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Hearing on Whether the Supreme Court has Limited Americans' Access to Court  
Before the Committee on the Judiciary  
United States Senate

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## Introduction<sup>1</sup>

Mr. Chairman and members of the Committee: Thank you for inviting me to testify today on the vitally important question whether recent decisions of the Supreme Court have limited Americans' access to court. I commend you for recognizing the serious potential for damage posed by these decisions. I would like specially to commend Senator Specter for his early action in introducing a bill, S. 1504, to overrule the Court's decisions, thus signaling concern to the bench, the bar and the public, and stimulating interest and debate. Appendix A to this statement includes a draft substitute amendment for the Committee's consideration. It was inspired by a provision in the 1991 Civil Rights Act and by the dialogue among proceduralists that Senator Specter's bill (and the House bill modeled on it) stimulated.

The draft substitute amendment reflects my view that the primary purpose of any legislation responding to the Court's decisions should be to restore the status quo concerning pleading and motions to dismiss in federal civil actions until careful study, enabled by a process that is open, inclusive, and thorough, supports the need for change. It also reflects my view that any such change should be effected by amendments to the Federal Rules of Civil Procedure, by statute, or by some combination of the rulemaking and legislative processes. The goal should be a process that best deploys and facilitates the technical expertise, policy judgment and democratic accountability that are necessary for wise and legitimate lawmaking about access to court – the very antithesis, in other words, of the process that the Court has followed.

By way of background, I have been teaching and writing about federal practice and procedure, court rulemaking, judicial independence and accountability, and the relations between the federal judiciary and Congress for thirty years. My work on court rulemaking includes the definitive history of the Rules Enabling Act of 1934.<sup>2</sup> I have also been active in providing advice and assistance to Congress and to the federal judiciary. Thus, for example, I advised Representative Kastenmeier and testified before both the House Subcommittee he chaired and a Senate Subcommittee on the legislation, ultimately enacted in 1988, that made important changes to the process by which Federal Rules and amendments are considered.<sup>3</sup> I also testified before a Senate Subcommittee on proposals to change the arrangements for the discipline or removal of

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<sup>1</sup> This prepared statement draws on Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535; Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009), and Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy* (manuscript).

<sup>2</sup> See Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

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Since 1934, then, the rulemaking structure has evolved to include more decision makers, to provide for the representation of persons other than the Justices of the Supreme Court, to facilitate public notice and comment, to provide notes that accompany the text throughout the drafting and approval process, and to lengthen the opportunity for congressional review. None of these changes came about as a matter of grace on the part of the Supreme Court; rather, they were imposed by Congress through changes to the enabling legislation.

Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119 (2002).

federal judges, advocating the creation of a commission to study the issues. When Congress authorized such a commission, the Speaker of the House appointed me a member, and I was a principal author of its report. I have served twice as a Reporter for the Third Circuit, twelve times as a panelist or moderator (or both) at Third Circuit judicial conferences, and occasionally as a speaker or panelist at the judicial conferences of other circuits. In 2005 I conceived, and with Gregory Joseph recruited some twenty other academics and lawyers to implement, a project to review the proposed Restyled Federal Rules of Civil Procedure. This massive volunteer enterprise led to scores of recommended changes, many of which were accepted by the Advisory Committee and are part of the 2007 Restyled Federal Rules. Finally by way of example, I have served as an informal consultant to many committees of the federal judiciary, organized at least three conferences/symposia at the request of the federal judges who chaired those committees, and both testified before, and moderated discussions with, them on numerous occasions.

In sum, Mr. Chairman, in both scholarship and public service activities I am guided by twin commitments to an independent and accountable judiciary and to the institutions and values of democracy. I am here today because I believe that the recent decisions of the United States Supreme Court that prompted this hearing, *Bell Atlantic Corp. v. Twombly*,<sup>4</sup> and *Ashcroft v. Iqbal*,<sup>5</sup> challenge both of those commitments. These decisions involve the legal standards to be used for assessing the adequacy of complaints to withstand motions to dismiss in federal civil actions. A third decision involving the same problem, *Tellabs, Inc., v. Makor Issues & Rights, Ltd.*,<sup>6</sup> was decided shortly after *Twombly*. Although at one level concerned with technical requirements of pleading – the process by which, at the beginning of a case, parties disclose their claims and defenses to each other and the court – at another level, these cases raise important questions about access to court, compensation for injury, the enforcement of public law, the role of litigation in democracy and the role of democracy in litigation.

The degrees of particularization and persuasiveness of a complaint's allegations that a system requires implicate the ability of putative plaintiffs to pursue adjudication of disputes on the merits (withstand a motion to dismiss), including their ability to discover relevant information from defendants in order to prove their allegations at trial (or to defeat a motion for summary judgment). They thus also implicate the ability of those who have been injured to use litigation in order to secure compensation, and the ability of government to use private litigation for that purpose (i.e., in place of social insurance), and for the enforcement of social norms (i.e., in place of administrative enforcement).

From the perspective of those who are or may be sued, pleading requirements implicate the ease with which they can be haled into court and forced to incur direct and opportunity costs in defending against, or settling, what may be meritless claims. Finally, from the (self-interested) perspective of the judiciary, pleading requirements implicate the volume of civil litigation and the types of litigation activity that filed cases exhibit, both of which affect the allocation of resources by court systems that in this country are chronically underfunded.

I am concerned that *Twombly* and *Iqbal* may contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to jury trial, and the emasculation of

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<sup>4</sup> 550 U.S. 544 (2007).

<sup>5</sup> 129 S. Ct. 1937 (2009).

<sup>6</sup> 551 U.S. 308 (2007).

private civil litigation as a means of enforcing public law. I am particularly concerned because in rendering them the Court evaded the statutorily mandated process that gives Congress the opportunity to review, and if necessary to block, prospective procedural policy choices before they become effective. Both the process used to reach these decisions and their foreseeable consequences undermine democratic values.

Of course, no one yet knows enough about the impact of *Twombly* and *Iqbal* to state with confidence that they will cause a radical change in litigation behavior or the results of litigation. Still, Appendix B to this statement contains a sample of many lower court cases suggesting or making explicit that complaints have been dismissed that would not have been dismissed previously, and early empirical work suggests that *Twombly* and *Iqbal* have had a disproportionately adverse impact on the usual victims of “procedural” reform – civil rights plaintiffs.<sup>7</sup> Moreover, the relevant question now should be: Who should bear the risk of irreparable injury? In my view, it should not be those usual victims of “procedural” reform, and it should not be the intended beneficiaries of federal statutes that Congress intended to be enforced through private civil litigation.

The remainder of this prepared statement is organized as follows. I will first describe the choices made by those who drafted the original Federal Rules on pleading and sketch the role of notice pleading in the federal litigation landscape in the intervening years. My account reveals that, notwithstanding recurrent pressure to authorize fact pleading in certain categories of cases, the Supreme Court repeatedly insisted that such a change would require rulemaking or legislation, and that the rules committees of the Judicial Conference abandoned proposals to adopt fact pleading across the board as political dynamite. In light of this history, *Twombly* and *Iqbal* prompt the question what changed other than the membership of the Supreme Court. I then describe and discuss the Supreme Court’s decisions in those cases, identifying what in their architecture may lead to mischief, both of the sort that the framers of the original Federal Rules sought to avoid and a whole new brand of mischief reposing in a generally applicable plausibility requirement that depends on “judicial experience and common sense.” From there I turn to the defects of process, institutional competence and democratic accountability underlying the Court’s decisions in *Twombly* and *Iqbal*. In my view, these defects are sufficiently serious, standing alone, to warrant legislation requiring a return to the status quo ante until they have been cured by a new (and very different) process. In the concluding section I bring together the arguments in favor of legislation, as well as responses to arguments that I have encountered by those who oppose it.

## **Pleading in Historical Perspective**

The Rules Enabling Act was enacted in 1934. In 1935 the Supreme Court appointed an Advisory Committee to draft the rules that would implement this delegation of congressional power to make prospective, legislation-like rules. The original Advisory Committee interpreted the Enabling Act’s reference to “general rules” as requiring not just rules that would be applicable in all district courts but also rules that would be applicable in every type of civil action (trans-substantive). The latter interpretation added a practical imperative to the Advisory Committee’s preference for rules, including pleading rules, that were simple and flexible in the

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<sup>7</sup> See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, available at <http://ssrn.com/abstract=1487764>.

tradition of equity (ignoring that equity procedure had itself often led to technicality and complexity in pleading and otherwise). On the matter of pleading, the committee was in part reacting to the existence in many states of pleading rules – applicable in federal courts in those states -- that required the plaintiff to state facts supporting each element of the alleged legal basis or cause of action relied on. Those who drafted the Federal Rules objected to fact pleading because it led to wasteful disputes about distinctions – among “facts,” “conclusions,” and “evidence” – that they thought were arbitrary or metaphysical. As Edgar Tolman, who bore major responsibility for explaining the proposed new Federal Rules to Congress, put it in his 1938 House testimony:

I want you now to consider this provision in Rule 8, as to what you have to put into your paper. You used to have the requirement that a complaint must allege the “facts” constituting the “cause of action.” I can show you thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to whether a pleading contained a “cause of action”; and of whether certain allegations were allegations of “fact” or were “conclusions of law” or were merely “evidentiary” as distinguished from “ultimate” facts. In these rules there is no requirement that the pleader must plead a technically perfect “cause of action” or that he must allege “facts” or “ultimate facts.” [Rule 8 prescribes] the essential thing, reduced to its narrowest possible requirement, “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>8</sup>

They also believed that pleading was a poor means to expose the facts underlying a legal dispute, a role that could better be played by discovery. Again, Tolman explained:

One important consideration should be emphasized as to the method by which, under these rules, the opponents may be adequately advised as to the real matter in controversy. The simplified pleadings provided for ..., which give a general view of the controversy are supplemented by the provisions for depositions, discovery and pretrial practice ... which enable each side by the examination of witnesses, documents, and other evidence, to ascertain in advance of the trial, precise knowledge as to the nature of the case.<sup>9</sup>

In addition, vast changes in social and economic life since the mid-nineteenth century had made it harder for many of those suffering injuries – for instance those without resources to conduct an extensive pre-filing investigation – to know exactly what the facts were. This was another reason the Advisory Committee determined to reduce the role of pleading in the new procedural system it was fashioning for the twentieth-century federal courts. The members were also aware that Congress had in the past sought to promote private enforcement of public law (as in the antitrust statutes) and that the New Deal Congress was enacting an unprecedented number of regulatory statutes. Knowing that new legal bases of relief were being developed as a result of federal legislation, the committee wanted to escape the confinement of fact pleading and of the other dominant system at the time – common law procedure. They repeatedly emphasized that the procedures they had drafted should help insure that cases were decided on the merits rather than on the pleadings.

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<sup>8</sup> *Rules of Civil Procedure for the District Courts of the United States: Hearings Before the H. Comm. on the Judiciary, 75<sup>th</sup> Cong. 94 (1938) (statement of Edgar B. Tolman, Secretary of the Advisory Committee on Rules for Civil Procedure Appointed by the Supreme Court).*

<sup>9</sup> *Id.* at 98.

For all of these reasons, the original Advisory Committee decided to provide in Rule 8 that “[e]ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings and motions are required.” The Rule only required the plaintiff to supply in the complaint “a short and plain statement of the claim showing that the [plaintiff was] entitled to relief.” Neither the term “cause of action” nor “facts” was used. Moreover, in Rule 9 the committee made clear both that the Federal Rules required particularized allegations only of fraud or mistake, and that no such requirement applied with respect to “malice, intent, knowledge and other conditions of a person’s mind.”

The committee attached forms to the rules showing how very little was required of plaintiffs -- just enough that (1) the defendant could answer the complaint and the case could proceed to the next step, discovery, and (2) in the event of other litigation involving the same parties and subject matter, the law of res judicata (claim preclusion) could be applied. Thus, the only allegation regarding liability in Restyled Form 11 (“Complaint for Negligence”) is: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff.” In discussing its original (pre-restyling) version (Form 9) at an Institute for members of the bar that was held in October 1938, after the Federal Rules became effective, Dean Charles Clark, the Committee’s Reporter, observed:

[A]n allegation which says simply that the defendant did injure the plaintiff through his negligence is too general and would not stand, for really that tells you no differentiating features about the case whatsoever, except the very broad word “negligence”; while on the other hand ...the statement of the act in question in a general way, and with a characterization that it is negligent, is sufficient. That is the allegation in this form (Form 9). Here, instead of saying defendant’s negligence caused the injury, you say that defendant negligently drove his automobile against the plaintiff, who was then crossing the street, and you have then the case isolated from every other type of case of the same character, really from every other case, as a pedestrian or collision case. *At the pleading stage, in advance of the evidence, before the parties know how the case is going to shape up, that is all, in all fairness, you can require.*<sup>10</sup>

The Federal Rules of 1938 provided access to a highway that might attract and could accommodate a great deal of private litigation, including litigation enforcing public law. In the years following 1938, a number of Supreme Court decisions including *Hickman v. Taylor*<sup>11</sup> in

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<sup>10</sup> AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C. AND OF SYMPOSIUM AT NEW YORK CITY 241 (1938) (emphasis added). *See also id.* at 308 (“What these rules do emphasize with respect to the contents of a pleading (as the forms in the Appendix show) is that any plain telling of the story that shows that the pleader is entitled to relief upon the grounds he states is sufficient to bring the pleader’s cause into court. That the statement or averment includes a conclusion of law is no ground for a motion to strike or for a motion to make definite, merely because the statement or averment embodies a conclusion which might be elaborated by a more particularized detailing of the facts.”) (George Donworth). *See also infra* note 33 (relationship between Rule 12(b)(6) and Rule 12(e)).

<sup>11</sup> 329 U.S. 495, 501 (1947).

1947 and, most prominently, a 1957 case called *Conley v. Gibson*,<sup>12</sup> embraced the concept of “notice pleading,” permitting plaintiffs to allege very little in their complaints, and that in general terms. Decided shortly after some federal judges urged an amendment to Rule 8 in order to reintroduce fact pleading, and soundly rejecting that approach, *Conley* was repeatedly cited with favor by the Supreme Court and lower federal courts (in fact, thousands of times).

Eventually, however, aspects of the 1938 system, including notice pleading and the restrictive view of summary judgment that initially prevailed, assumed a different complexion when combined with other litigation-empowering devices such as broad discovery (further unleashed by amendment to the Federal Rules in 1970), statutory incentives to litigate (e.g., a host of new federal statutes with pro-plaintiff fee-shifting provisions), the modern class action (created by amendments to the Federal Rules in 1966), and an increasingly entrepreneurial bar (assisted by decisions striking down anti-competitive regulations like the traditional ban on advertising). As the federal litigation highway became congested, the federal judiciary responded to the perceived docket crisis (which was exacerbated by inadequate resources) by turning to one approach after another -- from managerial judging, to sanctions, to summary judgment, to heightened pleading. Although different in many respects, these approaches share the quest for greater definition and the ability it affords courts to make rational judgments as to whether a case should be permitted to proceed.

Apparently persuaded that an invigorated summary judgment procedure – already embraced by many lower federal courts starting in the 1970’s and blessed by the Supreme Court in the mid-1980’s -- was not a sufficient response to contemporary litigation ills, a number of lower federal courts performed a similar operation on the pleading rules. Notwithstanding the Supreme Court’s embrace of notice pleading and the listing of only a few matters requiring greater factual specificity in Federal Rule 9(b), some courts determined that certain types of cases should be subject to heightened pleading requirements. In its *Swierkiewicz* and *Leatherman* decisions, one a civil rights case and the other an employment discrimination case, the Supreme Court twice within a decade rejected such judge-made rules as inconsistent with the Federal Rules and with the principle that Federal Rules can be changed only through the Enabling Act process or by statute.<sup>13</sup> Apparently the message was lost on, or simply unacceptable to, some lower federal courts, as the technique persisted even after *Swierkiewicz*.<sup>14</sup> By this time it bordered on lawlessness.

During the same period when the Supreme Court was warning the district and appeals courts that notice pleading was still the law, efforts were again made (as they were prior to *Conley*) to persuade the Advisory Committee on Civil Rules to propose amendments that would implement some form of fact pleading on a trans-substantive basis. On a number of occasions the Advisory Committee quickly determined not to proceed. Because such amendments would obviously and directly implicate access to court and the enforcement of substantive rights,

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<sup>12</sup> 355 U.S. 41 (1957).

<sup>13</sup> See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993). See also *Crawford-El v. Britton*, 523 U.S. 574 (1998).

<sup>14</sup> See, e.g., *Perry v. Southeastern Boll Weevil Erad. Fund, Inc.*, 154 Fed. Appx. 467, 472 (6<sup>th</sup> Cir. 2005); *Danley v. Allen*, 540 F.3d 1298, 1313-14 (11<sup>th</sup> Cir. 2008).

rulemaking in the area would attract intense interest group activity (on both sides) and would lead to intense controversy in Congress. The Chief Justice appoints all members of rulemaking committees and meets regularly with key participants. He was undoubtedly aware of this history.

### ***Tellabs*, *Twombly* and *Iqbal*: The Archaeology and Architecture of Mischief**

The stage is now set for a consideration of the two decisions that have brought us here today. In order to understand and appreciate the significance of *Twombly* and *Iqbal*, however, it is helpful to recall that shortly after *Twombly*, the Court decided *Tellabs*, interpreting provisions in the Private Securities Litigation Reform Act of 1995 that superseded Federal Rules 8 and 9 in securities fraud cases by requiring not only factual particularity but a prescribed level of persuasiveness. The statutory language in question provides that “the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind [scienter].”<sup>15</sup> The *Tellabs* Court’s interpretation of “strong inference” was that “an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference.”<sup>16</sup>

Seeking to apply the Supreme Court’s decision in *Tellabs* on remand to the court of appeals, Judge Posner observed that “[t]o judges raised on notice pleading, the idea of drawing a ‘strong inference’ from factual allegations is mysterious.”<sup>17</sup> In doing so, he aptly described the sense of cognitive dissonance currently afflicting those who practice, or are otherwise concerned with, pleading in the federal courts. For, pleading’s new – or more precisely renewed<sup>18</sup> – prominence in the procedural landscape is hardly confined to cases brought under the PSLRA.

In *Twombly*, the Court reinstated the dismissal under Rule 12(b)(6) of an antitrust conspiracy complaint brought under § 1 of the Sherman Act against the regional telecommunications service providers remaining after the breakup of AT&T. In reversing a panel of the Second Circuit, the Court “retired” the language in *Conley v. Gibson* that “a complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief.”<sup>19</sup> Agreeing, however, with *Conley* that a complaint must give “fair notice of what the . . . claim is and the grounds upon which it rests,”<sup>20</sup> the Court interpreted the latter as requiring that its “[f]actual allegations must be enough to raise a right to relief above the speculative level[.]”<sup>21</sup> The Court then held that for a § 1 Sherman Act claim

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<sup>15</sup> 15 U.S.C. § 78u-4(b)(2) (2006).

<sup>16</sup> *Tellabs*, 551 U.S. at 324.

<sup>17</sup> *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7<sup>th</sup> Cir. 2008).

<sup>18</sup> See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573-74 (2007) (Stevens, J., dissenting) (discussing notice pleading as a response to “[t]he English experience with Byzantine special pleading-rules” and the Field Code’s requirement of pleading “‘facts’ rather than ‘conclusions’”).

<sup>19</sup> 355 U.S. at 45-46; see *Twombly*, 550 U.S. at 563 (“[T]his famous observation has earned its retirement”).

<sup>20</sup> *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).

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



these standards “require[d] a claim with enough factual matter (taken as true) to suggest that an agreement was made.”<sup>22</sup> Disregarding direct allegations of conspiracy as conclusory, the Court held that the plaintiffs’ claims were not plausible because they rested on “parallel conduct and not on any independent allegation of actual agreement among [defendants].”<sup>23</sup>

After *Twombly* came down, it was suggested that the ambiguity of the Court’s opinion was strategic, empowering the lower courts to vary requirements to withstand a motion to dismiss depending on perceived differences in procedural (i.e., discovery) demands and/or substantive contexts, with the Court retaining the power to police egregious excesses while preserving deniability.<sup>24</sup> An alternative account is simply that the Court’s goal of changing the Federal Rules outside of the Enabling Act process without admitting that it was doing so understandably yielded a confusing opinion.<sup>25</sup>

In any event, it now appears that two of the justices who joined the Court’s opinion in *Twombly*, including the author of that opinion, believed that the interpretation of the Federal Rules in that case represented a relatively minor reorientation, appropriate for the specific substantive context and other cases in which the federal courts strictly police the inferences that are permissible under the substantive law and/or for cases portending massive discovery. For these justices, in other words, *Twombly* did not represent a change in pleading standards that could fundamentally alter the role of litigation in American society.<sup>26</sup> Their belief was understandable but, at least in retrospect, naïve.

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<sup>22</sup> *Id.* at 556.

<sup>23</sup> *Id.* at 564.

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More probably, *Twombly* is an exercise in strategic ambiguity that empowers the lower federal courts to tighten pleading requirements in cases or categories of cases that augur similar discovery burdens (or are otherwise disfavored), while preserving deniability in the Court through the use of its discretionary docket to correct perceived excesses (as in *Erickson*).

Editorial, *The Devil in the Details*, 91 JUDICATURE 52 (2007). The author was Chair of the Editorial Committee of the American Judicature Society at the time this editorial was published. The reference is to *Erickson v. Pardus*, 551 U.S. 89 (2007), a case decided a few weeks after *Twombly* (without argument and per curiam) in which the Court reversed the Tenth Circuit’s affirmance of a judgment dismissing a prisoner’s complaint under Rule 12(b)(6). For reasons why *Erickson* did not provide much comfort to those concerned that *Twombly* was generally applicable (not confined to antitrust cases), see Editorial, *supra*.

<sup>25</sup> Compare, e.g., *Pavelic & LeFlore v. Marvel Entertainment Group*, 493 U.S. 120, 126 (1989) (the Court’s “task is to apply the text, not to improve upon it”); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999) (“[W]e are bound to follow Rule 23 as we understood it upon its adoption, and ... we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (“The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside of the process Congress ordered, a process properly tuned to the instruction that rules of procedure ‘shall not abridge ... any substantive right’.”).

<sup>26</sup> See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009) (Souter, J., dissenting); *id.* at 1961 (Breyer, J. dissenting).

The *Iqbal* case involved claims brought by a citizen of Pakistan whom federal officials arrested after the 9/11 attacks and who was detained at the (federal) Metropolitan Detention Center in Brooklyn, New York, pending trial on charges of fraud in connection with identification documents to which he ultimately pleaded guilty, leading to his removal to Pakistan. The complaint alleged that Iqbal's seven-month confinement in highly restrictive conditions resulted from unlawful racial and religious discrimination. It also alleged that a number of lower-level F.B.I. and Bureau of Prisons officials and employees were liable for such violations of his rights as use of excessive force, unreasonable and unnecessary strip and body-cavity searches and denial of medical care while in detention. Finally, Iqbal asserted that Robert Mueller, the Director of the F.B.I., and John Ashcroft, the Attorney General of the United States, adopted and/or approved policies and directives pursuant to which he was confined, policies and directives that purposefully discriminated on the basis of religion and race.<sup>27</sup>

In affirming the district court's decision denying motions to dismiss four counts against Mueller and Ashcroft, Judge Newman for a panel of the Second Circuit sought to apply *Twombly*, which had been decided less than two months earlier. He concluded:

[T]he allegation that Ashcroft and Mueller condoned and agreed to the discrimination that the plaintiff alleges satisfies the plausibility standard [of *Twombly*] without an allegation of subsidiary facts because of the likelihood that these senior officials would have concerned themselves with the formulation and implementation of policies dealing with the confinement of those arrested on federal charges in the New York City area and designated "of high interest" in the aftermath of 9/11.<sup>28</sup>

The Supreme Court granted the Solicitor General's petition for a writ of certiorari. In its brief, the Government argued that, in furtherance of the policies underlying the defense of official immunity, the Court should require that complaints against high-level government officials contain "'specific, nonconclusory factual allegations' that establish ... cognizable injury."<sup>29</sup>

In light of a slow trickle of ever more troubling information about how the previous administration fought the war on terrorism – despite an approach to governmental secrecy that would have made Ceausescu proud --<sup>30</sup> the Court should have affirmed the Second Circuit and allowed *Iqbal* to proceed to discovery, even if "limited and tightly controlled."<sup>31</sup> Alternatively, the Court should have forthrightly required fact pleading as a matter of substantive federal common law, that is, as a necessary protection for the judge-made defense of official immunity.<sup>32</sup> After all, there could be no question of inadequate notice in *Iqbal* even if that were a

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<sup>27</sup> See *Iqbal v. Hasty*, 490 F.3d 143, 147-49, 165, 174-76 (2d Cir. 2007), *rev'd*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

<sup>28</sup> *Id.* at 175-76; *see also id.* at 166.

<sup>29</sup> Brief for Petitioners at 15, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. Aug. 29, 2008) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)); *see id.* at 28.

<sup>30</sup> "Under Romanian law, anything that is not a 'State secret' is a 'Service secret' – in other words, everything is secret." *Reinsurance Co. of America, Inc. v. Administratia Asigurarilor de Stat*, 902 F. 2d 1275, 1283 (7<sup>th</sup> Cir. 1990) (Easterbrook, J., concurring).

<sup>31</sup> *Iqbal*, 490 F.3d at 158.

<sup>32</sup> See Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV.

relevant question under Rule 12(b)(6) (as opposed to Rule 12(e)).<sup>33</sup> Moreover, Judge Newman’s careful analysis of the complaint as pleaded with respect to the defendants of interest – the Attorney General and the Director of the FBI – made it difficult to hold that a general plausibility test under Rule 12(b)(6) had not been met. To do so, indeed, seemingly would advance the view, absurd on its face, that the Federal Rules impose on plaintiffs generally a more demanding standard to survive a motion to dismiss than does the PSLRA on plaintiffs in securities fraud cases.<sup>34</sup> The Government denied that it was calling for the imposition of a heightened fact pleading requirement in cases against high-level government officials who are entitled to the immunity defense,<sup>35</sup> as well it might because the Court has made it impossible for the judiciary openly to impose such a requirement other than through the Enabling Act process. Comments at the oral argument suggested, however, that the Court might accept the Second Circuit’s view of *Twombly* as prescribing a flexible “plausibility standard,” but take a different

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535, 555-56, 558.

<sup>33</sup> See *Iqbal*, 490 F.3d at 166 (“And like the Form 9 complaint approved in *Bell Atlantic*, *Iqbal*’s complaint informs all of the defendants of the time frame and place of the alleged violations”). The Second Circuit did, however, note generally that “in order to survive a motion to dismiss under the plausibility standard of [*Twombly*], a conclusory allegation concerning some elements of a plaintiff’s claim might need to be fleshed out by a plaintiff’s response to a defendant’s motion for a more definite statement. See Fed. R. Civ. P. 12(e).” *Id.* at 158.

Responding to a contention that the complaint in Form 9 [now 11] “would be insufficient in any court of law,” Dean Clark observed:

Now, as to what the law is generally in this country, I have studied it a good deal on this very point, and I think one must hesitate to make too definite pronouncements. My impression is that very few courts would hold such a general statement wholly invalid; that is, would hold that it did not state a cause of action. I am quite sure that a great many of the leading courts would say that the only possible objection is lack of detail, and the only question would be whether it would be subject to a motion to make more definite and certain.

AMERICAN BAR ASSOCIATION, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT CLEVELAND, OHIO 222, 223 (1938).

<sup>34</sup> I share the Second Circuit’s view that the allegations that Ashcroft and Mueller were personally involved in the adoption and/or approval of the policies and directives challenged in *Iqbal* tell a story that is reasonable to believe. Note that the *Iqbal* complaint does not attempt to hold those individuals responsible for the quotidian abuses during confinement that it alleges in claims against lower-level officials and employees.

<sup>35</sup> See, e.g., Transcript of Oral Argument at 11, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) [hereinafter *Iqbal* Transcript] (No. 07-1015) (“And we’re not asking for a heightened pleading standard, Justice Ginsburg.”) (Solicitor General Garre); Reply Brief for Petitioners at 12, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) (“Petitioners do not ask the Court to adopt any heightened pleading standard. Rather, their position is that the lower courts failed to follow this Court’s decisions in this area and give a ‘firm application’ of the Federal Rules”).

view of the appropriate contextual plausibility judgment than did the lower courts in *Iqbal*.<sup>36</sup> And that is what the Court did, changing the (judge-made) law of official immunity, disregarding direct allegations of intentional discrimination as conclusory, and deeming inferences of such motivation for the actions taken, in light of the revised substantive law, implausible when compared to other accounts they could imagine.

Over the dissent of four justices -- again, including the author of the Court's opinion in *Twombly* and another justice who joined that opinion -- the Court in *Iqbal* inconsistently treated some of the complaint's assertions as factual allegations and others as conclusions. Most notably, the Court disregarded direct allegations of intentional discrimination, notwithstanding Rule 9(b)'s assurance that "[m]alice, intent, knowledge and other conditions of a person's mind may be alleged generally."<sup>37</sup> That move enabled the Court, however breezily, to assess the plausibility of the inferential basis for the theory of the plaintiff's case.<sup>38</sup> Relying on "judicial experience and common sense,"<sup>39</sup> the Court found the complaint implausible. Because the Federal Rules are trans-substantive, the Court was constrained to make clear that its approach applies across the board -- that *Twombly* cannot be confined to its substantive context (antitrust) or according to some other criterion (e.g., cases with heavy discovery burdens).<sup>40</sup>

The architecture of *Iqbal*'s mischief -- undoubtedly a major source of regret for the author of the *Twombly* decision, who dissented in *Iqbal* -- is clear. The foundation is the Court's mistaken conflation of the question of the legal sufficiency of a complaint, which is tested under Rule 12(b)(6), with the question of its sufficiency to provide adequate notice to the defendant, which is tested under Rule 12(e). *Conley*'s "no set of facts" language concerned the former question, not the latter, with the result that even if post-*Conley* courts were technically correct in invoking that language when denying 12(b)(6) motions to dismiss, the same courts could have granted Rule 12(e) motions for more definite statement (had defendants made them and had the complaints in fact provided inadequate notice). Although the *Twombly* Court "retired" the "no set of facts" language, it did not retire, but rather perpetuated and exacerbated, this mistake.

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Well, I thought, and others may know better in connection to Bell Atlantic, but I thought in Bell Atlantic what we said is that there's a standard but it's affected by the context in which the allegations are made. That was a context of a particular type of antitrust violation and that affected how we would look at the complaint. And here because we're looking at litigation involving the Attorney General and the Director of the FBI in connection with their national security responsibilities, there ought to be greater rigor applied to our examination of the complaint.

*Iqbal* Transcript, *supra* note 35, at 36-37 (Chief Justice Roberts). *See id.* at 43 ("What you have to show is some facts, or at least what you have to allege are some facts, showing that they knew of a policy that was discriminatory based on ethnicity and country of origin.") (Chief Justice Roberts).

<sup>37</sup> FED. R. CIV. P. 9(b). *See* *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

<sup>38</sup> *See Iqbal*, 129 S. Ct. at 1951-52. Note that, prior to dealing with the adequacy of the complaint, the Court changed the law of official immunity, making it even more difficult to impose liability on officials in supervisory positions. *See id.* at 1947-49.

<sup>39</sup> *Id.* at 1950.

<sup>40</sup> *See id.* at 1953.

The Court's other errors were built on this rotten foundation. Thus, the power that the Court claimed to carve a complaint, accepting some allegations of fact as true while ignoring others ("threadbare allegations"), as well as mixed allegations of law and fact, as conclusory, was, from an originalist perspective, misguided. In *Twombly*, the Court ignored allegations of conspiracy; in *Iqbal*, notwithstanding Rule 9(b), it ignored allegations of discriminatory intent. The discretionary power of the judge to follow his or her personal preferences in assessing the plausibility of a complaint is enlarged to the extent that direct allegations of liability-creating conduct can be thus disregarded. Yet, as I have discussed, an important reason why the drafters of the 1938 Federal Rules rejected fact pleading is that one person's "factual allegation" is another's "conclusion."

Even more misguided, however, was the (wholly new) general power the Court claimed to assess the legal plausibility of a complaint. Unlike Rule 56 (summary judgment), Rule 12(b)(6) was not intended to serve as a tool for separating wheat from chaff. As noted, the *Conley* Court's use of the "no set of facts" language was intended to address only those situations in which, no matter how compelling the facts alleged, the law did not provide relief. That is a far cry from the power to assess the plausibility of recovery under an accepted theory of relief. Moreover, although the plausibility analysis in *Twombly* involved assessing competing inferences in a well-trodden path of antitrust law, in *Iqbal* the Court was at sea, subjecting the competing inferences, most of which were left to the justices' imaginations, to an implicit comparative exercise. *Iqbal* thereby confirmed the view that *Twombly* was an invitation to the lower courts to make ad hoc decisions, often reflecting buried policy choices, and with little fear of reversal because of the impotence of federal appellate review to police discretionary decision-making.

Employment discrimination cases are one category likely to suffer at the hands of district judges implementing a contextual plausibility regime. Systematic empirical evidence has long demonstrated how poorly employment discrimination plaintiffs fare in federal court.<sup>41</sup> A recent Federal Judicial Center study reveals that employment discrimination cases terminate by summary judgment at rates far higher than other categories of cases.<sup>42</sup> One reason may be that we are witnessing in employment discrimination cases the results of what Professors Kahan, Hoffman and Braman call "cognitive illiberalism"<sup>43</sup> in their recent article on the dangers of summary adjudication exemplified by the Supreme Court's decision in *Scott v. Harris*.<sup>44</sup> The reason is that in employment discrimination cases one would expect "Americans [to] interpret

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<sup>41</sup> See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMP. LEG. STUD. 429 (2004); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 1 (2009).

<sup>42</sup> See Memorandum to Judge Michael Baylson from Joe Cecil and George Cort 17 (Aug. 13, 2008) (Table 12) (available from author).

<sup>43</sup> Dan M. Kahan, David A. Hoffman, and Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 838 (2009). See *id.* at 896.

<sup>44</sup> 550 U.S. 372 (2007). This discussion is adapted from my letter opposing a proposed amendment to Rule 56 (summary judgment). See letter from Stephen B. Burbank to Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure (Jan. 28, 2009).

th[e] facts against the background of competing subcommunity understandings of social reality,”<sup>45</sup> making them strong candidates for the operation of cognitive biases of the sort those authors document.

The *Iqbal* Court’s reliance on “judicial experience and common sense” is, in certain types of cases, an invitation to “cognitive illiberalism” more worrisome than when summary judgment is involved. At least in the latter situation judicial subjectivity is disciplined by an evidentiary record created after discovery. No such constraint operates when a judge assesses the plausibility of a complaint in connection with a motion to dismiss. Judgments about the plausibility of a complaint are necessarily comparative.<sup>46</sup> They depend in that regard on a judge’s background knowledge and assumptions, which seem every bit as vulnerable to the biasing effect of that individual’s cultural predispositions<sup>47</sup> as are judgments about adjudicative facts. Whether or not *Twombly* and *Iqbal* draw in question the compatibility of the motion to dismiss with the Seventh Amendment right to jury trial,<sup>48</sup> this perspective suggests a reason for judicial humility in addition to the consideration that plaintiffs confronting a motion to dismiss have had no access to formal discovery. Both plaintiffs and jurors in employment discrimination cases will often have “recognizable identity-defining characteristics” that might cause them to dissent from a view of plausibility grounded in a judge’s cultural predispositions.<sup>49</sup>

### **Institutional Questions: Defects of Process, Institutional Competence, and Democratic Accountability**

I turn now to the institutional questions raised by the Court’s decisions in *Twombly* and *Iqbal*. For this purpose it is again useful to recall the *Tellabs* decision, in which the Court struggled with the ambiguities of the PSLRA’s statutory pleading requirements. There is an important difference, however, between figuring out what the Supreme Court meant in its *Tellabs* decision,<sup>50</sup> and sorting out the confusion that *Twombly* and *Iqbal* have created. The ambiguities the *Tellabs* Court explored arose in the interpretation of statutory language prescribing procedural requirements for a specific substantive context. They thus emerged from a democratic process that is acknowledged as appropriate for the resolution of broad questions of social policy such as access to court, compensation for injury, and norm enforcement. Whether or not the choices underlying the provision considered in *Tellabs* are wise, they are confined to cases brought under the PSLRA. And if the policy choices it reflects are buried, the concern is democratic accountability in the weak sense of lawmakers taking responsibility for their actions.

The Federal Rules at issue in *Twombly* and *Iqbal*, by contrast, were crafted for all civil actions in the federal courts under a delegation from Congress that seeks to restrict prospective

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<sup>45</sup> Kahan et al., *supra* note 43, at 887.

<sup>46</sup> “The plausibility of an explanation depends on the plausibility of alternative explanations.” *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 711 (7<sup>th</sup> Cir. 2008).

<sup>47</sup> See Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUT. L. REV. 705, 767-71 (2007); Russell M. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

<sup>48</sup> See Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

<sup>49</sup> See Kahan et al., *supra* note 43, at 898-99.

<sup>50</sup> See Geoffrey P. Miller, *Pleading after Tellabs*, 2009 WISC. L. REV. 507.

court rulemaking to the realm of “procedure” as opposed to “substantive rights.”<sup>51</sup> As suggested by that dichotomy, they emerged from a process that, although it has increasingly come to resemble the legislative process in some respects in recent decades,<sup>52</sup> is *not* acknowledged as appropriate for the resolution of broad questions of social policy. If any such policy choices are buried in the Federal Rules – or (more likely) in discretionary decisions made under their authority – the resulting concern involves democratic accountability in both the weak sense previously defined and in the strong sense of separation of powers.<sup>53</sup>

Although *Tellabs* is conclusive proof, were it needed, that Congress has learned that procedure is power, at least Congress was well-positioned institutionally to evaluate the social costs and benefits of setting a high bar for complaints filed without benefit of formal discovery, and its task in doing so was circumscribed by the social policies germane to the domain of substantive securities law. In *Twombly* and *Iqbal*, by contrast, the Court was not well-positioned institutionally to evaluate even the procedural costs and benefits of tightening the pleading screws on plaintiffs, even in the isolated substantive law contexts involved in those cases.<sup>54</sup> The Court acting as such under Article III was even less well-positioned to estimate the procedural costs and benefits of a general rule of plausible pleading, let alone the broader social costs and benefits of such a rule. Still, the Article III process may have been all that the Court thought was available, since the justices likely knew through the Chief Justice that changing pleading requirements through the Enabling Act process had been considered and abandoned as political dynamite on more than one occasion, including in the recent past. If so, the Chief Justice may have changed his mind since the time when, as a member of the Justice Department, he apparently wrote:

Not only are unelected jurists with life-tenure less attuned to the popular will than regularly elected officials, but judicial policymaking is also inevitably inadequate or imperfect policymaking. The fact-finding resources of courts are limited – and inordinately dependent upon the facts presented to the courts by the interested parties before them. Legislatures, on the other hand, have extensive fact-finding capabilities that can reach far beyond the narrow special interests urged by parties in a lawsuit. Legislatures can also devise comprehensive solutions beyond the remedial powers of

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<sup>51</sup> The Rules Enabling Act, as currently codified but reflecting a limitation that has existed since 1934, provides that “[s]uch rules shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b) (2006).

<sup>52</sup> See Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1724 (2004) (noting that “the changes in the rulemaking process in the 1980s that were designed to open it up to more and more diverse points of view, make it more transparent, and diminish the need for congressional involvement, may in fact have facilitated a process of redundancy wherein participants treat rulemaking that is at all controversial as merely the first act”).

<sup>53</sup> See Stephen B. Burbank, *The Costs of Complexity* (Book Review), 85 MICH. L. REV. 1463, 1475 (1987).

<sup>54</sup> On the theoretical and practical differences between making law by decision vs. by Federal Rule, see generally Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 698-713 (1988).

courts.<sup>55</sup>

A number of the policy questions presented by *Twombly* and *Iqbal* would have benefited from the fruits of empirical research, even if only research whose results had already been published. Consider in that regard the *Twombly* Court's discussion of the costs of discovery. Eschewing any reference to systematic as opposed to anecdotal data, the majority relied to a great extent on an article by Judge Easterbrook that is heavy on theory and light on facts.<sup>56</sup> Not only was that article's analysis predicated on a law and economics model of so-called "impositional discovery;" it was published in 1989, before substantial changes to the discovery rules in 1993, 2000, and 2006, changes that the *Twombly* Court ignored. I am reminded of an observation about the Seventh Circuit's attempt to turn Rule 11 into a "fee-shifting statute": "Theory is an irresponsible basis for lawmaking about something as important as access to court. And it is especially irresponsible when the lawmaking involves judicial amendment of a Rule... ." <sup>57</sup> Finally in this aspect, quite apart from systematic empirical research, consideration of many of the policy questions implicated in *Twombly* and *Iqbal* would have benefited from a base of experience with federal trial court litigation broader than that possessed by the members of the Supreme Court, almost all of which predated Justice Stevens' appointment in 1975.

The political scientist Sean Farhang has recently written about the institutional incentives underlying, and dynamics affecting, "formalized, private enforcement regime[s]."<sup>58</sup> He challenges narratives that attribute the enormous growth of federal statutory litigation starting in the 1960's to an imperial judiciary responding to the self-interested efforts of irresponsible lawyers. Instead, his evidence suggests that the phenomenon may be the result of conscious congressional choices to empower private litigation through devices such as pro-plaintiff attorney fee-shifting and multiple damage provisions. Moreover, recalling the "stickiness of the status quo," Farhang demonstrates how resistant litigation-empowering statutory provisions are to change.

From this perspective, notice pleading can be seen as an important architectural element of a private enforcement regime that was created by the federal judiciary pursuant to congressional delegation. Once entrenched through *Conley v. Gibson*, notice pleading became part of the background against which Congress legislated. It also became part of the status quo and thus was highly resistant to change through the lawmaking process that brought it forth – the Enabling Act process. Further, from this perspective, desiring to effect change, the Court was equally hobbled by the inertial power of the status quo and the limitations created by foundational assumptions and operating principles associated with the Enabling Act process. In

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<sup>55</sup> Draft Article on Judicial Restraint, National Archives & Records Administration, Record Group 60: Department of Justice, Accession # 60-89-372, Box 30 of 190, Folder: John G. Roberts, Jr. Misc.

<sup>56</sup> See *Twombly*, 550 U.S. at 559, 560 n.6 (citing Frank Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638-39 (1989)).

<sup>57</sup> Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1947-48 (1989).

<sup>58</sup> Sean Farhang, *Public Regulation and Private Lawsuits in the American Separation of Powers System*, 52 AM. J. POL. SCI. 821, 825 (2008).



initiating change through its power to decide cases and controversies, however, the Court was forced to forego the informational, participatory and other benefits that the rulemaking process affords.<sup>59</sup>

**Conclusion: Congress Should Restore the Status Quo Ante Until the Case for Fundamental Change Has Been Made on the Basis of Reliable Information and through a Legitimate Process**

Perhaps the most troublesome possible consequence of *Twombly* and *Iqbal* is that they will deny access to court to plaintiffs and prospective plaintiffs with meritorious claims who cannot satisfy those decisions' requirements either because they lack the resources to engage in extensive pre-filing investigation or because of informational asymmetries. As Judge Nygaard stated in the *Phillips* case, "[f]ew issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts."<sup>60</sup> In that respect, the Court's recent pleading decisions may signal a striking departure from the pleading (and discovery) regime that has been a cornerstone of modern federal litigation and that Congress is presumed to have had in mind when enacting scores of statutes, including statutes in which Congress included incentives for private enforcement.<sup>61</sup>

Fifty years ago between 11% and 12% of federal civil cases had a trial in open court. In recent years between 1% and 2% of federal civil cases have terminated at or after trial. This is a staggering reduction in trials in less than half a century. Put otherwise, during a period that witnessed an enormous increase in civil case filings, there has been a reduction in the absolute number of cases terminating at or after trial. *Twombly* and *Iqbal* are likely further to erode the role of trials and of juries, another respect in which those decisions may undermine democratic values.

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Requiring that changes take place through the rulemaking process – rather than through adjudication – at least increases the chances that amendments will be subjected to a deliberative process and informed by practical knowledge. In addition, the structure of the rulemaking process facilitates informed and deliberative decision making and permits a holistic approach to the revision of the Rules. Although the rulemakers have not always made as much use of this opportunity as they could, the rulemaking process clearly affords better access to empirical data than does adjudication. It also provides a better framework for input by all interested persons and allows the rulemakers to revise their proposals in response to such input. Moreover, the rulemakers can amend several provisions at the same time, which helps maintain coherence in the rules, and permits fine-tuning of proposed changes.

Struve, *supra* note 2, at 1140 (footnotes omitted). See also Frederick Schauer & Richard Zeckhauser, *The Trouble with Cases* 4, 11-12 (Draft 08/10/2009), available at <http://ssrn.com/abstract=1446897>.

<sup>60</sup> *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008).

<sup>61</sup> See, e.g., *Ocasio-Hernandez v. Fortuno-Burset*, 2009 WL 2393457, at \*6 n.4 (D. P.R. Aug. 4, 2009) ("Certainly such a chilling effect was not intended by Congress when it enacted Section 1983.").

At the end of the day, normative assessment of these possible developments depends, or should depend, on careful identification and comparative evaluation of the costs and benefits of the litigation system to which notice pleading, accompanied by the opportunity for broad discovery, contributed and that which is proposed as a replacement, as well as consideration of alternative institutional avenues of change. One need not reach the former steps, however, in order to conclude that *Twombly* and *Iqbal* were serious mistakes. For, as I have demonstrated, there are many reasons to deplore the use of litigation as opposed to rulemaking or legislation as the vehicle of change, whether one is concerned about the process that should be used before important public policy decisions are made or about democratic accountability. Although Sean Farhang's work helps to explain the course pursued, it does not justify that course.

Ultimately, these decisions raise the question whether our society remains committed to private litigation as a means of securing compensation for injury and enforcing important social norms. From that perspective, another important policy issue they raise is whether, if we retreated from that commitment, we would provide alternatives such as social insurance and administrative enforcement.<sup>62</sup> In addressing that question, decision-makers presumably would benefit from information about experience in other countries that did not previously share our commitment to private litigation, that have provided alternatives, but that are now rethinking the best way to achieve their societal goals. It is interesting if not ironic that a number of such countries have decided, among other reforms, to relax bans on contingent fee litigation and to experiment with group and other forms of aggregate litigation.<sup>63</sup> *In any event, from this perspective it is again apparent that the policy questions are not the sort that should be answered by nine judges in the exercise of Article III judicial power, with little information, less experience and no power to implement non-litigation alternatives.*

The arguments against legislation restoring the status quo ante that I have encountered are transparently teleological. Thus, some argue that it was not illegitimate for the Court to reinterpret a Federal Rule, that, in other words, *Twombly* and *Iqbal* were no more judicial amendments than was *Conley*. The argument is not persuasive for numerous reasons.

First, it is difficult to find *Twombly's* (let alone *Iqbal's*) standards in the relevant work of Charles Clark, the chief architect of the pleading rules, and difficult to separate his views from those of the Advisory Committee that he served as Reporter. Second, as Tolman testified, the original Advisory Committee found "thousands of cases that have gone wrong on dialectical, psychological, and technical argument as to whether ... certain allegations were allegations of 'fact' or were 'conclusions of law'."<sup>64</sup> Third, a generally applicable requirement of "plausibility" is unquestionably an innovation. Fourth, the Court has told us that "we are bound to follow [a Federal Rule] as we understood it upon its adoption, and ... we are not free to alter it except

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<sup>62</sup> See generally ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

<sup>63</sup> See, e.g., CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS : A NEW FRAMEWORK FOR COLLECTIVE REDRESS IN EUROPE (2008); Stephen B. Burbank, *The Roles of Litigation*, 80 WASH. U. L.Q. 705, 710-11 (2002) (describing U.K. change of position regarding "litigation on spec" as a direct result of cuts in the legal aid budget).

<sup>64</sup> *Hearings*, *supra* note 8, at 94.

through the process prescribed by Congress in the Rules Enabling Act.”<sup>65</sup> Clark’s pertinent statements about Rules 8 and 12 aside, if one insists on better evidence of the Court’s original understanding than *Conley*, there are (1) *Hickman v. Taylor*<sup>66</sup> (“The new rules, however, restrict the pleadings to the task of notice-giving... .”); (2) Tolman’s 1938 testimony to Congress, and (3) explanations of the new Federal Rules by members of the Advisory Committee at educational events that were held for the practicing bar in 1938.<sup>67</sup>

Those who seek to normalize *Twombly* and *Iqbal* from an institutional perspective thus must pretend that “interpretation” is a process capacious enough to accommodate (1) the abandonment of the system of notice pleading that Clark intended, that Congress and the bar were told in 1938 had been implemented in the Federal Rules, and that the Supreme Court embraced as early as 1947, (2) its replacement by a system of complaint-parsing that is hard to distinguish from that which the drafters of the Federal Rules explicitly rejected, and (3) a wholly new general requirement of “plausibility.” I understand that the difference between interpretation and judicial lawmaking is one of degree rather than kind, but here the degrees of separation approach one hundred and eighty.

In sum, comparing the role that those who wrote the Federal Rules envisioned for pleading, and what they thought could fairly be demanded of plaintiffs filing complaints, with the new world celebrated by *Twombly*’s and *Iqbal*’s defenders, leaves no doubt that the Court in those cases ignored previous acknowledgments that it has “no power to rewrite the Rules by judicial interpretation.”<sup>68</sup> Even before *Iqbal*, a number of judges and scholars not known for bleeding hearts appeared to agree.<sup>69</sup> One can only wonder at the spectacle of justices who deride a “living Constitution” enthusiastically embracing living Federal Rules. From this perspective, the legislation I favor would bring back the Federal Rules in Exile.

A variation of the argument that the Court didn’t really change the Federal Rules in question, but rather merely reinterpreted them, is the argument that, prior Supreme Court decisions aside, *Twombly* and *Iqbal* didn’t really change the law that was applied in the lower federal courts. There is a grain of truth in this argument, since it is probably true that very few courts took *Conley*’s “no set of facts” language literally. This is hardly a surprise both because, as I discussed above, that language was not intended to speak to the question of factual specificity and (relatedly) because a Rule 12(e) motion (for a more definite statement) has always been available to deal with a “the defendant wronged me” type of complaint.

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<sup>65</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 861 (1999).

<sup>66</sup> 329 U.S. 495, 501 (1947).

<sup>67</sup> *See, e.g., supra* note 10.

<sup>68</sup> *Harris v. Nelson*, 394 U.S. 286, 298 (1969).

<sup>69</sup> *See, e.g.,* *Brotherhood of Locomotive Engineers and Trainmen v. Union Pacific*, 537 F.3d 789, 791 (7<sup>th</sup> Cir. 2008) (Easterbrook, J., joined by Posner, J., concurring in denial of reh’g en banc) (“In *Bell Atlantic* the Justices modified federal pleading requirements and threw out a complaint that would have been deemed sufficient earlier.”); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 64 (2007) (“*Twombly* ... can not be defended if the only question is whether it captures the sense of notice pleading in earlier cases.”).

Surrounding that grain of truth, however, is the distinctly unappealing reality that some of the lower court decisions that support the argument were the essentially lawless lower court decisions I referred to earlier. That is, the “conversation” or “debate” between the Court and lower federal courts that some defenders of *Twombly* and *Iqbal* imagine was in fact akin to that between a parent and a serially wayward child.<sup>70</sup> Moreover, the notion, which I have also heard expressed, that *Twombly* and *Iqbal* can be seen as an invitation to the lower courts to do openly what they were doing even under *Conley*, is no more appealing because it either imagines an ex post blessing of lawless behavior or compounds the phenomenon of buried policy choices against which the Enabling Act process seeks to guard.

Other arguments that I have encountered deserve even less attention. The notion that good lawyers have already adapted to *Twombly/Iqbal* reveals the blinkered vision of those who espouse it, namely the kind of lawyers who have disproportionate influence in the rulemaking process and deserve some of the blame for creating a procedural system that is beyond the means of the middle class. For, it is a notion that ignores the resource constraints on prefiling investigations and information asymmetry problems that beset some putative plaintiffs and may make it impossible to meet the new standard of plausible pleading. The same defect undermines an argument that relies on the ability to amend after dismissal (if the court grants permission to do so), and nobody aware of the pleading jurisprudence of some courts of appeals after *Swierkiewicz* and *Leatherman* is likely to take too much comfort from the availability of an appeal from a judgment of dismissal. Of course, all such arguments are of the “it’s not so bad” variety, an argument that speaks but faintly to the merits of the Court’s decisions – and with faint praise -- and not at all to the fundamental process objection that animates this testimony. Most risible of all the arguments I have heard against the status quo approach I favor is that it will “guarantee inconsistency.” As if *Twombly* and *Iqbal* -- with the latter’s paean to “judicial experience and common sense” leading the way -- will bring about consistency. I prefer the devil I know to the devil I do not know, at least until such time as there has been a thorough, open, and democratically accountable lawmaking process that justifies installing a new king of the nether regions.

Finally, opponents of legislation restoring the status quo ante also argue that Congress should respect the Enabling Act process and that there is no evidence that time is of the essence. As to R-E-S-P-E-C-T, the advice might better have been offered to and heeded by the Court, whose decisions in *Twombly* and *Iqbal* could not have been more disrespectful of the Enabling Act process.<sup>71</sup> Indeed, legislation of the sort I favor would restore the Enabling Act process to

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<sup>70</sup> In that regard, the (unanimous) Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), did not accept a requirement of fact pleading that had been imposed by a lower federal court. It used the occasion of litigation governed by the PSLRA to contextualize the requirement that a complaint provide fair notice. *Dura* may have facilitated part of the analysis in *Twombly*, but it is light years away from *Iqbal*.

<sup>71</sup> In this regard, given *Swierkiewicz*’s insistence on the use of the Enabling Act process to impose fact pleading, it is particularly interesting that the Third Circuit has taken the view 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*. Fowler

the position it was always intended to have when it is proposed to change Federal Rules. And as to whether time is of the essence, the Enabling Act process takes about three years, which is appropriate for matters requiring thorough study, particularly when the rulemakers commission original empirical research. Again, who should bear the risk of irreparable injury while the rulemakers assess the impact of *Twombly* and *Iqbal* and determine whether to recommend amendments to the Federal Rules?<sup>72</sup>

Apart from the admittedly incomplete evidence of the impact of changed standards to which I have referred, there is no guarantee that the Court would accept any changes that the rulemakers (after three years or so of work) might propose, since “a Court that wishes to change a Rule, but resists doing so via interpretation, will support (and transmit to Congress) a proposed amendment that effects the desired change; but a Court that has changed a Rule via interpretation may be reluctant to approve a proposed amendment that would undo its work.”<sup>73</sup> In light of the patent inadequacy of the process that was used to reach these decisions (whether or not it was formally illegitimate), asking the usual victims of “procedural” reform also to bear that risk seems to me as insupportable as telling those whose complaints have been dismissed under the new regime, when they would have survived to discovery under the old, that the sky is not falling. That, of course, depends upon where you live.

Because the Supreme Court’s recent pleading decisions are at odds with premises underlying the Federal Rules, with precedent, and with congressional expectations, and because those seeking access to the federal courts should not have to bear the risk of irreparable injury as a result of improvident Supreme Court decisions, legislation to restore the status quo is necessary and appropriate. In addition, such legislation is needed to avert irreparable injury to the important social norms underlying federal statutes in which Congress has included multiple damage recovery and/or one-way pro-plaintiff fee-shifting provisions that signal Congress’s preference for vigorous private enforcement. Once legislation restoring the status quo is in place, it will be time to consider change after a thoughtful and deliberate study within more democratic processes. The Supreme Court, acting as such (that is, rather than as Congress’s delegate under the Enabling Act), is incapable of conducting or acting on such a study, because it lacks the information, experience and political legitimacy to make an informed judgment about either the procedural or the broader social costs and benefits of changing pleading law.

Although it is certainly possible that careful study could yield a contrary conclusion, I suspect that notice pleading should remain the norm, at least so long as the Federal Rules are trans-substantive. That seems to me particularly likely to be true given that the main concerns

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v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009). *But see, e.g.*, *Gilman v. Inner City Broadcasting Corp*, 2009 WL 3003244 (S.D. NY. Sept. 18, 2009).

<sup>72</sup> In addition, the longer *Twombly* and *Iqbal* are permitted to remain in effect, the harder it will be to wean lower courts of their standards.

<sup>73</sup> Struve, *supra* note 2, 1135-36. As previously suggested, only a lawyer, and at that only a lawyer on a mission, could argue with a straight face that the Court’s recent pleading decisions did not “change a Rule.”

underlying the Court's recent decisions have to do not with pleading, but with discovery.<sup>74</sup> On the other hand, Congress has required greater factual specificity and persuasiveness in pleading when they were deemed important to the attainment of particular substantive goals, as it did in securities cases. Congress can do so again, if necessary. I have no doubt that Congress would benefit from a careful study by the federal judiciary – particularly if it focused on the real perceived problem -- but the fruits of such study need not be in the form of proposed amendments to the Federal Rules of Civil Procedure. They could instead be presented as recommendations to Congress. The point in any event is that Congress alone has the power to calibrate decisions about the level of enforcement in one realm (e.g., litigation) with those in another (e.g., administrative enforcement), power that the Supreme Court lacks when acting in any capacity.

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<sup>74</sup> Note again that if concern about discovery in lawsuits against high government officials drove the decision in *Iqbal*, the problem could have been addressed by requiring fact pleading as a matter of substantive federal common law (the source of the official immunity defense). See *supra* text accompanying note 32. See also *Schulte v. Wood*, 47 F.3d 1427, 1433 (5<sup>th</sup> Cir. 1995) (en banc) (“There is a powerful argument that the substantive right of qualified immunity supplants the Federal Rules’ scheme of pleading by short and plain statements.”). It could also have been addressed (*and still can be*) by statute. Either approach would have avoided the imposition of the costs of *Iqbal* on the entire universe of federal court plaintiffs. The Court’s failure to take a more targeted approach not only demonstrates one of the costs of trans-substantive procedure; it also raises the question whether the discovery rationale captures the Court’s full agenda.

## APPENDIX A

Below is a draft substitute amendment to implement an approach that would return the law governing pleading and pleading motions to the status quo before *Twombly* and *Iqbal*, until such time as change were effected by amendments to the Federal Rules of Civil Procedure or by statute. The approach was suggested by 42 U.S.C. § 2000e-2(k)(1)(C), a provision of Title VII added by the Civil Rights Act of 1991, which requires that “the demonstration of [an alternative employment practice] shall be in accordance with the law as it existed on June 4, 1989... .”

### Section 1. The Congress of the United States finds that

(a) the decisions of the Supreme Court of the United States in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), decided on May 21, 2007, and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), are inconsistent with fundamental premises underlying the Federal Rules of Civil Procedure, with the Court's previous decisions interpreting those rules, and with congressional expectations formed and relied upon over a period of more than seventy years;

(b) the law governing pleading and pleading motions should be restored to the status quo ante pending thorough study by appropriate institutions through processes that are open and inclusive;

(c) time is of the essence because of the risk of irreparable injury to those who lack the information or resources to comply with the Court's recent pleading decisions, and to important public policies underlying federal statutes that the enacting Congress intended to be enforced through private civil litigation, and

(d) prior to May 21, 2007, some lower courts disregarded decisions of the Supreme Court interpreting the Federal Rules of Civil Procedure relating to pleading and pleading motions, and undermined the system of notice pleading intended by those rules and decisions, by insisting on heightened pleading requirements.

Section 2. Except as expressly provided by an Act of Congress enacted heretofore or hereafter or by a Federal Rule of Civil Procedure effective hereafter, the law governing (a) dismissal or striking of all or any part of a pleading containing a claim or defense for failure to state a claim, indefiniteness, or insufficiency and (b) judgment on the pleadings, shall be in accordance with interpretations of the Federal Rules of Civil Procedure by the Supreme Court of the United States, and by lower courts in decisions consistent with such interpretations, that existed on May 20, 2007.

Section 3. This Act shall apply in all actions pending in any federal court on its effective date and in all actions commenced on or after its effective date.

## APPENDIX B

**United States ex rel. Lobel v. Express Scripts, Inc.**, 2009 WL 3748805, at \*1 (3d Cir. Nov. 10, 2009) (unpublished) (“Lobel’s failure even to cite *Twombly* and *Iqbal* in either of his two briefs is a telling omission. When Lobel’s amended complaint is analyzed under the more exacting standard established by those cases, it falls well short.”).

**Arar v. Ashcroft**, 2009 WL 3522887, at \*51 (2d Cir. Nov. 2, 2009) (en banc) (Parker, J., dissenting):

The flaws in the majority’s approach are not unique to Arar, but endanger a broad swath of civil rights plaintiffs. Rarely, if ever, will a plaintiff be in the room when officials formulate an unconstitutional policy later implemented by their subordinates. Yet these closeted decisions represent precisely the type of misconduct that civil rights claims are designed to address and deter. Indeed, it is this kind of executive overreaching that the bill of rights sought to guard against, not simply the frolic and detour of a few “bad apples.” The proper way to protect executive officials from unwarranted second-guessing is not an impossible pleading standard inconsistent with Rule 8, but the familiar doctrine of qualified immunity.

**In re Travel Agent Com'n Antitrust Litigation**, 2009 WL 3151315, at \* 13, \*15, \*16 (6th Cir. Oct. 2, 2009) (Merritt, J., dissenting):

As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple ‘plausibility,’ but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial evidence. . . . The antitrust cases decided in both courts of appeals and district courts since *Twombly* and *Iqbal* are few, and most of the cases decided by district courts have yet to reach the courts of appeals. . . . The uniformity needed for the rule of law and equal justice to prevail is lacking. This irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims. . . . There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Using the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence.



**Panther Partners, Inc. v. Ikanos Commen's**, 2009 WL 2959883, at \*4 (2d Cir. Sept. 17, 2009) (“[W]e recognize that *Iqbal* and *Twombly* raised the pleading requirements substantially while this case was pending”).

**Al-Kidd v. Ashcroft**, 2009 WL 2836448, at \*23 (9<sup>th</sup> Cir. Sept. 4, 2009) (“post-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints.”).

**Fowler v. UPMC Shadyside**, 578 F.3d 203, 210 (3d Cir 2009) (upholding plaintiffs’ claim against motion to dismiss, but making it clear that standards have changed):

The Supreme Court's opinion makes clear that the *Twombly* "facial plausibility" pleading requirement applies to all civil suits in the federal courts. After *Iqbal*, it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S.Ct. at 1949. To prevent dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See id.* at 1949-50; *see also Twombly*, 550 U.S. at 555, & n.3.

*Iqbal* additionally provides the final nail-in-the-coffin for the "no set of facts" standard that applied to federal complaints before *Twombly*. *See also Phillips*, 515 F.3d at 232-33. Before the Supreme Court's decision in *Twombly*, and our own in *Phillips*, the test as set out in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), permitted district courts to dismiss a complaint for failure to state a claim only if "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." *Id.* Under this "no set of facts" standard, a complaint effectively could survive a motion to dismiss so long as it contained a bare recitation of the claim's legal elements.

....

We have to conclude, therefore, 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*.

**Courie v. Alcoa Wheel & Forged Prods.**, 577 F.3d 625, 629-30 (6th Cir. Ohio 2009) (complaint dismissed, but no indication that result would have been different under *Conley*)

The Supreme Court recently raised the bar for pleading requirements beyond the old "no-set-of-facts" standard of *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), that had prevailed for the last few decades. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). . . Indeed, while this new *Iqbal/Twombly* standard screens out the "little green men" cases just as *Conley* did, it is designed to also screen out cases that, while not utterly impossible, are "implausible." ... Exactly how

implausible is "implausible" remains to be seen, as such a malleable standard will have to be worked out in practice.

**Moss v. U.S. Secret Service**, 572 F.3d 962, 972 (9<sup>th</sup> Cir. 2009) (“Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief ... Under the Court’s latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. As many have noted, this is a significant change, with broad-reaching implications.”).

**Ayres v. Ellis**, 2009 U.S. Dist. LEXIS 103109, at \*\*14-15 (D. N.J. Nov. 4, 2009): After discussing differences between *Conley* and *Iqbal* (e.g., “The Third Circuit observed that *Iqbal* provided the “final nail-in-the-coffin” for the “no set of facts” standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), which was applied to federal complaints before *Twombly*.”), the district court dismissed the pro se complaint by pre-trial detainee who was assaulted by prisoners while in prison:

Plaintiff’s medical claims against the nursing personnel cannot be entertained because: (a) Plaintiff did even not name the nurses that treated him as defendants in this matter; and (b) did not state what particular denial of medical care resulted in the alleged infection (rather, Plaintiff merely offered the Court his self-serving conclusory statement, in violation of Rule 8 pleading requirements, as clarified in *Twombly* and *Iqbal*).

**Kasten v. Ford Motor Co.**, 2009 U.S. Dist. LEXIS 101348, at \*15 (E.D. Mich. Oct. 30, 2009) (dismissing discrimination claim) (“The Court has no doubt Plaintiffs’ Complaint would have survived a motion to dismiss before *Iqbal* expanded *Twombly* to all civil actions. However, Plaintiffs’ factual allegations are too meager to satisfy the Supreme Court’s newly-announced standard.”).

**Mitchell v. Sosa**, 2009 U.S. Dist. LEXIS 89961, at \*\*11-12 (D. Colo. Sept. 29, 2009) (dismissing prisoner’s pro se *Bivens* claim):

It is possible Plaintiff’s claim would survive if the Court were operating under *Conley v. Gibson*’s “no set of facts” pleading standard, under which “a complaint [would] not be dismissed for failure to state a claim unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim . . .” *Robbins v. Oklahoma*, 519 F.3d 1242, 1246 (10<sup>th</sup> Cir.2008) (quoting *Conley*, 355 U.S. at 45-46 (1957)). Under that standard, “a complaint containing only conclusory allegations could withstand a motion to dismiss if there was a possibility that a fact not stated in the complaint could render the complaint sufficient.” *VanZandt v. Oklahoma Department of Human Services*, 276 Fed.Appx. 843, 846 (10<sup>th</sup> Cir. 2008) (citing *Robbins*, 519 F.3d at 1246)).

As mentioned, however, the pleading standards have changed. Plaintiff’s complaint will not survive unless he states a plausible entitlement to relief. Plaintiff’s claim -- a loose collection of disjointed words -- does not plausibly allege that Defendant violated Plaintiff’s constitutional rights. Thus, it must be dismissed.

**Fed. Trade Comm’n v. Innovative Mktg., Inc.**, 2009 WL 2959680, at \*2 n.2 (D. Md. Sept. 16, 2009) (*Twombly* and *Iqbal* “represent a new framework for reviewing the sufficiency of

complaints under Rule 8); *id.* at \*7 (“*Twombly* and *Iqbal* may have raised the bar for stating a claim under Rule 8, but not to the extent proposed by D’Souza.”).

**Elan Microelectronics Corp. v. Apple, Inc.**, 2009 WL 2972374, at \*3 (N.D. Cal. Sept. 14, 2009) (“It is not easy to reconcile Form 18 [for direct patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a ‘short and plain statement,’ it offers little to ‘show’ that the pleader is entitled to relief ... Under Rule 84 of the Federal Rules of Civil procedure, however, a court must accept as sufficient a pleading made in conformance with the forms.”).

**McClelland v. City of Modesto**, 2009 WL 2941480, at \*5 (E.D. Cal. Sept. 10, 2009) (“the fact remains that, since *Twombly*, the requirement for fact pleading has been significantly raised”).

**Procentury Ins. Co. v. Harbor House Club Condo. Ass’n**, 2009 U.S. Dist. LEXIS 73362, at \*\*20-21 (D. N.J. Aug. 19, 2009) (dismissing complaint by condo association against insurance agent alleging that it was negligent in the issuance of an insurance policy):

Here, Harbor House has alleged that Cowles & Connell, acting as ProCentury's insurance agent, issued the policy negligently by "failing to provide the necessary and correct information, failing to ascertain the true nature of the risk, failing to make proper inquiry or to explain the coverages afforded, and in failing to act in accordance with the standard of conduct for insurance agents and brokers performing such services in the District of New Jersey." (Third Party Compl. P 28.) Under the previous, more permissive pleading standard, this claim may have been sufficient. See *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) ("On such a focused and literal reading of *Conley*'s 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery.").

However, under the current, more stringent pleading standard articulated by the Supreme Court in *Twombly*, and reiterated in *Iqbal*, Harbor House's claim fails.

**Young v. City of Visalia**, 2009 WL 2567847, at \*6 (E.D. Cal. Aug. 18, 2009) (“In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. "bare allegations") is no longer viable.”). *Accord*, **Lewis v. City of Fresno**, 2009 WL 2905738, at \*10 (E.D. Cal. Sept. 4, 2009).

**Coleman v. Tulsa Cty. Bd. Of Cty. Comm’rs**, 2009 WL 2513520, at \*3 (N.D. Okla. Aug. 11, 2009) (stating that claim might have survived under *Conley* standard)

**Doe ex rel. Gonzales v. Butte Valley Unified School Dist.**, 2009 WL 2424608, at \*\*8-9 (E.D. Cal. Aug. 6, 2009):

Although *Iqbal*'s majority opinion itself did not intimate any seachange, jurists and legal commentators have observed that the decision marks a striking retreat from the highly permissive pleading standards often thought to distinguish the federal system from " ‘the hyper-technical, code-pleading regime of a prior era,’ 129 S.Ct. at 1949. . . Prior to *Iqbal*, many courts--including this court and, apparently, the Supreme Court itself--read Rule 8

to express a ‘willingness to “allow [ ] lawsuits based on conclusory allegations ... to go forward,”’ . . . . Indeed, for over half a century, district courts had been instructed that the ‘short plain statement’ required by Rule 8 ‘must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”’ . . . Now, however, even the official Federal Rules of Civil Procedure Forms, which were touted as ‘sufficient under the rules and ... intended to indicate the simplicity and brevity of the statement which the rules contemplate,’ Fed. R. Civ. Proc. 84, have been cast into doubt by *Iqbal*. . . Accordingly, although the court will grant in part defendants’ motion to dismiss, the court will also permit plaintiff leave to amend. Plaintiff, however, is admonished to thoroughly and carefully set forth his allegations in any subsequent amended complaint, as both judicial resources and fairness to defendants preclude unlimited opportunities to amend the pleadings.”

**Ocasio-Hernandez v. Fortuno-Burset**, 2009 WL 2393457, at \*6 n.4 (D. P.R. Aug. 4, 2009) (acknowledging that complaint “clearly met the pre-*Iqbal* pleading standard,” and stating that *Iqbal* creates harsh results, making political discrimination claims nearly impossible to plead without “smoking gun” evidence. “Certainly such a chilling effect was not intended by Congress when it enacted Section 1983.”)

**Ibrahim v. Department of Homeland Sec.**, 2009 WL 2246194, at \*10 (N.D. Cal. July 27, 2009):

Ibrahim has not pleaded that defendants took action because of and not merely in spite of her being Muslim and a Malaysian citizen. That plaintiff was Muslim and detained is not enough to draw an inference of discrimination under the *Iqbal* standard. No additional facts, such as derogatory statements, are alleged. Accordingly, as pled, the discrimination claims against San Francisco officers or Bondanella are insufficient. A good argument can be made that the *Iqbal* standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court. Yet, the harshness is mitigated here. Counsel for the San Francisco defendants and Bondanella admit that plaintiff’s Fourth Amendment claim can go forward. This means that discovery will go forward. During discovery, Ibrahim can inquire into facts that bear on the incident, including why her name was on the list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.

**Air Atlanta Aero Eng’g Ltd. v. SP Aircraft Owner I, LLC**, 2009 WL 2191318, at \*13 (S.D. N.Y. July 23, 2009) (“[I]n the context of the case, a blanket statement that a defendant ‘confirmed an intention to pay’ without any factual details supporting that allegation does not state a plausible claim for relief. While such allegations may have provided sufficient notice pleading in the past, *Twombly* and *Iqbal* provide clear instructions that conclusory statements about a party’s alleged intentions should be accompanied with supporting factual allegations where circumstances so demand.”).

**Williams v. City of Cleveland**, 2009 WL 2151778, at \*4 (N.D. Ohio July 16, 2009):

A municipality can only be held liable under § 1983 if the complaint alleges that Plaintiff’s injury directly resulted from the municipality’s policies or customs. . . Under

the heightened pleading standard articulated by the Supreme Court of the United States in recent decisions, Plaintiff's amended complaint does not sufficiently state a § 1983 claim. . . Plaintiff's amended complaint recites the critical element of a § 1983 claim against a municipality--a policy or custom--but does so in a conclusory manner. Plaintiff makes no factual allegations that can support the conclusion that the City has a policy or custom of ignoring exculpatory evidence and continuing with prosecutions. To merely state that the City has a policy or custom is not enough; Plaintiff must allege facts, which if true, demonstrate the City's policy, such as examples of past situations where law enforcement officials have been instructed to ignore evidence. Here, while Plaintiff has alleged facts sufficient to demonstrate that exculpatory evidence was ignored in his case, he has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy. Accordingly, the amended complaint would not state a claim cognizable under federal law. Thus, Plaintiff's motion for leave to amend the complaint is denied as futile and Count V of Plaintiff's complaint against the City is dismissed.

**Carpenters Health & Welfare Fund of Philadelphia v. Kia Enters. Inc.**, 2009 WL 2152276, at \*3 (E.D. Pa. July 15, 2009) (dismissing discrimination claim):

The Supreme Court's clarification of federal pleading standards in *Twombly* and *Iqbal* has raised the bar for claims to survive a motion to dismiss by emphasizing that a plaintiff cannot rely on legal conclusions or implausible inferences from factual allegations to state a claim..

....

Kia has attempted to plead sufficient additional facts to 'nudge' its allegations of discrimination across the 'line from conceivable to plausible' by alleging, on information and belief, that the plaintiffs do not make similar efforts to collect unpaid CBA obligations from non-minority-owned businesses. Kia, however, offers no specific facts in support of the plaintiffs' alleged disparate treatment of minority and non-minority businesses. In the absence of any more specific allegations identifying particular instances of disparate treatment, these allegations are merely 'legal conclusions couched as factual allegations,' which under *Twombly* and *Iqbal* cannot be taken as true.

**Argeropoulos v. Exide Techs.**, 2009 U.S. Dist. LEXIS 59009, at \*\*15-16 (E.D.N.Y. July 8, 2009) (dismissing hostile work environment claim)

Plaintiff alleges that the anecdotes he provided were merely some examples of discrimination that occurred on a "daily and continuous basis because he is Greek." Am. Comp. P 45. When combined with the two anti-Greek statements pled in the Amended Complaint, this kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old "no set of facts" standard for assessing motions to dismiss. See *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). But it does not survive the Supreme Court's "plausibility standard," as most recently clarified in *Iqbal*, 129 S. Ct. at 1949-1953. In applying the plausibility standard set forth in *Twombly* and *Iqbal*, a court "assume[s] the [] veracity" only of "well-pleaded factual allegations." *Id.* at 1950. Thus, the Court need not accept as true Plaintiff's

conclusory and entirely non-specific allegation that similar conduct occurred on a "daily and continuous basis because he is Greek." Rather, Plaintiff must plead sufficient "factual content" to allow the Court to draw a "reasonable inference" that Plaintiff suffered from a hostile work environment. *Iqbal*, 129 S. Ct. at 1449. And Plaintiff has not done so. At most, Plaintiff's national origin hostile work environment claim is "conceivable." *Id.* at 1451. But without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is "plausible." *Id.*

**Ansley v. Florida Dep't of Revenue**, 2009 WL 1973548, at \*2 (N.D. Fla. July 8, 2009) (concluding that although "[t]hese allegations might have survived a motion to dismiss prior to *Twombly* and *Iqbal* ... now they do not").

**Kyle v. Holinka**, 2009 WL 1867671, at \*1 (W.D. Wis. June 29, 2009) (court describes *Iqbal* as "implicitly overturn[ing] decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion.").

**Fulk v. Village of Sandoval**, 2009 WL 1606897, at \*2 (S.D. Ill. June 9, 2009) (court grants leave to amend "[b]ecause of the recent change in federal pleading standards").