

WHEN *KELO* MET *TWOMBLY-IQBAL*: IMPLICATIONS FOR PRETEXT CHALLENGES TO EMINENT DOMAIN

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I. INTRODUCTION

Some of the most controversial Supreme Court decisions in recent years have involved the seemingly mundane topics of property rights and interpretation of the Federal Rules of Civil Procedure.

First, in 2005, the Court's decision in *Kelo v. City of New London*¹ ignited public outrage and sparked demands that states take action to impose more restrictive limits on government's use of

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1. 545 U.S. 469 (2005). In *Kelo*, the Supreme Court was faced with the question of whether homes and businesses that were not blighted could be taken from their private owners and transferred to other private owners based *solely* on a "public use" of "economic development." *Id.* The term "public use" arises from the Takings Clause of the 5th Amendment's limitation, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. *See Chi., Burlington & Quincy R.R. Co. v. City of Chi.*, 166 U.S. 226, 238–39 (1897). "Economic development" describes an asserted public use that does not alleviate any extant harm, but rather provides to a community economic benefits, such as an increased tax base, jobs, and increased economic activity. *See discussion infra* Parts II.A, III.A.

eminent domain.² *Kelo* captured media attention and galvanized an eminent domain reform movement that, as of the end of 2008, had produced state-level reform in forty-three states.³ It generated keen interest and vigorous debate among scholars, students, government officials, attorneys specializing in eminent domain, developers, activists, and political commentators. Eminent domain issues remain of great interest to the public and the media continues to focus attention on eminent domain injustices.⁴

The Court's 2007 decision in the antitrust case *Bell Atlantic Corp. v. Twombly*⁵ "retire[d],"⁶ at least in part, *Conley v. Gibson*'s⁷ longstanding interpretation that had governed pleadings and motions to dismiss for failure to state a claim upon which relief can be granted under the Federal Rules of Civil Procedure,⁸ in favor of a plausibility standard.⁹

2. See Steven J. Eagle, *Kelo v. City of New London: A Tale of Pragmatism Betrayed*, in EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 195, 196 (Dwight H. Merriam & Mary Massaron Ross eds., 2007) ("To call it a backlash would hardly do it justice. Calling it an unprecedented uprising to nullify a decision by the highest court in the land would be more accurate." (citing Kenneth R. Harney, *Eminent Domain Ruling Has Strong Repercussions*, WASH. POST, July 23, 2005, at F1)).

3. CASTLE COALITION, FIFTY STATES REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 1 (2007), available at http://www.castlecoalition.org/pdf/publications/report_card/50_State_Report.pdf [hereinafter FIFTY STATES REPORT CARD] (reporting that as of the summer of 2007, 42 states had some type of legislation in response to *Kelo*). Rhode Island passed *Kelo* reform legislation in 2008. R.I. GEN. LAWS § 42-64.12-1 (2009).

4. See e.g., John Lender, *State to Pay More than \$28 Million Extra: Judge Rules Original Payment Too Low for 108-Acre Property Bonus for Brookfield Quarry Owners*, HARTFORD COURANT, Aug. 4, 2009, at A3; Kenneth R. Gosselin, *In the Busway's Path: Businesses, Homes Lost to Plan with Shaky Future*, HARTFORD COURANT, July 26, 2009, at A1. The Hartford Courant ran two major articles within 10 days reporting perceived injustices in eminent domain projects. See Lender, *supra*, at A3 (reporting that Connecticut had been accused of manipulating appraisal process to lower just compensation and was ordered by court to pay \$18.8 million over the \$4.1 million it had paid as compensation for rock quarry taken for road bypass in 2004); Gosselin, *supra*, at A1 ("Even though debate continues over whether \$569 million busway should even be built, the state has spent millions taking properties through eminent domain and demolishing buildings along the proposed route.").

5. 550 U.S. 544 (2007).

6. *Id.* at 563.

7. *Conley v. Gibson*, 355 U.S. 41 (1957). *Twombly* abrogated *Conley*'s famous "no set of facts" language that had set the standard for motions to dismiss under Rule 12(b)(6) for over 50 years. See discussion *infra* Parts II.B, III.B–C.

8. FED. R. CIV. P. 8(a)(2); 12(b)(6).

9. *Twombly*, 550 U.S. at 556.

Finally, the Court's 2009 decision *Ashcroft v. Iqbal*¹⁰ confirmed that *Twombly* was not limited to antitrust cases under the Sherman Act,¹¹ but covered all cases governed by the Federal Rules of Civil Procedure.¹² The Court in *Iqbal* went on to announce a two-pronged test for examining motions under Rule 12(b)(6) that may prove to make it even more difficult for complaints to survive such motions to dismiss.¹³

While the *Twombly-Iqbal* duo attracted little media or public attention, it startled judges, litigators, and scholars.¹⁴ It has generated consternation, confusion, controversy, and debate among them.¹⁵ It has apparently gained political attention as evidenced by a bill introduced in the United States Senate by Senator Arlen Specter that, if enacted in its present form, would provide that "a Federal Court shall not dismiss a complaint under Rule 12(b)(6) or (e)¹⁶ of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in *Conley v. Gibson*."¹⁷ The *Twombly-Iqbal* duo, like *Kelo*, has caused more than a little upheaval.

What happens when *Kelo* meets *Twombly-Iqbal*? This article explores the possible impact of *Twombly-Iqbal* on pretext challenges to takings under the power of eminent domain.¹⁸ It suggests that the procedural changes wrought by *Twombly-Iqbal* will make it even more difficult for landowners to be successful in bringing such challenges on the federal level. With federal opportunities for challenges thus further curtailed, challenges to takings based on state law become increasingly important. At the same time, states that utilize the prior interpretation of pleadings and Rule 12(b)(6)

10. 129 S.Ct. 1937 (2009).

11. 15 U.S.C. §1 (2006).

12. *Iqbal*, 129 S.Ct. at 1953.

13. See discussion *infra* Parts III. B–C.

14. See Hon. 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) ("*Bell Atlantic Corp. v. Twombly* was probably the least anticipated decision to come out of the 2007 Supreme Court.>").

15. See generally *id.*; discussion *infra* Parts III.B–C.

16. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009). I question the inclusion of Rule 12(e) here. Perhaps it is included because Rule 12(e) was mentioned in the dissent in *Twombly*, 550 U.S. at 590 n.9 (Stevens, J., dissenting), or perhaps it may be a typo meant to refer to Rule 12(c) or (f).

17. S. 1504, 111th Cong. (2009).

18. See discussion *infra* Parts III and IV.

established by *Conley* under the Federal Rules of Civil Procedure will be faced with the question of whether or not to adopt all, some, or any of the modifications created by *Twombly-Iqbal*.

This article also suggests that use at the state level of the *Twombly-Iqbal* test may undermine the viability of pretext challenges based on state law. States' decisions of whether or not, and if so, how, to modify state rules of procedure are usually made on a transsubstantive basis, not dictated by their impact in one area of law. However, the importance that citizens attach to property rights has been made clear by the public outrage that followed *Kelo* and the subsequent demand for reform at the state level. Thus, it is important that the impact of *Twombly-Iqbal* on states' eminent domain laws, particularly those that address pretextual takings in which eminent domain might be abused to benefit private parties, be kept in mind as states consider changes to their procedural rules. Obviously, eminent domain reformers who intend to protect or establish meaningful pretext challenges to eminent domain on the state level need to be on guard against states' incorporation of *Twombly-Iqbal* in state rules of civil procedure.

II. BACKGROUND

A. Kelo

In *Kelo*, the Supreme Court revisited the Public Use Clause of the Fifth Amendment to the United States Constitution¹⁹ for the first time since its prominent 1984 decision in *Hawaii Housing Authority v. Midkiff*.²⁰ *Midkiff* had significantly weakened the Public Use Clause.²¹ In writing for a unanimous Court in *Midkiff*, Justice O'Connor had equated public use with the police power,²² a connection she ultimately regretted—as she expressed in her stinging

19. U.S. CONST. amend. V (“Nor shall private property be taken for public use without just compensation.”).

20. 467 U.S. 229 (1984).

21. See, e.g., Alice M. Noble-Allgire, *Analysis of the Supreme Court's Controversial Decision on the Use of Eminent Domain for Economic Development Purposes*, PROB. & PROP., Jan.-Feb. 2006, at 9–10 (generally describing a trend that had developed over a series of cases, and discussing in detail from varying perspectives the majority and dissenting opinions of *Kelo*).

22. *Midkiff*, 467 U.S. at 240 (“The ‘public use’ requirement is thus conterminous with the scope of a sovereign’s police powers.”).

dissent in *Kelo*²³—because of the way it was used to justify vastly expanded use of eminent domain.²⁴

By the time *Kelo* came before the Court, scholars had already declared the Public Use Clause to be insignificant as a limitation within the Takings Clause.²⁵ Yet in the early years of the new millennium some commentators noted a possible trend among state courts to reinvigorate public use as a limitation on eminent domain under their state constitutions.²⁶ The Court decided to hear *Kelo* shortly after the Supreme Court of Michigan overturned its seminal decision *Poletown Neighborhood Council v. City of Detroit*²⁷ in *County of Wayne v. Hathcock*,²⁸ and rejected economic development as a public use under the Michigan constitution. This generated considerable interest in the outcome of *Kelo*.²⁹

23. Justice O'Connor distinguished *Berman* and *Midkiff* by stating that in those cases there was "precondemnation use . . . that inflicted . . . harm on society." *Kelo v. City of New London*, 545 U.S. 469, 500 (2005) (O'Connor, J., dissenting). She characterized her previous statement equating public use with the police power as errant language. *Id.* at 501 (O'Connor, J., dissenting).

24. Steven J. Eagle, *A Tale of Pragmatism Gone Awry*, PROB. & PROP., Jan.-Feb. 2006, at 16.

25. See, e.g., Carol L. Zeiner, *Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use*, 28 U. VA. ENVTL. L. REV. 1 (forthcoming 2009) ("Most state courts followed the federal lead in virtually emasculating the public use requirement." (citing David L. Callies, *Public Use: What Should Replace the Rational Basis Test?*, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 81 (Dwight H. Merriam & Mary Massaron Ross, eds.), reprinted in PROB. & PROP. Mar.-Apr. 2005, at 10-19)); James W. Ely, Jr., *A Welcome Blow for Private Property*, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 79 (Dwight H. Merriam & Mary Massaron Ross, eds.), reprinted in PROB. & PROP. Mar.-Apr. 2005, at 10-19 ("During the twentieth century [the] notion of 'public use' was stretched to encompass virtually any purpose endorsed by legislators It appeared that in practice there was no limit on government power to acquire private property."); DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 191 (2002) ("[I]n practice [the public use limitation] has proven to be rather toothless.").

26. See Alice M. Noble-Allgire, *Poletown Overruled: Recent Michigan Case Tightens the Reins on the Public Use Requirement—Property Scholars Take Up Eminent Domain*, in EMINENT DOMAIN USE AND ABUSE: KELO IN CONTEXT 75 (Dwight H. Merriam & Mary Massaron Ross, eds.), reprinted in PROB. & PROP. Mar.-Apr. 2005, at 10-19.

27. 304 N.W.2d 455 (Mich. 1981).

28. 684 N.W.2d 765 (Mich. 2004). The Michigan Supreme Court announced its decision in *Hathcock* July 30, 2004. The United States Supreme Court granted certiorari in *Kelo* September 28, 2004.

29. See, e.g., PROB. & PROP. Mar.-Apr. 2005, a collection of articles by prominent scholars discussing "the proper balance between private property rights and government's authority to take property for 'public use.'" Noble-Allgire, *supra* note 26, at 11.

*Kelo*³⁰ held that the Public Use Clause of the federal constitution is not violated when government uses the power of eminent domain to condemn privately owned, non-blighted land to take it from one private party for transfer to another private party who will make [what government considers to be] more intensive use of the land as part of a comprehensive plan for economic development.³¹

In so holding, “the Court specifically equated public use [with] public purpose”³² and reaffirmed its standard of almost total deference to governmental pronouncements of public use.³³

Justice Stevens, who wrote the majority opinion in the 5–4 decision, positioned the decision as controlled unequivocally by *Fallbrook Irrigation District v. Bradley*,³⁴ *Berman v. Parker*,³⁵ and

30. To briefly summarize the facts of the case, New London, Connecticut had been in economic decline for years. In order to “capitalize” on the intention of Pfizer to build a research facility in New London, the city devised a comprehensive plan to redevelop 90 acres of land near Pfizer’s new location to include a number of uses, including a new waterfront conference hotel at the center of a new “small urban village.” The city’s stated public purpose for the project was to create jobs, generate tax revenue, and “build momentum for the revitalization of downtown New London”; in other words, “economic development.” The land was to be transferred to a private developer. The site was a small, close-knit, non-blighted neighborhood that included modest homes. At least one of its residents had lived in her house for her entire life. A group of residents refused to sell and government prepared to condemn their land. The petitioners brought the action in state court, claiming that the government’s proposed taking of their property under the power of eminent domain violated the Public Use Clause of the Fifth Amendment. The government’s only enunciated public purpose for the project was economic development. The facts contained in the Court’s decision and the syllabus of the case are brought to life in the book, JEFF BENEDICT, *LITTLE PINK HOUSE* (2009).

31. Zeiner, *supra* note 25.

32. David L. Callies, *A Requiem for Public Use*, PROB. & PROP., Jan.-Feb. 2006, at 11. See *Kelo v. City of New London*, 542 U.S. 469, 480, 482–85 (2005). Professor Eagle has noted, “*Kelo* appears to drain ‘public use’ as a separate constitutional safeguard of any remaining significance.” Steven J. Eagle, *Kelo v. City of New London: A Tale of Pragmatism Betrayed*, in EMINENT DOMAIN USE AND ABUSE: *KELO* IN CONTEXT 195 (Dwight H. Merriam & Mary Massaron Ross eds., 2007).

33. *Kelo*, 545 U.S. at 480–84; James W. Ely, Jr., *Post-Kelo Reform: Is the Glass Half Full or Half Empty?* 14 (Vanderbilt University Law School, Public Law & Legal Theory Working Paper No. 08-39, Law & Economics Working Paper No. 08-21) (“virtually conclusive deference accorded legislative judgments by the federal courts.”). Justice Thomas, in his dissent, and other scholars have noted that this level of deference is unlike that afforded any other individual right protected in the Bill of Rights. *Kelo*, 545 U.S. at 517–18 (Thomas, J., dissenting); Leonard W. Levy, *Property as a Human Right*, 5 CONST. COMMENT 170, *passim* (1988).

34. 164 U.S. 112 (1896).

35. 348 U.S. 26 (1954).

Midkiff.³⁶ While the majority in *Kelo* and supporters of the outcome asserted that the case broke little new ground,³⁷ others disagreed. “*Kelo* represented a novel and expansive affirmation of eminent domain.”³⁸ For the first time, the Court approved condemnation of non-blighted homes for transfer to private developers purely for promoting economic development.³⁹

The case generated impassioned dissents from Justice O’Connor and Justice Thomas. Neither would have allowed takings purely for economic development.⁴⁰ After asserting that the majority had significantly expanded the meaning of public use,⁴¹ Justice O’Connor went on to say that, based on the holding by the majority,

the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.⁴²

36. The latter two cases are those that largely eviscerated the Public Use Clause in the last half of the twentieth century.

37. See generally ROBERT G. DREHER & JOHN D. ECHEVERRIA, *KELO’S UNANSWERED QUESTIONS: THE POLICY DEBATE OVER THE USE OF EMINENT DOMAIN FOR ECONOMIC DEVELOPMENT* 11 (2006), available at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIReport_Kelo.pdf; Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, 7 VT. J. ENVTL. L. 41, 41 (2005–2006); Thomas W. Merrill, *Six Myths About Kelo*, PROB. & PROP., Jan.-Feb. 2006, at 19.

38. Ely, *supra* note 33, at 1.

39. *Id.*

40. *Kelo v. City of New London*, 545 U.S. 469, 498 (O’Connor, J., dissenting); *id.* at 506 (Thomas, J., dissenting).

41. *Id.* at 501 (O’Connor, J., dissenting) (“[T]he Court today significantly expands the meaning of public use.”).

42. *Id.* The incidental public benefit of which she speaks echoes Justice Kennedy’s discussion of impermissible pretextual takings in which a taking “is intended to favor a particular private party with only incidental or pretextual public benefits.” *Id.* at 491 (Kennedy, J., concurring).

Justice O'Connor pointed out that "[t]he trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."⁴³

Justice O'Connor charged that the Court's statement in *Kelo*—that the states, if they wished, could pass more restrictive laws to reduce the hardships accompanying economic development takings—was an abdication of the Court's responsibility.⁴⁴ Ultimately, her strong dissent sparked public outcry and laid the groundwork for efforts at reform at the state level because, in her words, "The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."⁴⁵

The public was outraged and demanded that the states enact reform. As of December 2008, forty-three states had enacted some type of reform.⁴⁶ The approach and efficacy of reform measures vary greatly among the states.⁴⁷ In some states, the responses were comprehensive and reform was by way of constitutional amendment so that the changes could not easily be nullified by future legislatures.⁴⁸ In others, reform was limited to additional procedural steps.⁴⁹ Professor Somin has noted, "[u]nfortunately, much of the proposed legislation is likely to have little effect and may simply represent 'position-taking' intended to mollify public opinion."⁵⁰

Despite its criticized unleashing of the power of eminent domain,⁵¹ the Supreme Court in *Kelo* for the first time expressly

43. *Id.* at 502 (O'Connor, J., dissenting).

44. *Id.* at 504 (commenting on the majority opinion (citing *Id.* at 489 (majority opinion))).

45. *Id.* at 503.

46. FIFTY STATES REPORT CARD, *supra* note 3, at 1.

47. See Steven J. Eagle & Lauren A. Perotti, *Coping with Kelo: A Potpourri of Legislative and Judicial Responses*, 42 REAL PROP. PROB. & TR. J. 799 (2008).

48. See, e.g., FLA. CONST. art. X, § 6(c).

49. FIFTY STATES REPORT CARD, *supra* note 3, at 2 (illustrating that reforms vary from the nominal to the comprehensive).

50. Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183, 190 (2007) (explaining the legislative response to *Kelo*); Ely, *supra* note 33, at 4 ("Other[] [laws] afford virtually no additional protection . . . and seem calculated to placate public opinion rather than to reign in the exercise of eminent domain.").

51. Based both on the extremely broad definition of public use and the high degree of deference afforded to government pronouncements of public use. It should be noted that some commentators view *Kelo* as being more restrained than some of its predecessors.

recognized the pretext challenge to takings.⁵² The Court reiterated that a “purely private taking”⁵³—a taking for the “sole purpose of transferring [the property] to another private party”⁵⁴—“could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.”⁵⁵ The majority then went on to make its only statement about pretext. The Court said, “Nor would the City be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit.”⁵⁶ The Court did not elaborate further because it had been determined that there was no such pretext in *Kelo*.⁵⁷

Justice Kennedy also recognized the possibility of successful pretext challenges to takings in his concurrence. He wrote, “A court . . . should strike down a taking that by a clear showing is intended to favor a particular private party, with only incidental or pretextual public benefits”⁵⁸ He quoted the trial court’s statement with respect to economic development cases:

Where the purpose [of a taking] is economic development and that development is to be carried out by private parties or private parties will be benefitted, the court must decide if the stated public purpose—economic development advantage to a city sorely in need of it—is only incidental to the benefits that will be conferred on private parties of a development plan.⁵⁹

Justice Kennedy went on to write, “A court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption [of validity].”⁶⁰ After

52. *Goldstein v. Pataki*, 516 F.3d 50, 60 (2d Cir. 2008) (citing *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 282 (E.D.N.Y. 2007)).

53. *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984); *Miss. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*, 3 Dall. 386, 388 (1798)).

54. *Kelo*, 545 U.S. at 477 (emphasis added).

55. *Id.* (citing *Midkiff*, 467 U.S. at 245; *Miss. Pac. Ry. Co.*, 164 U.S. at 417; *Calder*, 3 Dall. at 388).

56. *Id.* at 478.

57. *Id.* (“The trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case [T]he City’s development plan was not adopted to ‘benefit a particular class of identifiable individuals.’”).

58. *Id.* at 491 (Kennedy, J., concurring).

59. *Id.* (citation omitted).

60. *Id.*

finding that the trial court in *Kelo* had already decided that “benefitting [the private party] Pfizer was not ‘the primary motivation or effect of this development plan,’”⁶¹ Justice Kennedy went on to write that someday a more stringent standard of review might be appropriate for a more narrowly drawn category of takings that present a more acute risk of undetected favoritism.⁶²

Justice Kennedy did not elaborate further on the standards of his heightened scrutiny test or provide detail on his concept of the pretext challenge because, as previously stated, it already had been determined that a pretext challenge was inapplicable in *Kelo*.⁶³

The absence of guidance from the majority opinion and the vague possibilities raised by the concurrence left federal courts—and state courts making decisions on the basis of the federal Constitution—to fend for themselves as to the elements and parameters of federal pretext challenges to eminent domain. This is discussed further in Part III.A. below. Eminent domain and pretext challenges continued to be a hot topic among commentators both before and after the Supreme Court decided *Bell Atlantic Corp. v. Twombly*.⁶⁴

B. Twombly

*Bell Atlantic Corp. v. Twombly*⁶⁵ reviewed the reversal of the dismissal of a complaint in an antitrust action alleging violation of Section 1 of the Sherman Act, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of [*inter alia*, interstate commerce].”⁶⁶ The district court had dismissed the complaint of the representatives of a putative class action for failure to state a claim upon which relief can be granted.⁶⁷ The Second Circuit reversed, reinstating the claim.⁶⁸ The Supreme Court “granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁶⁹

61. *Id.* at 492 (citation omitted).

62. *Id.* at 493.

63. *Id.* at 492.

64. 550 U.S. 544 (2007).

65. *Id.*

66. 15 U.S.C. §1 (2004).

67. *Twombly*, 550 U.S. at 552 (citing *Twombly*, 313 F. Supp. 2d 174, 179 (S.D.N.Y. 2003)).

68. *Id.* at 553 (citing *Twombly*, 425 F.3d 99 (2d Cir. 2005)).

69. *Id.*

Justice Souter wrote the majority opinion in the 7–2 decision. The Court reversed the Second Circuit, finding that the complaint was insufficient. The Court asserted that it was not changing the standards for pleadings under Rule 8(a)(2) and rules to dismiss under Rule 12(b)(6),⁷⁰ but merely reinterpreting those standards to “retire” the long-standing interpretation from *Conley v. Gibson*⁷¹ that the Court characterized as misinterpreted and misused.⁷² *Twombly*’s antitrust “reinterpretation”⁷³ altered pleadings under Rule 8(a)(2)⁷⁴ and the level of factual allegations required in order for a pleading to withstand a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6).⁷⁵ It also recognized the distinction between “facts” and “legal conclusions,”⁷⁶ as further described below, that had played an important role in procedure prior to the 1938 adoption of notice pleading in the Federal Rules of Civil Procedure. The decision unsettled district courts, litigators, scholars, and students of the law, causing disagreement, confusion and consternation.⁷⁷

Twombly requires that the plaintiff must plead facts that take the claim beyond that which is “possible” or “conceivable”⁷⁸ to that which is “plausible”⁷⁹ in the eyes of the court based on the factual matter stated in the complaint. “Factual allegations must be enough

70. See discussion *infra* note 91.

71. 355 U.S. 41 (1957).

72. *Twombly*, 550 U.S. at 562–63. The portion of *Conley* that was abrogated was the famous “no set of facts” language pertaining to motions to dismiss under Rule 12(b)(6). *Id.* Under the long-standing *Conley* interpretation, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove not set of facts in support of his claim that will entitle him to relief.” *Conley*, 355 U.S. at 45–46.

73. See *Twombly*, 550 U.S. 544. Be it “interpretation” as claimed by the majority, or the standards themselves, without benefit of the rule amendment process, as charged by the dissent. Compare *id.* at 562 (Souter, J., dissenting) with *id.* at 595 (Stevens, J., dissenting).

74. FED. R. CIV. P. 8(a)(2). Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 41, 47).

75. FED. R. CIV. P. 12(b)(6). There are two sides to the *Twombly* controversy. Some commentators and courts do not think that *Twombly* instituted any major change, and Justice Souter did not see himself as making a major change. See *Twombly*, 550 U.S. at 555 n.3.

76. *Twombly*, 550 U.S. at 555–56. This distinction may well have taken on a larger role after *Iqbal*. See discussion *infra* Part II.C.

77. See discussion *infra* Part III.B.

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

79. *Id.* at 556.

to raise a right to relief above the speculative level.”⁸⁰ For the case before the Court, this meant that the plaintiff needed to plead *facts* suggesting the existence of an illegal agreement beyond its pleading of facts of parallel conduct of the alleged co-conspirators and a “conclusory allegation of agreement at some unidentified point”⁸¹ in time.

The Court explained that its insistence on “enough *factual matter* (taken as true)”⁸² to establish “*plausible* grounds . . . [did] not impose a probability requirement at the pleading stage; it simply call[ed] for enough fact to raise a *reasonable expectation* that discovery [would] reveal evidence of illegal agreement.”⁸³ Without this, the Court reasoned, the pleading of parallel conduct could be explained equally well by independent parallel action—even conscious parallel action, which is legal—or by an agreement to engage in parallel conduct which is illegal under Section 1 of the Sherman Act.⁸⁴ According to the majority in *Twombly*, this level of ambiguity is now inadequate to survive a motion to dismiss under Rule 12(b)(6).⁸⁵ In order to survive a motion to dismiss in an antitrust case alleging violation of Section 1 of the Sherman Act, it is necessary to plead facts under which illegal conduct is not merely one of the “conceivable” or “possible” alternatives, but is raised to the level of a “plausible” explanation.⁸⁶ According to *Twombly*, “The need at the pleading stage for [factual] allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”⁸⁷

The Court recognized that its interpretation was at odds with the “no set of facts” interpretation of Rules 8(a)(2) and 12(b)(6) that had been established in 1957 by its decision in *Conley v. Gibson*.⁸⁸ It

80. *Id.* at 555.

81. *Id.* at 557.

82. *Id.* at 556 (emphasis added).

83. *Id.* (emphasis added).

84. *Id.* at 565–70.

85. *Id.* at 557.

86. *Id.* at 570.

87. *Twombly*, 550 U.S. at 557.

88. 355 U.S. 41 (1957). *Conley* involved a suit brought by African-American railroad employees against their local and national labor union and certain officials. *Id.* at 42–43. Their employer, the railroad company, had “purported to abolish 45 jobs held by petitioners or other Negroes, all of whom were either discharged or demoted.” *Id.* at 43. “In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except

stated tersely that *Conley*, which “has never been interpreted literally,”⁸⁹ had been “questioned, criticized and explained away long enough;”⁹⁰ *Conley*’s statement had “earned its retirement, . . . and is best forgotten as an incomplete, negative gloss on . . . [the] pleading standard.”⁹¹

The Court justified its reinterpretation of Rules 8(a)(2) and 12(b)(6) in *Twombly* by noting the increasing caseload of the federal courts; the cost of federal antitrust litigation, in which discovery accounts for as much as ninety percent of the litigation costs;⁹² the difficulty of effective judicial supervision of discovery;⁹³ and preventing a plaintiff with a largely groundless claim from taking up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.⁹⁴

for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority.” *Id.* The petitioners alleged that the contract between the union and the railroad “gave employees in the bargaining unit protection from discharge and loss of seniority[.]” but that the union, despite numerous requests by the African-American employees, “act[ed] according to plan, [to do] nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given to white employees.” *Id.* “The complaint then went on to allege that the [u]nion had failed in general to represent Negro employees equally and in good faith . . . [in violation of the union’s statutory duties] under the Railway Labor Act” *Id.*

89. *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

90. *Id.*

91. *Id.* at 563. While the dissent strongly disagreed with this statement, *see infra* notes 101–106 and accompanying text, it cannot be said that the *Conley* interpretation of Rule 8(a)(2) had been totally free of question. While the “short and plain statement of the claim” language of Rule 8(a)(2) generated little disagreement, there had been some disagreement as to how much factual matter was required in order to give the defendant fair notice of the grounds upon which the claim rests. *See, e.g.*, 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2009).

On the one hand, we find it declared to be “axiomatic that a plaintiff must state the facts sufficient to show a cause of action” On the other hand, it is said that “the function of the complaint is to afford fair notice to the adversary of the nature and basis of the claim asserted and a general indication of the type of litigation involved” That facts must be stated, rather than legal conclusions unsupported by facts, seems to be for the most part accepted, although conclusions either of fact or of law have been deemed sufficient if they meet the test of fair notice. But whether the facts thus required need only be such facts as afford adequate notice of the claim, or (omitting mention of “cause of action”) must be “definite facts upon which a judgment might be based,” is a matter on which unanimity is lacking.

Id. (citations omitted).

92. *Twombly*, 550 U.S. at 558.

93. *Id.* at 559–60.

94. *Id.* at 558.

The majority closed its opinion with the statement, “[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.”⁹⁵ Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”⁹⁶

Justice Stevens penned a vigorous dissent, which Justice Ginsburg joined in substantial part. The dissent made a number of points. Among them was that the majority’s concerns⁹⁷ “do not justify an interpretation of Federal Rule of Civil Procedure 12(b)(6) that seems to be driven by the majority’s appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.”⁹⁸ This statement led up to the dissent’s most strident criticism, “While the majority assures us that it is not applying any ‘heightened’ pleading standard, . . . I have a difficult time understanding its opinion in any other way.”⁹⁹

Justice Stevens asserted that the majority’s decision was wrong in its conclusion as to this particular motion to dismiss, wrong in abrogating *Conley*, and wrong in instituting a change in pleading standards that was not in accord with the design or policies governing the Federal Rules of Civil Procedure.

With respect to the complaint in *Twombly*, Justice Stevens found that the complaint was sufficient to survive a motion to dismiss under Rule 12(b)(6) under the controlling precedent of *Conley*. It not only averred a course of parallel conduct that could be legal or illegal, but plaintiff also alleged in three places in its complaint that the defendants “did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other,”¹⁰⁰ an illegal conspiracy under Section 1 of the Sherman Act. He pointed out that this is sufficient at the pleading stage because the court is to assume the allegations as true, even if doubtful in fact. He

95. *Id.* at 570. The Court stated, “in reaching this conclusion, we do not apply any ‘heightened’ pleading standard, nor do we seek to broaden the scope of Federal Rule of Civil Procedure 9, which can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation.” *Id.* at n.14 (citation omitted).

96. *Id.* at 570.

97. *Id.* at 573 (Stevens, J., dissenting). Justice Stevens believed that the majority in *Twombly* was concerned with two practical problems: that private antitrust litigation can be vastly expensive, and that a poorly instructed jury could mistakenly conclude that evidence of parallel conduct proved an illegal agreement. *Id.*

98. *Id.*

99. *Id.* at 588.

100. *Id.* at 589.

therefore found it “mind-boggling” that the majority dismissed the complaint on the basis that, so far as the Federal Rules are concerned, no agreement had been alleged at all.¹⁰¹

Justice Stevens took exception with the majority’s characterization of the plaintiff’s three allegations of illegal agreement as “merely legal conclusions resting on the prior allegations’ of parallel conduct.”¹⁰² He pointed out that the majority’s opinion had the effect of inserting in the Federal Rules the confusing and often artificial distinction between “statements of fact” and “conclusions of law” that had been a part of prior systems of procedure and were purposely eliminated from the Federal Rules of Civil Procedure¹⁰³ as “the starting point of a simplified pleading system . . . to focus litigation on the merits.”¹⁰⁴

Justice Stevens asserted that *Conley* was not “careless composition”¹⁰⁵ but meant what it said and, unlike the majority’s formulation, was in accord with the design and policies of the Federal Rules of Civil Procedure,¹⁰⁶ which sought to do away with hyper-technical pleadings¹⁰⁷ and “sw[i]ng the courthouse door open.”¹⁰⁸ The dissent said, quoting Charles E. Clark, the “chief architect” of the Federal Rules,¹⁰⁹

Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement

101. *Id.* In my view, this sentence in the dissent is one of the few in the decision that foreshadows the first prong of the two-pronged test clearly enunciated in *Iqbal*. Compare *id.* with *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950–52 (2009).

102. *Twombly*, 550 U.S. at 589 (Stevens, J., dissenting) (citing *Id.* at 564 (majority opinion)).

103. *Id.* at 574–75, 589–91 (citing, *inter alia*, Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520–21 (1957); Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921); 5C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1216 (3d ed. 2009)).

104. *Id.* at 575 (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 514 (2002)).

105. *Id.* at 577.

106. *Id.*

107. *Id.* at 574.

108. Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1920 (1989); *Twombly*, 550 U.S. at 579–80 (Stevens, J., dissenting).

109. Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 891 (2009).

distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear . . .¹¹⁰

Justice Stevens also said that the majority's change to a plausibility standard improperly inserted an evidentiary standard at the pleading stage that, although appropriate to a case at the summary judgment stage, was inappropriate at the pleading stage in a motion to dismiss a complaint under Rule 12(b)(6).¹¹¹

Finally, in Part IV of the dissent, which Justice Ginsburg did not join, Justice Stevens charged that

[t]he transparent policy concern that drives the decision . . . protecting antitrust defendants[,] . . . some of the wealthiest corporations in our economy[,] [] from the burdens of pretrial discovery . . . [does] not provide an adequate justification for this law-changing decision. [I]t is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations that could account for this stark break from precedent.¹¹²

“[It is] a fundamental—and unjustified—change in the character of pretrial practice.”¹¹³ In Part IV of his dissent, Justice Stevens also mused that the future would tell “[w]hether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether [the Court's plausibility] test will inure to the benefit of all civil defendants.”¹¹⁴ The future arrived in *Ashcroft v. Iqbal*.¹¹⁵

C. *Iqbal*

*Ashcroft v. Iqbal*¹¹⁶ was an appeal from a decision of the Second Circuit.¹¹⁷ *Iqbal* had initiated a *Bivens*¹¹⁸ action against various

110. Charles E. Clark, *New Federal Rules of Civil Procedure: The Last Phase—Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A.B.A. J. 976, 977 (1937).

111. *Twombly*, 550 U.S. at 580 (Stevens, J., dissenting). Justice Stevens also questioned the majority's conclusion that the complaint had not reached the level of plausibility. *Id.* at 586.

112. *Id.* at 596–97.

113. *Id.* at 597.

114. *Id.* at 596.

115. 129 S.Ct. 1937 (2009).

116. *Id.*

117. *Id.* at 1944. The Second Circuit had decided to apply *Twombly* to civil cases governed by the Federal Rules of Civil Procedure generally, despite *Twombly*'s posture as an

government officials, including Robert Mueller and John Ashcroft,¹¹⁹ emanating from Iqbal's arrest and detainment after the 9/11 attacks.¹²⁰ Iqbal "allege[d] that [Mueller and Ashcroft] adopted an unconstitutional policy that subjected [Iqbal] to harsh conditions of confinement [in a maximum security facility] on account of his race, religion, or national origin."¹²¹ This, Iqbal asserted, gave rise to a private civil claim against Ashcroft and Mueller for damages.

The Court began its opinion with an explanation of the substantive requirements for a *Bivens* claim stemming from an alleged violation of the First and Fifth Amendments: "[O]ur decisions make clear that the plaintiff must plead and prove that the defendant[s] acted with discriminatory purpose."¹²² Thus, Iqbal's complaint had to plead some basis to infer that Ashcroft and Mueller had instituted a policy of confinement in maximum-security facility by designation of "high interest" because of a discriminatory purpose.

Before discussing whether the allegations rose to the level of plausibility announced in *Twombly*, the Court struck allegations that it (the majority at least) decided were too conclusory. "We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth."¹²³ What was left of the complaint, the Court concluded, did not rise to the level of plausibility.

To prevail . . . the complaint must contain facts plausibly showing that [Ashcroft and Mueller] purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin. This[,] the complaint fails to do [Iqbal's] only factual allegation against

antitrust case and its possibly broadening language that still seemed limited to complex cases. Most other circuits did likewise. McMahon, *supra* note 14, at 862–63.

118. See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Bivens*, the Court held, for the first time, that a violation of a citizen's constitutional right (under the Fourth Amendment) by a federal employee may give rise to a private action for damages. See *id.* at 391–92. There is no foundation for a private civil claim in the Constitution. See *id.* at 391–97. Thus, a *Bivens* action is a judicially created cause of action.

119. See *Elmaghraby v. Ashcroft*, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (listing the original parties). At the time of Mr. Iqbal's arrest, Ashcroft was the Attorney General of the United States and Mueller was the Director of the Federal Bureau of Investigation (FBI). *Iqbal*, 129 S.Ct. at 1939.

120. *Iqbal*, 129 S.Ct. at 1942. Iqbal was deemed by the government to be a person of "high interest." *Id.* This designation subjected him to restrictive confinement. *Id.* at 1943–44.

121. *Id.* at 1942.

122. *Id.* at 1948.

123. *Id.* at 1951.

[Ashcroft and Mueller] accuses them of adopting a policy approving “restrictive conditions of confinement” for post-September-11 detainees until they were “‘cleared’ by the FBI.” Accepting the truth of that allegation, the complaint does not show, or even intimate, that [Ashcroft and Mueller] purposefully housed detainees in [a maximum security facility] due to their race, religion, or national origin. All it plausibly suggests is that the Nation’s top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. [Iqbal] does not argue, nor can he, that such a motive would violate petitioners’ constitutional obligations. He would need to allege more by way of factual content to “nudge” his claim of purposeful discrimination “across the line from conceivable to plausible.”¹²⁴

Iqbal might be described as “*Twombly* plus” for its treatment of pleadings and motions to dismiss under Rule 12(b)(6). In *Iqbal*, the Court reiterated the plausibility standard of *Twombly* for pleadings and Rule 12(b)(6) motions to dismiss, essentially repeating that a naked allegation of illegal conduct in a complaint “devoid of further ‘factual enhancement’”¹²⁵ is not sufficient to survive a motion to dismiss under Rule 12(b)(6).¹²⁶ The Court then went on to reemphasize that in order “[t]o survive a motion to dismiss, a complaint must contain sufficient *factual matter*, accepted as true, to ‘state a claim to relief that is plausible on its face.’”¹²⁷ “A claim has facial plausibility when the plaintiff *pleads factual content* that allows the court to *draw the reasonable inference* that the defendant is liable for the misconduct charged.”¹²⁸ The Court stated, as it had in *Twombly*, that it was not imposing a “probability requirement” at the pleadings stage, but required more than a sheer possibility,¹²⁹ and that “[w]here 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.’”¹³⁰

The most critical “plus” factor by which *Iqbal* went beyond *Twombly* was that the Court in *Iqbal* unequivocally stated that

124. *Id.* at 1952 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

125. *Id.* at 1949 (citing *Twombly*, 550 U.S. at 557).

126. *Id.*

127. *Id.* (citing *Twombly*, 550 U.S. at 570) (emphasis added).

128. *Id.* (citing *Twombly*, 550 U.S. at 556) (emphasis added).

129. *Id.*

130. *Id.* (citing *Twombly*, 550 U.S. at 557).

Twombly's "plausibility" standard was not limited to antitrust treble-damages cases.¹³¹ The Court stated, "Our decision in *Twombly* expounded the pleading standard for *all* civil actions . . . and proceedings in the United States district courts."¹³²

In addition, *Iqbal* cast the *Twombly* examination as a two-pronged test and "invited" lower courts to follow suit.¹³³ First, the Court in *Iqbal* combed the complaint for conclusory statements,¹³⁴ gave them no weight or assumption of truthfulness for purposes of considering the motion under Rule 12(b)(6),¹³⁵ and eliminated them from the balance of the test. The Court explained that in *Twombly* itself, the part that was conclusory and to be eliminated from consideration for purposes of Rule 12(b)(6) was the conclusory statement of unlawful agreement.¹³⁶ The Court then directed that, as a second prong, courts were to look at the balance of the complaint—without the allegations that had been eliminated—to determine whether the plausibility threshold had been crossed.¹³⁷ Looking back to *Twombly*, the *Iqbal* majority said that the remaining language in *Twombly* to be considered in the second step of the test was "the well-pleaded nonconclusory factual allegation of parallel behavior."¹³⁸ Where these remaining allegations in the complaint are considered consistent with both legal and illegal conduct, but more likely to be explained by legal conduct in the judgment of a court, the complaint has not met the threshold of "plausibility," and is to be dismissed under Rule 12(b)(6),¹³⁹ as was the outcome in *Twombly*. In *Iqbal*, the Court also directed that in determining plausibility a court is

131. *Id.* at 1953. Most courts of appeal had already held this, despite indications in Justice Souter's opinion that could be interpreted to limit *Twombly*'s applicability to antitrust cases. See McMahon, *supra* note 14, at n.82 (listing circuits applying *Twombly* broadly).

132. *Iqbal*, 129 S.Ct. at 1953 (citing FED. R. CIV. P. 1) (emphasis added).

133. *Id.* at 1950 (interestingly stating that the two-pronged approach was instituted in *Twombly*). While upon careful reading the two-pronged approach can be found in *Twombly*, it was not particularly evident until recast in *Iqbal*. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, Social Science Research Network (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1487764.

134. *Iqbal*, 129 S.Ct. at 1950–51.

135. *Id.* There is nothing new in not accepting conclusions of law as true.

136. *Id.* at 1950 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

137. *Id.* (citing *Twombly*, 550 U.S. at 565–66).

138. *Id.*

139. *Id.*

performing a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹⁴⁰

Unlike *Twombly*, which was a 7–2 decision, *Iqbal* was a closer 5–4 decision in which Justices Souter and Breyer joined the *Twombly* dissenters, Justices Stevens and Ginsburg. Justice Souter, author of the majority opinion in *Twombly*, wrote the dissenting opinion in which the other dissenters joined; in addition, Justice Breyer filed a separate dissenting opinion.

The dissent found the majority opinion to be incorrect in setting a standard for supervisory liability that was different than that conceded by the parties for purposes of the instant motion.¹⁴¹ It also argued that supervisory liability was unbriefed and that the majority’s standard was incorrect.¹⁴² However, what the dissent stated was “most remarkable”¹⁴³ was that the majority determined “that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned or even were aware of their subordinates’ discriminatory conduct are ‘conclusory’ and therefore are ‘not entitled to be assumed true.’”¹⁴⁴ The dissent explained that with those allegations eliminated for purposes of 12(b)(6), the remainder of the allegations were consistent with both legal and illegal conduct, and it was more likely that the officials acted for proper purposes, rendering *Iqbal*’s allegations possible, but not plausible, thus necessitating that the complaint be dismissed.¹⁴⁵ The dissent stated that the “fallacy of the majority’s position, however, lies in looking at the relevant assertions in isolation”,¹⁴⁶ “[when v]iewed in light of [the] subsidiary allegations, the allegations singled out by the majority as conclusory are no such thing.”¹⁴⁷ That being the case, these allegations should not be ignored and, because the truth of the allegations is not to be judged at the motion to dismiss Rule 12(b)(6) stage,¹⁴⁸ the allegations are to be taken as true. Accordingly, the complaint would then be

140. *Id.*

141. *Id.* at 1956–57 (Souter, J., dissenting).

142. *Id.* at 1957–59.

143. *Id.* at 1958.

144. *Id.* (citing *id.* at 1951 (majority opinion)).

145. *See id.* at 1960.

146. *Id.*

147. *Id.* at 1961.

148. *Id.*

sufficient to cross the threshold of plausibility and should not have been dismissed.¹⁴⁹

When comparing the majority opinion with the dissent, it is clear that we have the highest court of the land unable to agree, and in fact sharply divided, as to what is impermissibly conclusory and therefore in disagreement as to what is plausible. This does not bode well for pretext challenges to eminent domain as will be further examined in Part III.

III. IMPLICATIONS FOR PRETEXT CHALLENGES TO TAKINGS UNDER EMINENT DOMAIN: GRAPPLING WITH THE UNDEFINED

Now that the Supreme Court has clarified that the *Twombly-Iqbal* standards and two-pronged test apply to all cases governed by the Federal Rules of Civil Procedure, there are implications for all types of cases, including pretext challenges to eminent domain that are to be decided under federal law. It is clear that procedural rules can impact substantive rights. Because discovery is especially important in the process of unearthing the factual details of pretext, and landowners will not be able to engage in discovery unless they survive a 12(b)(6) motion, *Twombly-Iqbal* is likely to result in the dismissal of federal pretext challenges. As a result, it is likely that landowners will opt to file their pretext challenges in state court.¹⁵⁰

States that have followed the “no set of facts” rule of *Conley* to govern motions to dismiss for failure to state a claim upon which relief can be granted will have to decide whether they will adopt any or all of the changes wrought by *Twombly-Iqbal*. Those decisions could have a major impact on the viability of pretext challenges to takings governed by state law and rules of procedure. On the state level, regardless of the particular state’s definition or means of determining pretext, a procedural system that results in the dismissal of claims pre-discovery could nullify hard-won substantive reforms. Therefore, those intent on establishing or protecting state law pretext challenges to eminent domain need to be mindful of state adoption of either prong of the *Twombly-Iqbal* test.

Part III.A. looks at the definitional and analytic issues that have arisen as landowners raise pretext challenges to takings under the power of eminent domain. Part III.B. considers the definitional

149. *Id.*

150. *See, Hatamyar supra* note 134, at 54.

problems that have been produced by *Twombly* and hypothesizes as to the complications that are likely to arise following the Supreme Court's decision in *Iqbal*. Part III.C. examines the implications for pretext challenges that will arise when *Kelo* meets *Twombly-Iqbal*. Part IV looks at states' decisions to adopt *Twombly-Iqbal* procedural standards and the impact of these changes on state law pretext challenges to eminent domain. It recommends that states exercise caution for a number of reasons, one of which is the deleterious effect that such a procedural system would have on hard-won reforms that were intended by citizens to accept the Supreme Court's invitation in *Kelo* to adopt more stringent definitions of public use.

A. Pretext

Although the Supreme Court expressly recognized pretextual takings for the first time in *Kelo*,¹⁵¹ it did not provide a definition of pretext in *Kelo*.¹⁵² Nor did it direct how a court should analyze a case alleging that a taking is pretextual. Judging from the Court's denial of certiorari in *Goldstein v. Pataki*,¹⁵³ the Court is not likely to explain pretextual takings or to reconsider *Kelo* any time soon.

In the years following the Supreme Court's decision in *Kelo*, federal and state courts, litigants, commentators, and those involved in public use issues of eminent domain, have grappled with the majority's one sentence about pretext challenges and Justice Kennedy's discussion of pretext in his concurrence¹⁵⁴—which, in some ways, is possibly consistent with the majority's single sentence and, in other ways, is clearly different, but also sketchy and ultimately confusing.¹⁵⁵

151. *Goldstein v. Pataki*, 516 F.3d 50, 61 (2d Cir. 2008).

152. *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 172 (D.C. Cir. Ct. App. 2007) (quoting *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 287 (E.D.N.Y. 2007)).

153. 516 F.3d at 50, *cert. denied*, 128 S.Ct. 2964 (2008).

154. Ely, *supra* note 33, at 12 (“It remains unclear how and under what circumstances a court can ascertain whether a particular taking is a just pretext for private gain.”).

155. Although Justice Kennedy's concurrence does not form a part of the Court's opinion, Justice Kennedy cast the fifth and deciding vote in *Kelo*. His concurrence expounds beyond the majority's one sentence; pretext is clearly an issue that was of concern to him, and likely played a role in his decision to cast the deciding vote with the majority. Therefore, his concurrence is mentioned by litigants, courts, and commentators as they try to define, and refine, pretext. *Franco*, 930 A.2d at 169 n.8. The dissents are also concerned about pretext. Its inherent unfairness is at the heart of Justice O'Connor's dissent. (She also notes that only a “stupid staffer” could fail the heightened scrutiny test referred to by Justice Kennedy.) Justice Thomas predicts that the decision will continue to cause minorities, the old, and the poor—

The problem is all the more challenging given the Court's expansive definition of public use and great deference to government pronouncements of public purpose.¹⁵⁶ The Court's expansive interpretation of public use left some thinking that pretext was the last best hope for challenges to eminent domain on federal grounds.¹⁵⁷

The cases dealing with pretext claims are widely divergent and irreconcilable,¹⁵⁸ as have been their definitions of pretext. Multiple analytic frameworks have been used; none is truly comprehensive. Some examples will illustrate.

The trial court decision of the District of Columbia Superior Court, *Franco v. District of Columbia*,¹⁵⁹ and its appeal, *Franco v. National Capital Revitalization Corporation*,¹⁶⁰ are two such examples. Mr. Franco owned a store that formed a part of the Skyland Shopping Center in the District of Columbia.¹⁶¹ The

people without political clout—to continue to bear a disproportionate share of the hardship wrought by eminent domain. The disparate impact of takings on those with less political power is discussed by a number of commentators. See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON REV. 183, 267–71 (2007); David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365 (2007); *contra* Ilya Somin, *Is Post-Kelo Eminent Domain Reform Bad for the Poor? A Reply to David Dana*, 101 NW. U. L. REV. 1931 (2007). I have wondered whether the public outcry in reaction to *Kelo* can be explained in some small part by the fact that, in *Kelo*, the adversity usually experienced by the most defenseless members of society had impacted the middle class. Carol L. Zeiner, *Establishing a Leasehold Through Eminent Domain: A Slippery Slope Made More Treacherous by Kelo*, 56 CATH. U. L. REV. 503, 536 n.172 (2007).

156. See *Berman v. Parker*, 348 U.S. 26, 32 (1954) (government's determination of public use is "well-nigh conclusive"); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 244 (1984) ("[I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use."); *Midkiff*, 467 U.S. at 241 (lower courts are not to "substitute [their] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'") (citing *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)); *Midkiff*, 467 U.S. at 241 (legislative determination of public use is to be upheld if it is "rationally related to a conceivable public purpose") (emphasis added).

157. Daniel S. Hafetz, Note, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 FORDHAM L. REV. 3095, 3097 (2009).

158. Amy Brigham Boulris & Annette Lopez, 2007–2008 Update on Judicial Reactions to *Kelo*, at 1, presented at ALI ABA Annual Conference on Eminent Domain and Land Valuation Litigation, Jan. 8–10, 2009, Miami Beach, FL.

159. *Franco v. District of Columbia*, 422 F. Supp. 2d 216 (D.D.C. 2006), *motion denied*, 456 F. Supp. 2d 35 (D.D.C. 2006).

160. 930 A.2d 160, 160 (D.C. Cir. 2007).

161. *Id.* at 162. Redevelopment of the Skyland Shopping Center produced considerable litigation including some focusing on public use. *Id.* at 163 n.2 (citing *Rumber v. District of Columbia & Nat'l Capital Revitalization Corp.*, 487 F.3d 941 (D.C. Cir. 2007)) (reversing

National Capital Revitalization Corporation (NCRC) filed a complaint to condemn Mr. Franco's property for a new privately-owned project. The announced public purpose was to redevelop the shopping center that had been deemed blighted.¹⁶² Mr. Franco's answer "denied that the [site] was blighted and denied that NCRC had submitted a carefully considered development plan designed to serve a public purpose."¹⁶³ It also raised seven affirmative defenses and included six counterclaims.¹⁶⁴ Mr. Franco's first defense asserted a pretext challenge under the Fifth Amendment on grounds that the actual purpose of the condemnation was to confer a private benefit on a private party.¹⁶⁵ According to the appellate court, the trial court's interpretation of pretext challenges "suggest[ed] that, once the legislature has declared that there is a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext."¹⁶⁶ Since government had stated a public purpose, the trial court granted NCRC's motion to strike the defenses and counterclaims¹⁶⁷ under a District rule identical to Federal Rule of Civil Procedure 12(f).¹⁶⁸ It also granted a NCRC motion for immediate possession. Mr. Franco appealed.¹⁶⁹

The District of Columbia Court of Appeals exercised its rarely used pendant appellate jurisdiction to hear the appeal.¹⁷⁰ The appellate court had a very different view of pretext. It rejected the trial court's enunciation of pretext claims and reversed the trial

dismissal on ripeness grounds of claim alleging that taking was for a private, rather than public, use).

162. *Id.* at 163.

163. *Id.* at 164.

164. *Id.*

165. *Id.* His first counterclaim also asserted a violation of the "Takings Clause Public Use Provisions of the [Fifth Amendment]." *Id.*

166. *Id.* at 168. This interpretation employed by the lower court—challenge is only available if the legislative body fails to declare a public purpose—is in some ways narrower than that enunciated by the Second Circuit in *Goldstein v. Pataki*, 516 F.3d 50 (2008). *See infra* notes 199–220 and accompanying text.

167. *Franco*, 930 A.2d at 164.

168. *Id.* at 166 n.5.

169. *Id.* at 164.

170. The lower court's grant of immediate possession was linked inextricably to its decision to strike the defenses, and the District of Columbia Court of Appeals "was unable meaningfully to review the order transferring possession without considering the predicate decision to strike Mr. Franco's defenses." *Id.* at 165.

court's decision.¹⁷¹ The District of Columbia Court of Appeals noted that even though pretext was not present in *Kelo*, the *Kelo* majority made a point of emphasizing "that the government would not 'be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.'"¹⁷² The court in *Franco* decided that "*Kelo* recognized that there may be situations where a court should not take at face value what the legislature has said,"¹⁷³ and that despite the high level of deference accorded statements of public purpose, "*Kelo* makes it clear that there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext designed to mask a taking for private purposes."¹⁷⁴ The court reasoned that "[t]he government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual."¹⁷⁵

The court in *Franco* lamented that the Court in *Kelo* had failed to define the term "mere pretext,"¹⁷⁶ and noted that "the Supreme Court's decision may raise many more questions than it answers"¹⁷⁷ about pretext defenses.¹⁷⁸ It struggled with the notion of pretext¹⁷⁹ to ultimately provide the trial court with guidance on the pretext defense.¹⁸⁰ It noted that the *Kelo* majority expressed concern that

171. Like the trial court, the D.C. Court of Appeals looked to *Twombly* for guidance on pleading standards; unlike *Twombly*, the pleading in this case was Samuel Franco's answer. *Id.* at 170. See *infra* notes 187–92 and accompanying text.

172. *Id.* at 169 (citing *Kelo v. City of New London*, 545 U.S. 469, 478 (2005)).

173. *Id.* Professor Steven Eagle has said, "[s]ince government officials are subordinate to the law, conscientious citizens cannot take officials' word alone as definitive of what the public interest is." Steven J. Eagle, *Reflections on Private Property, Planning and State Power*, 61 PLAN. & ENVTL. L. 3, 4 (Jan. 2009) (a contemplative article on the respective roles of private property and the use of state power for land use planning purposes. The particular language quoted was contained in a discussion of land use planning more generally, but applies with equal force when eminent domain is used as a tool in effectuating a project that is the product of land use planning.).

174. *Franco*, 930 A.2d at 171.

175. *Id.* at 169.

176. *Id.* at 172 (citing *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 288 (E.D.N.Y. 2007)).

177. *Id.* at 169.

178. *Id.*

179. Ely, *supra* note 33, at 12.

180. The court based its decision on the majority's opinion in *Kelo*, noting that Justice Kennedy's more lengthy discussion was not the holding of the Court. *Franco*, 930 A.2d at 169 n.8. The *Franco* court noted, however, that "Justice Kennedy's concurring opinion may

private-to-private transfers “executed outside . . . an integrated development plan, . . . would certainly raise a suspicion that a private purpose was afoot”¹⁸¹ It pointed out that Justice Kennedy noted similar suspicions in private-to-private transfers in which “the projected economic benefits of the project [are] *de minimis*.”¹⁸² The *Franco* court stated that the focus should be on the quality¹⁸³ of public benefits—their incidental nature when compared to the private benefit on particular favored private entities—not the mindset or thought process of legislators or other governmental officials.¹⁸⁴ If “the benefits to the public are only ‘incidental’ or ‘pretextual’ . . . [the] defense may well succeed,”¹⁸⁵ but will fail if “the taking will serve ‘an overriding public purpose’ and the . . . development ‘will provide substantial benefits to the public.’”¹⁸⁶ The court noted, however, that “harder cases will lie between these extremes.”¹⁸⁷

The court in *Franco* expressed its interpretation of at least three perplexing questions left unanswered by *Kelo*. First, *Franco* answers in the affirmative the critical question of whether a pretext challenge can succeed when there is *some* public purpose to be derived from the taking but the major, or primary, benefit is private. This is clearly the interpretation of the court in *Franco* because the court points out that landowners can look behind the stated purpose of government, and that the inquiry is to consider the extent of public purposes—their quality, whether they are *de minimis* or incidental *when compared to* the private benefit.¹⁸⁸ Second, *Franco* answers the question of whether a court must determine the subjective mindset of legislators or focus on the often circumstantial objective indicia of the public benefits themselves in order to determine whether the legislature’s

accurately predict what the Court will hold when the record before it does not resolve the pretext issue.” *Id.*

181. *Id.* at 172 (quoting *Kelo v. City of New London*, 545 U.S. 469, 487 (2005)). The court in *Kelo* went on to note that no such situation existed in the factual situation before it and that such situations could be addressed when they arose. *Kelo*, 545 U.S. at 487.

182. *Franco*, 930 A.2d at 172 (quoting *Kelo*, 545 U.S. at 493 (Kennedy, J., concurring)).

183. Based on the rest of the sentence and context in which it appears, I believe that “quality” as used here means “extent.”

184. *Franco*, 930 A.2d at 173.

185. *Id.* at 174.

186. *Id.* at 174.

187. *Id.* The court cautioned that, as stated in *Kelo*, the likelihood of success in achieving goals intended by the legislature is not to be part of the test; rather it is whether the legislature reasonably could have believed that the project could have promoted the intended goal. *Id.* at 174 n.13 (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242 (1984)).

188. *Id.* at 172–74.

purpose was public benefit or private benefit. *Franco* directs that it is proper to base a decision on the latter.¹⁸⁹ Third, *Franco* addresses how to handle the highly deferential standard set by the Supreme Court for examination of legislative pronouncements when that pronouncement turns out to be pretextual. The court in *Franco* concludes that no deference is to be afforded to such a pronouncement once it is found to be pretextual because the actual purpose is then private gain, an unconstitutional purpose.¹⁹⁰ It agreed with the United States District Court for the Central District of California that said “[n]o deference is required . . . where the ostensible public use is demonstrably pretextual.”¹⁹¹

Ultimately, the court in *Franco* went on to decide that the appellant sufficiently pled a pretext defense, employing an adaptation of *Twombly*¹⁹² in which the court considered factual detail included in the counterclaims that were before the trial court,¹⁹³ as well as the allegations in the defenses.¹⁹⁴ “With the detailed allegations included in his ‘counterclaims,’ the defense ‘fairly present[ed] a question of law or fact which the [trial] court ought to hear.’”¹⁹⁵ Upon analysis of the court’s decision, it appears that the court sought to follow *Twombly*’s refusal to treat conclusory pleadings as true for purposes of Rule 12(b)(6), as well as its insistence that factual allegations raise the pleadings—in this case Mr. Franco’s defense—beyond the level

189. *Id.* at 173–74.

190. *Id.* at 172.

191. *Id.* (quoting *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001)).

192. Although *Twombly* (discussed *infra* at Part II.B.) involved a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), and in *Franco* the pleading at issue was an answer and the motion present was a motion to strike, the court utilized a *Twombly* plausibility standard because one of the key cases dealing with motions to strike, *Securities & Exchange Commission v. Gulf & Western Industries, Inc.*, 502 F. Supp. 343, 345 (D.D.C. 1980), utilized an adaptation of the “no set of facts” language that had been discredited in *Twombly*, and, the court noted, it was “unable to foresee the spillover effect of *Twombly*. *Franco*, 930 A.2d at 167 n.6.

193. The counterclaims had been dismissed by the trial court yet, according to *Franco*, the factual detail therein could still be considered and assumed true for purposes of considering the adequacy of Franco’s pleading of his defenses. *Id.* at 170.

194. In reaching this decision the court relied on Superior Court Civil Rules 8(c) and 8(f), as well as case law, that a pleading denominated as a counterclaim could be treated as a defense so as to do justice. *Id.* at 170 n.9.

195. *Id.* at 172 (quoting *Gulf & Western*, 502 F. Supp. at 345) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

of the merely “conceivable” to the “plausible,”¹⁹⁶ without falling into the trap, supposedly eliminated by the adoption of the Federal Rules of Civil Procedure, of being slave to the technicalities of form. The court in *Franco* also remained true to the deferential standard set by the Supreme Court for governmental findings of public purpose.¹⁹⁷

The Second Circuit took a very different view of pretext challenges in *Goldstein v. Pataki*.¹⁹⁸ In that case, fifteen landowners challenged the eminent domain taking of their properties for “a publicly subsidized development project,”¹⁹⁹ the Atlantic Yards Project, which included a new arena for the New Jersey Nets, at least sixteen high-rise apartment towers, and several office towers²⁰⁰—all part of a massive redevelopment project²⁰¹ in Brooklyn, New York. The project also included related mass transit improvements, public open space,²⁰² and creation of affordable housing units.²⁰³ According to the landowner plaintiffs, the project and its geographic boundaries were proposed by Bruce Ratner, owner of the New Jersey Nets; the plan as proposed by Ratner was essentially the plan approved, and an entity in the Ratner Group was selected as the primary developer.²⁰⁴ The site encompassed twenty-two acres.²⁰⁵ Nearly half of the site²⁰⁶ was a former transit yard owned in part by the Metropolitan Transit Authority that first had been declared blighted in 1968, a designation that had been reaffirmed multiple times.²⁰⁷ According to the plaintiff-appellants, the balance of the area, which included their non-blighted properties, was not designated for redevelopment until three years

196. “Recognizing the limited role of the courts in eminent domain jurisprudence we are especially careful not to indulge baseless conclusory allegations that the legislature acted improperly.” *Id.* at 171.

197. *Id.* at 168 (“[O]ur cases . . . reflect[] our longstanding policy of deference to legislative judgments [regarding public use]” (quoting *Kelo v. City of New London*, 545 U.S. 469, 480 (2005))).

198. 516 F.3d 50 (2d Cir. 2008).

199. *Id.* at 53.

200. *Id.*

201. *Id.* at 55 (“[A] project of unprecedented size.” (quoting Brief of Appellant-Petitioner at 6, *Goldstein v. Pataki*, No. 07-2537 (2d Cir. July 31, 2007))).

202. *Id.* at 58–59.

203. *Id.* at 59 n.6 (“[B]elow-market rate housing for middle class occupants, not subsidized housing for the poor.”).

204. *Id.* at 54, 56.

205. *Id.* at 53.

206. *Id.* at 59.

207. *Id.* The cited portion of the opinion notes that the designation had been reaffirmed ten times, most recently in 2004. *Id.*

after the project was announced²⁰⁸ and after *Kelo* was decided,²⁰⁹ and “rest[ed] smack in the middle of some of the most valuable real estate in Brooklyn.”²¹⁰ They asserted that the expansive footprint of the project into the second area was the result of a political process that had been co-opted by Ratner²¹¹ “in service of his understandable desire to expand the Project . . . thus increasing the profit to himself, his companies and his shareholders.”²¹² They conceded, however, that many properties within the second area were blighted and that therefore “the Project as a whole, target[ed] an area more than half of which is significantly blighted.”²¹³

Plaintiffs’ complaint alleged that there was no public purpose for the project or, in the alternative, “that the project’s public benefits were serving as a pretext that mask[ed] [the real purpose for the project]: enriching the private individual who proposed the project and [stood] to profit most from its completion,”²¹⁴ Bruce Ratner and his affiliates (the Ratner Group).²¹⁵ Specifically, the complaint alleged “that the ‘public does not benefit from the taking of plaintiffs’ properties’ and ‘[a]lternatively any benefit from the taking of plaintiffs’ properties is secondary and incidental to the benefit that inures to [the Ratner Group]’ because the ‘desire to confer a private benefit to [the Ratner Group] was a substantial, motivating factor in defendants’ decision to seize plaintiffs’ property and transfer it to [the Ratner Group].”²¹⁶

The lower court had looked to *Twombly* for guidance and dismissed the claims at issue, with prejudice, under Rule 12(b)(6).²¹⁷ On appeal, the Second Circuit also relied upon *Twombly* and its standard that the “complaint’s ‘[f]actual allegations be enough to raise a right to relief above the speculative level on the assumption that all

208. *Id.*

209. *Id.* at 56.

210. *Id.* at 59 (quoting Complaint at 15, *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. CV 06 5827)).

211. *Id.* at 55.

212. *Id.* (quoting Brief of Appellant-Petitioner at 6–7, *Goldstein v. Pataki*, No. 07-2537 (2d Cir. July 31, 2007)).

213. *Id.* at 59.

214. *Id.* at 53.

215. *Id.* at 53–54.

216. *Id.* at 54 n.3 (quoting Complaint at 30, *Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007) (No. CV 06 5827)).

217. *Id.* at 56.

the allegations in the complaint are true.”²¹⁸ It affirmed the lower court’s decision.²¹⁹

While clearly the dismissal of plaintiffs’ complaint was for failure to meet the *Twombly* standard of pleading,²²⁰ the more controversial aspect of the case, and the factors that influenced the outcome of the *Twombly* test, were the court’s definition of pretext and its interpretation of how a pretext challenge is to be analyzed. First, the appellate court disposed of one of the plaintiffs’ alternative assertions—that public purpose was entirely absent and private benefit was its sole purpose—because the plaintiffs admitted that there were classic public uses within the project.²²¹

In examining the plaintiffs’ pretext claim, the court seemed to say that pretext challenges are available only where the sole basis for a project is economic development.²²² It then went on to examine pretext defenses more generally and concluded that pretext challenges are precluded by the presence of any classic public use within a project.²²³ Moreover, based on the appellants’ statement(s) at oral argument that they would “seek depositions of pertinent government officials, along with their emails, confidential communications, and other pre-decisional documents,”²²⁴ the court found “full judicial inquiry into the subjective motivation of every official”²²⁵ to be fraught with difficulties and ultimately impossible even if one is “[t]o look for *the sole purpose* of even a single legislator”²²⁶ in enacting legislation. Since the court examined the problems inherent in determining subjective motivation, rather than disavowing it and

218. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007)).

219. *Id.* at 56–57.

220. This was the holding of the court and the characteristic for which the case is noted by some authors. *See, e.g.*, David L. Callies, CURRENT CRITICAL ISSUES IN REAL ESTATE LAW: PUBLIC USE AND PUBLIC PURPOSE AFTER *KELO V. CITY OF NEW LONDON* 30 (2008).

221. *Goldstein*, 516 F.3d at 58 (“[T]he specific allegations in the complaint foreclose any blanket suggestion that the Project can be expected to result in no benefits to the public.”).

222. *Id.* at 61, 64.

223. *Id.* at 59–64. This is also the position taken by the dissent in *County of Hawaii v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615, 665 (Moon, C.J., dissenting).

224. *Goldstein*, 516 F.3d at 62. New York must have public records and sunshine laws less broad than those of Florida that prohibit most government officials from having confidential conversations in furtherance of their official duties outside the “sunshine,” and make most of their written and electronic communications accessible. FLA. STAT. §§ 119.07, 286.011 (2009).

225. *Goldstein*, 516 F.3d at 63.

226. *Id.* (quoting *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting)).

directing attention toward objective indicia of purpose as the proper means of investigating pretext claims, the Second Circuit apparently believes that subjective purpose, rather than objective indicia that evidence purpose, is the proper test for pretext challenges.

Obviously, the court in *Franco* and the court in *Goldstein* have radically differing definitions and interpretations of pretext challenges based on the Fifth Amendment. As divergent as they are, *Franco* and *Goldstein* do not illustrate all the different interpretations that are possible, or even all the definitional and analytical issues that must be considered in defining pretext and the parameters of pretext challenges. For example, as illustrated below, and in *Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use*,²²⁷ the private beneficiary of the pretext is not always the transferee/developer of the project as they were in *Franco* and *Goldstein*.²²⁸ The parameters of pretext challenges should take this into account.²²⁹

49 WB LLC v. Village of Haverstraw,²³⁰ a case decided under the eminent domain laws of the state of New York, is one such case. It is in line with *Goldstein's* interpretation of the federal standards that pretext can be present *only* when there is no public purpose for the taking.

The Village of Haverstraw, as condemnor, had advanced three public purposes for condemning the petitioner's building.²³¹ The court found that the first enunciated public purpose was illusory in that the Village failed to articulate how the condemnation "fosters any benefit to the public which would not be obtained absent the

227. Zeiner, *supra* note 25 *passim*.

228. In *Kelo*, the majority seemed to gain comfort that pretext could not be present because the identity of the party to whom the land was to be transferred was not known at the time the plan was developed. *Kelo v. City of New London*, 545 U.S. 469, 478 n.6 (2005). In reality, this factor should provide little comfort because the party obtaining the private benefit from the transfer may not be the party to whom title is transferred. See Zeiner, *supra* note 25 *passim*; *49 WB, LLC v. Village of Haverstraw*, 44 A.D.3d 226 (N.Y. App. Div. 2007). As it turns out Pfizer may have had a larger role as a beneficiary in *Kelo* than was known by the courts. See generally BENEDICT, *supra* note 30.

229. See Zeiner, *supra* note 25.

230. *Haverstraw*, 44 A.D.3d at 226.

231. The asserted public purposes were: 1) a community outreach health center; 2) suitable office space for the not-for-profit private corporation that was the Village's designated affordable housing and neighborhood preservation organization; and 3) to provide affordable housing. *Id.* at 240.

condemnation.”²³² The second purported public use was found to lack any public benefit, but would benefit a private, not-for-profit affordable housing and preservation corporation that was already a tenant in the building and to whom title would be transferred following the condemnation.²³³ The court said “there is no foundational support in the record to conclude that any ‘public’ benefit would flow from having [the private, not-for-profit corporation] . . . be an owner of its office space rather than a tenant.”²³⁴ Finally, the court found that the only beneficiary of the third purported public use, providing affordable housing, would be the private developer that was developing a project on the village’s waterfront.²³⁵ The developer’s right to develop the waterfront had been conditioned on providing eighty-five affordable housing units in scattered sites throughout the Village.²³⁶ While the taking of this building would enable the developer to provide sixteen units that would count toward his obligation at a very low cost, the overall impact of the taking if the condemnation went forward was that the Village would end up with fewer affordable housing units.²³⁷ The reason was that the condemnee already had proposed to construct affordable housing units in the building, and, absent condemnation, these units would not be counted toward the waterfront developer’s total.²³⁸ Thus, the enunciated public purposes were all nonexistent.²³⁹ The *sole* beneficiaries would be the not-for-profit corporation and the developer.²⁴⁰

The Supreme Court of Hawaii examined the issue of pretext under Hawaii’s constitution in *County of Hawai’i v. C & J Coupe*

232. *Id.* at 240–41. The condemnee was already leasing part of the building to a dentist who was to extend his lease the day following the public hearing; the government failed to show that the private not-for-profit organization to which title was to be transferred following condemnation “would be more likely or successful in delivering a health center to the site” or “would attract broader or higher quality health care services than would [the condemnee].” *Id.*

233. *Id.* at 241.

234. *Id.*

235. *Id.* at 241–42.

236. *Id.* at 229.

237. *Id.* at 241–42.

238. *Id.* at 243.

239. *Id.*

240. *Id.*

Family Ltd P'ship.²⁴¹ It remanded the case, which involved a taking for a public road, for an express determination of whether the government's asserted public purpose for the taking was pretextual.²⁴² In that case, a developer sought to develop a 1,550 acre parcel.²⁴³ However, existing zoning did not allow the developer's planned project.²⁴⁴ In exchange for granting rezoning of its land, the developer agreed to construct, at the developer's expense, a road accessing the development from the existing road infrastructure.²⁴⁵ According to government, the road was needed to "alleviat[e] unacceptable and unsafe traffic conditions."²⁴⁶ The condemnee landowner challenging the taking claimed that although his land would be titled in the government and used for a classic public use—a road—the taking was nonetheless pretextual because the public benefit was merely incidental to the private benefit to the developer.²⁴⁷

The court used the same highly deferential standard as in federal precedent, yet, in *Coupe*, the court emphatically rejected the dissent's propositions that would have disallowed "all pretext arguments where the government's stated public purpose is a 'classic' use, such as a road, and . . . confined [pretext arguments] to cases where the condemnation was for economic development."²⁴⁸ In reaching its conclusion and rejecting the position of the dissent,²⁴⁹ the majority in *Coupe* relied upon the majority in *Kelo*, stating, "Plainly it was not the intention of this court . . . or of the Supreme Court in *Kelo* to foreclose the possibility of pretext arguments merely because the stated purpose is a 'classic' one,"²⁵⁰ and "[t]here is no indication [in *Kelo* that the pretext defense to takings] is limited to economic development takings such as in *Kelo*."²⁵¹

241. 198 P.3d 615 (Haw. 2008). The summary of *C&J Coupe* and the language employed closely parallels my discussion in Carol Zeiner, *Eminent Domain Wolves in Sheep's Clothing: Private Benefit Masquerading as Classic Public Use*, *supra* note 25.

242. *C&J Coupe*, 198 P.3d at 620.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 622–23.

248. *Id.* at 647 (internal citations omitted).

249. *See id.* at 654. The dissent also seemed to be arguing for a *Twombly*-like pleading standard.

250. *Id.* at 647.

251. *Id.* The court went on to explain how such a distinction would conflict with the opinion of the majority in *Kelo*. *Id.* at 657–58.

The court concluded that the definition of pretext was “whether [the condemnation] provided a *predominantly* private benefit to [the developer]”²⁵² Therefore, like *Franco*, and unlike *Goldstein*, the Supreme Court of Hawaii recognizes a pretext defense where there is *some* public purpose which is not the predominant motivating purpose. Private benefit need not be the *sole* purpose of a taking before a pretext challenge will be allowed under the Hawaii constitution. Moreover, *Coupe* recognized that the beneficiary of a pretextual taking can be a party other than the transferee of land and pretext is not eliminated simply because a classic public use is present or the land will be titled in government.

These few cases illustrate the lack of conformity among the courts on the definition of pretext, the variety of contexts in which pretext can arise, and the broad disagreement on the elements of a pretext challenge. In addition, courts and commentators have differed on the extent to which the presence of a comprehensive plan protects against pretext.²⁵³ Three states have enacted statutory prohibitions on pretextual takings subsequent to *Kelo*²⁵⁴: Idaho,²⁵⁵ Michigan,²⁵⁶ and Texas.²⁵⁷ Interestingly, none of these statutes, or the earlier Georgia statute,²⁵⁸ provides a definition of pretext, elaborates on the elements of a pretext challenge, or contributes to the development of an analytic framework.

Pretext challenges to takings did not originate with *Kelo*. Such challenges had been recognized in the law of various states for a

252. *Id.* at 647.

253. This factor seemed very important to the majority in *Kelo*.

254. GA. CONST. art. I, § 3 (1983); GA. CODE ANN. § 22-1-3 (2009).

255. IDAHO CODE ANN. § 7-701A(2)(a) (2009):

Eminent domain shall not be used to acquire private property:

For any alleged public use which is merely a *pretext* for the transfer of the condemned property or any interest in that property to a private party

The rationale for condemnation by the governmental entity proposing to condemn property shall be freely reviewable in the course of judicial proceedings involving exercise of the power of eminent domain.

(emphasis added).

256. MICH. COMP. LAWS § 213.23 Sec. 3 (6) (2006) (“A taking of private property for public use, as allowed under this section, does not include a taking for a public use that is a *pretext* to confer a private benefit on a known or unknown private entity . . . [except for certain drain projects by a drainage district.]”) (emphasis added).

257. TEX. CODE ANN. § 2206.001(b)(2)(a) (2006) (“A governmental or private entity may not take private property through the use of eminent domain if the taking: . . . is for a public use that is merely a pretext to confer a private benefit on a particular private party.”).

258. GA. CODE ANN. § 22-1-3 (2009).

number of years.²⁵⁹ The court in *Goldstein* asserted that pre-*Kelo* state pretext cases were cases in which there was no public purpose at all.²⁶⁰ In my view this is an overstatement. Pre-*Kelo* state cases on pretext seem to include both those in which the public purpose stated by government was a mask for a purely private benefit, and those in which the public would receive some actual benefit; thus, there was *some* valid public purpose, but that purpose was merely incidental to the private benefit that was the actual driving force behind the taking.²⁶¹ Pre-*Kelo* pretext cases typically were deciding matters of state law, and the analysis quite naturally varied among the states. Once *Kelo* recognized pretext as a possible basis for challenges to eminent domain under the Fifth Amendment, definitional inadequacy became problematic, generating need for a coherent definition of pretext takings and a comprehensive analytic framework.

259. In addition, some cases decided in the states on grounds other than pretext which do not even mention the word “pretext” could have been decided based on pretext. One example is the 1975 Florida Supreme Court case, *Baycol, Inc. v. Downtown Development Authority*, 315 So.2d 451 (Fla. 1975), which is cited as stating that economic development takings are banned in Florida. Somin, *supra* note 50, at 186 n.7. In that case, several blocks of downtown Ft. Lauderdale were to be condemned for a parking garage. (The project was to be based on a plan originally prepared by the internationally acclaimed architect Victor Gruen, who is known to first year law students as the donor of a future interest in a painting in the case of *Gruen v. Gruen*, 104 A.D.2d 171 (N.Y. App. Div. 1984).) One of the landowners challenged the taking on public use grounds. The Florida Supreme Court noted that although a public parking garage is a public use and the garage was intended to be available to members of the public generally, in this instance there was no need for the garage but for the needs of the shopping center that was to be constructed over the garage.

260. *Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008). These cases appear to be used as justification for *Goldstein*'s conclusion that the presence of any classic public use eliminates the possibility of a pretext claim.

261. See, e.g., *SW Ill. Dev. Auth. v. Nat'l City Envtl., LLC*, 199 Ill. 2d 225 (Ill. 2002). Reducing unsafe traffic back-ups onto the interstate and congestion on surface roads approaching the enormously popular Gateway motorsports track, and enhancing pedestrian safety, are valid public purposes. Thus, the public would receive some benefit—in fact these benefits were not merely conceivable, they were even likely to be achieved. However, these public benefits were merely incidental to the private benefit of enabling Gateway to provide the additional parking needed for its expanded seating at lower cost (thus increasing private profit more than if Gateway were to construct a parking garage on land it already owned). One can also make a “but for” argument. “But for” Gateway's profit-enhancing expansion of spectator seating, the problem of additional traffic congestion and more pedestrians would not have arisen, and thus the public purpose would not have been present. (This illustrates Justice O'Connor's point in her dissent in *Kelo* that public purpose and private benefit are typically mutually reinforcing in economic development projects.) *Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O'Connor, J., dissenting).

Definitional inadequacy has been noted in the scholarly literature,²⁶² and a limited amount of scholarly work has been undertaken to address the lack of a comprehensive analytic framework for pretext takings.²⁶³ Student Daniel Hafetz suggests a more robust version of process scrutiny.²⁶⁴ And in *Pretextual Takings*,²⁶⁵ Professor Kelly suggests another possible analytic framework.²⁶⁶ Professor Kelly notes, as I do, that thus far courts have employed a variety of analytic frameworks,²⁶⁷ and suggests that the current test based on *Kelo* is inadequate.²⁶⁸ I would not go so far as to say that there is a single “current test.” Rather, the courts have adopted a variety of competing tests, none of which have been developed completely. The result is uncertainty for lower courts and litigants,²⁶⁹ but even more importantly, lack of guidance for landowners, government, and the business sector as they plan their affairs.²⁷⁰ Professor Kelly and I agree that “a failure to develop a

262. See, e.g., Ely, *supra* note 33, at 12.

263. A great deal of writing has examined the analytical framework for eminent domain in general and economic development takings in particular.

264. Daniel S. Hafetz, Note, *Ferretting Out Favoritism: Bringing Pretext Claims After Kelo*, 77 FORDHAM L. REV. 3095, 3095 (2009). Since the political process has often been co-opted in a pretext situation, I am not convinced that scrutiny of more process, which also can be manipulated, is the answer.

265. Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REP. 173, 175 (2009).

266. See *id.* Professor Kelly uses a matrix to identify whether and the point at which private involvement becomes necessary: site identification, or development/operation/ownership. He then uses a burden shifting test to analyze pretext. While it is an admirable start on a perplexing problem, I believe that further dialectic and additional models are needed because Professor Kelly’s model is inadequate to address some serious varieties of pretext, for example those in which private benefit is derived from takings for a “classic” public use and the land is titled in government. Zeiner, *supra* note 25.

267. Kelly, *supra* note 266, at 175.

268. Kelly, *supra* note 266, at 182.

269. Kelly, *supra* note 266, at 175. Kelly notes that “a more robust legislative response may have been warranted.” *Id.*

270. In my view, the problem ultimately is rooted in a much deeper core issue, well beyond the scope of this article. The fact of the matter is that that “neither property rights nor government powers have been fully defined.” Steven J. Eagle, *Reflections on Private Property, Planning, and State Power*, 61 PLAN. & ENVTL. LAW 3, 3 (Jan 2009). What level of esteem is to be accorded to private rights in the United States constitutional system? Is the ownership of property a fundamental right? A civil right? Is property simply another fungible medium of exchange, like money? Although resolution of that fundamental issue is nowhere in sight, the debate underlies questions with such far reaching implications as the level of scrutiny to be afforded to property issues under the Constitution, and infiltrates the entirety of eminent domain, including topics such as pretextual takings, economic development takings, and regulatory takings. The debate underlies the dissenting opinions versus the majority

coherent jurisprudence of pretext could result in excessive judicial deference or excessive judicial discretion”²⁷¹ While Professor Kelly’s express concern is that either of these outcomes could “exacerbate the public’s reaction against *Kelo*,”²⁷² my concerns are in part similar—that a pattern of excessive judicial deference could lead to abuse of eminent domain beyond that which was reported in the wake of *Kelo*²⁷³—and in part different—that “excessive judicial discretion” is another way of saying “too much subjectivity” to the extent that decisions could vary tremendously from judge to judge, which is unacceptable when discussing a federal constitutional standard.

Standing alone, without the influence of *Twombly* or *Iqbal*, pretext challenges are problematic. Nevertheless, I believe that, over time, the concepts could be reformed and refined, and an appropriate analytic process could be developed. The picture is greatly complicated now that *Twombly* and *Iqbal* have entered the scene.

B. “Plausibility” and “Conclusory Allegations” Under *Twombly-Iqbal*

Just as “pretextual takings” suffers from definitional inadequacy and wide disagreement, a similar problem arises with respect to the terms “plausible” and “conclusory allegations” as a result of *Twombly* and *Iqbal*. Since these two cases now work in tandem for the reinterpreted pleading standards, I will combine them into one, “*Twombly-Iqbal*,” for purposes of analysis.

In an essay, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*,²⁷⁴ written prior to the Supreme Court’s decision in *Iqbal*, Federal District Judge Colleen McMahon²⁷⁵ reported that the Supreme Court’s decision in *Twombly* had unintentionally “throw[n the federal district courts] into disarray.”²⁷⁶ She noted that “in the first six months after [*Twombly*]

opinion in *Kelo*. One barely needs to scratch the surface to see that it had a role in the public reaction to *Kelo* and inspires the property rights movement.

271. Kelly, *supra* note 266, at 176.

272. Kelly, *supra* note 266, at 177.

273. See DANA BERLINER, OPENING THE FLOODGATES: EMINENT DOMAIN ABUSE IN THE POST-KELO WORLD 2–19 (2006).

274. McMahon, *supra* note 14 (written for a lecture that was presented at Suffolk University School of Law on November 8, 2007).

275. Judge, U.S. District Court for the Southern District of New York.

276. McMahon, *supra* note 14, at 858.

was handed down, it was cited in more than 2000 district court opinions and 150 circuit court opinions,”²⁷⁷ and that given the case’s “seismic impact,”²⁷⁸ “it is particularly unfortunate that no one quite understands what the case holds.”²⁷⁹ Pre-*Iqbal* commentators’ analyses of the standard enunciated in *Twombly* are illustrative of the confusion spawned by the Court’s decision. Professor Spencer decisively stated that the Supreme Court had adopted a stricter standard, dealing what he termed to be a probable “death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers” and predicted that plaintiffs with valid claims would be frustrated in their attempts to enter federal courts.²⁸⁰ After discussing the Supreme Court’s affirmation that heightened pleading standards not be imposed in *Swierkiewicz v. Sorema*²⁸¹ in 2002, Spencer depicted *Twombly* as calling into question the validity of *Swierkiewicz*.²⁸²

277. *Id.* at 852.

278. *Id.*

279. *Id.* Compare Scott Dodson, *Pleading Standards After Bell Atlantic v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 135 (2007), available at <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (“The best reading of *Bell Atlantic* is that the new standard is absolute, that mere notice pleading is dead for all cases and causes of action.”), and A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431–32 (Mar. 2008) (“Notice pleading is dead. Say hello to plausibility pleading. In a startling move by the U.S. Supreme Court, the seventy-year-old liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) in favor of a stricter standard requiring the pleading of facts painting a ‘plausible’ picture of liability.”), with Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. COLLOQUY 117, 122 (Nov. 19, 2007) (“It is a misreading of *Twombly* to extend ‘plausibility’ beyond [its] context [W]e must read *Twombly* in the context of antitrust law [I]t does not provide a rule for other kinds of cases.”), and Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 632 (Sept. 7, 2006) (“It should be evident . . . the decision in *Bell Atlantic* was narrow. From a pleading perspective, one could say that the general rules of simplified pleading as envisioned by [s]ubstantive [s]ufficiency were applied to the specific context of a § 1 Sherman Act claim premised on parallel conduct.”).

280. Spencer, *supra* note 279, at 433.

281. *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002). *Swierkiewicz* involved an employment discrimination claim under Title VII of the Civil Rights Act and Age Discrimination in Employment Act. *Id.* at 509. The trial court had dismissed the complaint for a failure to plead a prima facie case of employment discrimination. *Id.* The Second Circuit affirmed the trial court’s dismissal as in accord with Second Circuit precedent requiring plaintiffs to plead a prima facie case under the McDonnell Douglas standard. *Id.* At the time the Supreme Court granted review there was a split among the circuits as to whether a complaint alleging employment discrimination under the Civil Rights act must plead a prima facie case to be adequate. *See id.* at 509 and n.2. The Supreme Court characterized the requirement as a heightened pleading standard that was inconsistent with Rule 8(a)(2). *Id.* at

In stark contrast, Professor Ides described the plausibility standard as nothing new, stating that, as always, it is the substantive law underlying the claim that determines what makes a complaint “substantively sufficient.”²⁸³ He dispelled any suggestion that the pleading standards had been heightened, relying on the Supreme Court’s citation to *Swierkiewicz v. Sorema*. Professor Ides explained that, in *Swierkiewicz*, the Court “reversed a lower court decision that required the plaintiff to ‘allege ‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to relief’ . . . [T]he [*Twombly*] plaintiffs failed to plead facts necessary to state a claim on which relief could be granted.”²⁸⁴

While post-*Iqbal* we now know the *types* of cases to which *Twombly* applies, much of the rest of the confusion continues to abound and confound. Many of these problems are now exacerbated because *Twombly* applies so broadly.

With respect to the *Twombly* aspect of the current dilemma, Judge McMahon pointed out that “the Supreme Court did not include a definition of ‘plausible’ . . . [and] the definition of plausibility is far from self evident.”²⁸⁵ “[P]lausible’ falls [somewhere] between ‘conceivable’ and ‘probabable[,]’ . . . [and] deciding what constitutes ‘enough facts’ to render a claim plausible on its face is an inherently subjective endeavor.”²⁸⁶ “As both district court and appellate court judges try to parse the meaning of a few key phrases . . . the pleading standard . . . is being fragmented on a circuit-by-circuit—or

512. The Court stated, “Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case.” *Id.* Reminding the lower courts of the distinction between Rule 8(a) and Rule 9(b) the Court explained: “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.” *Id.* at 513.

282. See Spencer, *supra* note 279, at 476.

283. Ides, *supra* note 279, at 632.

284. *Id.* Indeed, in *Swierkiewicz* the Court had taken time to explain that the burden shifting standard established in *McDonnell Douglas* was but one way in which a plaintiff claiming employment discrimination could seek to establish his claim. *Swierkiewicz*, 534 U.S. at 510–13. However, because direct evidence of employment discrimination would not necessitate use of the burden shifting framework it was improper to use it as a measure by which to gauge the sufficiency of pleadings. Thus, Ides compared the substantive requirements of the causes of action in *Swierkiewicz* and *Twombly* to distinguish the outcome and reconcile the Court’s decisions in *Twombly* and *Swierkiewicz*.

285. McMahon, *supra* note 14, at 864.

286. *Id.*

sometimes a judge-by-judge—basis.”²⁸⁷ Judge McMahon characterized *Twombly* as a “vague, confusing, and inherently contradictory opinion.”²⁸⁸

While some of the confusion may have been alleviated by *Iqbal*’s statement of the types of cases to which the *Twombly* standard applies, the plausibility standard itself, undefined by the Court, remains vague, confusing, inherently contradictory, and ultimately subjective. In my view, plausibility will not only vary among causes of action, but the additional factual matter to “nudge” a complaint from *Conley*’s “conceivable” to *Twombly-Iqbal*’s “plausible” will vary based on the particular circumstances of a case. Along this line, the Supreme Court in *Iqbal* made a statement that is puzzling. The Court said, “[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.”²⁸⁹ Is the Court admitting to the subjectivity of “plausibility”? Inviting subjectivity? Or is it saying something about judicial experience that lends itself to misinterpretation? Combining all the possibilities together, plausibility could vary circuit by circuit, judge by judge, cause of action by cause of action, and situation by situation. Unless clarified or changed by the Court itself, by federal legislation, or through the rules amendment process,²⁹⁰ I believe the term “plausibility” will remain confusing for a long time. Such a potentially chaotic situation is not desirable.

Therefore, although her essay was written pre-*Iqbal*, Judge McMahon’s concerns remain highly relevant, particularly her assertion that “[t]he standard for pleading a claim must be clear and it must be the same for everyone. . . . [It] should not be complicated or cumbersome to apply.”²⁹¹ She noted that

different courts will inevitably exhibit different levels of tolerance for complaints that do not include a plethora of detailed factual allegations. As a result, it may be easier for a plaintiff to survive a

287. *Id.* at 852–53. It appears that Judge McMahon made these statements with respect to both the problem of determining the types of cases to which *Twombly* applies and deciphering the altered pleading standards necessary to survive a motion to dismiss under Rule 12(b)(6). The latter concern remains post-*Iqbal*.

288. *Id.* at 869.

289. *Aschcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009) (citing *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007)).

290. *See* 28 U.S.C. §§ 2071–2074 (2009).

291. McMahon, *supra* note 14, at 869–70.

motion to dismiss in one court than another. This undermines the uniformity that underlies our federal judicial system. . . .²⁹²

Judge McMahon also noted that “there are claims where important factual information is particularly within the control of the defendant. This makes it harder for the plaintiff to allege enough facts to meet the plausibility standard.”²⁹³ Scott Dodson makes a similar point in *Pleading Standards After Bell Atlantic Corp. v. Twombly*.²⁹⁴ He points out that

[s]afeguarding defendants from meritless strike suits is all fine and good. But using fact pleading standards to do so is problematic. Antitrust plaintiffs often do not possess evidence of an agreement to conspire, and requiring such evidence prior to discovery may prevent them from ever having it. It may be that *Twombly* did not allege more facts because he simply did not have them yet, not because they did not exist. This “information asymmetry” as Professor Randy Picker calls it, undermines the Court’s suspicions that the pleading standard only will bar cases that have no “reasonably founded hope” of “reveal[ing] relevant evidence” in discovery. On the contrary, the Court’s standard is likely to bar many antitrust cases (and mass tort, discrimination and a host of other cases) *with merit*.²⁹⁵

Pretext challenges to takings under eminent domain are among that “host of other cases.”

Not only did *Iqbal* establish that the plausibility standard applies to all pleadings governed by the Federal Rules of Civil Procedure, *Iqbal*’s enunciation of the two-pronged test focused further attention on the distinction between sufficiently factual allegations and conclusory allegations. The majority in *Iqbal* would have us believe that it was merely enunciating more clearly a standard that had been established in *Twombly*. The dissenting Justices in *Iqbal*, including Justices Souter and Breyer, who joined the *Twombly* dissenters Justices Stevens and Ginsburg, found it to be an inappropriate expansion of *Twombly*. Whether *Iqbal* actually is a wholesale expansion of *Twombly* or merely highlights a point about conclusory allegations mentioned in *Twombly* is a fascinating debate, but is

292. *Id.* at 867.

293. *Id.*

294. See Dodson, *supra* note 279.

295. *Id.* at 138–39 (citing Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2007/05/closing_the_doo.html (May 21, 2007, 16:45 EST), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

largely unimportant for concerns about pretext challenges to eminent domain. Regardless of whether the conclusory allegation interpretation arose in *Iqbal*, or arose in *Twombly* but was not fully-enunciated until *Iqbal*,²⁹⁶ the end result is the same: conclusory allegations with “insufficient” factual matter are to be excluded from the complaint for purposes of determining plausibility when a court decides whether a complaint is sufficient to survive a motion to dismiss under Rule 12(b)(6).

The situation is further exacerbated by the intrinsic difficulty in determining which allegations of a complaint are too conclusory versus those that allege sufficient factual matter to make it past prong-one into the prong-two test of plausibility. The decision of what is impermissibly conclusory is not at all clear; even the Supreme Court is sharply divided, as evidenced by its 5–4 division in *Iqbal*, based on, *inter alia*, this very point. Moreover, it harkens back to the hyper-technical distinctions that typified code pleading in which cases were decided on the fine points of pleading rules, rather than on the merits.²⁹⁷ This standard supposedly was eschewed when code pleading was abandoned in favor of notice pleading, which was embraced by the Federal Rules of Civil Procedure.²⁹⁸ At least one commentator noted over a decade ago that fact pleading and the older technical distinctions had not totally disappeared and were re-infiltrating notice pleading.²⁹⁹ *Twombly-Iqbal* seems to confirm his point.

Significantly, the decision of what is unduly conclusory or sufficiently factual is an inherently subjective decision. Thus, just as Judge McMahon noted as to the plausibility standard, the pleading standard as to what allegations are impermissibly conclusory is likely to be “fragmented on a circuit-by-circuit—or sometimes a judge-by-judge—basis.”³⁰⁰ This is hardly desirable for pretext challenges

296. This latter explanation would mean that even Justices Souter and Breyer did not fully understand what was being accomplished through their opinion in *Twombly*. This is highly unlikely because Justice Souter authored the majority opinion in *Twombly*.

297. See *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1960–61 (2009) (Souter, J., dissenting) (implicating *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 573–76 (2007) (Stevens, J., dissenting)).

298. *Id.*

299. Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 435 (1986).

300. McMahon, *supra* note 14, at 852–53.

under the Takings Clause that bear upon a constitutional right contained in the Bill of Rights.³⁰¹

Both *Twombly* and *Iqbal* examined situations in which the defendants' conduct could have been legal behavior, or could have been illegal. It all depended on the facts that would have been discovered and placed in evidence, had the cases proceeded that far. According to *Twombly* and *Iqbal*, ambiguous pleadings that are consistent with both legal and illegal conduct, but are more likely to be explained by legal conduct *in the judgment of a court*, do not cross the threshold of plausibility.³⁰² The implementation of the foregoing sentence and those italicized words could prove critical for many would-be pretext challenges. Thus, I am of the opinion that *Twombly-Iqbal* often will be decisive in determining whether a landowner's pretext challenge can go forward.

C. When Kelo Meets Twombly-Iqbal

Kelo expanded the interpretation of public use to the extent that it further weakened an already enervated Public Use Clause.³⁰³ It produced Justice O'Connor's famous statement, "Any property may now be taken,"³⁰⁴ and enraged the public. Nevertheless, by recognizing pretext challenges, *Kelo* opened a small window of hope in the Fifth Amendment for condemnees. That "window" was extremely difficult to access because of the great deference accorded legislative pronouncements of public purpose. Moreover, as previously discussed, "pretext" was left undefined.³⁰⁵ Cases utilizing the pretext theory proliferated,³⁰⁶ and early on one court mused that it "may now represent a growth industry for litigation over . . . purported public uses . . ."³⁰⁷

When *Kelo* meets *Twombly-Iqbal*, there will be an interaction of substantive law and procedure in which the procedural rules will likely overwhelm the substantive and control the outcome of controversies to the extent that substantive legal rights are likely to be

301. A similar situation arises as to civil rights cases, and is evident with respect to Mr. Iqbal's *Bivens* claim in *Iqbal*. See Hatamyar, *supra* note 133.

302. *Iqbal*, 129 S. Ct. at 1950 (citing *Twombly*, 550 U.S. at 567).

303. See *DANA & MERRILL* *supra* note 25, at 191.

304. *Kelo v. City of New London*, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting).

305. See discussion *supra* Part III.A.

306. Boulris & Lopez, *supra* note 158, at 1.

307. 49 WB, LLC v. Village of Haverstraw, 44 A.D.3d 226, 228 (N.Y. App. Div. 2007).

abridged substantially. *Twombly-Iqbal* will likely close the window of hope for many condemnees who otherwise would be able to challenge takings as pretextual under federal constitutional law.³⁰⁸

Even without *Twombly-Iqbal* the bar is set very high for the landowner asserting a pretext challenge. As described above,³⁰⁹ in order to know what to plead, the condemnee must fathom the likely components of an as-yet not comprehensively-defined challenge. Then, in order to prevail, the condemnee landowner must prove “pretext,” whatever that means in the particular jurisdiction—or whatever the court believes it to mean if there is no controlling precedent.³¹⁰ This must be accomplished in face of the great deference, which is “well-nigh conclusive,” accorded to the legislature’s announced public purpose. Discovery is likely to be crucial because government is unlikely to acknowledge that it is acting for an impermissible purpose.³¹¹ Nor is government likely to reveal enough details from which one can reasonably reach the conclusion of pretextual purpose unless compelled to do so. In many, if not all circumstances, the crucial facts are likely to be in the possession of government or the favored private party, neither of which is likely to release them. Public records laws do not in most instances apply to private entities.³¹² It is likely that a landowner will not have the critical evidence needed to prevail in his claim and

308. In his note Daniel Hafetz wrote, “[f]or those who believed that pretext claims were the last best hope in challenging a taking in federal court in the wake of *Kelo*, the Second Circuit’s decision in *Goldstein v Pataki* may prove otherwise.” Hafetz, *supra* note 264, at 3097 (footnotes omitted). Mr. Hafetz’s note was written post-*Twombly* and pre-*Iqbal*. As discussed above at notes 219–225 and accompanying text, I believe that *Goldstein* proved debilitating to pretext challenges in the Second Circuit, and in other jurisdictions where that highly regarded circuit is influential, more because of that court’s analytic model and definition of pretext than because of *Twombly*—even though insufficiency under *Twombly* was stated as the court’s reason for dismissing the complaint. Nevertheless, Mr. Hafetz was on the right track. He noted that “a narrow plausibility . . . standard . . . raises serious questions as to the viability of any future pretext claims.” Hafetz, *supra* note 264, at 3098. His description of the fading “last best hope” came to fruition when the Supreme Court decided *Iqbal*. *Id.* at 3097.

309. See discussion *supra* Part III.A.

310. Some of the possibilities: private benefit is the sole purpose; there is some public purpose but the actual motivation is private benefit; the public benefit is only incidental to the private benefit; private benefit is the primary motivating factor; private benefit is a substantial motivating factor; pretext is available only if the sole public purpose for the project is economic development. There are, of course, other possibilities.

311. *Franco v. Nat’l Capital Revitalization Corp.*, 930 A.2d 160, 169 (D.C. 2007).

312. In addition, public records laws vary among the states as to their comprehensiveness.

successfully protect his constitutional rights until judicially authorized discovery has been completed.

The introduction of *Twombly-Iqbal* into this situation is likely to present an insuperable hurdle for condemnees. The aggrieved landowner now must plead sufficient factual detail to survive elimination on the pleadings at steps one and two of the *Twombly-Iqbal* test in order to reach the plausibility threshold for discovery. As predicted by Scott Dodson in another context, without discovery claimants may not yet have the facts necessary to accomplish the task—even if their case has merit.³¹³ In the context of pretextual challenges to eminent domain, sufficient factual detail may not be available prior to discovery, absent aggressive investigative reporting by the media or the “stupid staffer” mentioned by Justice O’Connor.³¹⁴ Therefore, it is very possible that *Twombly-Iqbal* will impose an insurmountable procedural problem that will leave many landowners without a remedy for legitimate constitutional claims. While this “problem” may not be life-threatening, it could be freedom-threatening.

It appears that *Twombly-Iqbal* will create a procedural roadblock that will prevent landowners from staying in court to obtain the discovery needed to prove that government takings overly amenable to well-connected, politically influential private parties were actually undertaken to bestow private benefit. This outcome threatens the constitutional rights of landowners.³¹⁵ Obviously, a procedural rule that prevents citizens from vindicating their constitutional rights is inappropriate. Yet, as soon as *Kelo* meets *Twombly-Iqbal*, this is the problem that will exist on the federal level. The question presents itself: in jurisdictions that have no limits beyond the federal

313. Dodson, *supra* note 279, at 138.

314. *Kelo v. City of New London*, 545 U.S. 469, 502 (2005) (O’Connor, J., dissenting). In this instance, the “stupid staffer” is the employee who provides information consisting of facts necessary to establish pretext by “talking too much” or producing documents when not compelled by law to do so, rather than “towing the mark” to abide by the process carefully designed by government to bury such damaging information and prevent a successful pretext challenge.

315. There is a positive side to *Twombly-Iqbal* as well: quickly ending meritless claims of any type that would deplete the resources of defendants and the courts and which can be used by rent-seeking plaintiffs to virtually extort a settlement from defendants merely to avoid the greater expense and distraction that accompanies litigation discovery and pre-trial preparation. Unfortunately, as expressed by Professor Dodson, the procedure is overly broad as it prevents claims *with merit* in situations in which the evidence is in the hands of the defendant. Pretext challenges to eminent domain in which government will not voluntarily admit to improper purposes is one such area. Dodson, *supra* note 279, at 138.

constitution, will we see even more aggressive use of eminent domain by government and developers?

In addition, when *Kelo* meets *Twombly-Iqbal*, theoretical questions arise that present a fascinating conundrum. To begin with, we have a convergence of the impenetrable and the undefined. It can be described more particularly as follows.

First, we must identify and eliminate “conclusory allegations.” However, in some situations, the distinction between the sufficiently factual and the impermissibly conclusory allegation can be so overly technical or highly debatable as to be impenetrable (as evidenced by a nearly deadlocked Supreme Court in *Iqbal*). Next, we must use the undefined “plausible” to evaluate the sufficiency under Rule 12(b)(6) of yet another undefined term, “pretext,” as used in the context of a claim, “pretextual taking,” that, as yet, does not have fully defined elements and lacks a comprehensive analytic framework. Moreover, as stated in Part III.B., “plausibility” and “conclusory allegations” are inherently subjective terms. Thus, we have a fascinating convergence of so many subjective or indecipherable standards and undefined terms that the result is highly problematic, even if the need for facts did not precede the ability to get those facts through discovery.

Beyond the subjective and indeterminate “conclusory allegation” and “plausibility” definitional problems, an additional question that is particular to pretextual takings cases remains unresolved as to “plausibility.” It is the role that deference to legislative pronouncements of public purpose will play in the determination of “plausibility.”³¹⁶ In both *Twombly* and *Iqbal*, there were situations in which the defendants could have been engaged in legal conduct or illegal conduct. The Court decided to move away from the “no set of facts” interpretation of *Conley*, under which it is at least arguable that the complaints could have withstood the defendants’ motions to dismiss under Rule 12(b)(6), and, instead, chose to be guided by “plausibility.” As stated in Part III.B., both *Twombly* and *Iqbal* directed that pleadings that are consistent with both legal and illegal conduct, but are more likely to be explained by legal conduct in the judgment of a court, do not cross the threshold of plausibility.³¹⁷

316. Such a theoretical problem does not arise in the average tort or contracts case. Although I have not given any consideration to the issue, it might be possible that a somewhat similar problem can arise in causes of action that employ shifting burdens of proof.

317. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

Turning to cases involving pretext challenges to eminent domain, it will be very rare that government does not enunciate a public purpose for a project involving eminent domain.³¹⁸ Typically, government will provide a public purpose that ostensibly justifies the project. Clearly, the landowner who brings a pretext challenge is convinced that the stated public purpose masks the actual private purpose for the taking. Thus, there will be a situation, not unlike the situations in *Twombly* and *Iqbal*, in which government may be engaged in legal conduct—the enunciated public purpose—or may be engaged in illegal, unconstitutional conduct—a taking for private benefit. How will courts apply the instruction that pleadings that are consistent with both legal and illegal conduct, but are more likely to be explained by legal conduct in the judgment of a court, do not cross the threshold of plausibility?³¹⁹ The question remains insufficiently answered as to whether the great deference to be given the government’s assertions of public purpose in takings cases could *automatically* subject the pleadings to a determination that they are “more likely to be explained by legal conduct in the judgment of a court.”

Goldstein, which dismissed a pretext complaint for legal insufficiency under Rule 12(b)(6) based on its understanding of *Twombly*,³²⁰ states that “the issue of pretext must be understood in light of . . . the ‘longstanding policy of deference to legislative judgments [of public purpose].’”³²¹ In my view, and in the context in which it is used, this sentence refers to the idea that deference is used with regard to the substantive issue of pretext challenges. The reference has nothing to do with the plausibility determination under *Twombly*. This conclusion is further supported by the court’s recitation that “[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual.”³²² Student Daniel Hafetz remarks in his Note, “[D]eference . . . constrains courts’ review of pretext claims.”³²³ Someone might mistake that to mean

318. Although rare, it’s not impossible. See *Mayor and City Council of Baltimore City v. Valsamaki*, 916 A.2d 324, 334 (Md. 2007).

319. *Iqbal*, 129 S.Ct. at 1950 (citing *Twombly*, 550 U.S. at 567).

320. But see discussion *supra* Part III.A.; see also *infra* text accompanying notes 331–32 (arguing that *Goldstein* would have had the same outcome under *Conley* and that the case actually turned on the court’s definition of “pretext”).

321. *Goldstein v. Pataki*, 516 F.3d 50, 61 (2d Cir. 2008) (quoting *Kelo v. City of New London*, 545 U.S. 469, 480 (2005)).

322. *Id.* (quoting *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001)).

323. Hafetz, *supra* note 264, at 3103 n.58.

that everything having to do with a pretext challenge, including the determination of plausibility—a topic also discussed separately in the Note—should be “constrained” by judicial deference. I doubt that this is what Mr. Hafetz meant, but the possibility of such an interpretation exists.

I am aware of no decisions or predictions on the question of whether judicial deference to government pronouncements of public purpose will play a role in judicial determinations of plausibility. However, the possibility is both intriguing and of concern. If a taking is pretextual, that determination is not made until trial; until a proclaimed purpose is found to be pretextual it is entitled to deference. Thus at the time pleadings come before the court for a determination of plausibility due to a motion to dismiss under Rule 12(b)(6), the government’s announced public purpose will be cloaked in great deference. However, that deference is *for purposes of the substantive pretext claim*. Hopefully, courts will not confuse deference for one purpose, the substantive claim of pretext, with deference for another, the determination that government purpose in a taking is more likely legal than illegal. The question gets a bit more complicated when we take into account that courts are to use their “judicial experience and common sense”³²⁴ in deciding whether an ambiguous situation is more likely to be explained by legal conduct, in the judgment of a court. Does common sense not indicate that, after *Kelo*, pronouncement of almost *any* conceivable public purpose is sufficient to support a taking, absent pretext? How likely is it that government’s purported reason is cloaking an illegal purpose? Will some courts, unlike the court in *Franco*, be reluctant to question the *bona fides* of government’s assertion? Will the court’s judicial experience and common sense be even more in favor of government when a complaint alleges that although the public will receive *some* actual benefit, the *true* purpose is private gain? Will the outcome of the plausibility threshold be more slanted in government’s favor when the condemned land is to be titled in government or a party other than the alleged private beneficiary of the taking? When I look at the possibilities in this much detail I become concerned that deference could become confused with plausibility even though I am of the view that deference to the announced public purpose should play no role at the Rule 12(b)(6) plausibility stage of a case, and that instead,

324. *Iqbal*, 129 S.Ct. at 1950.

the truth of the “well-pleaded, non-conclusory allegations” should be assumed.

In further pursuing the question of what happens when *Kelo* meets *Twombly-Iqbal*, it should be noted that *Kelo* had already met *Twombly* at least twice before *Twombly*’s “life took on new meaning” from *Iqbal*. The results of the two meetings were diametrically different. In *Franco*, a pretext defense, with “pretext” broadly defined and with one analytic framework, was allowed to go forward on an interpretation of *Twombly* that “looked” for factual matter throughout the pleadings, including in defenses and counterclaims that had been stricken below.³²⁵ In *Goldstein*, a complaint based on pretext was dismissed for insufficiency under Rule 12(b)(6) based on a definition of pretext that was so narrow that the court did not really need to look to *Twombly* plausibility at all.³²⁶ In my view, *Goldstein* would have come out the same even under *Conley*’s “no set of facts” standard. The court’s definition of pretext and analytic regimen were so narrow—pretext challenges are not available when a “classic” public use is present in the project,³²⁷ and perhaps, pretext challenges are limited to takings that are solely based on a public purpose of economic development³²⁸ (which was not the sole stated public purpose for the Atlantic Yards project)—that it was not conceivable that the landowners could show that there was no classic public purpose. In fact, the landowners had conceded that the project included traditional public purposes. This case, in my view, ultimately was determined by the court’s definition of pretext, not by *Twombly*.

Because of the particularities involved, I find these cases not particularly predictive of what will happen when *Kelo* meets *Twombly-Iqbal*. How will a court that does not have as narrow a definition of pretext challenges as the Second Circuit apply the *Twombly-Iqbal* tests? The answer is unknown, but the outcome of such cases probably depends on whether or not the landowner has access to the necessary facts, rather than the underlying merits of the claim.

325. See discussion *supra* Part III.A.

326. See discussion *supra* Part III.A.

327. See discussion *supra* Part III.A.

328. Not everyone necessarily would agree that the case actually says this, but the dissent in *C & J Coupe* cites it for this proposition. *County of Haw. v. C & J Coupe Family Ltd. P’ship*, 198 P.3d 615, 660 (Haw. 2008) (Moon, C.J., dissenting).

It is reasonably clear from the court's opinion that the court in *Franco* looked at Mr. Franco's pleadings as an integrated whole, without the *Iqbal* two-pronged test. If the court in *Franco* had looked at the claims in isolation and with the focus on first eliminating "conclusory allegations" as emphasized in *Iqbal*, would the result in *Franco* have been the same or different? In *Franco*, the pretext claim arose as an affirmative defense. Should that make a difference? It does not seem that it ought to make a difference, but it is not entirely settled how, or whether, *Twombly-Iqbal* is to apply in a defensive context. If *Franco* is predictive, a pretext challenge used as a defense would be subject to the same plausibility standards under *Twombly-Iqbal* as when a pretext challenge is brought in a complaint. A recent order of the United States District Court for the District of Massachusetts "assumed, without deciding, . . . that a defendant has the same rule 8 obligations with respect to notice pleading as does a plaintiff," except that the designation of a "general" defense under Rule 8(c)(1),³²⁹ other than fraud, need not meet that standard in order to give a plaintiff sufficient notice.³³⁰

It is too early to know for sure what impact *Twombly-Iqbal* will have on pretext challenges, but I predict that the *Twombly-Iqbal* "reinterpretation" will prevent more pretext claims from going forward than the prior *Conley* test simply because the most telling facts are likely to be within the possession of the government condemnor or the favored private party, not the condemnee or the general public. But, we may never be able to gauge the accuracy of this prediction by simply counting the number of federal pretext challenges that are dismissed following *Twombly-Iqbal*, with those that were dismissed post-*Kelo* but pre-*Twombly*. The mere existence of the test may chill the filing of pretext claims. It is also possible that the mixed results that were obtained in pretext challenges post-*Kelo* but pre-*Twombly* could themselves discourage the filing of pretext challenges.

IV. WHAT IS A STATE (AND ITS EMINENT DOMAIN REFORMERS) TO DO? RECOMMENDATIONS

Now that *Conley*'s famous "no set of facts" language has been discredited by the Supreme Court, and new tests have been

329. FED. R. CIV. P. 8(c)(1).

330. Kaufmann v. Prudential Ins. Co. of America, No. 09-10239-RGS (D. Mass. Aug. 6, 2009) (order denying plaintiff's motion to strike affirmative defenses).

enunciated in the *Twombly-Iqbal* duo, states will be faced with the decision of whether and to what extent to abandon *Conley* and adopt *Twombly-Iqbal*.

The dual nature of our justice system gives rise to the quandary now faced by states that have adopted procedural rules modeled after the federal system. In 1938, Congress enacted the Federal Rules of Civil Procedure to govern all pleadings in federal courts.³³¹ Proponents behind the movement for a uniform federal procedure suggested that the rules would serve as a model for the states.³³² However, state adoption of the federal model was neither uniform nor comprehensive.³³³ Those states employing a procedural system akin to the federal system historically consider federal court decisions interpreting the federal rules to be persuasive.³³⁴ Student Z.W. Chen best illustrates the impact that the Supreme Court's abrogation of *Conley* has on these states:

Federal-state accord is perhaps greatest when it comes to Rules 8(a) and 12(b)(6)—which govern federal pleadings and the threshold at which these pleadings can be dismissed for failure to state a claim—and the adoption of *Conley*'s “no set of facts” language. All told, twenty-six states and the District of Columbia interpreted their pleading rules according to *Conley* at the time the Court decided *Twombly*.³³⁵

Alabama's Court of Civil Appeals faced head-on the question of whether Alabama courts should apply the standard announced in *Twombly*.³³⁶ Reaffirming Alabama's allegiance to *Conley*, the court stated, “To hold otherwise would be to require more factual specificity than is required under our supreme court's and this court's

331. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 SUFFOLK U. L. REV. 351, 351 (1987). Prior to the enactment of the Federal Rules of Civil Procedure, federal courts applied the procedural laws of the states in which they sat. *Id.* One objective behind the rules was to achieve uniformity within the federal system. *Id.*

332. Z.W. Julius Chen, Note, *Follow the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1436 (2008).

333. *Id.* at 1437–38.

334. *Id.* at 1439 and n.57; see, e.g., *Edwards v. Young*, 486 P.2d 181, 182 (Ariz. 1971) (“Because Arizona has substantially adopted the Federal Rules of Civil Procedure, we give great weight to the federal interpretations of the rules.”).

335. Chen, *supra* note 332, at 1439–40 (footnote omitted); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 578 (2007) (26 states and District of Columbia follow *Conley*).

336. *Crum v. Johns Manville, Inc.*, No. 2070869, 2009 WL 637260, at *13 n.2 (Ala. Civ. App. Mar. 13, 2009). The Alabama Supreme Court adopted the *Conley* standard in *Bowling v. Pow*, 301 So.2d 55, 63 (Ala. 1974).

interpretation of Rules 8 and 12(b)(6), Ala. R. Civ. P.”³³⁷ The court apparently felt that the standard announced in *Twombly* did not accord with Alabama’s notice-pleading system.³³⁸ Although the court’s decision was rendered prior to *Iqbal*, the court’s citation to a decision it rendered in 1987 militates against the proposition that Alabama courts will employ *Iqbal*’s reinvigorated distinction between facts and conclusions: “A fair reading and study of the Alabama Rules of Civil Procedure lead to the determination that pleading technicalities are now largely avoided and that the pleading of legal conclusions is not prohibited, as long as the requisite fair notice is provided thereby to the opponent.”³³⁹

States’ decisions of whether or not, and if so how, to modify state rules of procedure are typically more likely to be made on a transsubstantive basis, not dictated by their impact in one area of law. However, the likely impact of those changes on pretext challenges to eminent domain ought to be one of the factors to be considered by states and the District of Columbia as they make their decisions. The impact of *Twombly-Iqbal* on other causes of action, as well as the states’ constitutions, public policy, and a plethora of other considerations, ought to be part of the decision-making process. My comments are limited to pretext challenges to eminent domain. They are but a cursory glimpse on a question about which volumes could be written.

There are many considerations even when only considering pretext challenges to eminent domain. There are financial, practical, political, policy, moral, and constitutional considerations to name just a few. The decision impacts states that have case law or statutes

337. *Crum*, 2009 WL 637260, at *5. Referring to Alabama case law, the court stated that the “standard by which [Alabama courts] review a dismissal pursuant to Rule 12(b)(6), ALA. R. CIV. P., is well settled.” *Crum*, 2009 WL 637260, at *2. In contrast, the Massachusetts Supreme Court expressly adopted *Twombly*. *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008) (“We agree with the Supreme Court’s analysis of the *Conley* language, which is the language quoted in our decision in *Nader v. Citron* . . . and we follow the Court’s lead in retiring its use.” (emphasis added)). *But see* *Colby v. Umbrella Inc.*, 955 A.2d 1082, 1086–87 n.1 (Vt. 2008) (“[W]e have relied on the *Conley* standard for over twenty years, and are in no way bound by federal jurisprudence in interpreting our state pleading rules.”).

338. *See Crum*, 2009 WL 637260, at *3 (citing Alabama’s Supreme Court for the proposition that pleadings are to provide fair notice of claims and their grounds).

339. *See id.* (quoting *Mitchell v. Mitchell*, 506 So.2d 1009, 1010 (Ala. Civ. App. 1987)). As of August 1, 2009, a Westlaw search fails to produce Alabama state opinions after *Iqbal* and the Alabama Supreme Court has neither affirmed nor reversed *Crum*.

recognizing pretext challenges, as well as those that might develop them in the future.

Most of the states are presently in a budgetary crisis. Court budgets are severely strained. Taxpayers are pressuring states to cut their expenditures. Viewed in that light, measures that are likely to reduce the caseloads of courts could seem like a good idea, especially if they are “just procedural” changes. Changes that “keep meritless claims from clogging the courts” make for appealing news that is likely to be well-received by the public, at least initially.

However, if courts are inundated with motions to dismiss complaints and motions to strike defenses and counterclaims, perhaps the relief to court budgets and dockets will not be as great as one might initially imagine—especially right now when we seem to be in an especially intense phase of state budget crises. Furthermore, if as Judge McMahon asserts, the change is creating upheaval in federal courts, perhaps states will want to wait until the upheaval is resolved, rather than initiating upheaval of their own. In addition, proposed federal legislation has been filed seeking a return to the *Conley* standard.³⁴⁰ Perhaps states should await that outcome as well.

It is true that eminent domain litigation is costly and time-consuming. It distracts government administrators from their other official duties, and the taxpayers often foot the bill for government to defend against challenges to projects that involve eminent domain. This is often the case even when the project is for economic development or may otherwise provide great benefit to a private party. But is denying a landowner the right to proceed with a constitutional challenge a proper way to reduce government expenditures? To put it mildly, citizens may not be favorably disposed to procedural changes that substantially close the small window of hope that was left open in the *Kelo* case. Rarely has a decision of the Supreme Court been so reviled by the public.³⁴¹ Moreover, *Twombly-Iqbal*, if adopted, will also impact the states’ newly instituted reforms that were created in response to *Kelo*. The public, the media, and lawmakers ought to be made aware that government’s adoption of *Twombly-Iqbal* is likely to eviscerate those new reforms.

In addition to all the other factors that will play a role in states’ decisions, it is necessary to recognize that there will be active interest

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

341. FIFTY STATES REPORT CARD, *supra* note 3, at 2.

by groups on both sides of the eminent domain debate.³⁴² Large corporate developers and end-users who participate in projects involving eminent domain may use their influence to encourage adoption of *Twombly-Iqbal*. It would provide an indirect means of reversing some of the eminent domain reform that they likely see as inconvenient. Other wealthy corporations and institutions that see themselves as “deep pockets” for lawsuits may also urge adoption of *Twombly-Iqbal*. Municipalities that liked the old way of using eminent domain are also likely to be in favor of the change. Even where the decision for rule changes is solely the domain of the judicial system, parties on both sides of the eminent domain debate are likely to, and should, participate in whatever advisory process is available.

Therefore, those who were active in generating eminent domain reform, and particularly those who want to preserve or establish state level pretext challenges to eminent domain, need to be aware of the likely impact of *Twombly-Iqbal*. If they are not diligent, they may see their hard won reforms disappear by way of procedural change.

V. CONCLUSION

When *Kelo* meets *Twombly-Iqbal* the likely effect is the further reduction of means for landowners to challenge pretextual takings of their property on federal grounds. The “reinterpretation” of *Conley* by the arrival of *Twombly-Iqbal*, and the duo’s new test under Federal Rule of Civil Procedure 12(b)(6), is likely to have a chilling effect on pretext challenges to eminent domain under the federal Constitution.

States that have followed *Conley* will have to decide whether to follow the Supreme Court’s lead. Citizens who have been involved in eminent domain reform on the state level ought to be vigilant while states consider *Twombly-Iqbal*’s procedural changes lest pretext challenges on the state level be limited as a means for landowners to protect their constitutional rights.

342. See Ely, *supra* note 33, at 7 (noting that there is “determined opposition to eminent domain reform by developers and local government officials,” but also noting that “defenders of property rights have achieved some positive changes”).