

Federal Pleading Practice After *Iqbal*

Professor Lonny Hoffman
Law Foundation Professor of Law
University of Houston Law Center



Evaluating Federal Pleading Practice post-*Twombly* and *Iqbal*

Looking to the Past:
Placing the decisions in historical context

Looking to the Present:
What is the *Twombly/Iqbal* doctrine?

Looking to the Future:
Unanswered doctrinal questions?
Are any reforms likely?



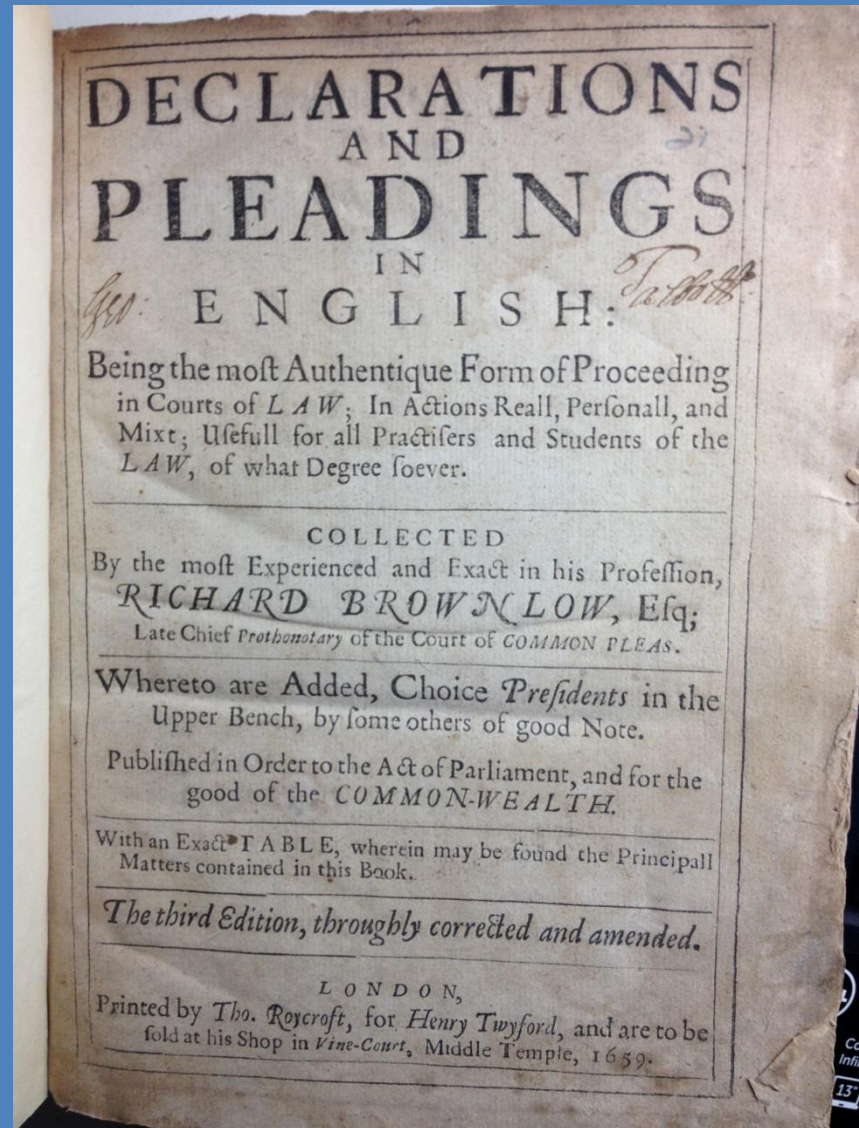
Looking to the Past:
Placing the decisions in historical context



Common law
pleading from
England :

The Writ
System

Single issue
pleading



**Code
Pleading-
NY's Field
Code**

**Abolished
common law
forms**

**Merged law
and equity**

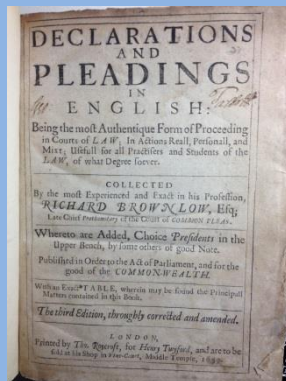
David Dudley Field



Common law
pleading was:

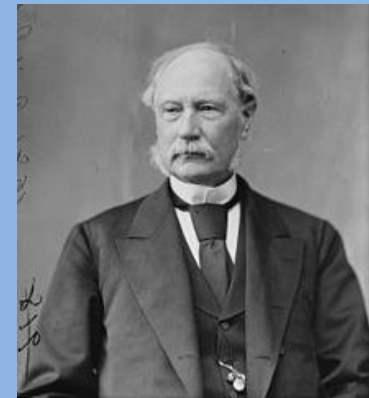
Technical

Designed to resolve a
single issue



Field Code's
pleading rule

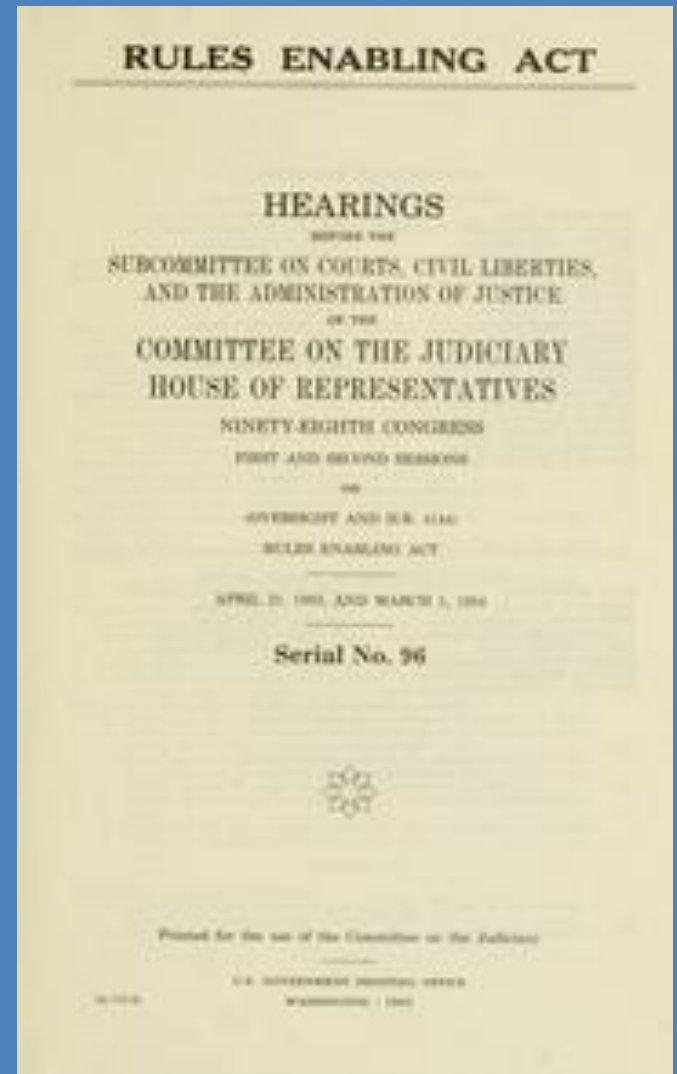
“... a plain and
concise statement of
the facts constituting
a cause of action



Modern Federal Pleading Practice:

Rules Enabling Act of 1934

Federal Rules Civil Procedure 1938



**Flexible equity rules
emphasized**

**Liberalized
pleading, joinder,
and discovery**

**Rule 8 is
“cornerstone”**

Charles E. Clark



Charles E. Clark

Kenneth K. ...

**Strongly
disfavored
pleading
challenges**

**Sought to replace
Field Code's fact
pleading with
simplified notice
pleading**

Charles E. Clark



Charles E. Clark

Wm. W. Wood

Field Code's pleading rule

“... a plain and
concise statement of
the facts constituting
a cause of action



FRCPP 8(a)(2):

“A pleading that
states a claim for
relief must contain ...
(2) a short and plain
statement of the
claim showing that
the pleader is entitled
to relief”

“1. For many years until May, 1979, the groundwater used by plaintiffs and plaintiffs’ decedents for drinking and household purposes was contaminated with toxic chemicals disposed of by defendants.”

by plaintiffs and decedents for drinking and household purposes was contaminated with toxic chemicals disposed of by defendants. Plaintiffs and plaintiffs' decedents have either contracted fatal illnesses, been exposed to a significant risk of contracting fatal or otherwise serious illnesses and/or suffered significant mental anguish as a result of the contamination of their drinking water. Plaintiffs seek compensatory and punitive damages and an injunction.

Plaintiffs

2. Plaintiff Anne Anderson is a resident at and owner of the property at 11 Orange Street in Woburn, Massachusetts, where she has lived for seventeen years. She is the mother of Christine Anderson and mother and parent and next friend of

What were
common
examples of
insufficient
pleading
before
Twombly
and *Iqbal*?

Failure to allege a
recognized cause
of action

What if P pleads “negligent infliction of
emotional distress”
but there’s no such recognized cause of
action?

D could move to dismiss –
allegation is legally insufficient.

Rule 12(b)(6)

What were
common
examples of
insufficient
pleading
before
Twombly
and *Iqbal*?

Some key
allegation missing

What if there is a cause of action for
“intentional infliction of emotional
distress”

but the plaintiff must suffer a
contemporaneous physical injury

If P fails to allege she suffered a
contemporaneous physical injury,

D could move to dismiss –
allegation is legally insufficient.

What were
common
examples of
insufficient
pleading
before
Twombly
and *Iqbal*?

Pleader pleads
themselves out of
court

Assume D asserts the affirmative defense of limitations, saying case must have been brought within two years from date of injury (suit filed)

But if D alleges that injury occurred on 2/1/2012 and lawsuit was filed on 1/15/2014, then P should be able to dismiss D's affirmative defense

Supreme Court Pleading Highlights Before 2007

Conley
(1957)

Leatherman
(1993)

Swierkiewicz
(2002)



Conley (1957)

“the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim”

**No dismissal
“unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief”**

Leatherman (1993)

“[I]t is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules”

**Swierkiewicz
(2002)**

**Rule 8(a)(2) is a
“simplified notice
pleading standard”**

NOTICE: This opinion
preliminary print c
notify the Reporter
ington, D. C. 2054
that corrections m

SUPREME C

BELL AT
TION

ON WRIT OF

JUSTICE

Liability
requires
restraint

Cite as: 556 U. S. ____ (2009)

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 07-1015

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL,
ET AL., PETITIONERS *v.* JAVAID IQBAL ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May 18, 2009]

JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional rights while in federal custody.

Looking to the Present:
What is the *Twombly/Iqbal* doctrine?



What is the new pleading test from *Twombly* and *Iqbal*? And where does it come from?

Rule 8(a)(2):

A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim **showing** that the pleader is entitled to relief

Printed for the use
of

THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

The *Twombly-Iqbal* Two-Step

Step 1:
Disregard all
conclusory
allegations

Step 2:
Test for
plausibility



The *Twombly-Iqbal* Two-Step

Step 1:

Disregard all “conclusory” allegations



“...more than labels and
conclusions”

the claim
in order to
im is and
son, 355
y a Rule
factual

provide the “grounds” of his “enti-
sions, and a formulaic recitation of the elements of a cause
of action will not do, see *Papasan v. Allain*, 478 U. S. 265,
286 (1986) (on a motion to dismiss, courts “are not bound
to accept as true a legal conclusion couched as a factual
allegation”). Factual allegations must be enough to raise a
right to relief above the speculative level, see 5 C. Wright
& A. Miller, *Federal Practice and Procedure* §1216, pp.
235–236 (3d ed. 2004) (hereinafter *Wright & Miller*)
 (“[T]he pleading must contain something more . . . than
... a statement of facts that merely creates a suspicion [of]
a legally cognizable right of action”),³ on the assumption
that all the allegations in the complaint are true (even if

conven-
independent action


“Defendant violated my
constitutional rights.”

**But note this would fail under
traditional notice pleading doctrine as
well**

“Defendant violated my constitutional right to equal protection under the law.”



This would also usually fail under traditional notice pleading doctrine as well



“On Dec 5, 2011, Defendant fired me because of my race, in violation of my constitutional right to equal protection under the law.”

Lopez v. Bay Shore Union Free Sch. Dist., 668 F. Supp. 2d 406, 414–15 (E.D.N.Y. 2009) (dismissing discrimination claim as conclusory; needed also to allege that similarly situated people were treated differently)

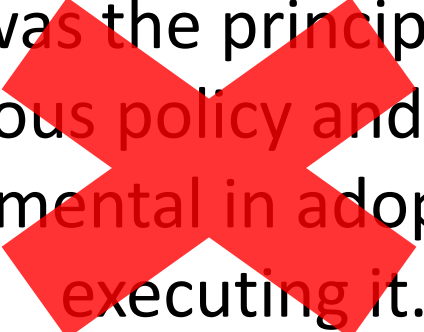


“On Dec 5, 2011, Defendant fired me because of my race and replaced me with Mr. John Smith, a less qualified white male, in violation of my constitutional right to equal protection under the law.”



“Would you please elaborate on ‘then something bad happened’?”

“Defendants knew of, condoned, and willfully and maliciously agreed to subject Plaintiff to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate penological interest.”


“Ashcroft was the principal architect of
this invidious policy and Mueller was
instrumental in adopting and
executing it.”



“The policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.”



“The State’s refusal to release the biological evidence for testing has deprived the defendant of his liberty interests in utilizing state procedures to obtain reversal of his conviction and/or to obtain a pardon or reduction of his sentence.”

To sum up Step 1:
What are Conclusory Allegations?

**Don't just quote statutory or
common law elements**

**“Threadbare recitals of the elements of a
cause of action, supported by mere conclusory
statements, do not suffice.”**

**"formulaic recitation of the elements" also not
sufficient**

To sum up Step 1:
What are Conclusory Allegations?

**Detailed allegations supposedly not required:
but the more you can provide, the better**



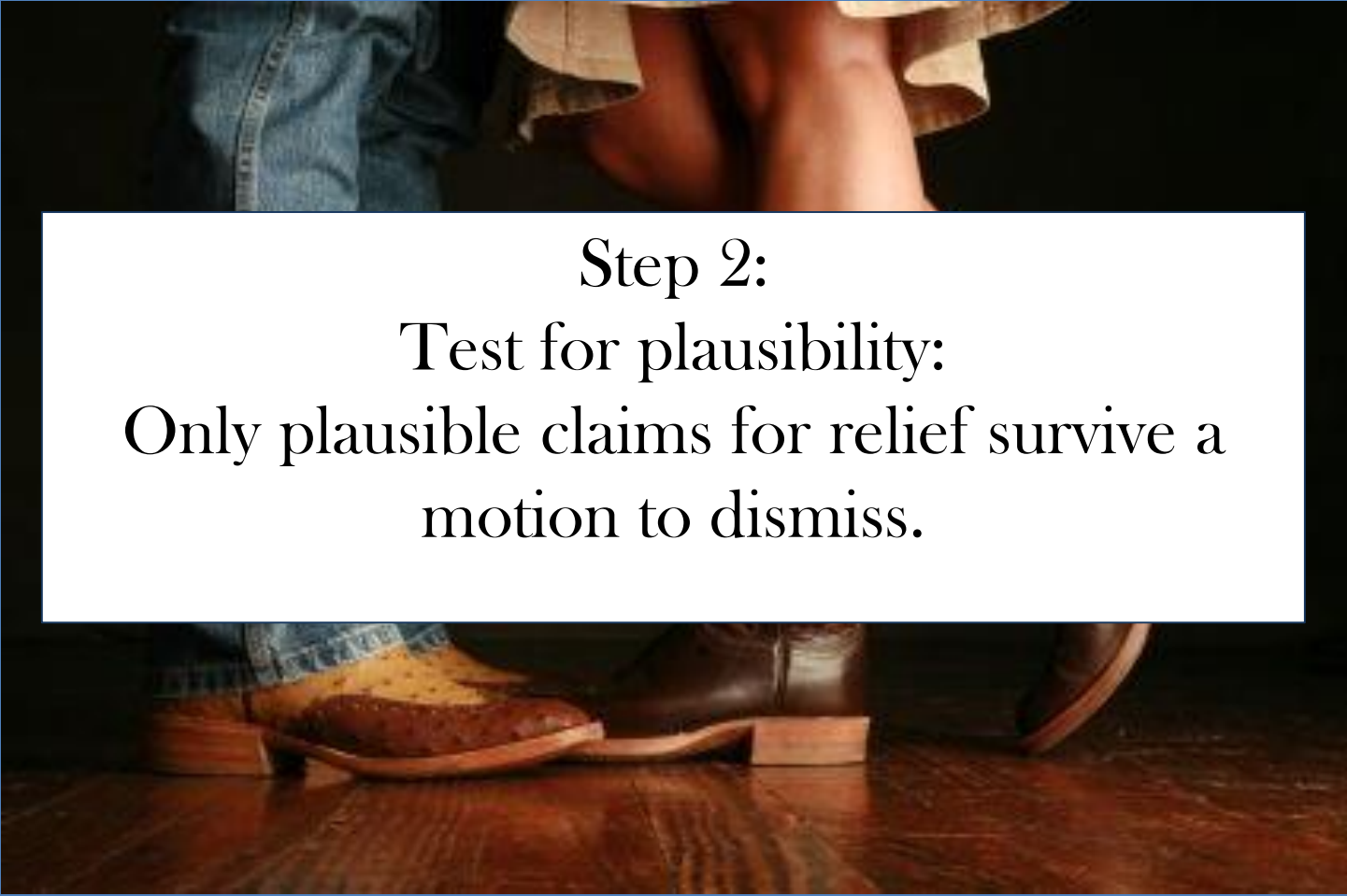
To sum up Step 1:
What are Conclusory Allegations?

**Maybe there's a sliding scale of specificity,
based on how complex the claims are**

**“Complex claims like those in *Twombly* and
Iqbal, require more specificity than simple
ones”**

Guzman v. Hacienda Records

The *Twombly-Iqbal* Two-Step

A photograph showing a person's legs from the knees down. They are wearing blue denim jeans and a light-colored, possibly tan or beige, skirt. The person is standing on a dark wooden floor. A brown cowboy hat is lying on the floor in front of them. The background is dark and out of focus.

Step 2:
Test for plausibility:
Only plausible claims for relief survive a
motion to dismiss.

“merely consistent with” is not
enough

...the plausibility standard is not
fully. ... possibility that a defendant has acted unlaw-
fully. ... Where a complaint pleads facts that are
“merely consistent with” a defendant’s liability, it “stops
short of the line between possibility and plausibility of
‘entitlement to relief.’” *Id.* at 557 (brackets omitted).
charges and ... claims he was deprived of ...
tions while in federal custody. To redress ...
deprivations, respondent filed a complaint against numer-

Determining whether a complaint states a plausible claim for relief ... requires the [] court to draw on its judicial wisdom and common sense”

... 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 assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint, 128 S. Ct. 1907, 180 L. Ed. 2d 1029 (2008).

**To sum up Step 2:
What is the “plausibility” test?**

**Allegations have to be reasonable: if only a
“sheer possibility” not enough**

**“The plausibility standard is not akin to a
‘probability requirement,’ but it asks for
more than a sheer possibility that a
defendant has acted unlawfully”**

**To sum up Step 2:
What is the “plausibility” test?**

**Allegations have to be reasonable: if only a
“sheer possibility” not enough**

**“where the well-pleaded facts do not
permit the court to infer more than the
mere possibility of misconduct, the
complaint has alleged- it has not
‘show[n]’-‘that the pleader is entitled to
relief’”**

To sum up Step 2:
What is the “plausibility” test?

**But is plausibility comparative:
What’s more likely to be true?**

“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of ‘entitlement to relief’”

To sum up Step 2:
What is the “plausibility” test?

**But is plausibility comparative:
What’s more likely to be true?**

“Taken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.”

To sum up Step 2:
What is the “plausibility” test?

**If plausibility is comparative, then this would
make it a question of believability**

That employee
fired b/c of his
race



Or that he was
fired for any other
possible non-
discriminatory
reason

Looking to the Future:
Unanswered doctrinal questions?
Are any reforms likely?



Should *Iqbal* be limited to civil rights claims
(or even a small class of civil rights claims?)



Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an anti-trust claim. But that is not what we said. The Federal Circuit has determined that the *Twombly* standard applies to anti-trust and discrimination suits alike. See 550 U.S., at 555–556, and n. 3.

Twombly and Iqbal's standard applies to
“all civil actions”

Rule Civ. Proc. 8. Our decision in *Twombly* expounded the pleading standard for “all civil actions,” *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U.S., at 555–556, and n. 3.

claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numer-

Ashcroft v. Iqbal, 129 S.Ct 1937, 1953:

Should *Twombly-Iqbal* be limited to
circumstances involved particularly
burdensome discovery?



Other Unanswered Questions

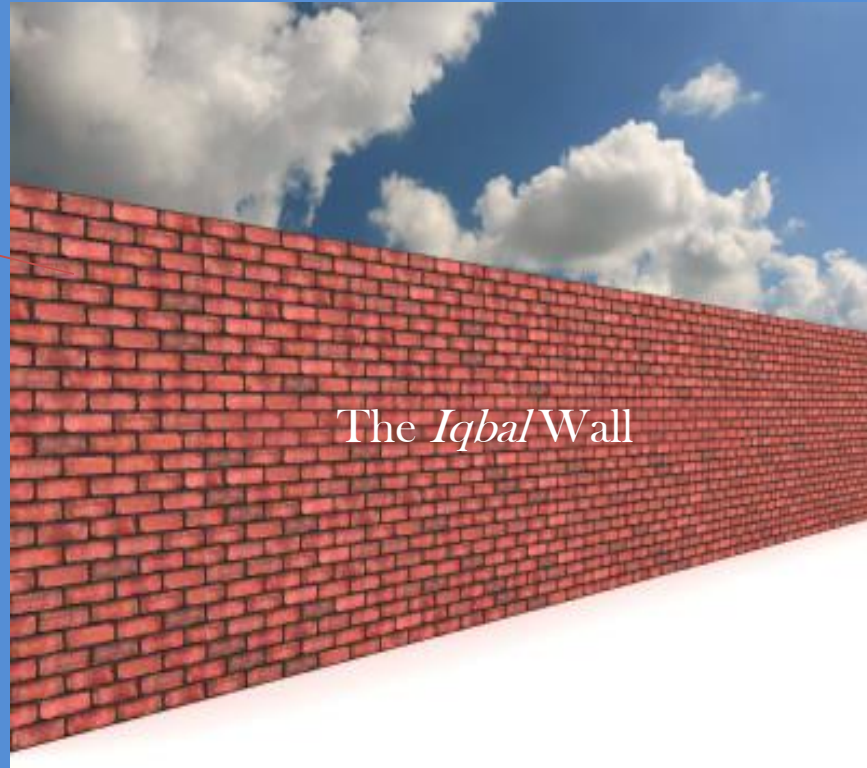
Should failure to meet T/I mean dismissal
or a right to replead?



Other Unanswered Questions

Should a court be able to order limited discovery?

Iqbal: “Because respondent’s complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.”



To scale wall, critical for lawyers to (1) lay out specifically what they need, (2) why they need it and (3) show they have no other way to get it



Other Unanswered Questions

Do *Twombly* and *Iqbal* Apply to Counterclaims, Cross-Claims and Third-Party Claims?



What about affirmative defenses?



Previously Pending Legislation
but nothing even pending now



Rule Reform?

Three real possibilities:

1. Reforming rules on preservation and spoliation sanctions for e-discovery

2. Reforming Rule 12 to expressly allow delay of dismissal motion

3. Departing from the “Principle of Transsubstantivity”

FEDERAL RULES
OF
CIVIL PROCEDURE

WITH FORMS

DECEMBER 1, 2009



Printed for the use
of
THE COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES