

Working Through a Muddled Standard: Pleading Discrimination Cases After *Iqbal*

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In 2009, the U.S. Supreme Court ruled that Javaid Iqbal, a Pakistani Muslim detained by the FBI, had not sufficiently pled the facts in his complaint alleging discrimination by top United States government officials. As such, the Court dismissed his claims. The Court's opinion in Ashcroft v. Iqbal appeared to adopt the Court's heightened pleading standard, introduced two years earlier by the Court in Bell Atlantic Corp. v. Twombly. That decision elevated the pleading standard from "a short and plain statement of the facts" to one of "plausibility." This plausibility standard is fraught with ambiguity, particularly with regard to discrimination cases. What must a plaintiff alleging discrimination include in a complaint to meet Iqbal's plausibility standard? This Note, using Title VII employment discrimination claims, analyzes how lower courts have construed this new standard in the context of alleged motive-based discrimination, and what must be included in a complaint to meet this new standard. Acknowledging the high value of adjudicating discrimination claims on the merits, this Note finds that the plausibility standard has placed too heavy a burden on plaintiffs alleging discrimination. As such, this Note proposes a two-step legislative solution. First, Congress must pass legislation to restore notice pleading as a default standard for all cases, particularly discrimination claims. Second, in order to address the heavy costs associated with some types of claims, such as antitrust cases, Congress must conduct fact-finding to identify costly litigation and pass legislation instructing courts to apply heightened pleading in these cases.

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I. INTRODUCTION

In May 2009, the Supreme Court caused a stir in legal academic and practitioner circles with its decision in *Ashcroft v. Iqbal*,¹ which adopted a new and sweeping “plausibility” pleading standard for civil cases.² The case received relatively little mainstream attention at the time, but it was, according to one prominent Supreme Court observer, “[t]he most consequential decision” of the Court’s term.³

The justice system values access to courts and efficiency. The Federal Rules of Civil Procedure (“FRCP”) were a response to burdensome common-law pleading requirements that effectively kept litigants out of courts.⁴ The drafters of the Rules⁵ sought to

1. 129 S. Ct. 1937 (2009).

2. Since the decision, articles and commentary, ranging from an empirical analysis of cases since *Iqbal* to formulations of entirely new pleading standards, have added to the already extensive body of literature on pleading. See, e.g., Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (offering “plain pleading” as an alternative to notice and plausibility pleading); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905 (2010); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Thomas P. Gressette, Jr., *The Heightened Pleading Standard of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401 (2010); Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal*, 94 MINN. L. REV. 505 (2009).

Additionally, practitioners and observers of the Supreme Court have recognized the significance of *Iqbal*. The American Bar Association created the *Iqbal* Task Group in order to provide “timely, substantive, and objective analysis and reporting” on cases following *Iqbal*. See ABA Pretrial Practice & Discovery Comm., *Iqbal Task Group*, AM. BAR ASS’N, <http://www.abanet.org/litigation/committees/pretrial/iqbal-task-group.html> (last visited Sept. 12, 2010). See also Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court’s Iqbal’ Ruling*, NAT’L L.J. (N.Y.C.), Sept. 21, 2009, available at <http://www.law.com/jsp/article.jsp?id=1202433931370>; *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 79–92 (2009) (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.).

3. Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10, available at <http://www.nytimes.com/2009/07/21/us/21bar.html>.

4. Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL’Y 1107, 1111–16 (2010).

5. Unless otherwise noted, any reference to a Rule (i.e., Rule 8, Rule 12(b)(6)) will be to the Federal Rules of Civil Procedure.

balance access to courts with efficiency in the court system.⁶ A court's application of pleading standards can make or break a plaintiff's ability to present his case on the merits. Pleading standards dictate whether a plaintiff's complaint may survive a Rule 12(b)(6) motion to dismiss for failure to state a claim. If the claim survives, parties can move on to the discovery phase of trial.⁷ This phase is important to plaintiffs, as they rely on discovery to build a case against defendants, and it provides plaintiffs with access to information they would not have otherwise.⁸ Complainants alleging intent-based Constitutional torts⁹ are in special need of discovery, as the burden of showing evidence of intent usually belongs to the defendant.¹⁰

This Note assesses the impact of plausibility pleading on intentional discrimination cases by analyzing employment discrimination cases brought after *Iqbal*.¹¹ It ultimately finds that the plausibility standard is detrimental to the American justice system and should be eliminated. Further, this Note calls for a two-step legislative solution. First, Congress should restore notice pleading as a default pleading standard for all cases, including discrimination claims. Second, Congress must conduct fact-finding in order to determine what types of litigation are so burdensome that they warrant heightened pleading.¹²

6. Schwartz & Appel, *supra* note 4, at 1116–21.

7. See FED. R. CIV. P. 12(b)(6).

8. See Kilaru, *supra* note 2, at 927–29; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 533 (2010).

9. Intent-based constitution torts, a subset of civil rights cases, are violations of constitutional rights that require intent on the part of the tortfeasor to be actionable. See Kilaru, *supra* note 2, at 927–29.

10. See generally Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267 (2002).

11. Employment discrimination cases, for purposes of this Note, will involve only employment discrimination claims brought in federal courts under Title VII of the Civil Rights Act of 1964.

12. Heightened pleading must satisfy a “higher standard” than that imposed by notice pleading and the *Twombly/Iqbal* plausibility standard. Heightened pleading refers to the special pleading requirements imposed on specific causes of action. See, e.g., FED. R. CIV. P. 9.5(b) (imposing special requirements on complaints alleging fraud or mistake); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1301.1 (3d ed. 2004) (“Concerned that Federal Rule 9(b) was not being applied effectively by the federal courts to prevent cases of this character, Congress amended the Securities Exchange Act of 1934 . . . to include unique pleading requirements for private actions alleging securities fraud.”).

Pleading standards have only recently become the subject of scrutiny. For fifty years, courts relied upon the “no set of facts” standard set forth in *Conley v. Gibson*.¹³ In *Conley*, the Supreme Court established “notice pleading” as the standard for Rule 8 complaints.¹⁴ This standard set a low bar for plaintiffs, comporting with the Rules’ goal of allowing greater access to the courts.¹⁵

In the decades following *Conley*, courts were mired in discovery issues, which could last for years before a case went to trial.¹⁶ In 2007, the Supreme Court revisited pleading in *Bell Atlantic Corp. v. Twombly* and introduced a “plausibility” standard for pleading.¹⁷ The *Twombly* court held that plausibility pleading required the plaintiff to do more than merely state a claim; he or she must also show a plausible entitlement to relief that would rise “above the speculative level.”¹⁸

Two years after *Twombly*, the Supreme Court again applied a higher pleading standard, this time in a case of alleged racial discrimination by government officials in *Ashcroft v. Iqbal*.¹⁹ *Iqbal* reaffirmed the plausibility pleading adopted in *Twombly*, elevating the standard in a discrimination case from “a short and plain statement of the facts” to one of “plausibility.”²⁰ It appeared that the Supreme Court, in endorsing *Twombly* through *Iqbal*, was imposing plausibility pleading as the new universal standard for courts to adopt in evaluating motions to dismiss for failure to state a claim.

Drawing from *Conley*, *Twombly*, and *Iqbal*, one can draw a conceptual framework of pleading, on a spectrum ranging from possible to probable.²¹

13. 355 U.S. 41, 45–46 (1957), *abrogated by* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

14. *Id.* at 47–48.

15. See Gressette, *supra* note 2, at 407.

16. See PAUL V. NIEMEYER, REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES (1999), *reprinted in* 192 F.R.D. 340, 354–61 (2000).

17. 550 U.S. 544 (2007).

18. *Id.* at 555.

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

20. *Id.* at 1949.

21. Notice pleading would likely fall towards the possible end of the spectrum, while heightened pleading would fall between plausible and probable. Heightened pleading in this Note refers to the explicit adoption of higher pleading standards in the federal rules on as prescribed by Congress. See *supra* note 12. The *Twombly* court explicitly refused to label plausibility pleading as “heightened pleading.” 550 U.S. at 570.

justice. It has closed the door on the cases that are the most valuable to society — those that protect the rights guaranteed by the Constitution.

This Note offers a comprehensive legislative solution that satisfies the need to balance the values of accessibility and efficiency. In the first step, Congress would adopt legislation for a return to *Conley*-style notice pleading as the default pleading standard for all cases, as proposed by Senator Specter's Notice Pleading Restoration Act of 2009.²⁸ Second, Congress would conduct fact-finding to ascertain which types of litigation involve heavy and unnecessary costs. Congress may then impose appropriate and specific pleading requirements on these cases. Such a solution would have the legitimacy of democratic process and allow for an equitable and efficient solution.

Part II of this Note provides an overview of the pleading requirements set down by the Rules and by the Supreme Court, as well as the criticisms leveled against notice pleading. Part III analyzes discrimination cases in lower courts post-*Iqbal*, finding that the plausibility standard for discrimination cases presents a roadblock for plaintiffs and poses a threat to the underlying motivation to provide access to federal courts. Finally, Part IV of this Note argues that the best solution to balance accessibility with efficiency is a comprehensive legislative scheme.

II. THE SHIFTING SANDS OF FEDERAL PLEADING STANDARDS

Pleading standards remained relatively stable following the adoption of the Federal Rules of Civil Procedure, but the changes caused by the burdensome costs of discovery and the uptick in lawsuits have led to stricter standards. This Part will provide a brief overview of the history of pleading standards and describe the confusion wrought by *Iqbal* and its predecessor, *Bell Atlantic Corp. v. Twombly*.

28. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

A. NOTICE PLEADING, ENDORSED BY THE RULES
AND THE COURTS

The adoption of the Rules and the Supreme Court's opinion in *Conley v. Gibson* allowed plaintiffs to access courts with greater ease than in the previous common law system. Adopted in 1938, Rule 8 requires only that a complaint notify the defendant and the court of the basis of the claim in general terms.²⁹ This replaced the common law system of pleading, in which it had been more difficult for claimants to access the court system.³⁰ This low threshold for pleading, coupled with generous discovery rules, allowed cases to proceed to trial and to be judged on the merits.³¹ Rule 8 reflected the intent of the drafters to grant plaintiffs their day in court.³²

In 1957, the Supreme Court endorsed this liberal view of pleading requirements in *Conley v. Gibson*, a discrimination case.³³ In *Conley*, African-American railroad workers alleged discrimination by their employers and union.³⁴ The Court found that Rule 8 required simple notice pleading in which the complaint would give the defendant "fair notice" of the claim and the "grounds upon which [the claim] rests."³⁵ In addition, when evaluating a 12(b)(6) motion to dismiss for failure to state a claim, the *Conley* standard required the court to take all allegations in the complaint as true, construe the complaint in a light most favorable to the plaintiff, and draw from the complaint all reasona-

29. See FED. R. CIV. P. 8(a)(2) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief").

30. See Spencer, *supra* note 26, at 2 ("The Federal Rules ushered in a new era of open access for plaintiffs by casting aside complicated fact-pleading regimes in favor of simplified pleading and broad discovery."); see generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909 (1987).

31. See Spencer, *supra* note 26, at 2 (noting the underlying reasoning to implement notice pleading "was that decisions should be rooted in the merits, something not promoted, it was thought, through pleadings-based dispositions of matters before discovery could ensue").

32. See Hatamyar, *supra* note 2, at 557–58.

33. 355 U.S. 41 (1957), *abrogated by* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

34. *Id.* at 42.

35. *Id.* at 47.

ble inferences favoring the complainant.³⁶ The Court added that a complaint should not be dismissed 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.”³⁷ This standard, deferential to the plaintiff’s complaint, remained the cornerstone of pleading for five decades.³⁸

The Supreme Court continued to affirm notice pleading, particularly in discrimination contexts. *Conley*’s notice pleading favored civil rights plaintiffs, even though immediately following *Conley* not all courts adopted the liberal pleading standards.³⁹ Some courts even continued to apply heightened pleading to civil rights cases,⁴⁰ until the Supreme Court definitively rejected application of heightened pleading to discrimination cases in *Swierkiewicz v. Sorema N.A.*⁴¹ In *Swierkiewicz*, a Hungarian plaintiff brought a Title VII discrimination claim against his employer after his demotion.⁴² The Court emphasized that an employment

36. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2009).

37. *Conley*, 355 U.S. at 45–46.

38. Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1013 (2009).

39. A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 105 (“The access to federal courts that the *Conley* standard facilitated was critical to enabling aggrieved civil rights claimants to petition the federal courts for relief from the discrimination being endured during this time.”). See also *Access to Justice Denied*, *supra* note 2, at 82 (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.) (“*Conley* is a dramatic example of a case where the Court rebuffed efforts by a defendant and its counsel to inoculate themselves from a charge of stark racial discrimination through pleading gymnastics.”). The Fifth Circuit was particularly vigilant in correcting district court dismissals of racial discrimination claims. In *United States v. Bruce*, for example, the Fifth Circuit reversed a dismissal of a voter intimidation claim, stating the defendants had “threatened, intimidated, and coerced . . . for the purpose of interfering with the right of Negroes to register and to vote.” 353 F.2d 474, 475 (5th Cir. 1965) (internal quotation marks omitted).

40. See *Powell v. Workmen’s Comp. Bd.*, 327 F.2d 131, 137 (2d Cir. 1964) (“It was incumbent upon [the plaintiff] to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.”); *Valley v. Maule*, 297 F. Supp. 958 (D. Conn. 1968). Circuit courts, too, suggested a need for heightened pleading in civil rights cases. See *Caldwell v. City of Elwood*, 959 F.2d 670, 672 n.4 (7th Cir. 1992) (noting that certain issues § 1983 complaints may require heightened pleading); *Andrews v. Wilkins*, 934 F.2d 1267, 1269–70 (D.C. Cir. 1991), *abrogated by* *Atchinson v. District of Columbia*, 73 F.3d 418 (D.C. Cir. 1996); *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989), *overruled by* *Educa-dores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 64 (1st Cir. 2004).

41. 534 U.S. 506, 507, 510–14 (2002) (finding that the Second Circuit’s heightened standard imposed on a Title VII plaintiff conflicted with Rule 8(a)’s language).

42. *Id.* at 508–09.

discrimination complaint need not plead a prima facie case in the complaint and reversed the lower courts' application of heightened pleading to the case.⁴³

It should be noted, however, that heightened pleading still applied in some non-civil rights contexts, even during the *Conley* era of notice pleading. For example, FRCP 9(b) calls for a description of circumstances with sufficient "particularity" in fraud cases.⁴⁴ Likewise, the Private Securities Litigation Reform Act ("PSLRA") has been held to impose heightened pleading for civil suits alleging securities fraud.⁴⁵ Absent explicit instruction from Congress, then, courts may not impose heightened pleading independently or ignore Rule 8 altogether.⁴⁶ Apart from these narrow sets of cases, the liberal standard went relatively undisturbed for fifty years as the Supreme Court reaffirmed notice pleading, and Congress did not disturb Rule 8.

B. TWOMBLY AND PLAUSIBILITY PLEADING

1. Overview of Twombly

In 2007, the Supreme Court reevaluated the *Conley* system of notice pleading in *Bell Atlantic Corp. v. Twombly*,⁴⁷ prompting speculation among scholars and practitioners as to whether plausibility pleading would be applied in civil rights contexts. *Twombly* involved an antitrust class action lawsuit against incumbent local exchange carriers ("ILECs"), including Verizon, BellSouth, Qwest, and SBC.⁴⁸ The class members were "subscribers of local telephone and/or high speed internet services . . . from February

43. *Id.* at 511. The prima facie case referred to is one step in the process adopted in the *McDonnell Douglas* framework for adjudicating a Title VII claim. See *infra* Part III.A.

44. See FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); see also 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 8.04(8)(b) (3d ed. 1999) (noting Congress' power to impose heightened pleading through statutory means).

45. See *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002); *Edward J. Goodman Life Income Trust v. Jabil Circuit, Inc.*, 594 F.3d 783, 789 (11th Cir. 2010)

46. See *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)).

47. 550 U.S. 544 (2007).

48. *Id.* at 549–51. The defendant ILECs had previously enjoyed monopolies in their regional markets, yet were subject to government regulation. *Id.* at 549.

8, 1996 to present.”⁴⁹ The class’s complaint alleged that the ILECs had conspired to prevent local carriers from entering the market and had agreed not to encroach on each other’s regional monopolies, thereby violating Section 1 of the Sherman Act.⁵⁰ However, because plaintiffs lacked proof of the existence of a conspiracy, the complaint only stated that defendants: (1) engaged in parallel conduct in order to block CLECs from entering their markets; and (2) agreed collectively to not enter each other’s respective markets as CLECs, in order to preserve the regional status quo.⁵¹

The district court held that a showing of parallel conduct was not sufficient to state a claim.⁵² The Second Circuit vacated, finding that the imposition of “plus factors” on an antitrust claim was not required in the complaint.⁵³ The Supreme Court granted certiorari to “address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁵⁴

The Court held that the complaint was not sufficiently pled and introduced the plausibility standard. While citing *Conley’s* notice pleading standard, the Court found that Rule 8 required the complaint to not only state a claim, but also to show a plausible entitlement to relief “above the speculative level.”⁵⁵ The Court found that in this case, the mere showing of parallel conduct did not plausibly create an inference of a conspiracy between ILECs.⁵⁶ The Court further rejected the Second Circuit’s interpretation of

49. Consol. Amended Class Action Complaint at para. 1 *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 CIV. 10220 (GEL)), 2003 WL 25629874.

50. *Twombly*, 550 U.S. at 550–51.

51. *Id.*

52. *Twombly v. Bell Atlantic Corp.*, 313 F. Supp. 2d 174, 180–81 (S.D.N.Y. 2003) (“Because parallel conduct is often simply the result of similar decisions by competitors who have the same information and the same basic economic interests, allowing simple allegations of parallel conduct to entitle plaintiffs to discovery circumvents both § 1’s requirement of a conspiracy and Rule 8’s requirement that complaints state claims on which relief can be granted.”), *vacated*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, 548 U.S. 903 (2006), *rev’d*, 550 U.S. 544 (2007).

53. *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99, 114 (2d. Cir. 2005), *cert. granted*, 548 U.S. 903 (2006), *rev’d*, 550 U.S. 544 (2007).

54. *Twombly*, 550 U.S. at 553.

55. *Id.* at 555.

56. *Id.* at 570 (“Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”).

the *Conley* standard, resisting a literal reading of *Conley*'s "no set of facts" language.⁵⁷ Despite this rather harsh treatment of the *Conley* decision, the Supreme Court maintained that the introduction of "plausibility" did not amount to heightened pleading and that the *Conley* standard had not been overruled.⁵⁸

2. *Twombly*: Effect on Discrimination Cases

Following *Twombly*, one major concern was whether the plausibility standard would apply to civil rights cases.⁵⁹ *Twombly* was an antitrust case, and the Court did not indicate plausibility pleading as a blanket standard.⁶⁰ The circuit courts split on this question, with some circuits applying notice pleading in civil rights cases, and others requiring factual substantiation.⁶¹ A survey of civil rights cases, including discrimination claims, that followed *Twombly* suggested no clear pattern in lower courts but demonstrated the willingness of some district and circuit courts to apply *Twombly* to civil rights cases.⁶²

57. *Id.* at 563 ("But [*Conley*'s "no set of facts"] passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard.").

58. *Id.* at 570.

59. Seiner, *supra* note 38, at 1013–14.

60. See Spencer, *supra* note 39, at 158.

61. In describing "factual substantiation," Spencer alludes to the years prior to and immediately following *Conley*, when courts required greater specificity in factual allegations in complaints. *Id.* at 105–11. For example, in *Baldwin v. Morgan*, a district court in 1957, one year following *Conley*, dismissed a complaint filed by African Americans denied access to whites-only waiting rooms in train stations, claiming the complaint did not sufficiently plead state action when the factual allegations were simply that "plaintiffs, Negro citizens . . . were placed under arrest" while waiting in the "Whites only" Birmingham train station waiting area. 149 F. Supp. 224, 225 (N.D. Ala. 1957), *rev'd*, 251 F.2d 780 (5th Cir. 1958). The Fifth Circuit reversed, stating that the complaint need not "set forth the terms of the [City of Birmingham's] order or more fully describe the custom or usage." *Baldwin v. Morgan*, 251 F.2d at 785. Indeed, the Fifth Circuit found the complaint's allegation that the City had a "custom and usage to compel segregation" was an "everyday statement of fact" rather than a conclusion. *Id.* Factual substantiation required specific facts that went beyond the allegations of legal elements of the claim (in *Baldwin*, more than claiming there was "state action"). See Spencer, *supra* note 39, at 109–110 (asserting that the First, Fourth, and Eleventh Circuits were moving towards plausibility pleading post-*Twombly* but that the Second, Sixth, Eighth, and Ninth Circuits were maintaining notice pleading). Spencer argues that the "mixed signals" by the *Twombly* court led to a "Rorschach test" for judges. *Id.* at 156–57.

62. See Spencer, *supra* note 39, at 156.

There was also a difficulty in assessing whether a complaint dismissed under *Twombly* would have survived under *Conley*, since the deciding courts generally do not explicitly undertake such an “if-then” analysis.⁶³ The effect of *Twombly* was therefore not so much to remove notice pleading in discrimination contexts as it was to muddle courts’ understanding of pleading requirements in civil rights cases.⁶⁴

C. IQBAL: REAFFIRMING PLAUSIBILITY PLEADING

1. A Pleading Issue in a Terrorism Case

Two years after addressing pleading in an antitrust context, the Supreme Court addressed pleading in a decidedly different context: a discrimination case against top government officials in the midst of the global war on terror. Following 9/11, Javid Iqbal, a Pakistani Muslim, was detained by the FBI in a detention center in Brooklyn, New York, and designated a person of “high interest” in the global war on terror.⁶⁵ Iqbal’s designation led to highly restricted confinement⁶⁶ and alleged mistreatment and abuse.⁶⁷ Iqbal brought a *Bivens* action⁶⁸ against John Ashcroft, former Attorney General of the United States, and then-FBI Di-

63. See *id.* at 158 (“[U]nless the deciding court expressly indicates how it would have decided the case under *Conley* versus what it is doing under *Twombly*, one can never be certain that any given pleadings dismissal would have come out differently in the hands of the same judge had *Twombly* never been decided.”).

64. John P. Sullivan, *Twombly and Iqbal: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 41–42 (2009) (“The courts of appeals generally agreed that *Twombly* left a good deal of uncertainty about the new pleading standard.”); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2008) (arguing against states adopting the *Twombly* standard only for the sake of federal-state uniformity).

65. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942–43 (2009).

66. Iqbal was placed in the Administrative Maximum Special Housing Unit (“ADMAX SHU”) and kept on lockdown twenty-three hours a day, while the remaining hour was spent in handcuffs and leg irons with a four-officer escort. *Id.* at 1943.

67. *Id.* at 1943–45.

68. A *Bivens* claim originates from the Supreme Court decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, in which the Court found that complainants could sue individual government officials, acting in their official capacity, for a violation of a constitutional right. 403 U.S. 388 (1971). A *Bivens* claim requires the plaintiff to show a constitutional right has been violated, and government officials are given absolute or qualified immunity as defenses. *Iqbal*, 129 S. Ct. at 1948–49.

rector Robert Mueller, claiming deprivation of constitutional rights based on his religion, race, or national origin.⁶⁹

In his fifty-page complaint, Iqbal argued that defendants “knew of, condoned, and willfully and maliciously agreed to subject” him to harsh treatment based on his racial and religious background.⁷⁰ Ashcroft allegedly acted as “principal architect” of the alleged confinement policy, while Mueller was “instrumental” to its execution.⁷¹ Ashcroft and Mueller raised qualified immunity as a defense and filed a motion to dismiss for failure to state a claim, arguing that Iqbal’s complaint included “conclusory allegations”⁷² that could not withstand a qualified immunity defense.⁷³

The district court denied the motion to dismiss and the qualified immunity defense, finding that the plaintiff had sufficiently pled the facts in the complaint.⁷⁴ On interlocutory appeal, the Second Circuit affirmed the district court’s denial of the motion to dismiss.⁷⁵ The Second Circuit, while refusing to confine *Twombly* to antitrust cases, ultimately found that a heightened pleading standard should not be applied in the instant case.⁷⁶ *Twombly*’s plausibility standard “obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”⁷⁷ The court found that amplification was not called for in this instance and that the

69. *Iqbal*, 129 S. Ct. at 1944. Iqbal originally brought an action also against the administrators of the ADMAX SHU facility. *Iqbal v. Hasty*, 490 F.3d 143, 149 & n.3 (2d Cir. 2007). The complaint filed in the district court listed 21 causes of action, including invidious discrimination in violation of the First and Fifth Amendments, violations of the Fourth and Eight Amendments, and violations of the Religious Freedom Restoration Act and the Alien Tort Statute. See *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *1 (E.D.N.Y. Sept. 27, 2005), *aff’d sub nom. Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

70. *Iqbal*, 129 S. Ct. at 1959 (internal quotation marks omitted).

71. *Id.* at 1960 (internal quotation marks omitted).

72. *Iqbal v. Hasty*, 490 F.3d 143, 153 (2d Cir. 2007), *rev’d sub nom. Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The *Hasty* opinion was issued only shortly after *Twombly*.

73. *Id.* at 152–53.

74. *Elmaghraby*, 2005 WL 2375202, at *21 (“Plaintiffs should not be penalized for failing to assert more facts where, as here, the extent of defendants’ involvement is peculiarly within their knowledge. Plaintiffs have alleged sufficient facts to warrant discovery as to the defendants’ involvement, if any, in a policy that subjected plaintiffs to lengthy detention in highly restrictive conditions while being deprived of any process for challenging that detention.”).

75. *Hasty*, 490 F.3d 143.

76. *Id.* at 158.

77. *Id.* at 157–58.

complaint sufficiently stated facts and could proceed.⁷⁸ The Supreme Court granted certiorari to address whether Iqbal sufficiently plead the facts in order to state a claim upon which relief could be granted.⁷⁹

2. *The Supreme Court Weighs in*

In assessing Iqbal's complaint, the Supreme Court examined the allegations within the context of the substantive law at issue: the principles and case law applied in *Bivens* actions, which involve claims made against individual government officials.⁸⁰ Justice Kennedy, writing for the majority, stated that a pleader in a *Bivens* action involving invidious discrimination must "plead and prove"⁸¹ that the defendant acted with discriminatory intent, not mere knowledge of discrimination by subordinates.⁸² A plaintiff alleging a constitutional violation must also plead and prove that the conduct was undertaken "because of, not merely in spite of, its adverse effects upon an identifiable group."⁸³ As such, the pleader must establish that each government-official defendant, through his or her individual actions, violated the pleader's constitutional rights.⁸⁴

The Court established a two-step approach to assess the plausibility of a claim. First, the court must identify all legal conclusions in the complaint; these conclusions are not entitled to an assumption of truth.⁸⁵ Second, the court must identify nonconclusory factual allegations in the complaint and determine whether the allegations, accepted as true, "plausibly give rise to an entitlement of relief."⁸⁶ Thus, a court discards conclusory legal assertions and relies on the remaining factual allegations to deter-

78. *Id.* at 175.

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

80. *Id.* at 1947–50.

81. *Id.* at 1948.

82. *Id.* at 1948–49 ("It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.")

83. *Id.* at 1948 (internal quotation marks omitted).

84. *Id.* at 1949.

85. *Id.* at 1949–50.

86. *Id.* at 1950.

mine whether these remaining facts would “nudge” the claim “across the line from conceivable to plausible.”⁸⁷ Evaluating plausibility, according to the Court, was a “context-specific task” that incorporates “judicial experience and common sense.”⁸⁸ The plausibility standard is not met when the complaint merely mimics the elements of a cause of action.⁸⁹ Furthermore, well pled factual allegations, assumed to be true, must yield inferences of plausible — as opposed to conceivable or possible — liability.⁹⁰

In *Iqbal*’s case, the Court assessed whether *Iqbal*’s factual allegations against Ashcroft and Mueller created an inference of a plausible entitlement to relief.⁹¹ The complaint alleged that the FBI, under Mueller’s direction, “arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11” and that Ashcroft approved of “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI.”⁹² The Court held that these factual allegations, assumed to be true, did not give rise to a plausible claim.⁹³ Although the allegations would be consistent with discriminatory practices, there were more likely lawful explanations for the policy, given the national security situation following 9/11.⁹⁴ Discrimination, then, was “not a plausible conclusion.”⁹⁵

87. *Id.* at 1952 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (internal quotation marks omitted)). Applying this framework to *Iqbal*’s case, the Court began by identifying the conclusory statements in the complaint. The allegations that Ashcroft was a “principal architect” of an invidious policy, that Mueller was “instrumental” in carrying out the policy, and that Ashcroft and Mueller condoned and agreed to *Iqbal*’s treatment due to his race, religion, or national origin were not entitled to the assumption of truth because they were conclusory. *Id.* at 1951 (“These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a formulaic recitation of the elements of a constitutional discrimination claim.” (internal quotation marks omitted)).

88. *Id.* at 1950.

89. *Id.* at 1949.

90. *Id.* (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” (internal quotation marks omitted)).

91. *Id.* at 1951.

92. *Id.* at 1951 (quoting First Amended Complaint and Jury Demand at ¶ 47, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2004 WL 3756442 (2004) (modification in original)).

93. *Id.* at 1951–52.

94. *Id.*

95. *Id.*

The Court went even further to demonstrate the insufficiency of the complaint. Even if the factual allegations gave rise to a plausible inference of “unlawful discrimination,” the complaint “must contain facts plausibly showing” that Ashcroft and Mueller “purposefully adopted” a policy of classification based on race, religion, or national origin.⁹⁶ Iqbal failed on this count, as the complaint merely alleged that the detainees were subject to “restrictive conditions of confinement” until “cleared” by the FBI.⁹⁷ This allegation “does not show, or even intimate” that defendants acted with purposeful discriminatory intent, only that officials “sought to keep suspected terrorists in the most secure conditions available.”⁹⁸ Thus, the Court held that Iqbal’s pleadings did not “meet the standard necessary to comply with [federal pleading standards].”⁹⁹

Justice Souter, joined by three other justices, dissented.¹⁰⁰ The dissent argued that the Court wrongly interpreted *Twombly* as allowing courts to consider, at the motion to dismiss stage, whether allegations in a complaint are true.¹⁰¹ The dissent also argued that *Twombly* made clear that, unless allegations are “sufficiently fantastic,”¹⁰² factual allegations are assumed to be true.¹⁰³ The dissent further asserted that the Court mischaracterized many of Iqbal’s allegations as “conclusory.”¹⁰⁴ According to Justice Souter, the Court had imprudently viewed “in isolation” the factual allegation that Ashcroft and Mueller detained suspects in restrictive conditions following 9/11, apart from the other allegations in the complaint.¹⁰⁵ Based on a sum-of-its-parts assessment of the complaint, Justice Souter found the plaintiff to

96. *Id.* at 1952.

97. *Id.* (quoting First Amended Complaint and Jury Demand at ¶ 69, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2004 WL 3756442 (2004)).

98. *Id.*

99. *Id.*

100. Justice Souter had penned the *Twombly* majority opinion two years earlier. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

101. *Iqbal*, 129 S. Ct at 1959 (Souter, J., dissenting).

102. Such allegations include “little green men, or the plaintiff’s recent trip to Pluto, or experiences in time travel.” *Id.*

103. *Id.*

104. *Id.* at 1961.

105. *Id.* at 1960 (“But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates.”).

have sufficiently pled the facts to give notice to defendants and demonstrate entitlement to relief.¹⁰⁶

The *Iqbal* decision reinforced the plausibility standard introduced by *Twombly* and immediately caused a stir among practitioners, scholars, and the media.¹⁰⁷ While some practitioners welcomed the decision as a way to control the high costs of discovery,¹⁰⁸ other civil rights and plaintiffs groups saw the decision as a dangerous mechanism that would limit access to the courts, particularly for plaintiffs asserting civil rights violations.¹⁰⁹ Other commentators, however, argued that *Iqbal* would have little impact on most claims, given the unique nature of *Bivens* claims.¹¹⁰ A year after *Iqbal*, however, most commentators agree that courts have begun to apply plausibility pleading at least to all discrimination claims, if not all civil cases.¹¹¹

D. THE COURT IDENTIFIES PITFALLS OF NOTICE PLEADING

In both *Iqbal* and *Twombly*, the Supreme Court discussed the role of notice pleading in modern litigation. According to the *Iq-*

106. *Id.* at 1961.

107. Editorial, *Restoring Access to the Courts*, N.Y. TIMES, Dec. 22, 2009, at A40; Liptak, *supra* note 3; David G. Savage, *Narrowing the Courthouse Door: High Court Makes It Tougher to Get Past the Pleading Stage*, ABA J., July 2009 (quoting practitioners in public organizations and private law firms on *Iqbal*'s impact), available at http://www.abajournal.com/magazine/article/narrowing_the_courthouse_door/.

108. Mark Herrmann & James M. Beck, Debate, *Plausible Denial: Should Congress Overrule Twombly and Iqbal?*, 158 U. PA. L. REV. PENNUMBRA 141, 142–47 (2009), <http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf> (Herrmann & Beck, Opening Statement).

109. *Access to Justice Denied*, *supra* note 2, at 79–92 (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.); Bone, *supra* note 2, at 878–83; Mauro, *supra* note 2.

110. Maxwell S. Kennerly, *Ashcroft v. Iqbal: Not Nearly as Important as You Think*, LITIGATION & TRIAL BLOG (June 29, 2009) (“*Iqbal*'s casual reference to pleading standards does not change the narrow focus of the actual opinion, which relates to the very specific issue of how ‘qualified immunity’ applies to high-ranking officials in suits against the federal government for deprivations of constitutional rights.”), <http://www.litigationandtrial.com/2009/06/articles/the-law/for-lawyers/ashcroft-v-iqbal-not-nearly-as-important-as-you-think/>.

111. See Hatamyar, *supra* note 2, at 582 (“[I]t appears that district courts after *Iqbal* are granting 12(b)(6) motions at a much higher rate than they did under either *Conley* or *Twombly*.”); Schneider, *supra* note 8, at 532 (“[S]everal empirical studies of district court judicial interpretation of the case suggested that it had led to dismissals of civil rights and employment cases.”; *but see* Smith v. Duffey, 576 F.3d 336 (7th Cir. 2009). Judge Posner, in dicta, grappled with *Iqbal* as “special in its own way” and suggested neither *Twombly* nor *Iqbal* would apply to the case at bar. *Id.* at 340.

bal court, notice pleading allowed for extensive lawsuits, resulting in litigation that “exacts heavy costs in terms of efficiency and expenditure of valuable time and resources.”¹¹² Likewise, the *Twombly* court had argued for a trial court’s control over litigation “before allowing a potentially massive factual controversy to proceed.”¹¹³ In both *Iqbal* and *Twombly*, the Court was arguably attempting to limit the astronomical costs of discovery in today’s justice system.¹¹⁴ Plausibility pleading may also have been the Court’s attempt to limit dockets and conserve the justice system’s time and resources.¹¹⁵ Thus, the *Iqbal* and *Twombly* courts criticized notice pleading because it was perceived to exact heavy discovery costs and burden the court system’s resources and time.

III. ANALYSIS OF EMPLOYMENT DISCRIMINATION CASES

The reaction to *Iqbal* by practitioners and commentators was swift and varied.¹¹⁶ Plaintiffs’ groups and trial lawyers, for example, labeled *Iqbal* as a roadblock to justice,¹¹⁷ while groups favoring the decision pointed to it as a cost-effective tool for courts to use in managing discovery costs and frivolous lawsuits.¹¹⁸ For

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

113. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks omitted).

114. *Iqbal*, 129 S. Ct. at 1953 (noting that “litigation . . . exacts heavy costs in terms of efficiency and expenditure of valuable time and resources”); *Young v. Centerville Clinic, Inc.*, Civil Action No. 09-325, 2009 WL 4722820 (W.D. Pa. Dec. 2, 2009) (noting the *Iqbal* court ruled to dismiss despite the low costs of discovery).

115. *See, e.g.*, Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638–39 (1989) (stating that a “sketchy” complaint is enough to launch “abusive discovery”); *see also* INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM, FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 5–6 (2009) (arguing that fact-based pleading should replace notice pleading), available at <http://www.actl.com/AM/Template.cfm?Section=Home&template=/CM/ContentDisplay.cfm&ContentID=4008>; Jim Beck & Mark Herrmann, *In Praise of “Short and Plain” Pleadings After Twombly and Iqbal*, DRUG AND DEVICE LAW BLOG, (May 28, 2009, 2:26 PM), <http://druganddevicelaw.blogspot.com/2009/05/in-praise-of-short-and-plain-pleadings.html>.

116. *See supra* note 2.

117. *Access to Justice Denied*, *supra* note 2, at 79–92 (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.); Bone, *supra* note 2; Mauro, *supra* note 2.

118. *See, e.g.*, Mauro, *supra* note 2 (“Business advocates say that *Iqbal* weeds out weak or frivolous lawsuits and is much-needed standard that will reduce federal court caseloads.”).

civil rights advocates, the main query concerns what a plaintiff alleging discrimination needs to plead in order to meet *Iqbal*'s plausibility standard. In the year following *Iqbal*, courts have applied the plausibility standard in evaluating motions to dismiss in an "astonishing" number of cases, estimated to be in the thousands.¹¹⁹

A. TITLE VII CLAIMS AND METHODOLOGY OF STUDY

While the impact of *Iqbal* on civil rights cases has been empirically documented,¹²⁰ there has been little qualitative analysis conducted on how courts are applying the plausibility standard on intent-based constitutional torts.¹²¹ A Title VII employment discrimination claim is one type of intent-based constitutional tort, because it requires a showing of discriminatory intent.¹²² A study of Title VII cases brings to bear the requirements that plausibility pleading imposes on plaintiffs alleging intentional violations of constitutional rights. This study will analyze Title VII employment discrimination cases in the year following *Iqbal* in an effort to explore plausibility pleading's effect on civil rights cases (i.e., intent-based constitutional violations).

Title VII refers to the provision in the Civil Rights Act of 1964 that prohibits an employer from treating an employee differently based on the employee's membership in a protected class.¹²³ A Title VII case¹²⁴ usually centers on whether the employer acted with discriminatory intent, a fact that is difficult to prove other than in the rare case where employer admits to or there is other direct evidence of intentional discrimination.¹²⁵ In *McDonnell Douglas Corp. v. Green*,¹²⁶ the Supreme Court established a

119. Schneider, *supra* note 8, at 533.

120. See generally Hatamyar, *supra* note 2.

121. There have, however, been analyses of plausibility pleading as a part of broader studies on the impact of *Twombly* and *Iqbal* on litigation generally. See generally, e.g., Kilaru, *supra* note 2; Schneider, *supra* note 8.

122. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977).

123. Title VII protected classes include "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2006).

124. For the purposes of this Note, Title VII cases include only private, non-class action cases.

125. See D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 773 (1987).

126. 411 U.S. 792 (1973).

framework for the adjudication of employment discrimination cases when there is no direct evidence of discriminatory intent.¹²⁷

A plaintiff must first allege facts to support a prima facie case of employment discrimination under Title VII, with the following elements: (1) that he is a member of a protected class; (2) that he was qualified for the position; and (3) that he experienced an adverse employment action.¹²⁸ Plaintiffs establishing a prima facie case create an inference of intentional discrimination that the defendant may rebut by showing other legitimate reasons for the adverse action.¹²⁹ In turn, the plaintiff must present facts to counter the defendant's explanation.¹³⁰ Plaintiffs may do so by demonstrating that the explanation is a pretext for discrimination or otherwise proving defendants' discriminatory intent.¹³¹ This last step is particularly difficult for plaintiffs, as it requires knowledge of the defendants' true motives.¹³²

At the pleading stage, Title VII plaintiffs are unlikely to have access to the information necessary to prove the defendants' motives.¹³³ The Supreme Court in *Swierkiewicz v. Sorema N.A.*, recognizing this tendency, emphasized that the prima facie case the plaintiff must establish is an evidentiary, not a pleading, standard.¹³⁴ As such, the *Swierkiewicz* Court rejected the lower courts' requirement of establishing a prima facie case in the complaint.¹³⁵

This Note looks at the language of courts citing *Iqbal* in Title VII cases and assesses how the courts are construing and applying *Iqbal*'s plausibility standard. My methodology was to identify and analyze the post-*Iqbal* Title VII employment discrimination cases in federal courts that were reviewing a Rule 12(b)(6) motion to dismiss, citing *Iqbal*, and attempting to make sense of plausi-

127. The *McDonnell Douglas* framework is applied to several federal and state causes of action involving discrimination. See, e.g., *Pleau v. Centrix, Inc.*, 343 F. App'x. 685, 687 (2d. Cir. 2009).

128. *McDonnell*, 411 U.S. at 802.

129. *Id.*

130. *Id.* at 804–05.

131. *Id.* at 804.

132. See *Welch*, *supra* note 125, at 773.

133. See *Schneider*, *supra* note 8.

134. 534 U.S. 506, 510–13 (2002).

135. *Id.*

bility pleading.¹³⁶ The primary objective of this analysis is to determine *Iqbal*'s effects, if any, on discrimination claims. Moreover, the analysis aims to identify emerging patterns and distill the requirements of a Title VII complaint that could meet the plausibility standard.

The limits of this study are worth noting. First, although Title VII cases involve intent-based discrimination, the effect of plausibility pleading does not necessarily translate to other civil rights cases. Second, not all cases involving Title VII discrimination following *Iqbal* were analyzed. Only those cases that explicitly cite *Iqbal* and discuss plausibility pleading at length were given consideration. Finally, only the cases that had published opinions in the LexisNexis or Westlaw databases were considered. Nevertheless, the study covers a significant number of the Title VII cases in federal courts since *Iqbal*.

B. MORE EMPLOYMENT DISCRIMINATION CLAIMS ARE DISMISSED AT THE PLEADING STAGE UNDER THE PLAUSIBILITY REGIME

There is little doubt that plausibility pleading is more stringent than the *Conley* standard.¹³⁷ Further, researchers have empirically documented the increased rate of dismissed employment discrimination complaints following *Iqbal*.¹³⁸ This is in spite of the precedent established in *Swierkiewicz*, which rejected requiring a Title VII plaintiff to establish a prima facie case at the pleading stage.¹³⁹ Some cases suggest that post-*Iqbal* courts have granted 12(b)(6) motions to dismiss when, absent *Iqbal*, the complaint would likely have survived the motion under *Conley*'s "no set of facts" standard.¹⁴⁰

136. The sample ranges from the date of *Iqbal*'s opinion, May 18, 2009 to September 13, 2010.

137. See *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6th Cir. 2009) (stating that in *Iqbal*, the Supreme Court "raised the bar" on pleading requirements).

138. *Hatamayar*, *supra* note 2, at 624.

139. *Swierkiewicz*, 534 U.S. at 510–12.

140. A district court in Oklahoma dismissed the complaint of a female employee who brought a Title VII hostile work environment claim against her employer for derogatory remarks. *Coleman v. Tulsa Cnty. Bd. of Cnty. Comm'rs*, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009). Citing both *Twombly* and *Iqbal*, the court dismissed the complaint for insufficient factual substantiation, because the complaint did "not reference a single date on which any event occurred, nor [did] it identify which of

In *Atherton v. District of Columbia Office of the Mayor*, for example, a Hispanic plaintiff brought suit against the city of Washington, D.C., claiming that his dismissal from a jury constituted an equal protection violation.¹⁴¹ The D.C. Circuit, citing *Iqbal* extensively, reversed the district court's pre-*Iqbal* denial of a motion to dismiss for failure to state a claim.¹⁴² The court found that Atherton's claims were insufficiently pled because his complaint only factually alleged that he (1) spoke in Spanish to a witness and (2) was half-Mexican.¹⁴³ Thus, while before *Iqbal* the D.C. District Court had found the pleading sufficient, the D.C. Circuit, after *Iqbal*, reversed, requiring more than the facts of his ethnicity and his dismissal from the jury.¹⁴⁴

Therefore, the plausibility standard introduced in *Twombly*, and solidified by *Iqbal*, have kept alleged victims of discrimination out of court who would otherwise have been able to reach the discovery stage under the *Conley* standard. This trend in employment discrimination cases is indicative of the fate of many civil rights cases.¹⁴⁵ This leads to a troubling catch-22 for plaintiffs alleging motive-based violations of civil rights: plaintiffs cannot "state a claim because they do not have access to documents or witnesses," and they cannot get that access without stating a claim.¹⁴⁶

C. THE HARMS OF PLAUSIBILITY PLEADING

Plausibility pleading's impact on Title VII cases has unduly restricted access to courts. At best, plausibility pleading has led to confusion in the courts, leading to disparate pleading requirements in different courts. At worst, many courts have imposed burdensome requirements on plaintiffs for a Title VII complaint to succeed and move on to the discovery phase.

defendant's employees harassed her or describe any of the harassing statements." *Id.* at *3.

141. 567 F.3d 672, 676–77 (D.C. Cir. 2009), cert. denied, 130 S. Ct. 2064 (2010).

142. *Id.* at 681.

143. *Id.* at 688.

144. *Id.* at 688–89.

145. See, e.g., *Sanders v. Grenadier Realty, Inc.*, 367 F. App'x. 173, 176 (2d Cir. 2010) (dismissing a § 1983 claim for insufficient factual specificity); *Pleau v. Centrix, Inc.*, 343 F. App'x. 685, 686–87 (2d Cir. 2009) (dismissing a marital status discrimination claim, which is evaluated under the *McDonnell Douglas* framework).

146. Kilaru, *supra* note 2, at 927.

1. *Disarray and Confusion in Pleading Discrimination Cases*

Federal courts have grappled with the meaning and application of plausibility pleading, particularly after *Iqbal* imposed the standard on all civil cases.¹⁴⁷ This confusion has serious ramifications for plaintiffs alleging Title VII discrimination, particularly because of the precedent established in *Swierkiewicz*, which does not require a prima facie case at the pleading stage.¹⁴⁸ The confusion wrought by *Iqbal* effectively leaves plaintiffs at the mercy of judges' interpretation of "plausibility."

A few courts have made efforts to make sense of plausibility pleading. The Sixth Circuit, for example, declined to define plausibility pleading and simply predicted that the standard would be defined in future cases.¹⁴⁹ The Seventh Circuit also attempted to interpret *Iqbal's* "opaque language,"¹⁵⁰ and ultimately dismissed the complaint at bar as "implausible" without much explanation.¹⁵¹ These cases indicate how the Supreme Court has left lower courts with little practical guidance as to how to evaluate plausibility. Consequently, courts are left with great discretion in using "judicial experience and common sense" to evaluate plausibility.¹⁵²

Title VII plaintiffs are particularly vulnerable to the fallout from this confusion. This is primarily because the precedential weight of *Swierkiewicz* is unclear in this new pleading regime. The Third Circuit has effectively declared *Swierkiewicz* dead, implying that plausibility pleading requires the plaintiff to plead a prima facie case.¹⁵³ A D.C. district court, however, as recently as

147. *Swanson v. Citibank N.A.*, 614 F.3d 400 (7th Cir. 2010).

148. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511–12 (2002).

149. *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 630 (6th Cir. 2009) ("Exactly how implausible is 'implausible' remains to be seen, as such a malleable standard will have to be worked out in practice."). The court ultimately dismissed the Title VII claim. *Id.* at 632–33.

150. One can almost visualize the judge throwing his hands in the air in frustration: "It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn't think a plaintiff's case is more likely than not to be a winner (that is, doesn't think $p > .5$), as long as it is substantially justified that's enough to avert dismissal." *Swanson*, 614 F.3d at 411.

151. *Id.*

152. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

153. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009). ("We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly*

August 2010, found that *Swierkiewicz* controlled in Title VII cases.¹⁵⁴ As such, the court evaluated the complaint under notice pleading standards and found the claim sufficiently pled.¹⁵⁵ Whether *Iqbal* overruled *Swierkiewicz* is a significant issue for courts to resolve as the answer is likely outcome-determinative for plaintiffs.

Following *Iqbal*, the level of specificity required in factual allegations of Title VII discrimination has varied widely among the courts. In one Pennsylvania district court, a 60-year-old African American woman made the following factual allegations: “[Complainant] was performing satisfactorily, her supervisors asked her to work temporarily as a receptionist with no loss of pay or benefits because of a legitimate need, a younger white female was to cover for her temporarily, and another employee that was approximately Williams’ age voluntarily resigned.”¹⁵⁶ The district court found these allegations fell “far short” of a plausible claim for relief.¹⁵⁷ Other district courts have also required a high level of specificity in complaints.¹⁵⁸

and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”)

154. *Winston v. Clough*, 712 F. Supp. 2d 1, 14 n.10 (D.D.C. 2010) (“*Swierkiewicz* . . . is still good law.”)

155. *Bryant v. Pepco*, Civil Action No. 09-cv-1063 (GK), 2010 WL 3118705, at *2 (D.D.C. Aug. 9, 2010). See also *Winston v. Clough*, 712 F. Supp. 2d 1, 14 n.10 (D.D.C. 2010) (“*Swierkiewicz* . . . is still good law.”); *Moore v. Metro. Human Servs. Dist.*, Civil Action No. 09-6470, 2010 WL 1462224, at *3 (E.D. La. Apr. 8, 2010) (“[T]he current pleading standards for a Title VII case . . . reconcile[s] *Swierkiewicz*, *Twombly*, and *Iqbal*.”); *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909(LAP), 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009) (“*Iqbal* was not meant to displace *Swierkiewicz*’s teachings.”).

156. *Williams v. Family Serv. of Roanoke Valley*, Case No. 7:09cv00227, 2009 U.S. Dist. LEXIS 106122, at *17 (W.D. Va. Nov. 13, 2009).

157. *Id.* at 17–18.

158. In *Olsen v. Ammons*, the court dismissed a Title VII and § 1983 claim, despite the female police officer’s factual allegations that defendants not only harassed her over minor errors, but also instituted a policy of not backing her up in dangerous situations. No. 1:CV-09-0057, 2009 U.S. Dist. LEXIS 111156, at *17–19 (M.D. Pa. Dec. 1, 2009). The district court found that the facts were not sufficient to support a hostile work environment claim. *Id.* The case itself reads as if the court were evaluating a summary judgment motion.

For an argument suggesting plausibility pleading amounts to summary judgment motion, see generally Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010). Similarly, in *Nicoletti v. N.Y.C. Department of Education Office of Legal Services*, the district court found that the “adverse employment” action element of the claim was not factually supported by an unsatisfactory employer review of a schoolteacher, because the consequences

Yet, in other situations, courts have not required that much detail in the complaint. A New York district court, for example, found the plaintiff had sufficiently pled against one of the defendants when she alleged that he voted to abolish her position and reassigned her position to a white male under a different title.¹⁵⁹ Another court indicated evidence of false negative reviews could “nudge” claims from conceivable to plausible territory when it allowed a gender discrimination case to go forward based on allegations that two of the defendants wrote “false negative reviews and letters” about the plaintiff, who claimed this negative treatment was due to her gender.¹⁶⁰

2. *The Undue Burden on Title VII Plaintiffs at the Pleading Stage*

In the midst of these unclear standards, what must a Title VII plaintiff allege in order to guarantee success on a Rule 12(b)(6) motion to dismiss? An analysis of federal district and circuit court cases involving Title VII claims demonstrates that, contrary to *Swierkiewicz*, a prima facie case must be established at the pleading stage. That is, the plaintiff must state in the pleadings that he or she is the member of a protected class; was qualified for the position; and suffered an adverse employment consequence.¹⁶¹ Courts go even further: a plaintiff must also identify the factual allegations in connection with the legal elements of the prima facie case.¹⁶²

of such a review were not harmful to the teacher. No. 08 Civ. 11305 (WHP), 2009 WL 4756508 (S.D.N.Y. Dec. 7, 2009).

159. DeLong v. Soufiane, No. 05-CV-5529(ADS)(WDW), 2010 WL 234781, at *5–6 (E.D.N.Y. Jan. 14, 2010) (dismissing complaint against other defendants when the complaint was “void of any *factual* allegations regarding [second defendant’s] purported indifference. The Plaintiff instead relies on legal conclusions that the Court need not credit, even at the motion to dismiss stage.”).

160. Mehrhoff v. William Floyd Union Free Sch. Dist., No. 04-CV-3850(JS)(MLO), 2009 WL 5219019, at *3 (E.D.N.Y. Dec. 28, 2009) (“The Court again acknowledges that Plaintiff’s Amended Complaint is extraordinarily light, and just barely alleges the Individual Defendants’ personal involvement. However, the Amended Complaint does allege enough facts to place it slightly above [t]hreadbare recitals of the elements of a cause of action.”); see also Chih Cheng Tsao v. Cnty. of Los Angeles, Case No. CV 09-01268 DDP(CWx), 2009 U.S. Dist. LEXIS 112478, at *14 (C.D. Cal. Dec. 3, 2009) (finding allegations of disciplinary action and denial of promotion as sufficient factual support for the adverse employment action element of a Title VII claim).

161. See *supra* note 127, detailing the *McDonnell Douglas* framework.

162. Gatto v. Jet Blue Airways, No. 09 Civ. 983(LTS)(KNF), 2010 WL 125974, at *2 (S.D.N.Y. Jan. 13, 2010).

Professor Joseph Seiner, an expert in employment discrimination litigation, writing after *Twombly* but before *Iqbal*, provided a framework for plausibility pleading in employment discrimination cases.¹⁶³ Seiner argued that, in order to survive a Rule 12(b)(6) motion, a complaint must identify (1) the victim of the discrimination; (2) the protected characteristic of the plaintiff; (3) the nature of the discrimination suffered; (4) details as to the time, place, and manner of the alleged discrimination; and (5) an assertion that the employer's discrimination was due to the plaintiff's characteristic.¹⁶⁴ While Seiner's post-*Twombly* framework appears to satisfy most of the requirements for sufficient allegations laid out in *Twombly* and lower courts' interpretations of *Twombly*, the analysis of cases following *Iqbal* suggests a complaint requires more. Specifically, a complaint must not only include detailed relevant facts, but it must also demonstrate how the facts relate to the legal elements of the prima facie case.¹⁶⁵

Courts have moved toward requiring greater factual detail of allegedly discriminatory actions, especially the, time, and manner in which they occurred.¹⁶⁶ Further, courts discard any assertions that are deemed "legal conclusions," even though an allegation

163. Joseph A. Seiner, *The Trouble with Twombly*, 2009 U. ILL. L. REV. 1011.

164. See Seiner, *supra* note 38, 1042–47.

165. See *Gatto*, 2010 WL 125974, at *2.

166. A Florida district court, dismissed a Title VII sex discrimination complaint, despite the plaintiff's assertion that he was "treated badly and eventually fired on a pretext" and that "similarly situated others" were treated more favorably. *Ansley v. Fla. Dep't of Revenue*, No. 4:09cv161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009). The district court stated that the plaintiff did not have a "factual basis for his claim that the others who were treated better were similarly situated" and that the plaintiff "[did] not say what the alleged reason — the pretextual reason — for the firing was." *Id.* at *2. In fact, the defendant, not the plaintiff, should be the party that presents the non-discriminatory (which the plaintiff will likely argue is pretextual) reason for the adverse employment action. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) ("The burden . . . must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."). See also, *Eldeeb v. Potter*, 675 F. Supp. 2d 521, 523 (E.D. Pa. 2009) (requiring complaint to indicate "frequency, severity, or abusive nature" of alleged harassment); *Morales v. Power Sec., Inc.*, No. 09-1127 (GAG/CVR), 2009 WL 3873572, at *1 (D.P.R. Nov. 16, 2009) (dismissing sex discrimination claim whose factual allegations included that plaintiff, a woman, was promoted without being given the salary increase males received and that defendant frequently made discriminatory, gender-based comments); *Coleman v. Tulsa Cnty. Bd. of Cnty. Comm'rs*, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009) ("The second amended complaint does not reference a single date on which any event occurred, nor does it identify which of defendant's employees harassed her or describe any of the harassing statements.").

that a defendant pursued certain adverse actions because of an employee's race appears to be both factual and legal.¹⁶⁷ Thus, in order to move closer to plausibility, factual allegations of discriminatory intent must be fully fleshed out and explicitly connected with the elements of the legal claim. For example, in describing a demotion or a negative evaluation, the plaintiff must explain how it relates to the "adverse employment consequences" element of the legal claim, even if such a connection is self-evident.¹⁶⁸

Overall, in order to survive a Rule 12(b)(6) motion to dismiss, the complaint requires several things. First, the plaintiff must recognize all the elements of a legal claim. Second, the plaintiff must show how each of the factual allegations support each element, with as much specificity as possible. Third, each factual allegation must be explicitly connected to an element of the claim. The problem with this framework, however, is that it requires civil rights plaintiffs to understand the legal underpinnings of the claim before the factual allegations, which themselves must be ascertained prior to discovery.¹⁶⁹ This is an onerous burden to place on a plaintiff in the first step of litigation and is unwarranted in light of the high value of adjudicating intent-based violations of constitutional rights.

IV. A PLEADING SOLUTION: LEGISLATIVE INTERVENTION

Pleading standards today are muddled and in serious need of clarification. More importantly, *Twombly* and *Iqbal's* introduction of plausibility pleading has unduly burdened plaintiffs in cases involving violations of constitutionally protected rights. This is an untenable situation. This Note offers a two-step legislative solution. First, Congress must restore notice pleading to all civil cases. Second, Congress must undertake fact-finding and

167. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (internal quotation marks omitted)).

168. *Gatto*, 2010 WL 125974, at *2. Plaintiff alleged his supervisor issued two negative write-ups and made the work atmosphere uncomfortable for Plaintiff. *Id.* Despite this, the court dismissed the complaint because complaint failed to "connote[] any adverse employment consequences" of the two write-ups. *Id.*

169. This may not be true of all jurisdictions. In a Seventh Circuit case, Judge Posner stated that *Twombly* and *Iqbal* "do not undermine the principle that plaintiffs in federal courts are not required to plead legal theories." *Hatmaker v. Mem'l Med. Ctr.*, 619 F.3d 741, 743 (7th Cir. 2010). That is, legal elements of a claim do not need to be explicitly stated and tied with factual allegations. *Id.*

impose heightened pleading on the types of cases that are most burdensome on the courts, thereby carving out the claims most harmful to the system.

A. WHY CONGRESS?

While the courts have often clarified the Federal Rules of Civil Procedure, Congress ultimately may reject or amend the Rules.¹⁷⁰ The Rules often reflect policy decisions because they are the product of a democratic process.¹⁷¹ Judicial decisions that radically re-interpret the Rules should be subject to particular scrutiny, because such changes have not undergone the same democratic process required for amending the text of the Rules.¹⁷² In the case of pleading, the *Iqbal* and *Twombly* courts upended decades of established practice in a matter of two years. A legislative solution would be the best method to clarify and correct pleading standards for several reasons. It would utilize Congress's fact-finding resources, allow for a robust public debate on pleading, create clear standards for federal courts, and result from a democratic process.¹⁷³

B. THE FIRST STEP: MERITS AND CRITICISMS

A return to notice pleading, the standard of the past fifty years, would undo the confusion brought on by plausibility pleading. Two months after *Iqbal*, Senator Arlen Specter introduced the Notice Pleading Restoration Act ("NPRA") of 2009 in an effort to repudiate *Twombly* and *Iqbal*'s plausibility standard and reintroduce the *Conley* "no set of facts" standard.¹⁷⁴ The text of the bill provides, in relevant part:

170. *Legislation*, UNITED STATES COURTS, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Legislation.aspx> (last visited Nov. 18, 2010) ("The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of Congress to reject, modify, or defer any of the rules.")

171. *See Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Con. 253-69 (2009) (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.).

172. *Id.*

173. *Id.*

174. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

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).¹⁷⁵

In Congressional hearings on the matter, the Senate Judiciary Committee and a subcommittee of the House of Representatives Judiciary Committee heard from plaintiffs' groups¹⁷⁶ and civil procedure scholars on the issue.¹⁷⁷ Senators, themselves trained in the legal field, expressed concerns that the *Iqbal* decision could deny plaintiffs access to courts, as well as shift the burden to private litigants to enforce public law.¹⁷⁸ Additionally, some lawmakers saw the decision as the Supreme Court's circumvention of the democratic process,¹⁷⁹ noting the overnight change in pleading standards.¹⁸⁰

Lawmakers critical of the legislation included Representative Jim Sensenbrenner, who disapproved of legislative action *against Iqbal* and claimed that Senator Specter's legislation would lead to attorneys simply stating the names of defendants in complaints.¹⁸¹ Other critics have warned against legislative action,

175. *Id.*

176. See *Access to Justice Denied*, *supra* note 2, at 79–92 (statement of Debo P. Adebile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.).

177. See *Has the Supreme Court Limited Americans' Access to Court*, *supra* note 171, at 4–5 (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc. (citing Judge Jack Weinstein)).

178. Senators Arlen Specter, Patrick Leahy, and Russ Feingold denounced *Iqbal*. Videofile: *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary* (Dec. 2, 2009) [hereinafter *Video of Access to Courts*], available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>.

179. *Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 171, at 173 (statement of Sen. Russell D. Feingold, Member, S. Judiciary Comm.).

180. Video of *Access to Courts*, *supra* note 178 (testimony of John Payton, President and Director-Counsel, NAACP Legal Defense & Educational Fund, Inc.) (begins at 26:06) (arguing that a legislative solution would have allowed for two years of fact-finding, as opposed to *Iqbal*'s immediate and unexpected ruling).

181. *Access to Justice Denied*, *supra* note 2, at 4 (opening statement of Rep. F. James Sensenbrenner, Jr., Ranking Member, Subcomm. on the Constitution, Civil Rights & Civil Liberties) ("If the *Iqbal* decision is overridden by statute, lawyers of course would save money because their complaints would simply have to list the names of the people sued

particularly the NPRA's blanket adoption of *Conley*, claiming the "no set of facts" language has generated great confusion in courts.¹⁸² Criticizing the legislation as a misguided attempt to "reset" the pleading standards,¹⁸³ one critic also described how "no set of facts," taken literally by courts,¹⁸⁴ would allow for any and all claims to enter the justice system.¹⁸⁵ Commentators also mentioned the burdensome costs that result from allowing conclusory and implausible claims against government officials and civil defendants to go forward.¹⁸⁶ Despite these criticisms, passage of the NPRA would bring the courts back to notice pleading and impose relative clarity on the confusion surrounding pleading standards. Further, notice pleading encourages access to courts, access that alleged victims of constitutional violations require in order to vindicate their rights.

C. SECOND STEP: HEIGHTENED PLEADING FOR SOME, BUT NOT ALL

Notice pleading does have its flaws, however, particularly in light of modern trends in litigation. In order to address the need to control discovery costs, Congress must take an additional step. It must use its institutional fact-finding capacity to ascertain which types of litigation present the most burdensome costs. Congress must then impose pleading standards that would pre-

with no supporting facts. But it would be immensely costly to the cause of justice, the innocent, and to our national security.").

182. *Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 171, at 209–10 (statement of Gregory G. Garre, Partner, Latham & Watkins, LLP).

183. *Id.* at 210 ("On the day before *Twombly* was decided, the law governing pleading was in a much more nuanced state.").

184. It is doubtful that courts would so interpret legislation like the NPRA; Senator Specter's own analysis of the bill is to return to *Conley*-style notice pleading, which was in effect for fifty years. See Video of *Access to Courts*, *supra* note 178 (testimony of Sen. Arlen Specter).

185. *Has the Supreme Court Limited Americans' Access to Courts?*, *supra* note 171, at 210 (statement of Gregory G. Garre, Partner, Latham & Watkins, LLP) ("That legislation would apparently call for a literal interpretation of *Conley*'s 'no set of facts' language, even though, as noted, the consensus among courts and commentators before *Twombly* and *Iqbal* was that *Conley* could not be taken literally. In addition, it would mandate that complaints stating implausible claims be allowed to proceed to discovery."). Garre went on to advise the Senate to wait for more data on whether *Iqbal* has led to dismissals of meritorious claims rather than legislate. *Id.* at 194–98.

186. *Id.* at 198–207.

vent frivolous claims in specific types of litigation.¹⁸⁷ Legislators will need to make policy judgments on important issues. How much discovery is too much? What cost-benefit analysis must be employed to evaluate types of litigation? These policy judgments are under the proper purview of legislators and should remain in the legislature, not with the courts.

This two-step approach, if drafted properly, will give courts clear direction on pleading standards. The virtues of a legislative solution, as detailed in this section, would also bring certainty to courts and practitioners. A return to notice pleading would ensure that discrimination claims, or any other motive-based constitutional tort, would be allowed to move past the pleading stage. As a result, discrimination claims will be assessed on their merits — most likely during summary judgment proceedings; plaintiffs will get their day in court; and the likelihood that legitimate claims will fall through the cracks will decrease. These cases are valuable to society, both to vindicate civil rights and to ensure that rightly named defendants are not allowed to continue subverting the law.

Furthermore, a Congressional imposition of heightened pleading to specific types of cost-heavy litigation would address the efficiency concerns expressed by the *Iqbal* court. Ultimately, plausibility pleading and *Iqbal* have thrown the courts into pleading disarray, and allowed courts to ignore legitimate discrimination claims. A return to notice pleading in certain contexts, as well as greater congressional action in this area, would fulfill the goals of the Federal Rules of Civil Procedure: ensuring access to courts and the efficient administration of justice.

V. CONCLUSION

One of the cornerstones of the Federal Rules of Civil Procedure, as demonstrated by the simple requirements of Rule 8, was to provide plaintiffs their day in court.¹⁸⁸ Notice pleading, *Conley*'s “no set of facts” standard, and years of Supreme Court polic-

187. In fact, Congress has already imposed heightened pleading requirements on private securities fraud claims. See *supra* note 12.

188. Hatamyar, *supra* note 2, at 557.

ing of lower courts¹⁸⁹ kept the courthouse doors open for aggrieved plaintiffs. The Supreme Court upended decades of established precedent and practice with *Twombly* and *Iqbal*'s plausibility pleading and provided uncomfortably vague criteria¹⁹⁰ with which to evaluate complaints. Plausibility pleading has had the effect of dismissing and deterring the types of claims that should be adjudicated in courts, those that involve violations of constitutionally protected rights. The task of correcting the fallout from plausibility pleading standards should be left to the legislature. Congress has the institutional capacity to take a more precise and thorough look into pleading standards and change the FRCP accordingly. It should restore notice pleading and impose heightened pleading where necessary. Maintaining the plausibility pleading regime may screen "little green men" claims,¹⁹¹ but it also stops meritorious claims of constitutional violations at the courthouse doors.

189. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

190. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").

191. *Id.* at 1959 (Souter, J., dissenting).