICO's extraterritorial effect"); *id.* at \*19 (ordering jurisdictional discovery). For an admirably precise and succinct statement of the correct standards for jurisdictional challenges after *Iqbal*, see *Arocho v. Nafzinger*, No. 07-cv-02603, 2009 U.S. Dist. LEXIS 11673, at \*4-5 (D. Colo. Jan. 14, 2009) (personal jurisdiction analysis should have included official acts), *rev'd on other grounds*, 367 F. App'x 942, 948-49.

<sup>140</sup> Cf. Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 630 (applying the "insights of *Twombly* . . . to the vexing problem of personal jurisdiction," Rule 12(b)(2)).

<sup>141</sup> See also *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 608 F.3d 871, 882 (D.C. Cir. 2010) (applying *Iqbal* to the amendment of a complaint, to determine whether its allegations should be allowed to "relate back" under Fed. R. Civ. P. Rule 15(c)), *cert. denied sub nom. Bill Harbert Int'l Constr., Inc. v. United States*, 131 S. Ct. 2443, 2443 (2011); *Junk v. Terminix Int'l Co., Ltd. P'ship.*, 628 F.3d 439, 445 (8th Cir. 2010) (determining that the *Iqbal* standard should not be applied to determinations of fraudulent joinder under Fed. R.

in fact be read to encourage courts to grant 12(b)(1) as well as 12(b)(6) motions. A landmark case from 2010, however, reaffirmed the two key holdings of the *Arbaugh* line of cases: that jurisdiction and merits are very different things, and that jurisdiction should be accepted regardless of the quality of the complaint's non-frivolous factual allegations.

The issue in *Morrison v. Nat'l Austl. Bank Ltd.* was whether U.S. securities fraud laws applied to foreign conduct by a foreign-owned company. The plaintiffs were foreign investors, but they claimed the fraud had been carried out by acts within the United States.<sup>142</sup> In a factual challenge under Rule 12(b)(1), the defendants had contended that there was not enough U.S. subject matter to invoke the court's jurisdiction.<sup>143</sup> The appeals court had followed the Second Circuit's well-respected jurisprudence on securities fraud issues, and accordingly dismissed the case for lack of subject-matter jurisdiction.<sup>144</sup> The Supreme Court, in a straightforward first section to its ruling, corrected this "threshold" procedural error and added *Morrison* to the line of cases reversing deplorable "drive-by jurisdictional rulings."<sup>145</sup> Justice Scalia explained that jurisdiction should not have been the issue: "to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question."<sup>146</sup> This meant that the analysis should have been conducted under Rule 12(b)(6), requiring the plaintiffs to allege enough facts to invoke the securities-fraud laws.<sup>147</sup> The complaint was factually adequate, but the Court interpreted the statute to hold that it did not apply in such cases, and hence dismissed the case for failure "to state a claim on which relief can be granted."<sup>148</sup> As in the pre-*Iqbal* line of cases, therefore, the Court was at pains to emphasize the distinct nature of the two key

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Civ. Proc. Rule 20), *cert. denied sub nom.* *Breneman v. Junk*, 132 S. Ct. 95, 95 (2011); Nathan Leber, *Solving a Pleading Plague: Why Federal Courts Should Strike Insufficient Affirmative Defenses Under the Twombly-Iqbal Plausibility Standard*, 61 CLEV. ST. L. REV. (forthcoming 2013).

<sup>142</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2876 (2010).

<sup>143</sup> See *In re Nat'l Austl. Bank Sec. Litig.*, No. 03-Civ.-6537, 2006 U.S. Dist. LEXIS 94162, at \*9 (S.D.N.Y. Oct. 25, 2006) (district court specifying that challenge was factual and that the court could consider matters outside the pleadings).

<sup>144</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 173 (2d Cir. 2008) (analyzing jurisdiction under the "'conduct test': identify which action or actions constituted the fraud and directly caused harm . . . and then determine if that act or those actions emanated from the United States" (citing *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975)); cf. *Romero v. Int'l Terminal Oper. Co.*, 358 U.S. 354, 393-94 (1959) (holding extraterritorial reach of statute a question of statutory interpretation, and not of the Court's jurisdiction); *Lauritzen v. Larsen*, 345 U.S. 571, 577-79 (1953) (same)).

<sup>145</sup> See Elizabeth Cosenza, *Paradise Lost: § 10(b) after Morrison v. National Australia Bank*, 11 CHI. J. INT'L L. 343, 368 (2011) ("[T]he distinction between subject matter jurisdiction and the ingredient of the claim is among the reasons the Supreme Court granted certiorari in the National Australia Bank case.").

<sup>146</sup> *Morrison*, 130 S. Ct. at 2877.

<sup>147</sup> Cf. *Castiglione v. Papa*, 423 F. App'x 10, 12 (2d Cir. 2011) (wrongly identifying *Morrison* as "involving a 12(b)(1) motion" and then incorporating *Iqbal* plausibility requirements into the description of the standard of review for such motions).

<sup>148</sup> *Morrison*, 130 S. Ct. at 2888 (invoking Fed. R. Civ. P. 12(b)(6)).

constituents of the complaint—jurisdiction on the one hand, and adequacy of the claim on the other. *Morrison* was a resounding reaffirmation of *Arbaugh*, and a clear signal from the court, again, that 12(b)(1) motions deal with different types of question from 12(b)(6) motions. As *Morrison* shows, the Court has held steadily after *Iqbal* to the reasoning of *Arbaugh*.<sup>149</sup> In many cases, too, lower courts continue to follow this lead.<sup>150</sup> *Morrison*, and the other cases distinguishing merits from

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<sup>149</sup> See also *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011) (“Because the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of this term.”); *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1244 (2010) (“Our recent cases evince a marked desire to curtail such ‘drive-by jurisdictional rulings,’ which too easily can miss the ‘critical difference[s]’ between true jurisdictional conditions and nonjurisdictional limitations on causes of action.” (citation omitted) (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998), and *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004))).

The court’s zeal for preventing drive-by jurisdictional rulings has reached a fever pitch: In 2012, the Court interposed a footnote in the landmark case confirming the existence of a “ministerial exception” preventing certain employment-discrimination claims against religious organizations. *Hosanna-Tabor Evang. Lutheran Church & Sch. v. Equal Emp’t Opportunity Comm’n*, 132 S. Ct. 694, 714 n.4 (2012). The footnote resolved a “conflict [that] has arisen in the Courts of Appeals over whether the ministerial exception is a jurisdictional bar or a defense on the merits . . . . We conclude that the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar.” *Id.* (citing *Morrison*, 130 S. Ct. 2869 at 2877); accord Howard M. Wasserman, *Prescriptive Jurisdiction, Adjudicative Jurisdiction, and the Ministerial Exemption*, 160 U. PA. L. REV. PENNUMBRA 287, 295 (2012), available at <http://www.pennumbra.com/essays/02-2012/Wasserman.pdf> (seeking to “unpack why the exemption is, in fact, a merits doctrine”). *Contra* Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject-Matter Jurisdiction, and the Freedom of the Church*, 17 WM. & MARY BILL RTS. J. 43, 69-81 (distinguishing *Arbaugh* and arguing that the bar should be jurisdictional, because the Constitution’s constraints on court power—not the statute—place decisions about ministerial employment “beyond the reach of the law” (citing *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1171 (4th Cir. 1985))).

This result suggests that fact-intensive ministerial-exception inquiries will now probably be handled in the summary-judgment context, since unlike in factual 12(b)(1) challenges, 12(b)(6) procedures constrain courts from looking outside the complaint. To reach that stage, plaintiffs will need to satisfy *Iqbal* by pleading facts in the complaint plausibly showing their non-ministerial status.

The Court’s explanation in *Hosanna-Tabor* was perplexing, since it should have been true regardless of whether 12(b)(1) or 12(b)(6) was implicated: “District courts have power . . . to decide whether the claim can proceed or is instead barred by the ministerial exception.” *Hosanna-Tabor*, 132 S. Ct. at 714 n.4. This observation does not eliminate the possibility of a jurisdictional bar, since it is axiomatic that any court has the power to decide in the first instance whether it has jurisdiction or not.

<sup>150</sup> See, e.g., *Jahn v. Fed. Deposit Ins. Corp.*, No. 10-1364, 2011 U.S. Dist. LEXIS 144412, at \*31 (D.D.C. Dec. 15, 2011) (dismissing inadequately stated claim under *Iqbal* standard, and separately dismissing under traditional “notice pleading” standard claims barred for lack of subject-matter jurisdiction due to failure to exhaust administrative remedies); *Pittsburgh Mack Sales & Serv., Inc. v. Int’l Union of Operating Eng’rs*, 580 F.3d 185, 189 (3d Cir. 2009) (“the existence of a union contract is not a jurisdictional requirement” under the Labor Management Relations Act).

jurisdictional determinations, suggest that the plaintiff confronted with a facial 12(b)(1) motion has kept all those safeguards, even though *Iqbal* now denies them to a plaintiff confronting a 12(b)(6) motion.

After *Iqbal*, then, a challenge to the facts in a complaint can be correctly adjudicated in one of three ways. Consider the crude hypothetical of a cruise-ship passenger alleging in federal court that he suffered emotional distress intentionally inflicted by a crew-member's actions while officiating a shuffleboard game in American territorial waters. The defendant may move for dismissal on the basis that tort law is preempted on cruise ships by a Congressionally mandated regime of shuffleboard-dispute arbitration: this would be a facial 12(b)(1) challenge, and despite *Iqbal* no plausibility in the factual pleadings is required. The defendant might, however, contend that the story told in the complaint is far more plausibly explained by unintentional conduct, and that the lawsuit fails to achieve plausibility as a matter of law. This argument would call for analysis of the complaint under the *Iqbal* standard, taking the plaintiff's version of events as true but ignoring conclusory legal assertions.<sup>151</sup> Or yet again, the defendant may argue that the ship was several miles farther out to sea than the plaintiff claims, and that as a *factual* matter, the court lacks jurisdiction.<sup>152</sup> In this latter case, a factual 12(b)(1) challenge, the court would require discovery to be taken on the factual question of the ship's location, and accord no presumption of truth to the plaintiff's allegations about latitude and longitude. This three-tiered scheme serves the two distinct rationales of the jurisdiction and merits dismissal motions, while also retaining the principle that the court must satisfy itself as to its jurisdiction if predicate facts are disputed.

A typical appearance of the *Iqbal* 12(b)(1) error, harmless in its context, occurs in a Tenth Circuit ruling on Eleventh Amendment sovereign immunity in 2010: the issue, in light of the constitutional constraint on federal courts' jurisdiction over state governments, was whether the Oklahoma Tax Commission and its officials could be sued. Their defense of sovereign immunity (unlike the qualified immunity at issue in *Iqbal*) called into question the court's subject-matter jurisdiction—its power to hear the case. The court, as many decades of precedent suggested, noted that since the challenge was a facial, not a factual one, “we apply the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action.”<sup>153</sup> As it happened, it did not need to do so: the plaintiffs'

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<sup>151</sup> See, e.g., *Lobegeiger v. Celebrity Cruises, Inc.*, No. 11-21620, 2011 U.S. Dist. LEXIS 93933, at \*55 (S.D. Fla. Aug. 23, 2011) (applying *Iqbal* in tort suit under admiralty law, and dismissing claim for gross negligence because “the Complaint does not contain any factual allegations indicating Anderson Teak was aware the Brianna Sun Lounger presented an increased risk of injury”).

<sup>152</sup> *But see* *Friedman v. Cunard Line Ltd.*, 996 F. Supp. 303, 307 (S.D.N.Y. 1998) (holding that admiralty jurisdiction, and federal common law, are available on the high seas as long as there is a nexus with U.S. maritime commerce (citing *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864-65 (1986)); *Coastal Fuels Mktg., Inc. v. Fla. Express Shipping Co.*, 207 F.3d 1247, 1251 (11th Cir. 2000) (“[W]hen neither statutory nor judicially created maritime principles provide an answer to a specific legal question, courts may apply state law provided that the application of state law does not frustrate national interests in having uniformity in admiralty law.”).

<sup>153</sup> *Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010); *accord* *Waters v. Fed. Bureau of Investigation*, No. 11-cv-17, 2011 U.S. Dist. LEXIS 44972, at \*2-3 (S.D. Ohio Apr. 26, 2011) (in facial 12(b)(1) motion to dismiss based on sovereign

theories about overcoming sovereign immunity were legally inadequate rather than implausible.<sup>154</sup> Later, though, citing *Iqbal*, the opinion concluded on a 12(b)(6) issue that the tribe had failed to state a “plausible” claim.<sup>155</sup> It would be easy for a lower court reading the opinion to deduce that insufficiently pled factual allegations as to jurisdiction should be governed by *Iqbal*.

By contrast, a Colorado court in 2011 was careful in deciding a sovereign-immunity issue to distinguish between subject-matter jurisdiction *over* the case and the legal sufficiency *of* the case.<sup>156</sup> The court declined to apply *Iqbal*:

Defendants explain that their motion to dismiss contends that Plaintiff has failed to plausibly plead his claims, and they argue that they are entitled to sovereign immunity from claims that are not plausibly pled . . . Defendants confuse the information that Plaintiff must plead [under Rule 8(a)(1)] to establish their waiver of sovereign immunity with respect to the type of claims he is asserting with the information that Plaintiff must plead [under Rule 8(a)(2)] to establish that his specific claims are facially plausible.<sup>157</sup>

The first kind of “pleading information” is relevant to 12(b)(1) motions, the second to 12(b)(6) motions. Treating these types of factual allegations in the same way, the court explained, would entangle jurisdictional questions with the substantive plausibility analysis: “The fact that Defendants believe that Plaintiff’s claims are facially implausible does not implicate the doctrine of sovereign immunity or the Court’s jurisdiction over the claims.”<sup>158</sup> This opinion’s echoes of *Bell v. Hood* and *Steel Company* show that this reasoning is in line with longstanding Supreme Court precedent on the generous standard for statements of jurisdiction, and the fact that that determination is distinct from the standard for statement of an adequate claim.<sup>159</sup> Those cases teach that courts should not automatically apply *Iqbal* to issues of subject-matter jurisdiction.

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immunity, “the Court applies the same standard applicable to Rule 12(b)(6) motions” (citing *Ohio Nat’l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

<sup>154</sup> *Muscogee*, 611 F.3d at 1232 (holding Eleventh Amendment jurisdictional analysis for a suit against state officials requires only a “straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective” rather than plausibility) (quoting *Verizon Md. Inc. v. Pub. Serv. Comm’n*, 535 U.S. 635, 645 (2002)).

<sup>155</sup> *Id.* at 1237 (specifying allegations that would have made the complaint adequate).

<sup>156</sup> *Sattar v. Holder*, No. 07-cv-02698, 2011 U.S. Dist. LEXIS 63623, at \*5-6 (D. Colo. June 16, 2011) (refusing to dismiss facially implausible claim for lack of subject-matter jurisdiction).

<sup>157</sup> *Id.* at \*2-6 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)).

<sup>158</sup> *Id.* at \*7; *cf.* *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) (“[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts’ statutory or constitutional power to adjudicate the case.”).

<sup>159</sup> *Compare Sattar*, 2011 U.S. Dist. LEXIS 63623, at \*7 (“[I]t is not improper for the Court to determine at the outset of a case that it has subject-matter jurisdiction over a claim that appears very likely to fail on its merits.”), *with Bell v. Hood*, 327 U.S. 678, 682 (1946)

*D. Plausibility Standards are Unnecessary for the Facial 12(b)(1) Motion*

The approach taken by the *Sattar* court, distinguishing *Iqbal* contexts from jurisdictional contexts, was adopted by the Ninth Circuit in September, 2011, in *Maya v. Centex Corp.* Addressing a question about a plaintiff's standing, the circuit court rejected the defendant's attempt to apply plausibility analysis: "[rather than standing,] *Twombly* and *Iqbal* deal with a fundamentally different issue."<sup>160</sup> The plaintiff's standing truly implicates jurisdiction, the court's power to hear a case, because if the action proceeds when it is lacking, the court oversteps the constitutional requirement to address true controversies only.<sup>161</sup> Standing therefore should be addressed under Rule 12(b)(1). Hence, in *Maya*, the district court had erred by addressing standing under Rule 12(b)(6)—and, accordingly, it had erred by applying *Iqbal*. The court of appeals explained:

*Twombly* and *Iqbal* are ill-suited to application in the constitutional standing context because in determining whether plaintiff states a claim under 12(b)(6), the court necessarily assesses the merits of plaintiff's case. But the threshold question of whether plaintiff has standing (and the court has jurisdiction) is distinct from the merits of his claim.<sup>162</sup>

This admirable clarity on standing doctrine and civil procedure exemplifies a court that has learned the teaching of *Arbaugh* and its associated cases.

The *Maya* circuit-court holding did not mean that the trial court should have ignored the defendants' challenge to the facts establishing plaintiffs' standing, and simply assumed all the allegations were true. In fact, as a result of the error, the trial court had "unnecessarily limited the scope of its review." Since the challenge was to jurisdictional facts, the judge should not have relied on the complaint's allegations, but should have called for evidence to satisfy herself of the court's jurisdiction.<sup>163</sup> In scrutinizing the complaint only, then dismissing the case with prejudice, the judge had used *Iqbal* not to reject the sufficiency of the claim, but to deploy the wrong procedure and divest the court of power to resolve it.

The approach to jurisdictional challenges after *Iqbal* taken by the Ninth Circuit in *Maya* sets up a circuit split with the Eighth Circuit. As discussed below, boilerplate in the Eighth Circuit establishes that subject-matter jurisdiction challenges are

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("[J]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.").

<sup>160</sup> *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011).

<sup>161</sup> See *Muskrat v. United States*, 219 U.S. 346, 361-62 (1911) (if the court were to rule on a law's constitutionality outside the context of deciding the rights of the litigants in justiciable controversies then "in a legal sense the judgment could not be executed").

<sup>162</sup> *Maya*, 658 F.3d at 1068 (citing *Bell*, 327 U.S. at 682).

<sup>163</sup> As explained *supra*, notes 135-36 and accompanying text, a factual challenge to jurisdiction places the burden on the plaintiff, and frees the court from analyzing the complaint alone. See *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983) ("The plaintiff must *show* that he has 'sustained or is immediately in danger of sustaining some direct injury' as a result of the [defendant's] conduct. . . ." (emphasis added)). A facial challenge should lead to lenient reading of the complaint, but applying *Iqbal* instead confines the court to scrutinizing the complaint while requiring a plausible showing jurisdictional facts.

addressed under the *Iqbal* and *Twombly* plausibility standard.<sup>164</sup> As a result, a panel of the Eighth Circuit in a 2009 case, *Zanders v. Swanson*, addressed the threshold question of standing under this standard.<sup>165</sup> The issue was whether the plaintiffs could challenge a law under which they feared prosecution; they claimed that this fear chilled their free speech. The requirement in such cases was that the fear of prosecution be “objectively reasonable,”<sup>166</sup> and the court held that in this case it was not. In reaching the determination that the asserted chill was based on a fear that was “too speculative,” the court deployed *Twombly*’s requirement of plausibility, applying it this time not to a conspiracy theory but to a future possibility: “It is too speculative for standing purposes to allege that this statute *could* be manipulated or that the police *might* misuse the criminal justice system for retaliatory purposes . . . . Plaintiffs have thus not ‘nudged their claims across the line from conceivable to plausible.’”<sup>167</sup> It is unclear, given the interplay of “reasonable” and “plausible” in this opinion, whether its holding could have been reached without the rhetoric of *Twombly* and the erroneous application of its heightened standard.<sup>168</sup>

The *Arbaugh* line of cases, with their purposeful clarity on doctrine, demolish the *Zanders* court’s premise that a jurisdictional evaluation should be conducted in the same way as an evaluation of a claim’s legal merits. *Zanders*, indeed, typifies the emergence of a new kind of “drive-by jurisdictional ruling.” In such a ruling, a

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<sup>164</sup> See Part V *infra*.

<sup>165</sup> *Zanders v. Swanson*, 573 F.3d 591 (8th Cir. 2009).

<sup>166</sup> *Id.* at 594 (citing *Republican Party of Minn. v. Klobuchar*, 381 F.3d 785, 792 (8th Cir. 2004)). *Zanders* addressed Article III standing, which implicates subject-matter jurisdiction; see further discussion *infra* at Part V.A. So-called prudential standing raises different questions. Unlike Article III standing, prudential standing does not implicate the existence of subject-matter jurisdiction, only the court’s willingness to exercise it. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004); see, e.g., *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011) (“Unlike a dismissal for lack of constitutional standing, which should be granted under Rule 12(b)(1), a dismissal for lack of prudential or statutory standing is properly granted under Rule 12(b)(6).”). It is appropriately addressed under *Iqbal* standards. See, e.g., *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 92 (2d Cir. 2009) (in section on prudential standing, rejecting defendant’s *de minimis* harm argument because “we need only consider whether the complaint alleges a *plausible* claim that the regulation violates the Commerce Clause” (emphasis added) (citing *Ashcroft v. Iqbal*, 566 U.S. 662, 678-769 (2009))).

<sup>167</sup> *Zanders*, 573 F.3d at 594 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)). Notably, the court reached this conclusion despite the fact that one of the plaintiffs actually claimed she had herself been charged under the challenged statute, for purposes that were at least implicitly improper. Her individual case was dismissed not because it involved a conspiracy theory, but under an abstention doctrine because she was still involved in state court proceedings.

<sup>168</sup> See also *Novak v. Ind. Family & Soc. Servs. Admin.*, No. 1-10-cv-0677, 2011 U.S. Dist. LEXIS 34249, at \*3 (S.D. Ind. Mar. 30, 2011) (not distinguishing between facial and factual jurisdictional challenges in stating that “surviving a Rule 12(b)(1) motion to dismiss is more difficult” than satisfying the *Twombly/Iqbal* standard (citing *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) (factual challenge to subject matter jurisdiction)); *id.* at \*11-12 (referring to what “appears to be alleged” in the complaint, rather than investigating the factual predicate of eligibility, to determine whether plaintiffs were eligible for Medicaid at the right time to establish injury, standing, and therefore jurisdiction).

federal court finds that an inadequately “plausible” pleading under the *Iqbal* standard divests the court of power to hear the case, even though longstanding precedent, undisturbed by *Iqbal*, allows for jurisdictional discovery to establish the predicate facts. Like the “drive-by rulings” deplored by the Supreme Court in no uncertain terms,<sup>169</sup> these decisions result when the doctrines of jurisdiction and legal sufficiency are muddled, and they exacerbate that confusion. In these increasingly common rulings, courts unjustifiably apply to all components of a complaint the skepticism that *Twombly* and *Iqbal* encouraged for the treatment of conspiracy allegations.<sup>170</sup>

The approach taken in *Zanders* is contradicted not just by the Ninth Circuit, but also by other law of the Eighth Circuit. In another case involving standing, a different panel of the Eighth Circuit clearly applied separate standards for standing and legal merits:

Whether Braden may pursue claims on behalf of the Plan at all is a question of constitutional standing [i.e., subject-matter jurisdiction] which turns on his personal injury. Whether relief may be had for a certain period of time *is a separate question*, and its answer turns on the cause of action Braden asserts.<sup>171</sup>

After correctly clarifying that its approaches to jurisdiction and the merits were distinct, this panel reversed the lower court’s finding that there was no injury in fact.<sup>172</sup> Only after settling the jurisdictional question of standing did the court turn to the 12(b)(6) motion at issue, and invoke *Iqbal*.

#### *E. Reading Iqbal too Broadly Undermines Rule 12 Jurisprudence*

The confusion created in some lower courts by the multiple standards for motions to dismiss is hard to overstate. One court appeared to invoke all three standards at once for the purposes of an inquiry into standing.<sup>173</sup> In another instance,

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<sup>169</sup> *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 91 (1998).

<sup>170</sup> This error is not prevented in circuits where the appeals court has maintained careful distinctions between *Iqbal* requirements and standing requirements. *See, e.g.*, *MVP Asset Mgmt. (USA) LLC v. Vestbirk*, No. 2:10-cv-02483, 2012 U.S. Dist. LEXIS 1889, at \*11 (E.D. Cal. Jan. 6, 2012) (using the *Iqbal* standard to dismiss a claim that used a “bare allegation” of the occurrence of a transaction to establish standing); *Tini Bikinis-Saginaw, LLC v. Saginaw Charter Twp.*, No. 11-10280, 2011 U.S. Dist. LEXIS 147249, at \*18 (E.D. Mich. Dec. 22, 2011) (quoting *Iqbal* in dismissing three of four claims for mootness, ripeness, and lack of standing, Rule 12(b)(1)); *Stabiner v. United States*, No. 11-3782, 2011 U.S. Dist. LEXIS 141574, at \*6 (D.N.J. Dec. 9, 2011) (quoting *Iqbal* in dismissing tax claims for lack of standing, as relief was only declaratory).

<sup>171</sup> *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 592 (8th Cir. 2009) (emphasis added).

<sup>172</sup> *Id.* (sustaining jurisdiction for the moment because “[a]t this stage in the litigation it is impossible to say” with certainty whether the timing of events supports the plaintiff’s standing (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (“standing must be shown ‘with the manner and degree of evidence required at the successive stages of the litigation’”))).

<sup>173</sup> *NB v. Dist. of Columbia*, No. 10-1511, 2011 U.S. Dist. LEXIS 86908, at \*3-5 (D.D.C. July 29, 2011) (positing, for purposes of a single 12(b)(1) motion, the *Conley* standard, the factual-challenge standard burdening the plaintiff, and the *Twombly* standard, and concluding,

the complexity of the new three-tiered scheme utterly baffled the District Court of New Jersey, which reached a novel result by increasing the pleading standards for factual, rather than facial, 12(b)(1) motions. Since factual challenges had never been tested by the 12(b)(6) standard, the rationale for this extension of *Iqbal* is worth quoting at length. The question at hand was whether a factual dispute on an issue deemed jurisdictional under binding circuit precedent should be resolved by discovery or by analysis of the pleadings. The court improvised:

[I]t appears logical for the Supreme Court’s guidance in *Iqbal* to have at least a ripple effect on the standard applicable to factual challenges. Since the Supreme Court in *Iqbal* expressly guided that a plaintiff cannot obtain discovery with regard to his/her claims unless the plaintiff actually spells out the facts underlying these claims, the same guidance—if applied to factual rather than facial review—must yield the rule that a plaintiff cannot obtain discovery with regard to evidence verifying jurisdiction. . . . [A]llowing the plaintiff to conduct discovery for the purposes of factual challenge would result in an anomalous rule granting the plaintiff a broader pleading latitude for the purposes of the test under which the plaintiff’s pleadings are not even granted presumption of truth.<sup>174</sup>

In the context of a factual 12(b)(1) challenge, this court made what seems a natural extrapolation from *Twombly* and *Iqbal*: if pleading standards are raised for merits evaluations, they must be accordingly raised for jurisdictional evaluations. What the court missed, however, was the underlying rationale of *Iqbal*, which was to prevent costly, broad-ranging discovery on the merits, directed by the plaintiff. *Iqbal* was not intended to prevent tightly focused jurisdictional discovery to satisfy the court on its power to hear the case. The court should have conducted more discovery; this would have reduced the need for analysis and surmise, in a ruling that spanned two-hundred pages, with regard to the factual predicates of the case.<sup>175</sup>

On appeal, the circuit court followed the reasoning of *Arbaugh* and overruled its earlier precedent, thus establishing that the question being decided in the district court was a merits question and not a jurisdictional one.<sup>176</sup> This meant that on

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“Simply put, a pleading requires more than just ‘labels and conclusions.’” (citing *Ashcroft v. Iqbal*, 566 U.S. 662, 678 (2009)).

<sup>174</sup> *Animal Sci. Prods. v. China Nat’l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320, 334 n.6 (D.N.J. 2010).

<sup>175</sup> Extensive factfinding was needed to address the question the district court attempted to resolve, but, following the example of *Iqbal*, the court refused to expand the evidentiary record. Jurisdictional discovery might also have done the job, but a better solution was found by the circuit court, which followed *Arbaugh*. The appeals court held that this issue was in fact not jurisdictional at all. This holding meant that the survival of the lawsuit could be addressed in a simpler way on remand. *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 469-70 (3d Cir. 2011) (“Unmoored from the question of subject matter jurisdiction, [conformity with the statute] becomes just one additional merits issue . . . . [T]he District Court may exercise its discretion ultimately to resolve this matter through other means, for example, by deciding the defendants’ original motions to compel arbitration.”).

<sup>176</sup> *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 465-68 (3d Cir. 2011) (citing *Arbaugh*, 546 U.S. at 515-16); see also *Minn-Chem, Inc. v. Agrium Inc.*, 657 F.3d 650, 659 (7th Cir. 2011) (strongly suggesting, but not reaching until “another day,” the conclusion

remand the court would be deciding a 12(b)(6) motion, not a 12(b)(1) motion, and no fact finding before discovery would be required. In remedial fashion, the circuit court explained why this distinction matters practically:

We catalogue just two of the significant differences between these two motions and how they may apply on remand in this case: First, the burden in a Rule 12(b)(1) motion rests with the plaintiff, who must establish [in a factual challenge] that there is subject matter jurisdiction; by contrast, the defendant carries the burden in a Rule 12(b)(6) motion. Accordingly, the burden on remand would no longer rest with the plaintiffs, but with the defendants. Second, while a court generally looks only to the face of the plaintiff's complaint, must accept all alleged facts to be true, and is not permitted to make independent findings of fact when deciding a Rule 12(b)(6) motion, a court may examine evidence and resolve factual disputes on a Rule 12(b)(1) motion. . . . It would . . . be inappropriate for the District Court, on remand, to assess independently the credibility of allegations asserted by plaintiff's expert witness.<sup>177</sup>

In applying *Iqbal* outside its proper context, the district court in *Animal Science* had given plaintiffs *both* the detriment of a factual 12(b)(1) analysis, in which no presumption of truth attaches to the complaint's allegations, *and* the detriment of a 12(b)(6) analysis, in which contested legal conclusions are ignored rather than resolved. The result was an overly skeptical reading of the complaint. In the circuit court, on the other hand, the guidance of *Arbaugh* led to clarity on the doctrine. Without such clarity, as the circuit court recognized,<sup>178</sup> *Iqbal* disrupts jurisdictional analysis and causes problems the Supreme Court never intended.

The same mistake was made in the personal-jurisdiction context by a Maryland District Court in 2011, although this time the court carefully explained its reasoning:

The Supreme Court's decisions in *Twombly* and *Iqbal* did not specifically address the pleading requirements for jurisdiction, and the issue has not been resolved by the Fourth Circuit. . . . [But] similar language is used in Rule 8 to describe the requirements for pleading both claims in a complaint and the grounds for jurisdiction. . . . Indeed, it would be highly incongruous to require separate pleading standards for two subsections of the same rule. Moreover, the factual nature of the claims surrounding the grounds for jurisdiction are, more often than not, intertwined with the factual allegations showing that the pleader is entitled to relief. As such, this Court concludes that the pleading standards articulated in *Twombly* and *Iqbal* apply to Rule 8(a)(1).<sup>179</sup>

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that *Arbaugh* and *Morrison* would require the same doctrinal change in antitrust law in that circuit); *Carrier Corp. v. Outukumpo Oyj*, 673 F.3d 430, 439 n.4 (6th Cir. 2012) (same).

<sup>177</sup> *Animal Sci.*, 654 F. 3d at 470 n.9 (citations omitted).

<sup>178</sup> *Id.* at 470.

<sup>179</sup> *Haley Paint Co. v. E.I. DuPont de Nemours & Co.*, No. RDB-10-0318, 2011 U.S. Dist. LEXIS 34925, at \*20-22 (D. Md. Mar. 31, 2011). This holding is now the governing law in the District of Maryland for challenges to personal jurisdiction. See *Mykey Tech., Inc. v. TEFKAT LLC*, No. 12-cv-01468, 2012 U.S. Dist. LEXIS 110122 (D. Md. Aug. 7, 2012);

As it turned out, since it refused to order jurisdictional discovery, the court had to revisit this ruling in light of new facts fifteen months later, after further evidence emerged in discovery on related claims.<sup>180</sup> In any event, its failure to consult Supreme Court doctrine on the stark difference between jurisdiction and merits led it to the wrong outcome as a matter of doctrine.<sup>181</sup>

*F. The Special Case of Jurisdictional Statutes:  
Stating a Claim Under the Alien Torts Statute*

To be sure, the errors involved in *Zanders*, *Animal Science*, and *Haley Paint* are not always based on a misreading of *Iqbal*'s aims; such procedural miscues can also be motivated by the same legitimate policy concerns that motivated *Iqbal*. The Eleventh Circuit, for example, has seized on the *Iqbal* plausibility standard as part of its jurisprudence on 12(b)(1) issues in international human-rights cases. The statutory authority for such charges in federal court, the Alien Tort Statute, is often read to confer jurisdiction to U.S. courts only if the crime alleged is a clear and definite element of international law,<sup>182</sup> in the way piracy was in 1789 when the statute was passed.<sup>183</sup> Thus evaluating the legal sufficiency of claims under the

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C.R. Daniels, Inc. v. Naztec Intern. Grp., LLC, No. 11-01624, 2011 U.S. Dist. LEXIS 138871, at \*10 (D. Md. Dec. 2, 2011).

<sup>180</sup> *Haley Paint Co. v. E.I. Dupont de Nemours & Co.*, No. RDB-10-0318, 2012 U.S. Dist. LEXIS 46875, at \*14 (D. Md. Apr. 3, 2012).

<sup>181</sup> Another Maryland District Court recently replicated this mistake in the context of subject-matter jurisdiction, although it did not affect the outcome. The court found that the complaint satisfied *Iqbal* because it mentioned that the fax number used in the case was of the kind used in mass-marketing campaigns:

Brey has alleged sufficient facts to support the \$5 million amount-in-controversy requirement [for diversity jurisdiction under the Class Action Fairness Act]. Brey avers that LQ sent “unsolicited facsimile advertisements to tens of thousands of consumers” over “the past four years” and *has put forth enough facts to show that such allegations are plausible*. This is all that the *Iqbal* and *Twombly* pleading standard requires.

*Brey Corp. v. LQ Mgmt. LLC*, No. AW-11-cv-00718, 2011 U.S. Dist. LEXIS 125903, at \*8 (D. Md. Nov. 1, 2011) (emphasis added).

<sup>182</sup> See Richard J. Goldstone, *International Jurisdiction and Prosecutorial Crimes*, 47 CLEV. ST. L. REV. 473, 474 (1999) (“The origins of international jurisdiction [generally], certainly in modern times, lie in the development of the concept of ‘crimes against humanity.’”).

<sup>183</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732-33 (2004). Even though the statute only confers jurisdiction, whether its applicability in a given case is truly a jurisdictional matter is a matter of considerable disagreement. See Shepherd, *supra* note 8, at 2327 n.72 (“[T]he *Sosa* Court never explicitly stated whether it was dismissing the claims based on lack of jurisdiction or for failure to state a claim for relief.”). See generally *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1002 (S.D. Ind. 2007) (explaining the conundrum, and persuasively rejecting “a standard that blurs the line between subject matter jurisdiction and the sufficiency of a claim on the merits”) (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 89 (1998) and *Bell v. Hood*, 327 U.S. 678, 682 (1946)). *Roe* shows persuasively that the better approach is to

Alien Tort Statute arguably implicates a federal court's subject-matter jurisdiction, and vice versa.<sup>184</sup> Many circuits, including the Eleventh, regard as jurisdictional the issue of what crimes are included.<sup>185</sup> This in turn makes Rule 12(b)(1) the proper framework; nonetheless, the Eleventh Circuit has established that its courts should apply *Iqbal* to determination of these questions.<sup>186</sup>

In the leading Eleventh Circuit case, a U.S. corporation was allegedly in league, through its local affiliate, with Colombian paramilitary forces that violently suppressed union activity.<sup>187</sup> The circuit court affirmed the finding that the complaint "fell short of pleading the factual allegations necessary to invoke the court's subject matter jurisdiction under the [Alien Tort Statute]."<sup>188</sup> As in *Iqbal*, the court held that plaintiffs had "insufficiently pled a conspiracy," this one "between the local facilities' management and the paramilitary officers."<sup>189</sup> Unlike in *Iqbal*, though, the court held that this insufficiency in the pleadings (along with inadequate allegations of state action) not only canceled the lawsuit but actually divested the court of its power to hear the case. The introduction of *Iqbal* was straightforward: the court cited recent circuit precedent for the proposition that in "a Rule 12(b)(1) facial challenge a plaintiff has 'safeguards similar to those retained when a Rule 12(b)(6) motion to dismiss for failure to state a claim is raised.'"<sup>190</sup> This outdated

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assume jurisdiction, then treat issues about international norms under Rule 12(b)(6). See Shepherd, *supra* note 8, at 2328-29 (favorably describing *Roe*).

<sup>184</sup> The same is true in evaluating whether the Federal Tort Claims Act has been successfully invoked. 28 U.S.C.S. § 1346(b) (LexisNexis 2010) (United States' sovereign immunity is waived only "under circumstances where the United States, if a private person, would be liable to the claimant."). The statute arguably confers jurisdiction only if the tort claim is successful on the merits. Hence any element of the claim could arguably be contested in a motion to dismiss for lack of subject-matter jurisdiction. See Erin M. Watkins, *The Scope of Employment Requirement of the Federal Tort Claims Act: The Impropriety and Implications of the Monez Decision, and the Superior Jurisdictional Prima Facie Approach*, 17 GEO. MASON L. REV. 533, 534 (describing circuit split as to 12(b)(1) or 12(b)(6) status of the FTCA defense that federal employee's tortious act was not embraced by the jurisdictional statute, because committed outside the scope of employment).

<sup>185</sup> *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260-61 (11th Cir. 2009); cf. *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1021 n.44 (C.D. Cal. 2009) ("[T]he initial jurisdictional inquiry in an [Alien Tort Claims Act] case does not evaluate whether the cause of action will turn out to be well founded in law and fact.") (quoting *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1200 (9th Cir. 2007) (in turn citing *Bell*, 327 U.S. at 682-83)).

<sup>186</sup> See Shepherd, *supra* note 8, at 2341-44 (describing the approach of the *Sinaltrainal* court, in contrast to the Second Circuit, and showing that prior Eleventh Circuit approaches to Alien Tort Statute cases underlie its readiness to apply *Iqbal* to jurisdictional disputes in such cases).

<sup>187</sup> *Sinaltrainal*, 578 F.3d at 1260-61.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1260 (quoting *McElmurray v. Consol. Gov't of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007)).

cross-reference in turn activated *Iqbal*, and required plausibility of the plaintiffs' claims.<sup>191</sup>

The conspiracy allegations in *Sinaltrainal* invite comparisons with *Iqbal* itself, and its holding can be defended as another instance of identifying plaintiff's failure to plead plausible facts adequate to activate a federal statute. The only difference is that the statute happened to be one that operates solely to confer jurisdiction.<sup>192</sup> Though the substantive outcome is defensible by analogy to *Iqbal*, the case's citations on procedure do not support its approach. The court was correct to note that recent circuit precedent stated that facial 12(b)(1) and 12(b)(6) plaintiff safeguards are similar—and that precedent postdated *Twombly*. But the precedent went on to explain clearly that in a facial challenge, the court was authorized “merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction . . . [T]he allegations in his complaint are taken as true for the purposes of the motion.”<sup>193</sup> It admonished, moreover, that if the challenge disputes the alleged jurisdictional facts, “the district court *must* give the plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss.”<sup>194</sup> This would seem to foreclose the 12(b)(1) approach taken in *Sinaltrainal*. Moreover, tracing back any of the citations in that 2007 precedent leads the student of civil procedure to *Bell v. Hood*, the pathbreaking Supreme Court decision distinguishing between 12(b)(1) and 12(b)(6) motions.<sup>195</sup>

In the context of the Alien Tort Statute, other circuits have taken a different approach than the Eleventh for a variety of reasons.<sup>196</sup> It seems indisputable, though,

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<sup>191</sup> See Shepherd, *supra* note 8, at 2342 (showing how the outcome of *Sinaltrainal* hinged on application of the plausibility standard); see also Abdullahi v. Pfizer, Inc., 562 F.3d 163, 172 n.6 (2d Cir. 2009) (reviewing under the *Twombly* standard lower court's hybrid determination “that it lacked subject matter jurisdiction because plaintiffs failed to state claims under the ATS”).

<sup>192</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004) (Alien Tort Statute as “only jurisdictional”); see also *Olivier Plantation, LLC v. St. Bernard Parish*, 744 F. Supp. 2d 575, 582 (E.D. La. 2010) (in the context of a different jurisdictional statute, the Federal Tort Claims Act, granting 12(b)(1) motion under *Iqbal* standard because plaintiff landowners' claims did not establish jurisdiction to access federal court to redress emergency actions taken after Hurricane Katrina).

<sup>193</sup> *McElmurray*, 501 F.3d at 1251 (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)).

<sup>194</sup> *Id.* (emphasis in original) (citing *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir. 1981)).

<sup>195</sup> See *Lawrence*, 919 F.2d at 1529 (citing *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980) and *Williamson*, 645 F.2d at 413 (“It is elementary that a district court has broader power to decide its own right to hear the case than it has when the merits of the case are reached.”) (citing *Menchaca*, 613 F.2d at 516)); *Menchaca*, 613 F.2d at 516 (case should be dismissed for want of subject-matter jurisdiction “only if the federal claims are ‘wholly insubstantial or frivolous’”) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)).

<sup>196</sup> See *Al-Quraishi v. Nakhla*, 728 F. Supp. 2d 702, 716-17, 735 (D. Md. 2010) (using different standards for jurisdiction and merits, and concluding, for example, that before discovery “it is clearly too early to dismiss Defendants on the basis of derivative sovereign immunity”) (citing *Schrader v. Hercules, Inc.*, 489 F. Supp. 159, 161 (W.D. Va. 1980)), *rev'd on other grounds sub nom.* *Al-Quraishi v. L-3 Servs., Inc.*, 657 F.3d 201, 205 (4th Cir. 2011)

that no longstanding precedent or policy justifies the Eleventh Circuit procedure of applying *Iqbal* to jurisdictional questions as a matter of course. It is true that *Sinaltrainal* bears some resemblance to *Iqbal*, and can be justified with some of the *Twombly* policy rationales for dispensing with the case before discovery. In addition, it raises issues of international diplomacy that counsel caution. But the doctrinal foundation of the *Sinaltrainal* approach is tenuous.

*G. The Special Case of Jurisdictional Elements in the Cause of Action:  
Pleading Interstate Commerce*

Reading the complaint skeptically in all its aspects, as *Iqbal* seems to encourage, leads to early jurisdictional dismissals of suspect reliability. One instructive instance of the error of disavowing jurisdiction under *Iqbal* occurred in the Southern District of Mississippi in 2010, in a suit alleging anticompetitive conduct in price quotes for rounds of golf.<sup>197</sup> Before addressing the substance of Sherman Act unfair-competition claims, courts have to determine as a factual matter whether interstate commerce is involved, because if not, subject-matter jurisdiction is lacking.<sup>198</sup> It would be unconstitutional to apply the Congressional statute if the case involved purely local commerce, outside Congress's power to regulate. Atypically, this threshold inquiry is required not only to test the claim's legal sufficiency, but also to test whether adjudicating the claim is within the scope of federal power.<sup>199</sup> The upshot of this quirk in the Sherman Act is that the dispositive motion in the Mississippi case, *Gulf Coast*, tested whether the court had subject-matter jurisdiction.<sup>200</sup> Under this procedural posture, the plaintiffs should have been

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(“we have accepted as true the plaintiffs’ allegations that the defendants engaged in a conspiracy with military personnel to torture them, abuse them, and cover up those actions”); see also *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (analyzing viability of Alien Torts Statute claim solely under Rule 12(b)(6), without questioning subject-matter jurisdiction); *Chowdhury v. Worldtel Bangladesh Holding*, 588 F. Supp. 2d 375, 379 (E.D.N.Y. 2008) (noting in a discussion of *Twombly*'s applicability “the very substantial issue, one that has recently divided a panel of the Second Circuit, as to whether there are separate tests for analyzing subject matter jurisdiction and failure to state a claim under the [Alien Torts Statute]”) (citing *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (per curiam)).

<sup>197</sup> *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, No. 1:08CV1430, 2010 U.S. Dist. LEXIS 81211, at \*4 (S.D. Miss. Aug. 10, 2010).

<sup>198</sup> *McLain v. Real Estate Bd.*, 444 U.S. 232, 242 (1980) (“[J]urisdiction may not be invoked under [the Sherman Act] unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce.”); cf. Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 660-61 (contending that “jurisdictional elements” like effect on interstate commerce should be handled in 12(b)(6) motions, as they establish an aspect of the claim).

<sup>199</sup> *McLain*, 444 U.S. at 242; see also *Mortensen, v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (“That the same phrase [in the Sherman Act, ‘commerce among the several States,’] is both an element of the offense and a vital prerequisite for federal court jurisdiction has caused considerable confusion.”).

<sup>200</sup> See generally *Mortensen*, 549 F.2d at 891 (finding dubious “the propriety of dismissing Sherman Act claims for lack of subject matter jurisdiction at a pretrial stage when relevant facts are in dispute, and relevant discovery has not been completed”).

required only to satisfy Rule 8(a)(1), by giving a “short and plain statement of the grounds for the court’s jurisdiction,” and if facts were in question the court should have undertaken jurisdictional discovery.

None of the rationales of *Iqbal* applied to this jurisdictional issue, since no expensive discovery or disruptive depositions of high-level officials would be required to determine whether the greens fees charged to plaintiffs’ customers had interstate effects. The court just had to satisfy itself that the golf controversy was not purely local, like a child’s lemonade stand. If it were, the issue would be outside Congress’s power to regulate, and hence outside the court’s power to adjudicate. Moreover, as a policy matter, the threshold plausibility under *Iqbal* should not have been the issue: the interstate quality of the commerce in such a case defines the *type* of case in question, not the merits of the specific claim.<sup>201</sup> Hence the legal sufficiency of the complaint should have been tested under *Conley*, or its factual sufficiency tested using the court’s own fact-finding powers.<sup>202</sup>

Instead, the district court applied the *Iqbal* test and found that it lacked jurisdiction. The complaint’s relevant paragraphs, it said, “contain purely conclusory allegations as to the purported impact of Defendants’ conduct on interstate commerce.”<sup>203</sup> Assertions in subsequent briefs—specifically, “that the vast majority, if not all, of the customers who purchase these vouchers are out of state customers”—were ignored as the court focused on the four corners of the complaint.<sup>204</sup> As a result, the plaintiffs had ostensibly failed to “*make the requisite showing* that the activities in question were sufficiently in interstate commerce” to establish federal-court jurisdiction.<sup>205</sup> But neither Supreme Court precedent on the Sherman Act<sup>206</sup> nor the Federal Rules of Civil Procedure require the complaint to make a particularized *showing* to defeat a 12(b)(1) motion: a preliminary showing in

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<sup>201</sup> *McLain*, 444 U.S. at 243 (“Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired.”).

<sup>202</sup> *See, e.g.*, *Jessie v. Potter*, 516 F.3d 709, 712 (8th Cir. 2008) (noting that a Rule 12(b)(1) ruling may resolve disputed facts, while a 12(b)(6) dismissal must be decided on the pleadings); *see also McLain*, 444 U.S. at 246 (“Th[e] [lenient *Conley*] rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants’ activity and interstate commerce.” (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)); *see also id.* at 243 (specifying that this is a “jurisdictional element”); *Mortensen*, 549 F.2d at 892 (suggesting that because the interstate-commerce test is so closely entwined with the merits, in factual 12(b)(1) challenges under the Sherman Act “we feel it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage”).

<sup>203</sup> *Gulf Coast Hotel-Motel Ass’n v. Miss. Gulf Coast Golf Course Ass’n*, No. 1:08CV1430, 2010 U.S. Dist. LEXIS 81211, at \*16 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

<sup>204</sup> *Id.* at \*18, \*21. The court pointed out that authorities suggesting otherwise predated *Twombly*.

<sup>205</sup> *Id.* at \*16-17 (emphasis added).

<sup>206</sup> *McLain*, 444 U.S. at 242-43 (“to establish jurisdiction a plaintiff must allege the critical relationship in the pleadings[,] and if these allegations are controverted must proceed to demonstrate *by submission of evidence beyond the pleadings*” that the commerce is interstate) (emphasis added).

the complaint is needed on the substance of a claim, not to establish jurisdiction. Rule 8(a)(1) requires only a *statement* of the grounds for a court's jurisdiction.

In *Gulf Coast*, the district court should have acknowledged and credited the allegation that the plaintiff hotels were involved in interstate commerce (unless it was obviously "completely devoid of merit"<sup>207</sup>). If the fact was contested by the defendants, the court should have permitted thorough jurisdictional discovery, or held hearings later, to resolve the question as a matter of fact.<sup>208</sup> Instead the decision was based only on serially amended complaints.

On appeal, the Fifth Circuit reversed the district court's holding on jurisdiction, and remanded. Unfortunately, it did so not by correcting the standard of review but by reading the complaint more attentively under the wrong standard.<sup>209</sup> Since the plaintiffs had alleged that out-of-state golfers came to the resort, the circuit court held that they had shown enough factual matter to satisfy *Iqbal*.<sup>210</sup> Even though the issue at hand was jurisdictional, the circuit court believed that the analysis had to be adjusted for *Iqbal*. Disagreeing with the district court, it found that the complaint was adequate under the heightened pleading standard.<sup>211</sup> But the opinion implied<sup>212</sup> that absent a passing reference to out-of-state golfers, it might have found a lack of

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<sup>207</sup> *Oneida Indian Nation of N.Y. v. Cnty. of Oneida*, 414 U.S. 661, 667 (1974).

<sup>208</sup> See, e.g., *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537-38 (1995) ("Normal practice permits a party to establish jurisdiction at the outset of a case by means of a nonfrivolous assertion of jurisdictional elements, and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone.") (citations omitted); cf. *Montez v. Dep't of Navy*, 392 F.3d 147, 150 (5th Cir. 2004) ("[W]here issues of fact are central both to subject matter jurisdiction and the claim on the merits, we have held that the trial court must assume jurisdiction and proceed to the merits.").

<sup>209</sup> The trickiness of the distinction between jurisdiction and merits in this scenario has a long history: in 1976, the Supreme Court acknowledged that the issues overlapped in Sherman Act cases, but noted that "our analysis in this case would be no different" as between 12(b)(1) and 12(b)(6) analyses. *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 742 n.1 (1976) ("In either event, the critical inquiry is into the adequacy of the nexus between respondents' conduct and interstate commerce that is alleged in the complaint."). After *Twombly*, it is no longer the case that the two analyses are procedurally identical.

<sup>210</sup> *Gulf Coast Hotel-Motel Ass'n v. Miss. Gulf Coast Golf Course Ass'n*, 658 F.3d 500, 506 (5th Cir. 2011).

<sup>211</sup> *Id.* at 506 n.3 ("No party here argues that *Summit Health* is no longer good law in light of *Twombly* or *Iqbal*. Indeed, at least one of our sister circuits has recently relied on *Summit Health*." (citing *Yakima Valley Mem. Hosp. v. State Dep't of Health*, 654 F.3d 919 (9th Cir. 2011)) (citing *Summit Health, Ltd. V. Pinhas*, 500 U.S. 322 (1991) (establishing the threshold test for such claims)). But see *Yakima Valley*, 654 F.3d at 924, 932 (addressing whether complaint stated a claim under 12(b)(6), not jurisdiction under 12(b)(1), and not invoking *Iqbal* in section on the jurisdictional issue of standing) (citing *City of Los Angeles v. Cnty. of Kern*, 581 F.3d 841, 845 (9th Cir. 2009) (jurisdictional issue of standing addressed without reference to *Twombly* or *Iqbal*)).

<sup>212</sup> *Gulf Coast*, 658 F.3d at 506 (noting that "the allegations in this complaint that the Golf Association's anticompetitive acts 'substantially affected interstate commerce' [would] not [be] sufficient on their own" to establish jurisdiction after *Iqbal*).

jurisdiction from the face of the complaint, even though significant case law<sup>213</sup> suggested it should draw the contrary inference in the case of a golf resort. It gave no indication that further jurisdictional discovery might have been appropriate.

In the end, nothing turned on the pleading standard in *Gulf Coast*, since the circuit court found that the complaint satisfied either standard, and the lower court might have reached the same result by applying the Sherman Act requirement without framing it in jurisdictional terms. In applying *Iqbal* to focus on the complaint alone, though, both courts regarded jurisdiction and statement of a claim as the same category of requirement, in defiance of the *Arbaugh* line of cases.<sup>214</sup> To be sure, the procedural error here arose in part from the confusing double-status of the required nexus with interstate commerce, which is a “jurisdictional element” of a Sherman Act claim. Nonetheless, *Gulf Coast* stands in the Fifth Circuit for the erroneous proposition that *Iqbal* requires a complaint to show, not just to state, the grounds for subject-matter jurisdiction.<sup>215</sup> Accordingly it suggests, erroneously, that a jurisdictional statement is to be read with the same skepticism the *Twombly* court applied to statements of the merits of a claim.

#### IV. THE ERROR ENTRENCHED

The error of applying *Iqbal* to jurisdictional questions propagates through the federal court system in two different ways. The first has to do with the way courts read *Iqbal* itself, and sometimes take it to authorize more skeptical reading of complaints regardless of the procedural posture of the case. This error was exemplified in *Haley Paint*, where the district court tackled the issue as a matter of “first impression,” and compared Rules 8(a)(1) and 8(a)(2) without noticing that the latter requires the plaintiff to “show” something, while the former requires only a

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<sup>213</sup> See *id.* (citing cases about hotels and summer camps for the principle that “[e]ven when business activities are purely local, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze”) (quoting *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573-74 (1997)).

<sup>214</sup> See *id.* at 507 (mingling 12(b)(1) and 12(b)(6) terminology by holding that the complaint “states a claim with respect to subject matter jurisdiction”). The error is particularly notable in both courts in light of the fact that the district court cites *Arbaugh* as part of its boilerplate on subject-matter jurisdiction. *Gulf Coast Hotel-Motel Ass’n v. Miss. Gulf Coast Golf Course Ass’n*, No. 1:08CV1430, 2010 U.S. Dist. LEXIS 81211, at \*9.

<sup>215</sup> See also *Castro v. United States*, 560 F.3d 381, 386 (5th Cir. 2009) (Rule 12(b)(1) motion should be granted only “if it appears certain that the plaintiff cannot prove a *plausible* set of facts that establish subject-matter jurisdiction” (emphasis added)), *vacated*, 608 F.3d 266, 268 (5th Cir. 2010) (en banc) (Stewart, J., dissenting) (indicating that ruling applies the same standard: “[t]he majority acknowledges that we have before us a Rule 12(b)(1) dismissal, but it erroneously concludes that Castro has not met her burden under *Twombly* and *Iqbal*”); *Lane v. Halliburton*, 529 F.3d 548, 566 (5th Cir. 2008) (evaluating only “plausible set[s] of facts” consistent with the complaint to determine subject-matter jurisdiction) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). *But cf.* *Adapt v. Cnty. of El Paso*, No. EP-10-CV-307-PRM, 2011 U.S. Dist. LEXIS 98113, at \*11 (W.D. Tex. May 17, 2011) (refusing to convert a 12(b)(1) motion to a 12(b)(6) motion, to address substance of motion to dismiss, because defendant had wrongly “cite[d] to *Twombly* in the same paragraph in which it argues that the Court lacks subject matter jurisdiction”).

“statement.”<sup>216</sup> Similarly, the improvisations of the *Animal Science* court resulted from the novelty of *Iqbal*. As circuit courts absorb *Iqbal* into binding precedents, though, such errors will become less common.

The second kind of error propagation, though, is considerably more difficult to prevent. It results from one of the strengths of the common-law system: the fact that district courts generally do not improvise, but draw on previous rulings in order to describe the rules and the procedures for following them. As we have seen, this means that the standard rule of thumb equating factual approaches to 12(b)(6) and facial 12(b)(1) analyses has often been restated and re-applied, even after it has ceased to be correct. Worse yet, it means that an error in a circuit-court analysis gets transplanted, like a virus, into contexts where it can have much larger effects.

*A. Erroneous Application of the Iqbal Pleading Standard Increasingly Disrupts Jurisprudence on Standing*

In the Eighth Circuit, analysis of plaintiff’s standing to sue has on several occasions deployed the *Iqbal* standard. The *Zanders* case described above has been cited dozens of times, and in one case its formulation of the “nudged across the line” *Twombly* standard for plausibility was re-quoted and applied three times for jurisdictional questions.<sup>217</sup> But *Zanders* itself seemed sound even to the careful law clerk: it had drawn on unquestioned circuit precedent. In a 2007 case, a panel of the Eighth Circuit had, in passing, endorsed the use of *Iqbal* in determining standing.

[Since] the district court addressed a deficiency in the pleadings, our standard of review is the same standard we apply in Rule 12(b)(6) cases. We accept as true all factual allegations in the complaint, *giving no effect to conclusory allegations of law*. 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.<sup>218</sup>

In this case, *Stalley v. Catholic Health Initiatives*, the plaintiff was a lawyer who claimed for himself the right to pursue private insurers who failed to reimburse Medicare for expenses caused by their customers’ own malpractice. There was a statutory basis for this argument, but the statute assigned the right to the patients themselves, not to third parties. Lacking an injury-in-fact or any artificial *qui tam* standing,<sup>219</sup> the lawyer was sent away empty-handed after straightforward statutory

<sup>216</sup> *Haley Paint Co. v. E.I. DuPont De Nemours & Co.*, No. RDB-10-0318, 2011 U.S. Dist. LEXIS 34925, at \*21 (D. Md. Mar. 31, 2011).

<sup>217</sup> *Farm-To-Consumer Legal Def. Fund v. Sebelius*, 734 F. Supp. 2d 668, 686, 688, 690 (N.D. Iowa 2010).

<sup>218</sup> *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007) (citing *Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697-98 (8th Cir. 2003) and *Twombly*, 550 U.S. at 553-56) (emphasis added).

<sup>219</sup> In a *qui tam* action the party filing the complaint lacks actual standing to bring the case, and therefore is called the relator (or “informer”) rather than the plaintiff. The action is constitutional because there is a “case or controversy” between the government and the defendant. See *Flast v. Cohen*, 392 U.S. 83, 120 (1968) (citing *Marvin v. Trout*, 199 U.S. 212, 225 (1905)); *United States ex rel. Hall v. Tribal Dev. Corp.*, 49 F.3d 1208, 1213 (7th Cir. 1995) (“it is the government, not the individual relator, who is the real plaintiff in the suit”).

analysis.<sup>220</sup> Nothing in the case hinged on the matter of plausibility. Nonetheless, the new boilerplate for the Eighth Circuit had now been written (replacing the pre-*Twombly* case *Mattes*, which was cited for the equivalence between 12(b)(1) and 12(b)(6) approaches). In four years, *Stalley* has been cited thirty-four times by district courts in the Eighth Circuit for cases involving subject-matter jurisdiction.<sup>221</sup>

Hence, instead of simply reading the *Zanders* case in order to understand the rationale applying *Iqbal* standards to the jurisdictional question of injury-in-fact, a clerk (or attorney) must read at least three other cases: *Stalley*, *Mattes*, and *Iqbal*. Without the awareness of the doctrinal niceties, even then such a clerk is unlikely to see any problem with *Stalley*'s formulation of the test for jurisdiction. The excellence of the automatized Federal Rules, which are applied uniformly by ongoing citations from precedent to precedent, becomes a weakness in such a scenario. The *Stalley* court's incautious handling of the standard of review set an error propagating rapidly: in two years, Eighth Circuit district courts have now in turn cited *Zanders* for the approach to jurisdictional questions no less than thirty-five times.<sup>222</sup>

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<sup>220</sup> Many courts might have considered the *Stalley* dismissal a matter of "prudential," or "statutory," standing, since it hinged on whether "the legal rights of third parties" created by a federal law "implied a right of action in the plaintiff." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); see also *Tribal Dev.*, 49 F.3d at 1215 (observing that the Eighth Circuit atypically regards applicability of a *qui tam* statute as a matter of prudential standing) (citing *Schmit v. Int'l Fin. Mgmt. Co.*, 980 F.2d 498, 498 (8th Cir. 1992) (per curiam)).

In the Eighth Circuit, atypically, prudential standing is considered a jurisdictional bar: it is raised on a 12(b)(1) motion and can even be challenged in the appeals court after not being raised at trial. See, e.g., *South Dakota v. Dep't of the Interior*, No. 11-1745, 2012 U.S. App. LEXIS 597, at \*9, \*11 (8th Cir. Jan. 11, 2012) (dismissing case in response to a prudential-standing argument raised "for the first time on appeal"). This allowed the *Stalley* ruling on prudential standing to set Eighth Circuit precedent for all subject-matter jurisdiction analyses. Cf. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (prudential standing concerns can lead the court to refrain from hearing a suit "[e]ven in cases concededly within [its] jurisdiction").

<sup>221</sup> In addition, the Second Circuit has used *Stalley* to support a tenuous reading of its own precedent that apparently required plausible pleadings to establish standing:

[T]o survive [the] Rule 12(b)(1) motion to dismiss, Amidax must allege facts that affirmatively and plausibly suggest that it has standing to sue [citing *Selevan v. N. Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009), and *Stalley*, 509 F.3d at 521] . . . . What is missing [in the complaint] is factual support for Amidax's allegation that SWIFT handed over Amidax's financial information to the government. Only if such factual support exists can Amidax nudge its alleged injury from one that is conceivable to one that is plausible.

*Amidax Trading Grp. v. S.W.I.F.T. SCRL*, No. 09-3293-cv, 2011 U.S. App. LEXIS 25074, at \*9, \*13 (2d Cir. Dec. 19, 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009)). This was both an erroneous standard and a misreading of *Selevan*. As observed *supra* note 166, the *Selevan* court had not used the *Iqbal* standard for Article III standing, but for prudential standing. In the Second Circuit, prudential standing is not a jurisdictional matter. *Arar v. Ashcroft*, 532 F.3d 157, 172 (2d Cir. 2008) ("prudential standing [is] the sort of 'threshold question . . . [that] may be resolved before addressing jurisdiction'") (quoting *Tenet v. Doe*, 544 U.S. 1, 6-7 n.4 (2005)).

<sup>222</sup> Shepard's "restrict by headnote" search conducted December 28, 2011.

Leniency in jurisdictional pleading standards does not constitute overall leniency in assuming jurisdiction. In the leading recent Supreme Court case on standing, a conservative five-judge majority carried out a significant tightening of the requirements for constitutional standing.<sup>223</sup> Finding a lack of subject-matter jurisdiction both factually and facially, the Court dismissed a plaintiff's action despite a congressionally created cause of action in an environmental law.<sup>224</sup> Even here, however, the Court made clear that adverse jurisdictional rulings must not occur on a slender factual record. If a court is to be divested of its power to hear a case, it may not do so merely on the basis of a scanty complaint: "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim."<sup>225</sup> This premise of the standing analysis under Rule 8(a)(1) is incompatible with the new Rule 8(a)(2) *Iqbal* pleading standard; the two should not be conflated. Even when extending minimal generosity toward plaintiffs, as in *Lujan*, the Supreme Court still insists that jurisdictional pleadings be read leniently.

*B. Erroneous Application of the Iqbal Pleading Standard  
Creates Unreasonable Outcomes*

Other circuits have done better than the Eighth at keeping distinct the standards for 12(b)(1) and 12(b)(6) analyses. But even in the circuits that have been most clear on the topic, small mistakes are quickly reproduced and magnified. For example, in September 2009, a panel of the Ninth Circuit mentioned in passing that it was applying *Iqbal* to determine whether jurisdiction had been established against the Kingdom of Spain, to overcome its sovereign immunity.<sup>226</sup> Although this standard had no effect on the analysis, and although an en banc panel revisited the decision and made no mention of *Iqbal*,<sup>227</sup> one district court had already picked up on the error and replicated it.<sup>228</sup> That district-court ruling, *Sustainable Delta*, applied *Iqbal*

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<sup>223</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *cf. id.* at 579 (Kennedy, J., concurring in the judgment) ("I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing.").

<sup>224</sup> *Id.* at 576 (public interest cannot "be converted into an individual right by a statute that denominates it as such").

<sup>225</sup> *Id.* at 561 (contrasting this standard with the standard of review at the summary-judgment stage).

<sup>226</sup> *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1052 n.2 (9th Cir. 2009).

<sup>227</sup> *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1022 n.1 (9th Cir. 2010) (en banc) (noting simply that "we take the facts as alleged in the complaint as true because we are reviewing a denial of a motion to dismiss" (citing *Altmann v. Rep. of Austria*, 317 F.3d 954, 961-62 (9th Cir. 2002))).

<sup>228</sup> *Coal. for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 711 F. Supp. 2d 1152, 1158 (E.D. Cal. 2010) ("The standards used to resolve motions to dismiss under Rule 12(b)(6) are relevant to disposition of a facial attack under 12(b)(1).") (citing *Cassirer*, 580 F.3d at 1052 n.2); *see also id.* at 1159 n.2 (noting that the previous circuit standard for rulings on standing, requiring only "general factual allegations," had been "issued before the Supreme Court's paradigm-shifting ruling in *Iqbal*").

to a jurisdictional analysis, and was cited in turn in January 2011 in a brief in the Northern District of California in *Coalition for ICANN Transparency v. VeriSign, Inc.*, an antitrust case already well into its fifth year.

The initial dismissal on the merits in *ICANN*<sup>229</sup> had been overturned by the Ninth Circuit on appeal,<sup>230</sup> and the case was remanded for re-pleading and discovery. But the defendants now contended that the plaintiffs lacked standing, and had not conformed their allegations of standing to *Iqbal* and *Twombly*.<sup>231</sup> Although standing is jurisdictional, and therefore should not be affected by *Iqbal* scrutiny, the court was persuaded by the brief: it examined the allegations of standing and found that the revised complaint “fail[ed] to allege facts *showing that* [plaintiff’s injured members] were financial supporters or members at the time the complaint was filed in 2005.”<sup>232</sup> Hence, the plaintiffs had not alleged standing except in a conclusory fashion. This should have satisfied Rule 8(a)(1), but the court found it lacking by the *Iqbal* Rule 8(a)(2) standard.

While dismissing one component of the claim on the merits again, the *ICANN* court disposed of the bulk of the case a second time around for jurisdictional reasons, even though the circuit court had remanded the case to be heard. Thus *Iqbal*, working its way into the analysis through dicta in a little-known previous ruling, allowed the district court on remand to dispose of the case yet again because the complaint had listed the plaintiff’s member organizations incorrectly.<sup>233</sup> The case settled in May, 2011, after 333 docket entries.<sup>234</sup>

It is certainly possible that the second *ICANN* dismissal was correct. If the plaintiff had replaced constituent organizations during the course of the litigation, and now was relying on different antitrust injuries than the litigation had begun with, that would raise a legitimate standing problem. But instead of ordering its own

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<sup>229</sup> *Coal. for ICANN Transparency Inc. v. VeriSign, Inc.*, 464 F. Supp. 2d 948, 965 (N.D. Cal. 2006).

<sup>230</sup> *Coal. for ICANN Transparency, Inc. v. VeriSign, Inc.*, 567 F.3d 1084, 1096 (9th Cir. 2009) (finding two out of three claims adequately stated, and failing to acknowledge *Twombly* precedent on adequacy of pleadings in antitrust cases), *reprinted as amended at* 611 F.3d 495, 509 (9th Cir. 2010) (reaching same result using *Twombly* terminology, and reminding district court to expect third revised complaint to be amended to satisfy *Twombly* and *Iqbal*).

<sup>231</sup> Reply Memorandum of Defendant Verisign, Inc. in Support of Motion to Dismiss Plaintiff Coalition for ICANN Transparency, Inc.’s Third Amended Complaint, No. 05-cv-04826-RMW, 2011 U.S. Dist. Ct. Motions LEXIS 1238, at \*10-11 (Jan. 21, 2011) (contending that in the amended complaint the plaintiff “ignore[s] its pleading obligations under *Iqbal/Twombly* and the standard for demonstrating standing under federal law”).

<sup>232</sup> *Coal. for ICANN Transparency Inc. v. VeriSign, Inc.*, 771 F. Supp. 2d 1195, 1200 (N.D. Cal. 2011) (emphasis added).

<sup>233</sup> Plaintiffs’ Memorandum of Points and Authorities in Opposition to Verisign, Inc.’s Motion to Dismiss CFIT’s Third Amended Complaint, No. 05-cv-04826 RMW, 2011 U.S. Dist. Ct. Motions LEXIS 1237, at \*6 (N.D. Cal. Jan. 18, 2011) (“CFIT has disclosed, both in discovery and in earlier filed pleadings, the names of members who satisfy the same standing requirements as those who have withdrawn.”).

<sup>234</sup> Order on Stipulation for Dismissal of Action Pursuant to Federal Rule of Civil Procedure 41(A) and for Retention of Jurisdiction over Action to Enforce Settlement, No. 05-CV-04826 PACER/ECF No. 333, (N.D. Cal. May 31, 2011).

discovery to satisfy itself as to its jurisdiction, the court used the heightened *Iqbal* standard to disclaim its power to act, rather than resolving the factual dispute or reaching the merits. This is the sort of outcome that sharp merits/jurisdiction distinctions are meant to prevent.

*C. Heightened Jurisdictional Pleading Standards Have  
Significant Constitutional Implications*

One consolation in light of this propagating error might be that these doctrinal questions are theoretical, and unlikely to have an impact in any case of great national moment. If a complaint is weakly pleaded and fails firmly to establish a case or controversy to invoke jurisdiction, it seems unlikely that anything significant is at stake for society. This consolation is unsustainable, however, in light of a Tennessee district court's 2010 decision in *Shreeve v. Obama*.<sup>235</sup> The motion to dismiss the lawsuit's challenge to the constitutionality of the 2010 Patient Protection and Affordable Care Act hinged on whether the plaintiffs had standing to bring the case before the law's individual mandate to buy health insurance took effect. The court posited that the facial 12(b)(1) challenge about standing should lead it to "review the motion similarly as it would a Rule 12(b)(6) motion," and cited the *Iqbal* and *Twombly* plausibility standards.<sup>236</sup> Accordingly, it evaluated only "the complaint on its face,"<sup>237</sup> and declined to "consider facts [in responsive briefs] that could have been pleaded in Plaintiffs' original complaint and amended complaints."<sup>238</sup> Because it found a lack of jurisdiction, the court "expresse[d] no opinion on the merits of Plaintiffs' or Defendants' arguments regarding the constitutionality of the [Affordable Care Act]."<sup>239</sup>

The prevalence and entrenched character of the jurisdictional *Iqbal* error raise concerns that the Supreme Court takes seriously. If courts divest themselves of power to hear cases, rather than reaching the merits, less is accomplished to resolve difficult problems of law and policy. Litigation can drag on for many months before a motion to dismiss is granted on jurisdictional grounds. Such resort to technicalities to wash the court's hands of a case may be a smaller problem than the problem of protracted, expensive discovery addressed by *Twombly*, but it is a real problem nonetheless. And it is a problem more fundamental to the U.S. system of justice. The importance of procedural leniency in accepting jurisdiction was reaffirmed by the Supreme Court in 2010, in a case that carried remarkable echoes of the original affirmation of lenient pleading standards, *Conley v. Gibson*.

At the opening of its ruling in *Union Pacific* the Court quoted the first Supreme Court Chief Justice:

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<sup>235</sup> *Shreeve v. Obama*, No. 1-10-CV-71, 2010 U.S. Dist. LEXIS 118631 (E.D. Tenn. Nov. 4, 2010); *cf.* *Peterson v. United States*, 774 F. Supp. 2d 418, 421 (D.N.H. 2011) (using non-*Iqbal* standards to evaluate jurisdictional pleadings of Medicare recipient seeking to challenge Affordable Care Act (ACA)).

<sup>236</sup> *Shreeve*, 2010 U.S. Dist. LEXIS 118631, at \*2; see also *id.* at \*10 (holding that "Plaintiffs' complaint fails to plead sufficient facts to establish jurisdiction").

<sup>237</sup> *Id.* at \*6.

<sup>238</sup> *Id.* at \*11 (ignoring allegation that certain healthcare providers were given an "unfair competitive advantage" by ACA regulations on tanning salons).

<sup>239</sup> *Id.* at \*2.

“It is most true that this Court will not take jurisdiction if it should not,” Chief Justice Marshall famously wrote, “but it is equally true, that it must take jurisdiction if it should. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”<sup>240</sup>

Like *Conley*, this case was about a dispute involving the employment conditions of railway workers and the authority of the National Railway Adjustment Board. This time, though, it was not a lower federal court, but the Board itself, that had divested itself of jurisdiction to hear the case.<sup>241</sup> It found, late in the proceedings, that the parties had failed to state, in their filings with the Board, that they had attempted arbitration as the rules required. There was no dispute that the arbitration had in fact been attempted, but the parties had not said so up front. Determining that this undermined, not the merits of the case, but the Board’s own jurisdiction, the panel had canceled the proceedings and undone its own participation in the dispute.<sup>242</sup>

In *Union Pacific*, the Supreme Court delivered a forceful rebuke to this maneuver, and in doing so reasserted its own authority to correct errors: “By presuming authority to declare procedural rules [governing initial filings] ‘jurisdictional,’ the panel failed to conform, or confine itself, to matters [Congress placed] within the scope of [NRAB] jurisdiction.”<sup>243</sup> The Court reversed and remanded. As in the lower courts in *Conley*, the Board’s cramped reading of the initial filings had created an abrupt dismissal of a case for jurisdictional reasons. The Supreme Court saw this as a betrayal of a tribunal’s duty to exercise its power and decide cases.

Paradoxically, then, according to the Supreme Court, the Board had exceeded its mandate by *declining* to hear a case.<sup>244</sup> The irony of exceeding power by renouncing it, as the Board had done in *Union Pacific* and the lower courts had done in *Conley*, should not be unfamiliar to students of constitutional law and civil procedure. It is, after all, the way the Supreme Court gained the power of judicial review in the first place.<sup>245</sup> Rather than addressing the merits of *Marbury v. Madison*, a politically untenable proposition, Chief Justice Marshall washed the Court’s hands of the case by finding a lack of jurisdiction over it.<sup>246</sup> The holding of this seminal case was

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<sup>240</sup> *Union Pac. R.R. v. Bhd. of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 590 (2009) (citing *Cohens v. Virginia*, 19 U.S. 264, 404 (1821)).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* (internal quotation marks omitted).

<sup>244</sup> Cf. Anthony Andricks, Note, *Creating Diversity Jurisdiction in Removal Actions through the Improper Use of Fed. Rule Civ. Proc. 21*, 60 CLEV. ST. L. REV. 249, 261-67 (2012) (describing an instance of the more familiar concern: a court reinterpreting the rules to expand its jurisdiction).

<sup>245</sup> *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (rejecting the proposition that “the power remains to the legislature, to assign original jurisdiction to [the Supreme Court] in other cases than those specified” by Article III).

<sup>246</sup> *Id.* at 178 (holding unconstitutional the jurisdictional statute that enabled the case to be brought).

simply that the Supreme Court could not hear the case until it had been heard by a lower court.<sup>247</sup>

In proclaiming its impotence, the *Marbury* Court ingeniously laid claim for posterity to unforeseen strengths in the judiciary. Instead of attempting to match its power of command with the executive branch, it struck down a jurisdictional grant of Congress and pronounced predominant its own authority to determine what the law is.<sup>248</sup> Thus the Court greatly expanded the acknowledged breadth of its power by leveraging a technicality of civil procedure. Such extensions of power are rarely in the spirit of the Constitution, and achieving them through subterfuge is called for only once in the life of a political system. When they forswear jurisdiction now under *Iqbal* pleading standards, instead of following the Federal Rules, lower federal courts improperly reenact this primal gesture of power.

#### V. CONCLUSION

It is now possible to see the value of the Supreme Court's sustained attention to the distinction between failure to state a claim and lack of subject-matter jurisdiction. Until *Iqbal*, the issue was largely theoretical or academic, having few real-world consequences. Since the standards of review for each motion were the same, a working mastery of civil procedure did not require clarity in distinguishing 12(b)(1) and 12(b)(6) matters. That state of affairs has now changed, due to *Iqbal*'s alteration of the requirements for adequate statement of a claim. The "showing" required by Rule 8(a)(2) should now be judged by a different standard from the "statement" of jurisdiction required by Rule 8(a)(1). Hence the distinction between jurisdictional matters and matters of legal sufficiency has significant real-world implications.

It is hard to prevent courts from erring by treating identically these two threshold requirements of the complaint, and harder to eradicate the error once it has appeared in a circuit. Without attentive remedial work in the courts of appeal, Rule 12 jurisprudence faces the prospect of gradual further erosion of jurisdictional doctrine and imprecision in civil procedure. The two trends reinforce each other, and only the Supreme Court is in a position to halt the spiral.

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*; see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (invalidating the "citizen-suit" provision of the Endangered Species Act, because it violated the "case or controversy" requirement of Article III) (quoting *Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)); *Muskat v. United States*, 219 U.S. 346, 362-63 (1911) (reversing and remanding with instructions to dismiss for lack of subject-matter jurisdiction, because in passing the law enabling litigants to sue without standing "the Congress [had] exceeded the limitations of legislative authority, so far as it required of this court action not judicial in its nature within the meaning of the Constitution").