

The Missed Revolution: How *Twombly* and *Iqbal* Tilted the Legal Playing Field While Political Science Remained Silent

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ABSTRACT: Two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), sent shockwaves through legal and academic circles by introducing a plausibility requirement for all pleadings to be sufficient. Because of these decisions, the likelihood of dismissal in all cases through 12(b)(6) and related motions has jumped in the past three years. Consequently, a significant percentage of cases were dismissed before the discovery process could reveal the full facts. Our essay examines these outcomes of this new requirement through an analysis of a large sampling of cases. Specifically, we examine two outcomes of this revolution. First, the heightened pleading standard has severely hindered politically marginal plaintiffs and bolstered the defenses of the politically powerful. Our second observation casts a puzzled look at the political science academy. Significantly, while this judicially imposed revolution has stirred the legal community, no mention of this broad shift in political power in our courts can be found in political science journals. This silence is especially glaring when viewed in light of the repeated calls to make political science, as a discipline, more relevant.

Introduction

Two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), sent shockwaves through legal and academic circles by introducing a plausibility requirement for all pleadings to be sufficient (McMahon, 2008). The likelihood of dismissal in all cases through what are known as 12(b)(6) and related motions has jumped in the past three years (Hatamyar, 2010; Steiner, 2009). A significant percentage of cases were dismissed before the discovery process could reveal the full facts. Our essay examines the outcome of this new requirement through an analysis of a large sampling of cases. We specifically examine two outcomes of this revolution. The heightened pleading standard has severely hindered politically marginal plaintiffs and bolstered the defenses of the politically powerful. This result has significant policy implications concerning the perceived fairness and justice provided by our legal system. Our second observation casts a puzzled look at the response of political scientists. While this judicially imposed revolution has stirred the legal community, a search of the leading political science journals revealed no mention of this broad shift in political power in our courts. This silence is especially glaring when viewed in light of the repeated

calls to make political science, as a discipline, more relevant (Jaschik, 2010, p. A1).

The first part of this paper examines the Court's opinions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* with a focus on the change to pleadings standards in the federal courts. Notice pleading has been under attack for some time. *Bell Atlantic Corp. v. Twombly* signaled the Court was listening. *Ashcroft v. Iqbal* revealed the Court was not only listening but ready to go beyond the suggestions of well-placed defendants. The paper's second part details the empirical analyses conducted to test the impact of the heightened pleadings standards. The most recent empirical studies demonstrate that there has been a statistically significant increase in the percentage of 12(b)(6) motions approved post-*Iqbal*, meaning that a particular type of defendant has seen their success rate increase while a corresponding particular type of plaintiff has been harmed by this alteration. In addition, when we examine the differences across different types of cases, there is again a statistically significant alteration depending on the nature of the case being litigated. Part three discusses the lack of attention within the political science discipline to this change in the federal litigation process. As of this writing, no article has appeared in any of the major political science journals concerning this topic.

This may be explained by the time delay for articles to be conceived, written, reviewed and published in mainstream political science journals. However, this seems unlikely for, while the review process for articles in law journals is fundamentally different than mainstream political science journals, the appearance of articles in law journals covering the transition began over three years ago. Certainly there has been enough time for research in political science to be made public. With the robust coverage of this shift in pleading standards in a myriad of legal journals, this suggests it is more than just the process of academic publishing. We suggest that political science as a field has failed in its responsibility to remain relevant in this area of political activity. We argue the field's silence in the face of this revolution speaks directly to the emphasis in the discipline away from relevance and towards minutiae.

What *Twombly* and *Iqbal* mean

In *Bell Atlantic Corp. v. Twombly* (2007) and *Ashcroft v. Iqbal* (2009), the Supreme Court radically altered what had been seen as settled litigation practice. The Court dropped the long-accepted procedure for pleadings standards established in *Conley v. Gibson* (1957), "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" (355 U.S. at 45-46). In place of *Conley's* notice pleading standard, the Court adopted a new plausibility standard. To go forward to the discovery stage of the litigation process, a plaintiff must present a complaint that alleges "enough facts to state a claim to relief that is plausible on its face" (*Bell Atlantic Corp. v. Twombly*, 2007). This alteration in pleading standards alters the long-accepted balance of power between plaintiffs and defendants in federal court. Moreover, not only did *Ashcroft* extend *Bell Atlantic Corp.*, it imposed a new two-step approach to determine 12(b)(6) motions to dismiss and other similar legal actions. The Federal Rules of Civil Procedure allow parties to present motions to the court to halt a legal proceeding before the judgment phase of the process begins. The most common of these motions is a 12(b)(6) motion to dismiss the claim for failure to state a claim upon which relief can be granted. This motion is designed to prevent unreasonable claims from forcing litigants to go through the taxing process of a full adjudication. In addition to 12(b)(6) motions, the Federal Rules of Civil Procedure allow for dismissal un-

der a 12(c) Motion for Judgment on the Pleadings. These motions are proper after the pleadings are closed but early enough not to delay trial if the court believes there is no possibility a party could be victorious on a claim.¹ First, district courts are to ignore all conclusions from the plaintiff's complaint that are not entitled to be taken as true for purposes of the motion to dismiss (*Bell Atlantic Corp. v. Twombly*, 2007). In addition, courts should apply the new heightened plausibility standard to the remaining allegations. The true importance of this shift is in how the long-established balance of power between the plaintiff and defendant has been altered. Before we prove this result, we must briefly review the change in pleading requirements.

A. *Conley v. Gibson's* "Notice Pleading"

The Federal Rules of Civil Procedure (FRCP), first adopted in 1938, attempted to make the pleading rules more fair and efficient (Bone, 2009). Over the past seventy years the FRCP have undergone several alterations. However, the pleading requirement established in 1938 has remained consistent in Rule 8(a)(2). It states a complaint (or other pleading seeking relief) requires "a short and plain statement of the claim showing that the pleader is entitled to relief" (FED. R. Civ. P. 8(a)(2)). In a test of the pleading standard initiated in 1938, the Court provided a broad interpretation of Rule 8(a)(2) in *Conley* (1938). The Court wrote:

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. (45-46)

The Court reiterated the general philosophy of notice pleading:

[T]he 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. (*Conley v. Gibson*, 355 U.S. at 47, 1938)

For the past half-century courts reiterated the doctrine established in *Conley*. The "no set of facts" and the "fair notice" phrases from the sections excerpted above

became a mantra to nearly all writings on pleadings (*Leibowitz v. Cornell Univ.*, 2006).

B. Bell Atlantic Corp. v. Twombly's "Plausibility Standard"

The *Bell Atlantic Corp. v. Twombly* (2007) controversy was initiated by the breakup of AT&T. While the facts of the case are intriguing, they are beyond the scope of this research. Instead, we focus on the implication of Justice Souter's majority holding. Justice Souter's opinion reiterated the FRCP on pleading and made reference to *Conley v. Gibson* (*Bell Atlantic Corp. v. Twombly*, 2007). The Court left *Conley v. Gibson*'s language half-stated. There was no mention that under a 12(b)(6) motion the plaintiff was to be given the benefit of the doubt. Nor was there mention that all inferences are to be construed in the plaintiff's favor. Instead the Court stated:

[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 plaintiffs here had not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

(*Bell Atlantic Corp. v. Twombly*, 2007)

The Court explained that the plausibility standard is not a heightened standard but simply "calls for enough fact[s] to raise reasonable expectation that discovery will reveal evidence" of alleged claim (*Bell Atlantic Corp. v. Twombly*, 2007). Adding to the confusion, the majority opinion did not explicate how lower courts were to judge plausibility. Justice Souter suggested "plausibility" is more than "possible" but less than "probable" (*Bell Atlantic Corp. v. Twombly*, 2007). In rendering its decision, the Court subtly switched the burden from the party making the 12(b)(6) motion to the plaintiffs: "[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations of the complaint" (*Bell Atlantic Corp. v. Twombly*, 2007). Instead of all reasonable inferences going toward the plaintiff, the Court requires an increased factual specificity before the plaintiff can pass the threshold and enter the discovery phase of litigation. With this assertion, the Court concluded the notice pleading established in *Conley v. Gibson* "ha[d] earned its retirement" (*Bell Atlantic Corp. v. Twombly*, 2007).

C. Ashcroft v. Iqbal's "Plausibility Plus"

Ashcroft took up the assertions of *Bell Atlantic Corp.* and not only reiterated its heightened pleading standard,

but increased the difficulty of plaintiffs to get to discovery even beyond that suggested in the preceding opinion. In a 5-4 decision, with Justice Kennedy writing for the majority, the Court provided a more-than-robust reading of *Bell Atlantic Corp.* (*Ashcroft v. Iqbal*, 2009). Kennedy's opinion moved beyond the standard language long-copied from *Conley v. Gibson* without even a mention of the precedent. Also jettisoned was any mention of giving the plaintiff the benefit of the doubt or that all reasonable inferences should be construed in the plaintiff's favor. Oddly, the Court began, "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" (*Ashcroft v. Iqbal*, 2009). The Court then rejected the judicial experience and common sense of the Second Circuit in overturning their rejection of a number of 12(b)(6) motions to dismiss. The Court interjected its own judgment, concluding the "complaint fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners" (*Ashcroft v. Iqbal*, 2009).

Justice Souter, the majority's author in *Bell Atlantic Corp.*, wrote a scathing rebuke of the majority in *Ashcroft v. Iqbal* (2009). Souter suggested the majority had misinterpreted *Bell Atlantic Corp.* by creating a heightened pleading standard on steroids, "*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true" (*Ashcroft v. Iqbal*, 2009).

The majority in *Ashcroft v. Iqbal* laid out the new standard:

[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 for a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should [1] assume their veracity and then [2] determine whether they plausibly give rise to an entitlement for relief. (Ashcroft v. Iqbal, 2009)

Because the Supreme Court places no limit on what a court may or may not accept as true or what it may or may not label as a legal conclusion, *Iqbal* opens the door for much wider rejection of complaints. With *Iqbal*, the Supreme Court implicitly allows reviewing courts to make judgments on the facts prior to the full disclosure of the facts provided for by discovery.

Table 1. Frequency of 12(b)(6) Motions Between May 22, 2005 and December 31, 2010

	Grant w/o Amendment	Grant w/ Amendment	Mixed	Deny	Total
Under <i>Conley</i>	157 (38%)	29 (7%)	103 (25%)	120 (29%)	409
Under <i>Twombly</i>	183 (43%)	45 (10%)	112 (26%)	89 (21%)	429
Under <i>Iqbal</i>	188 (39%)	94 (19%)	118 (24%)	85 (18%)	485
Total	528 (40%)	168 (13%)	333 (25%)	294 (22%)	1323

Assessment of the Alteration of Pleading Standards

Has the shift from notice pleading enshrined in *Conley* to plausibility pleading suggested in *Bell Atlantic Corp.* to plausibility-plus pleading asserted in *Ashcroft* resulted in a statistically significant difference in acceptance of 12(b)(6) motions to dismiss?

We followed the model suggested by Hatamyar (2009–2010) in selecting a random sample of cases from the federal district courts in the three distinct time periods under investigation: two years prior to the *Twombly* decision, the time between the *Twombly* and *Ashcroft*, and the time after *Ashcroft* up to June 30, 2011. We randomly selected 500 of the more than 20,000 cases in these three periods that contained a 12(b)(6) or similar motion. Of this dataset of 1,500 cases, a number were eliminated for lack of procedural safeguards (e.g., sua sponte reviews of prisoners' complaints, etc.) or that were dismissed for other grounds without full consideration of the 12(b)(6) motion or that required a heightened pleading standard (e.g., fraud, etc.). A test of the independence of these selection decisions proved that no statistical bias was identified. Once these reductions were completed our final database consisted of 1,323 decisions.

We categorized cases on a number of variables to assess whether the change in pleadings standards is having a statistically significant effect on the result of motions to dismiss. Aside from a list of control variables, we coded each case by the nature of the suit: contract, torts, civil rights (constitutional violations, Title VII actions, age and disability actions, etc.), labor, intellectual property, and other. In addition, we coded each case based on its

ruling on the dismissal motion: granted without leave to amend, granted with leave to amend, mixed rulings in which the court granted the motion on one or more counts but denied others, and straight denials.

Statistical Results

Table 1 shows the frequency of rulings under 12(b)(6) motions in the database under *Conley v. Gibson*, *Bell Atlantic Corp. v. Twombly*, and *Ashcroft v. Iqbal*. The table is further delineated based on the four ruling categories in the dataset.

Our findings indicate that a significant proportion of 12(b)(6) motions end a cause of action at this early stage of litigation. The traditional belief that 12(b)(6) motions are viewed with disfavor and rarely granted is unjustified. If we combine the frequency of 12(b)(6) motions approved with and without amendment, over half of all of these motions halt (or stall) the proceedings of the plaintiff. A simple examination of those 12(b)(6) motions granted under any of our three guiding cases shows little alteration. While our database displays an increase from 38% to 43% of motions granted without leave from *Conley* to *Twombly*; this percentage reverts to nearly the percentage of notice pleadings (38% to 39%) under *Iqbal*. This suggests that the change in pleading requirement has had little significant impact. However, the main importance of the increased pleading requirements contained in *Twombly* and *Iqbal* are to move a number of cases from the denial of 12(b)(6) motion to granted with allowance for amendment. Prior to *Twombly*, only 7% of the cases in our dataset brought under *Conley* witnessed

Table 2. Frequency by Nature of Suit and Pleading Standard Between May 22, 2005 and December 31, 2010

Nature of Suit	Grant (with or without leave)			Mixed Ruling			Denial		
	<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	19 (33%)	23 (38%)	24 (39%)	20 (35%)	20 (33%)	19 (31%)	18 (32%)	18 (30%)	19 (31%)
Tort	31 (40%)	34 (48%)	36 (51%)	27 (35%)	25 (35%)	20 (28%)	19 (25%)	12 (17%)	15 (21%)
Civil Rights	89 (45%)	97 (51%)	104 (52%)	66 (34%)	62 (33%)	61 (31%)	41 (21%)	31 (16%)	34 (17%)
Labor	10 (48%)	14 (47%)	14 (48%)	3 (14%)	4 (13%)	4 (14%)	8 (38%)	12 (40%)	11 (38%)
IP	5 (33%)	7 (41%)	8 (40%)	1 (7%)	0	2 (10%)	9 (60%)	10 (59%)	10 (50%)
Other	33 (48%)	28 (42%)	44 (62%)	13 (19%)	15 (22%)	10 (14%)	23 (33%)	24 (36%)	17 (24%)
Total	187 (43%)	203 (47%)	230 (51%)	130 (30%)	126 (29%)	116 (26%)	118 (27%)	107 (25%)	106 (23%)

Percentages represent the percentage of rulings in the database by pleading requirement opinion for a particular type of suit. For example, for civil rights cases, we find an increase in 12(b)(6) motions granted as we move from *Conley* to *Iqbal* from 45% to 52%.

a 12(b)(6) motion granted with leave to amend while 29% of cases during this period saw the motion denied. These percentages changed to 10% and 21% respectively under *Twombly*, and 19% and 18% under *Iqbal*. This obviously places a burden on those facing these motions to recraft their complaint to conform to the directions of courts under the granted 12(b)(6) motion. With limited resources, it is expected that a number of the cases within this category are not amended and end at this step in the process. This is an important avenue for future research.

Turning to Table 2, we can address whether there is a difference in rulings across type of suit by governing pleading requirement.

Beginning with a general assessment, an examination of the totals in Table 2 reveals an increase in 12(b)(6) motions granted as we move from *Conley* to *Twombly* to *Iqbal* from 43% to 51% of cases receiving this ruling in our dataset. A corresponding decrease in denials of 12(b)(6) motions is also witnessed from 27% to 23%. This general finding adds strength to the claim that the pleading change represented by *Twombly-Iqbal* is having an effect on the litigation process.

Of more interest is whether there is a differing effect across type of suit. While the percentage of each of the three broad categories of rulings identified in Table 2 has seen little significant change in the number of types of suits such as contract cases and labor cases, there has been an important shift in those cases most likely to be brought by individuals. For example, in civil rights cases, which were our largest category of cases, we see an in-

crease in the number of 12(b)(6) motions granted and a decrease in the percentage of denials of 12(b)(6) motions. As a result, since the advent of *Twombly's* plausibility pleading and its solidification under *Iqbal*, it has become increasingly difficult for litigants bringing civil rights cases to reach the discovery phase. A similar finding is shown for tort claims. Again, we see an increase in the percentage of suits in which a 12(b)(6) motion is granted and a corresponding decrease in the percentage of denied 12(b)(6) motions. In many of these suits, the ability to get to discovery is essential for harmed plaintiffs to be able to show their injury and the defendant's culpability. For example, in a potential class action, employment discrimination suit, a single plaintiff is unlikely to know the extent of any discrimination beyond their own particular situation until the defending company is forced through discovery to reveal this information.

This quick analysis of the effect of the *Twombly* and *Iqbal* rulings provides evidence that the alteration in pleading requirements these decisions represent is having an impact at the federal district court level. Since *Iqbal*, it is more likely that a 12(b)(6) motion will be granted. This effect is seen in the aggregation of all types of suits but is particularly troubling in those suits that are most likely to be brought by unsophisticated litigants. Consequently, in civil rights and tort actions, the impact of these two decisions seems even more important. This finding has obvious implications for the ability of individuals to achieve justice through our litigation system. Since *Iqbal* made clear that the new pleading standards

are to be adopted across all litigation, all litigants must be cognizant of this change. The implications for our legal system are far-reaching.

Silence from the Political Science Field

The implications are far-reaching for political science as well. Silence on important matters such as *Twombly* and *Iqbal* may be seen as part of the impetus behind critical musings as found, for example, in the New York Times and Inside Higher Ed, “Just How Relevant is Political Science” and Jaschik’s “Should Political Science be Relevant,” respectively (Cohen, October 20, 2009). In each, political science is taken to task, usually by political scientists, for being too concerned with the fight between quantitative and qualitative methods and those types of research questions that promote the novelty of a methodological procedure or gimmick, rather than focusing on research that has an effect directly upon the public. It also seems to drive an editorial contribution in *The Daily Princetonian* by Vinay Sitapati, a graduate student in politics. Echoing the email circulated by “Mr. Perestroika” in the fall of 2000, Sitapati (2011, April 5) voices his concern that political science as it is taught at Princeton, and he can only assume in most other political science departments around the country, is taught in such a way that fetishizes “certain methods” and gives “a cold shoulder to theory and [abandons] reality” (p. 1). Added to this is the “belief that empirical political science must be divorced from normative concerns,” leaving it a purely descriptive endeavor where questions of the good are left to political theory, “a subfield hermetically sealed from the rest of the discipline” (Sitapati, 2011, April 5, p. 1). In the end political science becomes a “combination of model-made abstraction and number-numbing specificity” that makes it “irrelevant to politicians, policy makers, and, lest we forget, the public” (Sitapati, 2011, April 5, p. 1).

Such rumblings have not gone unnoticed by the American Political Science Association (APSA). The primary concern of the organization’s 2011 Task Force report on Political Science in the 21st Century was to take stock of the profession of political science “to determine whether it is living up to its full potential as a scholarly discipline by enriching the discourse, broadening the understanding, and modeling the behavior reflective of vibrant democracy” (p. 1). While the Task Force (2011) claimed that it “is rare for academic disciplines to take stock of the practice of their professions to determine if they are realizing their full potential as effective contributors to soci-

eties” (p. 7), it has in fact been going on for quite some time. As Jaschik (2010), Cohen (2009, October 20), and Sitapati (2011, April 5) all point out, these are not new complaints and all mentioned the Perestroika movement that started in 2000. The Perestroika movement itself was eerily reminiscent of earlier debates. For example, just as Mr. Perestroika’s “East Coast Brahmins” (the very same cast(e) Mr. Sitapati was writing against) were seen as promoting a “narrow parochialism and methodological bias toward the quantitative, behavioral, rational choice, statistical, and formal modeling approaches,” so too had another group of disaffected political scientists in the late 1960s chafed under what they perceived as the heavy-handed and often inept application of behavioral methods to the exclusion of other traditional and politically engaged approaches (Monroe, 2005, p. 1).

The disaffection of this earlier group of dissidents led to the establishment of the Caucus for a New Political Science (CNPS) at APSA’s 1967 annual meeting. The Caucus organized itself around a collective and personal commitment “to make the study of politics relevant to the struggle for a better world” (Barrow, 2008, p. 215). As these different groups of contrarians sought to challenge the discipline’s status quo, whether it was in the 2000s or 1960s, they followed similar paths in their rebellions. Both groups, early on in their respective movements, challenged methodological conventions and then threatened to upend the settled balance of power within the discipline.

What is clear from these past and recent complaints is the perception that political science remains detached from the public’s concerns. An unsystematic review of the association’s premier journal, *American Political Science Review*, shows very little work concerned with big issues concerning the public: war in Iran and Afghanistan; health care; the banking crisis. As Theda Skocpol pointed out in her work on the Task Force, many of the works published in the journal simply do not pass the “explain it to your aunt at Thanksgiving” test. In the words of Sheldon Wolin (1969), who wrote on the heels of the founding of the CNPS, political science has lost its “epicness.” Wolin argued that our methodological practices and the purview of the behavioral revolution essentially accepted the status quo and left the discipline to describe the polity as it had come to be. That status quo has moved beyond just our politics but into the discipline as well. The reward structure for graduates in the discipline favors those with high productivity in the publishing of peer-reviewed journals. This high productivity is aided by those methods that allow for

rapid replication of what already is and not those questions dealing with how things ought to be. In this, Wolin's (1969) work remains germane: political science no longer concerns itself with "epic" political questions: 1) questions that are expansive in scope and challenge the status quo, asking if there is a different and better way of conceiving of a political practice; 2) Wolin notes that all major theorists of the past, those part of the political science canon, all wrote with the public in mind, a quality he noted that wasn't incidental to the practice of political science, but central to it, as concern for health is to the true physician. It is this concern, this "epicness," that

has been pushed out of the discipline and that we can see as the root cause for such major silences when key political decisions like *Twombly* and *Iqbal* occur. Such silence should lead us to question just how relevant our discipline is.

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Note

1. While 12(b)(6) motions are distinct from 12(c) motions, for our research purposes they operate in an identical manner and will be examined in unison. Throughout the essay both these legal actions will be incorrectly but efficiently referred to as "12(b)(6) motions."

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