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### The Tao of Pleading: Do Twombly and Iqbal Matter Empirically

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Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically*, 59 *Am. U. L. Rev.* 553 (2010).

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# THE TAO OF PLEADING: DO *TWOMBLY* AND *IQBAL* MATTER EMPIRICALLY?

PATRICIA W. HATAMYAR\*

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\* Visiting Professor of Law, *St. Thomas University School of Law*. A research grant from *St. Thomas University School of Law* supported work on this Article. Many thanks to Morgan Hazelton, Jun Lu, Dennis Corgill, and Robert Mensel for their comments, and to Melodee Rhodes for her research assistance. All remaining errors are my own.

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## INTRODUCTION

In 2007, the Supreme Court issued its opinion in *Bell Atlantic Corp. v. Twombly*,<sup>1</sup> sending “shockwaves” through the federal litigation bar.<sup>2</sup> Seemingly without prior warning,<sup>3</sup> the Court abrogated “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”—the standard for deciding 12(b)(6) motions first stated fifty years earlier in *Conley v. Gibson*.<sup>4</sup> To replace the old rule, the Court announced a new “plausibility” standard: that a complaint must

1. 550 U.S. 544 (2007).

2. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 852 (2008).

3. See, e.g., *Thampi v. Collier County Bd. of Comm’rs*, No. 2:04-cv-441-FtM-29SPC, 2006 WL 2460654, at \*1 (M.D. Fla. Aug. 23, 2006) (“The federal notice pleading standards are well settled.”); McMahon, *supra* note 2, at 855 (“[T]he *Conley* standard was clear and well-settled.”).

4. 355 U.S. 41, 45–46 (1957); see FED. R. CIV. P. 12(b)(6) (“[A] party may assert the following defenses by motion: . . . failure to state a claim upon which relief can be granted . . .”).

allege “enough facts to state a claim to relief that is plausible on its face.”<sup>5</sup>

*Twombly* contained some indications that the Court intended to limit its holding to Sherman Act cases.<sup>6</sup> Nonetheless, the federal courts largely embraced *Twombly*’s “plausibility” standard for all cases.<sup>7</sup> Almost two years to the day after *Twombly*, the Supreme Court laid the matter to rest in *Ashcroft v. Iqbal*,<sup>8</sup> holding that the *Twombly* “plausibility” standard applies to all cases.<sup>9</sup> *Iqbal* further explained that “judicial experience and common sense” should inform the “plausibility” standard.<sup>10</sup>

In addition, *Iqbal* set forth a “two-pronged” approach to 12(b)(6) motions. First, the court should identify and ignore all “conclusions” from the complaint not entitled to be taken as true for purposes of the motion to dismiss.<sup>11</sup> Second, the court should apply the “plausibility” standard to the complaint’s remaining allegations.<sup>12</sup>

If *Twombly* caused a shock, *Iqbal* struck a blow. A firestorm of protest ensued over *Iqbal*’s alleged judicial activism. For example, Senator Arlen Specter recently introduced a bill that would attempt to turn the clock back by reinstating “the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*.”<sup>13</sup>

Absorbed by the vigorous academic debate, I wondered if it could be empirically demonstrated that district courts ruled much differently on 12(b)(6) motions after *Twombly*. Thus, for this Article, I conducted an empirical analysis of the effects of the different Supreme Court standards on rulings on 12(b)(6) motions in the federal district courts.

I chose, as randomly as possible, 1200 cases (500 from each of the two-year periods before and after *Twombly*), and I coded the cases for

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5. *Twombly*, 550 U.S. at 570.

6. See *id.* at 553 (“We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct . . . .”); *id.* at 554–55 (“This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act.”); *id.* at 558–59 (discussing the expense of discovery in antitrust cases).

7. In reviewing cases to be selected for inclusion in this study, I found only one district court case in which the court refused to apply *Twombly* in a non-antitrust case. See *Orthovita, Inc. v. Erbe*, No. 07-2395, 2008 WL 423446, at \*9 (E.D. Pa. Feb. 14, 2008). Most of the U.S. Courts of Appeals eventually adopted the “plausibility” standard for all civil cases, but some characterized *Twombly* as effecting only modest change. See *infra* notes 137–144 and accompanying text.

8. 129 S. Ct. 1937 (2009).

9. *Id.* at 1953.

10. *Id.* at 1950.

11. *Id.*

12. *Id.*

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

their rulings and other characteristics in a database (the “Database”). Because *Iqbal* was decided recently, I chose (again, as randomly as possible) 200 cases decided on 12(b)(6) motions under *Iqbal* from May–August 2009, and I included them in the Database.

My statistical analysis of the cases in the Database suggests that a surprisingly large percentage of 12(b)(6) motions was being granted (with or without leave to amend) under *Conley*—46% from May 2005 to May 2007. From May 2007 to May 2009, after *Twombly* was decided, the percentage of 12(b)(6) motions granted grew to 48%—not a remarkable increase. But since *Iqbal* was decided, a higher percentage of 12(b)(6) motions has been granted: 56% of the 12(b)(6) motions from May 2009 to August 2009 were granted. However, the short time span and smaller number of *Iqbal* cases counsel caution in interpreting the data.

Part I of this Article describes *Conley*, *Twombly*, and *Iqbal*, and surveys the development of the pleading standards in the fifty-two years spanned by these cases. I conclude, as have other commentators, that although courts continued to pay lip service to the “notice pleading” ideal of *Conley*, in practice, the standard was seriously eroded by the time *Twombly* was decided. *Iqbal*, though, contains not even a passing reference to notice pleading, and may portend the end of this liberal regime in the federal courts.

Part II outlines the design of the empirical study, and Part III presents a statistical analysis of the data. The analysis reveals that 49% of the 12(b)(6) motions were granted (with or without leave to amend) over the time period of the study. Further, it confirms that the rate at which such motions were granted increased from *Conley* to *Twombly* to *Iqbal*, although grants *with* leave to amend accounted for much of the increase. In addition, the results of a multinomial logistic regression indicate that under *Twombly*, the odds that a 12(b)(6) motion would be granted with leave to amend, rather than denied, were 1.81 times greater than under *Conley*, holding all other variables constant. Under *Iqbal*, the odds that a 12(b)(6) motion would be granted with leave to amend, rather than denied, were over four times greater than under *Conley*, holding all other variables constant. Moreover, in the largest category of cases in which 12(b)(6) motions were filed—constitutional civil rights cases—motions to dismiss were granted at a higher rate (53%) than in all cases combined (49%), and the rate 12(b)(6) motions were granted in those cases increased from *Conley* (50%) to *Twombly* (55%) to *Iqbal* (60%).

Part IV concludes, with some caution, that *Twombly* and *Iqbal* have significantly increased the rate at which 12(b)(6) motions have been granted by district courts, and suggests that this result, if desirable, should be accomplished by the normal rule amendment process rather than by a ruling of the Court.

## I. AN OVERVIEW OF THE FEDERAL PLEADING STANDARDS

### A. *The World Before Twombly*

The reformist philosophy and merits-based focus of the Federal Rules of Civil Procedure (“FRCP”), first adopted in 1938, have been well chronicled elsewhere.<sup>14</sup> For my purposes here, it suffices to say that Rule 8(a)(2) of the FRCP—unchanged since 1938—requires a complaint (or other pleading seeking relief) to contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>15</sup> The drafters chose this language deliberately to signal the softening of an earlier pleading regime known as “code pleading,” under which the equivalent requirement was that a complaint contain a “statement of the facts constituting the cause of action.”<sup>16</sup> Case law in code pleading regimes had devolved into endless, technical bickering about distinctions between “ultimate facts,” “evidence,” and “conclusions.”<sup>17</sup> Thus, the FRCP’s use of the phrase, “claim showing that the pleader is entitled to relief,” instead of the phrase from the code pleading standard, “facts sufficient to constitute a cause of action,” was an attempt to create a standard that would

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14. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 575 (Stevens, J., dissenting) (noting that Rule 8 of the FRCP was designed with flexibility to allow more frequent examination of the merits of a claim); Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 890–98 (2009) (highlighting the vision of the FRCP drafters to make pleading rules more fair and efficient); Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 458–60 (1943) (recognizing that complicated pleading requirements led to a call for reform); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437–51 (1986) (noting that a general dissatisfaction with pleading requirements led to simplification of the rules).

15. FED. R. CIV. P. 8(a)(2).

16. Anthony J. Bellia, *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 794 (2004) (quoting Act of Apr. 12, § 120(2), 1848 N.Y. Laws 521).

17. Marcus, *supra* note 14, at 438 (explaining that Code pleading “invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper),” and that courts had “great difficulty distinguishing ultimate facts from conclusions since so many concepts, like agreement, ownership[,] and execution, contain a mixture of historical fact and legal conclusion” (citation omitted)).

reach the merits of a dispute rather than one that would terminate a plaintiff's case on technical grounds at the outset.<sup>18</sup>

Yet there were still rival pleadings philosophies. One of the FRCP's primary draftsmen, Judge Charles Clark, was convinced that pleadings motions were wasteful and often unjust, and would have eliminated them altogether.<sup>19</sup> The opposing camp, however, emphasized the need for some screening effort to prevent nonmeritorious cases from proceeding.<sup>20</sup> The Supreme Court in *Conley* sided mostly with Judge Clark, at least for the moment.

### 1. *Conley v. Gibson*

The *Conley* "no set of facts" language materialized in the Court's opinion even though the lower courts had not discussed the pleading issue and even though the plaintiffs had hardly briefed the issue before the Court.<sup>21</sup> *Conley* was brought as a putative class action by "certain Negro members of the Brotherhood of Railway and Steamship Clerks . . . against the Brotherhood, its Local Union No. 28 and certain officers of both" (collectively, the "Union").<sup>22</sup> Plaintiffs alleged that they were employed by the Texas and New Orleans Railroad in Houston, and that Local 28 was their designated bargaining agent under the Railway Labor Act ("RLA").<sup>23</sup> The collective bargaining agreement between the railroad and the Union provided some protection to the Union members against loss of employment or seniority.<sup>24</sup> The complaint alleged that despite the existence of this protection, the railroad had "abolished" forty-five jobs held by Negroes and then refilled (through a wholly owned subsidiary) those jobs with either white employees or Negroes

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18. See, e.g., *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944). Referring to the district court's grant of a 12(b)(6) motion under the Code pleading standard, Judge Clark stated, "[H]ere is another instance of judicial haste which in the long run makes waste." *Id.*

19. Clark, *supra* note 14, at 456.

20. See, e.g., Bone, *supra* note 14, at 890 (identifying many courts' concerns about backlog, costs, and delay as reasons to support a higher level of screening).

21. Despite Justice Black's statement in *Conley* that the issue had been "briefed . . . by both parties," *Conley v. Gibson*, 355 U.S. 41, 45 (1957), in fact, only the Union expressly addressed pleading issues in its brief to the Supreme Court. See Petitioner's Brief at 3-4, *Conley v. Gibson*, 355 U.S. 41 (1957) (No. 7), 1957 WL 87661 [hereinafter Pet'r's Br.]. For a further discussion of the "accidental" nature of *Conley*'s prominence, see Emily Sherwin, *The Story of Conley: Precedent by Accident*, in *CIVIL PROCEDURE STORIES* 295 (Kevin M. Clermont ed., 2008).

22. *Conley*, 355 U.S. at 42. Gibson, the named defendant, was the General Chairman of Local Union No. 28.

23. *Id.* at 43; see also Railway Labor Act, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-88 (2006)).

24. *Conley*, 355 U.S. at 43.

“rehired” with loss of seniority.<sup>25</sup> The complaint alleged further that despite plaintiffs’ requests, the Union did nothing to prevent or protest these discriminatory discharges as it would have done if the plaintiffs had been white.<sup>26</sup>

Plaintiffs’ legal claim was that the Union had violated their rights to fair representation under the RLA.<sup>27</sup> The Union moved to dismiss the complaint for lack of jurisdiction (arguing that the National Railroad Adjustment Board (“Adjustment Board”) had exclusive jurisdiction), failure to join an indispensable party (the railroad), and failure to state a claim upon which relief could be granted.<sup>28</sup>

The lower courts addressed only the jurisdictional issue, and thus found it unnecessary to reach the pleading issue. The district court held that it lacked jurisdiction under the RLA “since plaintiffs raise[d] no question of the lawfulness of the selection of Local 28 as a bargaining agent, nor of the validity of [the collective] bargaining agreement.”<sup>29</sup> The appellate court affirmed per curiam and essentially without opinion, except for the citation of two cases regarding jurisdiction.<sup>30</sup>

The *Conley* Court made short shrift of the jurisdictional issue, pointing out that this was a dispute between an employee and his union and that the RLA conferred exclusive jurisdiction on the Adjustment Board only in “disputes between an employee . . . and a carrier.”<sup>31</sup> The Court then cursorily held that the railroad was not an indispensable party and then turned to the pleading issue for which the case is known.<sup>32</sup>

Frequently, courts citing *Conley* overlook that fact that the Court’s pleading analysis proceeded in two parts, only the first of which invoked the infamous “no set of facts” language. The two parts correspond to two ideas often invoked in pleading disputes: the legal sufficiency of a claim and the requisite level of specificity of the allegations.<sup>33</sup>

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Conley v. Gibson*, 138 F. Supp. 60, 62 (S.D. Tex. 1955), *aff’d*, 229 F.2d 436 (5th Cir. 1956), *rev’d*, 355 U.S. 41 (1957).

30. *Conley v. Gibson*, 229 F.2d 436, 436 (5th Cir. 1956), *rev’d*, 355 U.S. 41 (1957).

31. *Conley*, 355 U.S. at 44 (quoting 45 U.S.C. § 153 First (i) (2006)).

32. *Id.* at 45.

33. *See, e.g., Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a court can dismiss where a legal theory is not asserted or where sufficient facts are not alleged).



The Union made both arguments in its Supreme Court brief, but it did not organize or label them as such. First, as to “legal sufficiency,” the then-governing law under Supreme Court precedent was “that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race and . . . the courts have power to protect employees against such invidious discrimination.”<sup>34</sup> The Union conceded this principle, but argued that the complaint’s allegation that the Union failed to protest the firings and rehiring was insufficient to constitute discrimination; otherwise, a union would be required to protest each time a union member had a grievance with an employer, regardless of the merit of the grievance.<sup>35</sup> Admittedly, this is a strained argument that conveniently overlooks the thrust of the complaint; but in concept, it is a legal sufficiency argument: plaintiff complains that the Union did not protest, but the duty of fair representation does not require it to protest.

At this point, the Court expounded the “no set of facts” language that *Twombly* would later abrogate:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union’s statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit.<sup>36</sup>

As to the “factual specificity” branch of its pleading argument, the union asserted:

The factual allegations of the Complaint are completely vague as to what provisions of, or in what manner, the bargaining agreement was violated by the Railroad when it abolished the particular jobs in question . . . . There are no factual allegations that it ever happened before, or that it happened pursuant to an agreement between the Railroad and Respondents . . . [W]hat specific conduct by the [Union] discriminated against [plaintiffs] in favor of white

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34. *Conley*, 355 U.S. at 42 (citations omitted).

35. Brief for Respondents Pat J. Gibson, et al. at 32, *Conley v. Gibson*, 355 U.S. 41 (1957) (No. 7), 1957 WL 87662 [hereinafter *Resp’ts Br.*].

36. *Conley*, 355 U.S. at 45–46 (citations omitted).

employees and thus constituted a breach of its statutory duty of fair representation?<sup>37</sup>

In other words, the Union argued that the complaint's allegations of discrimination were conclusory. Justice Black could have responded in kind to the Union's lack-of-specificity argument by either pointing out that the complaint did make such allegations,<sup>38</sup> or that the specificity the Union wanted was irrelevant under the substantive law.<sup>39</sup> Instead, the Court retorted with the general philosophy of notice pleading:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.<sup>40</sup>

This is the part of *Conley* that remains good law under *Twombly*—and maybe *Iqbal*.

## 2. *The 12(b)(6) spiel*

For decades, courts have started their opinions with boilerplate language about the governing standards of a 12(b)(6) motion, the gist of which is learnedly described by Wright & Miller,<sup>41</sup> but which I have irreverently come to call the "12(b)(6) spiel." The "no set of facts" versus "plausibility" standard is only a portion of the spiel.

Of course, courts frequently begin their recitations by quoting Rule 8(a)(2). After *Conley*, the boilerplate language almost always included that case's two best-known quotes: the "no set of facts"

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37. Resp'ts Br., *supra* note 35, at 26–27, 31.

38. For example, the complaint alleged that the defendant violated the security provisions of the bargaining agreement. *Conley*, 355 U.S. at 42–43. The complaint also alleged that the railroad and the Union had entered into a "Union Shop Contract" which also contained security provisions that the defendant violated. Pet'r's Br., *supra* note 21, at 4.

39. Under the substantive law, the Union's actions could have been discriminatory even if the Union had not agreed with the railroad to engage in discrimination and even if the Union had not engaged in this conduct on any other occasion than the one in question. See 45 U.S.C. §§ 151–88 (2006); see also *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 202 (1944).

40. *Conley*, 355 U.S. at 47 (citing FED. R. CIV. P. 8(a)(2)).

41. See 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 417 (3d ed. 2004) ("[F]or purposes of the motion to dismiss, (1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader.").

quote and the “fair notice” quote.<sup>42</sup> But there is more to the spiel, only some of which finds roots in *Conley*.

*a. The “extraordinary” nature of 12(b)(6) motions*

Courts’ descriptions of the governing standards often open with a statement that 12(b)(6) motions are “rarely granted”<sup>43</sup> and “only in ‘extraordinary’ cases”<sup>44</sup> because a complaint’s threshold for sufficiency is “exceedingly low.”<sup>45</sup> Although this may once have been an accurate assessment,<sup>46</sup> it is now a gross understatement of the efficacy of 12(b)(6) motions.

*b. The plaintiff gets the benefit of the doubt*

The boilerplate language also usually contains the principle that the court should give the plaintiff the benefit of the doubt on a 12(b)(6) motion.<sup>47</sup> This concept is expressed in various formulations, such as that the court must “draw all reasonable inferences in favor of plaintiff”<sup>48</sup> or must view the complaint’s allegations “in the light most favorable to the plaintiff”<sup>49</sup> or that the complaint must be “liberally construed in favor of the plaintiff.”<sup>50</sup> However, these liberal inferences have a limit: “unwarranted” factual inferences and deductions are insufficient.<sup>51</sup>

42. See, e.g., *Leibowitz v. Cornell Univ.*, 445 F.3d 586, 590–91 (2d Cir. 2006) (referencing immediately the “no set of facts” and “fair notice” requirements established in *Conley* at the beginning of the discussion section); *Bodine Produce, Inc. v. United Farm Workers Org. Comm.*, 494 F.2d 541, 556 (9th Cir. 1974) (same).

43. E.g., *Lightfoot v. OBIM Fresh Cut Fruit Co.*, No. 4:07-CV-608-BE, 2008 WL 4449512, at \*1 (N.D. Tex. Oct. 2, 2008).

44. E.g., *Feregrino v. Micro Focus (US) Inc.*, No. 08cv2026 JM(JMA), 2009 WL 33308, at \*1 (S.D. Cal. Jan. 5, 2009).

45. E.g., *Rivers v. Residential Servs. Group, Inc.*, No. 8:08-cv-84-T-30TBM, 2008 WL 2776250, at \*2 (M.D. Fla. July 15, 2008).

46. See 5B WRIGHT & MILLER, *supra* note 41, at 565 (“[R]elatively few complaints fail to meet this liberal [pleading] standard . . .”).

47. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (“[I]t is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.”).

48. E.g., *King v. Simpson*, 189 F.3d 284, 287 (2d Cir. 1999).

49. E.g., *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1484 (11th Cir. 1994).

50. E.g., *Lowery v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

51. See, e.g., *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003) (stating that such conclusions “masquerad[e] as facts” and alone are insufficient to prevent dismissal); *Morgan v. Church’s Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987) (acknowledging that the court need not give weight to overly tenuous factual inferences in considering motions to dismiss).

c. *Pro se plaintiffs get even more benefit of the doubt*

*Pro se* complaints are also supposed to be construed liberally,<sup>52</sup> although it is unclear how this standard differs from that applied to plaintiffs represented by counsel. Other formulations are that *pro se* complaints should be “interpret[ed] charitably”<sup>53</sup> and dismissed “only in the most unsustainable of cases.”<sup>54</sup>

d. *The complaint does not have to identify the legal name for the claim it is attempting to assert*

Probably stemming from the *pro se* plaintiff’s unintentionally hilarious efforts in *Dioguardi v. Durning*,<sup>55</sup> courts have explained that “[t]here is no rule that requires a complaint to allege the statutory basis upon which a cause of action is founded.”<sup>56</sup> As Judge Posner pointed out, Rule 8(a)(2) does not require that a complaint must set forth its legal basis; but once the complaint is challenged on a 12(b)(6) motion, the pleader must identify some legal basis.<sup>57</sup> Courts are not inclined to root out the right cause of action for the plaintiff.

e. *The “conclusory” conundrum*

An important part of the boilerplate language refers to the court’s obligation on a 12(b)(6) motion to credit as true the complaint’s factual allegations, but not its legal conclusions. It is difficult to discern the origins of this notion in modern federal practice. *Conley*

52. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980) (stating that a complaint filed *pro se*, “however inartfully pleaded,” is considered less stringently than pleadings filed with the aid of counsel (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972))).

53. E.g., *Williams v. Anderson*, 959 F.2d 1411, 1417 n.4 (7th Cir. 1992) (reading the complaint in light of the plaintiff’s history of mental health problems); see also *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (providing the *pro se* plaintiff with an opportunity to offer proof in support of his claim for relief despite the Court’s inability to “say with assurance” that the plaintiff had alleged sufficient facts to entitle him to relief).

54. *Sealed Plaintiff v. Sealed Defendant # 1*, 537 F.3d 185, 191 (2d Cir. 2008) (quoting *Boykin v. KeyCorp*, 521 F.3d 202, 216 (2d Cir. 2008)).

55. 139 F.2d 774, 775 (2d Cir. 1944) (highlighting portions of the *pro se* plaintiff’s complaint—regarding a customs officer’s seizure of plaintiff’s “medicinal tonics” and subsequent sale at auction—which contained such gems as, “It isnt [sic] so easy to do away with two cases with 37 bottles of one quart. Being protected, they can take this chance.”).

56. E.g., *Darnell v. Hoelscher, Inc.*, No. 09-cv-204-JPG, 2009 WL 1768655, at \*2 (S.D. Ill. June 23, 2009); see, e.g., *Daniels v. USS Agri-Chemicals*, 965 F.2d 376 (7th Cir. 1992) (concluding that under federal and state pleading, the plaintiff need not include any theory of the case in a notice pleading system).

57. See *Kirksey v. R.J. Reynolds Tobacco Co.*, 168 F.3d 1039, 1041 (7th Cir. 1999) (stating that it is unresponsive for a plaintiff to refuse to offer the basis of a complaint after a defendant has presented a 12(b)(6) motion to dismiss).

mentioned nothing about it; nor do the Federal Rules of Civil Procedure.

The rule that legal conclusions are not accepted as true probably reaches back to code pleading, under which “legal conclusions” were not accepted as true on a demurrer (the code pleading forerunner to a 12(b)(6) motion).<sup>58</sup> The concept is sensible when the alleged “conclusion” is a fanciful misstatement of the law or a misapplication of the law to the facts. Take the following conclusion for example: “My roommate, the defendant, did not do his laundry for three months. Therefore, he has committed the tort of intentional infliction of emotional distress.” In such a situation, the court would ignore its role as the gatekeeper of substantive law if it credited the legal conclusion of the “tort.”

Whatever its source, the dividing line between allegations accepted and not accepted as true has been phrased in a myriad of ways.<sup>59</sup> The characterization of allegations accepted as true has run the gamut from “all allegations”<sup>60</sup> to “all material allegations”<sup>61</sup> to “facts”<sup>62</sup> to “all factual allegations”<sup>63</sup> to “all well-pleaded factual allegations.”<sup>64</sup> The characterization of allegations that a court is not bound to accept as true has ranged from “legal conclusions”<sup>65</sup> to “sweeping legal conclusions”<sup>66</sup> to “bare assertion[s]”<sup>67</sup> to “bare assertion[s] of legal conclusions”<sup>68</sup> to “bald assertions [and] unsupported conclusions”<sup>69</sup> to “conclusory allegations”<sup>70</sup> to “conclusory recitations

58. *See, e.g.*, *Gillispie v. Goodyear Serv. Stores*, 128 S.E.2d 762, 765 (N.C. 1963).

59. *See* 5B WRIGHT & MILLER, *supra* note 41, at 504–21 (“Nothing appears to turn on the differences in these semantic formulations of the standard.”).

60. *E.g.*, *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991).

61. *E.g.*, *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

62. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788, 792 (2009) (“Because this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we assume the truth of the facts as alleged in petitioners’ complaint.”).

63. *E.g.*, *Grammer v. John J. Kane Reg’l Ctrs.-Glen Hazen*, 570 F.3d 520, 523 (3d Cir. 2009).

64. *E.g.*, *Baker v. Kingsley*, 387 F.3d 649, 660 (7th Cir. 2004); *see also* *Scheuer v. Rhodes*, 416 U.S. 232 (1974). The phrase “well-pleaded facts” simply seems to be a tautological description of allegations that are not conclusory.

65. *E.g.*, *Lovick v. Ritemoney Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004) (citing *Jeanmarie v. United States*, 242 F.3d 600, 602–03 (5th Cir. 2001)).

66. *E.g.*, *Wiles v. Capitol Indem. Corp.*, 280 F.3d 868, 870 (8th Cir. 2002).

67. *E.g.*, *Florance v. Buchmeyer*, 500 F. Supp. 2d 618, 626 (N.D. Tex. 2007).

68. *E.g.*, *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993).

69. *E.g.*, *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir. 1996).

70. *E.g.*, *Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007).

of law”<sup>71</sup> to “legal conclusion[s] couched as [or ‘masquerading as’] fact[s]”<sup>72</sup> to my personal favorite, “periphrastic circumlocutions.”<sup>73</sup>

The near-impossibility of distinguishing “conclusion” from “fact” is nicely illustrated by the 1986 case of *Papasan v. Allain*.<sup>74</sup> By the time this case was decided, the rule that “for the purposes of this motion to dismiss we must take all the factual allegations in the complaint as true, [but] we are not bound to accept as true a legal conclusion couched as a factual allegation”<sup>75</sup> was set in stone. The Court applied this rule to the complaint’s allegation that due to disparities in government funding, schoolchildren in the Chickasaw Counties had been deprived of a “minimally adequate education,” and rejected the allegation as conclusory:

The petitioners do not allege that schoolchildren in the Chickasaw Counties are not taught to read or write; they do not allege that they receive no instruction on even the educational basics; they allege no actual facts in support of their assertion that they have been deprived of a minimally adequate education. As we see it, we are not bound to credit and may disregard the allegation that the petitioners have been denied a minimally adequate education.<sup>76</sup>

Contrast another of the complaint’s allegations which satisfied the *Papasan* Court as not too conclusory: “The allegations of the complaint are that the State is distributing the income from . . . lands or funds unequally among the school districts, to the detriment of the Chickasaw Cession schools and their students.”<sup>77</sup> The Court did not decry the lack of “actual facts in support of” plaintiffs’ assertion of “detriment.”<sup>78</sup> Could not the alleged “detriment” just have been the Trojan Horse version of the lack of “minimally adequate education” that had already been rejected? It is unclear why the first allegation is conclusory and the second is not.<sup>79</sup>

71. *E.g.*, *Zelenka v. NFI Indus., Inc.*, 436 F. Supp. 2d 701, 704 (D.N.J. 2006).

72. *See, e.g.*, *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (“[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.”); *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (“[L]egal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.”).

73. *E.g.*, *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 33 (1st Cir. 2007).

74. 478 U.S. 265 (1986).

75. *Id.* at 286.

76. *Id.*

77. *Id.* at 287–88.

78. *Id.* at 286.

79. In another recent example of the invisible line between “conclusions” and “facts,” one court rejected a claim because the claim only contained a “single, conclusory assertion that [the defendant] ‘sought . . . to appropriate and disclose the names of [plaintiff’s] customers.’” *All Bus. Solutions, Inc. v. NationsLine, Inc.*, 629 F. Supp. 2d 553, 558–59 (W.D. Va. 2009) (quoting Plaintiff’s Second Amended Complaint ¶ 23). Should the plaintiff have described how the defendant broke into

As another example of the conclusory facts dilemma, Justice Stevens and other scholars have pointed out that the judicial refusal to credit a “conclusory” allegation as true on a 12(b)(6) motion is seemingly inconsistent with the conclusory nature of the official forms following the FRCP, which “suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”<sup>80</sup> For example, Form 11, a complaint for negligence, states in its operative entirety, “On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff,” and then proceeds to allege damages.<sup>81</sup> How can Form 11’s allegation that “the defendant negligently drove a motor vehicle against the plaintiff”<sup>82</sup> not be a conclusion, whether of fact or law? Justice Stevens thinks it is a “bare allegation,” but one that is acceptable on a 12(b)(6) motion;<sup>83</sup> Justice Souter is satisfied that the allegation as a whole is not conclusory because it gives a date, a time, and a place.<sup>84</sup>

The problem is that one person’s “conclusion” is another person’s “fact.”<sup>85</sup> The continuing debate demonstrates exactly why the drafters of the FRCP intended to sweep away the failed code-pleading attempts to distinguish “evidence” from “ultimate facts” and “conclusions.”

### 3. *The resistance to “notice pleading”*

In the years before *Twombly*, the Court tried to slap down any pleading standard that lower courts had the audacity to call “heightened” in relation to the general notice pleading standard of Rule 8(a)(2). In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>86</sup> the Court reversed the decision of the United States Court of Appeals for the Fifth Circuit to impose an explicitly “heightened pleading standard” applied to claims against

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its office and stole a Rolodex, or how the defendant copied computer files, and gave them to a competitor?

80. FED. R. CIV. P. 84; see also *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 576 (2007) (Stevens, J., dissenting) (commenting on the *Twombly* majority’s inconsistency with the hypothetical pleadings in Form 9 of the FRCP); Bone, *supra* note 14, at 875 & n.4 (noting that courts have departed from the “liberal ethos” of the FRCP).

81. FED. R. CIV. P. Form 11 (formerly Form 9).

82. *Id.*

83. *Twombly*, 550 U.S. at 576 (Stevens, J., dissenting).

84. *Id.* at 565 n.10 (majority opinion) (“A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs’ conclusory allegations in the § 1 context would have little idea where to begin.”).

85. See 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE DESKBOOK § 72, at 635 (2002) (“[T]he distinction between facts and conclusions is one of degree only, not of kind.”).

86. 507 U.S. 162 (1993).

municipalities under 42 U.S.C. § 1983.<sup>87</sup> In *Swierkiewicz v. Sorema N.A.*,<sup>88</sup> the Court reversed the Second Circuit's imposition of a "prima facie case" pleading standard applied to employment discrimination claims.<sup>89</sup> These were easy cases given the structure of the FRCP. Rule 9(b) imposes only a "particularity" requirement in pleading claims of "fraud or mistake,"<sup>90</sup> so every claim that is not for "fraud or mistake" falls within 8(a)(2)'s "short and plain statement" requirement.<sup>91</sup>

But lower courts continued to attempt to evade the notice pleading standard, virtually ignoring *Leatherman* and *Swierkiewicz*.<sup>92</sup> For example, despite *Leatherman*, some courts continued to apply an explicit "heightened pleading" standard to § 1983 complaints brought against an individual defendant, especially when the defendant asserted the defense of qualified immunity with a subjective intent element<sup>93</sup> or when the plaintiff alleged supervisory

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87. *Id.* at 164–65.

88. 534 U.S. 506 (2002).

89. *Id.* at 509–10.

90. FED. R. CIV. P. 9(b).

91. *Swierkiewicz*, 534 U.S. at 512–13.

92. See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (discussing the regularity with which district courts avoided the simplified pleading standard in favor of consolidating an ever-growing federal docket).

93. See, e.g., *Gonzalez v. Reno*, 325 F.3d 1228, 1235 (11th Cir. 2003) ("In examining the factual allegations in the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity."); *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002) (holding that although Rule 8(a)(2) governs, "[p]laintiffs suing governmental officials in their individual capacities . . . must allege specific conduct giving rise to a constitutional violation"); *Ramirez v. Dep't of Corr.*, 222 F.3d 1238, 1241 (10th Cir. 2000) (explaining that when a qualified immunity defense is asserted, the court will "apply a heightened pleading standard, requiring the complaint to contain 'specific, non-conclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law'" (quoting *Dill v. City of Edmond*, 155 F.3d 1193, 1204 (10th Cir. 1998))); see also *Truvia v. Julien*, 187 F. App'x 346, 348 (5th Cir. 2006) (calling the proscription in *Oliver* an imposition of a "heightened pleading standard"); *Contra Thomas v. Indep. Twp.*, 463 F.3d 285, 294 (3d Cir. 2006) (refusing to "apply [the] heightened pleading standard in cases in which a defendant pleads qualified immunity"); *Educadores Puertorriqueños en Acción v. Hernandez*, 367 F.3d 61, 68 (1st Cir. 2004) (rejecting any heightened pleading standard in federal civil rights actions unless the FRCP specifically impose such a standard); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (reviewing the history of the heightened pleading standard and finding that the heightened pleading of a defendant's improper motive in constitutional tort cases is no longer required); *Currier v. Doran*, 242 F.3d 905, 914–16 (10th Cir. 2001) (holding that courts may no longer impose a heightened pleading requirement for cases in which the defendant officially raised the defense of qualified immunity after finding no support for such an imposition from federal statutory law or from the FRCP); *Schultea v. Wood*, 47 F.3d 1427, 1432 (5th Cir. 1995) (recognizing that the "heightened pleading standard is a departure from the usual pleading requirements of [Rules] 8 and 9(b)" (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring))).



liability.<sup>94</sup> In addition, despite *Swierkiewicz*, some lower courts continued to apply a “prima facie case” pleading requirement in employment discrimination cases.<sup>95</sup>

Even if they did not use the term “heightened,” courts still attempted to accomplish the same result by different means. The method of choice was the prohibition against “conclusory” allegations, especially in civil rights cases.

Justifications for tightening up “notice pleading” in civil rights cases usually focused on the disruption to government operations that could result from a flood of meritless cases and government officials’ entitlement through qualified immunity to protection from litigation as well as from liability.<sup>96</sup> With this study, I quantified a part of the problem: constitutional civil rights cases accounted for 32% of the 12(b)(6) motions in the Database.<sup>97</sup> I discovered another facet of the civil rights problem after reading hundreds of cases for this study: I began to experience a sinking feeling every time I came across a constitutional civil rights case—particularly, but not exclusively, with a *pro se* plaintiff—for I knew there was a good chance the claims would be jumbled, the number of defendants massive, the legal theories botched,<sup>98</sup> and the story sad. Perhaps similar sentiments—in addition to the oft-stated concerns about litigation disrupting daily government operations—have motivated federal courts to adopt a more scrutinizing approach throughout the tortured history of pleading standards in civil rights cases.

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94. See, e.g., *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1998) (“A defendant in a civil rights action must have personal involvement in the alleged wrongs . . . . Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence. Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity.” (internal citations omitted)); see also *Lynn v. Tobin*, No. 07-1622, 2009 WL 1971430, at \*2 (E.D. Pa. July 7, 2009) (“The Third Circuit has adopted a specific pleading standard for civil rights claims.”).

95. E.g., *Totten v. Norton*, 421 F. Supp. 2d 115, 120 (D.D.C. 2006).

96. For a discussion of the arguments for and against a heightened pleading standard in civil rights cases from a critical race theory perspective, see Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 107–10 (1994).

97. See *infra* Figure 4.

98. In legions of cases, plaintiffs appear to be unaware of a host of legal principles including: the doctrine of sovereign immunity; the difference between 42 U.S.C. §§ 1981, 1983, and 1985; the inability of municipalities to be sued on a *respondeat superior* theory; and the *Rooker-Feldman* doctrine. Many civil rights plaintiffs also fail to understand the redundancy in filing claims against a government employee in his or her “official capacity” and the governmental entity; when to use the Eighth versus the Fourteenth Amendment in claims of deliberate indifference to serious medical needs; and when exhaustion of administrative remedies is required.

B. *The New “Plausibility” Standard: Bell Atlantic Corp. v. Twombly*

*Twombly* had its genesis in the break-up of AT&T’s local telephone business into the “Baby Bells,” also known as Incumbent Local Exchange Carriers (“ILECs”).<sup>99</sup> The Telecommunications Act of 1996<sup>100</sup> sought to facilitate competition in local telephone service by permitting Competitive Local Exchange Carriers (“CLECs”) to use networks belonging to ILECs.<sup>101</sup> The *Twombly* plaintiffs, representing a putative class of all subscribers of local telephone or high-speed internet service from 1996 onward,<sup>102</sup> sued the ILECs, including Bell Atlantic, for antitrust violations under the Sherman Act,<sup>103</sup> which prohibits a “contract, combination . . . , or conspiracy, in restraint of trade or commerce.”<sup>104</sup>

The complaint alleged that the defendant ILECs engaged in anticompetitive conduct through (1) their “parallel conduct” in adopting certain practices that discouraged competition from the CLECs, and (2) their failure to compete with each other in local service in their respective service areas.<sup>105</sup> However, taken alone, this conduct was not sufficient for liability under the Sherman Act, which requires an anticompetitive agreement or conspiracy among the defendants. The complaint therefore attempted to allege the critical element of “agreement” or “conspiracy” in several ways.

First, the complaint alleged that the ILECs stayed out of each other’s territory even when one ILEC’s geographic operating area surrounded another ILEC’s operating area. For example, defendant ILEC SBC served California and Nevada, but defendant ILEC Qwest served all the states bordering California and Nevada.<sup>106</sup> In this context, the complaint alleged:

Richard Notebaert, the former Chief Executive Officer of Ameritech, who sold the company to Defendant SBC in 1999 and who currently serves as the Chief Executive Officer of Defendant

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99. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 549 (2007).

100. Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

101. *Twombly*, 550 U.S. at 549.

102. *Id.* at 550. The complaint was filed on behalf of the plaintiffs by the former law firm of Milberg Weiss Bershad Hynes & Lerach LLP. Unfortunately for the plaintiffs, former partners of Milberg Weiss were indicted around the time the case was heard in the Supreme Court. See Julie Creswell, *Partner at Law Firm Resigns to Focus on Criminal Charges Against Him*, N.Y. TIMES, Dec. 9, 2006, at C3.

103. Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (2006)).

104. 15 U.S.C. § 1 (2006).

105. *Twombly*, 550 U.S. at 550-51.

106. Complaint ¶ 37, at 12, *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02-cv-10220-GEL), 2003 WL 25753160.

Qwest, was quoted in a *Chicago Tribune* article as saying it would be fundamentally wrong to compete in the SBC/Ameritech territory, adding "it might be a good way to turn a quick dollar but that doesn't make it right."<sup>107</sup>

The complaint alleged further that congressional representatives and other persons considered Notebaert's statement evidence of an anticompetitive conspiracy.<sup>108</sup>

Second, the complaint alleged that "[e]laborate" or "frequent communications" among the ILECs to agree to allocate markets would not have been necessary because "four defendants . . . account[ed] for as much as ninety percent or more of the markets for local telephone services within the 48 contiguous states."<sup>109</sup> The complaint also alleged that the ILECs did "indeed communicate amongst themselves through a myriad of organizations, including but not limited to the United States Telecom Association, the TeleMessaging Industry Association, the Alliance for Telecommunications Industry Solutions, Telecordia, Alliance for Public Technology, the Telecommunications Industry Association and the Progress and Freedom Foundation."<sup>110</sup>

In support of its allegation that the "[d]efendants ha[d] engaged in parallel conduct in order to prevent competition," the complaint provided twelve examples of wrongful acts in which all the ILECs had engaged.<sup>111</sup> These acts included double-billing the CLEC's customers who converted from an ILEC and failing to provide a quality interconnection between the network and those of competitors.<sup>112</sup>

With this background, the complaint then alleged:

In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs . . . . Plaintiffs allege upon information and belief that Defendants have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local

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107. *Id.* ¶ 42, at 14.

108. The Illinois Coalition For Competitive Telecom allegedly characterized Notebaert's reported statement as "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service." *Id.* ¶ 44, at 14. Further, after Notebaert's reported statement, U.S. Representatives John Conyers and Zoe Lofgren allegedly asked the Antitrust Division to "investigate whether the [ILECs] are violating the antitrust laws by carving up their market territories and deliberately refraining from competing with one another." *Id.* ¶ 45, at 15.

109. *Id.* ¶ 48, at 18.

110. *Id.* ¶ 46, at 15.

111. *Id.* ¶ 47(a)-(l), at 15-18.

112. *Id.*

telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.<sup>113</sup>

The United States District Court for the Southern District of New York granted the defendants' 12(b)(6) motion.<sup>114</sup> The Second Circuit reversed, holding that under the "no set of facts" test from *Conley*, the complaint stated a claim for relief.<sup>115</sup>

The Supreme Court reversed. The majority, in an opinion by Justice Souter, began with Rule 8(a)(2) and the "fair notice" quote from *Conley*.<sup>116</sup> It continued with another part of the 12(b)(6) spiel: factual allegations, but not legal conclusions, are accepted as true, "even if doubtful."<sup>117</sup>

But the Court left out a key piece of the boilerplate language. It said nothing about how a plaintiff on a 12(b)(6) motion was to get the benefit of the doubt. There were no admonishments to draw all reasonable inferences, or liberally construe the allegations in the plaintiff's favor.

Instead, it dropped the "plausibility" bombshell:

[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.<sup>118</sup>

The Court explained that requiring "plausible grounds" for relief was not a "probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of the alleged wrongdoing.<sup>119</sup> This expectation was particularly important in an antitrust case, where discovery can be massive and ruinously expensive.

The Court's opinion was short on explaining the criteria by which plausibility was to be judged.<sup>120</sup> Apparently, "plausible" is more than "possible" but less than "probable."<sup>121</sup> In addition, Justice Souter

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113. *Id.* ¶ 51, at 19.

114. *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 176 (S.D.N.Y. 2003).

115. *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 106, 109 (2d Cir. 2005).

116. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

117. *Id.* at 555–57.

118. *Id.* at 570.

119. *Id.* at 556.

120. *Cf. Denton v. Hernandez*, 504 U.S. 25, 33 (1992) ("Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be 'strange, but true; for truth is always strange, Stranger than fiction.'" (citation omitted)).

121. *See Twombly*, 550 U.S. at 557.

suggested that plaintiffs' allegations of conspiracy against the ILECs should be judged "in light of common economic experience."<sup>122</sup> The Court did not attempt to define the group for which the economic experience would be "common," whether it be economists, monopolists, consumers, judges, Americans, or some other cohort.

Applying the "plausibility" standard, the Court noted that the alleged parallel conduct among the ILECs and their failure to compete with one another was consistent with legal behavior.<sup>123</sup> The complaint's "stray" allegations of illegal "agreement" among the ILECs were mere legal conclusions.<sup>124</sup> "[W]hen viewed in light of common economic experience,"<sup>125</sup> the defendants' acting to keep out the CLECs was just "the natural, unilateral reaction of each ILEC intent on keeping its regional dominance."<sup>126</sup> "[A]n obvious alternative explanation" for defendants' failure to compete with each other was that they were born-and-bred monopolists.<sup>127</sup> Thus, the Court held, nothing in the complaint made its conclusory allegations of an illegal "agreement" among defendants "plausible."<sup>128</sup>

Along the way, the Court held that the "no set of facts" standard from *Conley* "ha[d] earned its retirement"<sup>129</sup>:

The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.<sup>130</sup>

The Court mistakenly cited *Swierkiewicz*, among other cases, for this proposition.<sup>131</sup> In fact, *Swierkiewicz* stated the proposition thus: "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under *any set of facts* that could be proved consistent with the allegations."<sup>132</sup> There is no difference between the "no set of facts" rule and the "any set of facts" rule—indeed, two of the cases *Conley*

122. *Id.* at 565.

123. *Id.* at 554.

124. *Id.* at 564.

125. *Id.* at 565.

126. *Id.* at 566.

127. *Id.* at 567–68.

128. *Id.* at 564–65.

129. *Id.* at 563.

130. *Id.*

131. *Id.* (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 504, 514 (2002)).

132. *Swierkiewicz*, 534 U.S. at 514 (emphasis added) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

cited for the “no set of facts” principle actually used the language “any state of facts.”<sup>133</sup>

Two weeks after *Twombly*, the Court issued a per curiam opinion, *Erickson v. Pardus*,<sup>134</sup> in which it rejected the argument that a prisoner’s civil rights complaint for deliberate indifference to serious medical needs was too conclusory.<sup>135</sup> *Erickson* cited *Twombly* only for the “fair notice” part of *Conley* and the standard proposition that “a judge must accept as true all of the factual allegations contained in the complaint” on a 12(b)(6) motion.<sup>136</sup> The Court did not even refer to the “plausibility” standard, reinforcing speculation that “plausibility” was confined to the antitrust context.

*Twombly*, however, garnered much more attention than *Erickson*. Some commentators expressed concern that *Twombly* constituted improper judicial activism, was inconsistent with the merits focus of the FRCP, and might further erode access to justice.<sup>137</sup> Others claimed that *Twombly* was either correctly decided on its facts, clarified existing principles, or would not have a significant practical effect on rulings.<sup>138</sup>

133. See *Conley v. Gibson*, 355 U.S. 41, 46 n.5 (citing *Cont’l Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942)) (explaining that a case may not be dismissed unless it appears that a plaintiff cannot prevail under “any state of facts”); *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302, 306 (8th Cir. 1940) (“[W]e think there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.”). Nevertheless, some courts continue to favorably cite the “any set of facts” rule after *Twombly*. E.g., *Torres v. Dep’t of Corr.*, No. 08-98J, 2009 WL 1322564, at \*1 (W.D. Pa. May 12, 2009); *Gregory Surgical Servs., LLC v. Horizon Blue Cross Blue Shield of N.J., Inc.*, No. 06-0462 (JAG), 2009 WL 749795, at \*2 (D.N.J. Mar. 19, 2009); *Zawacki v. Realogy Corp.*, 628 F. Supp. 2d 274, 278 (D. Conn. 2009). Notably, at least one court has continued this trend even after *Iqbal*. E.g., *Ahern v. Omnicare ESC LLC*, No. 5:08-CV-291-FL, 2009 WL 2591320, at \*4 (E.D.N.C. Aug. 19, 2009).

134. 551 U.S. 89 (2007) (per curiam).

135. *Id.* at 93.

136. *Id.* at 93–94.

137. See, e.g., Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014–16 (2009) (examining dismissal rates of employment discrimination cases before and after *Twombly* and recommending a more cautious use of the “plausibility” standard); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 453–54 (2008) (arguing that the rule amendment process is the proper way to change pleading requirements).

138. See, e.g., Bone, *supra* note 14, at 889 (“Most complaints that pass muster under notice pleading should also pass muster under plausibility pleading.”); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 62 (2007) (applauding the result of *Twombly*, but not the underlying analysis, for preventing futile and expensive discovery); Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1064 (2009) (finding *Twombly*’s standard “relatively clear” and mandated by the Federal Rules).

Both sides had a point. On the one hand, when a pleading's sufficiency as a "short and plain statement . . . showing that the pleader is entitled to relief" under Rule 8(a)(2) has been interpreted for fifty years under the "no set of facts" standard, suddenly substituting a "plausibility" standard looks very much like an end-run around the constraints on the judiciary's rule-making power.<sup>139</sup> In addition, whatever the practical effect of the change, the two standards have very different aspirational connotations: to allow a complaint to stand unless "no set of facts" would support it suggests an intent to err on the side of upholding the pleading; to require a complaint to be "plausible on its face" suggests a more suspicious attitude towards pleadings. On the other hand, the lower federal courts have been chafing at the "notice pleading" standard for decades, particularly in civil rights cases, and numerous opinions, law review articles, and treatises have counseled that the *Conley* "no set of facts" standard is "somewhat hyperbolic" and is not to be applied literally.<sup>140</sup>

Meanwhile, most federal courts of appeals seemingly sided with the more sanguine view of *Twombly*, concluding that it did not considerably alter the pleading standard.<sup>141</sup> Instead, *Twombly* was described as imposing "two easy-to-clear hurdles": notice to the defendant and plausibility.<sup>142</sup> Nonetheless, the exhortation that the allegations must support a claim that is "plausible on its face" smacks of weighing evidence or of disbelieving the complaint's allegations,

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139. FED. R. CIV. P. 8(a)(2); see 28 U.S.C. §§ 2071–74 (2006) (prescribing the procedure by which the Supreme Court shall make the FRCP, including submission to Congress before becoming effective).

140. Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998); see, e.g., *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984) ("[T]he exceedingly forgiving attitude towards pleading deficiencies . . . in *Conley v. Gibson* . . . has never been taken literally."); *Doe v. Norwest Bank Minn., N.A.*, 909 F. Supp. 668, 671 (D. Minn. 1995) ("[T]he ['no set of facts'] phrase is not applied literally . . .").

141. E.g., *Phillips v. County of Allegheny*, 515 F.3d 224, 230 (3d Cir. 2008) ("[T]he Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression . . ."); *Boykin v. Keycorp*, 521 F.3d 202, 213–14 (2d Cir. 2008) (finding that *Twombly* does not significantly alter the lenient, notice-focused standard used to assess the complaint of a *pro se* litigant); *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 296 n.1 (6th Cir. 2008) (acknowledging circuit courts' interpretations of *Twombly* that "did not significantly alter notice pleading"). But see *St. Germain v. Howard*, 556 F.3d 261, 263 n.2 (5th Cir. 2009) ("*Twombly* jettisoned the minimum notice pleading requirements of *Conley v. Gibson*."); *Morgan v. Hanna Holdings, Inc.*, 635 F. Supp. 2d 404, 407 (W.D. Pa. 2009) ("[*Twombly*] required a heightened degree of fact pleading in an anti-trust case.").

142. *Equal Employment Opportunity Comm'n v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007).

neither of which may be done on a 12(b)(6) motion.<sup>143</sup> At least one court's misquoting of the new standard as requiring "enough plausible facts" illustrates the misunderstanding that the word may generate.<sup>144</sup>

### C. *Twombly on Steroids: Ashcroft v. Iqbal*

*Twombly's* "plausibility" standard was new and startling, but left most of the 12(b)(6) spiel intact, and, like it or not, can fairly be seen as better enunciating what lower courts were already doing, given their mistrust of notice pleading. *Iqbal* is a different story.

Javaid Iqbal's complaint grew out of the Federal Bureau of Investigation's ("FBI") massive investigation following the September 11, 2001, attacks by al-Qaida on the World Trade Center and other targets.<sup>145</sup> Iqbal alleged that "all Arab Muslim men [within the New York area] arrested on criminal or immigration charges while the FBI was following an investigative lead into the September 11th attacks—however unrelated the arrestee was to the investigation—were immediately classified as 'of interest' to the post-September-11th investigation."<sup>146</sup>

Iqbal, a Pakistani Muslim, was one of those men. Charged on November 5, 2001, with fraud in connection with identification documents, he alleged that he and other Muslim men were classified as persons "of high interest" based solely on their race, national origin, and religion.<sup>147</sup> As such, he was confined in a hastily constructed post-September-11th maximum security unit at the

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143. See *Neitzke v. Williams*, 490 U.S. 319, 326–27 (1989) (citations omitted) ("What Rule 12(b)(6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations."); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test."); *Hansen v. Native Am. Refinery Co.*, No. 2:06cv00109, 2007 WL 1108776, at \*3 (D. Utah Apr. 10, 2007) ("A court evaluating a 12(b)(6) motion should not 'weigh potential evidence that the parties might present at trial, but [should] assess whether the plaintiff's claim alone is legally sufficient' to provide relief." (quoting *Sutton v. Utah State Sch. for the Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999))).

144. *Halpin v. David*, No. 4:06cv457-RH/WCS, 2009 WL 789684, at \*3 (N.D. Fla. Mar. 20, 2009).

145. *Iqbal v. Hasty*, 490 F.3d 143, 147–48 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009). Iqbal had a co-plaintiff, Ehad Elmaghraby, who settled with the United States for \$300,000 after the district court denied most of the defendants' 12(b)(6) motions. *Id.* at 147.

146. *Elmaghraby v. Ashcroft*, No. 04:CV-01809 JS SMG, 2005 WL 2375202, at \*2 (E.D.N.Y. Sept. 27, 2005) (citation omitted).

147. *Id.* at \*1 & n.1.



Metropolitan Detention Center in Brooklyn (“ADMAX SHU”).<sup>148</sup> Conditions in the ADMAX SHU were brutal: beatings and repeated body-cavity searches; inadequate food, heat, and medical care; twenty-three-hour-a-day solitary lockdown; interference with religious practices and right to counsel; and ethnic insults.<sup>149</sup> Yet Iqbal alleged he was not “afforded the opportunity to contest his classification or continued confinement in the ADMAX SHU,” where he was kept for over six months, even after pleading guilty to the underlying criminal charges.<sup>150</sup>

After his removal to Pakistan,<sup>151</sup> Iqbal filed a twenty-one-count complaint asserting, among other things, *Bivens* claims<sup>152</sup> against John Ashcroft, former Attorney General of the United States, Robert Mueller, Director of the FBI, and numerous other supervisory and non-supervisory government officials.<sup>153</sup> Ashcroft and Mueller, along with many other supervisory defendants, moved to dismiss on the grounds of qualified immunity and that the allegations of participatory conduct by Ashcroft and Mueller were too “conclusory.”<sup>154</sup>

The district court, citing *Conley*’s “no set of facts” standard, denied most of Ashcroft and Mueller’s motions to dismiss.<sup>155</sup> But by the time the case reached the Second Circuit on defendants’ interlocutory appeal, *Twombly* had intervened. Struggling mightily to reconcile the “conflicting signals” in *Twombly* itself as well as to navigate the morass created by recent Supreme Court pleadings decisions, the Second Circuit concluded: “[W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*.”<sup>156</sup>

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148. *Id.* at \*2 & n.5.

149. *Id.* at \*3–7.

150. *Id.* at \*1 & n.1.

151. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1943 (2009).

152. *See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing a cause of action against federal officers for constitutional violations).

153. *Iqbal*, 129 S. Ct. at 1942.

154. *Elmaghraby*, 2005 WL 2375202, at \*10, \*20.

155. *Id.* at \*35 (denying motion to dismiss claims of violation of Fifth Amendment procedural due process, discrimination on the basis of religion and race under the First and Fifth Amendments, and conspiracy under 42 U.S.C. § 1985(3)).

156. *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007), *rev’d*, 129 S. Ct. 1937 (2009).

Applying this standard, the Second Circuit held that no further amplification was needed to render most of the claims “plausible.”<sup>157</sup> The court did dismiss the procedural due process claims against Ashcroft and Mueller, but left the First Amendment, Equal Protection, and § 1985 claims intact.<sup>158</sup>

The Supreme Court majority, in a 5-4 opinion by Justice Kennedy, reversed the Second Circuit.<sup>159</sup> In so doing, it espoused an extraordinary interpretation of *Twombly* and federal pleading practice—refuted bitterly in dissent by Justice Souter, the author of the two-year-old *Twombly*.<sup>160</sup>

The Court began with Rule 8(a)(2), but then omitted most of the rest of the 12(b)(6) boilerplate language. Remarkably, the Court never once referred to “notice pleading,” conspicuously failing to even cite the *Conley* “fair notice” language preserved in *Twombly* (Justice Souter, in dissent, cited the “fair notice” standard).<sup>161</sup> The Court also eschewed citation of *Swierkiewicz* or *Leatherman*, both of which upheld “notice pleading” against creeping “heightened pleading.” In fact, the Court did not expressly reject “heightened pleading,” as Justice Souter had been careful to do in *Twombly*.<sup>162</sup> Also absent was any mention of giving the plaintiff the benefit of the doubt or that all reasonable inferences should be made in the plaintiff’s favor.

Instead, the Court turned to the *Twombly* “plausible on its face” standard.<sup>163</sup> It brushed aside any doubt that the standard was to be applied in all civil cases, not just antitrust cases.<sup>164</sup> The Court then elaborated, “Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>165</sup>

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157. *Id.* at 166 (“[A]ll of the Plaintiff’s allegations respecting the personal involvement of these Defendants are entirely plausible, without allegations of additional subsidiary facts.”).

158. *Id.* at 177–78.

159. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1941, 1954 (2009).

160. *Id.* at 1954–55 (Souter, J., dissenting).

161. *Id.* at 1961.

162. *Compare id.* at 1949–50 (majority opinion) (suggesting that a pleading must contain factual enhancement and noting that a court can choose to begin by identifying pleadings that are not entitled to the assumption of truth), *with* *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (“[W]e do not apply any ‘heightened’ pleading standard . . .”).

163. *Iqbal*, 129 S. Ct. at 1949.

164. *Id.* at 1953.

165. *Id.* at 1950.

Applying its own judicial experience and common sense, the Second Circuit had found *Iqbal*'s claims against Ashcroft and Mueller plausible.<sup>166</sup> The Supreme Court majority did not; it held that the complaint did not "contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin."<sup>167</sup> Therefore, the Court held, the "complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners."<sup>168</sup>

The applications of the "plausibility" standard by the Supreme Court majority and the Second Circuit in *Iqbal* illustrate how rudderless a guide that standard is. For the Second Circuit, what made the alleged discriminatory policy "plausible" was the unprecedented national security crisis on American soil.<sup>169</sup> The same national security crisis, for the Supreme Court majority, was what made legitimate law enforcement purposes for the policy more "likely" than purposeful discrimination, thus rendering purposeful discrimination implausible.<sup>170</sup>

One can only imagine Justice Souter's distress over the majority's makeover of the "plausibility" standard. He reminded the Court that *Twombly* involved allegations that were consistent with both legal and illegal conduct, but that in *Iqbal*, "the allegations in the complaint . . . [were not] consistent with legal conduct."<sup>171</sup> Further, he was reduced to explaining elementary 12(b)(6) principles:

*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. . . . The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel.<sup>172</sup>

Far from embodying a notice pleading standard, *Iqbal*'s interpretation of "plausibility" is equivalent to the "strong inference of scienter" standard under the Private Securities Litigation Reform

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166. *Iqbal v. Hasty*, 490 F.3d 143, 166 (2d Cir. 2007), *rev'd*, 129 S. Ct. 1937 (2009).

167. *Iqbal*, 129 S. Ct. at 1952.

168. *Id.* at 1954.

169. *See Hasty*, 490 F.3d at 166, 175–76 (2d Cir. 2007) (considering the likelihood that senior officials would concern themselves with the formulation and implementation of such policies).

170. *See Iqbal*, 129 S. Ct. at 1951–52 (choosing the "obvious alternative explanation" that the arrest was based on potential terrorist connections).

171. *Id.* at 1960 (Souter, J. dissenting).

172. *Id.* at 1959.

Act (PSLRA)<sup>173</sup>—a heightened-plus pleading standard recently described by the Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*<sup>174</sup> Just as the Court in *Tellabs* compared opposing inferences of lawful and unlawful intent on a motion to dismiss under the PSLRA, the Court in *Iqbal* compared opposing inferences of lawful and unlawful intent on the part of Ashcroft and Mueller, and found the inference of lawful intent more “likely.”<sup>175</sup>

But the opinion did not stop there. The majority kept only one part of the 12(b)(6) spiel, which it raised to new heights: the principle that legal conclusions should not be accepted as true on a 12(b)(6) motion. The majority explained:

[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should [1] assume their veracity and [2] then determine whether they plausibly give rise to an entitlement to relief. . . . Our decision in *Twombly* illustrates [this] two-pronged approach.<sup>176</sup>

Thus, *Iqbal* invites judges to bifurcate the analysis: eliminate from consideration all the complaint’s conclusory allegations (whatever that means) and then judge the complaint’s remaining allegations under the “common sense” “plausibility” standard. Far from acknowledging that the so-called “two-pronged approach” constitutes a radical change, the Court implied that *Twombly* had explicitly and intentionally applied this “approach.”

This was disingenuous.<sup>177</sup> The *Twombly* Court did call the complaint’s allegations of an “agreement” among the defendants a “legal conclusion”—with which one could reasonably disagree.<sup>178</sup>

173. Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C.).

174. 551 U.S. 308, 314 (2007) (interpreting the PSLRA’s requirement that the complaint in a securities fraud case “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind,” to mean that “an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent”); see also 15 U.S.C. § 78u-4(b)(2) (2006).

175. *Iqbal*, 129 S. Ct. at 1951.

176. *Id.* at 1950.

177. None of the 422 cases decided under *Twombly* that I reviewed for this study applied anything like the “two-pronged approach” so allegedly plain from *Twombly*.

178. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 564 (2007) (stating that the allegation of an actual agreement was merely a legal conclusion resting on prior allegations).

But it did not banish the allegations from consideration.<sup>179</sup> And even assuming that the allegation of an agreement in *Twombly* was a “legal conclusion,” this would have made no difference in *Iqbal* because the Court in that case did not characterize *Iqbal*’s allegations as “legal conclusions.” The Court called the rejected allegations in *Iqbal* “bare assertions,” “formulaic recitations of the elements,” “bald allegations,” and “conclusory.”<sup>180</sup> Because it places no limit on what a judge may or may not accept as true, or what it may or may not call a legal conclusion, *Iqbal* opens the door for much wider rejection, on an ill-defined basis, of a plaintiff’s allegations on a defendant’s 12(b)(6) motion.

Citing only the near-incomprehensible case of *Papasin v. Allain*,<sup>181</sup> the Court provided no workable clarification of what is and is not “conclusory.” Indeed, the Court failed to acknowledge the definitional ambiguity of “conclusory” that has plagued the profession for at least a century.

The bankruptcy of the “conclusory allegation” label was demonstrated by the lower courts in *Iqbal*. The *Iqbal* district court assumed “that plaintiffs’ [factual] allegations [were] true.”<sup>182</sup> The district court noted only that “the parties disagree about how specific and ‘nonconclusory’ an allegation of personal involvement must be in order to survive a motion to dismiss where the defense of qualified immunity has been asserted,” but concluded that *Swierkiewicz* foreclosed any heightened pleading standard even in this situation.<sup>183</sup> The Second Circuit also credited all of the complaint’s allegations as true, even while calling some of the allegations “not entirely conclusory.”<sup>184</sup>

The Supreme Court majority, on the other hand, shot so-called “conclusory” allegations out of the complaint like so many skeet,<sup>185</sup>

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179. *See id.* at 566–67 (holding that nothing contained in the complaint suggests a conspiracy, but acknowledging plaintiffs’ claims that collusion was necessary to cause success by even one CLEC and that the ILECs’ parallel conduct suggested conspiracy).

180. *Iqbal*, 129 S. Ct. at 1951.

181. *See* 478 U.S. 265, 285–89 (1986) (holding that a claim challenging Mississippi’s distribution of public school land funds violated equal protection and was sufficient to state a claim if it was determined that the differential treatment was not rationally related to state interest).

182. *Elamaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at \*2 (E.D.N.Y. Sept. 27, 2005).

183. *Id.* at \*11–12.

184. *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007).

185. It rejected as “conclusory” the allegations that Ashcroft and Mueller “knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]” to brutal conditions in ADMAX SHU “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest;” that

leaving a mere skeleton of “factual” allegations for the court to consider under the “plausibility” standard.

Justice Souter, in dissent, disagreed that any of the complaint’s allegations were “conclusory,” and argued that there was “no principled basis” for the distinction that the majority made between conclusory and nonconclusory allegations.<sup>186</sup> He considered the majority’s “singl[ing] out” of certain allegations “in isolation,” rather than viewing the complaint as a whole, a “fallacy.”<sup>187</sup> But it was more than that; the majority’s decision overturned a long-accepted principle on 12(b)(6) motions that when considering a motion to dismiss under Rule 12(b)(6), the court must “[v]iew[] the complaint as a whole, rather than any one statement in isolation.”<sup>188</sup> *Iqbal* explicitly encourages judges to view the non-conclusory allegations in isolation from the conclusory allegations. Just as juries are more likely to rule for the defendant if they have to use a special verdict or answer special interrogatories (rather than give a general verdict),<sup>189</sup> I can only see the “two-pronged approach” working in favor of defendants.<sup>190</sup>

The courts of appeals have been quick to notice a sea change in *Iqbal*.<sup>191</sup> So far, most district courts have not explicitly characterized *Iqbal* as a dramatic departure from earlier pleading standards.<sup>192</sup>

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“Ashcroft was the ‘principal architect’ of this invidious policy;” and that “Mueller was ‘instrumental’ in adopting and executing [the scheme].” *Iqbal*, 129 S. Ct. at 1951.

186. *Id.* at 1961 (Souter, J. dissenting).

187. *Id.*

188. *E.g.*, Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 289 (5th Cir. 2004).

189. *Cf.* JONATHAN HARR, A CIVIL ACTION 368–70 (1995) (noting the plaintiff’s objections to the use of complicated special verdict forms because he felt it would negatively impact his chance at winning).

190. *Cf.* Elizabeth G. Thornburg, *Detailed Fact Pleading: The Lessons of Scottish Civil Procedure*, 36 INT’L LAW. 1185, 1201 (2002) (“Pleading specificity requirements are about limiting the scope of lawsuits from beginning to end.”).

191. *See, e.g.*, *McTernan v. City of York*, 577 F.3d 521, 530 (3d Cir. 2009) (noting *Iqbal*’s clarification that *Twombly* applied to all cases, and citing the *Iqbal* “judicial experience and common sense” gloss on “plausibility”); *Brooks v. Ross*, 578 F.3d 574, 580–81 (7th Cir. 2009) (recognizing the changes in evaluating motions to dismiss since *Iqbal*); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir. 2009) (noting that after *Iqbal*, “pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss,” and concluding that *Iqbal*’s “two-part analysis” of first “separat[ing]” the “factual and legal elements of a claim” and “disregard[ing] any legal conclusions” and then applying the “plausibility” standard puts “the final nail-in-the-coffin for the ‘no set of facts’ standard”); *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 630 (6th Cir. 2009) (commenting that “[e]xactly how implausible is ‘implausible’ remains to be seen, as such a malleable standard will have to be worked out in practice,” and quoting the “judicial experience and common sense” language).

192. *See, e.g.*, *Robinson v. Beard*, No. 08-3156, 2009 WL 2215088, at \*2 (E.D. Pa. July 22, 2009) (“Notwithstanding these new dictates, the basic tenets of the Rule

As this Article will demonstrate in the following Parts, however, it appears that district courts after *Iqbal* are granting 12(b)(6) motions at a much higher rate than they did under either *Conley* or *Twombly*.

Perhaps I am magnifying the importance of the “two-pronged approach.” Only a minority of district courts citing *Iqbal* in the Database I constructed even mentioned the “two-pronged approach.”<sup>193</sup> But the handful of courts that have literally applied the new standard are disconcerting. In one case, the court excised “conclusions” from the complaint and held that the complaint’s allegations—that officers shot a man in the head in front of his wife while the man, without resisting the officers, was attempting to drive to work—did not state a claim.<sup>194</sup> In another case, the court issued this *non sequitur*: “Plaintiff makes multiple allegations that the Court considers to be legal conclusions that do not merit a presumption of truth—specifically, the numerous variations of the allegation that Joytoto sent (also transmitted, broadcasted, caused to be sent) the unsolicited fax.”<sup>195</sup>

The fact that district courts rarely segregate “conclusions” in pleadings after *Iqbal* may simply be due to the nature of the task which can be highly time-consuming without counsel’s help. As the defense bar absorbs *Iqbal*’s teaching, we may see more motions

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12(b)(6) standard of review have remained static.”). Of all the cases read for inclusion in the Database, only one expressly acknowledged a significant change wrought by *Iqbal*. See *Kyle v. Holinka*, No. 09-cv-90-slc, 2009 WL 1867671, at \*1 (W.D. Wis. June 29, 2009). In *Kyle*, a § 1983 case, Judge Crabb reconsidered a 12(b)(6) motion that she had earlier denied. *Id.* She granted the motion under *Iqbal*, stating that *Iqbal* “implicitly overturned decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion,” and that under *Iqbal*, “an allegation of discrimination needs to be more specific.” *Id.* Moreover, the application of *Iqbal* in some cases is confusing. For example, in *Lynn v. Tobin*, No. 07-1622, 2009 WL 1971430 (E.D. Pa. July 7, 2009), the court found that the complaint’s allegations could “plausibly give rise to an entitlement to relief” under *Iqbal*, but that the allegations were not specific enough. *Id.* at \*3.

193. *E.g.*, *Mason v. Costco Wholesale Corp.*, No. 09-361 (JLL), 2009 WL 2634871, at \*2 (D.N.J. Aug. 26, 2009); *Petrusa v. Suffolk County Soc’y for the Prevention of Cruelty to Animals*, No. 05-CV-6017 (DRH), 2009 WL 1796996, at \*3 (E.D.N.Y. June 24, 2009).

194. *Canas v. City of Sunnyvale*, No. C 08-5771 JF (PVT), 2009 WL 2160572, at \*3, \*4 (N.D. Cal. July 20, 2009).

195. *Consumer Prot. Corp. v. Neo-Tech News*, No. CV 08-1983-PHX-JAT, 2009 WL 2132694, at \*2 (D. Ariz. July 16, 2009); see also *Goliad County v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688, at \*10, \*10 n.7, \*11 (S.D. Tex. June 5, 2009) (holding in an environmental case that a plaintiff’s allegation that a defendant’s “pattern of intentional disregard of these plugging requirements is sufficient to lead to the inference of intent to emplace fluids in the subsurface” is a “conclusion of law” not required to be accepted as true under *Iqbal*, and dismissing the case for lack of subject matter jurisdiction).

assisting the judge in identifying so-called “conclusions” that should be ignored.

One could also speculate that *Iqbal*, which involved a claim of qualified immunity at the highest levels of the Executive Branch, will be limited to its unusual political context and that it will be allowed to fade quietly into *Bush v. Gore* oblivion.<sup>196</sup> The months after *Iqbal*, however, have refuted such speculation.

#### D. *Where We Are Now*

At this point, the law of pleading consists of pronouncements worthy of Lao-tzu<sup>197</sup>:

Courts do not require “heightened specificity,” but “conclusions” are unacceptable. Never mind that if the pleader is concerned that an allegation is “conclusory,” she would probably attempt to remedy it by making the allegation more specific.

Plaintiffs must allege “facts,” but they need not be “detailed facts.”

Courts may or may not be required to construe the complaint in the light most favorable to a plaintiff, but courts certainly cannot grant a plaintiff “unwarranted” inferences of fact.

Courts are not to weigh evidence, evaluate witness credibility, or judge the likelihood that a plaintiff will prevail at trial, but a plaintiff’s claim must be “plausible on its face” in light of the judge’s “judicial experience and common sense.”

Courts should construe a complaint as a whole, and should not take any one statement in isolation, but if a court deems an allegation to be “conclusory” under some undefined standard, then the allegation may be ignored.

Such Tao-like paradoxes are not easily applied by judges and lawyers.

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196. 531 U.S. 98, 109 (2000) (limiting the holding to the present circumstances of the case, and cautioning that equal protection in election processes presents many complexities).

197. See, e.g., TAO TE CHING No. 14 (Stephen Mitchell, trans., Harper & Row Publishers 1988) (“Look, and it can’t be seen. Listen, and it can’t be heard. Reach, and it can’t be grasped. Above, it isn’t bright. Below, it isn’t dark.”); *id.* at No. 2 (“When people see some things as beautiful, other things become ugly. When people see some things as good, other things become bad.”).



## II. STUDY DESIGN

I now reach the question: does any of this academic discussion matter? What is happening empirically to 12(b)(6) motions in the federal district courts since *Twombly* and *Iqbal* were decided?

### A. Scope of Cases Studied

First, I chose to study only federal district court opinions.<sup>198</sup> Although they are bound to follow precedent in their own circuit court of appeals, district court judges are on the front line of applying the standards on 12(b)(6) motions. District court opinions also offer the closest look at the arguments lawyers use on 12(b)(6) motions in daily practice.

Second, for the greatest equivalence in the populations of cases decided under *Conley* and *Twombly*, I chose to limit my study of opinions decided under the *Conley* “no set of facts” standard to the two years immediately preceding *Twombly*. As of the date this Article was written, *Twombly* had been in effect approximately two years. *Conley*’s “no set of facts” standard was issued in 1957 and was not abrogated until *Twombly*—a life span of fifty years.

The difficulty of generating a truly random sample using Boolean searches on a legal database is apparent. After some experimentation,<sup>199</sup> I designed search terms in Westlaw to find as many cases as possible in the district courts decided on 12(b)(6) motions in the two years before and after *Twombly*.<sup>200</sup> At the time I

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198. I used opinions both “published,” in the sense of opinions bound in the West Reporters, and “unpublished,” in the sense of opinions only available electronically on Westlaw. Some scholars have suggested that the term “published” means any opinion available electronically; every opinion in the Database is “published” under this definition. Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, 53 VILL. L. REV. 973, 985 (2008); see also David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 693 (2007) (defining a federal district court “opinion” as “any judicial disposition on Westlaw or Lexis,” and an “order” as “any disposition that is not”). Many scholars have noted that the reliability of a database consisting only of publicly available opinions on Westlaw and Lexis cannot be easily tested. See, e.g., Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMP. LEG. STUD. 591, 604 (2004) (“[T]he picture of a legal landscape that emerges from published opinions, at whatever court level, is very probably distorted.”); Levin, *supra*, at 988–94. This is especially true at the district court level, where one estimate is that only 3% of all district court orders are available on Westlaw and Lexis. Hoffman, Izenman & Lidicker, *supra*, at 710. Still, unless and until the PACER electronic filing system for the federal courts becomes text-searchable, researching all existing district court orders is almost prohibitively resource-intensive. See, e.g., Levin, *supra*, at 987.

199. Earlier iterations of the search terms cast too wide a net.

200. For cases decided under *Conley*’s “no set of facts” standard in the two years before *Twombly*, I searched the Westlaw DCT database using the following terms: (‘12(b)(6)’ ‘12(c)’ & (‘conley’ /2 ‘gibson’) & ‘no set of facts’ & da(after 5/21/2005)

performed these searches, they yielded 6010 cases under *Conley* and 6319 cases under *Twombly*. Using an online random number generator,<sup>201</sup> I randomly selected 500 cases from the 6010 cases located in the two years before *Twombly*, and 500 cases from the 6319 cases located after *Twombly* for potential inclusion in the Database.

The decision in *Ashcroft v. Iqbal* then intruded on May 18, 2009. To locate as many district court cases as possible deciding a 12(b)(6) motion under *Iqbal*, I again searched terms on Westlaw, limiting the search to cases from May 19, 2009, to August 31, 2009.<sup>202</sup> This search generated 914 cases and I selected 200 of these cases using a random number generator. Because the *Iqbal* cases span only three months and are fewer in number than the *Conley* or *Twombly* cases, caution should be used in drawing inferences from the *Iqbal* data.

### 1. Cases excluded from the Database

Of the 1200 cases thus selected as randomly as possible, only 1039 were included in the Database (444 under *Conley*, 422 under *Twombly*, and 173 under *Iqbal*). This was because the Westlaw searches, while fairly narrow, still returned cases that I excluded from the Database for various reasons:

- (a) I excluded *sua sponte* reviews of prisoners' complaints under the Prison Litigation Reform Act ("PLRA")<sup>203</sup> and of complaints submitted with an application to proceed *in forma pauperis*.<sup>204</sup> District courts must review these complaints' allegations and dismiss where the complaint fails to state a claim upon which relief can be granted. Although the courts purport to use the 12(b)(6) standards—whether under *Conley*, *Twombly*, or *Iqbal*—in screening these cases to determine whether the complaint

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& da(before 5/22/2007)). For cases decided under *Twombly*'s "plausibility" standard in the two years after *Twombly*, I searched the same database using the following terms: ('12(b)(6)' '12(c)' & ('twombly' /p 'plausibl') & da(after 5/21/2007) & da(before 5/22/2009)). Admittedly, I arbitrarily chose to use Westlaw rather than Lexis, but one empirical study suggests that Westlaw includes more district court opinions than Lexis. See Hoffman, Izenman & Lidicker, *supra* note 198, at 710.

201. Research Randomizer, <http://www.randomizer.org>.

202. For cases decided under *Iqbal*, on August 31, 2009, I searched the Westlaw DCT database using the following terms: ("Ashcroft" /2 "Iqbal" & "12(b)(6)" & da(after 5/18/2009)).

203. 28 U.S.C. § 1915A(b)(1) (2006); see also 42 U.S.C. § 1997e(c)(1) (2006) (describing conditions under which the court may review and dismiss a prisoner's suit brought under a § 1983 claim).

204. 28 U.S.C. § 1915(e)(2)(B)(ii) (2006).

states a claim for relief,<sup>205</sup> there appeared to be some inconsistency in application, probably caused by the fact that many *pro se* inmates are also proceeding *in forma pauperis*.<sup>206</sup> More importantly, these cases were decided without adversarial input from the defendant—thereby possibly resulting in more cases passing muster than might otherwise have occurred. In addition, the converse possibility of bias against such litigants by the district courts counseled against the inclusion of these cases.

- (b) I excluded cases that the court decided on other grounds without considering an actual 12(b)(6) motion, even though the 12(b)(6) standard might have been mentioned or a 12(b)(6) motion might have been filed (thus yielding its location by the Westlaw search).<sup>207</sup> These excluded cases fall into two subcategories:
- (i) Cases decided on other types of motions to dismiss, such as motions to dismiss for lack of subject matter jurisdiction or personal jurisdiction, improper venue, or failure to join an indispensable party.
  - (ii) Cases decided on a type of motion other than a motion to dismiss. For example, defendants frequently move “to dismiss, or in the alternative, for summary judgment” under FRCP Rule 56. Summary judgment motions are decided under a different standard than 12(b)(6) motions.<sup>208</sup>

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205. *E.g.*, *Cutchin v. Hogshire*, No. 3:08CV802, 2009 WL 2899809, at \*4 (E.D. Va. Sept. 9, 2009).

206. For example, some courts state that they need not accept as true certain factual allegations in an *in forma pauperis* complaint. *E.g.*, *Salcedo v. Rossotti*, 636 F. Supp. 2d 35, 40 (D.D.C. 2009) (noting that the court can “dismiss those claims whose factual contentions are clearly baseless or describe fantastic or delusional scenarios” (internal quotation marks omitted) (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989))).

207. The changing standard for dismissal on 12(b)(6) motions, however, may spill over into motions decided under these other grounds. Courts deciding motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), for example, frequently cite the 12(b)(6) standard as applicable, although the courts use varying formulations. *E.g.*, *Petruska v. Gannon Univ.*, 462 F.3d 294, 299 n.1 (3d Cir. 2006) (“[W]e note that the standard is the same when considering a facial attack under 12(b)(1) or a motion to dismiss for failure to state a claim under Rule 12(b)(6).”).

208. FED. R. CIV. P. 56(c) (“The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”).

Accordingly, I excluded any case that was expressly or impliedly decided under Rule 56. Another common example of this type of excluded case is on a claimant's motion to amend a pleading, where the opponent of the motion argues that the amendment would be futile. Although, like the PLRA screening cases, the court in theory applies the 12(b)(6) standard to such motions to amend, I chose to exclude these cases on the ground that the strategic difference in the procedural posture of a motion to amend could potentially affect the ruling independently of the governing 12(b)(6) standard.

- (c) I excluded cases decided under an explicit “heightened pleading” standard, which is supposedly “heightened” in relation to the (theoretically) “lower” default pleading standard under Rule 8(a)(2). Thus, I excluded cases alleging fraud, which must be pled with particularity,<sup>209</sup> cases brought under the PSLRA,<sup>210</sup> which has additional heightened pleading requirements,<sup>211</sup> and derivative cases filed under Rule 23.1.<sup>212</sup>

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209. FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”). In addition, claims other than common law fraud that allege some sort of underlying deception, such as securities fraud, RICO, and *qui tam* actions under the False Claims Act, must also be pled with particularity. Such cases are not governed by *Twombly* and *Iqbal*, which purport only to interpret Rule 8(a)(2).

210. 15 U.S.C. §§ 77z-1, 78u-4 (2006).

211. *E.g.*, § 78u-4(b)(1) (stating that, in private actions in which the plaintiff alleges that the defendant made misleading statements or omissions, “the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed”); § 78u-4(b)(2) (stating that in private actions for damages in which plaintiff must prove “that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind”).

212. FED. R. CIV. P. 23.1(b) (In derivative actions, “[t]he complaint must be verified and must . . . (3) state with particularity: (A) any effort by the plaintiff to obtain the desired action from the directors or comparable authority and, if necessary, from the shareholders or members; and (B) the reasons for not obtaining the action or not making the effort.”).

## 2. Cases included in the Database

Cases that I *did* include in the Database (other than those involving the archetypical 12(b)(6) motion by a defendant to dismiss a complaint) were:

- (a) 12(b)(6) motions to dismiss any opposing party's pleading (such as a plaintiff's motion to dismiss a counterclaim, or a third-party defendant's motion to dismiss a third-party complaint).
- (b) 12(c) motions for judgment on the pleadings, which are decided under the same standard as, and are functionally equivalent to, 12(b)(6) motions.<sup>213</sup>
- (c) Cases that included motions other than 12(b)(6), but which also included a count or claim that was decided on a separable 12(b)(6) issue. In such cases I omitted the non-12(b)(6) count or claim from the coding of the cases and included only the 12(b)(6) count or claim.<sup>214</sup>

I thought that I might need to treat cases that were removed to federal court differently than those originating in federal court. What if the state court's pleading standards were looser than the federal court's standards? Apparently, nobody thinks this is a problem yet—I did not find a discussion of it in any removed case. Because federal pleading is (probably) still known as “notice pleading,” ostensibly the most liberal pleading standard, perhaps it is assumed that no state's pleading regime could be any more liberal. After *Twombly* and *Iqbal* are thoroughly digested, this issue may emerge if states reject the “plausibility” approach.<sup>215</sup>

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213. *E.g.*, *Buchanan-Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009); *Pérez-Acevedo v. Rivero-Cubano*, 520 F.3d 26, 29 (1st Cir. 2008).

214. For example, one defendant might move to dismiss for lack of personal jurisdiction; I would not include the ruling on this defendant's motion in the Database. If the personal jurisdiction motion was denied, and that same defendant also moved simultaneously to dismiss under 12(b)(6), I would include the 12(b)(6) ruling in the Database. To take this example further, if that same defendant's personal jurisdiction motion was granted, but a second defendant moved to dismiss under 12(b)(6), I included in the Database only the ruling on the second defendant's motion.

215. *Cf.* Carol L. Zeiner, *When Kelo Met Twombly-Iqbal: Implications for Pretext Challenges to Eminent Domain*, 46 WILLAMETTE L. REV. (forthcoming 2010); Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431 (2009) (analyzing potential problems that may arise in a system where the state courts use *Conley* pleading standards and the federal courts use a *Twombly* standard).

### B. Coding the Cases

I coded the following information (variables) for each opinion included in the Database.

#### 1. Identifying information

- (a) *Identifying number*: assigned number generated by the random number generator.
- (b) *Name and citation*: names of parties and citation of the case.

#### 2. Independent variables<sup>216</sup>

- (a) *Circuit*: judicial circuit within which the district court lies (for example, if the opinion was written by a judge in the Southern District of New York, I coded the case as coming from within the Second Circuit).
- (b) *Date*: date of the opinion.
- (c) *Type of judge*: whether the opinion was written by a district court judge or a magistrate judge. I coded as “district court judge” cases which were decided by a district court judge, cases in which a district court judge explicitly incorporated a magistrate judge’s recommendation,<sup>217</sup> and cases in which a magistrate judge stated explicitly that the parties had consented to the magistrate’s final ruling. I coded as “magistrate judge” cases in which a magistrate was making only a “recommendation” to the district court judge and cases in which the magistrate judge’s status was unclear.
- (d) *Pro se status*: whether the party whose pleading was being challenged on a 12(b)(6) motion (most frequently, the plaintiff) was represented by counsel or was proceeding *pro se*. When unclear, I left this field blank.

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216. See Lee Epstein, Andrew D. Martin & Christina L. Boyd, *On the Effective Communication of the Results of Empirical Studies, Part II*, 60 VAND. L. REV. 801, 808 (2007) (“For purposes of designing their research projects, scholars tend to differentiate between *dependent* variables—the outcomes or responses the researcher is trying to explain—and *independent* variables—the factors that may help account for or explain the outcome.” (emphasis added)).

217. See 28 U.S.C. § 636 (2006) (describing the “jurisdiction, powers, and temporary assignment” of magistrate judges).

- (e) *Class action*: whether the case was brought as a putative class action (whether or not the class was actually certified).
- (f) *Nature of suit*: Statistical difficulties may ensue when a variable has so many subcategories that only a handful of observations fall under each.<sup>218</sup> Further, experts in empirical legal research warn of generating so much detailed information that the main points are obscured.<sup>219</sup> Therefore, I tried to keep the number of values for this variable to a minimum while simultaneously focusing on the types of cases postulated to be most threatened by *Twombly* and *Iqbal*.

I began with the major categories listed on the federal district court Civil Cover Sheet<sup>220</sup>: “Contract,” “Real Property,” “Torts,” “Civil Rights,” “Prisoner Petitions,” “Forfeiture/Penalty,” “Labor,” “Immigration,” “Bankruptcy,” “Property Rights” (meaning intellectual property rights),<sup>221</sup> “Social Security,” “Federal Tax Suits,” and “Other Statutes.” It should be noted that I did not review the Civil Cover Sheets actually filed in the cases in the Database to see what box the plaintiff checked; I determined the nature of the suit myself by reviewing each opinion.

For various reasons, it quickly became apparent that few to no cases involving “Real Property,” “Forfeiture/Penalty,” “Immigration,” “Bankruptcy,” “Social Security,” and “Federal Tax” engender opinions on 12(b)(6) motions.<sup>222</sup> Another way of putting this is that

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218. See, e.g., MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 201 (2d ed. 2001) (“For tables larger than 2 X 2, it is recommended that chi-squared not be used if the expected cell frequency is less than 5 in more than 20% of the cells or less than 1 in more than 10% of the cells.”).

219. See Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies, Part I*, 59 VAND. L. REV. 1811, 1861 (2006) (arguing that graphical analysis should not be judged by how detailed it is, but rather how quickly a reader can understand it).

220. See Civil Cover Sheet, available at <http://www.uscourts.gov/forms/JS044.pdf>.

221. The boxes in this category include only “Copyright,” “Patent,” and “Trademark.” See *id.*

222. Cases involving core “Real Property” (as opposed to a dispute over a lease, which I coded as a “Contract”) constitute only a small fraction of cases filed in federal district courts. See, e.g., JAMES C. DUFF, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 162–64 (2007), available at <http://www.uscourts.gov/judbus2006/appendices/c2.pdf> [hereinafter 2006 REPORT] (presenting data demonstrating that real property actions comprised less than 2% of all cases filed in U.S. district courts for the year ending September 30, 2006). There were only two “Real Property” cases in the Database. I recoded these two cases as “Contract.”

*Twombly* and *Iqbal* have no practical effect on approximately 11% of all cases in federal district court.

As for prisoner petitions, the vast majority of these cases in the Database alleged civil rights violations. Accordingly, I coded them as “Civil Rights.”

This left the following six major categories:

- (i) *Contracts*: All types of contractual disputes, including insurance contracts and leases.
- (ii) *Torts*: All types of common law tort claims (e.g., negligence, wrongful death, products liability, tortious interference with contract, defamation, conversion, intentional infliction of emotional distress, breach of fiduciary duty), and claims under the Federal Tort Claims Act<sup>223</sup> and Alien Tort Claims Act.<sup>224</sup>
- (iii) *Civil rights*: These cases were also coded in four subcategories:
  - [1] Cases in which the plaintiffs alleged federal constitutional violations, whether or not they purported to bring the case under 42 U.S.C. § 1981 (equal rights under the law), 42 U.S.C. § 1983 (civil action for deprivation of rights), 42 U.S.C. § 1985

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“Forfeiture” and “Penalty” cases are brought overwhelmingly by the United States and apparently 12(b)(6) motions are virtually unknown in such cases. *See id.* None of the 1200 cases reviewed for the Database involved “Forfeiture” or “Penalty.”

The bulk of “Immigration” and “Bankruptcy” cases proceed in specialized courts; in those narrow instances where the district court has jurisdiction, 12(b)(6) motions appear to be uncommon. Only four “Immigration” cases and one “Bankruptcy” case appeared in the Database; I recoded the five cases as “Other Statutes.”

“Social Security” cases comprise about 6% of all cases filed—for example, a sizeable 14,404 cases in 2006—the vast majority against the United States. *Id.* Again, none of the 1200 cases reviewed for the Database involved “Social Security,” suggesting that “Social Security” cases are not normally amenable to 12(b)(6) motions.

Finally, “Tax Suits” make up a tiny 0.6% of all cases filed, *see id.*, and accordingly generated only twelve of the cases in the Database. I recoded these twelve cases as “Other Statutes.”

223. 28 U.S.C. §§ 2671–80 (2006).

224. *Id.* § 1350.



(conspiracy to interfere with civil rights), or *Bivens* actions.

- [2] Cases in which the plaintiffs alleged unlawful employment discrimination on the basis of race, sex, religion, or national origin under Title VII of the Civil Rights Act of 1964.<sup>225</sup>
- [3] Cases in which the plaintiffs alleged violations of the Age Discrimination in Employment Act (“ADEA”),<sup>226</sup> the Americans with Disabilities Act (“ADA”),<sup>227</sup> or the Rehabilitation Act of 1973.<sup>228</sup>
- [4] Any other civil rights actions, including sex discrimination under Title IX.<sup>229</sup>

(iv) *Labor*. These cases were coded in two subcategories:

- [1] Cases brought under the Employee Retirement Income Security Act (“ERISA”)<sup>230</sup> or any other provision of the Fair Labor Standards Act (“FLSA”).<sup>231</sup>
- [2] Other labor cases, including those brought under the Labor-Management Relations Act (“LMRA”)<sup>232</sup> or the Railway Labor Act.<sup>233</sup>

(v) *Intellectual property*: These include cases in which the plaintiffs alleged copyright, patent, or trademark infringement as well as in which the plaintiffs alleged misappropriation of trade secrets.

(vi) *All other federal and state statutes*: These cases were also coded in four subcategories:

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225. 42 U.S.C. §§ 2000e to 2000e-15 (2006).

226. 29 U.S.C. §§ 621-34 (2006).

227. 42 U.S.C. §§ 12101-213 (2006).

228. 29 U.S.C. § 794 (2006).

229. 20 U.S.C. § 1681 (2006).

230. 29 U.S.C. § 1132(a), (c) (2006).

231. *E.g.*, 29 U.S.C. § 216(b) (2006) (establishing penalties for failure to pay minimum wage or overtime).

232. *Id.* § 185.

233. 45 U.S.C. §§ 151-88 (2006).

- [1] Antitrust claims under the Sherman Act,<sup>234</sup> the Clayton Act,<sup>235</sup> or state antitrust statutes.<sup>236</sup>
- [2] Consumer credit claims, including cases brought under the Truth-in-Lending Act (“TILA”),<sup>237</sup> the Fair Debt Collection Practices Act (“FDCPA”),<sup>238</sup> the Fair Credit Reporting Act (“FCRA”),<sup>239</sup> or the Real Estate Settlement Practices Act (“RESPA”).<sup>240</sup>
- [3] Claims under the Racketeering Influenced and Corrupt Organizations Act (“RICO”).<sup>241</sup>
- [4] All other federal or state statutory claims.<sup>242</sup>

Once I chose these categories, the next issue became how to place each case in a single category.<sup>243</sup> The paradigmatic “one plaintiff, one defendant, one claim” case that inhabits law school hypotheticals and edited opinions in casebooks is not actually the mode in federal district court, at least in cases that result in 12(b)(6) motions. Most cases contain numerous legal theories that are usually alleged in separate counts and that are frequently asserted against a multitude

234. 15 U.S.C. § 1 (2006).

235. *Id.* § 15.

236. *E.g.*, Cal. Bus. & Prof. Code § 16720 (West 2008) (describing activities that create a trust).

237. 15 U.S.C. §§ 1601–1667f (2006).

238. *Id.* §§ 1692–1692p.

239. *Id.* §§ 1681–1681x.

240. 12 U.S.C. §§ 2601–17 (2006).

241. 18 U.S.C. §§ 1961–68 (2006).

242. This category includes claims brought under environmental statutes, franchise statutes, provisions of the Internal Revenue Code, and a host of other statutes not included within any of the other categories.

243. I considered coding the ruling on each count and/or each defendant separately, and I test-coded about fifty cases this way. I abandoned this effort for two main reasons. First, it was frequently impossible to discern the information I needed from the opinions without looking at the actual pleadings filed. This is particularly true in § 1983 cases, in which plaintiffs tend to lump several defendants and several legal theories into a single count. The detailed chart of counts, defendants, and claims prepared by Magistrate Judge Komives in *Hann v. Michigan*, No. 05-CV-71347-DT, 2007 WL 1322328, at \*1 (E.D. Mich. Mar. 2, 2007), was the exception, not the rule, and that case was by no means atypical of the complexity of such cases. Second, coding the ruling on each count and/or defendant as a separate data entry would give cases with multiple counts more weight—in some cases at least ten times more weight—than a single-count case.

of defendants. To assign only one “nature of suit” to each opinion, I devised guidelines that I applied consistently.

First, even if a plaintiff asserted more than one count in a complaint, I only coded the count or counts that were challenged by a 12(b)(6) motion and were governed by the normal pleading standard of Rule 8(a)(2).

For example, assume that a complaint asserted three counts—for breach of contract, fraud, and libel. Assume also that the defendant filed a 12(b)(6) motion attacking only the fraud and libel counts, but that the fraud motion was governed by the heightened pleading standard of Rule 9(b). The contract claim was not challenged and the fraud claim was not governed by the standard I am studying. Therefore, I would code this case in the Database as a “Tort” (libel) and then code only the court’s ruling on the libel claim.

A further application of the rule described above occurred when another motion was made in addition to, or in the alternative to, a 12(b)(6) motion, such as a motion to dismiss for lack of personal jurisdiction or a motion for summary judgment. For example, in a case with two defendants, assume that “Defendant A” had moved to dismiss a single count of negligence for lack of personal jurisdiction and for failure to state a claim for relief. Assume also that “Defendant B” had moved to dismiss two counts (e.g., a civil rights claim and an intentional infliction of emotional distress claim) for failure to state a claim, or in the alternative, for summary judgment. Say that the court had granted Defendant A’s motion to dismiss for lack of personal jurisdiction, thereby mooting Defendant A’s 12(b)(6) motion. Say also that the court had stated that it had decided the civil rights count of Defendant B’s motion under the summary judgment standard, but that it had decided the intentional infliction of emotional distress count of Defendant B’s motion under the 12(b)(6) standard. I would have coded this case as a “Tort” and then coded only the court’s ruling on the intentional infliction of emotional distress claim.

Second, applying the rule described above, if more than one count in the opinion was challenged by a 12(b)(6) motion governed by 8(a)(2), I usually would have coded the “nature of suit” for this type of case by the first such count appearing in the opinion. For example, if a defendant had filed a 12(b)(6) motion against Count I (for breach of contract) and Count II (for tortious interference with contract), I would have coded this as a “Contract” case. On occasion, though, I determined that one of the counts was more important and more indicative of the case as a whole and coded the “nature of suit”

by that count. For example, say that the defendant had moved to dismiss Count I (for breach of fiduciary duty), Count II (for TILA violations), and Count III (for FCRA violations). I would have coded this case as “Consumer Credit” (within “Other Statutes”), as better capturing the essence of the suit than “Tort.”

Third, I used only the parties’ and court’s designation of the legal theories for relief, rather than supplying what I might have considered the “better” claim. For example, in a *pro se* case filed by a man asserting a civil rights claim against his eye doctor and manufacturer Bausch & Lomb (claiming that his contact lens solution caused him to go blind),<sup>244</sup> it seemed to me that a products liability claim was a better fit (and somewhat less ludicrous) than a § 1983 claim. But § 1983 was the claim that he had asserted and was the claim that the judge ruled on, so I coded the case as “Civil Rights.”

Fourth, claims for indemnification or contribution were classified according to the nature of the underlying suit (usually, “Contract” or “Tort”).

- (g) *Authority*: I coded the case as “Conley” if the court cited *Conley* and used the *Conley* “no set of facts” standard as at least one of the governing principles in the motion.<sup>245</sup> I coded the case “Twombly” if the court cited *Twombly* and used some formulation of the *Twombly* “plausibility” standard as at least one of the governing principles in the motion.<sup>246</sup> I coded the case “Iqbal” if the court cited *Iqbal* as at least one of the governing authorities in deciding the 12(b)(6) motion.<sup>247</sup>

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244. *Spears v. Bausch & Lomb*, No. C2-06-470, 2007 WL 764305, at \*1 (S.D. Ohio Mar. 9, 2007).

245. Because of the structure of the Westlaw search, I assumed that these criteria would be met for every case found by the search in the two years before *Twombly*. However, there was one case in which the court only cited *Conley* when repeating the plaintiff’s arguments and did not clarify that the court itself was applying “no set of facts.” I did not include this case in the Database.

246. Only one court in the cases I reviewed cited *Twombly* but refused to apply it to a non-antitrust case. I did not include this case in the Database. Note that in addition to citing *Twombly*, most district courts continue to cite *Conley* for the “fair notice” quote when deciding 12(b)(6) motions.

247. In addition to citing *Iqbal*, most district courts in deciding 12(b)(6) motions continue to cite *Twombly* for the “plausibility” standard and many district courts continue to cite *Conley* for the “fair notice” quote.

### 3. *Dependent variables*<sup>248</sup>

- (a) *Ruling*: As should be evident from the foregoing examples, I coded only the court's ruling on counts that were challenged by a 12(b)(6) (or 12(c)) motion under the 8(a)(2) standard. As to those counts, I used the following categories for the rulings on the motions:
- (1) *Grant without leave* to amend the pleading.
  - (2) *Grant with leave* to amend the pleading.
  - (3) *Mixed ruling* when the court granted the motion (with or without leave to amend) on one or more counts and denied the motion on one or more counts.
  - (4) *Deny*.

For some of the analyses, I later collapsed the two "grant" subcategories into one: grant with or without leave to amend.

- (b) *Pending case status*: I attempted to gauge how frequently a grant of a 12(b)(6) motion was fatal to the entire case. I coded this variable as "no" if any part of the case remained pending after the court's ruling, and as "yes" if the grant of the 12(b)(6) motion (perhaps in conjunction with other rulings such as the grant of a summary judgment motion) resulted in the dismissal of the entire case.

## III. RESULTS

I present the results of this study in two parts. Part III(A) contains some descriptive statistics of the Database, presented in two-way tables or graphs; for example, this Part presents the frequency of each ruling outcome under each authority, as in Table 1. Part III(B) presents the results of a multinomial logistic regression in which the ruling on the 12(b)(6) motion is the dependent variable, and the results of a logistic regression in which the dependent variable is whether the case was entirely dismissed.

It is important to note that inferences—if any—to be drawn from the statistics should be confined to the regressions. I believe that the

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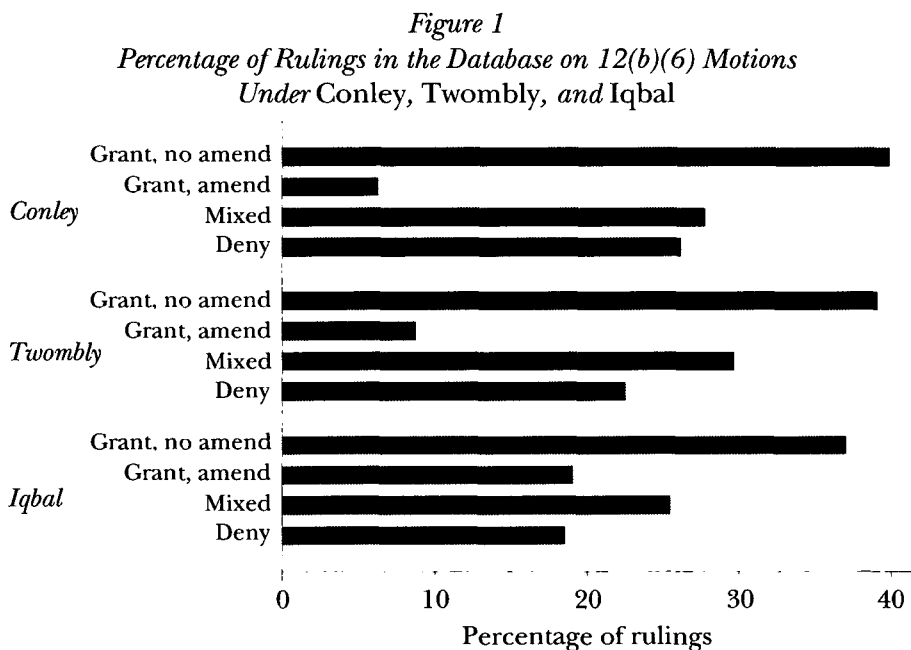
248. See Epstein, Martin & Boyd, *supra* note 216, at 808 (summarizing the difference between dependent and independent variables).

raw frequencies in Part III(A) may be of interest to the reader. However, multiple factors may affect the ruling on the 12(b)(6) motion, and two-way tables cannot account for any confounding effects of other variables.<sup>249</sup> As presented in two-way tables, any apparent relationships between the independent variables and outcomes can be misleading.

### A. Two-Way Tables and Graphs

#### 1. Differences in overall rulings on 12(b)(6) motions

Figure 1 and Table 1 show the frequency of rulings on 12(b)(6) motions in the Database under *Conley*, *Twombly*, and *Iqbal*. Both Figure 1 and Table 1 show all four ruling categories: “grant without leave to amend,” “grant with leave to amend,” “mixed,” and “deny.”



Database of 444 cases under *Conley*, 422 cases under *Twombly*, and 173 cases under *Iqbal*.

249. A confounding variable is one that is associated with both the dependent variable and another independent variable. For example, say the dependent variable is the presence or absence of heart disease, and that men suffer heart disease at an increasingly higher rate than women as they age. The variable “age” is associated with both the dependent variable, heart disease, as well as the independent variable, “gender.” See DAVID W. HOSMER & STANLEY LEMESHOW, APPLIED LOGISTIC REGRESSION 70–72 (2d ed. 2000).

*Table 1*  
*Percentage of Rulings in the Database on 12(b)(6) Motions*  
*Under Conley, Twombly, and Iqbal*

(1039 cases between May 22, 2005 and August 31, 2009)  
 Frequency in the Database (expected frequency)  
 Percentage in the Database (95% confidence interval)

	<b>Grant, no amend</b>	<b>Grant, amend</b>	<b>Mixed</b>	<b>Deny</b>	<b>Total</b>
<i>Conley</i>	177 (174) 40% (35–44%)	28 (42) 6% (4–9%)	123 (125) 28% (24–32%)	116 (104) 26% (22–30%)	444
<i>Twombly</i>	165 (165) 39% (34–44%)	37 (40) 9% (6–11%)	125 (119) 30% (25–34%)	95 (99) 23% (19–27%)	422
<i>Iqbal</i>	64 (68) 37% (30–44%)	33 (16) 19% (13–25%)	44 (49) 25% (19–32%)	32 (41) 18% (13–24%)	173
<b>Total</b>	<b>406</b> 39% (36–42%)	<b>98</b> 9% (8–11%)	<b>292</b> 28% (25–31%)	<b>243</b> 23% (21–26%)	1039

Pearson  $\chi^2(6) = 26.256$ , Pr = 0.000

Table 1 and Figure 1 show that under any authority, 12(b)(6) motions are more frequently successful than one might suppose.<sup>250</sup> Clearly, the endlessly repeated old saw that “12(b)(6) motions are viewed with disfavor and rarely granted”<sup>251</sup> should be laid to rest.

250. The surprisingly large percentage of 12(b)(6) motions that are granted, whether under *Conley*, *Twombly*, or *Iqbal*, has profound implications for the perceived desirability of further “tort reform” or “lawsuit reform.” See, e.g., Patricia W. Hatamyar, *The Effect of “Tort Reform” on Tort Case Filings*, 43 VAL. U. L. REV. 559, 560–62 (2009) (arguing that tort reform creates barriers and reduces plaintiffs’ ability to recover, thus causing a decrease in tort filings). At least in federal court, the 12(b)(6) motion appears to be a potent means for terminating a lawsuit in its early stages.

251. See *supra* notes 43–46 and accompanying text.

Of all 12(b)(6) motions in the Database, 39% were granted without leave to amend and another 9% were granted with leave to amend.<sup>252</sup> Even before *Twombly*, these courts were already granting (with and without leave to amend) almost half (46%) of all 12(b)(6) motions.

Looking at differences in rulings under different authorities, Table 1 and Figure 1 show that there was a slight decline in the proportion of motions granted *without* leave to amend from the Database under *Conley* (40%) to *Twombly* (39%) to *Iqbal* (37%). However, the percentage of 12(b)(6) motions in the Database that were granted *with* leave to amend increased from 6% under *Conley* to 9% under *Twombly* to 19% under *Iqbal*. The proportion of “mixed” rulings also increased slightly under *Twombly* to 30% as compared to 28% under *Conley*, but then declined to 25% under *Iqbal*. The proportion of motions denied—i.e., plaintiff wins—fell from 26% under *Conley* to 23% under *Twombly* to only 18% under *Iqbal*.

Keeping in mind my earlier point about the potentially confounding effects of other variables, the results of a chi-squared distribution test<sup>253</sup> indicate that the different proportions in rulings between cases decided under *Conley*, *Twombly*, and *Iqbal* are “statistically significant.”<sup>254</sup> The probability that this distribution occurred by chance is less than 0.1%. A “significant” chi square in a contingency table such as Table 1 indicates that the variables forming the table are related, but the chi square alone does not explain the relationship. For more meaningful information, an analysis of each cell’s contribution to chi square is performed. In Table 1, the largest contributors to the chi square are grants with leave to amend under *Conley*<sup>255</sup> and grants with leave to amend under *Iqbal*.<sup>256</sup>

252. Note, however, that the data also show that even if a 12(b)(6) motion is granted *without* leave to amend, the entire case is not necessarily dismissed at that time; part of the case often remains pending. See *infra* notes 277–279 and accompanying text.

253. The chi-squared distribution is used to compare expected to actual values in categorical data to test for statistical differences. Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 792 n.268 (1995).

254. Epstein, Martin & Schneider, *supra* note 219, at 1813 n.3 (defining “statistically significant” to mean a relationship whose “existence cannot be explained by chance alone”). As the minimally acceptable level of so-called “statistical significance,” researchers commonly require a maximum probability of 10%—and preferably no higher than 5%—that the result could have occurred by chance. See ABA SECTION OF ANTITRUST LAW, *ECONOMETRICS* 18 (2005) (“Levels of significance below 10 percent are rarely accepted.”).

255. The contribution is 4.599 of the chi square of 26.256. The adjusted residual (residuals standardized to a normal distribution) is -2.978. An adjusted residual with an absolute value of 2.58 or greater is significant at the 1% level. KEVIN DURRHEIM & COLIN TREDoux, *NUMBERS, HYPOTHESES & CONCLUSIONS: A COURSE IN STATISTICS FOR THE SOCIAL SCIENCES* 374–75 (2004).



Any explanation I could postulate for why grants with leave to amend are significantly less than expected under *Conley* and significantly more than expected under *Iqbal* is entirely speculative. Perhaps district courts were comfortable enough with the *Conley* standard to confidently discern when a dismissal without leave to amend would not be reversed on appeal, while the newness of the *Iqbal* standard caused them to err on the side of allowing the plaintiff one more chance to plead.

If the distribution of rulings includes only those cases decided under *Conley* and *Twombly* (without including the cases under *Iqbal*), there is an unacceptably high probability (35.9%) that the differences could have occurred by chance.<sup>257</sup> In other words, the differences in rulings between *Conley* and *Twombly* are not alone large enough to reject the null hypothesis that *Twombly* alone had no effect on courts' rulings on 12(b)(6) motions—at least as measured by a Pearson chi squared distribution.

As Table 1 shows, however, the inclusion of cases decided under *Iqbal* increases the differences in proportions of rulings. At this early point, *Iqbal* appears to have had a measurable impact on rulings. Another way of looking at this is to examine the 95% confidence intervals. The percentage of motions granted with leave to amend under *Iqbal* (19%) is well above the high end of the 95% confidence interval for cases decided under *Conley* (9%) and *Twombly* (11%). The percentage of motions denied under *Iqbal* (18%) is below the 95% confidence interval for cases decided under *Conley* (22%) and *Twombly* (19%).

Whether the noticeable increase in dismissals with leave to amend under *Twombly* and *Iqbal* will eventually translate into dismissals with prejudice remains to be seen. I am not aware of any empirical study that examines how frequently complaints are amended after a 12(b)(6) motion is granted with leave to amend; given the high percentage of *pro se* plaintiffs in the Database, one could speculate that many do not even try to amend. Nor am I aware of any study that examines how frequently a renewed 12(b)(6) motion directed to an amended complaint is granted without leave to amend; many plaintiffs may lack the legal competence or factual knowledge (without discovery) to amend their complaints satisfactorily. In such cases, a grant of a 12(b)(6) motion, even with leave to amend, will be

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256. The contribution is 17.055, over half of the chi square of 26.256. The adjusted residual (residuals standardized to a normal distribution) is 4.753.

257. Pearson  $\chi^2(3) = 3.2166$ , Pr = 0.359.

just the preliminary step in the dismissal of a complaint (or part thereof) with prejudice.

In Table 2 and Figure 2 below, the ruling categories “grant without leave to amend” and “grant with leave to amend” are combined into one category, “grant.” Figure 2 shows the results of Table 2 graphically.

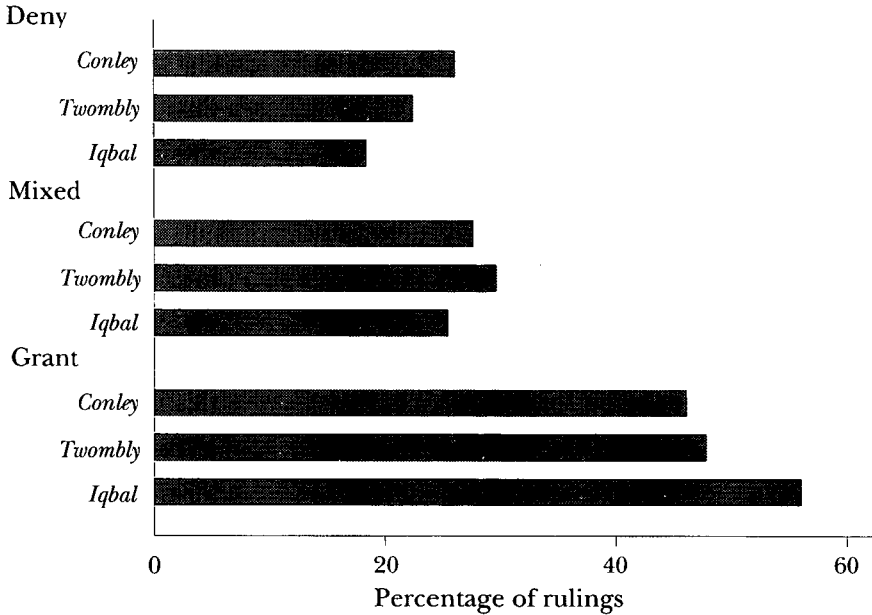
*Table 2*  
*Percentage of Rulings in the Database on 12(b)(6) Motions*  
*(Three Ruling Outcomes)*

(1039 cases between May 22, 2005 and August 31, 2009)  
Frequency in the Database (expected frequency)  
Percentage in the Database (95% confidence interval)

	<b>Grant</b>	<b>Mixed</b>	<b>Deny</b>	<b>Total</b>
<b><i>Conley</i></b>	<b>205</b> (215) <b>46%</b> (42–51%)	<b>123</b> (125) <b>28%</b> (24–32%)	<b>116</b> (104) <b>26%</b> (22–30%)	444
<b><i>Twombly</i></b>	<b>202</b> (205) <b>48%</b> (43–53%)	<b>125</b> (119) <b>30%</b> (25–34%)	<b>95</b> (99) <b>23%</b> (19–27%)	422
<b><i>Iqbal</i></b>	<b>97</b> (84) <b>56%</b> (47–63%)	<b>44</b> (49) <b>25%</b> (19–32%)	<b>32</b> (41) <b>18%</b> (13–24%)	173
<b>Total</b>	<b>504</b> <b>49%</b> (45–52%)	<b>292</b> <b>28%</b> (25–31%)	<b>243</b> <b>23%</b> (21–26%)	1039

Pearson  $\chi^2(4) = 6.716$ , Pr = 0.152

*Figure 2*  
*Percentage of Rulings in the Database on 12(b)(6) Motions by Authority*



With the “grant” categories combined, the increase in the grant of 12(b)(6) motions from *Conley* (46%) to *Twombly* (48%) to *Iqbal* (56%) is more obvious. In the overall time period, 49% of 12(b)(6) motions in the Database were granted.

However, the probability of the distribution in Table 2 and Figure 2, using only three subcategories for rulings (“grant,” “mixed,” and “deny”), occurring by chance is 15.2% using a Pearson chi-squared distribution test—too high for conventional statistical significance. A multinomial logistic regression (discussed below)<sup>258</sup> better isolates the predictive effect of the authority on the ruling.

## 2. Differences in rulings by nature of suit

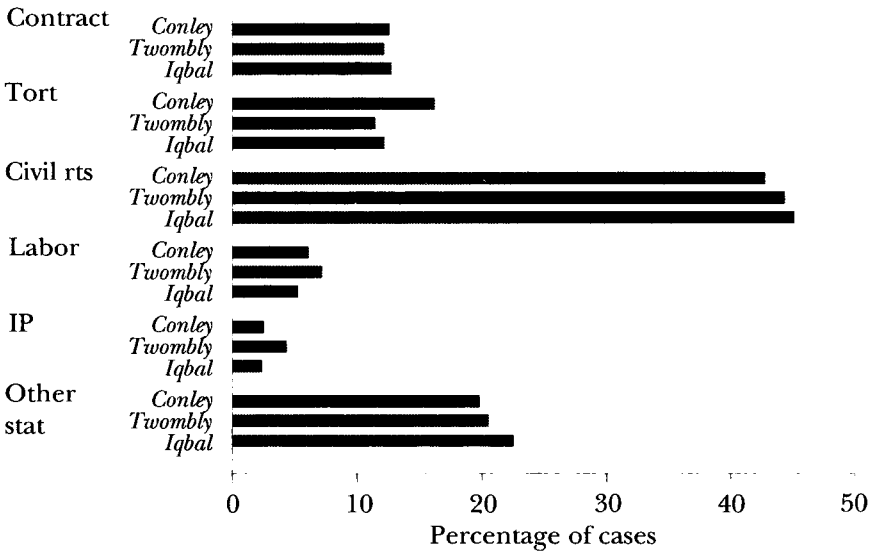
One of the important concerns about *Twombly* and *Iqbal* is their potentially negative effect on access to justice.<sup>259</sup> Thus, pleadings requirements applied to cases typically brought by individuals (frequently on a contingent-fee basis)—such as civil rights, consumer credit, or personal injury cases—would be of particular interest.

258. See *infra* Table 4.

259. See, e.g., Tony Mauro, *Groups Unite to Keep Cases on Docket: Plaintiffs' Lawyers Seek to Stop Dismissals After Iqbal Decision*, NAT'L L.J., Sept. 21, 2009, at 31 (discussing civil rights advocates' perspective that plaintiffs do not have access to the facts required to successfully plead after *Iqbal*).

Let us first examine the frequency of different types of suits in the Database. Figure 3 shows the percentage of cases selected by nature of suit (using six simplified subcategories)<sup>260</sup> and governing authority. Figure 4 shows similar information, using the more detailed subcategories for nature of suit.<sup>261</sup> Appendix Table A contains the backup for Figures 3 and 4.

*Figure 3*  
*Percentage of Cases in the Database by Nature of Suit and Authority*



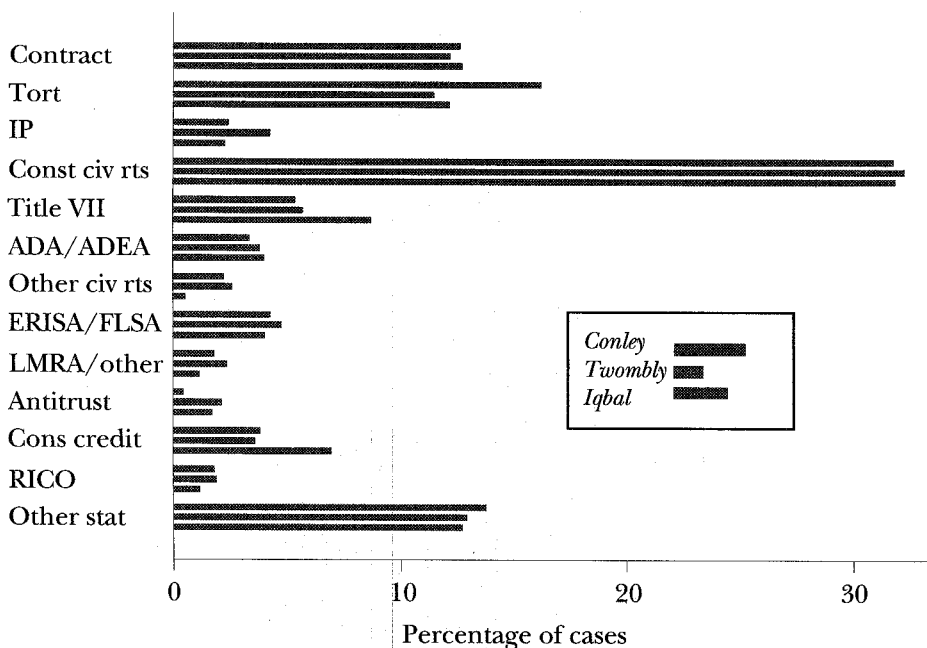
Exact frequencies are presented in Appendix Table A.

260. See *supra* notes 221–241 and accompanying text.

261. See *supra* notes 221–241 and accompanying text.

Figure 4

Percentage of Cases in the Database by Detailed Nature of Suit and Authority



Exact frequencies are presented in Appendix Table A.

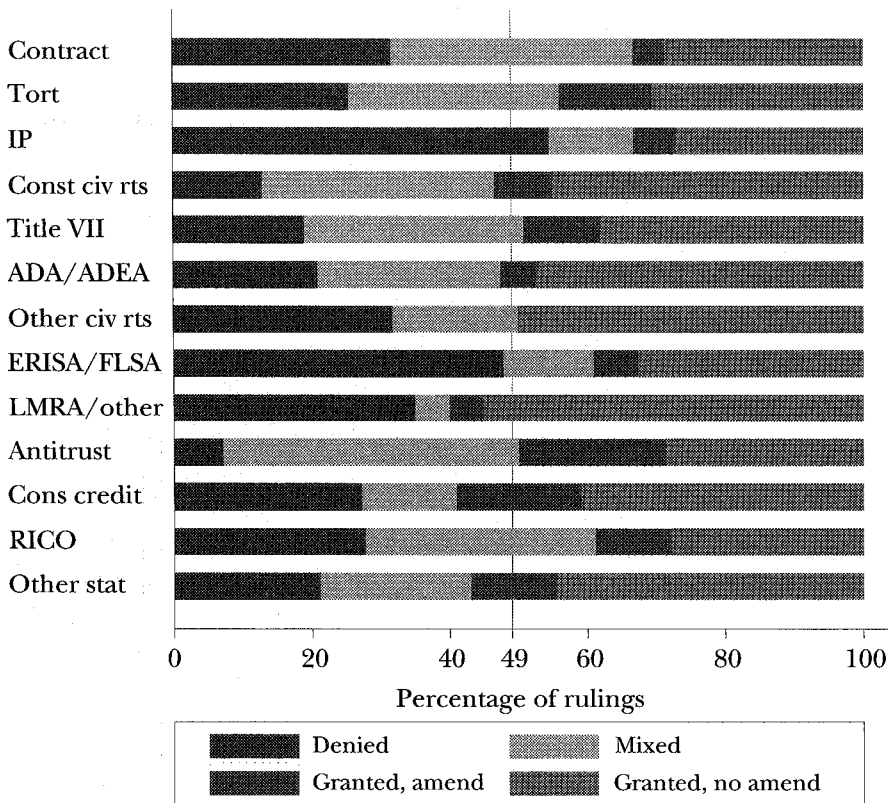
Each bar in Figures 3 and 4 represents the percentage of cases in the Database involving a specific type of suit, decided under a particular authority. For example, of all cases in the Database decided under *Conley*, 13% were “Contract” cases, 16% were “Tort” cases, 43% were “Civil Rights” cases, 6% were “Labor” cases, 3% were “Intellectual Property” cases, and 20% involved “Other Statutes” (using the six simplified categories of Figure 3).

Clearly, 12(b)(6) motions in the Database were filed in civil rights cases far more frequently than in any other type of case. Civil rights cases overall comprised 44% of the Database, and this percentage does not vary much among *Conley*, *Twombly*, and *Iqbal*. In particular, constitutional civil rights cases (a subcategory of all civil rights cases) accounted for 32% of all cases in the Database. Thus, constitutional civil rights cases made up 74% (141/190) of all civil rights cases in the Database under *Conley*, 73% (135/186) of all civil rights cases in the Database under *Twombly*, and 71% (55/78) of all civil rights cases in the Database under *Iqbal*. Falling well behind civil rights cases, the next largest group of cases in the Database involved “Other Statutes”

(including “Consumer Credit,” “Antitrust,” and “RICO”)—20% under *Conley*, 21% under *Twombly*, and 23% under *Iqbal*.

The Database also permits an examination of the rulings on 12(b)(6) motions made in different types of lawsuits. Figure 5 presents the percentage of rulings by nature of suit for the whole Database (cases decided under all three authorities). The exact frequencies underlying Figure 5 are shown in Appendix Table B.

*Figure 5*  
*Percentage of Rulings in the Database on 12(b)(6) Motions*  
*by Detailed Nature of Suit*



Reference line at 49% shows overall average.  
 Exact frequencies presented in Appendix Table B.

Each bar in Figure 5 represents the percentage of 12(b)(6) motions in the Database receiving that type of ruling in that type of suit. For example, of all “Contract” cases in the Database, 33% of 12(b)(6) motions were granted (with or without leave to amend), 35% received a mixed ruling, and 32% were denied.

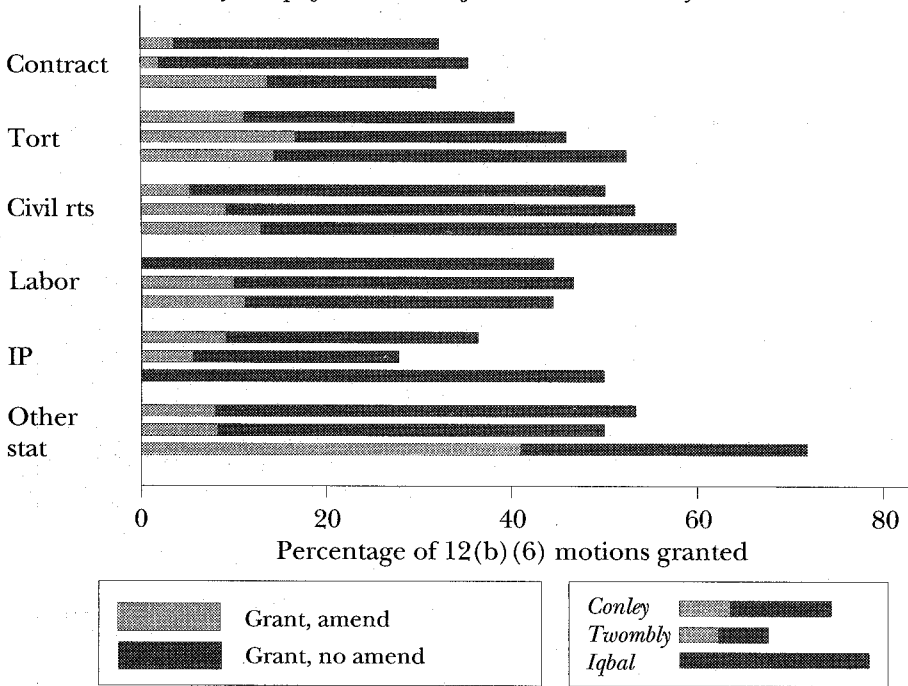
Comparing the percentage of rulings in different types of cases in Figure 5 (detailed in Appendix Table B) with the total percentage of rulings in all cases listed in Table 2, we can see which types of cases have a higher-than-average or lower-than-average percentage of a certain ruling. For example, approximately 49% of all 12(b)(6) motions in the Database were granted (with or without leave to amend).<sup>262</sup> In cases involving “Contracts” (33%), “Torts” (44%), “ERISA” (39%), “Intellectual Property” (33%), and “RICO” (39%), the percentage of 12(b)(6) motions granted was lower than average. In contrast, the percentage of 12(b)(6) motions granted (with or without leave to amend) was above average in cases involving “Constitutional Civil Rights” (53%), the “ADA and ADEA” (53%), “LMRA and Other Labor” (60%), “Consumer Credit” (59%), and “Other Statutes” (57%).

Figure 6 presents the percentage of cases in the Database in which the 12(b)(6) motion was granted (with and without leave to amend) by the six simplified categories for nature of suit, with the percentages under *Conley*, *Twombly*, and *Iqbal* shown separately. The exact frequencies underlying Figure 6 (as well as the frequency of motions denied or receiving a mixed ruling) are shown in Appendix Table C.

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262. See *supra* Table 2.

Figure 6  
 Percentage of 12(b)(6) Motions Granted  
 by Simplified Nature of Suit and Authority



Exact frequencies presented in Appendix Table C.

Figure 6 indicates that for the most part, the percentage of motions granted (with or without leave to amend) by nature of suit (for cases in the Database) did not appreciably change before *Iqbal* was decided. For example, about 32% of 12(b)(6) motions in “Contract” cases decided under *Conley* were granted; in “Contract” cases decided under *Twombly*, 35% of 12(b)(6) motions were granted.

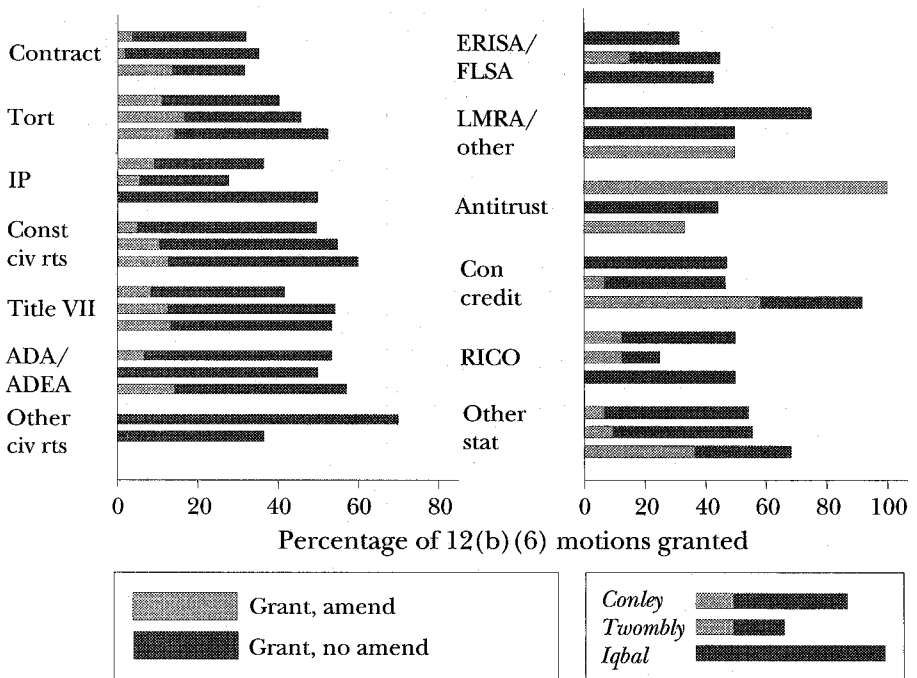
From *Conley* to *Twombly* to *Iqbal*, however, we can discern an upward trend in granting 12(b)(6) motions in some types of cases. The percentage of 12(b)(6) motions granted in “Tort” cases increased from *Conley* (40%) to *Twombly* (46%) to *Iqbal* (52%). The percentage of 12(b)(6) motions granted in “Civil Rights Cases” grew from 50% under *Conley* to 53% under *Twombly* to 58% under *Iqbal*. The percentage of 12(b)(6) motions granted in cases involving “Other Statutes” (including “Consumer Credit,” “Antitrust,” “RICO,” and “Environmental,” among others) declined from *Conley* (53%) to *Twombly* (50%), but then increased significantly to a whopping 72% under *Iqbal*. As Figure 6 shows, however, much of the increase in



“grants” under *Twombly* and *Iqbal* is comprised of grants *with* leave to amend.

Figure 7 presents essentially the same information as Figure 6—the percentage of 12(b)(6) motions in the Database granted (with or without leave to amend) by nature of suit and authority—but broken down into more detailed subcategories of nature of suit. Appendix Table D presents the exact frequencies for Figure 7, as well as the frequency of 12(b)(6) motions denied and given mixed rulings.

Figure 7  
Percentage of 12(b)(6) Motions Granted  
by Detailed Nature of Suit and Authority



Exact frequencies presented in Appendix Table D.

Again, we can spot an increase in the granting of 12(b)(6) motions (with or without leave to amend) from *Conley* to *Twombly* to *Iqbal* for certain types of cases in the Database. The percentage of 12(b)(6) motions granted (with or without leave to amend) in “Constitutional Civil Rights” cases grew from 50% under *Conley* to 55% under *Twombly* to 60% under *Iqbal*. The rate of granted 12(b)(6) motions (with or without leave to amend) in “Title VII” cases went from 42%

under *Conley* to 54% under *Twombly* to 53% under *Iqbal*. The rate of granted 12(b)(6) motions in “Consumer Credit” cases soared from 47% under *Conley* and *Twombly* to 92% under *Iqbal*. The rate of granted 12(b)(6) motions (with or without leave to amend) in cases involving “Other Statutes” (not including “Antitrust,” “Consumer Credit,” or “RICO”) grew from 54% under *Conley* to 56% under *Twombly* to 68% under *Iqbal*.

In some categories, differences that appear large (such as a decrease in percentage of motions granted in “Other Civil Rights” cases—not including “Constitutional Civil Rights,” “Title VII,” “ADA or ADEA”—from 70% under *Conley* to 36% under *Twombly* to 0% under *Iqbal*) may be skewed as a result of the small number of cases in that category. For “Other Civil Rights,” the Database contained twenty-two cases, only one of which was decided under *Iqbal*. Ironically, 12(b)(6) motions filed in “Antitrust” cases under *Conley* were more successful (100% of two cases) than under *Twombly*, an antitrust case (44% of nine cases), or *Iqbal* (33% of three cases). However, the small sample numbers here counsel against reading too much into the data.

### 3. *Differences in rulings by district courts in different circuit courts of appeals*

Strict “representativeness is not the primary goal of random sampling,”<sup>263</sup> and as indicated above,<sup>264</sup> the Database is not a perfectly random sample in any event. Nonetheless, some readers may wonder whether the Database’s distribution of district court cases by circuit is similar to the actual distribution of cases pending by circuit. Table 3 compares these proportions in the Database to the proportions of actual district court cases, as reported by the Administrative Office of the Courts.<sup>265</sup>

Table 3 indicates that this Database’s proportions of district court cases from the twelve circuits very roughly approximate the

263. FINKELSTEIN & LEVIN, *supra* note 218, at 259.

264. See *supra* note 198.

265. 2006 REPORT, *supra* note 222, at 159–61 (providing a basis for actual cases pending in fiscal years 2005 and 2006 in Table 3 using Table C-1: U.S. District Courts—Civil Cases Commenced, Terminated and Pending During the 12-Month Period Ending September 30, 2006); JAMES C. DUFF, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 140–42 (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> [hereinafter 2008 REPORT] (providing the number of U.S. District Courts—Civil Cases Commenced, Terminated and Pending for fiscal years 2007 and 2008). The figures for the fiscal year ending September 30, 2009 were not available at the time of this writing.

proportions of actual district court cases pending by circuit. It should be noted that the time period covered by the Database (May 22, 2005 to August 31, 2009) does not precisely match the Administrative Office of the Courts' annual reporting period, which ends on September 30.<sup>266</sup> But the comparison of Database cases to actual cases pending by circuit may address in some small degree the concern that some scholars have with studies that focus only on publicly-available opinions.

*Table 3*

*Number and Percentage of District Court Cases in the Database by Circuit Compared to Percentages of Actual District Court Cases Pending by Circuit*

	Cases in the Database (number of cases and percentage by circuit)				Actual percentage of district court civil cases by circuit		
	Cases under <i>Conley</i>	Cases under <i>Twombly</i>	Cases under <i>Iqbal</i>	All cases in the Database	Average for 2005 and 2006	Average for 2007 and 2008	Overall average for 2005- 2008
<b>First</b>	<b>10</b> 2.3%	<b>15</b> 3.6%	<b>15</b> 8.7%	<b>40</b> 3.9%	2.8%	2.4%	2.6%
<b>Second</b>	<b>67</b> 15.1%	<b>70</b> 16.6%	<b>41</b> 23.7%	<b>178</b> 17.1%	12.7%	13.2%	13.0%
<b>Third</b>	<b>49</b> 11.0%	<b>45</b> 10.7%	<b>21</b> 12.1%	<b>115</b> 11.1%	10.1%	18.8%	14.4%
<b>Fourth</b>	<b>23</b> 5.2%	<b>25</b> 5.9%	<b>12</b> 6.9%	<b>60</b> 5.8%	5.5%	4.7%	5.1%
<b>Fifth</b>	<b>29</b> 6.5%	<b>46</b> 10.9%	<b>13</b> 7.5%	<b>88</b> 8.4%	14.9%	12.9%	13.9%
<b>Sixth</b>	<b>55</b> 12.4%	<b>30</b> 7.1%	<b>9</b> 5.2%	<b>94</b> 9.1%	12.1%	7.8%	10.0%
<b>Seventh</b>	<b>34</b> 7.7%	<b>36</b> 8.5%	<b>9</b> 5.2%	<b>79</b> 7.6%	5.7%	5.1%	5.4%
<b>Eighth</b>	<b>25</b> 5.6%	<b>27</b> 6.4%	<b>4</b> 2.3%	<b>56</b> 5.4%	7.0%	6.6%	6.8%

266. Fiscal years 2005 and 2006 roughly cover the time period of the cases in the Database decided under *Conley*; fiscal years 2007 and 2008 roughly cover the time period of the cases in the Database decided under *Twombly*. No figures on actual cases pending after September 30, 2008, are available at this writing.

<b>Ninth</b>	<b>66</b> 14.9%	<b>57</b> 13.5%	<b>29</b> 16.7%	<b>152</b> 14.6%	15.8%	14.2%	15.0%
<b>Tenth</b>	<b>18</b> 4.1%	<b>31</b> 7.4%	<b>4</b> 2.3%	<b>53</b> 5.1%	3.6%	3.3%	3.4%
<b>Eleventh</b>	<b>44</b> 9.9%	<b>33</b> 7.8%	<b>8</b> 4.6%	<b>85</b> 8.2%	8.6%	10.0%	9.3%
<b>D.C.</b>	<b>24</b> 5.4%	<b>7</b> 1.7%	<b>8</b> 4.6%	<b>39</b> 3.8%	1.2%	1.0%	1.1%
<b>Total</b>	<b>444</b> 100%	<b>422</b> 100%	<b>173</b> 100%	<b>1039</b> 100%	100%	100%	100%

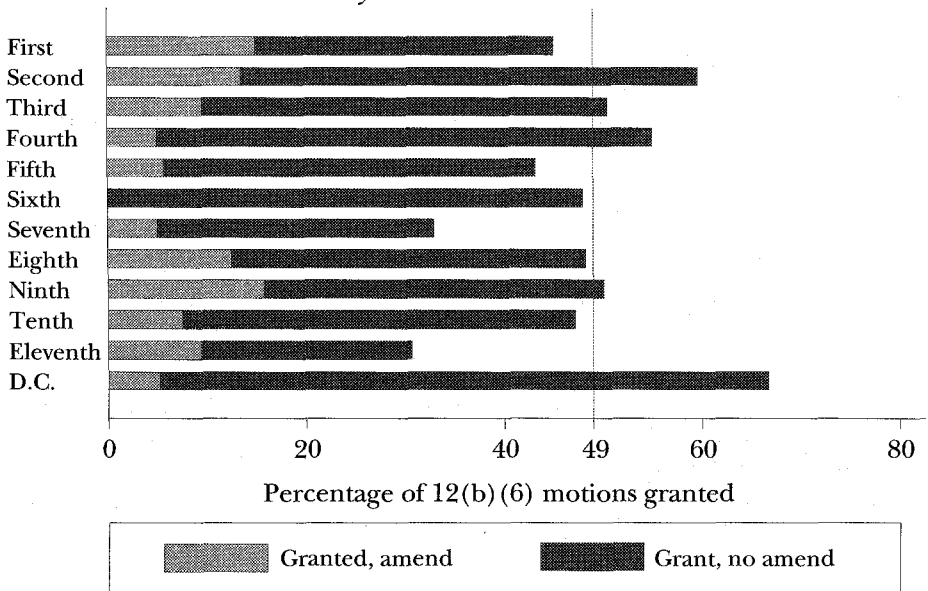
As Table 3 illustrates, district courts in the Third and Fifth Circuits may be somewhat underrepresented in the Database. For example, from October 1, 2005, to September 30, 2008, cases pending in district courts within the Fifth Circuit made up approximately 13.9% of all district court cases pending; cases chosen for inclusion in the Database here from district courts in the Fifth Circuit account for only 8.4% of the cases in the Database, which covers the period from May 22, 2005, to August 31, 2009.

Conversely, district courts in the Second, Seventh, and D.C. Circuits may be somewhat overrepresented in the Database. For example, from October 1, 2005, to September 30, 2008, cases pending in district courts within the Second Circuit comprised approximately 13% of all district court cases pending; cases chosen for inclusion in the Database here from district courts in the Second Circuit make up 17.1% of the cases in the Database, which covers the period from May 22, 2005, to August 31, 2009.

The difference between the percentage of actual district court cases pending by circuit and the percentage of cases in the Database is greatest when looking only at the cases decided under *Iqbal*. This is probably due to the short period of time (approximately three months) and the smaller number of cases in the Database covered by *Iqbal*.

We turn now to possible differences in the rate of granting 12(b)(6) motions depending on the circuit in which a district court sits. Figure 8 shows the percentage of 12(b)(6) motions granted (with or without leave to amend) by district courts in the Database within each of the twelve circuit courts of appeals for the entire period covered by the Database.

*Figure 8*  
*Percentage of 12(b)(6) Motions in the Database*  
*Granted by District Courts in Circuit*



Reference line at 49% shows overall average.  
 Exact frequencies presented in Appendix Table E.

Recall that about 49% of 12(b)(6) motions overall in the Database were granted (with or without leave to amend).<sup>267</sup> Figure 8 (detailed in Appendix Table E) shows that district courts in the Second and D.C. Circuits granted the 12(b)(6) motions (with or without leave to amend) in the Database at a higher-than-average rate (60% granted by district court judges in the Second Circuit and 67% granted by district court judges in the D.C. Circuit). District courts in the Third, Sixth, Eighth, Ninth, and Tenth Circuits granted 12(b)(6) motions (with or without leave to amend) in the Database at about the average rate (49%). Finally, district courts in the First (45%), Seventh (33%),<sup>268</sup> and Eleventh (31%) Circuits granted 12(b)(6)

267. See *supra* Table 2.

268. The Seventh Circuit, in particular, was vehement (at least before *Twombly*) about instructing district courts to adhere to “notice pleading.” See, e.g., *Doe v. Smith*, 429 F.3d 706, 708 (7th Cir. 2005) (“Any district judge (for that matter, any defendant) tempted to write ‘this complaint is deficient because it does not contain . . .’ should stop and think: What rule of law *requires* a complaint to contain that allegation?”).

motions (with or without leave to amend) in the Database at a lower-than-average rate.<sup>269</sup>

#### 4. *The effect of pro se plaintiffs*

A plaintiff's *pro se* status should leap to mind in any theory about probable factors that affect a court's ruling on a 12(b)(6) motion. It is reasonable to assume that a 12(b)(6) motion has a better chance of being granted against a *pro se* plaintiff's complaint than a complaint filed by a lawyer.<sup>270</sup>

Of all cases in the Database, approximately 28% involved *pro se* plaintiffs (281 of 1017 plaintiffs whose status could be determined from the opinion).<sup>271</sup> Interestingly, the percentage of *pro se* plaintiffs in the Database declined from *Conley* (30%) to *Twombly* (27%) to *Iqbal* (24%).<sup>272</sup>

"Civil Rights" cases comprised the largest category by nature of suit in the Database (about 44%).<sup>273</sup> Figure 9 (as detailed in Appendix Table F) shows that about 50% of plaintiffs in "Civil Rights" cases in the Database were *pro se*. Of the Database cases under *Conley*, 187 (43%) were "Civil Rights" cases, in which 100 (53%) of plaintiffs were *pro se*. Under *Twombly*, 181 (44%) of the Database cases were "Civil Rights" cases, in which 91 (50%) of plaintiffs were *pro se*. Under *Iqbal*, 78 (45%) of the Database cases were "Civil Rights" cases, and 30 (38%) of the plaintiffs in those cases were *pro se*. Note that "Civil Rights" cases are frequently brought by *pro se* prisoners.<sup>274</sup>

Figure 10 shows the difference in rulings on 12(b)(6) motions between *pro se* plaintiffs and plaintiffs represented by counsel under all three authorities.

269. It would be interesting to compare the district courts' rates of granting 12(b)(6) motions with the caseload per judge in the various districts, but such a comparison is beyond the scope of this article. See, e.g., 2008 REPORT, *supra* note 265, at 409–12 (showing statistic for U.S. District Courts—Weighted and Unweighted Filings per Authorized Judgeship During the 12-Month Period Ending September 30, 2008).

270. See, e.g., BRANDT GOLDSTEIN, *STORMING THE COURT* 57 (2005) ("Government statistics showed that legal representation more than doubled the chances that an individual would win asylum.").

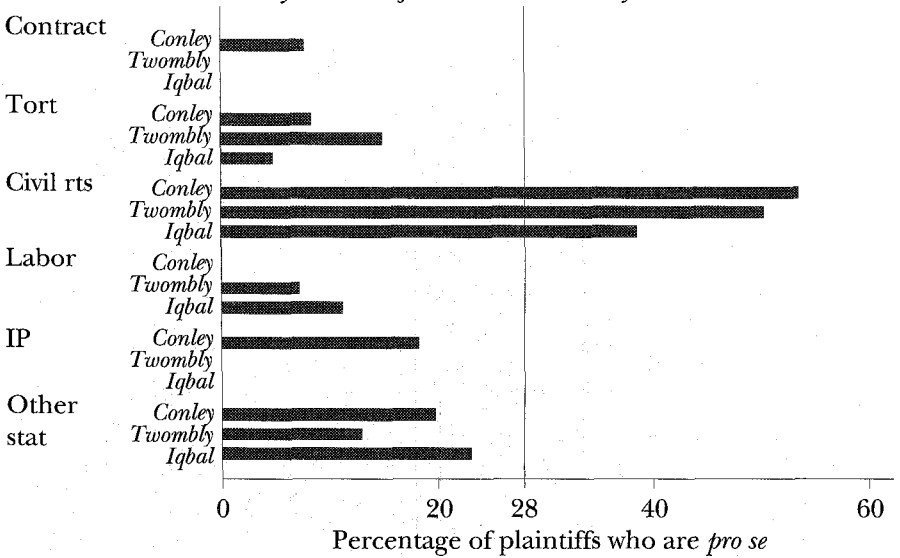
271. See *infra* Appendix Table G. This is only slightly higher than the percentage of all cases filed in federal district courts in fiscal year 2008 by *pro se* plaintiffs, which is 26.5% (70,948 *pro se* cases of 267,257 total filings). 2008 REPORT, *supra* note 265, at 78–80 (Civil Pro Se And Non-Pro Se Filings, by District, During the 12-Month Period Ending September 30, 2008).

272. See *infra* Appendix Table G.

273. See *supra* Figure 3; *infra* Appendix Table A.

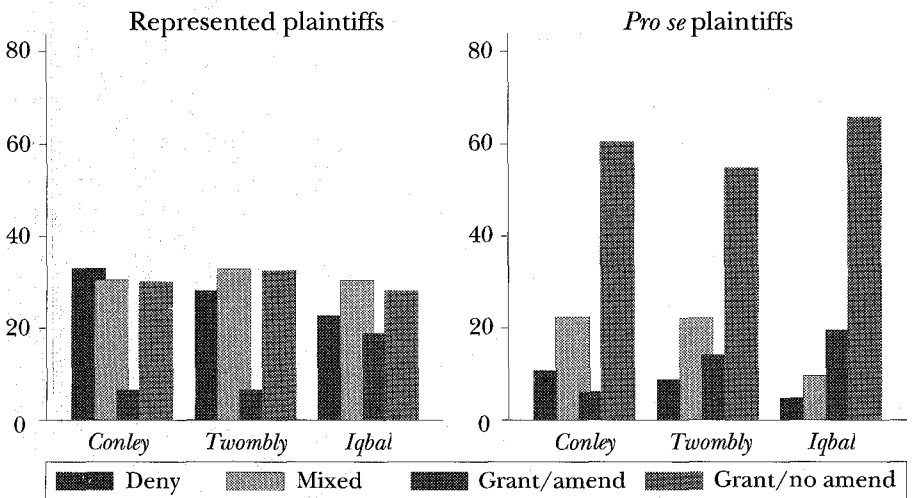
274. For example, in fiscal year 2008, *pro se* prisoner petitions made up 71.5% of all *pro se* filings in federal district courts (50,756 *pro se* prisoner petitions of 70,948 total *pro se* cases filed). 2008 REPORT, *supra* note 265, at 78–80.

Figure 9  
 Percentage of Pro Se Plaintiffs in the Database  
 by Nature of Suit and Authority



Reference line at 28% shows overall average percentage of *pro se* plaintiffs for all types of cases and authorities. Exact frequencies shown in Appendix Table F.

Figure 10  
 Percentage of Rulings in the Database by Status of Plaintiff and Authority



Exact frequencies presented in Appendix Table G.

The percentage of 12(b)(6) motions granted in all cases brought by *pro se* plaintiffs grew from *Conley* (67%) to *Twombly* (69%) to *Iqbal* (85%). Under any authority, 12(b)(6) motions were granted at a much higher rate in cases with a *pro se* plaintiff than in cases in which the plaintiff was represented. It appears that the boilerplate language that *pro se* plaintiffs' complaints should be treated with leniency<sup>275</sup> is not taken very seriously.<sup>276</sup>

##### 5. *The effects of other factors*

The two other factors coded in the Database were whether the case was brought as a putative class action and whether the ruling on the motion was recommended by a magistrate judge rather than ruled on or adopted by a district court judge. The absolute number of cases in the Database involving class actions and magistrates is too small to be meaningful. Further, multinomial logistic regressions that included these two independent variables indicated that neither variable was statistically significant in predicting the ruling on the 12(b)(6) motion.

##### 6. *Frequency of cases in the Database that were entirely dismissed upon a grant of a 12(b)(6) motion without leave to amend*

Just because a 12(b)(6) motion is granted, even without leave to amend, does not mean that the entire case has been dismissed. A 12(b)(6) motion will frequently involve less than all counts brought or less than all defendants joined in a complaint. In *Iqbal*, even if the plaintiff is not granted leave to amend on remand,<sup>277</sup> he will still have a multitude of government-official defendants left in the case. Thus, while the statistics presented above show, for example, that 39% of 12(b)(6) motions in the Database were granted without leave to amend,<sup>278</sup> that does *not* mean that entire cases were dismissed at the same rate.

Only the ruling "grant without leave to amend" could possibly result in the case being entirely dismissed at that time.<sup>279</sup> Looking

275. See *supra* notes 52–54 and accompanying text.

276. But see, e.g., *Felder v. Del. County Office of Servs. for the Aging*, No. 08-4182, 2009 WL 2278514, at \*2–3 (E.D. Pa. July 28, 2004) ("It would be unfair to allow a Plaintiff to file a *pro se* Complaint on the standard form, which provides minimal room for elaboration on the factual issues [seven lines], and then dismiss Plaintiff's Complaint under Rule 8 for failure to provide more factual allegations.").

277. See *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009) (remanding the case to district court in the wake of the Supreme Court's decision).

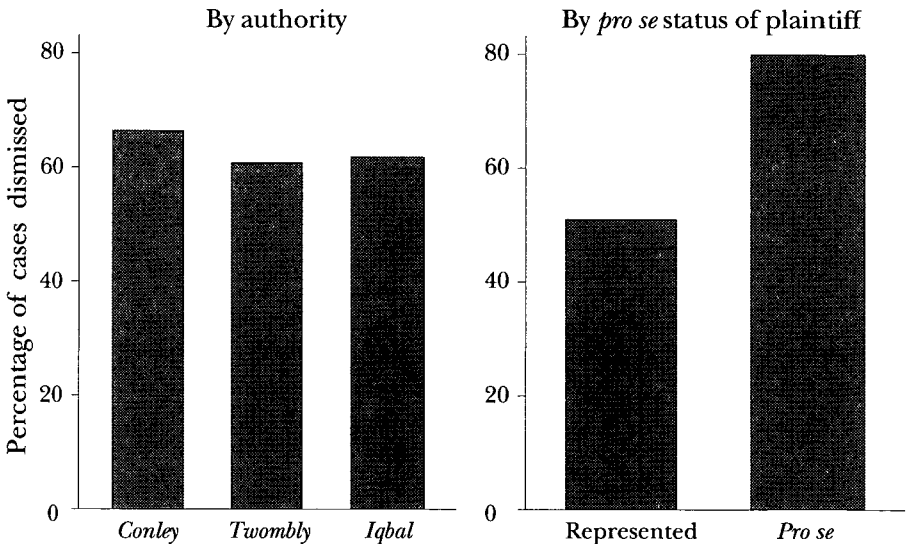
278. See *supra* Table 1.

279. In some cases, the court warns that if the plaintiff does not amend within a certain time period, the complaint will be dismissed, but if judgment was not entered, I coded that as a "grant with leave to amend."



only at the 403 cases in the Database in which the court granted the 12(b)(6) motion without leave to amend, the rate of cases entirely dismissed upon that ruling actually declined from *Conley* (66%) to *Twombly* (61%) and *Iqbal* (62%), but the distribution was not statistically significant. For *pro se* plaintiffs incurring a ruling of “grant without leave to amend,” however, 80% saw their cases entirely dismissed, as compared to only 51% for represented plaintiffs. Figure 11 presents these results.

*Figure 11*  
*Cases in the Database Entirely Dismissed*  
*upon Grant of 12(b)(6) Motion Without Leave to Amend*



Includes only those 403 cases in the Database in which a 12(b)(6) motion was granted without leave to amend.

### *B. Logistic Regressions*

#### *1. Multinomial logistic regression using the ruling on the 12(b)(6) motion as the dependent variable*

To better predict the possible effects of *Twombly* and *Iqbal* on the ruling on 12(b)(6) motions, I performed a multinomial logistic regression<sup>280</sup> using Stata.<sup>281</sup> The multinomial logistic regression model

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280. A multinomial logistic regression tests the strength of a model's various independent variables in predicting the outcome, or dependent variable. Its purpose is the same as the more commonly known multiple linear regression,

“estimat[es] the probability of different alternatives relative to the probability of a baseline.”<sup>282</sup> In this regression, the outcome, or dependent variable, is the ruling on the 12(b)(6) motion. The outcome possibilities are “deny,” “mixed ruling,” “grant with leave to amend,” and “grant without leave to amend.” I set the base outcome as “deny,” presumably the best outcome for the plaintiff (non-movant).

The independent variables, or possible predictors, used in this model included the one in which we are most interested—whether the case was decided under *Conley*, *Twombly*, or *Iqbal*—and whether plaintiff was represented by counsel or was proceeding *pro se*, the nature of suit, and the circuit within which the district court sits. I did not include the indicator variables for judge type and class action in the model; earlier models that included these variables showed that they had no statistical significance and that their presence did not appreciably increase the models’ ability to explain the differences in ruling outcomes.

Dummy (or “binary” or “indicator”) variables were created for the six major types of suit and the twelve circuit courts of appeal.<sup>283</sup> Based on the frequencies in the Database, 12(b)(6) motions are least frequently granted in contract cases as compared to the other major types of suit, and least frequently granted by district courts in the Eleventh Circuit as compared to district courts in the other circuits. Accordingly, I omitted the indicator variables for “Contract” and “11th Circuit” to use these as baselines. Note that the regression contains only 1017 cases, whereas the Database as a whole contains

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except that in multiple regression, the dependent variable is linear (also called “continuous” or “quantitative”), while in logistic regression, the dependent variable is categorical (also called “qualitative”; two-outcome variables are also called “binary” or “dichotomous”). The major dependent variable in this study—“Ruling”—is categorical; the categories are “grant without leave to amend,” “grant with leave to amend,” “mixed,” and “deny.” The other dependent variable in this study—whether a case is entirely dismissed upon the grant of a 12(b)(6) motion—is binary (entire case dismissed or entire case not dismissed). The multinomial logistic regression model is referred to by different names in various disciplines. See DAVID W. HOSMER & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* 260 (2d ed. 2000) (“[T]he model is frequently referred to as the discrete choice model in business and econometric literature while it is called the *multinomial*, *polychotomous* or *polytomous* logistic regression model in the health and life sciences.”); see also DAMODAR GUJARATI, *ESSENTIALS OF ECONOMETRICS* 451–53 (2d ed. 1999) (distinguishing binary regression models from multinomial regression models).

281. Stata is a commonly used statistical software package available commercially.

282. Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J. L. ECON. & ORG. 598, 608 (2007).

283. See HOSMER & LEMESHOW, *supra* note 280, at 62 (“[D]iscrete nominal scale variables are included properly into the [logistic] analysis only when they have been recoded into design variables.”).

1039 cases. Twenty-two cases (2% of the total) were eliminated from the regression because each case was missing a value for at least one variable.<sup>284</sup> Table 4 presents the results of this regression.

*Table 4*

*Multinomial Logistic Regression on Rulings on 12(b)(6) Motions in the Database of Cases Between May 22, 2005 and August 31, 2009*  
(four "ruling" outcomes; "deny" is base outcome)

Number of observations = 1017 log likelihood = -1186.216  
Probability > chi-squared = 0.0000 pseudo R-squared = 0.0954  
Likelihood Ratio chi-squared (57 degrees of freedom) = 250.32

\*Probability < 0.1 (considered significant at confidence level of 90%).

Odds comparing "grant without leave to amend" to "deny":

<i>Variable</i>	<i>Relative risk ratio</i>	<i>Std. Error</i>	<i>z</i>	<i>P&gt; z </i>	<i>[90% Conf.</i>	<i>Interval]</i>
<i>Twombly</i>	1.342	0.261	1.51	0.131	0.974	1.848
<i>Iqbal</i>	1.398	0.374	1.25	0.210	0.901	2.170
<i>Pro se</i>	5.119	1.348	6.20	0.000*	3.320	7.894
First Cir	3.068	1.795	1.92	0.055*	1.172	8.032
Second Cir	3.919	1.568	3.42	0.001*	2.030	7.567
Third Cir	2.062	0.851	1.75	0.080*	1.045	4.067
Fourth Cir	2.859	1.343	2.24	0.025*	1.320	6.192
Fifth Cir	1.948	0.828	1.57	0.116	0.969	3.919
Sixth Cir	3.123	1.315	2.70	0.007*	1.562	6.244
Seventh Cir	1.334	0.593	0.65	0.517	0.642	2.770
Eighth Cir	1.695	0.808	1.11	0.268	0.774	3.714
Ninth Cir	2.500	0.994	2.31	0.021*	1.300	4.808
Tenth Cir	2.903	1.530	2.02	0.043*	1.220	6.907
D.C. Cir	8.478	5.418	3.34	0.001*	2.963	24.255
Tort	1.367	0.461	0.93	0.354	0.785	2.381
Civ rts	1.828	0.544	2.03	0.043*	1.120	2.983
Labor	1.023	0.387	0.06	0.951	0.550	1.905

284. See JOSEPH L. SCHAFER, ANALYSIS OF INCOMPLETE MULTIVARIATE DATA 1 (1997) ("Many statistical software packages . . . automatically omit from a linear regression analysis any case that has a missing value for any variable. . . . When the incomplete cases comprise only a small fraction (say, five percent or less) then case deletion may be a perfectly reasonable solution to the missing-data problem.").

IP	0.661	0.329	-0.83	0.405	0.291	1.499
Other stat	1.875	0.574	2.06	0.040*	1.134	3.102

Odds comparing “grant with leave to amend” to “deny” (indicator variables for circuits omitted from Table, although not from regression; no variable for circuit was statistically significant at a 90% confidence level):

<i>Variable</i>	<i>Relative risk ratio</i>	<i>Std. Error</i>	<i>z</i>	<i>P&gt; z </i>	<i>[90% Conf.</i>	<i>Interval]</i>
<i>Twombly</i>	1.806	0.546	1.96	0.050*	1.099	2.969
<i>Iqbal</i>	4.035	1.398	4.03	0.000*	2.282	7.135
<i>Pro se</i>	4.352	1.527	4.19	0.000*	2.444	7.750
<i>Tort</i>	4.318	2.321	2.72	0.007*	1.783	10.454
<i>Civ rts</i>	2.535	1.222	1.65	0.100*	1.001	5.529
<i>Labor</i>	1.228	0.874	0.29	0.773	0.381	3.959
<i>IP</i>	0.748	0.661	-0.33	0.742	0.175	3.198
<i>Other stat</i>	4.090	2.090	2.76	0.006*	1.764	9.481

Odds comparing “mixed ruling” to “deny” (indicator variables for circuits omitted from Table, although not from regression; no variable for circuit was statistically significant at a 90% confidence level):

<i>Variable</i>	<i>Relative risk ratio</i>	<i>Std. Error</i>	<i>z</i>	<i>P&gt; z </i>	<i>[90% Conf.</i>	<i>Interval]</i>
<i>Twombly</i>	1.410	0.282	1.72	0.086*	1.015	1.960
<i>Iqbal</i>	1.255	0.349	0.82	0.414	0.794	1.983
<i>Pro se</i>	1.462	0.414	1.34	0.179	0.918	2.330
<i>Tort</i>	1.139	0.364	0.41	0.684	0.673	1.926
<i>Civ rts</i>	1.715	0.480	1.93	0.054*	1.082	2.718
<i>Labor</i>	0.224	0.107	-3.12	0.002*	0.101	0.493
<i>IP</i>	0.191	0.115	-2.75	0.006*	0.071	0.515
<i>Other stat</i>	0.951	0.288	-0.17	0.868	0.578	1.565

*Notes to Table 4:* “Deny” is designated as the base outcome for the ruling. Each other possible outcome (“mixed ruling,” “grant with leave to amend,” and “grant without leave to amend”) is compared to the base outcome. I omitted the indicator variables for “Contract” and “11th Circuit” to use as baselines.

The “pseudo  $R^2$ ” for this model is 0.095. Loosely, the pseudo  $R^2$  is a measure of how much of the outcome (here, the ruling) is explained by all the various factors used in the model (here, such as the authority).<sup>285</sup> The model here accounts for only about 9.5% of the variance in rulings on the motions. However, the model is still meaningful: the probability that the model does not explain the variance in rulings at all is less than 0.01%.<sup>286</sup>

A value greater than 1.0 for the “relative risk ratio” for any variable indicates that the presence of that variable (holding all other variables constant) increases the relative risk that a 12(b)(6) motion will be granted (with or without leave to amend), or will result in a mixed ruling, over the relative risk of the motion being denied. However, if the relative risk ratio for the variable is not significant ( $p < 0.10$ ), we cannot reject the null hypothesis that the variable has no impact on the ruling on the motion.

The relative risk ratio can thus be used to gauge the effect of *Twombly* and *Iqbal* on rulings as compared to the baseline category, which is *Conley*.<sup>287</sup> The effect of either *Twombly* or *Iqbal*, in comparison to *Conley*, is at least 1.34 on the relative risk of the motion being granted *without* leave to amend over being denied, meaning that the percentage increase of relative risk of the motion being granted without leave to amend over being denied is approximately 34%. However, this relative risk ratio (for grants without leave to amend as compared to denials) is not statistically significant ( $p = 0.131$  under *Twombly* and  $p = 0.210$  under *Iqbal*).

Comparing grants *with* leave to amend to denials under either *Twombly* or *Iqbal*, the relative risk ratios are statistically significant. Under *Twombly*, the relative risk that a 12(b)(6) motion will be granted with leave to amend, rather than denied, would be expected to increase by a factor of 1.81 over *Conley*, holding all other variables constant. At the 90% confidence level, this relative risk ratio could be as low as 1.1 (almost evenly likely) or as high as 2.97 (almost three

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285. See generally, Michael J. Vitacco et al., *Predicting Short-Term Institutional Aggression in Forensic Patients: A Multi-Trait Method For Understanding Subtypes of Aggression*, 33 LAW & HUM. BEHAV. 308, 315 (2009) (applying the pseudo  $R^2$  to determine the impact of different variables on overall variance). The pseudo  $R^2$  is one of several measures developed in logistic regression to approximate the  $R^2$  in linear regression. Because of mathematical differences between linear regression and logistic regression, the pseudo  $R^2$  in logistic regression is a less satisfactory measure of the “goodness of fit” of the model, and is typically far lower, than the  $R^2$  in a good linear regression model. HOSMER & LEMESHOW, *supra* note 280, at 166–67.

286. This is indicated by the line “Probability > chi-squared = 0.0000.”

287. For a detailed explanation of the interpretation of odds ratios, see generally HOSMER & LEMESHOW, *supra* note 280, at 189–92, 286–87.

times as likely) as a motion being granted with leave to amend, relative to being denied, under *Conley*.

Under *Iqbal*, the relative risk that a 12(b)(6) motion will be granted with leave to amend, rather than denied, would be expected to increase by a factor of 4.04 over *Conley*, holding all other variables constant. At the 90% confidence level, this relative risk ratio could be as low as 2.28 or as high as 7.14. Under *Iqbal*, then, it is more than twice as likely, and possibly more than seven times more likely, for a 12(b)(6) motion to be granted with leave to amend, rather than denied, as under *Conley*, at a 90% confidence level.

The relative risk of a 12(b)(6) motion receiving a “mixed” ruling relative to being denied would be expected to increase by a factor of 1.41 under *Twombly* than under *Conley*, holding all other variables constant; this is also statistically significant. At the 90% confidence level, this ratio could be as low as 1.02 or as high as 1.96. The relative risk ratio of a 12(b)(6) motion receiving a “mixed” ruling relative to being denied under *Iqbal* as compared to *Conley*, however, is not statistically significant.

Table 4 also shows that, by far, the variable with the largest predicted effect on whether a 12(b)(6) motion will be granted (with or without leave to amend), as opposed to the motion being denied, is whether the plaintiff is *pro se*. The relative risk of a 12(b)(6) motion to dismiss a *pro se* plaintiff’s complaint being granted without leave to amend, rather than denied, is over five times greater (5.12 times greater) than for a represented plaintiff. At a 90% confidence level, this ratio could be as low as 3.32 times greater or as high as 7.89 times greater. Note that the regression model in Table 4 holds constant the “*pro se* plaintiff” variable when testing for the effect of other variables.

Similarly, the relative risk of a 12(b)(6) motion to dismiss a *pro se* plaintiff’s complaint being granted *with* leave to amend, rather than denied, is over four times greater (4.35 times greater) than for a represented plaintiff. At a 90% confidence level, this ratio could be as low as 2.44 times greater or as high as 7.75 times greater.

As discussed earlier, certain types of suit appear to be associated with how the court will rule on a motion. In the Database, 12(b)(6) motions were least frequently granted in “Contract” cases; thus, I used “Contract” cases as the baseline. The relative risk that a 12(b)(6) motion will be granted without leave to amend, rather than denied, in a “Civil Rights” case is 1.83 times greater than in a

“Contracts” case, holding all other variables constant.<sup>288</sup> The relative risk that a 12(b)(6) motion will be granted without leave to amend, rather than denied, in a case involving “Other Statutes” is 1.88 times greater than in “Contract” cases, holding all other variables constant.<sup>289</sup> Both of these ratios are statistically significant.

The circuit within which a district court sits may also have a predictive effect on how the court will rule on a 12(b)(6) motion. Again using the raw frequencies in the Database as the guide for choosing a baseline circuit, district courts in the Eleventh Circuit showed the lowest rate of granting 12(b)(6) motions; I therefore chose the indicator variable for the Eleventh Circuit as the baseline. The relative risk that a district court in the First, Second, Third, Fourth, Sixth, Ninth, Tenth, and D.C. Circuits will grant without leave to amend, rather than deny, a 12(b)(6) motion are greater than 1.0 at, at least, a 90% confidence level, than in the apparently most lenient Eleventh Circuit.

2. *Logistic regression using the factor of whether the case was entirely dismissed as the dependent variable*

I also performed a logistic regression in which “entire case dismissed” was the dependent variable (coded “0” if the case was not entirely dismissed upon the grant of the 12(b)(6) motion without leave to amend, and coded “1” if it was entirely dismissed). Again, only those cases in which the motion was granted without leave to amend are included in the regression model. Table 5 presents the results.

*Table 5*

*Logistic Regression on Cases Entirely Dismissed Upon Grant of 12(b)(6) Motion Without Leave to Amend in the Database of Cases Between May 22, 2005 and August 31, 2009*

Number of observations = 389 log likelihood = -216.751  
 Probability > chi-squared = 0.0000 pseudo R-squared = 0.1528  
 Likelihood ratio chi-squared (19 degrees of freedom) = 78.17

\*Probability < 0.1 (considered significant at confidence level of 90%).

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288. p = 0.04. The 90% confidence interval is 1.12 to 2.98.

289. p = 0.04. The 90% confidence interval is 1.13 to 3.10.

<i>Variable</i>	<i>Odds</i>	<i>Std. Error</i>	<i>z</i>	<i>P&gt; z </i>	<i>[90% Conf.</i>	<i>Interval]</i>
<i>Twombly</i>	0.841	0.220	-0.66	0.509	0.547	1.294
<i>Iqbal</i>	0.692	0.242	-1.05	0.294	0.389	1.231
<i>Pro se</i>	3.482	0.951	4.57	0.000*	2.222	5.457
First Cir	1.326	1.082	0.35	0.729	0.346	5.078
Second Cir	4.114	2.559	2.27	0.023*	1.479	11.443
Third Cir	1.847	1.173	0.97	0.334	0.650	5.248
Fourth Cir	2.052	1.412	1.05	0.296	0.662	6.362
Fifth Cir	1.439	0.949	0.55	0.581	0.486	4.258
Sixth Cir	1.756	1.113	0.89	0.374	0.620	4.980
Seventh Cir	0.629	0.460	-0.63	0.526	0.189	2.093
Eighth Cir	1.106	0.808	0.14	0.890	0.332	3.681
Ninth Cir	3.956	2.573	2.11	0.034*	1.357	11.529
Tenth Cir	0.752	0.538	-0.40	0.690	0.231	2.441
D.C. Cir	3.113	2.269	1.56	0.119	0.940	10.307
Tort	0.296	0.158	-2.27	0.023*	0.123	0.714
Civ rts	1.533	0.670	0.98	0.329	0.747	3.147
Labor	1.242	0.727	0.37	0.711	0.474	3.253
IP	0.563	0.464	-0.70	0.486	0.145	2.185
Other stat	1.265	0.575	0.52	0.605	0.599	2.670

*Notes to Table 5:* Only includes 389 cases in the Database in which the entire case was dismissed upon the grant of a 12(b)(6) motion without leave to amend. (The total number differs from the total in Figure 11 (403 cases) because it was not possible to determine the nature of suit in all cases, and any case in which the value for at least one variable was missing was eliminated.) I omitted the indicator variables for “Contract” and “11th Circuit” to use as baselines. I did not include the indicator variables for judge type and class action in the model.

The results of the logistic regression indicate that the authority under which a motion was decided had no statistically significant effect on whether a case was entirely dismissed upon the grant of a 12(b)(6) motion without leave to amend. The variable with the largest predicted effect on whether a case was entirely dismissed was whether the plaintiff was *pro se*. The odds that a *pro se* plaintiff’s complaint would be entirely dismissed upon the grant of a 12(b)(6) motion were 3.48 times greater than the odds that a represented



plaintiff's complaint would be entirely dismissed (at a 90% confidence level, the odds could be as low as 2.22 or as high as 5.46). In addition, it is significantly more likely that a district court in the Second Circuit or the Ninth Circuit would entirely dismiss a case upon the grant of a 12(b)(6) motion than a district court in the Eleventh Circuit. Finally, and somewhat surprisingly, it is significantly less likely that a Tort case would be entirely dismissed upon the grant of a 12(b)(6) motion than a Contract case.

#### CONCLUSION

Notice pleading may not be "dead"<sup>290</sup> in federal court, but the prognosis is grave. Even before *Twombly*, courts had been straining to heighten the pleading standard. *Twombly* began the dismantling of the well-worn principles federal courts had used for decades to decide 12(b)(6) motions by replacing *Conley's* "no set of facts" standard with the "plausibility" standard and by neglecting to mention that all reasonable inferences should be made in the plaintiff's favor. Even so, the Court in *Twombly* insisted that it was adhering to "notice pleading," continuing to cite the *Conley* "fair notice" language with approval.

Several aspects of *Iqbal* appear designed to hasten the death of notice pleading. First, the Court failed to mention notice pleading at all, even as a background reference to the pleadings regime once proudly ushered in by the FRCP; and unlike *Twombly*, *Iqbal* did not expressly reject "heightened" pleading. Second, *Iqbal* uncritically embraced *Twombly's* "plausibility" standard without providing much further guidance except for the highly subjective directive to the lower courts to use "judicial experience and common sense." Third, *Iqbal* reinvigorated the always murky distinction between "facts" and "conclusions" in a complaint, inviting judges to somehow identify the latter and set them aside.

This study provides some evidence that district courts are taking *Twombly* and *Iqbal* to heart. Especially after *Iqbal*, they appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*—which was already a sizeable 49% in the Database in the two-year period before *Twombly*. In addition, *Twombly* and *Iqbal* are poised to have their greatest impact on civil rights cases, simply because those cases are by far the most likely type of case to be attacked by a 12(b)(6) motion.

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290. Spencer, *supra* note 137, at 431.

Many may not mourn the passing of notice pleading. For example, a recent report by a blue-ribbon panel suggesting improvements to the civil procedure rules recommends the following: "Notice pleading should be replaced by fact-based pleading. Pleadings should set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party's claims or affirmative defenses."<sup>291</sup>

But if federal courts are to swing back to a code-pleading-like regime, it would best be done by the normal rule amendment process. The "plausibility" standard injects too much subjectivity into the ruling, and the very word "plausible" implies a value judgment on the merits of the case at the pleadings stage. This was not the original intent of the FRCP, and such a profound shift in philosophy should be accomplished by deliberative and representative consensus.

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291. FINAL REPORT ON THE JOINT PROJECT OF THE AMERICAN COLLEGE OF TRIAL LAWYERS TASK FORCE ON DISCOVERY AND THE INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM 5 (2009), <http://www.actl.com/AM/Template.cfm?Section=Publications> (follow "All Publications" hyperlink under the "Publications" tab; then follow "Publications of General Interest" hyperlink, follow "2009 ACTL-IAALS OFFICIAL FINAL REPORT" hyperlink).

*Appendix Table A*  
*(Backup for Figures 3 and 4)*  
*Number and Percentage of Cases in the Database by Nature of Suit*

<i>Nature of suit</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Total</i>
<b>Contract</b> <sup>292</sup>	<b>56</b> 13%	<b>51</b> 12%	<b>12</b> 13%	<b>129</b> 12%
<b>Tort</b>	<b>72</b> 16%	<b>48</b> 12%	<b>21</b> 12%	<b>141</b> 14%
<b>Civil rts, all</b>	<b>190</b> 43%	<b>186</b> 44%	<b>78</b> 45%	<b>454</b> 44%
Constitutional civ rts	<b>141</b> 32%	<b>135</b> 32%	<b>55</b> 32%	<b>331</b> 32%
Title VII	<b>24</b> 5%	<b>24</b> 6%	<b>15</b> 9%	<b>63</b> 6%
ADA, ADEA	<b>15</b> 3%	<b>16</b> 4%	<b>7</b> 4%	<b>38</b> 4%
Other Civ rts <sup>293</sup>	<b>10</b> 2%	<b>11</b> 3%	<b>1</b> 1%	<b>22</b> 2%
<b>Labor, all</b>	<b>27</b> 6%	<b>30</b> 7%	<b>9</b> 5%	<b>66</b> 6%
ERISA, FLSA	<b>19</b> 4%	<b>20</b> 5%	<b>7</b> 4%	<b>46</b> 4%
LMRA, other	<b>8</b> 2%	<b>10</b> 2%	<b>2</b> 1%	<b>20</b> 2%
<b>IP</b>	<b>11</b> 3%	<b>18</b> 4%	<b>4</b> 2%	<b>33</b> 3%
<b>Other stat, all</b>	<b>88</b> 20%	<b>86</b> 21%	<b>39</b> 23%	<b>213</b> 21%
Antitrust	<b>2</b> 0%	<b>9</b> 2%	<b>3</b> 2%	<b>14</b> 1%
Cons Credit	<b>17</b> 4%	<b>15</b> 4%	<b>12</b> 7%	<b>44</b> 4%
RICO	<b>8</b> 2%	<b>8</b> 2%	<b>2</b> 1%	<b>18</b> 2%
All other stat <sup>294</sup>	<b>61</b> 14%	<b>54</b> 13%	<b>22</b> 13%	<b>137</b> 13%
<i>Total</i>	<b>444</b>	<b>419</b> <sup>295</sup>	<b>173</b>	<b>1036</b>

292. Includes two "Real Property" cases.

293. Includes four prisoner petitions that are not civil-rights based.

294. Includes four "Immigration," one "Bankruptcy," and twelve "Federal Tax."

*Appendix Table B*  
*(Backup for Figure 5)*  
*Number and Percentage of Rulings on 12(b)(6) Motions for*  
*Cases in the Database by Nature of Suit and Authority*

<i>Nature of suit</i>	<i>Ruling on 12(b)(6) motion</i>			
	<i>Grant</i>	<i>Mixed</i>	<i>Deny</i>	<i>Total</i>
Contract	<b>43</b> 33%	<b>45</b> 35%	<b>41</b> 32%	<b>129</b> 12% of column 100% of row
Tort	<b>62</b> 44%	<b>43</b> 31%	<b>36</b> 26%	<b>141</b> 14% of column 100% of row
Constitutional civ rts	<b>177</b> 53%	<b>111</b> 34%	<b>43</b> 13%	<b>331</b> 32% of column 100% of row
Title VII	<b>31</b> 49%	<b>20</b> 32%	<b>12</b> 19%	<b>63</b> 6% of column 100% of row
ADA, ADEA	<b>20</b> 53%	<b>10</b> 26%	<b>8</b> 21%	<b>38</b> 4% of column 100% of row
Other civ rts	<b>11</b> 50%	<b>4</b> 18%	<b>7</b> 32%	<b>22</b> 2% of column 100% of row
ERISA, FLSA	<b>18</b> 39%	<b>6</b> 13%	<b>22</b> 48%	<b>46</b> 4% of column 100% of row
LMRA, other	<b>12</b> 60%	<b>1</b> 5%	<b>7</b> 35%	<b>20</b> 2% of column 100% of row
IP	<b>11</b> 33%	<b>4</b> 12%	<b>18</b> 55%	<b>33</b> 3% of column 100% of row
Antitrust	<b>7</b> 50%	<b>6</b> 43%	<b>1</b> 7%	<b>14</b> 1% of column 100% of row

295. The total here is three less than the total number of cases in the Database under *Twombly* (422) because the “nature of suit” in the three cases could not be determined from the opinion.

Cons credit	<b>26</b> 59%	<b>6</b> 14%	<b>12</b> 27%	<b>44</b> 4% of column 100% of row
RICO	<b>7</b> 39%	<b>6</b> 33%	<b>5</b> 28%	<b>18</b> 2% of column 100% of row
Other stat	<b>78</b> 57%	<b>30</b> 22%	<b>29</b> 21%	<b>137</b> 13% of column 100% of row
Total	<b>503</b> 49%	<b>292</b> 28%	<b>241</b> 23%	<b>1036</b>

*Appendix Table C*  
(Backup for Figure 6)

*Number and Percentage of Rulings on 12(b)(6) Motions for All Cases in the Database by Simplified Nature of Suit and Authority*

	<i>Ruling on 12(b)(6) motion</i>								
	<i>Grant (with or without leave to amend)</i>			<i>Mixed ruling</i>			<i>Deny</i>		
<i>Nature of suit</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>
Contract	18 32%	18 35%	7 32%	21 38%	17 33%	7 32%	17 30%	16 31%	8 36%
Tort	29 40%	22 46%	11 52%	23 32%	16 33%	4 19%	20 28%	10 21%	6 29%
Civ rts	95 50%	99 53%	45 58%	60 32%	62 33%	23 29%	35 18%	25 13%	10 13%
Labor	12 44%	14 47%	4 44%	3 11%	2 7%	2 22%	12 44%	14 47%	3 33%
IP	4 36%	5 28%	2 50%	0	4 22%	0	7 64%	9 50%	2 50%
Other stat	47 53%	43 50%	28 72%	16 18%	24 28%	8 21%	25 28%	19 22%	3 8%
Total	205 46%	201 48%	97 56%	123 28%	125 30%	44 25%	116 26%	93 22%	32 19%

*Note to Appendix Table C:* Percentages in parentheses represent the percentage of rulings in the Database that were decided under the particular authority for that particular nature of suit. For example, in “Contract” cases decided under *Conley*, 32% of all 12(b)(6) motions were granted (with or without leave to amend), 38% received a mixed ruling, and 30% were denied.

*Appendix Table D*  
(Backup for Figure 7)

*Number and Percentage of Rulings on 12(b)(6) Motions for All Cases in the Database by Detailed Nature of Suit and Authority*

Nature of suit	Ruling on 12(b)(6) motion								
	Grant (with or without leave to amend)			Mixed ruling			Deny		
	Conley	Twombly	Iqbal	Conley	Twombly	Iqbal	Conley	Twombly	Iqbal
Contract	18 32%	18 35%	7 32%	21 38%	17 33%	7 32%	17 30%	16 31%	8 36%
Tort	29 40%	22 46%	11 52%	23 32%	16 33%	4 19%	20 28%	10 21%	6 29%
Constitutional civ rts	70 50%	74 55%	33 60%	46 33%	46 34%	19 35%	25 18%	15 11%	3 6%
Title VII	10 42%	13 54%	8 53%	9 38%	8 33%	3 20%	5 21%	3 13%	4 27%
ADA, ADEA	8 53%	8 50%	4 57%	4 27%	5 31%	1 14%	3 20%	3 19%	2 29%
Other civ rts	7 70%	4 36%	0	1 10%	3 27%	0	2 20%	4 36%	1 100%
ERISA, FLSA	6 32%	9 45%	3 43%	3 16%	2 10%	1 14%	10 53%	9 45%	3 43%
LMRA, other	6 75%	5 50%	1 50%	0	0	1 50%	2 25%	5 50%	0
IP	4 36%	5 28%	2 50%	0	4 22%	0	7 64%	9 50%	2 50%
Antitrust	2 100%	4 44%	1 33%	0	4 44%	2 67%	0	1 11%	0
Cons credit	8 47%	7 47%	11 92%	3 18%	2 13%	1 8%	6 35%	6 40%	0
RICO	4 50%	2 25%	1 50%	1 13%	5 62%	0	3 37%	1 13%	1 50%
Other stat	33 54%	30 56%	15 68%	12 20%	13 24%	5 23%	16 26%	11 20%	2 9%
Total	205 46%	201 48%	97 56%	123 28%	125 30%	44 25%	116 26%	93 22%	32 19%

*Note to Appendix Table D:* Percentages in parentheses represent the percentage of rulings in the Database decided under the particular authority for that particular nature of suit. For example, in “Contract” cases decided under *Conley*, 32% of all 12(b)(6) motions were granted (with or without leave to amend), 38% received a mixed ruling, and 30% were denied.

*Appendix Table E*  
(Backup for Figure 8)

*Number and Percentage of Rulings in the Database on 12(b)(6) Motions by District Courts in Circuits*

<i>Circuit</i>	<i>Ruling</i>			<i>Total</i>	<i>% of Column</i>
	<i>Deny</i>	<i>Mixed</i>	<i>Grant</i>		
<i>First</i>	7 18%	15 38%	18 45%	40	3.9%
<i>Second</i>	27 15%	45 25%	106 60%	178	17.1%
<i>Third</i>	27 24%	30 26%	58 50%	115	11.1%
<i>Fourth</i>	14 23%	13 22%	33 55%	60	5.8%
<i>Fifth</i>	27 31%	23 26%	38 43%	88	6.5%
<i>Sixth</i>	23 25%	26 28%	45 48%	94	9.1%
<i>Seventh</i>	26 33%	27 34%	26 33%	79	7.6%
<i>Eighth</i>	17 30%	12 21%	27 48%	56	5.4%
<i>Ninth</i>	33 22%	43 28%	76 50%	152	14.6%
<i>Tenth</i>	9 17%	19 36%	25 47%	53	5.1%
<i>Eleventh</i>	29 34%	30 35%	26 31%	85	8.2%
<i>D.C.</i>	4 10%	9 23%	26 67%	39	3.8%
<i>Total</i>	243 23%	292 28%	504 49%	1039	100%



*Appendix Table F*  
(Backup for Figure 9)

*Number and Percentage of Represented and Pro Se Plaintiffs in the Database  
by Nature of Suit and Authority*

	<i>Represented Plaintiff</i>			<i>Pro Se Plaintiff</i>			<i>Total (all cases)</i>	
	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Represented</i>	<i>Pro se</i>
Contract	48 92%	50 100%	22 100%	4 8%	0	0	120 97%	4 3%
Tort	66 92%	40 85%	20 95%	6 8%	7 15%	1 5%	126 90%	14 10%
Civ rts	87 47%	90 50%	48 62%	100 53%	91 50%	30 38%	225 50%	221 50%
Labor	27 100%	26 93%	8 89%	0	2 7%	1 11%	61 95%	3 5%
IP	9 82%	18 100%	4 100%	2 18%	0	0	31 94%	2 6%
Other stat	69 80%	74 87%	30 77%	17 20%	11 13%	9 22%	173 82%	37 18%
Total	306 70%	298 73%	132 76%	129 30%	111 27%	41 24%	736 72%	281 28%

*Notes to Appendix Table F:* The Table does not include cases in which the status of the plaintiff or the nature of the suit could not be determined from the opinion. Percentages in parentheses are percentages of cases in the Database by nature of suit and by authority. For example, 92% of all plaintiffs in "Contract" cases under *Conley* in the Database were represented by counsel; 8% were not.

*Appendix Table G*  
(Backup for Figure 10)

*Number and Percentage of Rulings in the Database on 12(b)(6) Motions  
by Status of Plaintiff (Represented or Pro Se) and Authority*

	<i>Ruling on 12(b)(6) motion</i>								
	<i>Grant (with or without leave to amend)</i>			<i>Mixed ruling</i>			<i>Deny</i>		
<i>Status of plaintiff</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>	<i>Conley</i>	<i>Twombly</i>	<i>Iqbal</i>
<i>Rep- resented</i>	<b>112</b> 37%	<b>117</b> 39%	<b>62</b> 47%	<b>93</b> 30%	<b>98</b> 33%	<b>40</b> 30%	<b>101</b> 33%	<b>84</b> 28%	<b>30</b> 23%
<i>Pro se</i>	<b>86</b> 67%	<b>78</b> 69%	<b>35</b> 85%	<b>29</b> 22%	<b>25</b> 22%	<b>4</b> 10%	<b>14</b> 11%	<b>10</b> 9%	<b>2</b> 5%
<b>Total</b>	<b>198</b> 45%	<b>195</b> 47%	<b>97</b> 56%	<b>122</b> 28%	<b>123</b> 30%	<b>44</b> 25%	<b>115</b> 26%	<b>94</b> 23%	<b>32</b> 19%

*Notes to Appendix Table G:* The Table does not include cases in which the status of the plaintiff or the nature of suit could not be determined from the opinion. Percentages in parentheses represent the percentage of the rulings in the Database that were decided under the particular authority for that status of plaintiff. For example, in cases decided under *Conley*, when the plaintiff was represented by counsel, 37% of 12(b)(6) motions were granted (with or without leave to amend), 30% received a mixed ruling, and 33% were denied; in cases decided under *Conley*, when the plaintiff was *pro se*, 67% of 12(b)(6) motions were granted (with or without leave to amend), 22% received a mixed ruling, and 11% were denied.