Evolutionary Pleading: Should Congress Override the Supreme Court’s Unnatural Selection in Ashcroft v. Iqbal to Prevent the Extinction of Civil Rights Cases?

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ABSTRACT

There are few issues in civil-procedure jurisprudence more significant than pleading standards, which are the key to accessing the courts. In the last three years, the United States Supreme Court revolutionized civil practice and procedure in federal courts. First in Bell Atlantic Corp. v. Twombly, the Supreme Court introduced the now-famous plausibility test to determine the sufficiency of a complaint, causing widespread speculation as to whether the era of notice pleading had come to an end. However, the Supreme Court did not leave the public questioning for long, as Ashcroft v. Iqbal ended all subsequent debate—the seventy-year-old notice-pleading regime is officially over. In its stead, the Iqbal majority instituted an entirely new standard that places additional barriers before claimants at the steps of federal court.

Almost immediately, a flood of doomsday predictions ensued concerning the future of civil actions under the new heightened pleading standard announced in Iqbal. Among these predictions were claims that specific types of cases would be targeted and dismissed more easily under the Iqbal pleading standard. Recent scholarship has paid particular attention to how Iqbal will impact civil rights cases considering the

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enhanced role given to judges under *Iqbal*, the increased likelihood of meritorious civil rights claims being dismissed, the consequent reduction of court access to civil rights plaintiffs, and the potential windfall discriminators will enjoy due to *Iqbal*’s heightened pleading standard. One scholar has even deemed *Iqbal* unconstitutional.

In light of *Iqbal*’s dramatic impact on civil rights cases, this Note calls for congressional action. Using case law and recent empirical data, this Note illustrates how civil rights cases presently face the threat of extinction due to the new strict requirements of the *Iqbal* standard. Because of the importance of civil rights claims as the enforcement mechanism for constitutional guarantees of due process and equal protection, congressional action to ensure their survival is imperative.

As a separate justification for congressional override, this Note also takes issue with the *Iqbal* majority’s unnatural selection—the Supreme Court drafted an entirely new rule to govern pleadings instead of going through the rulemaking process established by the Rules Enabling Act. As a result, the *Iqbal* Court circumvented the benefits and safeguards provided by the Rules Enabling Act. Moreover, the *Iqbal* majority abrogated over fifty years of Supreme Court precedent in order to make room for their new rule. This Note thus calls for congressional action to reverse the fundamental errors permeating the *Iqbal* decision, as the Court exceeded its judicial power to interpret federal rules and unjustifiably abandoned Supreme Court precedent and the doctrine of stare decisis.

**INTRODUCTION**

According to Charles Darwin’s theory of Natural Selection, organisms in competition with one another engage in a struggle for survival resulting in a progressively more advanced species.\(^1\) Darwin hypothesized that this struggle is the inevitable result of limited resources and an ever-increasing population.\(^2\) Since the final result of this struggle can be quite severe, the extinction of an entire species, every advantage is significant.\(^3\) At least superficially, this system of competition appears just and fair because all must compete with the same access to resources and chances of survival.\(^4\) However, the process of natural selection would be very unnatural if, for example, nature suddenly gave

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2. See id. at 220-21.
4. See id. at 109-12.
one organism an advantage to the significant detriment of a different species—ultimately leading to its extinction. Although nature does not tend to behave this way, mankind has been known to make such forms of selection.5

In the last three years, the U.S. Supreme Court revolutionized civil practice and procedure in federal courts.6 First, in Bell Atlantic Corp. v. Twombly,7 the Supreme Court introduced the now-famous plausibility test8 to determine the sufficiency of a complaint, causing widespread speculation as to whether the era of notice pleading9 had come to an end.10 However, the Supreme Court did not leave the public questioning for long, as Ashcroft v. Iqbal11 ended all subsequent debate—the seventy-year-old notice-pleading regime is officially over.12 In its stead, the Iqbal majority instituted an entirely new standard that focuses on the factual basis of a complaint rather than whether it gives notice to the defendant of the legal claims involved.13 Unfortunately, Twombly’s plausibility test was just the beginning; the Iqbal Court further heightened pleading such that the meaning of Rule 8 of the Federal Rules of Civil Procedure14 (“Civil Rules”)

5 See id. at 49-50.
8 See Ruth Bader Ginsburg, Assoc. Justice, Supreme Court of the United States, Remarks for Second Circuit Judicial Conference (June 12, 2009) (“Under Twombly, a plaintiff must ‘allege facts’ that, taken as true, state a ‘plausible’ basis for relief.”).
9 See Conley v. Gibson, 355 U.S. 41, 47 (1957) (providing that Rule 8(a) of the Federal Rules of Civil Procedure only requires a plaintiff to “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests”).
13 See 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. 6 (2009) (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense & Education Fund, Inc.) (“In contrast to Conley’s ‘fair notice’ requirement, the stricter plausibility pleading standard in Iqbal and Twombly compels plaintiffs to provide more of an evidentiary foundation to substantiate their claims in order to withstand a defendant’s motion to dismiss.”).
14 FED. R. CIV. P. 8(a)(2) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”).
has been effectively revised to a much stricter rule that demands more factual support under the threat of dismissal.\textsuperscript{15}

Almost immediately, a flood of doomsday predictions ensued concerning the future of civil actions under the new heightened pleading standard announced in \textit{Ashcroft v. Iqbal}.\textsuperscript{16} Among these predictions were claims that specific types of cases would be targeted and dismissed more easily under the \textit{Iqbal} pleading regime.\textsuperscript{17} Recent scholarship has paid particular attention to how \textit{Iqbal} will impact civil rights cases\textsuperscript{18} considering the relatively recent trend in limiting access to the federal-court system.\textsuperscript{19}

More specifically, academics are concerned with the enhanced role given to judges under \textit{Iqbal},\textsuperscript{20} the increased dismissal of potentially meritorious civil rights claims,\textsuperscript{21} the consequent reduction of court access and trial to civil rights plaintiffs,\textsuperscript{22} and the potential windfall discriminators will enjoy due to \textit{Iqbal}’s heightened pleading standard.\textsuperscript{23} One scholar has even deemed

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\textsuperscript{15} See infra Part II.A.

\textsuperscript{16} See Mauro, supra note 12. The \textit{Iqbal} decision has drawn criticism from numerous legal experts and scholars. \textit{id.} For example, Carl Tobias, professor at the University of Richmond School of Law commented, “Judges will have more discretion to dismiss cases earlier.” \textit{id.}


\textsuperscript{18} Under 42 U.S.C. § 1983 (2006), an individual may sue a state official for violating his rights under the United States Constitution or federal law while acting under color of state law. \textit{ERWIN CHEMERINSKY, FEDERAL JURISDICTION} § 8.1, at 480 (5th ed. 2007).

\textsuperscript{19} See, e.g., Levin, supra note 12, at 146; Arthur R. Miller, \textit{From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure}, 60 DUKE L.J. 1, 14 (2010) (identifying \textit{Iqbal} as part of a recent trend in Supreme Court jurisprudence limiting access to federal court).


\textsuperscript{21} See, e.g., Dodson, supra note 10, at 52-53; Suzette M. Malveaux, \textit{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, 101 (2010).

\textsuperscript{22} See, e.g., Levin, supra note 12, at 145, 148.

\textsuperscript{23} See, e.g., Howard M. Wasserman, \textit{Iqbal, Procedural Mismatches, and Civil Rights Litigation}, 14 LEWIS & CLARK L. REV. 157, 161 (2010) (arguing that civil rights enforcement will decrease after \textit{Iqbal}).
Iqbal unconstitutional. 24

Federal judges have also recognized Iqbal’s “chilling impact” by
the Supreme Court instituted a
new harsh pleading standard that cannot be reconciled with the
language of Rule 8 and because, in application, civil rights cases
are being dismissed at an unprecedented rate. As such, Part II.A
discusses the new pleading
rule and Part II.B illustrates Iqbal’s impact on civil rights cases using
recent

24 Suja A. Thomas, The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly, 14 LEWIS
& CLARK L. REV. 15, 38 (2010); see Kenneth S. Klein, Ashcroft v. Iqbal Crashes Rule 8 Pleading onto Unconstitutional
jurisprudence and arguing that the holding in Iqbal renders Rule 8 of the Federal Rules of Civil Procedure
unconstitutional in certain circumstances).

25 See, e.g., Arar v. Ashcroft, 585 F.3d 559, 615-16, 619 (2d Cir. 2009) (Parker, J., dissenting) (noting that Iqbal
endangers “a broad swath of civil rights plaintiffs” as it is an “impossible pleading standard inconsistent with Rule 8”);
(“A good argument can be made that the Iqbal standard is too demanding. . . . District judges, however, must follow
the law as laid down by the Supreme Court.”).

26 See Suzette M. Malveaux, Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation, 74 GEO.

27 See, e.g., Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. § 2(a) (2009); Notice
Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009); Hearing on Whether the
Supreme Court Has Limited Americans’ Access to Court Before the S. Comm. on the Judiciary, 111th
Cong. 1 (2009) [hereinafter Hearing] (statement of Stephen B. Burbank, David Berger Professor
senate.gov/pdf/12-02-09%20Burbank%20Testimony.pdf; Kevin M. Clermont & Stephen C.

case law and empirical data.

As a separate justification for congressional override, Part III takes issue with the *Iqbal* majority’s unnatural selection—the Supreme Court drafted an entirely new rule to govern pleadings instead of going through the rulemaking process established by the Rules Enabling Act. With this, the *Iqbal* majority selected to abrogate over fifty years of Supreme Court precedent in order to make room for their new rule. Part III.A therefore argues that Congress should override *Iqbal* because the Supreme Court exceeded its judicial power in drafting a new pleading rule itself rather than through the Enabling Act process. As a result, the *Iqbal* Court circumvented the benefits and safeguards provided by the Rules Enabling Act.29 Part III.B illustrates how the *Iqbal* decision is an unjustifiable abandonment of Supreme Court precedent worthy of congressional override.

I. Background: A Summary of Ashcroft v. *Iqbal*30

A. Facts and Procedural History

1. Facts

Following a criminal arrest and detention by federal officials in the wake of the September 11, 2001 terrorist attacks, Mr. Javaid *Iqbal* (“*Iqbal*”), a citizen of Pakistan and a Muslim, filed a *Bivens* action31 against numerous federal officials.32 The United States Department of Justice had launched a vast investigation composed of more than 4,000 agents to identify potential threats within the country, and due to their efforts and leads from the public, 184 individuals including *Iqbal* were classified as persons of “high interest.”33 These individuals were detained in the Metropolitan Detention Center (“MDC”) in Brooklyn, New York, specifically within the

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29 See infra Part III.A.


33 *Id.* at 1943.
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Administrative Maximum Special Housing Unit ("ADMAX SHU").

The complaint, containing twenty-one counts, focused specifically on Iqbal’s treatment while detained at ADMIAX SHU including claims of cruel and inhumane treatment, use of excessive force by MDC staff, strip and body-cavity searches, and denial of essential medical care. Furthermore, Iqbal alleged numerous constitutional claims including violations of his First Amendment right to freedom of religion (jailors unjustifiably interfered with Iqbal’s religious expression), Fourth Amendment right to be free from unreasonable searches (unwarranted strip and body-cavity searches), Fifth Amendment right to due process (continued confinement without subsequent hearings), Sixth Amendment right to counsel (prison officials prevented Iqbal from communicating with his criminal attorney), and Eighth Amendment right to be free from cruel and unusual punishment (assault and battery, serial strip and body searches).

The defendants in the underlying case included thirty-four federal officials and nineteen unknown federal correctional officers. However, Iqbal’s allegations against Robert Mueller ("Mueller"), the Director of the Federal Bureau of Investigation, and John Ashcroft ("Ashcroft"), the United States Attorney General, for their supervisory role in his incarceration, were the sole issues before the Supreme Court in Ashcroft v. Iqbal.

2. Procedural History

In response to Iqbal’s complaint, the defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), asserting the defense of qualified immunity and arguing that Iqbal failed to allege enough facts to

34 Id.
35 Originally, Mr. Ehab Elmaghraby filed suit with Iqbal but later settled with the United States for $300,000. Iqbal v. Hasty, 490 F.3d 143, 147 (2d Cir. 2007). Thus, Iqbal was the only remaining claimant on appeal. See id.
37 See Iqbal, 129 S. Ct. at 1943-44; Complaint, supra note 36, at 10-13, 15-17, 19-21; Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 854 & n.22 (2009).
38 Iqbal, 129 S. Ct. at 1943.
40 Rule 12(b)(6) challenges the sufficiency of a complaint as failing "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).
support a claim of unconstitutional conduct.\textsuperscript{41} The U.S. District Court for the Eastern District of New York denied the defendants’ motion by rejecting their argument for imposing a heightened pleading standard when resolving claims of federal immunity, and held that Iqbal’s complaint was sufficient pursuant to Conley v. Gibson, Swierkiewicz v. Sorena N.A., and Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.\textsuperscript{42}

The defendants filed an interlocutory appeal under the collateral-order doctrine\textsuperscript{43} in the United States Court of Appeals for the Second Circuit.\textsuperscript{44} While the defendants awaited appeal, the Supreme Court decided Twombly, and accordingly, the Second Circuit addressed at great length its applicability to Iqbal’s claims.\textsuperscript{45} First, the Second Circuit noted that Twombly created “[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings.”\textsuperscript{46} Secondly, in an effort to reconcile Twombly with Leatherman and Swierkiewicz, the court held that Twombly did not establish a new universal heightened pleading requirement, but instead instituted a “flexible ‘plausibility standard’” calling for a pleader to “amplify” a claim with additional facts only in specific contexts such as antitrust lawsuits.\textsuperscript{47} In application, the Second Circuit determined that Iqbal’s claim did not require amplification, and consequently, his complaint sufficiently alleged Ashcroft and Mueller’s personal involvement in discriminatory decisions involving Iqbal’s detainment.\textsuperscript{48}

Judge José Cabranes wrote a concurring opinion requesting the Supreme Court to consider, “at the[ir] earliest opportunity,” addressing the discord between recent Court precedents involving Rule 8.\textsuperscript{49} In reply, the Supreme Court granted certiorari.\textsuperscript{50}

\textsuperscript{41} See Iqbal, 129 S. Ct. at 1944.

\textsuperscript{42} Elmaghraby v. Ashcroft, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *11-12 (E.D.N.Y. Sept. 27, 2005); see Iqbal, 129 S. Ct. at 1944. The court applied Conley because Twombly had not yet been decided. Bone, supra note 37, at 855. For a discussion of these Supreme Court decisions see infra Part III.B.1.

\textsuperscript{43} The collateral-order doctrine allows a “small class” of lower court decisions immediate appeal even though they are not final judgments. Behrens v. Pelletier, 516 U.S. 299, 305 (1996).

\textsuperscript{44} Iqbal, 129 S. Ct. at 1944.


\textsuperscript{46} Id. at 155.

\textsuperscript{47} See id. at 155-58; Thomas D. Rowe, Jr. et al., Civil Procedure 57 (2d ed. 2008).

\textsuperscript{48} Hasty, 490 F.3d at 175-76. The Second Circuit did, however, reverse the district court’s decision regarding Iqbal’s procedural due process claim. Id. at 177-78.

\textsuperscript{49} See id. at 178-79 (Cabranes, J., concurring).

\textsuperscript{50} Ashcroft v. Iqbal, 128 S. Ct. 2931, 2931-32 (2008).
B. Making History by Making a New Rule: The Supreme Court’s Decision

The Supreme Court reversed the Second Circuit in a five-to-four decision. The majority began by noting the elements Iqbal must have pled in order to state a claim of unconstitutional discrimination against government officials who were entitled to assert qualified immunity. For claims brought under Bivens or § 1983 against high-level government officials, like Ashcroft and Mueller, the Court held that the doctrine of respondeat superior did not apply, and consequently, claimants must plead facts showing that each individual defendant purposely discriminated.

The Court then laid out federal pleading requirements under Rule 8(a)(2) and Twombly in a “two-pronged approach.” The first part of the analysis is to identify and distinguish the “factual allegations” from the “legal conclusions.” “Legal conclusions” are those “threadbare” allegations or “formulaic recitations” of legal elements without “factual enhancement”; these are not entitled to the assumption of truth. After all “legal conclusions” are extrapolated, the remaining facts are taken as true for the purposes of determining whether the claimant has sufficiently pleaded all elements of the legal claim.

The second prong of the test analyzes the remaining factual allegations to determine whether the claimant alleged a plausible claim. This assessment is performed by a court drawing from “judicial experience” and “common sense” as to whether there is enough factual material to plausibly show that the defendant is liable for the alleged conduct. Mere possibility is not enough.

In application, the Court held that Iqbal failed to “nudge” his constitutional claims against Ashcroft and Mueller across the line from

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52 Id. at 1947.
53 Respondeat superior is “[t]he doctrine holding an employer or principal liable for the employee’s or agent’s wrongful acts committed within the scope of the employment or agency.” BLACK’S LAW DICTIONARY 1426 (9th ed. 2009).
54 Iqbal, 129 S. Ct. at 1948-49; see Bone, supra note 37, at 856-57.
56 Bone, supra note 37, at 857.
57 Id. at 859; see Iqbal, 129 S. Ct. at 1949-50.
58 Iqbal, 129 S. Ct. at 1949-50.
59 See id.
60 See id. at 1950.
61 Id. at 1949-50; see Bone, supra note 37, at 873 & n.115.
possible to plausible.63 Under the first prong of the test, the Court found that two of Iqbal’s allegations were conclusory64: (1) “Defendants Ashcroft [and] Mueller . . . each knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to [harsh] conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest”65 and (2) “Defendant John Ashcroft . . . [was the] principal architect of the[se] policies . . .”66 and “Mueller . . . was instrumental in the adoption, promulgation, and implementation of the[se] policies . . .”67

As a result, these statements were not entitled to the assumption of truth and were thus excluded from the Court’s analysis of whether Iqbal’s claims against Ashcroft and Mueller were plausible.68 The remainder of Iqbal’s allegations were deemed “factual” and assumed to be true.69 With Iqbal’s essential allegations expunged,70 the majority held that Iqbal’s complaint did not contain enough facts to plausibly show that Ashcroft and Mueller purposely arrested and detained individuals based on their race, religion, or national origin.71

In closing, the majority addressed and struck down Iqbal’s chief arguments.72 Iqbal asserted that the plausibility test should be reserved solely for antitrust lawsuits or cases involving potentially high discovery costs because Twombly appeared to depart from prior precedent.73 The Court disagreed and held that the plausibility test, rooted in Twombly’s interpretation of Rule 8, and expounded upon in Iqbal, applies to “all civil actions and proceedings in the United States district courts.”74

Iqbal also argued that the Civil Rules allow him to plead discriminatory intent “generally” pursuant to Rule 9(b) and therefore his

63 Id. at 1950-51.
64 Id. at 1951; Bone, supra note 37, at 857.
65 First Amended Complaint, supra note 39, at 17-18.
66 Id. at 4.
67 Id. at 4-5.
68 See Iqbal, 129 S. Ct. at 1951.
69 See id. Iqbal additionally alleged that Ashcroft and Mueller approved and adopted a policy of arresting and detaining thousands of Arab Muslim men after the 9/11 attacks. Id.; First Amended Complaint, supra note 39, at 10, 13-14.
70 Bone, supra note 37, at 857.
71 Iqbal, 129 S. Ct. at 1952.
72 See id. at 1952-54.
complaint was sufficiently well-pleaded. Again, the majority rejected this argument and held that although Rule 9 permits pleading discriminatory intent generally, a claimant may not plead conclusory allegations contrary to Rule 8. Thus, the Court held that Iqbal failed to plead sufficient facts to state a claim of unconstitutional discrimination and remanded the case to the Second Circuit to decide whether to grant Iqbal leave to amend his complaint.

II. Survival of the Fittest: The Need for Congressional Override to Ensure the Survival of Civil Rights Cases After Ashcroft v. Iqbal

A. The Iqbal Majority Drafted a New Heightened Pleading Rule.

Based from the support of only five justices—“the slimmest majority”—the Iqbal Rule was established. Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. Tellingly, Justices Souter and Breyer were also both in the Twombly majority. In fact, Justice Souter wrote the majority decision in Twombly. The composition of the Iqbal dissent alone suggests that Iqbal is not simply a “straightforward application of Twombly,” but the institution of an entirely new Civil Rule.

Under Iqbal, pleading a short and plain statement is no longer simple. Contrary to the popular mantra, “judges should ‘interpret the law, not legislate from the bench,’” the Iqbal majority instituted a new, two-prong pleading standard. In doing so, the Court brought about a major evolutionary change in Rule 8, a hybrid test that utilizes ancient code pleading analysis and the Twombly plausibility test. More than this, the Iqbal majority heightened the Twombly plausibility test by implementing

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75 See Iqbal, 129 S. Ct. at 1954; Brief for Respondent, supra note 73, at 32.
76 See Iqbal, 129 S. Ct. at 1954; Blumstein, supra note 74, at 24.
79 Iqbal, 129 S. Ct. at 1954 (Souter, J., dissenting).
80 Bone, supra note 37, at 858.
81 Id.
82 Id.
83 See Levin, supra note 12, at 143 (predicting interpretative problems with the new Iqbal rule).
84 Ruth Marcus, Obama’s Nuanced Understanding of Judges, REAL CLEAR POLITICS (May 6, 2009), http://www.realclearpolitics.com/articles/2009/05/06/behind_the_blindfold_96349.html.
85 See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1955 (Souter, J., dissenting); infra Part II.A.1-3.
86 See Bone, supra note 37, at 859; Dodson, supra note 10, at 50.
new barriers\textsuperscript{87} for claimants to overcome before gaining access to court.\textsuperscript{88}

1. The Supreme Court Revised Rule 8 by Reinstating Code Pleading.

The \textit{Iqbal} test begins by inquiring as to which allegations in the complaint are legal conclusions and which are substantively factual.\textsuperscript{89} This determination is distinctively original to \textit{Iqbal} and is not found in \textit{Twombly}.\textsuperscript{90} Known as code pleading, this mode of analysis is not, however, unprecedented; it is deeply rooted in history as one of America’s original pleading standards.\textsuperscript{91} However, due to difficulties with application, the drafters of the Civil Rules ultimately abandoned this system altogether.\textsuperscript{92}

The drafters rejected code pleading because of two serious flaws: it is virtually impossible to distinguish between legal conclusions and factual allegations in practice, and secondly, the primary focus of the code pleading system is to keep litigants out of court.\textsuperscript{93} \textit{Iqbal}’s complaint, for example, alleged that federal officials discriminated against him based on his race, religion, and national origin and further, that Ashcroft and Mueller were knowingly and deliberately indifferent to the discrimination.\textsuperscript{94} Without explaining how to distinguish between factual allegations and legal conclusions, the majority decided that these allegations were conclusory.\textsuperscript{95} Justice Souter, however, found them to be sufficiently factual.\textsuperscript{96} Moreover, Justice Souter found the majority’s determination illogical and plainly contradictory to their treatment of

\textsuperscript{87} Professor Robert G. Bone refers to \textit{Iqbal}’s insistence on great factual specificity as the “thick screening model.” See Bone, supra note 37, at 852.

\textsuperscript{88} See Taylor Consultants, Inc. v. United States, 90 Fed. Cl. 531, 538 n.2 (2009) (“\textit{Iqbal} . . . place[s] a high burden on a plaintiff at the pleading stage . . . “); Bone, supra note 37, at 869 (“The two-pronged approach facilitates overly aggressive screening at the pleading stage.”); infra Part II.B.

\textsuperscript{89} Bone, supra note 37, at 857; see \textit{Iqbal}, 129 S. Ct. at 1960 (Souter, J., dissenting).

\textsuperscript{90} Bone, supra note 37, at 859.


\textsuperscript{92} See FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 187 (5th ed. 2001) (“The [drafters’] intention was to . . . avoid the semantic quibbling [the code pleading system] had engendered.”); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 207 (3d ed. 2004) (“[The drafters intended] to avoid the distinctions drawn under the codes among ‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions’ . . . .”).

\textsuperscript{93} See \textit{Iqbal}, 129 S. Ct. at 1961 (Souter, J., dissenting); \textit{Twombly}, 550 U.S. at 574-75 (Stevens, J., dissenting); CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 231 (2d ed. 1947).

\textsuperscript{94} \textit{Iqbal}, 129 S. Ct. at 1960 (Souter, J., dissenting).

\textsuperscript{95} See id. at 1960-61; Dodson, supra note 10, at 50.

\textsuperscript{96} \textit{Iqbal}, 129 S. Ct. at 1960 (Souter, J., dissenting).
Iqbal’s other allegations.97 For instance, the majority determined that the following allegation was factual, or non-conclusory: “The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants [Ashcroft] and [Mueller] in discussions in the weeks after September 11, 2001.”98

As noted by Justice Souter, this statement makes essentially two claims: first, that federal officials held certain individuals in highly restrictive conditions after September 11, 2001; and second, that Ashcroft and Mueller knew and approved of these conditions.99 On the other hand, the majority found Iqbal’s allegation that FBI agents designated Arab Muslims as individuals of “high interest” based on their religion, race, or national origin as conclusory.100 The difference between these allegations is extremely unclear, and unfortunately, the Court did not provide any guidance on how to make this distinction.101

Form 11 in the appendix to the Civil Rules, as a model complaint, has the sole purpose of illustrating sufficiency requirements under Rule 8.102 Form 11 is a basic negligence complaint arising from an automobile accident.103 Importantly, Form 11 does not allege any facts as to how the defendant negligently drove, but in a quite conclusory fashion, alleges “[o]n date, at place, the defendant negligently drove a motor vehicle against the plaintiff.”104 In comparison to Iqbal’s failed allegations, it is difficult to see how the Form 11 allegations meet the requirements of Rule 8 under the new Iqbal standard.105 Iqbal’s allegations appear even more factually detailed than those in Form 11.106

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97 See id. at 1961.
98 Id. at 1960.
99 Id.
100 Id.
101 Bone, supra note 37, at 861; see Malveaux, supra note 21, at 82; Marcus, supra note 30, at 438.
102 See Fed. R. Civ. P., Form 11; see also Fed. R. Civ. P. 84 (”The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).
104 See id.; Bone, supra note 37, at 861.
105 Bone, supra note 37, at 861; see Wasserman, supra note 23, at 161.
106 Bone, supra note 37, at 861.
2. The Supreme Court Revised Rule 8 by Instituting an Additional Step that Scrutinizes Each Allegation Before Analyzing the Entire Complaint.

The *Iqbal* decision further raised pleading standards by scrutinizing a claimant’s allegations in isolation rather than examining them in the context of the complaint as a whole. This step in the Court’s analysis significantly lowers a complaint’s chance of surviving the pleadings stage. The majority, for example, analyzed Iqbal’s allegations and determined them to be conclusory, with the exception of two. As a result, the Court did not consider Iqbal’s key allegations when it concluded that Iqbal’s complaint failed to state a plausible claim of unconstitutional discrimination. A complaint is more than simply a mere recitation of individual claims, but rather, a complaint is a coherent story written as a whole to relay the important events concerning a dispute. In addition, legal conclusions in a complaint help to provide a framework so that factual allegations support a clear legal right of action. By first removing legal conclusions when determining a complaint’s sufficiency, a court is, for all practical purposes, reading random pieces of a torn-up complaint. Justice Souter recognized this in his dissent when he called on the majority to examine all of Iqbal’s allegations rather than merely two. Justice Souter particularly criticized the majority’s isolated examination as the “fallacy of the majority’s position” and further, as a departure from their prior holding in *Twombly*.

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107 *Id.* at 869 (“A judge bent on screening aggressively does not have to work as hard . . . if she can classify problematic allegations as legal conclusions and eliminate them at the initial stage.”).

108 See infra Part II.B.


110 *Id.; see Bone, supra* note 37, at 868-69.

111 See generally Bone, *supra* note 37, at 868-69 (discussing the roles legal and factual allegations should play in deciding the sufficiency of a complaint).

112 See Malveaux, *supra* note 21, at 81 (citing Iqbal, 129 S. Ct. at 1950).

113 See *id*.

114 Iqbal, 129 S. Ct. at 1960 (Souter, J., dissenting).

115 *Id.*
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3. The Supreme Court Revised Rule 8 by Essentially Requiring “Smoking Gun” Evidence of Discriminatory Intent.116

The Iqbal decision thirdly instituted a new pleading rule by requiring Iqbal to allege Ashcroft’s and Mueller’s discriminatory intent with “greater factual specificity,” rather than plead it generally pursuant to Federal Rule of Civil Procedure 9(b).117 This requirement violates the clear language of Rule 9.118 Moreover, it creates a special problem for a subclass of claimants who must plead a defendant’s state of mind in order to survive a motion to dismiss.119 Corroboration of a defendant’s state of mind often requires documentation that is exclusively in the possession of the defendant, such as personal emails, company memoranda, or personnel files.120 In addition, it may require personal knowledge of private conduct, such as a conspiracy, that cannot be easily verified at this stage in the litigation.121 This specific problem arose in both Iqbal and Twombly.122 Both claimants in these cases were required to obtain factual support of intent or conduct that was nearly impossible to obtain without the benefit of compulsory discovery devices.123 This is problematic because it forces a claimant, at the time of filing, to plead factual details that often cannot be obtained without discovery tools, yet discovery is not available until a claimant passes the pleading stage.124 Lisa Bornstein, senior counsel at the Leadership Conference on Civil Rights, referred to this problem as a “Catch-22.”125 However, the Supreme Court in Iqbal ignored this problem and held that

117 Iqbal, 129 S. Ct. at 1954; see Hearing, supra note 27, at 11 (statement of Stephen Burbank); Bone, supra note 37, at 871.
118 “Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b); see 2 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE AND PROCEDURE § 9.03(3), at 9-32 (3d ed. 2009) (“[A] pleader cannot be expected to know the adverse party’s state of mind.”).
119 See Bone, supra note 37, at 873. Ordinary negligence or breach of contract suits, for example, do not require pleading any form of intent. Id. at 874. As a result, only subclasses of claims that have intent as an element of the action are impacted by this aspect of the Iqbal rule. See id. at 873; infra Part II.B.
120 See Bone, supra note 37, at 873; Mauro, supra note 12.
121 See Bone, supra note 37, at 873; Malveaux, supra note 21, at 89.
122 Bone, supra note 37, at 873.
123 See id. at 873-74, 874 n.117; see Mauro, supra note 12; Anthony F. Renzo, A Law-Free Zone for All the King’s Men, ACSBLOG (May 28, 2009, 3:57 PM), http://www.acslaw.org/node/13479.
124 See Bone, supra note 37, at 874 n.117; Malveaux, supra note 21, at 82-83; Miller, supra note 19, at 45 (referring to this as the “problem of information asymmetry”).
125 Mauro, supra note 16; see Bone, supra note 37, at 874 n.117.
future claimants essentially have to “get inside the head” of government officials in order to survive a motion to dismiss and gain access to
discovery.\textsuperscript{126} The Supreme Court, consequently, purchased their new
pleading rule at a significant cost—the screening of meritorious suits that
cannot obtain private information at the filing stage.\textsuperscript{127} Constitutional and
civil rights claims are particularly threatened by the \textit{Iqbal} decision because of
the difficulty in obtaining information from public officers that shows
their state of mind or personal involvement in the alleged discriminatory
conduct.\textsuperscript{128}

The pleading rule announced in \textit{Iqbal} places significant new hurdles
before claimants at the steps of federal courts, and is especially detrimental
to those with claims like \textit{Iqbal} and \textit{Twombly}.\textsuperscript{129} From the language of the
\textit{Iqbal} decision, it appears that the Supreme Court intended this result, only
permitting claims that are likely to succeed at trial based on the face of a
complaint.\textsuperscript{130} The majority in \textit{Iqbal}, for instance, held that the plausibility
test requires a pleading to contain enough factual material so that a judge is
able to \textit{reasonably infer} that the defendant is liable based on “judicial
experience” and “common sense.”\textsuperscript{131} This language evokes the expected
analysis of a jury \textit{at the end of trial} rather than a Rule 8 analysis of a
claimant’s short and plain statement.\textsuperscript{132} If the \textit{Iqbal} Court indeed intended
this result, they succeeded.\textsuperscript{133} In just a few months after the Court’s
decision, the immediate and detrimental impact on civil rights cases is
readily observable.\textsuperscript{134} This begs the question of whether constitutional
claims will be able to survive the evolutionary change in Rule 8 by \textit{Iqbal}
without congressional intervention.

B. \textit{The Aftermath of Ashcroft v. Iqbal: Recent Decisions and Empirical
Data Suggest that Civil Rights Cases Fare Worse Under the New
Pleading Rule.}

The remarkable impact of \textit{Iqbal} on the federal docket is observed in the
speed and success of motions to dismiss under the newly minted \textit{Iqbal}

\textsuperscript{126} Mauro, supra note 16; see Renzo, supra note 123.
\textsuperscript{127} Bone, supra note 37, at 878-79; see Christopher M. Fairman, \textit{The Myth of Notice Pleading}, 45
ARIZ. L. REV. 987, 1029 (2003); Malveaux, supra note 21, at 101.
\textsuperscript{128} Bone, supra note 37, at 879; Miller, supra note 19, at 45-46; see infra Part II.B.
\textsuperscript{129} See supra note 21, at 87; supra Part I.A.1-3.
\textsuperscript{130} See Bone, supra note 37, at 873-74.
\textsuperscript{132} See supra note 37, at 875; Malveaux, supra note 21, at 82-83 (arguing that judicial
fact-finding is prohibited at the pleading stage).
\textsuperscript{133} See infra Part II.B.
\textsuperscript{134} See infra Part II.B.
standard, which have amounted to more than 1500 district court and 100 appellate court decisions within a few months of the decision. One explanation for the increase in dismissals is that Iqbal provides federal judges with the means to dismiss claims from the start, should they be inclined, based particularly on their policy stances or prejudice toward a particular breed of case. For instance, judges who value protecting high-level government officials from the diversion of participating in litigation more than guaranteeing racial minorities like Iqbal an opportunity to have their case decided on the merits, now have a “blueprint” for quashing claims before they have a chance to develop. Accordingly, the Iqbal decision essentially provides a judicial bypass to constitutional and civil rights claims that federal judges find implausible due to their “judicial experience” and “common sense.”

The increase in dismissals may also be explained purely by the
strictness of the *Iqbal* pleading standard.\(^{142}\) The Ninth Circuit’s decision in *Moss v. U.S. Secret Service* best illustrates the strictness of *Iqbal* in application.\(^{143}\) Similar to *Iqbal*, anti-Bush protestors filed a *Bivens* action claiming that the United States Secret Service and a number of other federal and state officials violated their First Amendment rights by relocating their demonstration specifically because of the nature of their message.\(^{144}\) Granting the defendants’ qualified immunity defense, the court dismissed the protestors’ claims with the exception of those against individual Secret Service Agents.\(^{145}\) The agents appealed.\(^{146}\)

The issue before the Ninth Circuit, therefore, was whether the protestors had sufficiently alleged a constitutional violation under the *Iqbal* pleading standard.\(^{147}\) The court first examined the claimants’ specific legal claim, unconstitutional viewpoint discrimination, and whether the claim was plausible after removing all legal conclusions from the analysis.\(^{148}\) Just like in *Iqbal*, the *Moss* court marginalized claimants’ key allegations, deemed them conclusory, and left only two allegations to be analyzed under the plausibility prong.\(^{149}\) Unsurprisingly, the claimants’ complaint was determined insufficient.\(^{150}\) The court identified the protestors’ claims of unconstitutional motive and the existence of a secret policy of suppressing speech critical of President Bush as conclusory allegations.\(^{151}\) Furthermore, the claimants’ allegation of systematic viewpoint discrimination from top officials in the Secret Service was identified as “just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate” without additional factual content to support it.\(^{152}\)

The *Moss* case is a prime example of how constitutional and civil rights claims fare worse than many other types of legal claims under the new *Iqbal* rule.\(^{153}\) Like the claimants in *Iqbal*, it is difficult to discern how the *Moss* claimants were supposed to obtain additional factual support of a

\(^{142}\) See *supra* Part II.A.

\(^{143}\) See Wasserman, *supra* note 23, at 178-83.

\(^{144}\) *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 965-66, 969-70 (9th Cir. 2009).

\(^{145}\) *Id.* at 967.

\(^{146}\) *Id.*

\(^{147}\) *See id.* at 968.

\(^{148}\) *Id.* at 969-70.

\(^{149}\) Compare Ashcroft v. *Iqbal*, 129 S. Ct. 1937, 1960 (2009) (Souter, J., dissenting) (noting that the majority discarded all of *Iqbal’s* key allegations), with *Moss*, 572 F.3d at 970-71 (identifying all of the claimant’s essential allegations as conclusory and then analyzing the remaining two non-conclusory allegations).

\(^{147}\) *Moss*, 572 F.3d at 970-72.

\(^{150}\) *Id.* at 970.

\(^{151}\) *Id.*

\(^{152}\) See Wasserman, *supra* note 23, at 178-83.
secret policy of suppressing critical speech without access to discovery tools.\textsuperscript{154} The unfortunate reality is that, although the protestors were granted leave to amend their complaint,\textsuperscript{155} they most likely will not be able to obtain the factual support necessary to get past the new hurdles posed by \textit{Iqbal}.\textsuperscript{156} Thus, \textit{Moss v. United States Secret Service} represents yet another constitutional case dismissed without much hope of survival.\textsuperscript{157}

Judge Gelpí Gustavo, a district court judge in Puerto Rico, has specifically noted the draconian effect \textit{Iqbal} is having on civil rights cases.\textsuperscript{158} In a case before him, the plaintiffs brought a § 1983 claim alleging due-process, equal-protection, and freedom-of-political-expression violations under the Constitutions of both the United States and Puerto Rico, as well as violations of various Puerto Rican laws.\textsuperscript{159} After analyzing the plaintiffs' allegations, Judge Gustavo dismissed all of plaintiffs' claims and noted:

The court notes that its present ruling, although draconian and harsh to say the least, is mandated by the recent \textit{Iqbal} decision construing Rules 8(a)(2) and 12(b)(6). The original complaint (Docket No. 1), filed before \textit{Iqbal} was decided by the Supreme Court, as well as the Amended Complaint (Docket No. 61), clearly met the pre-\textit{Iqbal} pleading standard under Rule 8. As a matter of fact, counsel for defendants... did not file a 12(b)(6) motion to dismiss the original complaint because the same was properly pleaded under the then existing, pre-\textit{Iqbal} standard. This case was, in fact, fast-tracked... and discovery had just commenced when \textit{Iqbal} was decided.

As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 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. If the evidence was lacking, a case would then be summarily disposed of. This no

\textsuperscript{154} Cf. supra notes 120-26 and accompanying text.

\textsuperscript{155} Moss, 572 F.3d at 972.

\textsuperscript{156} See Wasserman, supra note 23, at 178-83; cf. Renzo, supra note 123 ("[T]he majority ... required \textit{Iqbal} to do the impossible and include behind-the-scenes factual detail in his complaint..."); David Ingram, \textit{Specter Proposes Return to Prior Pleading Standard}, BLOG OF LEGAL TIMES (July 23, 2009, 11:43 AM), http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html (reporting that the more specific facts required by the Court in \textit{Iqbal} are not often available until after discovery).

\textsuperscript{157} Cf. Ingram, supra note 156 ("The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries.") (quoting Sen. Arlen Specter).


\textsuperscript{159} Id. at 220.
longer being the case, counsel in political discrimination cases will now be forced to file suit in Commonwealth court, where Iqbal does not apply and post-complaint discovery is, thus, available. Counsel will also likely only raise local law claims to avoid removal to federal court where Iqbal will sound the death knell. Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.160

Ocasio-Hernandez and Moss are just two examples of numerous civil rights and constitutional cases that are being dismissed under the Iqbal rule.161 Early empirical data also suggests that the new Iqbal rule is helping defendants dismiss civil rights claims in greater numbers.162 Professor

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160 Id. at 226 n.4.
161 See, e.g., Bates v. Paul Kimball Hosp., 346 F. App’x. 883, 886 (3d Cir. 2009) (holding that the complaint failed to state a constitutional violation due to lack of factual support); Guirguis v. Movers Specialty Servs., Inc., 346 F. App’x. 774, 776 (3d Cir. 2009) (holding that a complaint for racial discrimination failed to allege enough facts to survive a Rule 12(b)(6) motion); El-Hewie v. Bergen Cnty., 348 F. App’x. 790, 796 (3d Cir. 2009) (affirming dismissal of employment discrimination complaint due to bare assertions and legal conclusions); Panther Partners Inc. v. Ikanos Comm’ns, Inc., 347 F. App’x. 617, 622 (2d Cir. 2009) (“[W]e recognize that Iqbal and Twombly raised the pleading requirements substantially while this case was pending.”); Al-Kidd v. Ashcroft, 580 F.3d 949, 977 (9th Cir. 2009) (providing that plaintiffs now face “a higher burden of pleading facts”); Fowler v. UPMC Shadyside, 578 F.3d 203, 210 (3d Cir. 2009) (noting the new heightened pleading requirement under Iqbal); Atherton v. D.C. Office of the Mayor, 567 F.3d 672, 688-89 (D.C. Cir. 2009) (dismissing racial discrimination claim for failing to plead enough facts to support that claimant was illegally removed from grand jury service); Kasten v. Ford Motor Co., No. 09-11754, 2009 WL 3628012, at *6 (E.D. Mich. Oct. 30, 2009) (“The Court has no doubt Plaintiffs’ Complaint would have survived a motion to dismiss before Iqbal expanded Twombly to all civil actions.”); Mitchell v. Sosa, No. 06-cv-00763-CMA-BNB, 2009 WL 3158139, at *4 (D. Colo. Sept. 29, 2009) (“It is possible Plaintiff’s claim would survive if the Court were operating under Conley ... .”). McClelland v. City of Modesto, No. CV F 09-1031 AWI dlb, 2009 WL 2941480, at *5 (E.D. Cal. Sept. 10, 2009) (“[T]he fact remains that, since Twombly, the requirement for fact pleading has been significantly raised.”); 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) (stating that claim might have survived under the Conley standard); Carpenters Health & Welfare Fund of Phila. v. Kia Enters. Inc., No. 09-116, 2009 WL 2152276, at *3 (E.D. Pa. July 15, 2009) (“Iqbal has raised the bar for claims to survive a motion to dismiss ... .”); Ansley v. Fla. Dep’t of Revenue, No. 4:09cv161-RH/WCS, 2009 WL 1973548, at *2 (N.D. Fla. July 8, 2009) (“These allegations might have survived a motion to dismiss prior to Twombly and Iqbal. But now they do not.”); Argeropoulos v. Exide Techs., No. 08-CV-3760, 2009 WL 2132443, at *6 (E.D.N.Y. July 8, 2009) (opining that plaintiff’s allegations would have met the Conley standard but dismissing under Iqbal); Fulk v. Vill. of Sandoval, No. 08-843-GPM, 2009 WL 1606897, at *2 (S.D. Ill. June 9, 2009) (granting leave to amend “[b]ecause of the recent change in federal pleading standards”).
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Patricia Hatamyar analyzed a random sampling of 1,200 cases in order to determine whether *Iqbal* had an empirical impact on federal cases. The sample included: 500 cases before *Twombly* with courts applying the notice-pleading standard; 500 cases after *Twombly* with courts applying the *Twombly* plausibility test; and 200 cases decided on 12(b)(6) motions to dismiss under the *Iqbal* rule during the first four months of its application. According to the study, not only are 12(b)(6) motions to dismiss granted more frequently under *Iqbal*—48% granted before *Iqbal* to 56% granted after—but civil rights cases are targeted by 12(b)(6) motions more than any other type of case, comprising 44% of all cases sampled. More than simply being targeted, Professor Hatamyar’s study shows that 12(b)(6) motions are more successful under *Iqbal* at a rate of 58%, compared with 53% under *Twombly* and 50% under *Conley*. Constitutional civil rights claims, like in *Iqbal*, *Ocasio-Hernandez*, and *Moss*, have jumped from a 50% dismissal rate under *Conley*, to 55% under *Twombly*, to a 60% dismissal rate under the new *Iqbal* rule. This study thus illustrates that the heightened design of the new *Iqbal* rule is resulting in an increase of dismissals for all cases, with civil rights cases suffering the greatest impact. Accordingly, with civil rights cases added to the endangered species list, the only hope of eliminating their extinction is congressional override.

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163 *Id.* at 555.
164 *Id.* at 555-56, 585.
166 *Id.* at 602, 604. Professor Hatamyar noted that there were “few to no cases involving Real Property, Forfeiture/Penalty, Immigration, Bankruptcy, Social Security, and Federal Tax” resulting in decisions on 12(b)(6) decisions. *Id.* at 590 (internal quotation marks omitted). The study included six major categories: contracts, torts, civil rights, labor, intellectual property, and all “other federal and state statutes.” *Id.* at 591-92.
167 *Id.* at 607.
168 Hatamyar, *supra* note 162, at 608.
169 *See supra* Part II.A.
170 Hatamyar, *supra* note 162, at 624.
171 *See infra* Part III.A; *see also* Dodson, *supra* note 10, at 64 (recognizing that a proposal to amend the *Iqbal* decision would likely fail because the Supreme Court is “highly skeptical of current tools to control discovery costs”); Mauro, *supra* note 16 (noting that the Supreme Court is in charge of the rulemaking process and is thus unlikely to overrule itself).
III. Unnatural Selection: The Need for Congressional Override After the
Iqbal Majority Exceeded Their Judicial Power and Ignored
Established Supreme Court Precedent

A. Congressional Override is Warranted Because the Supreme Court’s
Revision of Rule 8 in Ashcroft v. Iqbal Exceeded Its Judicial Power

1. The Rules Enabling Act Ensures Effective and Impartial
Rulemaking through a Deliberative Process with
Participation from the Federal Judiciary, Legal Academia,
and Congress.

Since 1938, when the Federal Rules of Civil Procedure were
promulgated, the federal judiciary and Congress have “sought a consistent,
predictable, and transparent” system of rule formation and amendment.172
The procedures by which the Civil Rules may be “amended, abrogated, or
replaced” are established by the Rules Enabling Act of 1934 (“Enabling
Act”).173 This system of amending federal rules has thereafter been
supplemented by custom, informal practice, congressional amendment,
and Supreme Court orders.174 Presently, a proposed new Civil Rule or
amendment undergoes at least seven stages of formal comment and
review, involving five separate institutions, beginning with the Advisory
Committee.175 The Chief Justice of the Supreme Court selects the Chair of
the Committee, typically a respected jurist, and a Committee Reporter,
usually an academic, who will then lead discussions as to whether

172 Clermont & Yeazell, supra note 27, at 846.
173 Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court’s Shimmering View of Summary
Judgment, Directed Verdict, and the Adjudication Process, 49 OHIO ST. L.J. 95, 181 (1988); see Rules
174 Stempel, supra note 173, at 181-82. The institutional structure that exists for amending
the Rules permits multiple entities to compete for rule-making power. See Catherine T. Struve,
1115 (2002).
175 4 WRIGHT & MILLER, supra note 92, § 1001, at 7 n.18; Struve, supra note 174, at 1103; see Stempel, supra note 173, at 182; see also Joseph P. Bauer, Schiavone: An Un-fortune-ate
Illustration of the Supreme Court’s Role as Interpreter of the Federal Rules of Civil Procedure, 63
NOTRE DAME L. REV. 720, 728 (1988) (describing the rules committees and processes involved in
supplementing or amending the Rules). The Advisory Committee was designed by the
Supreme Court as “a continuing body to ‘advise the Court with respect to proposed
amendments or additions to the Rules of Civil Procedure.’” Laurens Walker, A Comprehensive
of Advisory Committee, Order of January 5, 1942, 314 U.S. 720 (1942)).
advisory to judicial legitimacy, adopts position n.18. If the Committee accepts a proposal, the Reporter prepares a draft amendment and explanatory note, which is voted on and sent to the Standing Committee on Rules of Procedure for publication if approved. Thereafter, the proposed amendment and note are sent out for public comment and then back to the Advisory Committee with any suggested changes. If the changes are approved, they are sent to the Standing Committee for approval and then to the U.S. Judicial Conference, which will ultimately send a final proposal to the U.S. Supreme Court for review. Assuming the Supreme Court adopts the changes, the rule amendments will be presented to the U.S. Congress under the dictates of the Enabling Act, which has seven months to review the proposal, make additions or deletions, or postpone the effective date of the amendments. Finally, if Congress does not act within that time by either delaying the effective date of the proposed rules or by rejecting the proposal, it becomes effective with the full force of law.

During the last seventy-five years, the Enabling Act has been extensively acclaimed as “an efficient and effective procedure,” uniting the wisdom and expertise of the judiciary with the democratic protections afforded by an elected body and its more public deliberative process. Essentially, the Enabling Act bridges the perspective that the Civil Rules are best made by those who use them, the federal judiciary, and the position that, because federal rules possess the legal force of statutes, they must pass through Congress in order to be legitimate. The Enabling Act is thus an effective blend of legal expertise and congressional oversight; the

176 Stempel, supra note 173, at 182.

177 Struve, supra note 174, at 1103-04; see 4 Wright & Miller, supra note 92, § 1001, at 7 & n.18. The Standing Committee was created to help coordinate the work of the advisory committees, to make suggestions, and to transmit the proposals with recommendations to the judicial conference or to send them back to the appropriate advisory committee for further study. Judicial Conference of the United States, Annual Report of the Proceedings of the Judicial Conference of the United States 6-7 (1958).


179 The Judicial Conference was established by Congress to assist the Chief Justice in managing the federal courts. See Act of September 14, 1922, ch. 306, § 2, 42 Stat. 837, 838 (codified at 28 U.S.C. § 331 (2006)).

180 28 U.S.C. § 2074(a) (2006); Stempel, supra note 173, at 182; see 4 Wright & Miller, supra note 92, § 1001, at 7 & n.18.

181 Bone, supra note 179, at 892; Stempel, supra note 173, at 182.


183 Stempel, supra note 173, at 182; see 4 Wright & Miller, supra note 92, § 1001, at 6.
Advisory Committee, with the assistance of the Standing Committee, Judicial Conference, and the Supreme Court, drafts the proposed rule changes from a practical standpoint, and then Congress reviews the Committee’s work to ensure that it comports with the diverse needs of the nation.184

2. In Ashcroft v. Iqbal, the Supreme Court Circumvented the Benefits and Procedural Requirements Provided by the Rules Enabling Act.

The Rules Enabling Act, by Act of Congress, imposes significant procedural requirements on the promulgation or amendment of a federal rule—all of which seriously restrict the Supreme Court’s ability to amend rules through interpretation.185 Moreover, these procedural safeguards provide significant benefits to the rulemaking process as they carve up responsibility, ensure broad representation, provide notice to the public, and guarantee congressional review.186 In Ashcroft v. Iqbal, the majority circumvented the safeguards and benefits provided by the Enabling Act.187 Instead, the Supreme Court wholly revised Rule 8188 despite decades of practice and understanding of Rule 8 to the contrary,189 and the commands of the Enabling Act.190 An amendment to Rule 8 would have been best accomplished by following the system of revising federal rules pursuant to the Enabling Act, especially considering the potential impact of changing pleading standards.191 Rather than sidestepping the safeguards provided in the Enabling Act, the Iqbal majority could have begun the rule amendment

184 Stempel, supra note 173, at 182-83; see 4 WRIGHT & MILLER, supra note 92, § 1001, at 6-7.
186 See Struve, supra note 174, at 1103.
187 See Darrell A. H. Miller, Iqbal and Empathy, 78 UMKC L. REV. 999, 1012 (2010); cf. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (“Perhaps if Rule[] 8 . . . were rewritten today, claims . . . under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”).
188 See Bauer, supra note 175, at 726-29 (“[The Supreme] Court admittedly should not use a litigated dispute as the occasion to rewrite one of the Federal Rules . . . .”); Herrmann, Beck & Burbank, supra note 185, at 161 (calling Twombly and Iqbal “a wholly new general requirement of 'plausibility’” and “judge-made law”); supra Part II.A.
189 See infra Part III.B.1.
190 See infra Part III.A.3.
191 Stempel, supra note 173, at 184; see Hatamyar, supra note 162, at 625 (arguing that a change in pleading standards should be done by the “normal rule amendment process”).
process with relative ease\textsuperscript{192} and, in doing so, addressed the serious policy concerns at issue\textsuperscript{193} and avoided national criticism,\textsuperscript{194} as well as potential congressional override.\textsuperscript{195} Moreover, it is difficult to understand why the \textit{Iqbal} majority refused to acknowledge the proper mode of amending Rule 8, especially in light of recent Supreme Court precedent that explicitly refused to raise pleading standards without undergoing the Enabling Act process.\textsuperscript{196}

Whether deliberate or unintentional, the \textit{Iqbal} majority’s evasion of the Rules Enabling Act precluded the revision of Rule 8 from the many advantages of the proper rule amending process.\textsuperscript{197} For example, the rulemaking process under the Enabling Act helps to ensure that diverse perspectives are involved when amending a federal rule.\textsuperscript{198} The relatively unvaried professional backgrounds of the Justices in the \textit{Iqbal} majority, including their law clerks and staff, are simply no substitute for the teamwork of five separate institutions and public participation.\textsuperscript{199} When a rule amendment proceeds by the Enabling Act process, as opposed to judicial decision, there are significantly more diverse perspectives involved, which increases the likelihood that the rule amendment will accomplish its purpose.\textsuperscript{200} The Advisory Committee, for example, is made up of trial and appellate judges, bar groups and associations, seasoned practitioners, and learned academics.\textsuperscript{201} As such, the Advisory Committee

\begin{itemize}
\item Stempel, \textit{supra} note 173, at 184; see Struve, \textit{supra} note 174, at 1133.
\item See, \textit{e.g.}, sources cited \textit{supra} note 16.
\item See, \textit{e.g.}, sources cited \textit{supra} note 27.
\item See 4 \textit{Wright \& Miller}, \textit{supra} note 92, § 1005, at 31 (attributing the creation and success of the Civil Rules to the diverse experience brought by the members of the Advisory Committee and to the fact that the entire profession was represented in its making); Struve, \textit{supra} note 174, at 1105-19.
\item Clermont & \textit{Yeazell}, \textit{supra} note 27, at 847 (arguing that the Supreme Court’s interpretation of Rule 8 “substantially altered a systemic design choice” and that “a design change of this magnitude should only occur after a thorough airing of the choices”).
\item See \textit{Herrmann, Beck \& Burbank}, \textit{supra} note 185, at 151; Stempel, \textit{supra} note 173, at 184; Struve, \textit{supra} note 174, at 1105-19.
\end{itemize}
contains a great deal more experience in everyday litigation, as well as modern trends in the law, than the Justices of the Supreme Court who are relatively isolated.\footnote{202}{Stempel, supra note 173, at 184; see also Miller, supra note 19, at 94 n.360 (referring to the Advisory Committee as “an all-star team of proceduralists”).}

The Advisory Committee also has greater capability of assembling and analyzing empirical data relevant to a potential rule change, such as a rule’s ability to impact certain breeds of cases.\footnote{203}{Stempel, supra note 173, at 184 & n.424 (stating that Supreme Court Justices are somewhat removed from their peers “because of their geographic concentration and isolation while having to manage a crushing workload that leaves little time for anything else but Court business.”).} With this kind of data, the Committee would likely produce a more effective rule that would accomplish its desired effect without unforeseen results.\footnote{204}{The difference between this process of revising a federal rule and the Iqbal majority’s unilateral revision by adjudication is significant—the Supreme Court is given considerably more information from more diverse sources through the Enabling Act process.\footnote{205}{Stempel, supra note 173, at 185; see 4 WRIGHT & MILLER, supra note 92, § 1001, at 7 n.18.} The Supreme Court would still be given the opportunity to review any and all findings made by the Advisory Committee, as well as its ultimate product, and make changes if desired.\footnote{206}{Stempel, supra note 173, at 185; see 4 WRIGHT & MILLER, supra note 92, § 1001, at 7 n.18.} Thus, instead of revising a rule in a relatively isolated setting,\footnote{207}{Stempel, supra note 173, at 185; see 4 WRIGHT & MILLER, supra note 92, § 1001, at 7 n.18.} the Iqbal Court could have, under the Enabling Act, maintained a central role in developing an amendment to Rule 8 but with a significantly broader base of information.\footnote{208}{See Clermont & Yeazell, supra note 27, at 848; Preview of United States Supreme Court Cases: Ashcroft, Fmr. Attorney General v. Iqbal, Docket No. 07-1015, ABA, http://www.abanet.org/publiced/preview/briefs/dec08.shtml/ashcroft (last visited Dec. 13, 2010) (listing amicus briefs in Iqbal).}

The *Iqbal* majority, in raising pleading requirements contrary to the plain language of Rule 8, exceeded its limited judicial power to interpret and promulgate federal rules.209 Congress, under the Enabling Act, delegated the power of amending and interpreting federal rules to the Supreme Court, but in doing so Congress instituted specific restrictions to the process.210 Accordingly, the Supreme Court’s power to interpret and amend federal rules is limited by the specific requirements of the Enabling Act and the rulemaking process.211 The Supreme Court’s power to amend federal rules is thus not endless; it is specifically limited by the requirements of the Enabling Act, such as working with the Standing Committee and submitting to congressional override.212

In interpreting a federal rule, the Supreme Court is additionally limited by the specific language of the rule at issue and is not “free to strain the Rules’ text” and “ignore relevant Notes.”213 The Supreme Court, for example, cannot ignore the plain text of a rule in its interpretation in order to serve its own views of purpose and policy—this would exceed the Court’s limited power given by Congress.214 Furthermore, this form of judicial action violates the basic rulemaking structure of the Enabling Act, which is designed to open the process to multiple decision-makers, including the legal profession as a whole and the general public.215 In the same manner, the *Iqbal* majority exceeded its judicial power when it raised

1105-40.

209 See infra notes 213-15 and accompanying text.
210 Struve, *supra* note 174, at 1103; see Herrmann, Beck & Burbank, *supra* note 185, at 160.
213 Struve, *supra* note 174, at 1119-20; see Pavelic & LeFlore v. Marvel Entm’t Grp., 493 U.S. 120, 126 (1989) (responding to the argument that Rule 11 should be interpreted to apply to law firms as well as lawyers: “[W]e would not feel free to pursue that objective at the expense of a textual interpretation as unnatural as we have described. Our task is to apply the text, not to improve upon it.”); Harris v. Nelson, 394 U.S. 286, 298 (1969) (“We have no power to rewrite the Rules by judicial interpretations.”); Bauer, *supra* note 175, at 726-29 (arguing that the Supreme Court should not use a litigated dispute as an opportunity to rewrite one of the Civil Rules); cf. Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (refusing to interpret Rule 8 contrary to its plain language).
215 See Wasserman, *supra* note 23, at 161 (predicting that *Iqbal* will result in a significant decrease in the enforcement and vindication of federal constitutional and civil rights claims—an outcome one would expect from a substantive law change rather than procedural).
pleading standards contrary to the plain meaning of Rule 8 and the commands of the Enabling Act.216

Beyond the necessity of complying with the congressionally determined limits of the Supreme Court’s power to interpret federal rules, there are also numerous reasons for having amended Rule 8 through the Enabling Act process rather than by adjudication.217 The Enabling Act provides for congressional review of proposed rule amendments, which helps to ensure that all segments of society affected by a rule change have sufficient representation in the process.218 Under the Enabling Act, the Advisory Committee, whose members are appointed by the Chief Justice of the U.S. Supreme Court, and the Supreme Court work together to create a rule amendment but are not required to implement the suggestions of outsiders.219 This is why congressional oversight is a significant benefit—Congress, which is generally subject to the demands of its constituents, is likely to act to voice the concerns of the profession and the public that may have been ignored or outright rejected by the Committee and the Supreme Court.220 Members of Congress must be re-elected, unlike Supreme Court Justices, so although they possess a considerable amount of independence, they must at the very least listen to their political base.221 Accordingly, when proposed rule amendments make their way to Congress, “the plaintiff’s bar, the defense bar, the insurance industry, subject matter interest groups such as the ‘civil rights lobby,’ state and local officials, and elites of the profession . . . may make their cases to the Congress.”222 In sum, congressional involvement, although influenced by powerful interest groups and self-interest in re-election, provides a check to the potential self-interest that may be influencing the Supreme Court and the appointed members of the Advisory Committee.223

The policy concerns underlying Ashcroft v. Iqbal provide a prime example of why congressional involvement is needed before revising a

216 See supra notes 213-15 and accompanying text; cf. Struve, supra note 174, at 1127-28 (explaining that the Supreme Court rarely utilizes its veto power over proposed Rules and more regularly facilitates the creation of them by “functioning as a mere ‘conduit’ from the rulemakers to Congress”).
217 See Struve, supra note 174, at 1133-40.
218 See Herrmann, Beck & Burbank, supra note 185, at 163 (recognizing that “the usual victims of ‘procedural’ reform” are civil rights and employment discrimination cases).
220 Stempel, supra note 173, at 185; see Erwin Chemerinsky & Barry Friedman, The Fragmentation of Federal Rules, 46 MERCEY L. REV. 757, 775-76, 792 (1995); Miller, supra note 19, at 86 (noting the Supreme Court’s “lack of democratic accountability.”).
221 Stempel, supra note 173, at 185.
222 Id.
223 Id. at 186; see Herrmann, Beck & Burbank, supra note 185, at 164.
federal rule. After the district court denied federal officials’ qualified immunity claims, and the Second Circuit affirmed by granting a limited discovery order to Iqbal, the Supreme Court reversed, finding that trial judges could not sufficiently protect high-level government officials from over-burdensome discovery requests while granting civil rights litigants the opportunity to gain factual support. Because the Supreme Court had little to no empirical support for their belief that federal trial judges could not effectively manage limited discovery orders, it is possible that there are other motivators behind their decision, such as the desire to protect high-level government officials, or to reduce the federal docket by heightening pleading standards. At the very least, it is not illogical to imagine the Supreme Court instituting a heightened pleading standard to reduce the burden on the federal docket, especially in light of the Supreme Court’s current workload. Furthermore, even if an Advisory Committee were established to consider redrafting Rule 8, the same self-interest motivators may potentially creep in the rulemaking process because the members of the committee are appointees of the Supreme Court. This real possibility illustrates why congressional review is a significant benefit to rulemaking—the House of Representatives and the Senate do not work in federal courts and consequently are not directly affected if a rule revision increases federal filings. The revision of Rule 8 in Iqbal, accordingly, did not benefit from the more neutral review of Congress, or at least its non-judicial perspective, to ensure that unintended consequences such as the weeding out of civil rights cases do not occur. Thus, when the Supreme

226 The Second Circuit affirmed except for Iqbal’s claim alleging a procedural due process violation. Iqbal v. Hasty, 490 F.3d 143, 177-78 (2d Cir. 2007). For a discussion on limited discovery orders see Malveaux, supra note 21, at 106-40.
227 See Iqbal, 129 S. Ct. at 1953 (“[T]he common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.” (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007))).
228 See Herrmann, Beck & Burbank, supra note 185, at 151; Spencer, supra note 20, at 192.
229 Cf. Struve, supra note 174, at 1127-28 (noting that some Justices of the Supreme Court have claimed that they were too busy to review the text of proposed rule amendments).
230 Cf. Stempel, supra note 173, at 186 (recognizing that the tendency to revise federal rules based on self-interest motivators may exist on a subconscious level).
231 Id.; see, e.g., Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp. 2d 217, 226 n.4 (D.P.R. 2009) (arguing that the impact of Iqbal on civil rights cases was not intended by Congress when it enacted § 1983).
232 See Hatamyar, supra note 162, at 608 (highlighting the greater number of dismissals since Iqbal was decided); supra Part II.B; cf. Hearing, supra note 27, at 14 (statement of Stephen
Court decided to rewrite Rule 8 in Ashcroft v. Iqbal, they not only exceeded their judicial power but also neglected the significant benefits afforded by the Rules Enabling Act.233

B. Congressional Override is Warranted Because the Supreme Court’s Revision of Rule 8 in Ashcroft v. Iqbal Unjustifiably Violates the Doctrine of Stare Decisis.

1. Over the Last Fifty Years, the Supreme Court Uniformly Upheld its Interpretation of Rule 8 Pleading Standards.

The drastic revision of Rule 8 pleading standards in Ashcroft v. Iqbal is furthermore inconsistent with Supreme Court precedent and the doctrine of stare decisis.234 Ordinarily, the Supreme Court should follow precedent unless there is a special or compelling justification.235 Otherwise, the Supreme Court has only overruled prior precedent when the earlier decision was deemed to be “unworkable” or “badly reasoned.”236 The principle of stare decisis is thus not an “inexorable command,”237 but should be followed since the doctrine “promotes stability, predictability, and respect for judicial authority.”238 Other factors, such as what type of law is at issue,239 how long the precedent has been in place, and whether

Burbank) (“Congress was well-positioned institutionally to evaluate the social costs and benefits of setting a high bar for complaints . . . .”).

233 Struve, supra note 174, at 1136 (“Compared with the other rulemaking bodies, however, the [Supreme] Court appears less representative, less knowledgeable, and perhaps more liable to engraft erroneous policy choices on the Rules.”); see Hearing, supra note 27, at 1 (statement of Stephen Burbank) (referring to Iqbal as a rule change lacking “technical expertise, policy judgment and democratic accountability”); Herrmann, Beck & Burbank, supra note 185, at 164 (arguing that the Court’s decision to rewrite Rule 8 themselves undermines democratic values).


237 Id. at 828.


the decision has been significantly criticized, play a role in the Supreme Court’s analysis of whether to abrogate precedent. Accordingly, one must ask first whether the Supreme Court in \textit{Iqbal} departed from prior precedent in its interpretation of Rule 8(a)(2) of the Civil Rules, and if so, whether the Court’s basis for overruling precedent was justified notwithstanding its prior decisions and the doctrine of stare decisis.

In \textit{Ashcroft v. Iqbal}, the Supreme Court officially put to rest the uncontested understanding and interpretation of Rule 8(a)(2)’s text: “a short and plain statement of the claim showing that the pleader is entitled to relief.” For more than fifty years, \textit{Conley v. Gibson} remained the precedential authority on what was required to state a claim under Rule 8. The \textit{Conley} plaintiffs were African-American members of the Brotherhood of Railway and Steamship Clerks, a railroad union, as well as other railroad employees. The defendants were the Brotherhood Union, its Local Union No. 28, and specific officers of both. In their complaint, the plaintiffs alleged that they were terminated or demoted because of their race and that the union failed to represent them in good faith. In response, the defendants filed a motion to dismiss for failure to state a claim.

In a unanimous decision, the Supreme Court held that Rule 8(a) only required the plaintiffs to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” The Court, furthermore, held that a claimant is not required to provide detailed facts in support. Consequently, under \textit{Conley}, federal courts were prohibited from dismissing a claim unless it was apparent that there was “no set of facts” past precedent in the consideration of a procedural rule).

\begin{itemize}
  \item \textit{Iqbal} provides the final nail-in-the-coffin for the ‘no set of facts’ standard [of \textit{Conley}.”]; \textit{Hearing, supra note 78}, at 2-3 (statement of Sen. Leahy).
  \item \textit{Id}.
  \item \textit{Id} at 42-43.
  \item \textit{Id} at 43.
  \item \textit{Id} at 47.
  \item \textit{Id}.
\end{itemize}
that the plaintiff could prove to establish the claim.\textsuperscript{230} In accordance with the basic vision of the drafters of the Federal Rules of Civil Procedure, \textit{Conley} enshrined the concept of Notice Pleading, which dictates that the primary function of pleadings is to provide notice to the court of all relevant claims and defenses.\textsuperscript{231} Moreover, \textit{Conley} was intended to officially silence any and all claims that pleadings should be used to decide cases rather than simply give notice.\textsuperscript{232}

During subsequent decades, the Supreme Court uniformly upheld and applied notice pleading as provided in \textit{Conley}.\textsuperscript{233} However in 1993, due to a rising practice among federal trial courts of applying a heightened pleading standard specifically for civil rights claims, the Supreme Court took up the question of whether Rule 8 may be interpreted in this manner.\textsuperscript{234} In a relatively short but clear and unanimous opinion, Justice Rehnquist wrote that Rule 8 would not allow such an interpretation.\textsuperscript{235} The defendants argued that in this case more specificity should be required of the plaintiffs’ complaint because their case involved complex issues of municipal liability.\textsuperscript{236} Recognizing this as an attempt to impose a “heightened pleading standard,” Justice Rehnquist held that this argument is “impossible to square” with the language of Rule 8 and \textit{Conley}.\textsuperscript{237} After reversing for the plaintiffs, the Supreme Court concluded its decision by reminding the defendants that if they desired a heightened pleading standard, it would need to be obtained through the Enabling Act process.\textsuperscript{238}

Almost ten years later, the Supreme Court took up an employment-discrimination claim that had been dismissed for lacking specific facts to support an inference of discrimination.\textsuperscript{239} In another unanimous decision,

\begin{footnotes}
\item[230] Spencer, \textit{supra} note 241, at 435 (citing \textit{Conley}, 355 U.S. at 45-46).
\item[235] \textit{Leatherman}, 507 U.S. at 164.
\item[236] \textit{Id.} at 167.
\item[237] \textit{Id.} at 168.
\item[238] See \textit{id}.
\end{footnotes}
Justice Thomas wrote that an employment-discrimination complaint—like all civil complaints—does not require “greater particularity” but simply a “short and plain statement” giving notice to the defendant of all claims and possible defenses.\textsuperscript{260} According to the Court, this simplified and liberal approach to pleading relies on the overall structure of the Federal Rules of Civil Procedure—pleadings give notice while discovery and summary judgment motions define disputed issues as well as dispose of meritless claims.\textsuperscript{261} Furthermore, Justice Thomas rejected the defendant’s claim that plaintiff’s allegations were “conclusory” and that courts would be burdened with frivolous discrimination claims if the Court does not require greater specificity.\textsuperscript{262} The Supreme Court refused to heighten pleading and held that a change in Rule 8 must be obtained by the Enabling Act process.\textsuperscript{263} Swierkiewicz is thus another example of the Supreme Court’s fidelity to longstanding precedent holding that notice pleading should apply in all civil cases including civil rights and employment-discrimination cases.\textsuperscript{264}

2. Beginning with Bell Atlantic Corp. v. Twombly and Culminating in Ashcroft v. Iqbal, the Supreme Court Unjustifiably Abandoned Established Precedent.

Making official its abandonment of simplified notice pleading in Ashcroft v. Iqbal, the Supreme Court began its deconstruction of fifty-year-old precedent in Bell Atlantic Corp. v. Twombly.\textsuperscript{265} This case involved an antitrust class action brought by local and or high speed internet service subscribers against regional telephone service monopolies.\textsuperscript{266} In sum, plaintiffs alleged that defendants conspired not to compete with each other over a seven-year period of time in violation of the Sherman Antitrust Act.\textsuperscript{267} The district court dismissed the complaint under Rule 8 and Conley, the Second Circuit reversed, and the Supreme Court granted certiorari.\textsuperscript{268}

In a seven-to-two decision written by Justice Souter, the Supreme Court held that the complaint failed to meet Rule 8 requirements.\textsuperscript{269} In doing so, the Twombly majority made some significant changes to the

\textsuperscript{260} Id. at 511-12 (citing FED. R. CIV. P. 8(a)(2); Conley v. Gibson, 355 U.S. 41, 47 (1957)).
\textsuperscript{261} Id. at 512-13; see 5 WRIGHT & MILLER, supra note 92, § 1202, at 95 n.22.
\textsuperscript{262} Swierkiewicz, 534 U.S. at 514-15.
\textsuperscript{263} See id. (citing Leatherman, 507 U.S. at 168).
\textsuperscript{264} See Malveaux, supra note 21, at 72.
\textsuperscript{265} See Hearing, supra note 78, at 2 (statement of Sen. Leahy).
\textsuperscript{267} Id. at 550-51.
\textsuperscript{268} Id. at 552-53.
\textsuperscript{269} Id. at 549.
notice-pleading paradigm, while keeping it intact along with Conley v. Gibson. First, Justice Souter gave tribute to Conley and wrote that a pleading must give fair notice of the claim and that detailed factual allegations are not needed.270 However, the Court retired the Conley “no set of facts” standard that had for so many years helped to determine the sufficiency of a pleading.271 In its place, Justice Souter instituted a plausibility requirement; there must be enough facts in a complaint “to raise a right to relief above the speculative level.”272 Rather than focusing on giving notice, the plausibility standard asks whether a complaint contains enough factual support to make the claim plausible, not merely possible.273 Using the new plausibility test, Justice Souter wrote that plaintiffs’ allegations of a conspiracy did not amount to a plausible claim because “bare” or “conclusory” allegations of parallel conduct, without facts to tie the conduct to an illegal agreement, did not bring the plaintiffs’ complaint past the line of possibility into the realm of plausibility.274

The Twombly majority supported its partial departure from Conley and the creation of the plausibility standard on the language of Rule 8 and the “practical” need of keeping out meritless claims.275 Tying the new plausibility standard to Rule 8, Justice Souter noted that the text of Rule 8 requires “a showing” that the pleader is entitled to relief which implicitly requires enough factual support to give “fair notice.”276 According to the majority, the plausibility requirement is thus part and parcel with Rule 8’s threshold requirement of a “plain statement” showing “entitle[ment] to relief.”277

The Twombly majority also tied the plausibility standard to the practical need of weeding out groundless lawsuits early, thereby protecting the resources of federal courts as well as protecting litigants from abusive tactics which may coerce a defendant to settle early.278 Justice Souter, relying greatly on Judge Frank Easterbrook’s essay on discovery abuse, rejected the notion that trial judges could prevent these abuses by “careful

270 Id. at 555 (citing Conley v. Gibson, 355 U.S. 41, 47 (1957)).
272 Twombly, 550 U.S. at 555; see MOORE, supra note 118, § 8.04(1)(b), at 8-26; Blumstein, supra note 74, at 23.
273 See Twombly, 550 U.S. at 557.
274 Id. at 556-57.
275 See id. at 557-58.
276 Id. at 555 n.3.
277 See id. at 557.
278 See id. at 557-59.
It is no surprise that many scholars deem *Twombly*’s plausibility standard as heightening federal pleading from the longstanding notice regime, however, *Twombly* did not completely abrogate the language of Rule 8 and *Conley*. On the contrary, *Ashcroft v. Iqbal* is a complete revision of Rule 8 and an abandonment of the last fifty years of Supreme Court precedent. For instance, the *Iqbal* majority oddly did not mention notice pleading once in their entire decision, not even by way of background. Because all of the Supreme Court’s prior precedents specifically discuss notice pleading, it is safe not only to infer that the *Iqbal* majority intended this omission, but also that *Iqbal* was intended to institute an entirely new pleading regime.

Under the new *Iqbal* pleading system, the Supreme Court abandoned precedent by instituting additional heightened requirements with the focus on factual sufficiency rather than whether a complaint gives notice.

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279 *Twombly*, 550 U.S. at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989)).


281 See *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (per curiam) (affirming *Conley* and *Swierkiewicz after Twombly*); *Hatamyar*, supra note 162, at 624 (concluding that notice pleading survived *Twombly*); *Spencer*, supra note 20, at 192 (noting that *Twombly* did not overrule the “assumption-of-the-truth” rule from *Conley*).

282 See *Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.*., No. Civ. 09-245 WBS CMK, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009) (noting that *Iqbal* creates doubt as to whether the Forms attached to the Civil Rules are still valid); *Malveaux*, supra note 21, at 82 (arguing that *Iqbal*’s factual sufficiency requirement encourages “long, repetitive, [and] unwieldy complaints” contrary to the plain language of Rule 8); *Thomas*, supra note 24, at 38 (calling into question whether *Iqbal* was decided properly); supra Part II.A; cf. *Kyle v. Holinka*, No. 09-cv-90-alc, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (describing *Iqbal* as “overturn[ing] decades of circuit precedent”).


285 See *Hearing*, supra note 27, at 17 (statement of Stephen Burbank) (arguing that *Iqbal* cannot be reconciled with the works of Charles Clark, the chief architect of the pleading rules); *Hatamyar*, supra note 162, at 624; *Malveaux*, supra note 21, at 82 (arguing that “fair notice is the objective of pleadings” for “over half a century”); Scott Dodson, *Beyond Twombly*, CIVIL PROCEDURE & FEDERAL COURTS BLOG (May 18, 2009, 6:42 PM), http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html (recognizing *Iqbal*’s “new era” in pleading).

286 Compare *Iqbal*, 129 S. Ct. at 1949 (“Where a complaint pleads facts that are merely
The *Iqbal* majority not only adopted the *Twombly* plausibility standard, but also heightened it by reinstituting code pleading, scrutiny of individual allegations based on an ambiguous and subjective test of whether the allegation is conclusory or factual, and by requiring additional factual support of discriminatory intent. In addition, the age-old assumption-of-the-truth doctrine, established by *Conley* and maintained by *Twombly*, may have also been abrogated by *Iqbal*.

Furthermore, the *Iqbal* majority provided no guidance as to how these new pleading requirements are to be applied except by “judicial experience and common sense.” Consequently, *Iqbal* is a novel invitation to federal courts to make ad hoc decisions based on their “common sense,” which is certainly subject to abuse by trial judges who desire to dismiss a case based on their intuition or policy stances. Lastly, the *Iqbal* majority cemented its new pleading rule by holding that it is trans-substantive, applying to all Rule 8 cases no matter the type of action or potential cost of discovery. Taken together, the pleading standard under *Iqbal* represents an absolute abandonment of Supreme Court precedent.

The Supreme Court, however, has the authority to abandon precedent if it was based on error, inconsistently applied, or fundamentally unworkable. While fidelity to stare decisis is weaker in the context of consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” (internal quotation marks omitted), with *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (“[I]t is well established that, in passing on a motion to dismiss, . . . the allegations of the complaint should be construed favorably to the pleader.”).
procedural rulings, such as Ashcroft v. Iqbal, special factors still need to be presented to justify abandonment.

The Iqbal majority provided no direct justification for their revision of Rule 8 and abandonment of Supreme Court precedent. There was no discussion of error, inconsistent application, or unworkable precedent. Instead, the Iqbal Court provided a short summary of the Twombly decision, followed by its interpretative advancements, and a brief discussion of qualified immunity, discovery abuse, and judicially supervised case management. Importantly, the Iqbal Court’s reliance on Twombly does not provide it with a justification because Twombly too is an unworkable or inconsistently applied. The only conceivable grounds the Iqbal majority had for rewriting Rule 8 and abandoning Supreme Court precedent was the need to protect government officials from the “substantial diversion that is attendant to participating in litigation.”

The Court reasoned that government officials will be inhibited from performing their duties if they are subject to litigation which “exacts heavy costs in terms of efficiency and expenditure of valuable time and resources” that could otherwise be directed to government work—especially in the situation of a national emergency. While these are important issues, the Supreme Court has held that these kinds of policy concerns do not make a precedent unworkable so as to justify overruling age-old precedent. On the contrary, the Supreme Court deems a prior decision unworkable “when the intervening development of the law has ‘removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.’” With this in mind, the Iqbal decision failed to provide any showing that Conley and its predecessors


300 See Hohn, 524 U.S. at 259 (Scalia, J., dissenting).


302 See generally id.

303 See id. at 1949-50; supra text accompanying notes 288-91.

304 See Iqbal, 129 S. Ct. at 1953-54.

305 Spencer, supra note 241, at 466-69.

306 Iqbal, 129 S. Ct. at 1953.

307 Id.


309 Neal, 516 U.S. at 295 (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).
had become unworkable, or brought into question by new developments of the law, since the Supreme Court has persistently and consistently affirmed Conley for over fifty years.\footnote{310} The only challenge during this period to notice pleading came from Twombly, which also did not provide any legitimate justification for doing so.\footnote{311}

It therefore appears that the Iqbal majority’s only motivation for rewriting Rule 8 and overruling longstanding precedent was the desire to protect government officials from potentially frivolous litigation and the desire to fix perceived problems with the Civil Rules regarding discovery abuse and overburdened dockets.\footnote{312} However, the Court’s policy concerns do not amount to a sufficient justification to overturn the legacy of notice pleading—such concerns should be addressed by Congress or through the Enabling Act process.\footnote{313} The doctrine of stare decisis exists to promote “stability, predictability, and respect for judicial authority.”\footnote{314} The Iqbal majority, by unilaterally and unpredictably\footnote{315} rewriting Rule 8 and decades of precedent, caused considerable instability\footnote{316} and a reduced respect for judicial authority.\footnote{317} As a result, the Supreme Court has not only abandoned a half-century of pleading jurisprudence, but also the fundamental underpinnings of stare decisis and the rule of law.\footnote{318} The Supreme Court’s interpretative power\footnote{319} is not broad enough to accommodate the abandonment of the almost seventy-year-old notice-pleading system that the Court has repeatedly endorsed; the creation of a

\footnote{310} See cases cited supra note 253.
\footnote{311} Spencer, supra note 241, at 468-69.
\footnote{312} See Iqbal, 129 S. Ct. at 1953-54; Wasserman, supra note 23, at 159, 163. Robert Kohn, Co-Chair of the Federal Civil Procedure and Trial Practice Committee of the FBA Federal Litigation Section, has noted that Iqbal has, contrary to the apparent intentions of the Supreme Court, made litigation less predictable and more costly. Robert E. Kohn, Why Iqbal and Twombly Won’t Fix the Real Disaster, FED. LAW., May 2010, at 39, 39.
\footnote{313} See Ortiz v. Fibreboard Corp., 527 U.S. 815, 861 (1999) (“[W]e are bound to follow [a Civil Rule] as we understood it upon its adoption, and . . . we are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.”); supra Part III.A.
\footnote{314} See Part III.B.; see also Helen Hershkoff & Arthur R. Miller, Celebrating Jack H. Friedenthal: The Views of Two Co-Authors, 78 GEO. WASH. L. REV. 9, 28 (2009) (“[A]mendment by judicial fiat is a piecemeal process of revision that threatens to undermine the overall coherence of the Federal Rules and to create inconsistencies of application.”).
\footnote{315} See Spencer, supra note 20, at 197-201; sources cited supra note 27.
\footnote{316} See William S. Consovoy, The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson and the Consequences of Pragmatic Adjudication, 2002 UTAH L. REV. 53, 54.
\footnote{317} See supra notes 210-14 and accompanying text.
new, strict, and ambiguous pleading rule that violates the plain language of Rule 8; and the institution of a new pleading regime by unilateral adjudication rather than by congressional action or the Rules Enabling Act.\textsuperscript{320} Congress should thus act to reverse the \textit{Iqbal} majority’s many errors and restore confidence to the American justice system.\textsuperscript{321}

\textbf{CONCLUSION}

“Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts.”\textsuperscript{322} The Supreme Court in \textit{Ashcroft v. Iqbal} changed history by unilaterally instituting an entirely new pleadings rule and, in just about a year, its impact is clear—civil rights cases are being shut out of court and facing the threat of extinction. The importance of civil rights claims cannot be understated as their enforcement helps to protect the basic American values of equality and fairness and constitutional guarantees of due process of law and equal protection. Due to \textit{Iqbal}’s new procedural barriers, the federal court system may no longer be a viable option for the private enforcement of public law and policy.\textsuperscript{323} As a result, congressional action is warranted to prevent such injustice, but furthermore justified because of the fundamental errors permeating the \textit{Iqbal} decision. \textit{Iqbal} lies in stark contradiction: (1) to the basic principles underlying the Federal Rules of Civil Procedure; (2) with Supreme Court precedent and stare decidis; (3) with congressional command through the Rules Enabling Act; and (4) with the fundamental limitation of the Supreme Court’s interpretative powers. Therefore, this Note implores Congress to act not only for the sake of protecting the viability of civil rights, but also to ensure the legitimacy of the democratic process of rulemaking and legislation.

\textsuperscript{320} See Hearing, supra note 27, at 18 (statement of Stephen Burbank) (“I understand that the difference between interpretation and judicial lawmaking is one of degree rather than kind, but here the degrees of separation approach one hundred and eighty.”).

\textsuperscript{321} Cf. Malveaux, supra note 26, at 83-84. Congressional override would halt \textit{Iqbal}’s harsh impact on civil rights cases while providing an opportunity for the Civil Rules Advisory Committee to consider changes to Rule 8 in light of the policy concerns raised in \textit{Twombly} and \textit{Iqbal}. \textit{Contra} Michael R. Hurston, Note, \textit{Pleading with Congress to Resist the Urge to Overrule Twombly and Iqbal}, 109 Mich. L. Rev. 415, 443 (2010) (arguing that if legislative action is taken it should be under the Rules Enabling Act rather than Congressional override).

\textsuperscript{322} Phillips v. Cnty. of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008).

\textsuperscript{323} Miller, supra note 19, at 71.