Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal

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NOTE

PLEADING WITH CONGRESS TO RESIST THE URGE TO OVERRULE TWOMBLY AND IQBAL

Michael R. Huston*

In Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, the Supreme Court changed the rhetoric of the federal pleading system. Those decisions have been decried by members of the bar, scholars, and legislators as judicial activism and a rewriting of the Federal Rules of Civil Procedure. Such criticism has led members of both houses of Congress to introduce legislation to overrule the decisions and return to some variation of the “notice pleading” regime that existed before Twombly. This Note argues that both of the current proposals to overrule Twombly and Iqbal should be rejected. Although the bills take different approaches to their goal of overruling Twombly and Iqbal, each one would disrupt the careful balance of interests created by the Federal Rules and create intolerable confusion for judges ruling on the often-filed 12(b)(6) motion to dismiss. Especially because the long-term effects of Twombly and Iqbal on federal pleading remain unclear, Congress should avoid a rush to judgment on this important issue.

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INTRODUCTION

During the confirmation hearings of John G. Roberts, Jr. to become Chief Justice of the United States in 2005, then-Judge Roberts famously remarked, “Judges are like umpires. Umpires don’t make the rules, they apply them.” But in the wake of the Supreme Court’s decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, some have accused the Chief Justice and a majority of the Court of remaking the rules of the federal courts—the Federal Rules of Civil Procedure (the “Federal Rules”).

Iqbal has been called “the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts.” In that case, the plaintiff’s original cause of action alleged intentional racial discrimination, but by the time the case reached the Supreme Court it turned instead on a question of procedure: what standard governs a motion in federal court to dismiss a pleading for failure to state a claim under Rule 12(b)(6)?

Rule 8(a)(2), which has governed the sufficiency of federal pleadings since the adoption of the Federal Rules, requires only that the claimant provide “a short and plain statement of the claim showing that the pleader is

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5. This motion, typically filed before a defendant’s first responsive pleading, amounts to an assertion by the defendant that even if all the facts alleged by the plaintiff are true, those facts would nevertheless not subject the defendant to legal liability.
entitled to relief." From 1957 to 2006, the Supreme Court interpreted this rule in a plaintiff-friendly manner, highlighted by the landmark decision in Conley v. Gibson,7 which stated that a motion to dismiss should be denied unless the reviewing court can discern "no set of facts" that would entitle the claimant to relief. Conley came to be synonymous with "notice pleading," the view that the primary—or perhaps even sole—function of a complaint is to put a defendant on notice of the plaintiff's allegations so that the defendant can begin to prepare a defense. In Twombly, however, the Court announced that Conley's famous "no set of facts" language had "earned its retirement."8 Although the Court explicitly affirmed the validity of Rule 8(a)(2) as written and claimed no drastic change to the standard,9 the Court interpreted the rule to require that a claimant include enough facts in his complaint to state a claim to relief that is "plausible on its face."10

Two years later, the Supreme Court reaffirmed the Twombly standard11 in Iqbal and laid out the analytical framework, or "working principles," that federal courts now use to evaluate the sufficiency of pleadings.12 Iqbal's working principles direct the reviewing court to separate the complaint's "legal conclusions" and "threadbare recitals of the elements of a cause of action," neither of which are entitled to be presumed true, from its well-pled facts, which the court must presume to be true at the pleading stage.13 The court must then determine whether the well-pled facts alone, taken as true, state a "plausible claim for relief."14

Reaction to Iqbal in the academic community and from the plaintiffs' bar was overwhelmingly fierce and negative. Scholars and practitioners called it a "grave disappointment," a "really bad opinion," and "an excuse to throw out suits on the pleadings."15 Professor Stephen Burbank testified before Congress that "Twombly and Iqbal may contribute to the phenomenon of vanishing trials, the degradation of the Seventh Amendment right to a

6. FED. R. CIV. P. 8(a)(2).
9. Id. at 569 n.14.
10. Id. at 570. Critics of Twombly marked the decision as a drastic change from the "notice pleading" of Conley to a system of "plausibility pleading." They predicted that the decision would result in a significant increase in the number of plaintiffs who see their claims dismissed at the pleading stage. E.g., A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 431–33 (2008).
11. Because Twombly was decided in an antitrust case where the substantive law of what constitutes a plausible claim was already established, some commentators wondered whether Twombly would apply outside of an antitrust setting. E.g., Anthony Martinez, Case Note, Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly, 61 Ark. L. Rev. 763, 770–71 (2009).
13. Id. at 1949–50.
14. Id. at 1950.
jury trial, and the emasculation of private civil litigation as a means of enforcing public law.” This criticism was based in part on the fear that *Iqbal* will result in a significant increase in the number of cases dismissed in federal court before plaintiffs have an opportunity to develop their claims through the discovery process. The decision has even been described as creating an “insurmountable barrier to access” to the courts for certain plaintiffs. In 2009, animosity toward the Court’s recent pleading decisions led to the introduction of bills in both houses of Congress to overrule *Twombly* and *Iqbal* and mandate a return to the “notice pleading” standard of *Conley*. As of mid-2010, both of these bills have been referred to their respective chambers’ judiciary committees and reviewed in hearings.

This Note argues that Congress should reject the urge to overrule *Twombly* and *Iqbal* because such legislation would distort the careful balance of interests developed by the Federal Rules. Part I reviews the Supreme Court’s Rule 8(a)(2) pleading jurisprudence from *Conley* to *Twombly* and *Iqbal*, as well as Congress’s reaction to those decisions. Part II considers recent federal decisions that have applied the *Iqbal* working principles to Rule 12(b)(6) motions and concludes that the decision has not dramatically increased the number of cases dismissed in federal court. Finally, Part III argues that Congress should reject legislation that would overrule *Twombly* and *Iqbal*. Such legislation would either inject unacceptable confusion into federal pleading practice or would implement an unworkable standard that unfairly burdens defendants before any wrongdoing has been plausibly alleged.

I. FROM NOTICE PLEADING TO PLAUSIBILITY
PLEADING (AND BACK AGAIN?)

A. Conley and the Legacy of Notice Pleading

Notice pleading’s most important expression came in the Supreme Court’s 1957 decision in *Conley v. Gibson*. The *Conley* complaint alleged


illegal race discrimination in union practices and the defendants moved to dismiss for lack of jurisdiction and failure to state a claim upon which relief may be granted. The Supreme Court reversed the dismissal of the complaint in the lower courts, holding that the complaint was sufficient under Rule 8(a)(2) and stating that when reviewing Rule 12(b)(6) motions, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."  

Conley's interpretation of Rule 8(a)(2) was liberal by design. It reflected the Court's understanding that the Federal Rules seek to provide a plaintiff with an opportunity to pursue his claims even when he cannot prove them at the pleading stage. In this respect, the Conley standard was largely successful: the vast majority of motions to dismiss for failure to state a claim were denied in federal court. Along with generous discovery rules that permit a plaintiff to obtain all nonprivileged information in the defendant's possession relevant to the claim, Conley's interpretation of Rule 8(a)(2) sought to provide the plaintiff with the best possible opportunity to develop his facts and prove his case at trial.

21. The plaintiffs in Conley were African American members of a railway workers union who sued the union for failing to represent their interests to their employer in good faith, as the union had done for its white members. Id. The union was required to represent the plaintiffs equally under the Railway Labor Act. Id. at 42-43. In the lower federal courts, the complaint was dismissed for lack of jurisdiction on the grounds that the act conferred exclusive jurisdiction on the National Railroad Adjustment Board. Id. at 43. The Supreme Court reversed that finding, id. at 44, and then proceeded to address the sufficiency of the complaint.

22. Id. at 45-48. Although this language made Conley famous, it was dictum. The Conley complaint was held to be sufficient because, if all of the alleged facts were proved, a violation of the statute would necessarily be shown. Thus, the complaint would have survived under a much stricter interpretation of Rule 8(a)(2), possibly including the working principles of Iqbal. See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 434 (1986).

23. Conley, 355 U.S. at 47.

24. See Fed. R. Civ. P. 11(b)(3) (requiring that "the factual contentions [in a pleading] have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery"). Plaintiffs in many types of actions may be confident they have been wronged but unable to explain how defendant acted contrary to the law without accessing information in the defendant's possession. See Liptak, supra note 4 (identifying employment discrimination, products liability, antitrust violations, and harsh detention treatment as possible examples). Importantly, however, the class of plaintiffs who lack sufficient factual matter at the pleading stage to plead their claim with plausibility is much smaller.

25. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 565 (3d ed. 2004); Rothman, supra note 17, at 1. But see Patricia W. Hatamyar, The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?, 59 AM. U. L. REV. 553, 598--99 (2010) (concluding that approximately 40 percent of Rule 12(b)(6) motions were dismissed without leave to amend between 2005 and 2007, the two years immediately preceding Twombly, and noting surprise at these findings).

26. Fed. R. Civ. P. 26(b)(1). Interestingly, although American discovery is usually understood to favor plaintiffs, Conley interpreted the discovery rules as a limiting mechanism on the pleading standard. 355 U.S. at 47--48. The Court viewed discovery as a means of forcing the plaintiff to disclose the basis of his claim more precisely and to define the disputed facts more narrowly than he did at the pleading stage. Id.
Although Conley's "no set of facts" interpretation of Rule 8(a)(2) became the standard citation for federal courts ruling on Rule 12(b)(6) motions, that interpretation was severely criticized. Some believed that the standard unduly favored plaintiffs and would allow too many frivolous claims to proceed, thereby forcing defendants to undertake huge discovery expenses shortly after an action was filed.\(^27\) This in turn was said to create massive settlement leverage for plaintiffs\(^28\) and encourage them to bring suits with little or no merit. Such concerns led Congress to pass the Private Securities Litigation Reform Act of 1995,\(^29\) designed to prevent plaintiffs from manipulating the liberal pleading system to achieve settlement leverage through discovery in securities cases—cases which Congress believed were particularly vulnerable to abuse.\(^30\) Eventually, these same concerns contributed to the Supreme Court's repudiation of the Conley standard altogether.

## B. Twombly and the Rise of Plausibility

Conley's vision of notice pleading maintained its position as the standard interpretation of Rule 8(a)(2) for five decades. Then in 2007, the Supreme Court cast considerable doubt on the future of notice pleading with its decision in *Bell Atlantic Corp. v. Twombly*.\(^31\) In Twombly, the plaintiffs were subscribers to communications services who alleged that the defendants, a group of telephone and internet service providers, violated Section 1 of the Sherman Act.\(^32\) The complaint alleged that the defendants "engaged in parallel conduct" in an effort to prevent new competitors from entering the market and asked the court to infer an illegal conspiracy from the "absence of any meaningful competition between the [defendants] in one another's markets."\(^33\)

Justice Souter, writing for a majority of seven, first held that merely alleging parallel conduct is insufficient to establish the "contract, combination, or conspiracy" prohibited by the Sherman Act.\(^34\) Although parallel business behavior is "admissible circumstantial evidence from which

27. Rothman, supra note 17, at 1.
28. Liptak, supra note 4. For example, a corporate defendant facing allegations of an elaborate illegal scheme may find it more economical to settle even a meritless case and avoid discovery costs than to incur litigation costs and still risk an unfavorable judgment.
32. Id. at 550.
33. Id. at 550-51.
34. Id. at 554 (quoting 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1433(a), at 236 (2d ed. 2003)).
the fact finder may infer agreement," such behavior is also just as consistent with a "wide swath" of rational, competitive, and legal business strategy. Because the allegations in the complaint were just as consistent with legal, competitive behavior as with illegal, anticompetitive behavior, nothing in the complaint "nudged [the] claims across the line from conceivable to plausible." The complaint thus failed to show that the pleader is entitled to relief, as required by Rule 8(a)(2).

The Court held that a complaint with mere "labels and conclusions," or a "formulaic recitation of the elements of a cause of action" is not sufficient to comply with Rule 8(a)(2). Further, the rule that factual allegations in a complaint are to be presumed true does not apply to a "legal conclusion couched as a factual allegation." Justice Souter rejected the notion that this imposes a demanding standard on plaintiffs, stating that Rule 8(a)(2) does not require "detailed factual allegations" and "does not impose a probability requirement at the pleading stage." Instead, the rule's instruction that the complaint "possess enough heft to 'sho[w] that the pleader is entitled to relief'" merely requires that the complaint contain enough facts "to raise a reasonable expectation that discovery will reveal evidence of illegal [behavior]." When, as in Twombly, a defendant's alleged conduct is consistent with both legal and illegal behavior, Rule 8(a)(2) requires that the complaint plausibly suggest that the charged illegal behavior occurred.

The Court then engaged in a full-scale repudiation of Conley's interpretation of Rule 8(a)(2). It treated Conley as establishing the "breadth of opportunity to prove what an adequate complaint claims," rather than what constitutes a baseline of sufficiency for a federal pleading. That is, once "a complaint adequately states a claim"—but not before—"it may not [then] be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder." The Court explained that although Conley's "no set

35. Id. at 553 (quoting Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540 (1954)).
36. Id. at 554.
37. Id. at 566. But see id. at 589–90 (Stevens, J., dissenting) (contending that the complaint alleged direct agreement among the defendants, not merely parallel behavior).
38. Id. at 570 (majority opinion).
39. Id. at 555.
40. Id. (quoting Papasan v. Allain, 478 U.S. 265, 286 (1986)).
41. Id.
42. Id. at 556.
43. Id. at 557 (alteration in original) (emphasis added).
44. Id. at 556.
45. Id. at 557.
46. Id. at 561–63.
47. Id. at 563.
48. Id. at 564 n.8 (emphasis added).
of facts” language was cited with regularity, the literal application of such a standard was never actually the norm, in theory or in practice, for federal courts evaluating Rule 12(b)(6) motions. Then came the death blow: the majority stated that the “puzzling,” “no set of facts” rule is “best forgotten as an incomplete, negative gloss on an accepted pleading standard.” In its place, Justice Souter announced the Court’s new interpretation of Rule 8(a)(2): “heightened fact pleading of specifics” is not required, “only enough facts to state a claim to relief that is plausible on its face.”

C. Iqbal and the New Analytical Framework

In 2009, the Supreme Court clarified and implemented the new interpretation of Rule 8(a)(2) announced in Twombly. Most importantly, the decision worked through the specific analytical framework, or “working principles,” that federal courts are to utilize when considering a motion to dismiss for failure to state a claim. Iqbal also removed any ambiguity that existed concerning the applicability of the plausibility analysis to all Rule 12(b)(6) motions.

The plaintiff, Javaid Iqbal, was a Pakistani national who was arrested following the September 11, 2001, terrorist attacks and detained by federal officials on charges of identity fraud. Iqbal’s complaint alleged that Attorney General John Ashcroft and FBI Director Robert Mueller designated him—one of thousands of Arab Muslim men detained during the September 11th investigation—as a person of “high interest” solely “on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution.”

The district court denied the defendants’ Rule 12(b)(6) motion to dismiss, citing Conley. The Second Circuit affirmed, interpreting Twombly to...

49. Id. at 561–63. The Court cited a series of cases and scholarship repudiating Conley as excessively lenient and unworkable in practice. For more, see infra Section II.A.


51. Id. at 570.


53. See supra note 11.

54. Iqbal, 129 S. Ct. at 1942–43.

55. Id. at 1944.

56. Id. (second alteration in original).

57. Id. (alteration in original).

58. Id.
hold that a court need only consider a complaint’s plausibility when the claim is unusually complex, such as an alleged antitrust violation. The Supreme Court reversed. In an opinion by Justice Kennedy, the Court rejected the Second Circuit’s reading of Twombly and instead evaluated the complaint in light of what Iqbal’s cause of action would require him to prove. Because Iqbal’s claim required him to prove that the defendants adopted their detention policy with the deliberate intent to discriminate against him on account of his race, religion, or national origin, rather than for a neutral investigative purpose, Rule 8(a)(2) required Iqbal to plead sufficient facts to plausibly show intentional discrimination.

The Court then explained the two “working principles” of Twombly. First, facts will be presumed true at the pleading stage, but “legal conclusions” and “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements,” will not. The reviewing court must first separate those facts that are presumed true from the “conclusory” allegations that are not. Second, looking only to those facts that are presumed true, the court must “draw on its judicial experience and common sense” in order to engage in the “context-specific task” of determining whether the complaint “states a plausible claim for relief.” Both Twombly and Iqbal show that plaintiffs should take particular care to address the plausibility of their claims when the alleged behavior, despite being consistent with illegal conduct, is nevertheless more likely explained by a lawful purpose. Where the plaintiff’s facts do not allow the reviewing court to infer more than “the mere possibility of misconduct,” the complaint will not meet Rule 8(a)(2)’s requirement that the plaintiff “show” he is entitled to relief.

Applying these two principles, the Court first identified and set aside Iqbal’s conclusory allegations. For instance, Iqbal’s claim that the defendants “willfully and maliciously” subjected him to harsh confinement “solely on account of [his] religion, race, and/or national origin,”

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59. Id.
60. Id. at 1948–49. Iqbal’s substantive burden of proof was governed by the Supreme Court’s decision in Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971), in which the Court held that the Constitution implies a right of private plaintiffs to sue federal officials for actions taken in their official capacity for harm resulting from the officials’ deprivations of the plaintiffs’ constitutional rights.
62. Id.
63. Id.
64. Id.
65. Id. at 1950.
66. Id.
67. Id.
68. Id. at 1951 (alteration in original). The Court also identified as conclusory allegations Iqbal’s claims that Ashcroft was the “principal architect” of the detention policy and that Mueller was “instrumental” in its execution. Id.
“amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim,” and was not presumed true.\textsuperscript{69}

The remainder of Iqbal’s facts were presumed true, including that federal authorities, acting under Mueller’s direction, arrested thousands of Arab Muslim men following the September 11th attacks and that both defendants approved the policy of holding these detainees in highly restrictive confinement until they were cleared by the FBI.\textsuperscript{70} However, despite these policies being consistent with intentional discrimination, the Court found that the conduct was more likely explained by a legal, nondiscriminatory purpose to securely detain aliens who were illegally present in the United States and who had a potential connection to the September 11th attacks.\textsuperscript{71} Since Arab Muslims perpetrated those attacks, the investigation’s disparate impact on Arab Muslim men did not provide independent evidence of discriminatory purpose.\textsuperscript{72} Ultimately, because Iqbal’s complaint lacked any content that “plausibly suggest[ed] [defendants’] discriminatory state of mind” and the behaviors alleged were more likely explained by a lawful intention than an unlawful one, Iqbal could not nudge his claims “across the line from conceivable to plausible.”\textsuperscript{73}

The final portion of the opinion rejected three proposed limitations on Twombly.\textsuperscript{74} First, Twombly’s plausibility analysis is part of Rule 8(a)(2) and applies to all cases filed in federal court, not just those alleging antitrust conspiracy.\textsuperscript{75} Second, plausibility must be considered even in cases where careful case management might be used to minimize the burden of discovery on a defendant.\textsuperscript{76} Finally, “conclusory” allegations of intent are not made sufficient by Rule 9(b), which allows intent to be “alleged generally.”\textsuperscript{77} That rule does not relax the pleading standard below Rule 8(a)(2)’s required minimum for any allegation besides fraud or mistake.\textsuperscript{78}

Beyond merely affirming Twombly, the Iqbal opinion makes its own contribution to pleading doctrine by its absence of any language supporting the rhetoric of notice pleading. Despite retiring Conley, Twombly denied that plausibility amounted to a “heightened” pleading standard and reaffirmed the Court’s prior refusals to adopt a stricter standard in cases that create

\textsuperscript{69} Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

\textsuperscript{70} Id.

\textsuperscript{71} Id. at 1951.

\textsuperscript{72} Id.

\textsuperscript{73} Id. at 1951–52 (quoting Twombly, 550 U.S. at 570).

\textsuperscript{74} Id. at 1952.

\textsuperscript{75} Id. at 1953.

\textsuperscript{76} Id. at 1953–54 (holding that if the plaintiff’s complaint does not meet the pleading standard of Rule 8(a)(2), including plausibility, then “he is not entitled to discovery, cabined or otherwise”).

\textsuperscript{77} Id. at 1954.

\textsuperscript{78} Id.
concerns about litigation abuse. No such language in support of notice pleading appears in *Iqbal*. And while prior cases approving notice pleading may not be overruled, they are certainly made irrelevant by *Iqbal*'s requirement that the two working principles be applied to every Rule 12(b)(6) motion. After *Iqbal*, plausibility pleading appears to be here to stay.

D. Congress Reacts

1. The Senate: Notice Pleading Restoration Act of 2009

Senator Arlen Specter was the first member of Congress to introduce legislation taking aim at *Twombly* and *Iqbal*. On July 24, 2009, Specter introduced Senate Bill 1504, the Notice Pleading Restoration Act of 2009. The bill states:

Except as otherwise expressly provided by an Act of Congress or by an amendment to the Federal Rules of Civil Procedure which takes effect after the date of enactment of this Act, a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).

When introducing the bill, Specter claimed that the Federal Rules only require a complaint to put the defendant on notice of the substance of the plaintiff’s claims. Senator Leahy agreed during a hearing on the bill, stating that notice pleading reflects the intent of the Federal Rules and referring to the plausibility analysis as a “judge-made rule[].” Various senators claimed that the *Conley* standard was applied “consistently and faithfully” in the federal courts until 2007 and that *Twombly* and *Iqbal* represent a significant departure from that precedent. Senators also expressed concern that *Twombly* and *Iqbal* “grant[] too much discretion to trial judges” and allow them to indulge in subjective judgments when evaluating a

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80. Hatamyar, supra note 25, at 556 (“*Iqbal* . . . contains not even a passing reference to notice pleading . . . ”).
83. Id. § 2.
87. Senate Hearing, supra note 16, at 172 (statement of Sen. Feingold, Member, S. Judiciary Comm.).
88. Id.
complaint’s plausibility. Finally, several senators disapprovingly stated that the Supreme Court used *Twombly* and *Iqbal* to “effectively end [run]” the process for amending the Federal Rules envisioned by the Rules Enabling Act.

The senators’ comments are notable for two reasons. First, they show that many senators understand “notice pleading” to be a commandment of Rule 8(a)(2) itself rather than a description of doctrine derived from Conley’s interpretation of that rule. Second, despite the senators’ comments, and as will be shown in Section II.A, the federal courts’ treatment of Conley was neither faithful to nor consistent with a straightforward reading of the opinion’s “no set of facts” overstatement.


The introduction of Senate Bill 1504 gave members of the House of Representatives time to develop their own preferred legislative response to *Iqbal*, one which includes subtle but critical differences from the Senate bill. On November 19, 2009, Representative Jerrold Nadler introduced H.R. 4115, the Open Access to Courts Act of 2009. The bill states:

A court shall not dismiss a complaint under subdivision (b)(6), (c) or (e) of Rule 12 of the Federal Rules of Civil Procedure unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint under one of those subdivisions on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff’s claim to be plausible or are insufficient to warrant a reasonable inference that the defendant is liable for the misconduct alleged.

Statements in support of House Bill 4115 were similar to the comments in the Senate. Representative Nadler stated that *Iqbal* will “slam shut the courthouse door on legitimate plaintiffs” based on a trial judge’s “subjective...
take on the plausibility of a claim rather than [] on the actual evidence.”

He stated that House Bill 4115 is intended to “restore the standard followed for the last 50 years since ... Conley,” a standard that he referred to as “correct,” “well understood,” “practical,” and “workable ... for a half-century.”

Supporters of House Bill 4115 characterized Iqbal as a “heightened pleading standard” that amounts to an amendment to the Federal Rules. These representatives joined many of their Senate colleagues in decrying Iqbal as a “bypass,” or “judicial usurpation,” of the Rules Enabling Act.

Although the two bills were derived from similar motivations, they differ in the degree of specificity with which they seek to reverse Twombly and Iqbal. While Senate Bill 1504 only refers generically to the “standards set forth by the Supreme Court of the United States in Conley v. Gibson,” House Bill 4115 is intentionally more specific and mandates that the most liberal language in Conley, the “no set of facts” rule, be elevated from a mere “gloss” on Rule 8(a)(2) to the substantive pleading standard itself.

In the next Part, this Note explains why both of these bills would produce unacceptable results and should be rejected.

II. BUSINESS AS USUAL: RULE 8(A)(2) IN THE FEDERAL COURTS AFTER IQBAL

A review of the cases to date applying the Twombly and Iqbal pleading standards suggests that those decisions have not dramatically increased the number of cases dismissed in federal court for failure to state a claim. In Twombly, the Court hypothesized that the decision would have a limited effect on federal pleading practice because the plausibility analysis is consistent with a straightforward reading of Rule 8(a)(2) and decades of settled

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97. Id.


99. Id.

100. Id. at 2 (statement of Rep. Nadler).


103. October House Hearing, supra note 95, at 94 (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary, Subcomm. on the Constitution, Civil Rights, and Civil Liberties) (suggesting that Congress should respond to Iqbal through legislation “specifying [the standard] so the courts know what we mean and can’t interpret it differently”)


At least thus far, the *Twombly* majority has been vindicated in that prediction.

A. The Strict Language of *Conley* Has Never Actually Been Used as a Pleading Standard in Federal Court

Although Justice Stevens's dissent in *Twombly* called the majority's decision a "dramatic departure from settled procedural law," scholarship examining *Conley* shows conclusively that, long before *Twombly*, pure notice pleading was much more of a "myth" than a "consistently and faithfully implemented" doctrine. The *Twombly* Court noted that *Conley*'s terms were never interpreted literally and cited a handful of cases and articles showing that judges in practice had long since rejected *Conley*'s broad interpretation of Rule 8(a)(2).

The fact that federal courts never applied *Conley* literally is not surprising. The actual language of the rule is essentially broad beyond limitation: How will it ever "appear[] beyond doubt" that a plaintiff can "prove no set of facts entitling him to relief?" Even if one reads *Conley* to mean that Rule 8(a)(2) only requires the plaintiff to identify a valid legal theory and provide the defendant with notice of his claims, federal courts in practice have never understood the rule to do so little. Professor Charles Clark, who has been called the "principal architect" of the "liberal ethos" of the Federal Rules, described the *Conley* standard as "something like the
Golden Rule, which is a nice hopeful thing; but . . . isn’t anything that we can use with any precision.”

Conley’s imprecision in pleading jurisprudence can be seen at least as far back as the 1970s. In Warth v. Seldin, the Supreme Court dismissed the plaintiffs’ complaint for lack of standing after finding that the plaintiffs’ allegations were not supported by “specific, concrete facts” showing harm. Notably, the Court characterized the plaintiffs’ standing claim as “conclusory,” the same disapproving terminology used to reject various allegations in Twombly and Iqbal. In Associated General Contractors, Inc. v. California State Council of Carpenters, the Court reversed dismissal of the plaintiff’s antitrust action but directed the district court to require that the plaintiff plead with particularity, stating that “in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” In Papasan v. Allain, the Court affirmed dismissal of a plaintiff’s civil rights complaint and held that although a court must treat factual allegations as true, it is “not bound to accept as true a legal conclusion couched as a factual allegation.” In Crawford-El v. Britton, the Court held that a district judge may use a “firm application of the Federal Rules of Civil Procedure” at the pleading stage in order to prevent overly burdensome discovery on public officials and “may insist that the plaintiff put forward specific, nonconclusory factual allegations” that establish illegal conduct.

Lower courts adhered to these Supreme Court decisions and developed for themselves a pleading practice that is reasonably consistent with the working principles of Iqbal. Circuit courts consistently rejected pleading
allegations deemed "conclusory" and required that the plaintiff plead particular facts supporting his claim, even on the often difficult-to-prove question of a defendant's intent.\textsuperscript{125} It is not surprising that allegations of antitrust conspiracy and civil rights violations, the two actions at issue in \textit{Twombly} and \textit{Iqbal} respectively, were two of the most common types of cases in which courts demanded greater specificity from plaintiffs in the pre-\textit{Twombly} era. Because courts before \textit{Twombly} demanded greater specificity for claims alleging illegal intent, the decision is likely to have a less disruptive impact on other types of claims for which facts are more easily available preceding discovery.

Taken together, \textit{Warth}, \textit{Associated General Contractors}, \textit{Papasan}, \textit{Crawford-El}, and their lower court adherents represent the general approach of the federal courts to pleading even when \textit{Conley} still reigned. In this scheme, "conclusory" allegations were rejected, complex causes of action required the plaintiff to plead sufficient factual matter to create at least a reasonable belief that the plaintiff could prove his claims, and district courts were especially cautious in their review of pleadings where discovery might create significant costs or burdens for defendants.

And while it is undoubtedly true that the Supreme Court rejected calls for a "heightened pleading standard" in \textit{Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit}\textsuperscript{126} and \textit{Swierkiewicz v. Sorema N.A.},\textsuperscript{127} those decisions are not in conflict with \textit{Twombly} and \textit{Iqbal}.\textsuperscript{128} \textit{Leatherman} rejected the adoption of an explicitly higher pleading standard than called for by the Federal Rules and \textit{Swierkiewicz} refused to require the plaintiff to plead, in his complaint, all the evidence that would be needed to sustain his claim at trial. Those decisions prohibited the creation of pleading barriers that exceed the "show" requirement of Rule 8(a)(2), but they do not prohibit a reviewing court from considering the plausibility of the plaintiff's legal claims in light of his well-pled facts.

Long before \textit{Twombly} and \textit{Iqbal}, and contrary to the insistence of those decisions' critics, federal courts have been in the business of applying a pleading standard that bears a strong resemblance to the \textit{Iqbal} working principles.

\footnotesize

\begin{itemize}
  \item \textsuperscript{125} Marcus, \textit{supra} note 22, at 448–51, 463–64 (citing Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984); Williams v. Gorton, 529 F.2d 668, 671 (9th Cir. 1976)).
  \item \textsuperscript{126} 507 U.S. 163 (1993).
  \item \textsuperscript{127} 534 U.S. 506 (2002).
  \item \textsuperscript{128} \textit{Twombly} explicitly rejected the notion that it created a "heightened pleading standard" and cited both \textit{Leatherman} and \textit{Swierkiewicz} approvingly. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.14 (2007).
\end{itemize}
B. Iqbal Has Not Resulted in a Significant Increase in
Rule 12(b)(6) Dismissals

More than a year after *Iqbal* was announced, the decision has not imposed the "insurmountable barrier to access" to the courts that was predicted by some critics.\(^1\) Citations to *Iqbal* and *Twombly* abound\(^2\) but this shows nothing about the number of cases actually being dismissed.\(^3\) Even more importantly, frequency of citation does not show how many cases have been dismissed under *Iqbal* that would otherwise have survived under *Conley*. Thus far, federal courts have differed in their assessment of the long-term significance of *Iqbal*, but evidence to date suggests that the decision’s overall impact has been limited.\(^4\)

Various courts have stated that the "liberal" spirit of Rule 8(a)(2) remains in effect after *Iqbal*.\(^5\) According to the Eighth Circuit, "*Twombly* and *Iqbal* did not change [the] fundamental tenet of Rule 12(b)(6) practice" that in reviewing the sufficiency of a complaint, "inferences are to be drawn in favor of the non-moving party."\(^6\) Judge Merritt of the Sixth Circuit has stated that the Supreme Court has "started to modify somewhat, but not drastically, the notice pleading rules," but "is not making a major change in the law of pleading with *Twombly* and its progeny."\(^7\) One district court judge found nothing remarkable about *Iqbal*'s requirement that courts reject complaints which "essentially [do] no more than [restate] the elements of the statute," noting that allowing such a complaint to proceed would violate "long-standing principles of federal jurisprudence."\(^8\)

Other judges have used the *Iqbal* framework to grant motions to dismiss for failure to state a claim but have noted that the complaints would have

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\(^1\) See *Spencer*, supra note 18, at 28.

\(^2\) Memorandum from Andrea Kuperman to Civil Rules Committee and Standing Rules Committee 2 (July 26, 2010) [hereinafter Kuperman Memorandum], available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Iqbal-memo_072610.pdf. This memo is a survey of all federal cases after *Iqbal* that have applied it in a substantive way. Each of the cases discussed in this section is reviewed in the Kuperman Memorandum.

\(^3\) *Id.* at 1 n.2 (indicating that as of July 26, 2010, *Iqbal* has been cited more than 11,000 times in caselaw alone).


\(^5\) Kuperman Memorandum, supra note 130, at 2. But see *Hatamyar*, supra note 25 (concluding that *Iqbal* produced a short-term increase in dismissal rates during its first three months in effect). For reasons why Professor Hatamyar’s data is not likely to reflect long-term trends, see text accompanying notes 160–161.


\(^7\) *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009).

\(^8\) Tam Travel, Inc. v. Delta Airlines, Inc. 583 F.3d 896, 911–12 (6th Cir. 2009) (Merritt, J., dissenting) (citations omitted).

been insufficient even before *Twombly*. For example, the Seventh Circuit affirmed the dismissal of a complaint alleging that the defendants defrauded the plaintiff by failing to disclose their company's ensuing bankruptcy when negotiating the plaintiff's termination agreement. Judge Posner, writing for the majority, concluded that the company's dire financial situation was obvious to all the parties and that the defendant's failure to mention the bankruptcy in negotiations was more likely an innocent omission than a deliberate attempt to defraud the plaintiff. Although the opinion appeared to engage in something like a plausibility analysis, the court treated *Iqbal* as insignificant because the plaintiff's arguments themselves showed that his case had no merit. Accordingly, dismissal was justified under any reasonable interpretation of Rule 8(a)(2). Similarly, in *Cooney v. Rossiter*, another panel of the Seventh Circuit affirmed the dismissal of a complaint alleging that the trial judge conspired with child welfare officials to take away the plaintiff's custody of her minor son. The court noted that the complaint contained nothing but "a bare conclusion" of conspiracy that would not have been sufficient even pre-*Twombly*.

The most detailed review of *Iqbal*’s effects thus far supports these judges’ understanding of *Iqbal* as having a relatively limited impact. Although members of Congress have worried that *Iqbal* will lead to significantly more cases being dismissed, an ongoing comprehensive survey of cases applying *Iqbal* concludes that "the case law to date does not appear to indicate that *Iqbal* has dramatically changed the application of the standards used to determine pleading sufficiency." Judge Mark Kravitz, Chair of the Judicial Conference Advisory Committee on Civil Rules, agrees that judges have taken a "fairly nuanced" response to *Iqbal* and that the decision is not "a blockbuster that gets rid of any case that is filed." Testimony in congressional hearings indicates that federal courts have used the *Iqbal* framework in recent months to deny motions to dismiss for failure

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139. *Id.* at 338.
140. *Id.* at 340.
141. *Id.* at 338
142. 583 F.3d 967.
143. *Id.* at 971–72.
144. *Id.* at 971.
146. See *supra* Section I.D.
to state a claim in dozens of cases, including pro se complaints and claims based on deprivation of constitutional or civil rights.\(^{150}\)

On the other hand, some judges view *Twombly* and *Iqbal* as much more of a sea change than a mere clarification of a long-existing standard. Panels from various circuits have indicated that *Twombly* and *Iqbal* represent a "significant change, with broad-reaching implications,"\(^{151}\) and have marked the two decisions as instituting a "heightened"\(^{152}\) or "stricter"\(^{153}\) pleading standard. One district court judge has called *Iqbal* a "striking retreat from the highly permissible pleading standards often thought to distinguish the federal system from 'the hyper-technical, code-pleading regime of a prior era.'"\(^{154}\) In a very small number of cases, judges have granted motions to dismiss while noting that the now-insufficient complaint would have likely survived pre-*Twombly*.\(^{155}\)

Critics of *Iqbal* point to their own data as evidence of the decision's significant impact. For example, a recent empirical study by Professor Hatamyar suggests that *Iqbal* has produced an observable increase in the number of cases dismissed under Rule 12(b)(6), particularly for civil rights claims.\(^{156}\) The study reviews approximately 1,000 Rule 12(b)(6) motions decided in federal district court beginning 2 years prior to *Twombly* and ending 3 months after *Iqbal*.\(^{157}\) It concludes that *Iqbal* has resulted in a "statistically significant" increase in the number of cases dismissed under Rule 12(b)(6), with the increase potentially as high as 10% of all filed

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152. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009); *see also* *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009). The *Fowler* court further concluded that *Twombly* has overruled *Swierkiewicz* and undermined the sufficiency of the model causes of action, or "forms," provided as a supplement to the Federal Rules. 578 F.3d at 211. These forms are limited in their factual content and were designed to demonstrate the simplicity of federal pleading.


156. *See Hatamyar*, supra note 25, at 608. Some members of Congress have expressed concern about a disparate impact on civil rights cases. *See December House Hearing*, supra note 17, at *6 (statement of Rep. Conyers, Member, H. Comm. on the Judiciary) ("[T]here will be a number of civil rights and civil liberties cases that could be negatively affected [by *Iqbal*].").

157. Of the 1,039 total motions reviewed, only 173 were decided post-*Iqbal*. Hatamyar, supra note 25, at 585.
The data also indicate that pro se complaints have been dismissed at an increased rate as large as 15%.

However, as Professor Hatamyar notes, the usefulness of her study as a predictor of *Iqbal’s* long-term impact is limited given the small number of post- *Iqbal* motions reviewed (173) and the fact that all the cases were decided within three months of the *Iqbal* ruling. A significant increase in dismissal rates immediately after *Iqbal* is consistent with the rhetorical splash caused by the decision, as well as with judges’ unfamiliarity with applying the working principles, but will not necessarily reflect *Iqbal’s* long-term effects. *Iqbal* sent a message to the federal courts to revise their practices for deciding Rule 12(b)(6) motions, but it will take some time for the courts to settle on a consistent application of the decision’s analytical framework.

It is also important to note that Professor Hatamyar’s study shows that many more cases dismissed under *Iqbal* are dismissed with leave to amend. Although there are no available data that conclusively show what percentage of cases dismissed with leave to amend are successfully re-filed, the fact that more cases are dismissed under *Iqbal* with leave to amend supports Judge Kravitz’s view that judges are resisting a dramatic change in applying *Iqbal*.

C. *Iqbal* Is Not Likely to Significantly Increase Dismissal Rates in the Foreseeable Future

The cases reviewed above suggest that, by and large, federal courts are not dismissing significantly more cases following *Iqbal*. Although the decision’s permanent effects will only be revealed over time, there are several reasons to think this trend of limited impact will continue for the foreseeable future. First, judges’ hesitancy to use the *Iqbal* framework to grant significantly more Rule 12(b)(6) motions is plausibly explained by the enduring legacy of the *Conley* rule. Even though the pure *Conley* standard was not used in practice, *Conley’s* commitment to notice pleading served as the

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158. *Id.* at 601 (noting that under *Iqbal*, approximately 56 percent of all Rule 12(b)(6) motions were granted either with or without leave to amend, as compared to 46 percent under *Conley*).

159. *Id.* at 615 (noting that under *Iqbal*, approximately 85 percent of Rule 12(b)(6) motions on pro se complaints were granted either with or without leave to amend, as compared to 67 percent under *Conley*).

160. *Id.* at 585.

161. *Id.* at 598–99 (showing that while only 6 percent of cases dismissed under *Conley* were dismissed with leave to amend, 19 percent of cases dismissed under *Iqbal* were dismissed with leave to amend). When a case is dismissed with leave to amend, the plaintiff is allowed to correct the deficiencies in the complaint and refile it. In contrast, where dismissal is without leave to amend, the plaintiff is prohibited from refiling the case and it is effectively permanently terminated. Thus, whether leave to amend is granted makes a significant difference to a plaintiff.

162. *Id.* at 600.

163. *Id.* ("[The] newness of the *Iqbal* standard caused [district judges] to err on the side of allowing the plaintiff one more chance to plead.").
dominant pleading rhetoric for fifty years. Judges are unlikely to dismiss significantly more cases for failure to state a claim under Twombly and Iqbal when the requirement of a “short and plain statement” remains the rule and the Supreme Court has specifically denied that Twombly heightened the substantive pleading standard. Instead, judges are more likely to read “plausibility” as imposing something like a requirement that a complaint’s well-pled facts “reasonably” show a claim to relief.\(^{164}\)

Of course, the reasonableness of a legal theory in light of the facts alleged is a subjective judgment that will vary from judge to judge and case to case, but so will any Rule 12(b)(6) standard that calls for the trial judge to evaluate whether a complaint “shows” likely merit at the pleading stage. Plaintiffs should expect that the factual support required to make their claims plausible will vary depending on the complexity and novelty of the claim. In particular, more facts will be required when there is an obvious alternative legal explanation for the defendant’s behavior.\(^{165}\)

A further reason to think that Iqbal will not lead to a significant increase in dismissal rates is the fact that only a small minority of plaintiffs genuinely lack sufficient facts to plead their claim with plausibility when filing a complaint. For the majority of plaintiffs, Iqbal merely requires that counsel include more facts in the complaint—facts which counsel already has in his possession at the time of filing.\(^{166}\) One might object that this requirement will increase plaintiffs' initial litigation costs and shift the primary focus of litigation from summary judgment to the pleading stage.\(^{167}\) However, such concerns do not appear to have overly burdened plaintiffs thus far. In a recent survey of plaintiffs’ attorneys practicing employment discrimination law (claims in which clients often face “information asymmetries” at the pleading stage\(^{168}\)), fewer than 15 percent of those surveyed indicated that they conduct more investigation prior to filing a complaint, screen cases more carefully, or raise different claims than they would have prior to

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164. See Tymoczko, supra note 110, at 536.

165. Id. at 536–37 (arguing that judges will consider several factors to determine the reasonableness of a complaint’s legal theory, including expectations about how the world works, the breadth of legal behavior described by the plaintiff’s allegations, the amount and type of facts in the complaint, the plausibility of competing inferences, and the substantive legal context in which the claim is brought).

166. See Emery G. Lee III & Thomas E. Willging, Attorney Satisfaction with the Federal Rules of Civil Procedure: Report to the Judicial Conference Advisory Committee on Civil Rules 12 (2010) (reporting that while 70.1 percent of surveyed plaintiffs’ attorneys indicated Iqbal has changed the way they practice, 94.2 percent of that group indicated that, after Iqbal, they include more facts in the complaint).

167. See Suja A. Thomas, Pondering Iqbal: The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly, 14 Lewis & Clark L. Rev. 15 (2010) (arguing that the plausibility analysis of Twombly and Iqbal has effectively transformed the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment).

168. For criticism of Twombly as ignoring such information asymmetries between plaintiffs and defendants, see Lonny S. Hoffman, Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings, 88 B.U. L. Rev. 1217, 1261 (2008).
Twombly and Iqbal. Where information asymmetries truly prevent the plaintiff from accessing facts necessary to plead his claim with plausibility, the courts are likely to conduct the plausibility analysis less rigorously. Indeed, mere weeks after announcing the plausibility standard, the Supreme Court allowed a complaint to survive Rule 12(b)(6) dismissal where the complaint pled all the facts the plaintiff could reasonably have been expected to know before discovery and stated a valid legal theory.

Two final factors support the contention that Iqbal will not lead to a significant increase in dismissal rates. First, the Supreme Court has explicitly held that pro se complaints are to be "held to less stringent standards than formal pleadings drafted by lawyers." The Court effectively held that those complaints that are most likely to be burdened by a more rigorous review of a pleading's plausibility should not face an insurmountable barrier at the pleading stage. Second, recent amendments to the Federal Rules have expanded a plaintiff's right to amend his complaint as a matter of course. These amendments should ensure that many of those plaintiffs who find their complaints dismissed for failure to state a claim will be able to revise their pleadings, develop their factual content, and continue pursuing their claims.

169. Lee & Willging, supra note 166, at 12. These results also suggest that a long-term chilling effect, whereby plaintiffs with valid claims would be dissuaded from bringing suit, is unlikely. One of the primary advantages of Twombly and Iqbal is that, as the courts gain more experience applying them, the appropriate parameters of federal pleading will be clearer than they have been at any time since Conley. This increase in clarity will benefit plaintiffs' lawyers as they advise clients on the merits of potential claims and the decision to pursue litigation.

170. Cf. Recent Case: Eleventh Circuit Dismisses Alien Tort Statute Claims Against Coca-Cola Under Iqbal's Plausibility Pleading Standard, 123 Harv. L. Rev. 580, 584-85 (2009) (suggesting that courts should "apply[] the Supreme Court's plausibility standard leniently" in cases where defendants are "much better positioned than plaintiffs to provide facts crucial to resolving" the suit; otherwise it might become "practically infeasible" to bring such cases).

171. Erickson v. Pardus, 551 U.S. 89 (2007). The Court reversed the dismissal of a prisoner-plaintiff's pro se complaint alleging that the defendants deprived the plaintiff of his Eighth Amendment rights by "demonstrating deliberate indifference to his serious medical needs." Id. at 90. The complaint alleged only that the plaintiff had a hepatitis C-related illness which required a special treatment program, that prison officials terminated his treatment on the basis of their suspicion that plaintiff intended to use illegal narcotics, and that as a result, he faced the "imminent" risk of "furtherance of [his] disease," "irreversible damage to [his] liver[,] and possible death." Id. at 89-91 (second alteration in original). Citing Twombly, the Court held that these limited factual allegations were "enough to satisfy Rule 8(a)(2)." Id. at 93.

172. Id. at 94 (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976)). Applying this standard, the Supreme Court approved the complaint in Erickson despite its limited factual content.

173. But see Hatamyar, supra note 25, at 614 (noting a significant increase in the number of pro se complaints that are dismissed under Iqbal compared to those dismissed under Conley).

174. Under Rule 15(a), as amended on December 1, 2009, a plaintiff is entitled to amend his pleading as a matter of course up to twenty-one days after service of a motion under Rule 12(b), (e), or (f), provided the pleading is one to which a responsive pleading is required. Fed. R. Civ. P. 15(a)(1)(B). This amendment was designed to allow the plaintiff to amend his pleading, where he deems appropriate, in order to meet the arguments in the Rule 12 motion. The advisory committee recognized that such amendments may eliminate the need to decide the Rule 12 motion or reduce the number of issues to be decided. Id. advisory committee's note.
Although some courts have claimed that the importance of *Iqbal* “cannot be minimalized,” that is only true for those who care deeply about the mechanical procedures that judges use to decide Rule 12(b)(6) motions. If, as is likely the case for most members of Congress, the only real concern is with the ultimate judgments that courts reach, then the real impact of *Iqbal* is in fact limited. It is unwise at this early stage for critics to denounce the decision as guaranteed to dramatically increase the rate of dismissal of claims in federal court when evidence from the case law is inconclusive or to the contrary.

### III. Congress Should Reject Legislation Overruling *Twombly* and *Iqbal*

Congress should not respond to *Twombly* and *Iqbal* with a sweeping reversal. The Rules Enabling Act delegates responsibility for creating the Federal Rules to the Supreme Court in the first instance, and both *Twombly* and *Iqbal* show that a majority of the Court is concerned about the costs and burdens of discovery in modern federal litigation. *Iqbal* exemplifies the Supreme Court’s view that the pleading system should strike the right balance between the plaintiff’s need for access to the courts and the defendant’s desire to avoid discovery obligations early in litigation. Congress has a role to play in setting the Federal Rules that govern access to the federal court system, but its response to the *Iqbal* decision, if any, should be both tailored to and considerate of the Court’s concerns. In particular, Congress should reject both pieces of currently proposed legislation in order to avoid imposing an inflexible and unworkable standard on federal judges or injecting further ambiguity into the pleading standard.

As mentioned previously, the two existing congressional bills construct different legislative responses to *Twombly* and *Iqbal*. House Bill 4115 takes the more forceful approach and explicitly legislates a pleading standard by adopting the language of *Conley*, including the “no set of facts” rule, but does not mention *Conley* or the Supreme Court. In contrast, Senate Bill 1504 sets the pleading standard by reference to the “standards set forth by the Supreme Court of the United States in Conley v. Gibson.” In doing so, the Senate bill acknowledges a role for the Supreme Court in interpreting Rule 8(a)(2) and at least arguably authorizes federal courts to rely on other pre-*Twombly* precedents that dismissed complaints even when *Conley* reigned. Statements of the Senate bill’s proponents indicate that it is

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178. *See supra* Section I.D.2.
designed merely to restore the state of affairs that existed immediately before Twombly. And while supporters of the House bill also claim to want to "restore the notice pleading standard that existed prior to Ashcroft v. Iqbal," the text of that bill would in fact do much more. By explicitly setting the standard using the most liberal language from Conley, House Bill 4115 would go well beyond the pleading standard that existed in practice before Twombly. Although these two proposed legislative approaches would produce significantly different results if enacted, this Note argues that neither approach is desirable or acceptable.

A. House Bill 4115 Is Inconsistent with Rule 8(a) and Supreme Court Precedent, and Would Imbalance the Benefits and Burdens of Discovery

If House Bill 4115 is enacted, federal courts will be required to reject any expositions of Rule 8(a)(2) other than those that specifically cite to the "no set of facts" language in Conley. In doing so, House Bill 4115 would depart from decades of federal precedent and strike an inappropriate balance between the benefits and burdens of discovery to modern litigants.

A faithful application of the House bill's "no set of facts" language, which is extremely generous for plaintiffs, would overwhelm the federal court system by imposing virtually no pleading requirements whatsoever. The bill would eliminate Rule 12(b)(6) as an effective tool for the early disposal of suits lacking any plausible merit. For example, the complaint in Cooney v. Rossiter, alleging a conspiracy between court-appointed officers but lacking any facts whatsoever to support that allegation, could not be dismissed under the House bill standard because the district court could not ex ante rule out the possibility that facts might later be introduced to support the claim.

Without Rule 12(b)(6) as a screening mechanism, plaintiffs would acquire access to discovery in virtually every case and would be able to impose significant costs in both time and resources on public and private defendants. The Federal Rules have never required the plaintiff to do so little. Since its inception, Rule 8(a)(2) has required the plaintiff to both provide the defendant with notice of the plaintiff's claim and "show" that the claimant is entitled to relief. House Bill 4115 would essentially eviscerate the second half of Rule 8(a)(2) and institute a new pleading standard that is much too favorable to plaintiffs and inconsistent with the balance struck by the Federal Rules as written.

181. 111 CONG. REC. S7890 (daily ed. July 22, 2009) (statement of Sen. Specter) (stating that the intention of the Senate bill is to "restore the system of notice pleadings that has served our Federal judicial system well since 1938").


183. 583 F.3d 967 (7th Cir. 2009). Cooney is reviewed supra Section II.B.

184. FED. R. CIV. P. 8(a)(2).
Federal courts in practice have never adhered strictly to the Conley language to decide Rule 12(b)(6) motions, notwithstanding the statements of supporters of House Bill 4115 to the contrary. Decisions from Warth to Iqbal requiring more developed pleading reflect the federal courts’ effort to chip away at the Conley standard, especially in light of growing concerns about litigation abuse. Pre-Twombly cases insisting on more from plaintiffs’ pleadings reflected a judgment that the literal terms of Conley were neither desirable nor workable, a judgment to which Twombly and Iqbal are heirs. Yet House Bill 4115 would force the federal courts to employ just such an unprecedented generous pleading standard, one that raises serious concerns for the administrability of federal pleading and that ignores wholesale the Supreme Court’s legitimate concerns about the integrity of the federal litigation system.

The disagreement between a majority of the Supreme Court and those favoring House Bill 4115 consists primarily of a policy judgment about the most desirable structure of federal litigation. Although both Conley and Iqbal claimed fidelity to Rule 8(a)(2), those decisions represent different visions of what meaningful access to the courts should look like. Thus far, both before and after Twombly, a vision of pleading that interprets the Federal Rules as requiring some notion of plausibility has prevailed. This vision aims to minimize litigation abuse and preserve the Rule 12(b)(6) motion as a valuable tool for the early elimination of meritless claims. House Bill 4115 should be rejected because it would undo this balance and replace it with a framework that the federal courts have repeatedly rejected as unmanageable in practice.

B. Senate Bill 1504 Would Create Ambiguity in the Pleading Standard and Produce Conflicting Sources of Legal Authority

Although Senate Bill 1504 takes a less drastic approach to overruling Twombly and Iqbal, this bill should also be rejected. Even if the legislation’s only purpose is to return to the federal pleading practice that existed pre-2007 and it would sanction pre-Twombly cases that adopted “notice-plus pleading,” the Senate bill nevertheless suffers from several critical flaws.

First, the text of Senate Bill 1504 is incompatible with the notice-plus pleading cases that came before Twombly. The text references Conley, and only Conley, as the appropriate authority to decide Rule 12(b)(6) motions, and judges will be expected to apply the statute’s plain meaning. Twombly recognized the problem of federal courts citing Conley for a standard that many of them did not employ in practice, and it corrected the problem by resolving the ambiguity and announcing a new interpretation that it fully intends to apply in all future Rule 12(b)(6) motions. If Senate Bill 1504’s

185. See supra Section II.A.
186. For the origin of this phrase, see Scott Dodson, Pleading Standards After Bell Atlantic Corp. v. Twombly, 93 Va. L. Rev. in Brief 135, 138 (2007).
supporters expect judges to retain their pre-Twombly practice of dismissing complaints with excessively vague or conclusory allegations, it is irresponsible lawmaking for Congress to set the pleading standard by reference to a decision that emphasizes notice as the only function of a complaint.

Second, expecting the federal courts to apply the pre-Twombly notice-plus pleading standard in the face of a statute supporting Conley’s notice-only rhetoric would create conflicting sources of legal authority. A judicial interpretation of a Federal Rule can be modified or clarified in subsequent cases, but when Congress uses specific legislation to control the interpretation of a rule, the courts are bound to respect the statute. Senate Bill 1504 would specifically control the courts’ interpretation of Rule 8(a)(2) by requiring that Rule 12(b)(6) motions be decided under the Conley standard. When Congress passes a statute with a strict command in the text, the courts must honor that text and give effect to that strict rule even if Congress would actually prefer to see the statute applied in a less rigorous way (as Congress arguably intends for Senate Bill 1504). Therefore, the Senate bill would prohibit courts from rejecting complaints presenting mere conclusory allegations or lacking critical factual allegations even if Congress would actually prefer to see them do so.

It might be argued that we have little to fear from this apparent conflict of authority in light of the Supreme Court’s fifty years of pleading jurisprudence in which its rhetoric (notice pleading) did not match its practice (notice-plus pleading). Since courts adopted a strongly liberal rhetoric in Conley but then applied a more rigorous standard in practice, one might wonder why they cannot make a similarly rigorous application of the strongly liberal rhetoric in Senate Bill 1504. But this argument overlooks the respect that the Supreme Court owes to a congressional statute as opposed to language, especially dicta, in one of its own opinions.

Whereas the Court has always been in the business of interpreting statutes and then distinguishing and clarifying its interpretation in subsequent cases, resistance to an implementation of the language of Senate Bill 1504 would amount to judicial disrespect of a law passed by the legislative branch. Other than a proper respect for stare decisis, nothing prevented the Supreme Court from backing away from a strict application of its Conley decision in future cases—as it did in Papasan and Crawford-El—or from wholly repudiating parts of Conley as unclear and ill-advised—as it did in Twombly. And once the Supreme Court expressed doubt about the correctness of a pure application of Conley, lower courts in turn gained more flexibility in their ability to interpret Rule 8(a)(2). Because Conley’s interpretation of Rule 8(a)(2) was announced by the Supreme Court, the Court retained discretion to modify that interpretation when experience showed such modification to be necessary.

188. See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313–14 (2007). The Court in Tellabs noted that Congress used the Private Securities Litigation Reform Act of 1995 to enact “exacting pleading requirements” on those bringing private securities fraud claims. The Court then proceeded to determine the meaning of the statute’s requirement that a plaintiff state facts giving rise to a “strong inference” of fraudulent intent.
But the Court would have no such flexibility in interpretation if the Senate bill became law. That bill’s interpretation of the rule would be binding and the Court would be obligated to apply it faithfully to all Rule 12(b)(6) motions. Senate Bill 1504 would then leave the precedential effect of several Supreme Court decisions that claim to apply Conley in doubt. For instance, decisions like Associated General Contractors, Papasan, and Crawford-El all purported to follow Conley but rejected conclusory allegations and insisted that complaints contain some baseline level of factual sufficiency. If Congress intends that the courts ignore Twombly and Iqbal but preserve these other decisions and their notice-plus pleading approach, then the courts will be relegated to using an amorphous body of precedent that carries Conley’s strongly plaintiff rhetoric but which applies it unfaithfully. Senate Bill 1504 would thus deprive the courts of Iqbal’s useful analytical framework for evaluating Rule 12(b)(6) motions and would restore the ambiguous pleading practice that existed pre-Twombly.

Another problem with the Senate bill is that, if applied as Congress appears to intend, it cannot achieve its goal of restoring the pre-Twombly practice. The majorities in both Twombly and Iqbal viewed those cases as clarifying prior precedents interpreting plausibility as a requirement of Rule 8(a)(2) as written. If Rule 8(a)(2) still provides the substantive pleading standard after Senate Bill 1504, then judges will still need to evaluate the very same “show that the pleader is entitled to relief” requirement that was at issue in Twombly. That case, like many decisions before it, read the rule’s language to require a baseline showing of the plausibility of a claimant’s allegations. Because the courts indicated long before Twombly that Rule 8(a)(2) prohibits complaints with mere conclusory allegations, passing Senate Bill 1504 with a view toward the time just before Twombly would create virtually the same pleading standard that is currently in place under Iqbal.

Finally, we should not desire a return to the uncertainty of the pre-Twombly pleading jurisprudence. Pleading requirements immediately before Twombly may have appeared stable, but in fact the courts operated in something of a procedural twilight zone. Supreme Court cases like Papasan and Crawford-El, along with similar decisions in the lower courts, professed adherence to Conley’s nondiscretionary rule but nevertheless asked judges to evaluate complaints under a stricter framework. The result was a pleading doctrine whose rule in theory was forgiving and made virtually no allowance for judicial discretion (Conley), but which was applied in practice much more strictly and in a largely discretionary manner. Twombly put an end to the charade by asking courts to do openly what they had been doing in practice all along.

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189. The majorities in Twombly and Iqbal made these claims notwithstanding the dissenters’ accusation that the Court rewrote the Federal Rules with their decisions.

190. This stability was likely the result of judges’ and counsels’ familiarity with Conley. Both judges and litigants repeatedly cited Conley as the ostensible rule, but all understood that the actual process of deciding Rule 12(b)(6) motions would involve at least some subjective evaluation of the plausibility of the allegations in the plaintiff’s complaint. On the other hand, it is likely that before Twombly, judges were more likely to find the complaint to be sufficient in close cases.
A critic might respond that \textit{Iqbal}'s moderate impact on federal pleading practice, as shown in Section II.B, proves that it has done less to resolve the pleading tension than might be supposed. After all, if \textit{Iqbal} requires a more searching review of complaints than did \textit{Conley}, but \textit{Iqbal} is not resulting in significantly more dismissals, then perhaps the tension in pleading doctrine is still with us.

The answer to such a criticism lies in \textit{Iqbal}'s approval of judges' subjective decision making in their review of pleadings. Prior to \textit{Twombly}, the pleading system professed to have an objective pleading standard but it was applied by judges in a discretionary manner.\textsuperscript{191} After \textit{Iqbal}, the system now calls for reviewing judges to subjectively evaluate complaints to determine the plausibility of the claims. \textit{Twombly} and \textit{Iqbal} thus reflect the Supreme Court's view that the rhetoric of the pleading system should match the reality. Put another way, the Court is interested in having judges conduct subjective evaluations of a complaint's plausibility more openly and more consistently.\textsuperscript{192} The Court believes that judges have been making such determinations all along and it views the evaluation of plausibility as called for by the text of Rule 8(a)(2).

If Congress wishes to sanction the discretion used in practice by pre-\textit{Twombly} courts, then Congress should favor \textit{Twombly}'s subjective rule both for its openness and for its policy. But Senate Bill 1504 would instead return the pleading system to the twilight zone by mandating an objective standard in theory that Congress knows will be applied less strictly and with greater discretion in practice. Of course, the more likely explanation is that supporters of Senate Bill 1504 do not at all approve of the subjective determinations that judges used to evaluate pleadings pre-\textit{Twombly}. Indeed, supporters of the bill have indicated that a primary goal is to eliminate judicial discretion in evaluating the sufficiency of a complaint.\textsuperscript{193} Far from expressing desire for the discretionary approach of pre-\textit{Twombly} courts, the bill's supporters wish to implement once and for all the objective pleading framework espoused in \textit{Conley}. But for exactly the reasons stated below with respect to the House bill, this vision of pleading is unworkable and indeterminate.

\section*{C. Congress Should Resist the Urge to React Hastily to Twombly and Iqbal}

Given that pure notice pleading never applied in practice from 1957 to 2007 and that complaints were routinely dismissed as stating mere "conclusory" allegations, one wonders why \textit{Iqbal}'s critics consider that period the

\begin{itemize}
\item \textsuperscript{191} \textit{See supra} Section II.A.
\item \textsuperscript{192} \textit{But see} Senate Hearing, supra note 16, at 103 (statement of Professor Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School) (rejecting the desirability of having federal courts "do openly what they were doing even under \textit{Conley}" as an "ex post blessing of lawless behavior").
\item \textsuperscript{193} Senate Hearing, supra note 16, at 172 (statement of Sen. Feingold, Member, S. Judiciary Comm.).
\end{itemize}
golden years of pleading. After all, given the justification for the dismissals of complaints in decisions like *Associated General Contractors*, *Papasan*, and *Crawford-El*, it is curious that we have only now seen declarations of crisis from Congress and spirited efforts to pass legislation in the name of preserving access to the courts.

The most likely explanation is that *Twombly* and *Iqbal* created a rhetorical splash by upsetting *Conley’s* place as the “official” interpretation of Rule 8(a)(2). Justice Souter’s opinion for the majority in *Twombly* did not consider the retirement of *Conley’s* most liberal language to be particularly noteworthy. Instead, he pointed out that the standard “puzzl[ed] the profession for 50 years” and led to inconsistent results. Justice Souter likely believed that *Twombly* would clarify the often-used federal pleading standard, but almost certainly did not expect that it would lead to a significant increase in the number of cases dismissed for failure to state a claim. Even as he dissented in *Iqbal*, Justice Souter maintained adherence to the working principles of the new analytical framework; he merely disagreed with the majority on the plausibility of the complaint’s factual allegations. Nevertheless, despite Justice Souter’s attempt to do little more than clarify federal pleading practice, his unceremonious retirement of the *Conley* standard has caught the attention of Congress and led to imprudent calls for a sweeping legislative response.

A primary reason that Congress should resist the urge to legislate at all without a better understanding of *Iqbal*’s effects is a proper respect for the Rules Enabling Act. Critics of *Twombly* and *Iqbal* may have decried the Supreme Court for using those decisions to surreptitiously amend the Federal Rules, but such accusations cannot justify Congress itself in ignoring the Rules Enabling Act and setting out the pleading standard all on its own. The Rules Enabling Act is a particularly useful way to create the Federal Rules because it benefits from the collaborative expertise of legislators, Supreme Court Justices, lower-court judges, scholars, and legal professionals. The system is designed so that those who deal with the Federal Rules every day give them shape and only then does Congress give those rules the force of law. But Congress is not well-suited to legislate a pleading standard on its own without the advice of the Federal Rules Advisory Committee or the Supreme Court.


196. *See supra* notes 90, 98–100 and accompanying text.

197. *But see Senate Hearing, supra* note 16, at 104 (statement of Professor Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School) (arguing that the appropriate response is to temporarily restore the pre-*Twombly* standard and then direct the Rules Advisory Committee to address the issue).

198. *Cf. Robert G. Bone, Twombly, Pleading Rules, and the Regulation of Court Access, 94 Iowa L. Rev. 873, 876–77 (2009)* (noting that the Supreme Court is in a poor position to make choices about pleading practice in individual cases). The Federal Rules Advisory Committee has not yet taken a position on *Twombly* or *Iqbal*. 
Several other factors also counsel against an aggressive legislative response. First, the Justices who decided Conley could not have foreseen the burdens that modern discovery poses for defendants. In light of such developments, notice pleading may well have run its course as an appropriate pleading standard.199 In addition, the recent expansion of the right to amendment as a matter of course should increase the opportunity of plaintiffs with valid claims to survive a Rule 12(b)(6) motion.

Finally, the class of plaintiffs for whom Twombly and Iqbal will make a meaningful difference in access to the federal courts is small. While there are many types of plaintiffs who require access to discovery in order to prove their claims, it is a substantially smaller class who lack sufficient factual information at the time of filing to plead their claims with plausibility. For the majority of plaintiffs who can, without substantial effort, produce facts at the pleading stage to show that their claim is at least plausible, Twombly does little more than require that they do so. Only those plaintiffs who genuinely lack the ability to plead such facts at the outset are likely to suffer at the hands of Twombly's plausibility standard.201 A modification of the Federal Rules may be appropriate to ensure that the minority of plaintiffs in this latter category do not lose their opportunity to have their claim heard. Alternatively, perhaps notice pleading should be retained but access to discovery modified by amending other rules. Either way, Congress should not react hastily before the effects of the Supreme Court's reinterpretation of Rule 8(a)(2) in Twombly and Iqbal have become apparent.202

If there is to be a legislative response to the Supreme Court's pleading decisions, it should be the product of the deliberate process called for by the Rules Enabling Act in which rule changes end in Congress, but do not begin there. The Rules Advisory Committee is currently studying the effects of Iqbal and will soon be well-positioned to recommend solutions to meet the concerns of defendants while still preserving meaningful access to the courts for plaintiffs.203 Achieving the proper balance of access to federal courts is a policy choice and there is no doubt that Congress has a role to play. But Congress should not make that choice on its own before careful


200. See, e.g., December House Hearings, supra note 17, at *2 (statement of Rep. Hank Johnson, Chairman, H. Subcomm. on Courts and Competition Policy) (“In discrimination cases . . . it is frequently only through the discovery process that plaintiffs are able to identify non-public information that would support their claims.”); Mauro, supra note 149.

201. Lonny Hoffman has characterized plaintiffs in such cases as facing “information asymmetries.” See Hoffman, supra note 168, at 1261. Members of Congress have not expressed any substantial opposition to Twombly and Iqbal based specifically on a desire to protect this category of plaintiffs.

202. But see Hermann et al., supra note 199, at 153 (statement of Professor Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania Law School) (arguing that legislation is immediately necessary to undo Iqbal, which should only then be followed by “thoughtful and deliberate” consideration of the need for changes to the Federal Rules).

203. See Kuperman Memorandum, supra note 130, at 1.
consideration of the opinions of those in the best position to offer sound advice.

**Conclusion**

At bottom, pleading standards are about access to justice. The debate over finding the right balance between the interests of plaintiffs in litigating their claims versus those of defendants who would be haled into court without any showing of wrongdoing is far from over. Congress, like the Supreme Court, the Federal Rules Advisory Committee, the scholarly community, and the public, has a strong interest in this issue and a role to play in developing solutions to evolving challenges. The difficulties of modern pleading practice did not begin with *Twombly* and they will not end with *Iqbal*. However, because *Iqbal* has not resulted in a significant increase in the number of cases dismissed for failure to state a claim, a hasty legislative response is not appropriate. The problems this Note highlights with recent proposals for a congressionally legislated pleading standard should caution members of Congress against a rush to judgment on this complex and important issue.