



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY



Issue Brief

**Restoring Access to Justice:
The Impact of *Iqbal* and *Twombly* on Federal Civil
Rights Litigation**

By Joshua Civin and Debo P. Adegbile

September 2010

All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.

Restoring Access to Justice: The Impact of *Iqbal* and *Twombly* on Federal Civil Rights Litigation

Joshua Civin and Debo P. Adegbile*

I. Introduction

The names Yick Wo, Heman Sweatt, Pete Hernandez, Clarence Gideon, Annie Harper, Mildred and Richard Loving, and Willie Griggs are barely known to the American public, but the nation they helped forge is their lasting legacy. These individuals went to court, and their ability to do so literally changed our understanding of citizenship,¹ access to education,² jury service,³ the right to counsel,⁴ access to the voting booth,⁵ marriage,⁶ and equal employment opportunity.⁷ Indeed, much of our nation's progress toward the Constitutional aspiration of a "more perfect Union" occurred because these and other ordinary people have had ready access to litigate meritorious but often novel or difficult-to-prove cases in our courts.

Of course, this majestic view of courts and individuals' access to them does not tell the entire story. Lawsuits are by their very nature adversarial, slow, uncertain, and often inefficient, as well as frustrating for litigants, lawyers, and courts. And, to be sure, some are ill-founded. Yet, while few seriously contend that litigation is the exclusive way to achieve progress, it often is a vital tool for doing so and has proven particularly essential in the area of civil rights.

Recently, however, in a pair of decisions, the Supreme Court skewed the balance away from access to courts by elevating the threshold standard that all plaintiffs must meet to pursue legal claims. In *Bell Atlantic Corp. v. Twombly*⁸ and *Ashcroft v. Iqbal*,⁹ the Court suddenly and without clear necessity overturned well-settled law and imposed a more stringent standard for federal cases to survive. These decisions, by dramatically frontloading litigation and inviting judges to substitute their threshold personal judgments in place of evidence, go far beyond the familiar "verdict first, trial second" problem of which high-profile defendants complain. Instead, under *Twombly* and *Iqbal*, we now risk a world in which meritorious claims face "dismissal first, trial never."

* Joshua Civin is an Assistant Counsel and Debo P. Adegbile is Associate Director-Counsel and Director of Litigation at the NAACP Legal Defense & Educational Fund, Inc. The authors wish to thank John Payton, Leslie Proll, Norman Chachkin, Alex Reinert, John Vail, Anand Das, Melissa Bruijneel, and Amanda Thomas for their thoughts and suggestions.

¹ See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

² See *Sweatt v. Painter*, 339 U.S. 629 (1950).

³ See *Hernandez v. Texas*, 347 U.S. 475 (1954).

⁴ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966).

⁶ See *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

⁸ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

In this Issue Brief, which draws upon and updates Congressional testimony by the NAACP Legal Defense & Educational Fund, Inc. (LDF),¹⁰ we analyze the detrimental impact of *Iqbal* and *Twombly* on our legal system in general and on civil rights in particular. We then review the broad mobilization urging Congress to overturn these decisions and restore the pleading standard that, for decades, has enabled civil rights litigants to root out discrimination wherever it exists. In our view, immediate Congressional action is needed to ensure that *Twombly* and *Iqbal* do not create an undesirable safe harbor that effectively places some defendants beyond the reach of civil rights laws.

II. The Critical Importance of a Liberal Pleading Standard

When the Federal Rules of Civil Procedure were adopted in 1938, they transformed civil litigation by establishing a liberal standard for what plaintiffs must plead in their complaints to initiate a federal lawsuit and withstand a motion to dismiss. This liberal standard repudiated failed earlier approaches which, in effect, treated pleading requirements as traps for far too many meritorious claims. Notably, Rule 8(a)(2) requires only that a plaintiff's complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief." And Rule 8(e) emphasizes that "[p]leadings must be construed so as to do justice."

Drawing on his experience as a federal judge for over 40 years and as a member of the team that assisted LDF's first Director-Counsel Thurgood Marshall in litigating *Brown v. Board of Education*, Judge Jack Weinstein of the U.S. District Court for the Eastern District of New York explained the purposes of these liberal rules:

[T]hey were optimistically intended to clear the procedural clouds so that the sunlight of substance might shine through. Litigants would have straightforward access to courts, and courts would render judgments based on facts not form. The courthouse door was opened to let the aggrieved take shelter.¹¹

Almost two decades after the Federal Rules were adopted, the Supreme Court recognized that a liberal pleading standard was essential to the emerging civil rights movement. In *Conley v. Gibson*, African-American railroad workers sued their union for failing to protect them from demotion and discharge on the same basis as white workers.¹² The case was part of a larger strategy, led by visionary civil rights attorney Charles Hamilton Houston, to ensure that unions treated all members fairly, regardless of their race.

¹⁰ See *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 4-5, 253-69 (2009) (statement of John Payton, LDF President and Director-Counsel); *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 77-92 (2009) (statement of Debo P. Adegbile, LDF Associate Director-Counsel).

¹¹ Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 108 (2008) (citations and quotation marks omitted).

¹² *Conley v. Gibson*, 355 U.S. 41, 43 (1957).

In 1957, the Court ruled unanimously that the complaint could proceed. It noted that if the allegations were proven, there was a “manifest breach of the Union’s statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit.” Rejecting the union’s argument that the workers’ complaint failed to identify specific facts to support their “general allegations” of discrimination, the Court held that “the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.” Rather, “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.” According to the Court, a “fair notice” approach to pleading was sufficient because discovery and other pretrial procedures provided appropriate mechanisms to reveal the precise nature of claims and narrow disputed facts and issues prior to trial.¹³

Thus, *Conley* affirmed that the purpose of the Federal Rules’ pleading standard was to eliminate procedural barriers at the beginning of litigation that could prove fatal even to a meritorious claim: “The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.”¹⁴ In *Conley*, the Court dramatically rebuffed efforts by a defendant and its counsel to inoculate themselves from charges of stark discrimination through pleading gymnastics.

Placed in the civil rights context, the liberal pleading standard is a critical prerequisite to ensure that victims of discrimination can take full advantage of federal statutory safeguards. It is not an overstatement to say that the key successes of civil rights litigation in the last half century were due, in part, to the liberal pleading standard set forth in the Federal Rules and reinforced by the Supreme Court in *Conley*.

III. Overturning Well-Established Precedent: *Twombly* and *Iqbal*

For five decades after *Conley*, the Supreme Court repeatedly affirmed this “fair notice” approach designed to prevent excessive obstacles at the pleading stage and facilitate adjudication of civil rights claims and other litigation on the merits.¹⁵ During those five decades, the Court rebuffed efforts by district and appellate courts to heighten pleading standards, and no Justice ever “express[ed] any doubt” about the “adequacy” of *Conley*’s interpretation of Rule 8.¹⁶

Cracks in *Conley*’s foundation emerged three years ago in *Twombly*. The 7-2 majority opinion, authored by now-retired Justice Souter, held that, at least with respect to antitrust claims, *Conley*’s no-set-of-facts language “has earned its retirement.” Instead, *Twombly* promulgated a new and stricter “plausibility” standard, ruling that a plaintiff in an antitrust case

¹³ *Id.* at 45-48.

¹⁴ *Id.* at 48.

¹⁵ *See, e.g.,* Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993).

¹⁶ *Bell Atlantic v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting) (emphasis in original).

will survive a motion to dismiss only if he or she pleads “enough facts to state a claim to relief that is plausible on its face.”¹⁷

Twombly left open whether this new plausibility standard broadly applied to all civil cases. Last year, in *Ashcroft v. Iqbal*, the Court made clear that it did.¹⁸ *Iqbal* went much further than *Twombly* in its deviation from the *Conley* framework. Whereas *Twombly* endorsed *Conley*’s dictate that a complaint need do no more than give “fair notice” of the plaintiff’s claims and grounds for relief,¹⁹ *Iqbal* declined even to cite this well-established principle, and the decision substantially undermined it in practice.

In *Iqbal*, a Muslim Pakistani citizen—arrested along with hundreds of other individuals in the days following the September 11, 2001 terrorist attacks and detained in federal custody—alleged that he was subjected to an unconstitutional policy of “harsh conditions of confinement on account of his race, religion, or national origin.” In addition to suing lower-level prison officials, *Iqbal* named former U.S. Attorney General John Ashcroft as the “principal architect” of the policy and identified FBI Director Robert Mueller as “instrumental in [its] adoption, promulgation, and implementation.”²⁰

Writing for a narrow five-justice majority, Justice Kennedy did not question the right of plaintiff Javaid Iqbal to proceed with his lawsuit against lower-level prison officials (who subsequently settled). But the Court held that the claims against Ashcroft and Mueller should be dismissed because *Iqbal*’s complaint did not plead facts “sufficient to plausibly suggest [their] discriminatory state of mind.” For a complaint to survive a motion to dismiss under the new plausibility standard, *Iqbal* clarified that the litigant must plead specific and non-conclusory “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” In making that determination, a court is to “draw on its judicial experience and common sense.” Applying this standard, the Court considered whether it was more plausible that lawful or discriminatory intent motivated Ashcroft and Mueller and found the former was more “likely.”²¹

In an unusually strong dissent, Justice Souter contended that the majority had “misapplie[d]” the *Twombly* decision that he had authored. He insisted that *Iqbal*’s complaint “as a whole” should have survived a motion to dismiss because it gave Ashcroft and Mueller “fair notice” of the claims and grounds upon which they rested.²²

IV. Institutionalizing Disadvantages for Civil Rights Plaintiffs

Twombly and *Iqbal* drastically altered *Conley*’s pleading requirements. In the words of Professor Arthur Miller, a well-respected civil procedure expert, the substitution of plausibility

¹⁷ *Id.* at 563, 570.

¹⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

¹⁹ *Twombly*, 550 U.S. at 555.

²⁰ *Iqbal*, 129 S. Ct. at 1942, 1944 (alteration in original).

²¹ *Id.* at 1949-52.

²² *Id.* at 1955, 1961 (Souter, J., dissenting) (citing *Twombly*, 550 U.S. at 555, and *Conley*, 355 U.S. at 47) (quotation marks omitted).

pleading for notice pleading is “a philosophical sea change in American civil litigation.”²³ Cases can now be dismissed at first glance, without the benefit of any discovery or meaningful fact-finding. This outcome, while not certain in every case, is fundamentally at odds with Congress’s intent to provide effective enforcement of our nation’s civil rights laws. Short-circuiting litigation through artificial procedural barriers undermines our national interest in robust and expansive application of these laws.

The imposition of a heightened pleading standard effectively converts a motion to dismiss into one for summary judgment—but without any of the corresponding procedural protections or opportunities for factual development.²⁴ Confronted with a motion to dismiss, district courts must now sift through the plaintiff’s complaint in order to conduct a complex, two-pronged inquiry. First, a judge is required to identify and disregard all “conclusory” statements. Second, focusing only on specific factual allegations, the judge must assess the strength of the “showing” for each claim by weighing whether the plaintiff’s allegations are plausible. This judicially-mandated appraisal of the facts at the pleading stage comes uncomfortably close to supplanting adjudication on the merits by jury trial.²⁵ Moreover, these judgments are virtually unreviewable because trial courts are granted wide discretion to conclude that a claim is implausible and, thus, dismiss a complaint without permitting critical factual development of discrimination allegations.

The Court’s insistence in *Iqbal* and *Twombly* that a complaint must include non-conclusory factual support for each claim institutionalizes a disadvantage for plaintiffs. In contrast to *Conley*’s “fair notice” requirement, plausibility pleading compels plaintiffs to provide more of an evidentiary foundation to withstand a defendant’s motion to dismiss. Yet, because the Federal Rules typically permit plaintiffs to obtain discovery only if they survive a motion to dismiss, many plaintiffs will be denied the very tools needed to support meritorious claims and, thus, wrongdoers will escape accountability. As Professor Robert Bone explains, “strict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery.”²⁶ The result is a revival of precisely the sort of pleading gamesmanship that the Federal Rules were designed to avoid.

The new emphasis on factual specificity is especially onerous for civil rights plaintiffs. In many civil rights cases, most, if not all, pertinent information is within the exclusive province of the defendant—through its agents, employees, records, and documents. For instance, when a plaintiff alleges she was the victim of a discriminatory practice, she typically must expose the

²³ *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 6 (2009) (statement of Arthur R. Miller, Professor, N.Y.U. Sch. of Law).

²⁴ See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 833-34 (2010); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J. L. & POL’Y 61, 66, 98 (2007).

²⁵ See Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261, 264-65 (2009).

²⁶ Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849, 879 (2010).

defendant’s “private, behind-closed-doors conduct,” including “particular meetings and conversations, which individuals were involved, when and where meetings occurred, what was discussed, and, ultimately, who knew what, when, and why.”²⁷

This “information asymmetry” for civil rights plaintiffs at the pleading stage is compounded in intentional discrimination cases, where liability turns on proof of subjective intent. Without depositions and other discovery tools or the all-too-rare revelations from a whistleblower, it is extremely costly—and often impossible—for plaintiffs to obtain specific facts to substantiate a defendant’s state of mind, even with support from the most capable and committed lawyers. Disparate-impact claims, where proof of intentional discrimination is not required, could also be more difficult under *Iqbal* and *Twombly* because such claims often turn on analysis of statistical data that is usually under the exclusive control of defendants.²⁸

Iqbal and *Twombly* may be particularly effective in frustrating efforts to redress the subtle and sophisticated types of discrimination that are more commonplace in today’s society than instances of overt racial animus. As the Third Circuit has noted:

Anti-discrimination laws and lawsuits have “educated” would-be violators such that extreme manifestations of discrimination are thankfully rare. Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual’s race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial “smoking gun” behind. As one court has recognized, “defendants of even minimal sophistication will neither admit discriminatory animus or leave a paper trail demonstrating it.”²⁹

Because these subtle and sophisticated forms of discrimination are designed to be undetectable, a stricter pleading standard risks insulating wrongdoers and, therefore, depriving litigants of the ability to vindicate critical civil rights. As a result, defendants may be less likely to admit

²⁷ Howard A. Wasserman, *Iqbal*, *Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157, 168-69 (2010).

²⁸ Recognizing these concerns, a New York federal district court recently held that, even under *Iqbal*, “[i]t would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery.” *Jenkins v. N.Y. City Transit Auth.*, 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009).

²⁹ *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996) (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)).

wrongdoing because *Iqbal* and *Twombly* effectively preclude victims of discrimination from obtaining access to facts that defendants can keep from public view.

V. The Dangerous Subjectivity of Plausibility Pleading

Iqbal adds another pernicious element to the new litigation reality. Under *Iqbal*, the assessment of plausibility is a “context-specific task,” in which a court must “draw on its judicial experience and common sense.”³⁰ In contrast to *Conley*’s objective “fair notice” approach, the highly subjective nature of the *Iqbal* framework “is and should be a frightening thought,” as Judge Shira Scheindlin of the U.S. District Court for the Southern District of New York has explained:

When courts are told to draw on experience and common sense that means that predictability will vanish because every judge has had different experiences and has a different definition of common sense. What we will see is that depending on a judge’s views of various types of claims, one judge will dismiss a claim where another would have let it survive.³¹

Iqbal itself highlights the subjectivity of the Court’s new plausibility standard. The Second Circuit and the four dissenting Justices concluded that the crisis triggered by the events of September 11, 2001 made it “plausible” that top government officials had condoned a discriminatory policy of mass arrests. By contrast, the same crisis, in the view of the Supreme Court majority, made legitimate law enforcement purposes for the policy more “likely,” thus rendering purposeful discrimination implausible. The majority made this determination notwithstanding the cautionary historical precedent of the internment of Japanese Americans during World War II, which was endorsed at the time by the Supreme Court but has been widely condemned as an egregious violation of constitutional rights.³²

As civil rights litigators, we understand that a careful examination of the facts can alter judges’ initial preconceptions. A powerful example comes from *Swann v. Charlotte-Mecklenburg Board of Education*, a landmark school desegregation case litigated by LDF. In a rather remarkable passage, the district court judge acknowledged that it was only through litigation that he had come to appreciate the gravity of the discrimination that African-American school children experienced:

The case was difficult. The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which

³⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

³¹ Shira A. Scheindlin, Judge, U.S. District Court for the Southern District of New York, Remarks at the Inn of Court Dinner: The Future of Litigation 4-5 (Jan. 13, 2010), *available at* <http://www.nylj.com/nylawyer/adgifs/decisions/020510scheindlin.pdf>.

³² *Korematsu v. United States*, 323 U.S. 214 (1944). *But see id.* at 235 (Murphy, J., dissenting) (condemning the Court’s decision as “one of the most sweeping and complete deprivations of constitutional rights in the history of this nation”). Congress has publicly apologized and authorized payment of reparations for the internment. 50 U.S.C. app. § 1989 (2006).

had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no active segregation was being practiced in the Charlotte-Mecklenburg schools, that the aims of the suit were extreme and unreasonable, and that a little bit of push was all that the Constitution required of the court.

Yet, after the plaintiffs presented reams of evidence to support their claims, "they produced a reversal in the original attitude of the district court."³³

Of course, the benefits of close scrutiny of the facts are not limited to the courthouse. In one well-documented legislative example, Representative Henry Hyde commented that his initial views changed during the 1982 reauthorization of the Voting Rights Act. In an opinion piece, he wrote:

As the ranking Republican member of the House Judiciary Committee's subcommittee on civil and constitutional rights, I came to this issue with the expressed conviction that, indeed 17 years was enough. . . . Then came the hearings. Witness after witness testified to continuing and pervasive denials of the electoral process for blacks. As I listened to testimony before the subcommittee I was appalled by what I heard. . . . As long as the majestic pledge our nation made in 1870 by ratifying the 15th Amendment remains unredeemed, then its redemption must come first.³⁴

Representative Hyde's candid comments attest to the powerful ways in which a full evidentiary record can challenge assumptions, change minds, and affect one's perception of "common sense." Yet, *Twombly* and *Iqbal* place excessive emphasis on inherently limited pleading-stage facts and, therefore, deny plaintiffs—and by extension society as a whole—precisely this opportunity to focus on determining whether, in fact, discrimination and other civil rights violations persist.

The question is not whether a judge's experience can add something to the assessment of cases—it does and we rely upon it. But evidence can and should play a role in tempering judicial experience or "common-sense." The danger of the Supreme Court's new pleading standard is that it denies victims of racial and other forms of discrimination the opportunity to challenge the preconceptions of judges and the broader public by exposing persisting impediments to justice and equal opportunity that, on their face, may seem implausible but, lamentably, remain an aspect of American life. History is full of implausible events, and the most egregious civil rights violations are often the most implausible. One example is the exoneration of nearly 10% of the African-American community of Tulia, Texas, when it came to light, after an investigation by LDF and others, that these individuals were arrested in a drug

³³ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 66 F.R.D. 483, 484-85 (W.D.N.C. 1975).

³⁴ Henry J. Hyde, Op-Ed, *Why I Changed My Mind on the Voting Rights Act*, WASH. POST, July 26, 1981, at D7.

“sting,” based on the uncorroborated testimony of a single undercover agent who had a history of disciplinary misconduct.³⁵

VI. Documenting the Harm to Civil Rights

Our concerns about *Iqbal* and *Twombly* are not merely hypothetical. It is already evident from initial data, anecdotal evidence from practitioners, and our own qualitative monitoring of cases that these two Supreme Court decisions are impeding litigants from pursuing serious allegations of civil rights violations.

In one of the first of what we suspect will be numerous empirical assessments, Professor Patricia Hatamyar concluded that, holding other variables constant, the odds of a district court granting a motion to dismiss in the two years after *Twombly* was decided were 1.8 times greater—and in the four months after *Iqbal* was decided over four times greater—than under *Conley*’s notice pleading standard. In constitutional civil rights cases, the impact was particularly dramatic. In the two years prior to *Twombly*, the rate at which motions to dismiss were granted in such cases was an already high 50%. Post-*Twombly* but pre-*Iqbal*, the rate increased five percentage points to 55%. And in the four months after *Iqbal*, the rate increased to 60%.³⁶ Preliminary data from the Federal Judicial Center reveal a similar trend in civil rights cases. On average in the 11 months pre-*Twombly*, 27.8% of motions to dismiss were granted in civil rights employment cases, whereas in the 11 months post-*Iqbal*, 35.2% were granted—more than a seven percentage point increase. For other civil rights cases, the grant rate for motions to dismiss increased by 11 percentage points, from 25.9% to 36.9%.³⁷

Equally as significant, a forthcoming study by Professor Alex Reinert, who represented *Iqbal* in the Supreme Court, demonstrates that there is little correlation between sparsely pled complaints and lack of merit. Reinert reviewed federal appellate court decisions between 1990 and 1999 that reversed district courts’ improper dismissals under *Conley*’s liberal pleading standard. Although these cases would now be vulnerable to dismissal under *Iqbal* and *Twombly*, the plaintiffs were at least as successful on the merits as other litigants were during the same period.³⁸

³⁵ NATE BLAKESLEE, TULIA: RACE, COCAINE, AND CORRUPTION IN A SMALL TEXAS TOWN (2005).

³⁶ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010). Hatamyar acknowledges that there are limitations to her approach. For instance, her calculations of overall dismissal rates include cases where Rule 12(b)(6) motions were granted with leave to amend. Two other empirical analyses using similar methodologies have also documented the detrimental impact of the Court’s new heightened pleading standard on civil rights cases. See Joseph Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009); Kendall W. Hannon, *Much Ado About Twombly?: A Study of the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008).

³⁷ We calculated these figures using the Federal Judicial Center’s tables and graphs on motions to dismiss, updated through April 2010. See MOTIONS TO DISMISS: INFORMATION ON COLLECTION OF DATA (2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Motions_to_Dismiss_060110.pdf. These figures do not include motions denied in part and, thus, likely underestimate the impact of *Iqbal* and *Twombly*.

³⁸ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. ___ (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1666770.

At this early stage, however, it would be a mistake to focus solely on quantitative data to assess the implications of *Iqbal* and *Twombly*. We also need to look qualitatively at the newly announced plausibility standard as it has been applied in particular cases.

Some courts have candidly acknowledged that complaints that could have survived a motion to dismiss under *Conley* require dismissal under *Iqbal* and *Twombly*. For example, in *Kyle v. Holinka*, a Wisconsin district court initially allowed an African-American prisoner to challenge a policy of racially segregated cell assignments. The plaintiff alleged numerous statements by prison officials acknowledging this segregation policy, including one by a manager who stated, “This is the way we do it here.” There was no question that those officials were subject to suit. The dispute centered on whether the plaintiff should also be able to proceed against higher-ranking prison officials. The court first allowed the plaintiff’s claims against all of the defendants to proceed, but after *Iqbal*, it reconsidered its holding. Granting the higher-level officials’ motion to dismiss on the ground that the plaintiff failed to allege any facts showing that they implemented the discriminatory policy, the district court noted that the Supreme Court had “implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion.”³⁹

Another example is *Ocasio-Hernandez v. Fortuno-Burset*, a case filed by 14 former maintenance and domestic employees of the Puerto Rico governor’s mansion who claimed they were terminated due to their political affiliation. They were fired less than two months after a change in administration, and replaced by individuals belonging to the new governing party. The district court dismissed the plaintiffs’ political discrimination claims under 42 U.S.C. § 1983 on the ground that they had not alleged sufficient facts showing that the defendants knew of the plaintiffs’ political affiliation or that a causal connection existed between their affiliation and their termination.⁴⁰

The court wrote that its ruling was mandated by *Iqbal*, “although draconianly harsh to say the least.” It noted that defense counsel, who was experienced in political discrimination litigation, had not even filed a motion to dismiss under the pre-*Iqbal* standard and that the case had been fast-tracked for trial before *Iqbal* was decided. The court lamented:

[E]ven highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a [S]ection 1983 political discrimination suit without “smoking gun” evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstantial evidence needed to sustain the First Amendment allegations. . . . Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.⁴¹

³⁹ *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009).

⁴⁰ *Ocasio-Hernandez v. Fortuno-Burset*, 639 F. Supp. 2d 217, 223-24 (D. P.R. 2009).

⁴¹ *Id.* at 226 n.4.

Just as in *Ocasio-Hernandez*, other federal courts are now faulting plaintiffs for failing to plead facts that would be difficult, if not impossible, to obtain without the benefit of discovery. Consider, for instance, the case of Kevin Williams. Cleveland, Ohio, officials arrested him on charges in connection with a robbery and shooting at Double Exposure Deli. For eight months, they kept him in jail and continued to prosecute him, *even though* there was exculpatory videotape evidence that he was working as a janitor in a movie theater over ten miles away at precisely the moment when the shooting occurred. Prior to trial, all charges were dismissed against Williams based on the videotape and other evidence. Williams then sued the City of Cleveland and various officials alleging a violation of his constitutional rights. The district court acknowledged that Williams alleged facts sufficient to demonstrate that the City ignored exculpatory evidence in his case. Nevertheless, the court dismissed Williams' complaint against the City without even providing him an opportunity to amend because he "has not alleged facts from which it can be inferred that this conduct is recurring or that what happened in his case was due to City policy."⁴² To be sure, the district court accurately followed settled law that a city can be held liable for a constitutional rights violation only if the injury resulted from a municipal policy or custom;⁴³ but filling the evidentiary gaps that the court identified at the pleading stage would require precisely the sort of information that a victim of such a constitutional violation would rarely, if ever, be able to uncover without discovery.⁴⁴

Another category of cases reveal the difficulty that judges have had in applying the new plausibility standard without engaging in fact-finding and, thus, effectively displacing the critical role that a jury trial is supposed to play under our Constitution, laws, federal rules, and political traditions. For example, a district court in Arizona dismissed a complaint by Frank Vallejo, a Mexican-American disabled veteran who was turned away for lack of sufficient identification when he attempted to vote in a Tucson election. City officials conceded that they wrongfully denied Vallejo a provisional ballot as required by law. The key factual issue was whether or not this error was, as Vallejo alleged, the result of a discriminatory municipal practice or procedure; if that allegation proved true, the City could have been liable under the Voting Rights Act. Prior to *Iqbal* and *Twombly*, it had never been the case that a federal court was authorized to resolve such a contested issue at the pleading stage. Relying on these cases, however, the district court effectively made findings of fact in favor of the City that the failure to issue a provisional ballot "in no way affected the standard, practice, or procedure of the election."⁴⁵

As this case reveals, there are judges, as well as many Americans, who assume that intentional racial discrimination is unlikely to be a plausible explanation because it is such an aberration from 21st century societal norms. Evidence that can be gained through the discovery

⁴² *Williams v. City of Cleveland*, No. 1:09-1310, 2009 WL 2151778, at *1-2, *4 (N.D. Ohio July 16, 2009). For similar reasons, another district court recently dismissed a challenge to a jurisdiction's traffic stop policies while noting that it was "uncomfortable with [*Iqbal*'s] pleading standard as now applied, especially in the context of Section 1983 and municipal liability." *Hutchinson v. Metro. Gov't of Nashville & Davidson County*, 685 F. Supp. 2d 747, 752 (M.D. Tenn. 2010).

⁴³ See *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

⁴⁴ *Iqbal* may also limit the ability of plaintiffs to bring lawsuits against government officials in their capacity as supervisors—an issue that was not even briefed by the parties. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1957 (2009) (Souter, J., dissenting); see also *Dodds v. Richardson*, No. 09-6157, 2010 WL 3064002, at *15-19 (10th Cir. Aug. 6, 2010) (Tymkovich, J., concurring) (assessing *Iqbal*'s impact on the law of supervisory liability).

⁴⁵ *Vallejo v. City of Tucson*, No. CV-08-500 TUC DCB, 2009 WL 1835115, at *3 (D. Ariz. June 26, 2009).

process should be permitted once again to act as a necessary check on untethered judicial assessments of plausibility.

Of course, when judges draw on their experience and common sense, it does not always result in hostility towards civil rights. One example is a ruling by Judge Weinstein, whose criticism of the Supreme Court's heightened pleading standard we quoted above. Drawing upon his own judicial experience and common sense, as *Iqbal* requires him to do, Judge Weinstein denied the New York City Police Department's motion to dismiss two plaintiffs' allegations that they were falsely arrested, imprisoned, subjected to an illegal strip search, and maliciously prosecuted. Judge Weinstein's rationale for this decision was that "[i]nformal inquiry by the court and among the judges of this court, as well as knowledge of cases in other federal and state courts, has revealed anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department."⁴⁶ While Judge Weinstein's description may be accurate, it is disturbing that judges are now required to depart so substantially from the historical standard in which legal sufficiency was determined within the four corners of the complaint. Perhaps this was precisely the point that Judge Weinstein was making.

A prime example of the subjectivity of the newly-heightened pleading standard is a suit brought by the City of Baltimore against Wells Fargo. The City alleged that Wells Fargo engaged in predatory lending practices that led to a disproportionately high rate of foreclosure in the City's African-American communities that, in turn, caused financial harm to the City, including decreased property tax revenue and increased costs for boarding up and managing vacant properties. A federal judge denied Wells Fargo's motion to dismiss, concluding that the claims were "sufficiently plausible and grounded in fact to permit the case to proceed to full-fledged merits discovery."⁴⁷ Thereafter, however, the case was reassigned to another judge who disagreed with his predecessor. The new judge granted the bank's motion to dismiss the City's amended complaint, after concluding that the allegations of a "causal connection" between Wells Fargo's predatory practices and the "generalized type of damages claimed by the City" were implausible.⁴⁸

While our focus is on the civil rights areas in which we litigate, these are not the only types of cases in danger of unwarranted dismissal under the heightened pleading standard. *Iqbal*'s expansion of *Twombly* to all civil cases places in jeopardy innumerable personal injury and consumer cases, most of which require full development of the facts before facing a dispositive motion. For example, even in a straightforward slip-and-fall case, a district court dismissed a complaint as insufficient post *Iqbal*, holding that "the Plaintiff has failed to allege any facts that show how the liquid came to be on the floor, whether the Defendant knew or should have known of the presence of the liquid, or how the Plaintiff's accident occurred." This is a fact pattern that, as any first-year law student well knows, calls for at least limited discovery because the plaintiff typically has no other means of uncovering most of this information.

⁴⁶ Colon v. City of N.Y., Nos. 09-CV-8, 09-CV-9, 2009 WL 4263362, at *2 (E.D.N.Y. Nov. 25, 2009).

⁴⁷ Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 631 F. Supp. 2d 702, 704 (D. Md. 2009).

⁴⁸ Mayor & City Council of Baltimore v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 850 (D. Md. 2010). The City was granted leave to file a second amended complaint, which it has done. The new complaint focuses on specific damages suffered by the City in regard to specific houses that became vacant due to Wells Fargo's lending activities.

Nevertheless, the district court concluded that the complaint did not merit discovery in reliance upon *Iqbal*.⁴⁹

The detrimental impact of *Twombly*, and especially *Iqbal*, is increasingly apparent both in civil rights cases and more generally. Defense lawyers have not been shy about portraying *Iqbal* and *Twombly* as extremely favorable decisions for their clients, and there is evidence that defendants have become increasingly vigorous in their filing of motions to dismiss.⁵⁰ Thus, *Iqbal* and *Twombly* require plaintiffs to expend far more time and resources crafting their complaints. “Corporate America, conversely, has reason to be happy” especially because these cases “have helped companies fight investor claims arising from the recent market meltdown.”⁵¹

Moreover, a number of courts have applied *Twombly* and *Iqbal* to dismiss cases with prejudice, thereby foreclosing any opportunity to amend the complaint once more information is acquired.⁵² But even if civil rights plaintiffs are permitted to re-plead after a district court grants a motion to dismiss, it is often a pyrrhic victory when, as in many civil rights cases, critical information is within the exclusive possession of the defendant. At best, it delays the day when justice can be achieved in meritorious cases, and this is, in itself, an impediment for plaintiffs and a benefit for defendants. In addition, the new regime is becoming a factor when litigators assess which cases to file, and this may lead to a chilling effect for civil rights enforcement, which often depends upon private attorneys general for vindication.⁵³

VII. Substantial Uncertainty in *Iqbal*'s Wake

Iqbal and *Twombly* have also created uncertainty and doctrinal inconsistency in the federal courts. In particular, lower courts are struggling to reconcile *Iqbal* and *Twombly* with the Supreme Court's prior case law.

For instance, some courts have exhibited confusion about the impact of *Iqbal* on the Supreme Court's 2002 decision in *Swierkiewicz v. Sorema N.A.* The plaintiff in *Swierkiewicz* alleged that his employer discriminated against him because of his national origin and age. The district court dismissed the complaint on the ground that the plaintiff had not alleged facts supporting each element of a *prima facie* case of discrimination under the well-known burden-

⁴⁹ *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037, 2009 WL 2604447, at *2 (W.D. Va. Aug. 24, 2009). The plaintiff was permitted to amend her complaint to add further details, including the fact that one of the defendant's employees had just mopped the floor. *See* Amended Complaint, *Branham v. Dolgencorp, Inc.*, No. 6:09-CV-00037 (W.D. Va. Dec. 9, 2009). The defendant did not file a new motion to dismiss, and the parties ultimately settled. Whether this case represents a sensible application of a rule designed to deter costly or frivolous lawsuits or an unnecessary return to pleading formalism we leave our readers to decide.

⁵⁰ *See, e.g.*, Ashby Jones, *Why Defense Lawyers Are Lovin' the Iqbal Decision*, Law Blog, WALL STREET. J., May 19, 2009, <http://blogs.wsj.com/law/2009/05/19/why-defense-lawyers-are-lovin-the-iqbal-decision/>.

⁵¹ Nathan Koppel, *Wall Street Banks Feast on Twombly/Iqbal Rulings*, Law Blog, WALL STREET. J., May 19, 2009, <http://blogs.wsj.com/law/2010/09/10/wall-street-banks-feast-on-twomblyiqbal-rulings>.

⁵² *See, e.g.*, *Vallejo v. City of Tucson*, No. CV-08-500 TUC DCB, 2009 WL 1835115, at *2-4 (D. Ariz. June 26, 2009).

⁵³ Elizabeth J. Cabraser, Partner, Lief Cabraser Heinmann & Bernstein, LLP, ACS Convention Panel: Access to Federal Courts after *Iqbal* and *Twombly* (July 18, 2010), available at <http://www.acslaw.org/node/16380>.

shifting standard set forth in *McDonnell Douglas Corp. v. Green*.⁵⁴ In a unanimous decision by Justice Thomas, the Court expressly rejected this heightened pleading standard for employment discrimination cases. It held that a plaintiff need not allege specific facts establishing each element of a *prima facie* case to survive a motion to dismiss.⁵⁵

For several reasons, we believe *Swierkiewicz* remains good law. *Iqbal* did not even cite *Swierkiewicz*, and the Supreme Court has repeatedly insisted that it “does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.”⁵⁶ Moreover, *Twombly* explicitly distinguished *Swierkiewicz* and affirmed its continuing vitality.⁵⁷

While some courts have adopted this position,⁵⁸ others—including the U.S. Court of Appeals for the Third Circuit—have concluded that *Twombly* and *Iqbal* overruled *Swierkiewicz*.⁵⁹ This conclusion has already resulted in unwarranted dismissals of employment discrimination claims at the pleading stage, denying plaintiffs the opportunity to obtain discovery to support their allegations. For instance, in *Adams v. Lafayette College*, a 51-year-old man claimed discrimination under the Age Discrimination in Employment Act. Among his allegations was that he was penalized for minor infractions whereas younger employees were not. The district court “disregarded” these allegations as “legal conclusions” because they were “unsupported by any factual basis as to who these other comparators are, what comparable situations have arisen as between himself and those younger co-workers, and whether the alleged penalties or suspensions he has received are comparatively harsher than those of his colleagues.” While the district court was correct that, in this case, “[d]isparate treatment of otherwise similarly situated individuals [was] an integral facet of the employment discrimination claim,” identifying such individuals and their comparable experiences often cannot be accomplished without discovery, including access to the employer’s records and depositions of other employees.⁶⁰

It is also unsettled whether *Twombly* and *Iqbal* apply to affirmative defenses—although a majority of federal district courts have thus far held that they do.⁶¹ If *Twombly* and *Iqbal* do

⁵⁴ 411 U.S. 792 (1973).

⁵⁵ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

⁵⁶ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

⁵⁷ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007).

⁵⁸ See, e.g., *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at *3-4 (7th Cir. July 30, 2010) (affirming the “validity” of *Swierkiewicz*); *Rouse v. Berry*, 680 F. Supp. 2d 233, 236 (D.D.C. 2010) (disavowing any retreat from *Swierkiewicz* at least “[i]n the context of a fairly straightforward employment discrimination complaint”); *EEOC v. Propak Logistics, Inc.*, No. 1:09-cv-311, 2010 WL 3081339, at *4-5 (W.D.N.C. Aug. 6, 2010); *Gillman v. Inner City Broad. Corp.*, No. 08 Civ. 8909, 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009); *EEOC v. Scrub, Inc.*, No. 09 C 4228, 2009 WL 3458530, at *2 (N.D. Ill. Oct. 26, 2009); *EEOC v. Universal Brixius, LLC*, 264 F.R.D. 514, 515-17 (E.D. Wis. 2009).

⁵⁹ *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Cf. Thomas, *supra* note 24, at 18 (noting that *Swierkiewicz* “effectively may be dead”). More recently, however, another Third Circuit panel questioned *Fowler*’s analysis of *Swierkiewicz* and dismissed it as dicta. See *In re Ins. Brokerage Antitrust Litig.*, Nos. 08-1455, 08-1777, 07-4046, 2010 WL 3211147, at *9 n.17 (3d Cir. Aug. 16, 2010).

⁶⁰ *Adams v. Lafayette College*, No. 09-3008, 2009 WL 2777312, at *3, *4 (E.D. Pa. Aug. 31, 2009).

⁶¹ See, e.g., *Castillo v. Roche Labs., Inc.*, No. 10-20876-CIV, 2010 WL 3027726, at *2 (S.D. Fla. Aug. 2, 2010); *Francisco v. Verizon South, Inc.*, No. 3:09-cv-737, 2010 WL 2990159, at *6-8 (E.D. Va. July 29, 2010). But see,

apply, defendants would be compelled to make substantial additional investments in preparing their answers, because it is now commonplace to plead a laundry list of affirmative defenses in conclusory language with few, if any, supporting factual allegations. But to exempt defendants' answers from the new heightened pleading standard for complaints would only further institutionalize the disadvantages that *Iqbal* and *Twombly* have imposed upon plaintiffs in civil rights cases and other civil litigation.

Iqbal and *Twombly* may increase defendants' burden in another respect. In *Gordon v. City of Moreno Valley*, a federal district court denied a motion to dismiss claims by African-American barbershop operators that they were targeted for unusually aggressive administrative health and safety inspections based on their race. In so doing, the court emphasized the weakness of the defendants' alternative explanations proffered in an attempt to demonstrate that the complaint was implausible. For instance, defendants suggested that there were more African-American than white barbershops in the area, but the court noted that the pleadings contained no facts to support that assertion and defendants failed to offer such facts in their briefing.⁶²

Another area of uncertainty has resulted from the Supreme Court's failure to give substantive content to the plausibility standard set forth in *Iqbal* and *Twombly*. In a decision denying dismissal of a former state prisoner's claim that officials failed to properly investigate and protect her from numerous sexually abusive encounters with a prison guard, a federal district court judge in Massachusetts ruled that "a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible."⁶³ And the Seventh Circuit recently opined that the key question is whether the plaintiff "give[s] enough details about the subject-matter of the case to present a story that holds together."⁶⁴ We think these cases provide the correct reading of *Iqbal* and *Twombly*, but they are by no means the consensus view and the standard is sufficiently malleable that dismissal results will vary widely.⁶⁵

Especially while the law remains unsettled on these and other points, practitioners should aggressively resist motions to dismiss because, as it is important to emphasize, *Twombly* and *Iqbal* do not guarantee an adverse outcome, and indeed some courts have limited their reach. Still, the informational asymmetries and subjectivity of the plausibility pleading standard present obstacles that even the most sophisticated civil rights litigator will have difficulty surmounting.

e.g., *McLemore v. Regions Bank*, Nos. 3:08-cv-0021, 3:08-cv-1003, 2010 WL 1010092, at *13 (M.D. Tenn. Mar. 18, 2010) ("*Twombly* and *Iqbal* did not change the pleading standard for affirmative defenses.").

⁶² *Gordon v. City of Moreno Valley*, 687 F. Supp. 2d 930, 944-45 (C.D. Cal. 2009).

⁶³ *Chao v. Ballista*, 630 F. Supp. 2d 170, 177 (D. Mass. 2009).

⁶⁴ *Swanson v. Citibank, N.A.*, No. 10-1122, 2010 WL 2977297, at *3 (7th Cir. July 30, 2010).

⁶⁵ *See id.* at *5-11 (Posner, J., dissenting). It also remains to be seen whether state courts will apply *Iqbal* and *Twombly* to heighten state pleading standards. *See McCurry v. Chevy Chase Bank*, 233 P.3d 861, 863-64 (Wash. 2010) (declining to adopt the "drastic change in court procedure" of revising Washington state pleading standards to align with *Iqbal* and *Twombly*).

VIII. Encroachments on Congress and the Rulemaking Process

In *Iqbal* and *Twombly*, the Supreme Court also usurped by judicial fiat the deliberative and inclusive process that Congress has established under the Rules Enabling Act for amending the Federal Rules.⁶⁶ A broad coalition, ranging from civil rights groups like LDF to religious freedom advocates like the Alliance Defense Fund, has mobilized to urge Congress to resist this encroachment on its own prerogatives and the rule-making process that it has established. Congressional intervention to restore the liberal notice pleading standard that governed prior to *Iqbal* and *Twombly* would be entirely consistent with other actions that legislators have taken over the years to promote access to the courts for civil rights litigants—for example, through the creation of private rights of action and fee-shifting statutes to encourage legal representation.

In Congress, momentum is building for a restoration of *Conley*'s liberal notice pleading standard. A bill was introduced in the Senate in July 2009, with Senator Arlen Specter (D-PA) as the lead sponsor. Companion legislation was introduced in the House of Representatives in November 2009 by Representative Jerrold Nadler (D-NY).⁶⁷ Hearings have been held in both the Senate and the House.⁶⁸

Opponents of these bills contend that Congress should wait until the impact of *Twombly* and *Iqbal* becomes clearer. But, as we explained above, there is already qualitative and quantitative evidence that the newly-heightened pleading standard has inhibited victims of discrimination from vindicating their civil rights. Certainly, further empirical analysis should be encouraged, and it is for this reason that the bills pending in Congress not only restore *Conley*'s pleading standard but also permit amendments through the deliberative rulemaking process set forth under the Rules Enabling Act. In the meantime, civil rights litigants should not bear the burden while any changes to long-standing pleading rules are being assessed.⁶⁹ The pending bills, therefore, restore the *Conley* status quo so that, while further review is underway, litigants are free of uncertainty and the opportunity for plaintiffs to enter the courthouse is undiminished.⁷⁰

⁶⁶ 28 U.S.C. §§ 2071 *et seq.* (2006).

⁶⁷ The House bill is the Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009). The Senate bill is the Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009).

⁶⁸ *Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009); *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009); *Hearing on H.R. 4115, the Open Access to Courts Act of 2009, Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2009).

⁶⁹ Consider that even the recently enacted Lilly Ledbetter Fair Pay Act, which successfully overturned an adverse Supreme Court decision, did not alleviate the high cost of the denial of any personal redress to Ledbetter herself for the pay discrimination she experienced. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *abrogated by Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)).

⁷⁰ *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 7-9, 84-113 (2009) (statement of Stephen B. Burbank, Professor, Univ. of Pa. Law Sch.); Clermont & Yeazell, *supra* note 24, at 850-59. Not only did the Court short-circuit the traditional rule-making process, but it also entirely ignored that, through this process, amendments to the liberal pleading standard that governed prior to

This approach makes sense because the benefits of plausibility pleading remain in doubt. A primary concern animating *Iqbal*, *Twombly*, and their defenders is the alleged burden imposed on defendants when a district court denies a motion to dismiss and permits potential victims of discrimination to obtain discovery. We do not discount that there are cases, small in number but large in stakes, where discovery can become protracted and costly. But Professor Miller has aptly noted that “[f]or the great body of federal litigation, *Twombly-Iqbal*’s medicinal cure may be far worse than the supposed disease.”⁷¹

First, the new plausibility standard, even on its most favorable reading, overcorrects for concerns about defendants’ discovery burdens. In a recent survey, the Federal Judicial Center determined that median expenditures for discovery, including attorneys fees, were relatively small, ranging from 1.6% to 3.3% of the client’s stake in the case. In this study, a majority of lawyers also reported that, in the average case, the costs of discovery were not excessive in proportion to their clients’ stakes in the case and that discovery costs had “no effect” on the likelihood of settlement.⁷² Additionally, it is important to note that the costs of discovery in high-stakes cases can be affected by delay or obstructionist tactics by defendants. Eliminating the opportunity for discovery through a heightened pleading standard does not address such non-cooperative defendant conduct.

Second, federal judges have proven quite capable of dealing with the vast majority of frivolous lawsuits through robust case management. *Iqbal* and *Twombly* deprive federal courts of the flexibility to allow potentially meritorious claims to proceed because they require an all-or-nothing decision at the pleading stage. By contrast, effective use of case management tools permits courts to provide protection for defendants while allowing plaintiffs some discovery to facilitate assessment of the merits of their claims. For instance, Justice Breyer noted in his *Iqbal* dissent that the “phased discovery” approach, which had been endorsed by the Second Circuit below and has been utilized by other courts in similar circumstances, could have addressed concerns about excessive burdens on Ashcroft and Mueller; the district court initially could have restricted discovery to lower-level government defendants and then subsequently determined, based on the material that the plaintiff obtained, whether there were sufficient grounds to warrant discovery from high-level defendants.⁷³

Iqbal and *Twombly* have been repeatedly considered and rejected. See Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1751-52 n.18 (1998).

⁷¹ *Access to Justice Denied: Hearing on Ashcroft v. Iqbal Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 24 (2009) (statement of Arthur R. Miller, Professor, N.Y.U. Sch. of Law).

⁷² EMORY G. LEE, III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), available at [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). A subsequent Federal Judicial Center survey identified more mixed perceptions among attorneys about the costs of discovery but, unlike the prior study, it was not supported by statistical evidence of costs in particular cases. See EMORY G. LEE, III & THOMAS E. WILLGING, FEDERAL JUDICIAL CENTER, ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2010), available at [http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/\\$file/costciv2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv2.pdf/$file/costciv2.pdf).

⁷³ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1961-62 (2009) (Breyer, J., dissenting).

The Federal Rules provide a variety of other effective tools for ascertaining whether a plaintiff had sufficient evidence to warrant proceeding to trial. For instance, Rule 11 requires certain representations, subject to sanction, about the legitimacy of claims and the likely evidentiary support which will follow from discovery. Rule 12(e) provides defendants with an opportunity to file a motion for a more definite statement when a plaintiff's complaint is "so vague or ambiguous that a party cannot reasonably prepare a response." Rule 16 allows federal trial judges to use status conferences and strict timetables to shape the pretrial process. Under Rule 26, discovery normally may not proceed until the parties have adopted or the judge has ordered a discovery plan. And of course, Rule 56 remains available to parties who wish to seek resolution of a case prior to expending the resources associated with taking it to trial. Litigants have successfully employed these devices for decades. Congress should be loath to allow an end-run around these established procedures, particularly one that jeopardizes its longstanding legislative goal of robust enforcement of civil rights laws.

Third, on the other side of the ledger, the costs of plausibility pleading for plaintiffs and society at large cannot be discounted. As we explained above, a heightened pleading standard comes at the expense of a key pillar of our democracy: the guarantee of ready access to the courts. As Congress and the courts have repeatedly recognized, significant public benefits result when ordinary citizens pursue litigation that boldly defends and enhances civil rights. Professor Bone perceptively posits:

If constitutional rights protect important moral interests, then the harm from failing to vindicate a valid constitutional claim must be measured in moral terms too. This means that the cost side of the policy balance includes moral harms, and moral harms must be accorded great weight.⁷⁴

In the wake of *Iqbal* and *Twombly*, plaintiffs have been compelled to increase the length and detail of their complaints, investing in expensive investigations to track down factual details before discovery is available. Defendants are forced to respond in kind.⁷⁵ Satellite litigation over the tactics investigators use and the propriety of contact with whistleblowers and confidential sources will likely only increase. Proposed fixes within the existing Federal Rules, such as encouraging pre-suit discovery,⁷⁶ could be ameliorative, but they are not a substitute for a legislative fix because they are unlikely to adequately and consistently address the problem of information asymmetry in complex cases and eliminate the dangerous subjectivity that plausibility pleading has interjected into civil litigation, with its particularly detrimental impact for civil rights plaintiffs.

⁷⁴ Bone, *supra* note 26, at 879.

⁷⁵ 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).

⁷⁶ See, e.g., Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010); Edward A. Harnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473 (2010).

IX. Conclusion

For five decades, when reviewing a complaint for sufficiency, courts were directed to view allegations in the complaint in the light most favorable to the plaintiff and draw all reasonable inferences in her favor. The Supreme Court's new plausibility pleading standard undermines these presumptions and gives the benefit of the doubt to the defendant. And with each passing day, courts are using *Iqbal* and *Twombly* to turn away potentially meritorious claims—without the benefit of any fact-finding.

Simply put, the costs to civil rights are too great if Congress does nothing to address this harmful new development that has not only “revolutionized the law on pleading” but also “destabilized the entire system of civil litigation.”⁷⁷ Time and again, Congress has acted to encourage individuals to serve as private attorneys general and to robustly enforce constitutional and statutory rights. At this critical juncture in our nation's history, we are hopeful that Congress will recognize that immediate steps are necessary to reaffirm in the clearest terms that, as Rule 8(e) emphasizes, “[p]leadings must be construed so as to do justice.”

⁷⁷ Clermont & Yeazell, *supra* note 24, at 823.