

PRE-TWOMBLY PRECEDENT: HAVE *LEATHERMAN* AND *SWIERKIEWICZ* EARNED RETIREMENT TOO?

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ABSTRACT

*In theory, a complaint is a relatively minor part of a lawsuit, intended to initiate the litigation process. In practice, federal courts are struggling to implement the Supreme Court's opinions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*. This struggle is due, in part, to the fact that neither *Twombly* nor *Iqbal* expressly overruled the Court's pre-*Twombly* pleading jurisprudence. This Note focuses on how lower courts are assessing the continued vitality of two major pre-*Twombly* cases: *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit* and *Swierkiewicz v. Sorema N.A.* It finds that lower courts are taking conflicting views on the status of pre-*Twombly* precedent and concludes that this discord has serious consequences for litigation costs, respect for *stare decisis*, and litigants' access to justice.*

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I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings

– Judge Charles Clark¹

INTRODUCTION

Ever since the Supreme Court decided *Bell Atlantic Corp. v. Twombly*² and *Ashcroft v. Iqbal*,³ lower federal courts have struggled to figure out exactly what these decisions mean for civil pleading standards. Only one thing is clear from *Twombly* regarding the treatment of past precedent: the familiar standard laid out in *Conley v. Gibson*,⁴ that a motion to dismiss should only be granted if there is “no set of facts” to support the plaintiff’s claim, is no longer to be employed.⁵ As the Court noted, this standard “has earned its retirement.”⁶ What remains an important and open question, however, is how lower courts should treat the Court’s pre-*Twombly* pleading jurisprudence that has neither been explicitly retired nor explicitly overruled.

The Fourth Circuit recently examined this question in *McCleary-Evans v. Maryland Department of Transportation*.⁷ The case illustrates lower courts’ eight-year struggle to reconcile *Twombly* and *Iqbal* with pre-*Twombly* authority that remains good law. In *McCleary-Evans*, a divided panel dismissed an employment-discrimination complaint that relied on *Swierkiewicz v. Sorema N.A.*⁸ to state the applicable pleading standard.⁹ The court found that, in

1. Charles E. Clark, *Special Pleading in the “Big Case”*, 21 F.R.D. 45, 46 (1957).

2. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (holding, in relevant part, that a complaint must allege facts with enough specificity to state a claim for relief that is plausible, not merely conceivable).

3. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (clarifying that the plausibility-pleading standard announced in *Twombly* applies to all federal court cases).

4. *Conley v. Gibson*, 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. at 563.

5. *Twombly*, 550 U.S. at 561–63.

6. *Id.* at 563.

7. *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582 (4th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3260 (U.S. Aug. 26, 2015) (No. 15-573). For an in-depth description of this case, see *infra* Part IV.

8. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (holding that under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint need allege only a short and plain statement of the claims showing entitlement to relief, rather than establish a prima facie case).

9. *McCleary-Evans*, 780 F.3d at 583–84, 588.

light of *Twombly* and *Iqbal*, *Swierkiewicz* had “applied a more lenient pleading standard” than required.¹⁰ The dissent noted that lower courts are devoid of the power to overrule Supreme Court precedent, no matter how out-of-vogue these past precedents may seem when compared to the Court’s more recent case law.¹¹

Twombly and *Iqbal* generated vast amounts of scholarship debating the impact these decisions would have on lower courts.¹² These pieces either expressed concern that plaintiffs would be unable to survive the pleading stage without access to discovery in cases where the defendant has critical information¹³ or argued that such concerns were overblown.¹⁴ This debate gave rise to a body of literature that assessed *Twombly* and *Iqbal*’s (“*Twiqbal*”) impact through empirical data.¹⁵ This empirical work has “overwhelmingly focused on the question of whether judges have indeed applied a

10. *Id.* at 587.

11. *See id.* at 590 (Wynn, J., dissenting) (“[W]e have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court’s current thinking the decision seems.” (quoting *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002))).

12. *See generally, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) (examining what *Iqbal* adds to *Twombly*’s plausibility pleading and court access); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135 (2007) (analyzing how the *Twombly* ruling required lower courts to change their pleading jurisprudence); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (addressing the new paradigm of pleading following *Iqbal*).

13. Dodson, *supra* note 12, at 138–39.

14. Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1637–43 (2012).

15. *See generally, e.g.*, JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMM. ON CIVIL RULES 6 (2011) (comparing the filing and resolution of motions to dismiss for failure to state a claim under Rule 12(b)(6) in twenty-three federal district courts in 2006 and 2010); Scott Dodson, *A New Look: Dismissal Rates of Federal Civil Claims*, 96 JUDICATURE 127 (2012) (assessing the effect of *Twombly* and *Iqbal* on dismissals at the pleading stage); Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117 (2015) (analyzing whether *Iqbal* and *Twombly*’s new standards have significantly changed how motions to dismiss in general are resolved); Jonah B. Gelbach, Note, *Locking the Doors to Discovery? Assessing the Effects of Twombly and Iqbal on Access to Discovery*, 121 YALE L.J. 2270 (2012) (showing how party selection undermined the empirical usefulness of simple grant-rate comparisons and provided an alternative analysis by modeling party behavior); Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008) (attempting to answer empirically whether federal district courts applying *Twombly* required more from pleadings than they did prior to the decision).

higher standard.”¹⁶ To answer this question, empirical studies have focused on grant rates of 12(b)(6) motions. In other words, they have focused on results only. Interestingly, after reviewing these studies, Professor Jonah Gelbach claims that “data are unlikely to settle the debate over the case-quality effects of the new pleading regime ushered in by *Twombly* and *Iqbal*.”¹⁷

Rather than focus on outcomes alone, this Note measures *Twombly* and *Iqbal*'s impact on civil litigation by taking a substantive look at lower-court *reasoning* when testing a claim's sufficiency. Specifically, how do courts treat the conflicting notice-pleading standard reaffirmed in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*¹⁸ and *Swierkiewicz* in light of *Twombly* and *Iqbal*? Analyzing how seventy-four district court cases apply these pre-*Twombly* precedents begins to reveal the impact *Twombly* and *Iqbal* are having on civil litigation. By looking at these opinions' reasoning, this Note shows that lower courts are taking discordant approaches to the status of pre-*Twombly* precedent. This discord has serious consequences for litigation costs, respect for *stare decisis*, and litigant access to the judicial system.

This Note consists of six parts. Part I provides the context for this study by briefly summarizing the history of pleading standards at the federal level and tracing the development of the Federal Rules of Civil Procedure. Part II discusses the Supreme Court's pleading jurisprudence and highlights the tension in the case law created by both *Twombly* and *Iqbal*. Part III describes how the circuit courts have treated pre-*Twombly* precedent and what guidance, if any, this treatment provides to district courts. Part IV describes the methodology this study employed. Part V shows how district courts have treated pre-*Twombly* case law after *Iqbal*. Finally, Part VI analyzes lower courts' behavior and calls on the Supreme Court to clarify civil pleading standards.

16. Jonah B. Gelbach, *Material Facts in the Debate Over Twombly and Iqbal*, 68 STAN. L. REV. (forthcoming 2016) (manuscript at 1) (on file with author).

17. *Id.* (manuscript at 4).

18. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). In *Leatherman*, the Supreme Court considered whether a federal court could apply a “heightened pleading standard”—more stringent than the usual pleading requirements of Rule 8(a)” in civil-rights cases. *Id.* at 164. The Court held that such heightened pleading standards were “impossible to square” with the system of “notice pleading” codified by the Federal Rules of Civil Procedure. *Id.* at 168. *Leatherman* is discussed further *infra* Part II.A.

I. THE DEVELOPMENT OF THE FEDERAL RULES OF CIVIL PROCEDURE

A very brief review¹⁹ of the historical functions of pleading provides the context for this study. It illustrates that remnants of these systems, especially in the wake of *Twombly* and *Iqbal*, influence modern pleading practice. In their simplest form, complaints are the documents that state a plaintiff's claim, put a defendant on notice, and prompt the defendant to answer and raise defenses.²⁰ For the first century after the American Revolution, pleadings' key function was issue-formulating.²¹ By the mid-nineteenth century, complaints focused on parties stating "material" and "ultimate" facts.²² And in the twentieth century, the system emphasized pleading's "notice" function.²³

Common-law pleading was highly technical.²⁴ Under the issue-forming process, it was the parties' obligation to narrow their dispute down to a "single material point."²⁵ This process consisted of the parties pleading back and forth. The parties would make factual allegations and respond by either (1) demurring, challenging the legal sufficiency of the claim; (2) accepting the facts alleged, but adding a new matter; or finally (3) denying a single material point, forming the "single issue" to be resolved at trial.²⁶ The trial would then focus on this issue alone.

19. An in-depth analysis of the development of the Federal Rules of Civil Procedure is beyond the scope of this Note. For a complete historical study, see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

20. CHRISTOPHER B. MUELLER, TWENTY-FIRST CENTURY PROCEDURE 20 (2013).

21. See Subrin, *supra* note 19, at 916 (discussing the common-law pleading procedures adopted by the United States after the American Revolution).

22. See SCOTT DODSON, NEW PLEADING IN THE TWENTY-FIRST CENTURY 13–14 (2013) (describing the confusion caused by the Field Code's attempt to distinguish between ultimate facts, evidentiary facts, and conclusions of law). For further discussion of the Field Code, see *infra* notes 29–34 and accompanying text.

23. See Subrin, *supra* note 19, at 946–47 (quoting Roscoe Pound—one of the architects of the modern pleading system—regarding the purpose of notice pleading).

24. See *id.* at 916 (explaining how the early pleading system was designed to resolve a single issue).

25. CHARLES E. CLARK, HANDBOOK ON THE LAW OF CODE PLEADING § 4, at 11 (1st ed. 1928).

26. See Subrin, *supra* note 19, at 916 (detailing the basic procedures of common-law pleading); see also DODSON, *supra* note 22, at 7–8 (discussing the "back-and-forth colloquy" of common-law pleadings).

Common-law pleading also required plaintiffs to obtain a writ that related to the subject matter of the dispute. Writs were “royal order[s] which authorised a court to hear a case and instructed a sheriff to secure the attendance of the defendant.”²⁷ But because writs were “limited to cases where precedents existed,” the types of suits that could be brought were highly restricted.²⁸ The requirement of a writ, coupled with the fact that a trial on the merits could resolve only one issue, created a system fraught with technical difficulties that severely limited relief. These issues led to common-law pleading being replaced by code pleading.

The Field Code²⁹ abolished the writ system and combined all causes of action into the civil action.³⁰ Under code pleading, a complaint was to allege “material” facts and avoid stating “evidential facts” and “conclusions of law.”³¹ Although the code reduced the technicalities of pleadings, in practice it proved difficult to distinguish between facts, evidence, and conclusions.³² The code thus created a “whole new corpus of legal technicality at the pleading stage,”³³ leading to another push for reform that resulted in the creation of the Federal Rules of Civil Procedure (Federal Rules) in 1938.³⁴

The goal in drafting the Federal Rules was to identify procedures that would “most efficiently foster decisions on the merits.”³⁵ The Federal Rules ushered in an era of liberalized pleading as they “replaced fact pleading with notice pleading.”³⁶ Rule 8(a)(2), which sets out what a plaintiff is required to state in the complaint, requires

27. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 22 (1969).

28. CLARK, *supra* note 25, § 4, at 11–12.

29. The code was named after its principal draftsman David Dudley Field. *Id.* § 8, at 18.

30. *Id.* at 18–19. This language would later be incorporated into the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 2 (“There is one form of action—the civil action.”).

31. CLARK, *supra* note 25, § 38, at 150.

32. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 574 (2007) (describing the struggle of distinguishing evidence, facts, and conclusions); CLARK, *supra* note 25, § 38, at 155 (describing “attempted distinction between facts, law and evidence” as a “convenient distinction of degree”).

33. DODSON, *supra* note 22, at 14.

34. *See id.* at 15–16 (tracing the movement from the Field Code to the Federal Rules).

35. Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2179 (1989).

36. Thomson v. Washington, 362 F.3d 969, 970 (7th Cir. 2004). Notice pleading refers to a system of pleading created by the Federal Rules of Civil Procedure where all that is required is “‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting FED. R. CIV. P. 8(a)(2)), *abrogated by Twombly*, 550 U.S. at 563.

that a plaintiff provide the court with “a short and plain statement of the claim showing that the pleader is entitled to relief.”³⁷ For over fifty years, lower courts based their understanding of Rule 8(a)’s requirements and the demands of “notice pleading” upon the Supreme Court’s decision in *Conley v. Gibson*.³⁸

II. FEDERAL PLEADING STANDARDS FROM *CONLEY* TO *IQBAL*

This Part summarizes the Court’s pre-*Twombly* precedents, briefly describes the changes wrought by *Twombly* and *Iqbal*, and shows that the Court continues to send lower courts mixed messages by citing affirmatively to pre-*Twombly* precedent.

A. *Pre-Twombly Precedent*

In *Conley v. Gibson*, the Supreme Court articulated Rule 8(a)’s requirements. *Conley* made clear that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”³⁹ The Court stated that, to satisfy Rule 8(a), a complaint need only “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁴⁰ Under this notice-pleading approach, a court would not dismiss a complaint “unless it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴¹

For nearly fifty years after *Conley*, notice pleading was the dominant standard employed by lower courts when assessing a complaint’s sufficiency.⁴² Although some lower courts pushed back by imposing judicially created heightened pleading standards,⁴³ the Supreme Court struck down such standards in 1993 in *Leatherman*

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

38. See A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 102 (2008) (explaining that for several decades after *Conley* was decided, courts followed the decision’s notice-pleading standards).

39. *Conley*, 355 U.S. at 47.

40. *Id.*

41. *Id.* at 45–46.

42. See Spencer, *supra* note 38, at 102–05 (noting that, in “the decade or so after *Conley*,” district courts applied notice pleading when testing the sufficiency of complaints).

43. Christopher Fairman and Richard Marcus have argued that lower courts have had a longstanding tendency to impose heightened pleading even after the Supreme Court insisted upon a notice-pleading standard in *Conley*. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998).

and again in 2002 in *Swierkiewicz*. On both occasions, the Court reaffirmed its commitment to *Conley* and Rule 8(a)'s notice-pleading standard.

In *Leatherman*, a police officer detected a chemical odor associated with methamphetamines outside of the Leatherman home.⁴⁴ The police obtained a search warrant for the home based upon the officer's observation and executed the warrant while the Leathermans were away.⁴⁵ While searching for the narcotics, the officers shot and killed the two Leatherman family dogs.⁴⁶ No drugs were recovered.⁴⁷ The Leathermans filed suit under 42 U.S.C. § 1983, alleging that the officers' conduct violated their Fourth Amendment rights.⁴⁸ The federal district court dismissed the Leathermans' complaint, finding that they failed to meet the Fifth Circuit's "heightened pleading standard."⁴⁹ The Fifth Circuit affirmed, holding that complaints alleging municipal liability under § 1983 must plead facts with particularity.⁵⁰

The Supreme Court reversed and unanimously held that a federal court may not apply a "heightened pleading standard" in civil-rights cases alleging municipal liability.⁵¹ The Court reasoned that Rule 9(b) imposes a particularity requirement on pleadings alleging fraud or mistake,⁵² but does not make "any reference to complaints alleging municipal liability."⁵³ Therefore, lower courts cannot apply a heightened pleading requirement to complaints alleging municipal liability.⁵⁴

44. Duke Univ. Sch. of Law, *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, YOUTUBE (Oct. 27, 2014), <https://www.youtube.com/watch?v=BZjlnyWGwh4&feature=youtu.be> [http://perma.cc/WJH2-D83R] (documenting the circumstances surrounding the *Leatherman* case).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164–65 (1993).

49. *Id.* at 165.

50. *Id.*

51. *Id.* at 164.

52. "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

53. *Leatherman*, 507 U.S. at 168.

54. *Id.*

More importantly, the Court found that a heightened pleading standard was “impossible to square” with the fact that Rule 8(a)(2) requires only a “short and plain statement of the claim showing that the pleader is entitled to relief.”⁵⁵ The Court emphatically endorsed notice pleading by saying “[i]n *Conley v. Gibson*, we said in effect that the Rule meant what it said.”⁵⁶

In *Swierkiewicz v. Sorema N.A.*, the Court again rejected a heightened pleading standard, this time in the employment-discrimination context. Akos Swierkiewicz was a fifty-three-year-old Hungarian native employed by Sorema N.A. as a senior vice president and chief underwriting officer (CUO).⁵⁷ Sorema N.A. was owned and controlled by a French parent corporation.⁵⁸ Almost six years after being hired, the CEO demoted Mr. Swierkiewicz⁵⁹ and gave many of his responsibilities to a thirty-two-year-old French national.⁶⁰ A year later, the CEO said that “he wanted to ‘energize’ the underwriting department” and he appointed the young Frenchman as CUO.⁶¹ Mr. Swierkiewicz brought suit alleging discrimination based on his age and national origin in violation of the Age Discrimination in Employment Act of 1967 and Title VII of the Civil Rights Act of 1964.⁶² The District Court for the Southern District of New York held that Swierkiewicz “ha[d] not adequately alleged circumstances that support an inference of discrimination.”⁶³ The Second Circuit affirmed.⁶⁴

Writing for a unanimous Court, Justice Thomas distinguished evidentiary standards from pleading standards.⁶⁵ The Court held that an employment-discrimination complaint need not state specific facts making out a prima facie case.⁶⁶ In doing so, the Court again endorsed *Conley*’s “no set of facts” standard and stated that “[g]iven the

55. *Id.* (quoting FED. R. CIV. P. 8(a)(2)).

56. *Id.*

57. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 509.

63. *Id.* (alteration in original).

64. *Id.*

65. *Id.* at 511–12.

66. *See id.* at 515 (“[T]he Federal Rules do not contain a heightened pleading standard for employment discrimination suits.”). The prima facie case for employment discrimination was laid out by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Federal Rules' simplified standard for pleading '[a] court may dismiss a complaint only if it is clear no relief could be granted under any set of facts that could be proved consistent with the allegations.'"⁶⁷ The Court emphasized that its holding was not limited to employment-discrimination cases. Rather, the Court said that "Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions."⁶⁸

With these two cases, the Supreme Court sent a clear message to lower courts: the notice-pleading standard of Rule 8(a) applied to all civil actions unless the Federal Rules or a federal statute specified otherwise. The Supreme Court left the notice-pleading framework untouched for five years, until it revisited civil pleading standards in *Bell Atlantic Corp. v. Twombly*.

B. *Twombly*, *Iqbal*, and *Thereafter*

The Supreme Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*⁶⁹ marked a significant departure from the Court's earlier pleading jurisprudence.⁷⁰ Although *Twombly* and its potential impact have been the subject of an incredible amount of scholarly debate,⁷¹ two points can be clearly distilled from the case. First, Justice Souter and the *Twombly* majority decided that *Conley*'s "no set of facts" language had "earned its retirement."⁷² Second, the Court replaced the liberal *Conley* standard with a new "plausibility" standard.⁷³ Under this plausibility standard, a plaintiff must plead enough facts "to raise a right to relief above the speculative level."⁷⁴ To be more than mere speculation, a complaint must state facts that move the

67. *Swierkiewicz*, 534 U.S. at 514 (alteration in original) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

68. *Id.* at 513. The limited exceptions mentioned by the Court are Rule 9(b), *see supra* note 52, and the Private Securities Litigation Reform Act (PSLRA), which imposes a heightened pleading standard for claims involving securities fraud. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 747.

69. For a complete analysis of *Bell Atlantic Corp. v. Twombly*, see generally Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Pleading Practice*, 243 F.R.D. 604 (2007).

70. Although *Twombly* introduced a new pleading paradigm, it did not overrule (or retire) any of the Court's prior Rule 8 decisions other than *Conley*. In fact, *Twombly* reaffirms *Swierkiewicz* as good law. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569–70 (2007).

71. For examples of this debate, see *supra* note 12.

72. *Twombly*, 550 U.S. at 563.

73. *Id.* at 556–57.

74. *Id.* at 555.

claim across “the line between possibility and plausibility.”⁷⁵ Despite introducing a new standard, the Court maintained that they were not requiring “heightened fact pleading of specifics.”⁷⁶ The Court clearly moved away from a notice-pleading interpretation of Rule 8(a) yet insisted that it was not raising pleading standards; this move created tension within the opinion.

After *Twombly*, it was unclear whether or not *Twombly*’s new plausibility standard applied to all civil actions. Some thought that *Twombly* applied only in the antitrust context,⁷⁷ while others contended that *Twombly* applied to all civil actions and that the days of notice pleading were over.⁷⁸ The confusion and debate were fueled two years later when the Court attempted to clarify *Twombly* and plausibility pleading in *Ashcroft v. Iqbal*.

Iqbal confirmed that the *Twombly* Court’s plausibility interpretation of Rule 8(a) was trans-substantive. Thus, the plausibility-pleading standard applies “in all civil actions and proceedings in the United States district courts.”⁷⁹ *Iqbal* also outlined a “two-pronged approach” for courts to use when assessing a complaint’s sufficiency.⁸⁰ First, courts must identify and disregard all legal allegations in the complaint that are conclusory in nature.⁸¹ Second, courts must test whether the remaining nonconclusory allegations plausibly entitle the plaintiff to relief.⁸² The Court observed that determining plausibility is “a context-specific task that

75. *Id.* at 557.

76. *Id.* at 570.

77. See *Kersenbrock v. Stoneman Cattle Co.*, No. 07-1044-MLB, 2007 WL 2219288, at *2 n.2 (D. Kan. July 30, 2007) (“*Bell Atlantic* deals *only* with pleading requirements in the highly complex context of an antitrust conspiracy case.”); see also *Tackett v. M & G Polymers, USA, LLC*, 561 F.3d 478, 488–89 (6th Cir. 2009) (per curiam) (noting that *Twombly*’s plausibility-pleading standard was confined to cases involving “expensive, complicated litigation” (quoting *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009))).

78. See *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 n.2 (2d Cir. 2007) (“We have declined to read *Twombly*’s flexible ‘plausibility standard’ as relating only to antitrust cases.” (citing *Iqbal v. Hasty*, 490 F.3d 143, 157 (2d Cir. 2007), *rev’d and remanded sub nom.* *Ashcroft v. Iqbal*, 556 U.S. 662 (2009))); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) (“Notice pleading is dead.”); Dodson, *supra* note 12, at 138 (“Clearly, *Conley*’s ‘no set of facts’ language is dead . . .”).

79. *Iqbal*, 556 U.S. at 684 (quoting FED. R. CIV. P. 1).

80. *Id.* at 679.

81. See *id.* at 678 (“[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.”).

82. *Id.* at 679 (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”).

requires the reviewing court to draw on its judicial experience and common sense.”⁸³

The tension lower courts must reconcile can be summed up as follows: *Iqbal* makes it clear that *Twombly* applies to all civil actions,⁸⁴ yet *Swierkiewicz*, which was reaffirmed by *Twombly*,⁸⁵ and *Leatherman* stand for the proposition that Rule 8(a)’s notice-pleading standard also applies to all civil actions. Moreover, *Twiqbal* never explicitly overruled either *Leatherman* or *Swierkiewicz*. Only the Supreme Court can overrule its own decisions; thus these pre-*Twombly* precedents should not be disregarded by lower courts as no longer being in line with the Court’s current thinking.⁸⁶

In fact, given the Court’s recent decision in *Johnson v. City of Shelby*,⁸⁷ it appears that both *Leatherman* and *Swierkiewicz* remain viable. In *Johnson*, the Fifth Circuit affirmed the district court’s rejection of a plaintiff’s due-process claim because the plaintiff did not invoke 42 U.S.C. § 1983 in her complaint.⁸⁸ The Supreme Court summarily reversed and held that “no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim.”⁸⁹ In support of its holding, the Court cited positively to both *Leatherman* and *Swierkiewicz*,⁹⁰ suggesting that both cases remain at the forefront of the Court’s Rule 8(a) jurisprudence.

When the Supreme Court held that *Twombly*’s plausibility pleading standard applied to all civil actions, it created tension with its prior Rule 8(a) precedents that relied on the more lenient notice-pleading standard. The discord is due, in part, to the fact that the Court did not overrule its pre-*Twombly* precedents. Indeed, the Court saw no reason to overrule its prior case law as it maintained that *Twombly* did not create a more stringent pleading standard.⁹¹

83. *Id.*

84. *Id.* at 684.

85. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007).

86. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (noting that only the Court has “the prerogative of overruling its own decisions” (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))). Professor Adam Steinman has made this point in the same context. *See Steinman, supra* note 12, at 1320–23 (arguing that pre-*Twombly* case law remains good law).

87. *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (per curiam).

88. *Id.* at 346.

89. *Id.* at 347.

90. *Id.*

91. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007).

Lower courts and commentators have had a difficult time accepting this claim. The next Part focuses on how the federal courts of appeals have treated *Leatherman* and *Swierkiewicz* after *Iqbal*.

III. CIRCUIT COURT TREATMENT OF *LEATHERMAN* AND *SWIERKIEWICZ*

The federal circuit courts of appeals that have confronted the issue⁹² have taken discordant views on the vitality of pre-*Twombly* precedents. The cases reveal three approaches. Two circuits have noted the tension between pre-*Twombly* case law and *Twiqbal* but have declined to resolve the issue. Another five circuits have held that pre-*Twombly* case law remains good law, with one of these courts going so far as to still apply the notice-pleading standard. Finally, three circuits have radically reinterpreted pre-*Twombly* authority.

A. Courts Declining to Resolve the Issue

Decisions by the Second and Ninth Circuits illustrate the difficulty of defining a uniform pleading standard. Neither case definitively resolves the tension between pre-*Twombly* authority and *Twiqbal*, which leaves the status of pre-*Twombly* precedent an open question in these circuits.

In *Hedges v. Town of Madison*,⁹³ a plaintiff brought an employment-discrimination suit against his former employer, the Town of Madison, and various town officials.⁹⁴ The plaintiff's complaint stated that he was fired because he was nearing retirement age, but the only fact alleged in support of this claim was the plaintiff's age.⁹⁵ The Second Circuit opened by observing that "[t]he pleading standard for employment-discrimination complaints is somewhat of an open question in our circuit."⁹⁶ The court laid out the competing standards of *Swierkiewicz* and *Twombly*, and mused that "*Swierkiewicz*['s] reliance on *Conley* suggests that, at a minimum,

92. As of February 2016, the Fifth Circuit has published no opinions discussing the applicability of *Leatherman* and *Swierkiewicz* in a post-*Iqbal* world.

93. *Hedges v. Town of Madison*, 456 F. App'x 22 (2d Cir. 2012).

94. *Id.* at 22–23.

95. *Id.* at 23. Plaintiff also alleged that his firing violated the Americans with Disabilities Act and Rehabilitation Act. *Id.* However, his complaint did not allege that he qualified as disabled under these acts. *Id.* at 24. Rather, he argued that the "district court should have *inferred* he was disabled" given a litany of health issues he suffered from. *Id.*

96. *Id.* at 23.

employment-discrimination claims must meet the standard of pleading set forth in *Twombly* and *Iqbal*.⁹⁷ The court nonetheless opined that it “need not resolve these conflicts here,” as the plaintiff had failed to meet “any conceivable standard of pleading.”⁹⁸ The court thus avoided making any decisions about *Swierkiewicz*’s continued vitality.

Starr v. Baca,⁹⁹ out of the Ninth Circuit, is another example of a court expressing confusion over what pleading standard to apply. In *Starr*, the plaintiff brought a damages action under § 1983, alleging that police officers endorsed other inmates’ violent attack on the plaintiff while he was an inmate in a Los Angeles County jail.¹⁰⁰ The district court dismissed the plaintiff’s supervisory-liability claim, which was based upon the sheriff’s alleged deliberate indifference to the plaintiff’s injury.¹⁰¹ The Ninth Circuit disagreed and held that the plaintiff’s allegations were sufficient to satisfy Rule 8(a), but the court struggled to identify the appropriate pleading standard:

The juxtaposition of *Swierkiewicz* . . . on the one hand, . . . and . . . *Twombly*[] and *Iqbal*, on the other, is perplexing. Even though the Court stated . . . that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard in . . . *Twombly* and *Iqbal*.¹⁰²

The court did not make a definitive statement about the status of pre-*Twombly* precedent within the circuit. Instead, the court extracted principles common to both standards and created a hybrid standard that would permit more claims to survive a motion to dismiss than would otherwise under the plausibility-pleading regime.¹⁰³ The court framed this two-part rule as follows:

First, to be entitled to the presumption of truth, allegations in a complaint . . . may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself

97. *Id.*

98. *Id.*

99. *Starr v. Baca*, 652 F.3d 1202 (9th Cir. 2011).

100. *Id.* at 1204.

101. *Id.* at 1205.

102. *Id.* at 1215.

103. *Id.* at 1216 (“To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard.”).

effectively. Second, the factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation.¹⁰⁴

Using this rule, the court reversed the district court and remanded the case.¹⁰⁵ This standard still governs cases in the Ninth Circuit. But, as the district court cases in Part V suggest, it is unclear that this rule provides any more certainty than the competing standards created by the Supreme Court.

B. Circuits Holding that Pre-Twombly Precedent Remains Good Law

Other circuits have been willing to go beyond simply acknowledging the tension in the Supreme Court's pleading jurisprudence and have concluded that pre-*Twombly* precedent is still good law. The common thread among these cases is a reliance on *Swierkiewicz* and/or an affirmative statement that it remains good law after *Twiqbal*.¹⁰⁶

The Sixth Circuit's decision in *Keys v. Humana*¹⁰⁷ illustrates the reasoning these circuits apply. In *Keys*, an African American employee brought racial-discrimination claims under Title VII of the Civil Rights Act of 1964¹⁰⁸ and § 1981¹⁰⁹ against her former employer.¹¹⁰ The district court granted *Humana*'s motion to dismiss, but the Sixth Circuit reversed, relying on *Swierkiewicz* to hold that the complaint sufficiently stated a claim.¹¹¹ The court noted that “[t]he

104. *Id.* at 1216.

105. *Id.* at 1217.

106. This Section does not fully review each of these cases. Those not specifically addressed are *Horras v. Am. Capital Strategies, Ltd.*, 729 F.3d 798 (8th Cir. 2013), *Khalik v. United Air Lines*, 671 F.3d 1188 (10th Cir. 2012), and *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010).

107. *Keys v. Humana*, 684 F.3d 605 (6th Cir. 2012).

108. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

109. 42 U.S.C. § 1981 (2012). This Section provides that

[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id. § 1981(a).

110. *Keys*, 684 F.3d at 606.

111. *Id.* at 609–10.

Supreme Court's subsequent decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz*.¹¹² The court went on to reiterate that the Sixth Circuit has "recognized the continuing viability of *Swierkiewicz*'s holding" and that "it would be 'inaccurate to read [*Twombly* and *Iqbal*] so narrowly as to be the death of notice pleading."¹¹³ The court thus "recognize[d] the continuing viability of the 'short and plain' language of Federal Rule of Civil Procedure 8."¹¹⁴

Although this Sixth Circuit case is notable for its endorsement of *Swierkiewicz*, the Eleventh Circuit went even further in its affirmation of the vitality of pre-*Twombly* precedent in *Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*¹¹⁵ The case is factually distinct from the others addressed in this Note,¹¹⁶ but is notable for its reading of *Twombly* and *Iqbal*. In holding that the plaintiff's complaint sufficiently stated a claim, the court stated that "under the Federal Rules' simplified standard for pleading [a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."¹¹⁷ This is a direct application of *Swierkiewicz*'s notice-pleading standard, which was based on *Conley*'s "no set of facts" language. Thus, the Eleventh Circuit apparently does not view *Twombly* and *Iqbal* as having displaced notice pleading or any important pre-*Twombly* precedents, like *Swierkiewicz*.

C. Circuit Courts that Radically Reinterpreted Pre-*Twombly* Precedent

Three circuits have followed the logic that, because *Twombly* retired *Conley*'s "no set of facts" language, the Supreme Court's pre-*Twombly* authorities that relied on *Conley* are no longer viable.

112. *Id.* at 609.

113. *Id.* (alteration in original) (quoting *HDC, LLC v. City of Ann Arbor*, 675 F.3d 608, 614 (6th Cir. 2012)).

114. *Id.*

115. *Palm Beach Golf Center–Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245 (11th Cir. 2015).

116. "Palm Beach Golf Center–Boca, Inc. received an unsolicited one-page fax advertisement, promoting dental services provided by" dentist John G. Sarris, the owner of a Florida dental practice. *Id.* at 1248. Thereafter, Palm Beach Golf brought a class-action suit against Sarris, D.D.S., claiming that the fax advertisement violated the Telephone Consumer Protection Act of 1991. *Id.* at 1248–49.

117. *Id.* at 1260 (alteration in original) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

Although this reasoning has been disavowed by the Supreme Court,¹¹⁸ it highlights the conflict and confusion lower courts encounter when deciding the proper pleading standard for civil cases.

In *Rodríguez-Reyes v. Molina-Rodríguez*,¹¹⁹ several plaintiffs sued their former employer under § 1983, alleging discrimination based on their political affiliation.¹²⁰ Reversing the district court, the First Circuit held that the plaintiffs had sufficiently stated a claim.¹²¹ In doing so, the court stated that “the *Swierkiewicz* holding remains good law” after *Iqbal*.¹²² But the court relied on *Swierkiewicz*’s applicability regarding the “disconnect between the prima facie case and the rules of pleading” and not *Swierkiewicz*’s interpretation of Rule 8(a)’s requirements.¹²³ The court clarified that “[t]o the extent that the *Swierkiewicz* Court relied on *Conley v. Gibson* to describe the pleading standard, that description is no longer viable.”¹²⁴

The Third Circuit too has noted the “demise of *Swierkiewicz*.”¹²⁵ In *Fowler v. UPMC Shadyside*,¹²⁶ the plaintiff filed a disability-discrimination claim.¹²⁷ Much like the First Circuit in *Rodríguez-Reyes*, the Third Circuit drew a distinction between evidentiary standards and pleading standards and held that the plaintiff had sufficiently pleaded her claim.¹²⁸ After asking “the parties to comment on the continued viability of the Supreme Court’s decision in

118. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (“We reaffirm that ‘[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.’” (alteration in original) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))).

119. *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49 (1st Cir. 2013).

120. *Id.* at 52.

121. *Id.* at 58.

122. *Id.* at 53–54.

123. *Id.* at 54 n.3.

124. *Id.* (citation omitted).

125. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009).

126. *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir. 2009).

127. *Id.* at 206.

128. See *id.* at 213. The court also stated that

[a]t this stage of the litigation, the District Court should have focused on the appropriate threshold question—namely whether Fowler *pleaded* she is an individual with a disability. The District Court and UPMC instead focused on what Fowler can “prove,” apparently maintaining that since she cannot prove she is disabled she cannot sustain a *prima facie* failure-to-transfer claim. A determination whether a *prima facie* case has been made, however, is an evidentiary inquiry—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination.

Id.

Swierkiewicz,” the court found that “*Swierkiewicz* is based, in part, on *Conley*” and “that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”¹²⁹

The most recent circuit court to radically reinterpret pre-*Twombly* authority is the Fourth Circuit in *McCleary-Evans v. Maryland Department of Transportation*. The plaintiff in *McCleary-Evans*, an African American female, brought a claim against her employer alleging violations of Title VII.¹³⁰ Specifically, the plaintiff alleged that her employer gave two positions to white candidates, instead of to her, on account of her race and gender.¹³¹ The district court held that the plaintiff’s “complaint failed to allege facts that plausibly support a claim of discrimination” and granted the defendant’s motion to dismiss.¹³²

On appeal, *McCleary-Evans* claimed “that the district court imposed on her a pleading standard ‘more rigorous’ than *Swierkiewicz v. Sorema N.A.* allows.”¹³³ The Fourth Circuit affirmed the district court and held that the plaintiff’s reliance on *Swierkiewicz* was misplaced.¹³⁴ Judge Niemeyer noted that *Swierkiewicz* “applied a pleading standard more relaxed than the plausible-claim standard required by *Iqbal* and *Twombly*.”¹³⁵ The dissent, written by Judge Wynn, contended that *Swierkiewicz* should have applied, saying that the majority had “entirely ignore[d] the factual underpinnings of the *Swierkiewicz* holding, looking solely to the Supreme Court’s 2009 decision in *Iqbal* to guide its decision.”¹³⁶ Despite the apparent tension between *Iqbal* and *Swierkiewicz*, Judge Wynn noted that lower federal courts “have no authority to overrule a Supreme Court decision no matter . . . how out of touch with the Supreme Court’s current thinking the decision seems.”¹³⁷

129. *Id.* at 211.

130. *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582, 583 (4th Cir. 2015), *petition for cert. filed*, 84 U.S.L.W. 3260 (U.S. Aug. 26, 2015) (No. 15-573).

131. *Id.*

132. *Id.*

133. *Id.* at 584 (citation omitted).

134. *See id.* at 586 (“A closer look at *Swierkiewicz* . . . reveals that it does not support [McCleary-Evans’s] position.”).

135. *Id.* at 587.

136. *Id.* at 589 (Wynn, J., dissenting).

137. *Id.* at 590 (alteration in original) (quoting *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir. 2002)).

These three circuits have effectively overruled *Swierkiewicz* insofar as it relies on *Conley* for the appropriate Rule 8(a) pleading requirements. Because *Leatherman* also relies on *Conley*, it can be assumed that these courts would also question *Leatherman*'s continued utility. The circuits are clearly split on the viability of pre-*Twombly* case law. With this uncertainty at the circuit level, the confusion is only compounded among the district courts.

IV. METHODOLOGY

Although some commentators contend that *Twombly* and *Iqbal* can be read as consistent with prior notice-pleading case law, questions remain as to the vitality of pre-*Twombly* precedent.¹³⁸ Just because it is *possible* to interpret these cases as being consistent with one another does not mean that this is the approach being taken by the lower courts. So, the question driving this study is as follows: How are lower courts treating *Swierkiewicz* and *Leatherman* now that they must apply the plausibility-pleading framework announced by *Twombly* and *Iqbal*?

To answer this question, this study focuses on district court cases decided between June 2009 and December 2014. This date span begins one month after *Iqbal* was decided, allowing time for district courts to begin applying plausibility pleading trans-substantively. The study is limited to claims involving 42 U.S.C. § 1983 and Rule 12(b)(6) motions to dismiss. As 12(b)(6) motions test the legal sufficiency of a claim, these are the cases where courts decide the appropriate pleading standard, thus giving insight into how lower courts have treated *Leatherman* and *Swierkiewicz* after *Twombly* and *Iqbal*. The district court cases were gathered from the commercial database Westlaw¹³⁹ based on a search in the federal district court database that first excluded cases involving pro se plaintiffs and then searching for all cases that (1) had a claim involving “42 U.S.C. 1983,” and (2) included a citation to “12(b)(6).”¹⁴⁰ The considerations

138. See Steinman, *supra* note 12, at 1302 (arguing that attempts to read Rule 8's general pleading standards more strictly, pre-*Twombly*, “were consistently rebuffed by the Supreme Court in unequivocal terms”).

139. All cases in this study were returned using the search terms “42 U.S.C. 1983” & “12(b)(6) % pro se” in the Westlaw federal district court database (DCT).

140. This search was conducted on March 23, 2015. Some of the cases retrieved were cases involving Rule 12(c) motions for judgments on the pleadings. These cases were included in the results because Rule 12(c) motions are decided under the same legal standard as Rule 12(b)(6) motions. See, e.g., *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010)

informing this choice were similar to other studies.¹⁴¹ This search retrieved 732 opinions meeting the search terms. Of these, seventy-four cited *Leatherman* or *Swierkiewicz*.

Both *Leatherman* and *Swierkiewicz* were civil-rights cases. Focusing on cases that involved § 1983 claims, the main statutory vehicle for bringing civil-rights claims, ensured that the cases represent a variety of civil-rights claims. This variety guaranteed that there would be cases where it was appropriate for plaintiffs to rely on either *Leatherman* or *Swierkiewicz* for support.

This sample size—seventy-four opinions—is adequate because the goal of this study is not to identify a quantitative trend, but rather to engage in a substantive analysis of lower-court decisions. This Note aims to assess the continued vitality of pre-*Twombly* precedent after *Iqbal* and highlight the confusion among lower courts. The hope is that this study will serve as an impetus for future empirical work from which broader conclusions can be discerned regarding lower courts' reinterpretation of *Leatherman* and *Swierkiewicz* in ways that the Supreme Court did not appear to intend.

This study is unique in so far as it looks at the substance of these seventy-four cases and categorizes them based on their treatment of pre-*Twombly* precedent. All seventy-four cases were read and divided into three categories: positive, negative, and neutral. Cases falling in the positive category made statements that *Leatherman* and *Swierkiewicz* remained good law. These cases also either squarely applied a notice-pleading standard or viewed plausibility pleading through the lens of pre-*Twombly* case law. Negative cases applied a plausibility-pleading standard but did so by radically reinterpreting pre-*Twombly* precedent. By “radically reinterpret,” I mean that these cases noted that a plaintiff’s reliance on *Leatherman* or *Swierkiewicz* was misguided and found that these cases no longer controlled in light of *Iqbal*, despite the fact that *Twombly* and *Iqbal* never overruled any

(“The same standard applicable to . . . 12(b)(6) motions to dismiss applies to . . . 12(c) motions for judgment on the pleadings.”).

141. See, e.g., CECIL ET AL., *supra* note 15, at 6 n.10 (choosing to exclude pro se and prisoner cases because they are “governed by standards other than *Twombly* and *Iqbal*”); Hannon, *supra* note 15, at 1828–29 (analyzing 12(b)(6) motions to examine if federal district courts require more from pleadings after *Twombly* because (1) “the 12(b)(6) motion is used to test the legal sufficiency of a claim”; (2) *Twombly* affirmed a grant of a 12(b)(6) motion to make “its most sweeping pronouncements regarding Rule 8” and introduce plausibility pleading; and (3) 12(b)(6) motions are easy to analyze empirically because they can only “be granted, denied, or granted-in-part/denied-in-part”).

pre-*Twombly* precedents.¹⁴² Cases were labeled neutral if they cited to *Leatherman* and *Swierkiewicz* but did not make any statements as to the continued vitality of these cases. Neutral cases appeared either to apply plausibility pleading or to reconcile the tension in the Court's pleading jurisprudence. This methodology yielded the following results.

V. DISTRICT COURT TREATMENT OF PRE-TWOMBLY CASE LAW AFTER *IQBAL*

The federal district courts, the front lines of litigation, take differing views on the proper pleading standard and the continued viability of pre-*Twombly* case law. Each of the 732 district court cases gathered here assesses, at least in part, the sufficiency of a complaint being challenged under Rule 12(b)(6).¹⁴³ This Part looks at the substance of some of these decisions and how they affected a court's ruling on the motion to dismiss.

A. District Court Cases: The Substance

The majority of the district court cases read for this study apply a plausibility-pleading standard, meaning that they directly apply the standard laid out in *Twiqbal*. This is true for about 77 percent (57 of 74) of the cases reviewed. Of great interest here, roughly 24.6 percent (14 of 57) of the cases that applied plausibility pleading do so by radically reinterpreting pre-*Twombly* precedent.¹⁴⁴

142. These courts never outright decided that *Leatherman* or *Swierkiewicz* were overruled. Rather, they overrule these cases by implication by noting that they are no longer useful in light of *Twombly* and *Iqbal*.

143. The remaining 658 cases in the data set that do not cite *Leatherman* or *Swierkiewicz* are comprised of civil-rights claims that do not involve employment discrimination or municipal liability. Section 1983 is the main vehicle for redressing constitutional and federal statutory violations. Thus, the types of claims falling under § 1983 vary greatly. Some examples of claims found in the 658 cases in this study were claims brought by prisoners, excessive force claims, violations of procedural and substantive due process, and unlawful search and seizure claims. Because these claims did not cite to *Leatherman* or *Swierkiewicz* they are not reviewed further here.

144. In other words, 18.9 percent (14 of 74) of the cases apply *Iqbal* and effectively overrule pre-*Twombly* precedent. The remaining forty-three of the fifty-seven cases that apply a plausibility-pleading standard do not call into question the vitality of pre-*Twombly* case law. These forty-three cases are categorized as neutral and are not specifically reviewed here since they do not express views on the continued utility of pre-*Twombly* precedent.

*Hodges v. Government of District of Columbia*¹⁴⁵ is paradigmatic of the reasoning district courts are applying in cases that are effectively overruling pre-*Twombly* precedent—that is, reasoning that questions *Swierkiewicz* and *Leatherman*'s vitality. The plaintiffs, four individuals, were arrested for disorderly conduct and released following a “post-and-forfeit” procedure.¹⁴⁶ The procedure involved the plaintiffs paying \$35.00 “to obtain their immediate release and resolution of their criminal charges.”¹⁴⁷ Plaintiffs were offered the option of following the post-and-forfeit procedure or spending the night in jail and appearing before a court in the morning.¹⁴⁸ Plaintiffs brought suit under § 1983 alleging that they were offered no other release options (such as citation and release) and argued that this policy and their arrests violated their Fourth Amendment rights.¹⁴⁹ The district court held that the plaintiffs' complaints failed to state a claim under § 1983.¹⁵⁰

Specifically, the court noted that even though this claim arose under § 1983, it had to “satisfy the criteria established in *Iqbal* and *Twombly*.”¹⁵¹ Although it noted that the D.C. Circuit had once articulated a less stringent pleading standard, the court stated that this precedent “preceded *Iqbal*, and must now be interpreted in light of that subsequent Supreme Court decision.”¹⁵² The court rejected the reasoning that “*Twombly* and *Iqbal* should be read in conjunction with earlier cases on the sufficiency of municipal-liability allegations, in particular, *Leatherman*” by stating that “[t]his Court is not confident that the *Leatherman* test survives *Twombly* and *Iqbal*.”¹⁵³ Rather than deal with the fact that the court had two applicable lines of reasoning before it, the court simply brushed away relevant Supreme Court authority.¹⁵⁴

145. *Hodges v. Gov't of D.C.*, 975 F. Supp. 2d 33 (D.D.C. 2013).

146. *Id.* at 38.

147. *Id.* at 39.

148. *Id.*

149. *Id.* at 48. Plaintiffs also alleged that they were arrested without probable cause and that the arrest violated their First Amendment rights. *Id.* at 39.

150. *Id.* at 47–48.

151. *Id.* at 54.

152. *Id.* (quoting *Smith v. District of Columbia*, 674 F. Supp. 2d 209, 214 n.2 (D.D.C. 2009)).

153. *Id.* at 55 n.15.

154. Other district courts have applied the same reasoning with different language. *See, e.g.*, *Hass v. Sacramento Cty. Sheriff's Dep't*, No. 2:13-CV-01746 JAM KJN, 2014 WL 1616440, at *6 (E.D. Cal. Apr. 18, 2014) (“Plaintiff's citation to pre-*Twombly* case law is unhelpful . . . given the heightened pleading requirements that have subsequently developed.”).

One final example of the reasoning district courts apply when effectively overruling pre-*Twombly* case law is *Mayfield v. County of Merced*.¹⁵⁵ The plaintiff, a lawyer, filed suit under Title VII and § 1983 against her employer, alleging race and sex discrimination and retaliation.¹⁵⁶ The District Court for the Eastern District of California dismissed the plaintiff's complaint for failure to state a claim and found the plaintiff's "reliance on *Leatherman* . . . for the premise that a complaint must only include a 'short and plain statement of the claim showing that the pleader is entitled to relief' is outdated. The current pleading standard was altered by the Supreme Court's decision in *Twombly*."¹⁵⁷ This quote highlights absolute confusion over the state of pleading standards. Although this is a reasonable interpretation of what the Court did in *Twombly*, other courts maintain that, even after *Twombly*, a plaintiff still need only assert "a short and plain statement" of the claim to satisfy Rule 8(a).¹⁵⁸ No matter the language these courts use, the former reasoning still effectively renders *Leatherman* and *Swierkiewicz* "hollow shell[s]."¹⁵⁹

On the other end of the spectrum, about 23 percent (17 of 74) of the cases in this study cite *Swierkiewicz* and *Leatherman* positively and apply them without regard to *Twombly*. Two recent cases illustrate the types of cases that fall into the category of "positive" in their treatment of pre-*Twombly* precedent. In *Hernandez v. County of Monterey*,¹⁶⁰ the plaintiffs were inmates or recently released inmates of the Monterey County jail.¹⁶¹ Their complaints alleged, in part, overcrowding, inadequate training, poor facilities, and inadequate access to medical and mental health care screening.¹⁶² The court dismissed the defendants' motion to dismiss and, after citing *Twombly*, quoted directly from *Swierkiewicz* and stated that the court could only dismiss a claim when "it is clear that no relief could be granted under any set of facts that could be proved consistent with

155. Memorandum Decision and Order Re: Defendant County of Merced's Motion to Dismiss, *Mayfield v. Cty. of Merced*, No. 1:13-cv-01619, 2014 WL 5822913 (E.D. Cal. Nov. 10, 2014).

156. *Id.* at *1.

157. *Id.* at *2 n.3.

158. FED. R. CIV. P. 8. Moreover, from a common-sense perspective, a statement of the claim can state plausible facts and still be "short and plain" in nature.

159. *McCleary-Evans v. Md. Dep't of Transp.*, 780 F.3d 582, 592 (4th Cir. 2015) (Wynn, J., dissenting), *petition for cert. filed*, 84 U.S.L.W. 3260 (U.S. Aug. 26, 2015) (No. 15-573).

160. *Hernandez v. Cty. of Monterey*, 70 F. Supp. 3d 963 (N.D. Cal. 2014).

161. *Id.* at 967.

162. *Id.* at 968.

the allegations.”¹⁶³ Applying this language, which was based on *Conley*,¹⁶⁴ is akin to applying a notice-pleading standard.

Finally, in *Jackson v. Pena*¹⁶⁵ the victim of a police-involved shooting sued individual police officers, the Baltimore Police Department, the mayor, and the city council under § 1983.¹⁶⁶ The district court granted the defendants’ motion to dismiss in part, but found that the plaintiff did allege facts sufficient to state a municipal-liability claim against the police department.¹⁶⁷ The court squarely applied *Leatherman*.¹⁶⁸ Noting that there is no heightened pleading for municipal claims, the court stated that in order to survive a motion to dismiss a plaintiff pleading a municipal-liability claim “need only satisfy Rule 8(a) by providing ‘a short and plain statement of the claim showing that [he] is entitled to relief.’”¹⁶⁹ Although some courts have seen *Twombly* and *Iqbal* as causing a sea change in pleading jurisprudence, the courts mentioned here show that notice pleading is still being applied in the post-*Iqbal* era.

The seventy-four cases analyzed in this study yield two important observations. First, courts remain confused about what pleading standard to apply, especially given the tension between pre-*Twombly* case law and the plausibility-pleading standard announced in *Twombly*. Second, some courts resolve this tension by effectively overruling *Swierkiewicz* and *Leatherman* despite Supreme Court pronouncements that these cases remain good law. These observations highlight a need for further study and, perhaps, Supreme Court intervention.

B. District Court Cases: The Results

Thus far this study has been unique in its attempts to assess *Twombly* and *Iqbal*’s impact by focusing on application and reasoning rather than results alone. Although the focus should be on accurate lower-court reasoning and analysis independent of results, actual outcomes for the parties are important. Looking at the outcomes of

163. *Id.* at 969 (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002)).

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

165. *Jackson v. Pena*, 28 F. Supp. 3d 423 (D. Md. 2014).

166. *Id.* at 427.

167. *Id.* at 434–35.

168. *Id.* at 433.

169. *Id.* (quoting *Lanford v. Prince George’s Cty.*, 199 F. Supp. 2d 297, 304 (D. Md. 2002)).

these motions to dismiss also helps identify substantive trends. This Section shows how courts have ruled on 12(b)(6) motions depending upon their treatment of pre-*Twombly* case law. The results are recorded in Table 1.

Table 1. Overall Results of 12(b)(6) Motions

Treatment of Pre- <i>Twombly</i> Caselaw		Motion Granted	Motion Denied	Granted in Part & Denied in Part
<i>Swierkiewicz</i>	Positive	0	3	7
	Negative	2	0	4
	Neutral	11	4	14
<i>Leatherman</i>	Positive	0	1	6
	Negative	4	0	4
	Neutral	7	2	5

These results show a potential correlation between how courts treat pre-*Twombly* authority and how they rule on defendants' motions to dismiss: when courts have taken a positive view of *Leatherman* and *Swierkiewicz*, they have not granted a motion to dismiss in full. That is not to say that these courts let any and all claims through. These same courts have, on thirteen occasions, still engaged in merits screening at the pleading stage by granting the motion in part and denying it in part.¹⁷⁰ Conversely, none of the observed courts that effectively overruled *Leatherman* and *Swierkiewicz* denied a motion to dismiss. This means that, in these courts, plaintiffs and their lawyers are relying on good law to their detriment.

In contrast, the wider spread of results in the "neutral" category may reflect attempts to reconcile the tension in pleading standard jurisprudence. Rather than deciding that either pre-*Twombly* case law or Twiqbal plausibility applies to all cases, these courts appear to

170. These thirteen cases are comprised of the "positive" treatments of both *Swierkiewicz* and *Leatherman* recorded in the "Granted in Part & Denied in Part" column of Table 1. Looking at these "mixed" results is also revealing. Courts that treated *Swierkiewicz* and *Leatherman* positively or neutrally were more likely to deny the 12(b)(6) motion for the part of the claim based on § 1983. Conversely, the courts that reinterpreted pre-*Twombly* case law and severely questioned their viability were more likely to grant the 12(b)(6) motion when it came to § 1983 claims.

be looking at each case's underlying facts to decide which of the two relevant standards applies. For example, in *Kleehammer v. Monroe County*¹⁷¹ the court noted that the plaintiff contended that "the pleading standard for an employment-discrimination case was set by the Supreme Court in *Swierkiewicz*."¹⁷² In assessing this claim, the court laid out the pleading standard it was applying as follows:

The *Twombly* court held that *Swierkiewicz* remains good law. However, some courts and commentators have concluded that *Twombly* and *Iqbal* repudiated *Swierkiewicz*, at least to the extent that *Swierkiewicz* relied upon pre-*Twombly* pleading standards. Reconciling *Swierkiewicz*, *Twombly*, and *Iqbal*, a complaint need not establish a *prima facie* case of employment discrimination to survive a motion to dismiss; however, "the claim must be facially plausible and must give fair notice to the defendants of the basis for the claim."¹⁷³

Until the Supreme Court speaks again on the issue, this approach aligns most closely with Supreme Court pronouncements on how lower courts should treat conflicting precedent.¹⁷⁴ Namely, by recognizing that absent a Supreme Court ruling, the relevant case law still applies.

These observations are based off of the seventy-four cases read for this study. A larger trans-substantive study is necessary to confirm these trends and provide greater insight regarding how *Twombly* and *Iqbal* and lower-court treatment of pre-*Twombly* authority are affecting access to the next phases of litigation. But this study does begin to reveal the confusion lower courts are facing as they attempt to assess the continued vitality of pre-*Twombly* precedent.

VI. THE CONSEQUENCES OF THE CONFUSION

The cases in this study illustrate the "confusion and disarray among judges and lawyers" caused by the tension between pre-

171. *Kleehammer v. Monroe Cty.*, 743 F. Supp. 2d 175 (W.D.N.Y. 2010).

172. *Id.* at 183.

173. *Barbosa v. Continuum Health Partners, Inc.*, 716 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) (footnotes omitted) (quoting *Fowler v. Scores Holding Co.*, 677 F. Supp. 2d 673, 679 (S.D.N.Y. 2009)).

174. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

Twombly precedent and *Iqbal*.¹⁷⁵ These cases produce two additional insights. First, that some courts are effectively overruling relevant Supreme Court case law. And second, that notice pleading is far from retired.

A. *Lower Courts Reinterpreting Pre-Twombly Precedent*

Twombly's announcement that Rule 8(a)(2) required a plaintiff to plead plausible facts in their complaint was “wholly inconsistent with Supreme Court precedent.”¹⁷⁶ However, other than abrogating *Conley*, the Court did not overrule any of its other Rule 8(a) jurisprudence. As this study has shown, to reconcile this inconsistency, some courts have effectively overruled *Leatherman* and *Swierkiewicz*. This approach is unacceptable for two reasons.

First, lower courts overruling *Leatherman* and *Swierkiewicz* run afoul of the Supreme Court's longstanding instruction that only the Court has “the prerogative of overruling its own decisions.”¹⁷⁷ Although these lower courts are clearly wrong, they are not entirely to blame. The Supreme Court has sent them conflicting messages and has itself deviated from the requirements of *stare decisis*. As Justice White noted in *Irwin v. Department of Veterans Affairs*,¹⁷⁸ “the doctrine of *stare decisis* demands that we attempt to reconcile our prior decisions rather than hastily overrule some of them.”¹⁷⁹ But this does not seem to have been the Court's approach in *Twombly* and *Iqbal*. Rather than announce that the Court was creating a new pleading standard, thereby being forced to both confront past precedent and provide a “special justification”¹⁸⁰ for doing so, the Court maintained that it simply was not raising pleading standards. Thus, commands that only the Court can overrule its precedents coupled with the Court's unwillingness to reconcile its past

175. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 31 (2010).

176. Spencer, *supra* note 78, at 460.

177. *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas*, 490 U.S. at 484); see also *Ides*, *supra* note 69, at 635 (“Of course, the Court is free to overrule any line of cases, but in the absence of an express overruling one should at least be circumspect in concluding that the execution has occurred.”); Steinman, *supra* note 12, at 1323 (arguing against the view that because *Twombly* and *Iqbal* are in “profound conflict with prior precedent that lower courts ought to deem the earlier cases to have been implicitly overruled”).

178. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990).

179. *Id.* at 99–100.

180. See *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) (“[D]eparture from the doctrine of *stare decisis* demands special justification.”).

precedents with newly created standards puts lower courts in a bind. Lower courts see the Supreme Court saying that is not creating a heightened pleading standard but, given that plausibility pleading seems inconsistent with earlier Rule 8(a) case law, these courts believe the Supreme Court is actually heightening pleading standards. Moreover, since the Court is giving them ambiguous instructions on how to apply plausibility pleading, it is, in essence, licensing the type of behavior observed in lower courts in this study.

Second, and more simply, lower courts that are effectively overruling binding Supreme Court case law are denying plaintiffs justice because plaintiffs and their lawyers are relying to their detriment on cases they believe to be good law.

B. Confusion in the Lower Courts

The confusion among lower courts after *Iqbal* is further highlighted by the fact that some courts are still applying an outright notice-pleading standard. There are “federal interests in uniformity, certainty, and the minimization of unnecessary litigation” and the discordant approaches taken by lower courts undermine these interests.¹⁸¹

The lack of a uniform and clear pleading standard introduces uncertainty at the earliest stage of the federal litigation process. Uncertainty raises costs in any system, and the federal court system is no different. Post-*Twombly*, federal courts must now deal with an increased workload, as there has been an increase in the filings of motions to dismiss for failure to state a claim.¹⁸² Moreover, parties are now forced to spend more time preparing a complaint, to state more facts without the benefit of pretrial discovery, and to perhaps even increase the length of their pleadings to preemptively fend off challenges under *Iqbal*. These reactions increase cost and also waste the most precious of judicial resources, time. Ironically, these costs are antithetical to the policy goals of making litigation less

181. *Wilson v. Garcia*, 471 U.S. 261, 275 (1985), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 313(a), 104 Stat. 5089, 5114–15, *as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004).

182. *See CECIL ET AL.*, *supra* note 15, at 21–22 (finding a general increase from 2006 to 2010 in the rate of filings of motions to dismiss for failure to state a claim).

burdensome and freeing courts of meritless claims that were the main drivers of the Courts decision in *Iqbal*.¹⁸³

From a historical perspective, the uncertainty currently surrounding pleading standards returns us to a time when a plaintiff's claims could be dismissed because the law was confusing and rife with technicalities.¹⁸⁴ Plaintiffs may believe that they are relying on good law only to have their claims dismissed by a court that takes it upon itself to radically reinterpret valid Supreme Court precedent on pleading standards. Moreover, just as it was difficult to distinguish between "material facts," evidentiary facts, and conclusions under Code pleading,¹⁸⁵ it is also difficult to reliably identify what claims a court will find conclusory or plausible. Courts are supposed to vindicate rights, but if the esoteric debate over what facts are possible, plausible, or probable locks a plaintiff out of court, then citizens seeking their day in court will lose their faith in the judicial system.

Quite simply, there is a guidance function to the rule of law and to fulfill it the Supreme Court should clarify pleading standards. The conflicting approaches taken by lower federal courts illustrate that judges are unsure over the proper pleading standard to apply. Five years have passed since *Iqbal*, and pleading standards have not worked themselves out. On the contrary, every day that passes seems to invite further judicial creation of ways to reconcile the tension in the Court's pleading jurisprudence. This includes some courts accepting that invitation by effectively overruling two major Rule 8 precedents. The issue is ripe for review. The recent *McCleary-Evans* case presents a clean issue for the court to decide once and for all if *Leatherman* and *Swierkiewicz* have been retired too.

CONCLUSION

Claims that "*Conley* has been overruled" or that "notice pleading is dead" spark exciting debates. But they are simply not true. *Swierkiewicz* and *Leatherman* went untouched by *Twiqbal* and have

183. See *Ashcroft v. Iqbal*, 556 U.S. 662, 685–86 (2009) ("Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources . . .").

184. See *supra* notes 19–28 and accompanying text (discussing the technicalities of common-law pleading).

185. See *supra* notes 29–34 and accompanying text (discussing the practical issues presented by Code pleading).

not officially earned their retirement. Yet, as this study has shown, some lower courts have deemed these pre-*Twombly* precedents to no longer be viable. Radically reinterpreting good law leaves litigants and their attorneys with the burdens accompanying uncertainty.

As Judge Clark noted, paper pleadings cannot take the place of a trial on the merits.¹⁸⁶ The goal of the draftsmen of the Federal Rules of Civil Procedure was to create procedures that “most efficiently foster decisions on the merits.”¹⁸⁷ The disagreement among lower courts about the continued vitality of pre-*Twombly* precedent presents the Supreme Court with an opportunity to revive this goal.

186. Clark, *supra* note 1, at 46.

187. Carter, *supra* note 35, at 2179.