

2010

Nineteenth-Century Principles for Twenty-First-Century Pleading

Adam McDonell Moline

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/elj>

Recommended Citation

Adam M. Moline, *Nineteenth-Century Principles for Twenty-First-Century Pleading*, 60 Emory L. J. 159 (2010).

Available at: <https://scholarlycommons.law.emory.edu/elj/vol60/iss1/3>

This Comment is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory Law Journal by an authorized editor of Emory Law Scholarly Commons. For more information, please contact law-scholarly-commons@emory.edu.

NINETEENTH-CENTURY-PRINCIPLES FOR TWENTY-FIRST-CENTURY PLEADING[†]

ABSTRACT

Two recent Supreme Court decisions, Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, upended the standards of pleading under the Federal Rules. In both cases, the plaintiffs had filed complaints so unsubstantiated that the Court concluded they could have no other purpose than to abuse the discovery process against the defendants. Rather than subject the defendants to these unfair burdens, the Court struck language from a fifty-year-old precedent, Conley v. Gibson, that would have allowed the suits to proceed.

The Court's solution created three new problems. Lower court judges found little guidance in its new, amorphous "plausibility" standard. Critics argued that Twombly and Iqbal would lock the gates to the federal courts. Even the decisions' supporters bristled at the Court's cavalier treatment of precedent.

This Comment solves all three of these problems. It reaches back to the writings of David Dudley Field, the great nineteenth-century legal reformer, from whose work Judge Charles E. Clark derived the Federal Rules. Consulting these two giants of civil procedure reveals Twombly and Iqbal to be consistent with the commonsense principles that Field first articulated in 1847 and Clark reaffirmed in 1938. For judges interpreting Twombly and Iqbal, this Comment fills in those cases' gaps to propose a model of decision that unites traditional principles with the Court's new jurisprudence. For the critics, this Comment shows how tradition mandates a narrow reading of Twombly and Iqbal, allowing judges to dismiss complaints only when those complaints present the same dilemma that prompted the Court to intervene. For the supporters, this Comment shows how Twombly and Iqbal better reflect the original meaning of the Federal Rules than the caselaw the Court discarded, so that they no longer need choose between keeping faith with tradition and defending sensible pleading standards.

[†] This Comment received the 2010 Mary Laura "Chee" Davis Award for Writing Excellence.

INTRODUCTION	161
I. COMMENTARIES ON THE CODIFICATION WARS	163
A. <i>Pleading at Common Law</i>	164
B. <i>Pleading Under the Field Code</i>	166
C. <i>Pleading Under the Federal Rules</i>	169
1. <i>Fair Notice—Rule 8’s Original Meaning</i>	169
2. <i>No Set of Facts—“A Phrase Best Forgotten as an Incomplete, Negative Gloss on an Accepted Pleading Standard”</i>	173
II. THE RESTORATION OF FAIR NOTICE	176
A. <i>Plausible Notice as Story of the Case</i>	177
1. <i>Story of the Case in Bell Atlantic Corp. v. Twombly</i>	178
2. <i>Notice-Gap Analysis in Ashcroft v. Iqbal</i>	183
B. <i>The Court’s Policy Rationale as Deference Principle</i>	186
1. <i>Protection of Private Interests in Bell Atlantic Corp. v. Twombly</i>	187
2. <i>Protection of Public Interests in Ashcroft v. Iqbal</i>	190
III. TWO PRINCIPLES OF PLEADING JURISPRUDENCE	192
A. <i>The Notice-Gap Principle</i>	193
1. <i>The Genuine Antecedent Dispute Requirement</i>	193
2. <i>The Strong Countervailing Inference Test</i>	198
B. <i>The Deference Principle</i>	200
1. <i>Keeping Meritorious Cases In</i>	201
2. <i>Keeping Frivolous Cases Out</i>	204
CONCLUSION	207

*Into what dangers would you lead me, Cassius,
That you would have me seek into myself
For that which is not in me?*

—WILLIAM SHAKESPEARE,
JULIUS CAESAR act 1, sc. 2

INTRODUCTION

Pleading precedes jurisdiction, and so crisis in pleading threatens crisis for all the law. According to the Federal Rules of Civil Procedure, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹ This crisis came about as plaintiffs began to exploit a decades-old precedent, which had interpreted this language before the advent of modern complex litigation. *Conley v. Gibson*,² articulating a standard that would come to be synonymous with the phrase “notice pleading,” instructed that a complaint would survive a motion to dismiss³ unless the plaintiff could prove “no set of facts” that would entitle him to relief.⁴ So, said the plaintiffs in *Bell Atlantic Corp. v. Twombly*, we could sue all the major telecommunications companies in America for conspiracy in restraint of trade, subjecting them to millions of dollars in discovery costs, without first alleging any evidence that such a conspiracy had taken place.⁵ So, said the plaintiff in *Ashcroft v. Iqbal*, I could sue the Attorney General of the United States for discrimination, gaining access to sensitive documents about national security policy, without first alleging any evidence that he had acted on any racial or religious bias.⁶ If the Court had followed this precedent, all Americans would have borne the burdens: as consumers of the telecommunications companies, to whom the companies would pass those costs; and as citizens of the government, whose leaders would have no choice but to divide their time between their duties and their legal defense. Instead, the Court decided that *Conley*’s no set of facts standard afforded defendants too little protection from opportunistic plaintiffs, from whom federal courts would require “plausible” claims for relief before allowing their cases to proceed to discovery.⁷

¹ FED. R. CIV. P. 8(a)(2).

² 355 U.S. 41 (1957).

³ FED. R. CIV. P. 12(b)(6) (allowing defendants to move to dismiss for “failure to state a claim upon which relief can be granted”).

⁴ *Conley*, 355 U.S. at 45.

⁵ 550 U.S. 544 (2007).

⁶ 129 S. Ct. 1937 (2009).

⁷ *Twombly*, 550 U.S. at 556.

The solution to this crisis created another, because in its rush to do justice to the parties before it, the Court seemed to have disregarded the understanding of federal pleading as developed over the prior fifty years. In dissent, Justice Stevens excoriated the majority for discarding the bulk of its pleading jurisprudence under the Federal Rules.⁸ Beginning immediately after the announcement of the *Twombly* decision, critics echoed Justice Stevens in decrying the majority's choice to overthrow the "70-year-old regime of notice pleading" and its bad faith in doing so.⁹ The majority's scanty list of authorities supporting its assertion that the no set of facts standard had "been questioned, criticized, and explained away long enough"¹⁰ played into this charge. The Court's confusing disposition of the case embarrassed even commentators who agreed with its result, such as Professor Richard Epstein, who described *Twombly* motions to dismiss as "(disguised) summary judgments."¹¹ In addition, *Twombly* replaced the straightforward no set of facts standard with a new "plausibility" test so nebulous that in *Iqbal*, the original *Twombly* majority could not agree on how to apply it to the *Iqbal* complaint.¹² This left lower court judges with the task of figuring out how *Twombly-Iqbal* pleading should work in other areas of law.

If the *Conley* Court's 1957 understanding of Federal Rules pleading under Rule 8 was correct, then Justice Stevens and the chorus of naysayers have *Twombly* right. *Twombly* would exemplify "judicial activism," the practice of judges making up law as it suits them rather than adhering to a consistent methodology for deciding cases. *Twombly*'s sins would be all the more egregious because among the members of that majority are some of the harshest critics of judicial law making.¹³

This Comment argues that the Federal Rules embody principles dating back to David Dudley Field's original pleading reforms of 1848, which Judge Clark updated rather than reinvented when he drafted the Rules on pleading. It

⁸ *Id.* at 544, 577–78 & n.4 (Stevens, J., dissenting) (citing numerous authorities).

⁹ See, e.g., Michael Dorf, *The End of Notice Pleading?*, DORF ON LAW (May 24, 2007, 7:35 AM), <http://www.michaeldorf.org/2007/05/end-of-notice-pleading.html> (describing a "rough consensus coalescing among proceduralists" that the *Twombly* Court's treatment of precedent is "simply false").

¹⁰ *Twombly*, 550 U.S. at 562 (majority opinion).

¹¹ Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 61–62 (2007).

¹² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1959 (2009) (Souter & Breyer, JJ., dissenting) (Justices Souter and Breyer, who were among the *Twombly* majority, disagreeing with the other five members of the *Twombly* majority on the application of its holding).

¹³ See generally, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting) (attacking the majority's activism); *id.* at 605 (Thomas, J., dissenting) (same).

unfolds across three parts. Part I begins by relating the problems that prompted Field's reforms. It explains Field's principles of pleading and how the courts of the time misapplied them. It shows how Judge Clark refined Field's work into Rules pleading only to have *Conley* misconstrue that as well. Part II argues that *Twombly* and *Iqbal* mark a return to the original meaning of the Rules. It organizes them into two principles of pleading, which this Comment calls the "notice-gap principle" and the "deference principle." Part III develops these principles of pleading into a model that judges and litigators can use to structure their analysis of pleading problems.

I. COMMENTARIES ON THE CODIFICATION WARS

Twombly's roots in the nineteenth-century pleading reform movement both explain its textual legitimacy and direct its interpretation for future cases. The pleading reform movement arose because the then-prevailing pleading standards wasted litigants' time and resources on matters unrelated to their cases' merits. The reformers, led by David Dudley Field, undertook to repurpose pleading from a ritual exercise driven by technicalities into a tool to focus cases on the real matters in dispute. Although the problem Field set out to solve differs in its particulars from the one that the *Twombly* Court attempted to fix, the same principle of "fair notice" connects these two generations of reformers.

The history of pleading is divided into three parts. Until the nineteenth century, pleading developed as a common law discipline. As the law had evolved, pleading rules persisted from times when courts had entertained fewer types of disputes. These rules had served to restrain courts from exceeding their limited jurisdiction, but when changes in the substantive law expanded the courts' role in civic life, the antiquated, obsolete pleading rules remained.¹⁴ David Dudley Field wrote and helped enact a code of civil procedure to restore procedural fairness to the litigation process, structuring pleadings around the concept of fair notice. Judges, however, resisted these reforms. They overlaid a doctrine of technicalities onto the process. These dubious judicial inventions came to define the era of "Code pleading."¹⁵ A new generation of reformers took on this problem in the twentieth century. Led by Judge Clark, they chose to reassert Field's principle of fair notice through judicial rules rather than statutes. This ushered in the third era, Federal Rules pleading. The Rules

¹⁴ See *infra* Part I.A.

¹⁵ See *infra* Part I.B.

brought pleading practice closer to Field's ideal than ever before, but once again, judges refused to apply the principle of fair notice as codified, resulting in the *Conley* decision and the muddled caselaw following it.¹⁶

Proper *Twombly-Iqbal* jurisprudence requires study of this history because it provides the answers to questions that fell outside the scope of the Court's review in those cases. Though on its face *Twombly* may appear vague and incomplete, this is because the decision reaffirms a longstanding doctrine of fair notice rather than invents a new one.¹⁷ Where the Court's precedents do not provide a certain answer to a *Twombly-Iqbal* question, judges can use these historical sources to discern Rule 8's original meaning and decide cases accordingly.

A. *Pleading at Common Law*

The term "pleading," though archaic in describing contemporary judges' permissive attitude in granting access to courts, captures the fraught process through which litigants attempted to vindicate their claims in the common law era by "pleading" for help. "Pleading" has survived with its tinge of feudal supplication intact, recalling that time of limited judicial intervention. As the scope of rights under the substantive law expanded, though, judges did not loosen procedural rules to accommodate them. Instead, they insisted on applying those rules woodenly, often inflicting waste and delay on meritorious litigants.¹⁸

The common law model of pleading came from a time when courts had narrower jurisdiction, structuring cases around the then-crucial determination of whether the court had the power to issue judgment for the plaintiff. Causes of action, then known as "forms of action,"¹⁹ comprise, in a sense, courts' enumerated powers.²⁰ At common law, plaintiffs invoked these powers through "writs," which corresponded to the available forms of action.²¹ When

¹⁶ See *infra* Part I.C.

¹⁷ See *infra* Parts I.B, I.C.1, II.A.

¹⁸ See generally RICHARD D. FREER, CIVIL PROCEDURE § 7.2 (2d ed. 2009) (describing the historical development of pleading practice).

¹⁹ *Id.*

²⁰ Cf. U.S. CONST. art. I, § 8 (limiting the power of the Legislative Branch by individually listing each of Congress's powers). Just as enumeration of powers checks Congress by confining its legislation to a few key subjects, causes of action check the courts by permitting intervention only in a few particular kinds of disputes. See *id.* art. III, § 2 (limiting the power of the Judicial Branch by individually listing the "cases" and "controversies" over which the federal courts could exercise jurisdiction).

²¹ FREER, *supra* note 18, § 7.2.

a plaintiff could not articulate his dispute as a form of action, the court had no jurisdiction over the parties, and the plea would go unanswered.²² Unlike present practice, common law pleading involved successive rounds of pleading that continued back and forth until the parties fully developed the questions of fact and law for the court.²³ Because early legal systems arose as alternatives to vengeance, they entertained only controversies involving intentional harms that would otherwise have led to feuds.²⁴ Over time, courts began to recognize new forms of liability and created new forms of action so that plaintiffs could reach them.²⁵

This jurisdiction-oriented, pleadings-driven style of litigation became obsolete when the forms of action began to encroach on one another until no jurisdictional gaps remained, because cases were still revolving around jurisdiction even as jurisdiction was becoming substantively trivial. Cases arose in which judges might have no doubt about their jurisdiction over a dispute or whether the defendant was liable to the plaintiff, but nonetheless agonized over whether the plaintiff had sued using the appropriate writ.²⁶ An unlucky plaintiff might have found, as his case developed, that the facts established his right to relief on some form of action other than his writ's. Though the plaintiff would have won the case had he chosen the correct writ, this variance would compel the court to grant judgment to the defendant.²⁷ The vehemence that this nonsensical practice inspired in its contemporaries has persisted to this day.²⁸

²² See DAVID DUDLEY FIELD, WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS? (Jan. 1, 1847), reprinted in 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 226, 233 (A. P. Sprague ed., 1884) ("In the earliest periods of our law, every cause was commenced by an original writ, . . . which gave jurisdiction of the cause to those Courts . . .").

²³ CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING § 4 (2d ed. 1947) [hereinafter CLARK, CODE PLEADING]; FREER, *supra* note 18, § 7.2.

²⁴ O. W. HOLMES, JR., THE COMMON LAW 2–3 (1881).

²⁵ See *id.* at 3–38 (tracing the development of liability).

²⁶ E.g., *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 294–95 (1850) (distinguishing between the question whether "any action will lie," i.e., whether the plaintiff can obtain any remedy at all, and "the long-vexed question, under the rule of the common law, whether a party's remedy, where he has one, should be sought in an action of the case, or of trespass," i.e., whether the plaintiff sued on the appropriate writ); see also FREER, *supra* note 18, § 7.2 (describing the difference between trespass and case).

²⁷ See FIELD, *supra* note 22, at 237 ("A mistake in the form of the action is generally fatal to the case.").

²⁸ Compare *id.* at 232 ("Why should it be necessary to go through with this troublesome, dilatory, and expensive process, simply to ask one's adversary a question?"), with FREER, *supra* note 18, § 7.2 (describing common law pleading as "arcane" and "excruciating," as leading to decisions "based upon technicalities" rather than "merits," as "elevat[ing] form over substance," and as "hinder[ing] the administration of justice").

B. Pleading Under the Field Code

The courts did not correct this problem on their own initiative, and so lawmakers attempted to impose a solution. David Dudley Field drafted it, and it became known as the “Field Code.”²⁹ Instead of forcing the plaintiff to plead “issues,” the Code only tasked the plaintiff with providing notice to the defendant of his legal claim and its factual background by pleading “facts.”³⁰ Field intended this process to replace the common law’s technicalities with a flexible notice requirement. However, judges trained in and used to the common law created a new set of technicalities called the “ultimate facts” doctrine. They prohibited not only complaints that provided too little notice to the defendant but also those that provided too much.³¹ The original meaning of the Field Code, as understood both by its drafters and by the next generation of procedural reformers, never prevailed in practice, leaving its fruition to future generations of reformers—ultimately, the *Twombly* Court.

The Field Code organized pleadings around the concept of the story of the case. Field wrote, “[T]here can not be any good reason why the story should not be told in the ordinary language of life, in the only language intelligible to the juries who are to decide the causes.”³² The plaintiff would “set forth his cause of action in his complaint briefly, in ordinary language, and without repetition.”³³ Field envisioned pleadings that would allow “any plain man, hearing the parties’ own statements [to] get a better understanding, in half an hour, of the points in dispute between them, than the most astute lawyer can get from our modern records.”³⁴ His Code reduced pleadings to a complaint and answer containing the “real charge” and “real defense,” permitted amendment of pleadings for cases in progress, and severed discovery from pleading.³⁵

²⁹ Charles E. Clark, *Code Pleading and Practice Today*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 55, 56 (Alison Reppy ed., 1949) [hereinafter Clark, *Pleading and Practice*] (“While the Commission which recommended the code was composed of three persons . . . it is well known that the other commissioners allowed [Field] free scope to put into effect the original ideas he had been advocating . . .”).

³⁰ CLARK, CODE PLEADING, *supra* note 23, § 7 (contrasting Code “fact pleading” against common law “issue pleading”).

³¹ FREER, *supra* note 18, § 7.3.2.

³² FIELD, *supra* note 22, at 239.

³³ *Id.* at 240.

³⁴ *Id.* at 244.

³⁵ *Id.* at 240–42.

These reforms aimed “to do justice, with the least possible delay and expense.”³⁶ As such, this form of pleading also allowed for the practice of verification by oath, which Field regarded as “desirable, both as a means of preventing to a considerable extent groundless suits and groundless defenses, and of compelling the parties respectively to admit the undisputed facts.”³⁷ “Suppose it were certain that a cause would be better decided if the parties were allowed five years to get their proofs, and the Court five years to decide: who would think of allowing any such thing? The expensiveness of lawsuits is also a consideration of immense consequence.”³⁸ From this followed his insight that “[d]ear justice is no justice to the largest class of litigants.”³⁹

The Field Code yielded some progress but ultimately disappointed the next generation of reformers, who would write the Federal Rules. The same sort of judges whose caprice had provoked the codification movement insisted on reading the Field Code obtusely.⁴⁰ One onlooker, Wisconsin’s then-Chief Justice Winslow, marveled at “the cold, not to say inhuman, treatment which the infant Code received from the New York judges.”⁴¹

The principal problem in the Code came from language to the effect that pleadings should contain “facts” rather than “law” or “evidence,” all terms of art in Code pleading. Judges took the vague distinction between these three categories as a license to reintroduce complications into Code pleading. Lawyers and judges in practice tended to “overemphasize ‘facts’ as uniquely different from either law or evidence.”⁴² In doing so, these judges perverted Field’s fact pleading into a doctrine of “ultimate facts,” as distinguished from “conclusions of law” (facts alleged too generally) and “evidentiary facts” (facts

³⁶ *Id.* at 243.

³⁷ *Id.* at 239.

³⁸ *Id.* at 247. A few years later, a British former law clerk denounced

[a] suit before the Court [of Chancery] which was commenced nearly twenty years ago; in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a *friendly suit*; and which is (I am assured) no nearer to its termination now than when it was begun.

CHARLES DICKENS, *BLEAK HOUSE* 5–6 (Barnes & Noble Classics ed. 2005) (1853).

³⁹ FIELD, *supra* note 22, at 247.

⁴⁰ See FREER, *supra* note 18, § 7.3.2 (“[M]any of the judges weaned on the technicalities of the common law system could not help but import silly subtleties into the new system.”).

⁴¹ Clark, *Pleading and Practice*, *supra* note 29, at 58 (quoting *McArthur v. Moffet*, 128 N.W. 445, 446 (Wis. 1910)) (internal quotation marks omitted).

⁴² *Id.*

alleged too specifically).⁴³ Because “facts do not easily disentangle themselves from conclusions or from details,”⁴⁴ a man of common understanding trying to communicate his story in ordinary and concise language could stumble over a conclusion of law or evidentiary fact. This would doom his case. A layman could hardly expect to navigate between this Scylla and Charybdis without the assistance of counsel.

The ultimate facts doctrine eclipsed the fair notice inquiry, which Field intended as the real test of a pleading’s adequacy under the Code. Contrary to Field’s ideal of pleadings as “plain, short statement[s] by each party”⁴⁵ and his admonition that under the Code “[w]e shall avoid the risk of losing causes from mistaking the rules of pleading,”⁴⁶ courts discarded complaints that put the defendants on notice when those complaints failed to use the courts’ preferred formulations of fact.⁴⁷ Though he criticized complaints that were “so general as to convey no idea of the plaintiff’s demand,” he only attacked needlessly specific complaints to the extent that they were “redundant with words multiplied on words.”⁴⁸ He placed no totemic significance on the pleading of “facts” as such, asking instead for the plaintiff to plead “the nature and particulars of the cause of suit,”⁴⁹ providing further that “[t]he [c]ourt shall have power at any time, in its discretion, to amend any . . . pleading . . . in furtherance of justice.”⁵⁰

For Field, pleadings served only two purposes. They facilitated trial preparation by apprising each party of the other’s case and directing them toward the evidence that would settle it, and they facilitated trial itself by identifying the issues for the judge and jury to resolve the case.⁵¹ These goals

⁴³ FREER, *supra* note 18, § 7.3.2. For example, a plaintiff might try to allege that he has superior title by claiming that he “has superior title to the property” or is “entitled to the property,” both of which the New York Court of Appeals regarded as impermissibly general. *Id.* (quoting *Sheridan v. Jackson*, 72 N.Y. 170, 173 (1878)). Allegations that a plaintiff “paid for property pursuant to contract” and that a defendant “delivered to her a deed to the property,” though, were regarded as impermissibly specific by the California Supreme Court. *Id.* (paraphrasing *McCaughy v. Shuette*, 46 P. 666 (Cal. 1896)).

⁴⁴ CLARK, CODE PLEADING, *supra* note 23, § 38.

⁴⁵ FIELD, *supra* note 22, at 230.

⁴⁶ *Id.* at 248.

⁴⁷ For some examples of Code courts applying pleading rules arbitrarily, see the sources cited *supra* note 43.

⁴⁸ FIELD, *supra* note 22, at 236; *see also* CLARK, CODE PLEADING, *supra* note 23, § 38 (“Rarely should a pleading be condemned for being overspecific; and then the objection should be considered one of form merely—undue verbosity, repetition, etc.—rather than one of substance.”).

⁴⁹ FIELD, *supra* note 22, at 258.

⁵⁰ *Id.* at 259.

⁵¹ *Id.* at 243–44.

animate this Comment's proposed principles of pleading.⁵² Judges in Field's time lost sight of these goals, just as the *Conley* Court would under the Federal Rules.

C. Pleading Under the Federal Rules

This Comment now arrives at the current era, in which the Federal Rules replaced the Field Code at the vanguard of civil procedure, and shows how the *Conley* Court's misinterpretation of the Rules created the crisis that the *Twombly* and *Iqbal* Courts would later solve. This discussion splits into two parts to delineate the two major theories of pleading under the Rules. The first part lays out the original meaning of the Federal Rules. It embraced "fair notice" as the pleading model, as Judge Clark explained in his writings. The second part describes how the *Conley* Court reaffirmed fair notice as a principle of pleading but also introduced a new, yet-more-permissive standard of pleading that seemed to allow the plaintiff to provide less-than-fair notice.

1. Fair Notice—Rule 8's Original Meaning

Judge Clark, in drafting Rule 8, made Field's concept of fair notice the pleading standard in federal court. He lifted the Rule's operative language, "a *short* and *plain* statement of the claim showing that the pleader is entitled to relief,"⁵³ directly from Field, who had written that a complaint under his Code would require "a *plain, short* statement by each party, of his own case."⁵⁴ He described Field's fact pleading as a "main and guiding characteristic[] of fundamental importance,"⁵⁵ and portrayed his own project as a reassertion of this "great code principle[] and a reformulation of [it] in the light of modern experience to achieve more directly the results which Field had so thoroughly visualized."⁵⁶

Clark modernized Field by working with the courts rather than against them, switching from a code of pleading imposed on the courts by statute to a "code" adopted by the courts as a set of judicial rules. Clark described his project as "chang[ing] the source of our code, not its underlying nature, to substitute for the legislature a body which is both more expert in the subject

⁵² See *infra* Part III.

⁵³ FED. R. CIV. P. 8(a)(2) (emphasis added).

⁵⁴ FIELD, *supra* note 22, at 230 (emphasis added).

⁵⁵ Clark, *Pleading and Practice*, *supra* note 29, at 57.

⁵⁶ *Id.* at 58.

matter and more responsive to appropriate demands for change.”⁵⁷ The Rules’ relative success vindicates Justice Holmes’s aphorism that “[t]he life of the law has not been logic: it has been experience.”⁵⁸ The experience of the Field Code demonstrated that judges could thwart efforts to take control of civil procedure from them by interpreting the Code as a broad charter over which they were free to develop a new “common law” of pleading.⁵⁹ The Rules solved this problem by conveying ownership of civil procedure back to the judges.⁶⁰ Although the Rules’ language did not deviate from what Field suggested in 1847, the Justices of the Supreme Court had little reason to sap the Rules by decisional law when they could amend them through a straightforward legislative process.

Compared to Clark’s institutional innovations, the Rules’ drafting changes were minor, designed principally to ensure that judges could not import the “ultimate facts” caselaw that had bedeviled the Code era into the new Federal Rules jurisprudence. By generically inviting the claimant to show that he “is entitled to relief” rather than mandating that he plead “facts,” Clark allowed courts to avoid the problem of determining what a “fact” is.⁶¹

According to Clark, the Rules rejected “notice pleading,” opting instead for Field’s fair notice standard. “Notice pleading,” a confusing term because it resembles “fair notice,” refers to a practice whereby the plaintiff merely informs the defendant of the charge against him without substantiating the complaint with any factual background.⁶² Clark wrote that “[t]he prevailing idea at the present time [1947] is that notice should be given of all the operative facts going to make up the plaintiff’s cause of action, except, of course, those which are presumed or may properly come from the other side.”⁶³

⁵⁷ *Id.*

⁵⁸ HOLMES, *supra* note 24, at 1.

⁵⁹ *Cf.* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 13 (Amy Gutmann ed., 1997) (“[M]any believe that [the Constitution] is in effect a charter for judges to develop an evolving common law . . .”).

⁶⁰ *See* 28 U.S.C. § 2072(a) (2006) (granting the Supreme Court final approval of the Rules); *cf.* Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968) (describing how the institution of property encourages conscientious use by the propertied).

⁶¹ CLARK, *CODE PLEADING*, *supra* note 23, § 38.

⁶² Clark avoided using the term “notice” in the Rules to avert this confusion. *See* Charles E. Clark, *Special Pleading in the “Big Case,”* 21 *F.R.D.* 45, 49–50 (1957) [hereinafter Clark, *Special Pleading*] (“[‘N]otice’ is not a concept of the Rules . . .”).

⁶³ CLARK, *CODE PLEADING*, *supra* note 23, § 38.

Clark used the Forms to show the amount of detail Rules pleading required. The Forms are “probably the most important part of the rules so far as this particular topic [i.e., pleading detail] is concerned, . . . because when you can’t define you can at least draw pictures to show your meaning.”⁶⁴ The old Form 9⁶⁵ illustrated the difference between notice pleading and the fact pleading contemplated by the Federal Rules:

Even under the simplified federal practice, the form for personal injuries sustained in a motor vehicle, Federal Form 9, is not merely a claim for money damages for defendant’s “negligence,” but it differentiates the accident from all others by showing that it occurred between a pedestrian and an autoist at a certain time and place, thus making decision as to the proper method of trial or of appeal not difficult, and the application of the doctrine of *res judicata* clear.⁶⁶

This quotation illuminates two important aspects of Rule 8. First, it shows that Field’s concept of the claimant telling the story of his case, with just enough factual detail to explain the “nature and particulars” of the suit, survived the transition from the Code to the Rules. Second, instead of allowing the plaintiff to make a bare allegation of negligence, the Rules represent a policy of avoiding “needless delay and expense” by placing some of that burden on the plaintiff at pleading.⁶⁷

The Rules anticipate a notice requirement that scales as appropriate to the particular claim,⁶⁸ as demonstrated by Forms that require even more specifics. Form 17, which provides a model complaint for specific performance of a contract, requires the complainant not only to summarize the contents of the

⁶⁴ Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 181 (1958); see also FED. R. CIV. P. 84 (“The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

⁶⁵ The Rules Committee has revised the old Form 9 into a version bereft of local color, FED. R. CIV. P. Form 11 (2007), presumably to clarify that the Rules would also apply to an accident a block over on Hall or McBride.

⁶⁶ CLARK, CODE PLEADING, *supra* note 23, § 38.

⁶⁷ In a manner recalling the common law that the Code and the Rules had displaced, Judge Clark recognized that whereas “[g]eneral fact pleading is useful; special pleading of details, carried to the extreme” (as in New York’s prior Code practice) would lead to “pleading altercations . . . [that] go on and on as long as the judicial patience permits.” Clark, *Special Pleading*, *supra* note 62, at 47, 52. Judge Clark endorsed a note by the Rules Committee explaining that Rule 8(a)(2) “requires the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it.” *Id.* at 47, 54.

⁶⁸ See CLARK, CODE PLEADING, *supra* note 23, § 38 (explaining that what constitutes a “fact” for the purposes of fact pleading depends on the cause of action); *infra* Part III.A.1.

contract but also to attach the contract itself.⁶⁹ This obligation cannot be reconciled with the idea of stating claims in general terms and substantiating them only during discovery.

Other features of the Rules that bear on pleading, including the rules of construction, heightened particularity, and certification, reveal Clark's debt to Field. Rule 1's requirement that the Rules "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"⁷⁰ tracks Field's exhortation "to do justice, with the least possible delay and expense."⁷¹ Field had designed a certification-by-oath requirement⁷² that served as a prototype of Rule 11, which requires pleaders to certify that their "factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."⁷³ Rule 9's requirement that parties must "state with particularity the circumstances constituting fraud or mistake" when making such allegations,⁷⁴ which Justice Stevens would later misunderstand as a repudiation of fact pleading,⁷⁵ dates back not merely to the Field Code but to common law pleading itself.⁷⁶

While on the federal bench, Judge Clark applied the Rules according to the principle of fair notice. The textbook case⁷⁷ of *Dioguardi v. Durning* pitted a pro se plaintiff against a customs agent, the former alleging (in, as it were, ordinary and concise language) that although he had been the high bidder on certain "tonics" at auction, the agent had sold them to someone else.⁷⁸ The lower court had erroneously dismissed the case for "fail[ure] to state facts sufficient to constitute a cause of action" but did not explain why it believed the plaintiff had not stated a claim.⁷⁹ Judge Clark explained that the complaint, which had laid out the date, place, and harm giving rise to the suit, sufficed to

⁶⁹ FED. R. CIV. P. Form 17 (2007).

⁷⁰ FED. R. CIV. P. 1.

⁷¹ Field, *supra* note 22, at 243.

⁷² *See id.* at 243 (verifying pleadings by affidavit).

⁷³ FED. R. CIV. P. 11.

⁷⁴ *Id.* at 9(b).

⁷⁵ *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 584 (2007) (Stevens, J., dissenting) (interpreting Rule 9(b) to preclude using pleading to curb discovery abuse).

⁷⁶ CLARK, CODE PLEADING, *supra* note 23, § 39.

⁷⁷ *See, e.g.*, RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 293–98 (5th ed. 2008).

⁷⁸ 139 F.2d 774, 774–75 (2d Cir. 1944).

⁷⁹ *Id.*

state a claim under the relevant public auction statute.⁸⁰ This result followed the principle that as long as the plaintiff provides fair notice to the defendant, the court should not dismiss a claim for failure to observe some technical pleading formula.

2. *No Set of Facts*—“*A Phrase Best Forgotten as an Incomplete, Negative Gloss on an Accepted Pleading Standard*”⁸¹

Though both the text of the Rules, which comes from Field’s exegesis on fact pleading, and Clark’s subsequent commentary affirm the fair notice model of pleading, the Court declined to apply Rule 8 faithfully in its pleading jurisprudence. Although *Conley v. Gibson* seemed to reaffirm Rule 8’s fair notice requirement,⁸² it also provided a new “notice pleading” standard: a case should not be dismissed for failure to state a claim unless “no set of facts” could entitle the claimant to relief.⁸³ This permissive standard contradicted the principle of fair notice. It seemed to prohibit courts from dismissing complaints that offered inadequate notice if the plaintiff could possibly prove a set of facts that would entitle him to relief. The Court did not acknowledge this problem. As a result, two separate lines of jurisprudence emerged from *Conley*. Some later cases cited *Conley* for the proposition that the Rules required fair notice, the most prominent of these being *Twombly* itself.⁸⁴ Other cases cited *Conley* for its “no set of facts” language, and Justice Stevens would have resolved *Twombly* according to that standard.⁸⁵ This subsection of the Comment will show that *Conley* was divided against itself.

The urgency of civil rights and the staid pace of civil procedure pulled *Conley* apart. The *Conley* Court addressed the question of whether the complaint, which alleged a union’s racial discrimination, stated a claim under federal civil rights law.⁸⁶ Justice Black, writing for the majority, summarized the allegations as follows:

Petitioners were employees of the Texas and New Orleans Railroad at its Houston Freight House. Local 28 of the Brotherhood was the designated bargaining agent under the Railway Labor Act for the

⁸⁰ *Id.* at 775.

⁸¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563 (2007).

⁸² 355 U.S. 41, 45, 47 (1957).

⁸³ *Id.* at 45.

⁸⁴ *E.g.*, *Twombly*, 550 U.S. at 563; *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005).

⁸⁵ *See Twombly*, 550 U.S. at 577–78 & n.4 (Stevens, J., dissenting) (citing numerous authorities).

⁸⁶ *Conley*, 355 U.S. at 44.

bargaining unit to which petitioners belonged. A contract existed between the Union and the Railroad which gave the employees in the bargaining unit certain protection from discharge and loss of seniority. In May 1954, the Railroad purported to abolish 45 jobs held by petitioners or other Negroes all of whom were either discharged or demoted. In truth the 45 jobs were not abolished at all but instead filled by whites as the Negroes were ousted, except for a few instances where Negroes were rehired to fill their old jobs but with loss of seniority. Despite repeated pleas by petitioners, the Union, acting according to plan, did nothing to protect them against these discriminatory discharges and refused to give them protection comparable to that given white employees.⁸⁷

Justice Black noted that “[i]f these allegations are proven there has been a manifest breach of the Union’s statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit,”⁸⁸ which is to say that the plaintiffs had succeeded in laying out the story of their case. Responding to the defendants’ argument that the Rules required more factual specificity from the complaint, Justice Black explained that complaints suffice when they “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” and cited the Forms as “plainly demonstrat[ing] this.”⁸⁹

That aspect of the case correctly applied Field’s and Judge Clark’s principles as enacted in the Federal Rules, but the remainder of the decision both misapplied the Rules and contradicted the foregoing dicta. The centerpiece of the Court’s error was its assertion that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁹⁰ Among its authorities for declaring this “the accepted rule” was, surprisingly, Judge Clark’s opinion in *Dioguardi v. Durning*, which held no such thing.⁹¹

⁸⁷ *Id.* at 43. Justice Black’s summary goes on to include some allegations that the *Twombly* Court would likely have considered conclusory. See *infra* Part III.A.1.

⁸⁸ *Conley*, 355 U.S. at 46.

⁸⁹ *Id.* at 47.

⁹⁰ *Id.* at 45–46.

⁹¹ See Clark, *Special Pleading*, *supra* note 62, at 53–54. In a note excerpted by Judge Clark, the Rules Committee explained that *Dioguardi* “was not based on any holding that a pleader is not required to supply information disclosing a ground for relief. The complaint in that case stated a plethora of facts and the court so construed them as to sustain the validity of the pleading.” *Id.*

This no set of facts standard fit neither the text of the Rules nor the principles that underlie them. Rule 8 requires the plaintiff to “show,” not merely assert, that he “is entitled to relief,”⁹² by relating in the complaint the story of his case.⁹³ A plaintiff could fail to provide fair notice of what the claim is and the grounds upon which it rests and yet satisfy this standard⁹⁴—in an extreme case by pleading, “The defendant is liable to me.” This standard also would permit pleadings that violate Rule 11’s requirement that in the plaintiff’s representations to the court, his “factual contentions . . . will likely have evidentiary support,”⁹⁵ a degree of confidence stricter than the *Conley* Court’s “beyond doubt” formulation. Though these two Rules lack any explicit connection, reading them in conjunction would result in an anomaly. It would allow pleadings whose contentions are merely not beyond doubt but require lawyers to certify that those same contentions are likely to find evidentiary support. The breadth of the no set of facts standard strips from the trial judge the discretion to administer Rule 8 justly, speedily, and inexpensively in accordance with the historical meaning of Rule 1.⁹⁶ A system of pleading can satisfy Rule 1 “only as it tends to . . . enabl[e] the parties the better to prepare for trial” or “assist[] the jury and the Court in judging the cause.”⁹⁷ Rule 84 states that the Forms “illustrate the simplicity and brevity that these rules contemplate.”⁹⁸ Yet, as Judge Clark had explained,⁹⁹ they too require more factual detail than notice pleading under no set of facts.

The remainder of this Comment assumes that the no set of facts standard constitutes *Conley*’s holding. A narrow reading of this case would regard the “fair notice” language as the holding: this stricter test would have reached the same result because the *Conley* complaint contained the full story of the plaintiff’s case. However, cases all the way through Justice Stevens’s dissent in *Twombly* have cited “no set of facts” as the *Conley* holding.¹⁰⁰ Regardless

⁹² FED. R. CIV. P. 8(a)(2).

⁹³ See *supra* Part I.B.

⁹⁴ See *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989) (noting conflict between “no set of facts” and “grounds upon which it rests” language).

⁹⁵ FED. R. CIV. P. 11(b)(3).

⁹⁶ *Id.* at 1.

⁹⁷ FIELD, *supra* note 22, at 243 (“The legitimate end of every administration of law is to do justice, with the least possible delay and expense. Every system of pleading is useful only as it tends to this end. This it can do but in one of two ways: either by enabling the parties the better to prepare for trial, or by assisting the jury and the Court in judging the cause.”); cf. FED. R. CIV. P. 1 (“These rules should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

⁹⁸ FED. R. CIV. P. 84.

⁹⁹ See *supra* notes 64–66 and accompanying text.

¹⁰⁰ CLARK, CODE PLEADING, *supra* note 23, § 38.

of what Justice Black might have meant by that phrase in 1957, by the time *Twombly* came down fifty years later “no set of facts” had come to signify a fully articulated pleading doctrine. It remains the most plausible alternative to the fair notice standard that Field created, that *Twombly* reaffirmed, and that this Comment advocates.

II. THE RESTORATION OF FAIR NOTICE

In revisiting *Conley v. Gibson* to resolve the tension between the fair notice cases and the no set of facts cases, this Comment argues that the Court decided *Twombly* correctly because it chose to restore fair notice as the pleading standard rather than articulate a new, third way. As a jurisprudential matter, *Bell Atlantic Corp. v. Twombly* could legitimately overrule *Conley*'s precedent only if the Court could claim that its standard better reflects the original meaning of Rule 8 than *Conley* did, because otherwise the doctrine of stare decisis would militate against unsettling the law.¹⁰¹ The question whether *Twombly*, along with *Ashcroft v. Iqbal*, faithfully captured the history runs deeper than merely passing judgment on that case because, as this Comment argues,¹⁰² the *Twombly-Iqbal* standard's historical roots can guide judges through a consistent and fair analytical method where the Court's binding authority does not provide a clear rule of decision.

This Comment has shown that the two major historical goals of pleading reform were advancing the parties' interest in procedural fairness and the systemic interest in resolving cases on the merits.¹⁰³ This Part argues that *Twombly* and *Iqbal* share these same two goals. The *Twombly* Court stated that it considers fair notice to be *Conley*'s actual holding.¹⁰⁴ It rejected the idea that the no set of facts standard has served, or could serve, as a pleading standard when taken literally.¹⁰⁵ Both *Twombly* and *Iqbal* discuss a “plausibility” standard,¹⁰⁶ i.e., that courts should dismiss for failure to state a “plausible claim.” Although it may seem to be an improvisation of the

¹⁰¹ See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 577–78 & n.4 (2007) (Stevens, J., dissenting) (citing numerous authorities employing no set of facts as the established standard).

¹⁰² See *infra* Part III.

¹⁰³ See *supra* Part I.

¹⁰⁴ See *Twombly*, 550 U.S. at 555–63 (majority opinion) (focusing on the “fair notice of what the . . . claim is and the grounds upon which it rests” requirement as the *Conley* holding (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)) (internal quotation mark omitted)).

¹⁰⁵ *Id.* at 562.

¹⁰⁶ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Twombly*, 550 U.S. at 564.

Twombly Court, plausibility represents not so much a new standard as a gloss on fair notice.

The Court's concept of plausibility encompasses both of the fair notice reforms, and this Comment shows how to break the Court's plausibility analysis into these components. Part II.A reveals how the *Twombly* and *Iqbal* Courts' analysis of the respective complaints' notice comports with the "story of the case" theory of notice¹⁰⁷ as understood by David Dudley Field and Judge Clark. The Court probed each story for holes in the notice that it provided to determine whether it stated a claim, a process that this Comment terms "notice-gap analysis." Part II.B demonstrates that the policy driving the *Twombly* Court's decision follows David Dudley Field's principle that "[d]ear justice is no justice,"¹⁰⁸ prohibiting a structure of litigation in which manifest unfairness to defendants would preclude the resolution of cases on their merits. Although the Court did not explicitly incorporate this principle into its test, neither did the Court exclude it,¹⁰⁹ and its thorough policy discussion suggests that lower courts should consider this principle when applying *Twombly-Iqbal* to other areas of law. This Comment structures the Court's policy analysis as follows: where a complaint has a notice gap and the defendant would, as a result of that gap, suffer an unfair burden from proceeding to discovery, the judge should defer to the defendant's interest in procedural fairness by dismissing the case. This Comment refers to this as the "deference principle."

A. *Plausible Notice as Story of the Case*

This section of the Comment shows how the Court's "plausibility" analysis in *Twombly* and *Iqbal* does not illegitimately depart from pleading traditions but rather restores the traditional fair notice inquiry to its proper place in pleading jurisprudence. Working through the *Twombly* opinion, the *Twombly* Court reconstructed from the complaint the story about the defendants' alleged wrong and identified the gaps in the notice it provided. Although the Court characterized the problem in terms of the complaint not plausibly giving rise to the inference that the defendant was liable,¹¹⁰ the Court's treatment of the issue implies that, but for the notice gaps, the complaint would have stated a claim.¹¹¹ In the *Iqbal* opinion, the Court stated outright that the complaint

¹⁰⁷ See *supra* Part I.B.

¹⁰⁸ FIELD, *supra* note 22, at 247.

¹⁰⁹ *Twombly*, 550 U.S. at 544.

¹¹⁰ *Id.* at 566.

¹¹¹ *Id.* at 569 n.14.

would have survived the motion to dismiss if the complaint had contained certain crucial facts.¹¹² In each case, plausibility does not add anything to the fair notice analysis, and the Court could have reached the same result even if it had omitted the plausibility language.

1. Story of the Case in Bell Atlantic Corp. v. Twombly

The beginning of this Comment described *Twombly-Iqbal* as the solution to a crisis in the law, and a review of *Twombly*'s facts demonstrates the importance not only of resolving the individual case but also of repairing a broken pleading rule that invited large-scale discovery abuse. The defendants in *Twombly* comprised a group of large telecommunications firms, whose customer base includes virtually all Americans.¹¹³ In an attempt to encourage competition in the industry, Congress enacted a statute to force local carriers to license their local communications infrastructure to their competitors.¹¹⁴ The defendants chose not to take advantage of this option, electing instead to avoid the competition that would result if their competitors reciprocated, a business practice known as "conscious parallelism."¹¹⁵ As long as each defendant did so unilaterally, the defendants' actions collectively would not constitute a "conspiracy in restraint of trade" in violation of antitrust law.¹¹⁶ The complaint alleged, however, that the defendants had engaged in such a conspiracy.¹¹⁷ The plaintiffs contemplated a class action of all subscribers to telephone or internet service.¹¹⁸ A similar group of present and future subscribers would bear the costs of litigating it. This group is so extensive that the discovery burdens would constitute a de facto tax collected by a private IRS.

¹¹² Ashcroft v. Iqbal, 129 S. Ct. 1937, 1952 (2009).

¹¹³ See *Twombly*, 550 U.S. at 559 ("[P]laintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States . . .").

¹¹⁴ *Id.* at 549.

¹¹⁵ Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540–41 (1954).

¹¹⁶ See *Twombly*, 550 U.S. at 552, 564 ("[A]llegations of parallel business conduct, taken alone, do not state a claim under" the relevant antitrust statute.). But see Clark, *Special Pleading*, *supra* note 65, at 52 (conscious parallelism alone can give rise to an inference of conspiracy). There are two reasons why the latter should not be troubling. First, inasmuch as the *Twombly* Court read *Theater Enterprises*'s plus factors differently from Clark—as substantive elements of a conspiracy claim—they would require at least some independent factual support. Second, as this Comment explains in more detail in Part III.A.2, whether to draw an inference of this sort in a particular case will depend on whether the circumstances present (as here) a "strong countervailing inference" against the plaintiff's allegations.

¹¹⁷ *Twombly*, 550 U.S. at 550.

¹¹⁸ *Id.* at 559.

Much of the confusion about *Twombly* arises from the Court's poor explanation of the plausibility standard it used to determine the sufficiency of notice. Justice Souter opened by quoting the "fair notice" line from *Conley*, which he then defined as "plausible grounds to infer" the wrong alleged.¹¹⁹ He explained that a complaint "does not need detailed factual allegations," but mere "labels and conclusions" or "a formulaic recitation of the elements of the cause of action" does not suffice.¹²⁰ He further stated that a complaint requires "enough factual matter (taken as true) to suggest that an agreement was made": not so much fact as to meet a "probability requirement" but enough "to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."¹²¹ This hodgepodge of vague categories provided little guidance about how to settle close questions.

The Court instead began to reveal its method in rejecting *Conley*'s "no set of facts" language. Justice Souter described the no set of facts standard "as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."¹²² He understood *Conley* as a case whose complaint would have survived the fair notice standard,¹²³ such that the "no set of facts" language misleads the reader about what the *Conley* Court did.¹²⁴ Justice Souter regarded the *Conley* Court as having "described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."¹²⁵ The merits of this understanding aside, Justice Souter here seemed to consider the term "set of facts" as analogous to Field's story of the case. Further, he quoted approvingly language from circuit decisions that "a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory"¹²⁶ and

¹¹⁹ *Id.* at 555–56.

¹²⁰ *Id.* at 555.

¹²¹ *Id.* at 556.

¹²² *Id.* at 563.

¹²³ *See supra* Part I.C.2.

¹²⁴ *Twombly*, 550 U.S. at 562–63 ("[N]o set of facts" language "should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief.>").

¹²⁵ *Id.* at 563.

¹²⁶ *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)) (internal quotation marks omitted).

that “we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts.”¹²⁷

The Court then provided two examples of its notice analysis, each of which follows the notice gap model. Had the complaint alleged agreement directly, said Justice Souter, “we doubt that the complaint’s references to an agreement among the [defendants] would have given the notice required by Rule 8.”¹²⁸ The complaint “mentioned no specific time, place, or person involved in the alleged conspiracies. . . . furnish[ing] no clue as to which of the four [defendants] (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place.”¹²⁹ Souter contrasted these notice gaps with old Form 9’s model complaint, which he considered as a model for the complete factual picture that the Rules contemplate.¹³⁰

To judge the plaintiffs’ attempt at indirect proof, the Court also attempted to put together a story of their case that complied with Rule 8. The relevant substantive law requires a plaintiff attempting to prove conspiracy indirectly to show not only conscious parallelism but also “plus factors,” particular kinds of circumstantial evidence that more strongly suggest a conspiracy.¹³¹ Justice Souter used this structure—parallelism, then plus factors—to model his pleading analysis,¹³² presumably on the theory that the plaintiffs would not be “entitled to relief” unless they could later prove one of those plus factors. The factual material in the complaint tended to establish only parallel conduct: the complaint described each defendant engaging in various business practices resisting competition, which served each individual defendant’s interests without requiring collusion.¹³³

The notice gap here consisted of the plus factors’ absence. When Souter asked whether anything in the complaint “invest[ed] either the action or inaction alleged with a plausible suggestion of conspiracy,”¹³⁴ he meant that if he could characterize any of the allegations as suggesting more than mere

¹²⁷ *Id.* (quoting *O’Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976)) (internal quotation marks omitted).

¹²⁸ *Id.* at 565 n.10.

¹²⁹ *Id.*

¹³⁰ *See id.* (contrasting old Form 9 with allegations in the *Twombly* complaint that gave the defendants “no clue” how to respond).

¹³¹ *Id.* at 552–53.

¹³² *See id.* at 557 (“An allegation of parallel conduct . . . gets the complaint close to stating a claim, but without some further factual enhancement it stops short” of sufficiency.).

¹³³ *Id.* at 566.

¹³⁴ *Id.*

parallel conduct, such an allegation could fill in the complaint's notice gap. He analyzed each allegation that approached a plus factor, but determined that none of them did more than redundantly describe various courses of the defendants' parallel conduct.¹³⁵ In other words, with the information at their disposal, the plaintiffs could accuse the defendants only of activities that would not, in and of themselves, incur liability.¹³⁶ The notice gap here meant that the complaint did not, in the ordinary sense, state a claim: instead of using discovery to flesh out a dispute that existed prior to the outset of litigation, the plaintiffs hoped to use discovery to create a new dispute and extract from the defendants its settlement value.¹³⁷

Over the course of its notice analysis, the Court took care to distinguish the allegations that provided notice from those that merely explained the legal consequences of those allegations. Justice Souter described the former as "[f]actual allegations" and the latter as "conclusory allegations,"¹³⁸ raising the specter of the "ultimate facts" doctrine and its phony distinctions between "legal conclusions," "ultimate facts," and "evidentiary facts."¹³⁹ Recall the lesson Judge Clark drew from the ultimate facts debacle: judges should gauge allegations' merit not on the basis of formalistic criteria but on whether those allegations offer the defendant any actual notice.¹⁴⁰ Despite his terms' unfortunate resemblance, Justice Souter avoided those mistakes. The allegations that he deemed "conclusory" afforded the defendants no notice of how the plaintiffs believed the defendants harmed them, but instead only described the legal effect of the unpleaded conduct that they hoped to unearth during discovery, supposing that defendants had in fact engaged in such wrongful conduct.¹⁴¹ Because such allegations only inform the reader of the inferences the complainant hopes to elicit, providing no notice about the dispute itself, Justice Souter appropriately disregarded them in his notice-gap analysis.

¹³⁵ *Id.* at 566–69.

¹³⁶ This constitutes a Rule 11 violation. *See infra* Parts III.A.1, III.B.2.

¹³⁷ *See Twombly*, 550 U.S. at 558 (noting that the prospect of discovery abuse increases the settlement value of the case).

¹³⁸ *Id.* at 555, 557.

¹³⁹ *See supra* Part I.B.

¹⁴⁰ *See supra* Part I.C.1.

¹⁴¹ *Twombly*, 550 U.S. at 565 n.10.

Justice Stevens dissented, his substantive argument¹⁴² amounting to the proposition that courts should ignore notice gaps to facilitate the plaintiffs' bar's role as private antitrust regulators. Quoting Adam Smith, Justice Stevens claimed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."¹⁴³ The majority observed that, according to Justice Stevens's inference, meeting together for merriment and diversion would force the tradesman to "devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy . . ."¹⁴⁴ Although in some cases Justice Stevens's standard might uncover conspiracies against the public that would otherwise have remained hidden, it would also allow private parties to infringe on tradesmen's right to partake in merriment and diversion, by attaching discovery costs to it. The majority worried that plaintiffs would use the broader investigatory powers that Justice Stevens envisioned as a license to engage in profiteering.¹⁴⁵ This would undercut whatever civic good might come from increasingly vigorous private antitrust enforcement.

Twombly, then, is not an example of a hard case making bad law so much as an easy case making vague law. The no set of facts standard demanded the Court indulge the *Twombly* plaintiffs in, at best, tilting at windmills. The complaint was insufficient to such an extreme that the Court need not have articulated a precise pleading standard to dispose of the case. In what retrospectively seems a misguided exercise of minimalism, it chose to leave that standard for a future, subtler case. Further, *Twombly* demonstrates the enduring value of Field's draftsmanship. Even though the Court apparently

¹⁴² Justice Stevens's dissent also contained a historical argument about "notice pleading" under the Rules. *Id.* at 573–76 (Stevens, J., dissenting). See *supra* Parts I.B and I.C.1 for a discussion of this history. The sources Justice Stevens cited in support of the proposition that the original meaning of Rule 8(a)(2) (as distinguished from the later caselaw misinterpreting it) established a system of notice pleading actually maintained the opposite. Compare *Twombly*, 550 U.S. at 587–88 & n.8 (citing Clark, *Special Pleading*, *supra* note 62, at 46) (chastising the majority's deviation from "notice pleading"), with Clark, *Special Pleading*, *supra* note 62, at 50 (chastising a lower court judge for describing the Rules as a system of notice pleading); compare also *Twombly*, 550 U.S. at 576 (using old Form 9 as an example of Rule 8 requiring only "general notice-giving"), with CLARK, CODE PLEADING, *supra* note 23, § 38 (using old Form 9 as an example of Rule 8 requiring fact pleading rather than mere notice-giving).

¹⁴³ *Twombly*, 550 U.S. at 591 (quoting ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 54 (1852)) (alteration in original).

¹⁴⁴ *Id.* at 567 n.12 (majority opinion).

¹⁴⁵ See *id.* at 558–59 (explaining the potential for abuse inherent in the expensive antitrust discovery process).

ignored the historical record, it nonetheless interpreted the “short and plain” language much as Field had intended.¹⁴⁶

2. *Notice-Gap Analysis in Ashcroft v. Iqbal*

Like *Twombly*, *Ashcroft v. Iqbal* presented a crisis whose improper resolution would have severe consequences for the public interest, but this time the plaintiffs threatened public officialdom rather than private commerce. The plaintiffs alleged that federal officials had violated their civil rights by rounding them up after the September 11th terrorist attacks on the basis of their race rather than on genuine suspicion of wrongdoing.¹⁴⁷ Rather than bring suit only against the officials immediately responsible for the alleged harm, the complaint attempted to go all the way to the top, as it were, and charged the then-Attorney General with masterminding a scheme of illegal discrimination.¹⁴⁸ Civil rights jurisprudence contains an affirmative defense of qualified immunity that functions like the plus factors in antitrust. The plaintiff must provide a particular sort of circumstantial evidence—specific intent to discriminate—to establish liability at trial.¹⁴⁹ Like its counterpart in *Twombly*, the *Iqbal* complaint sought to rely on inferences from facts arguably consistent with either permissible conduct, by crafting a policy that incidentally affected one race more than others, or impermissible discrimination, by using the public-policy rationale as a pretext to injure a disfavored race.¹⁵⁰ This litigation presented a systemic problem of exposing high officials to the burdens of defending suits brought on the basis of their subordinates’ wrongdoing, even against plaintiffs who could not articulate any connection between the harm and the defendant-official beyond an attenuated supervisory relationship.¹⁵¹

The *Iqbal* Court refined the vague notice standard from *Twombly* into an analysis that more straightforwardly applies the traditional story-of-the-case understanding of pleading. Justice Kennedy began “by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified

¹⁴⁶ See *supra* Part I.B.

¹⁴⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1944 (2009).

¹⁴⁸ *Id.* at 1942.

¹⁴⁹ *Id.* at 1947–49.

¹⁵⁰ *Id.* at 1949.

¹⁵¹ *Id.* at 1953–54.

immunity.”¹⁵² This reaffirmed Field’s principle that the complaint should frame the case by pleading to all the points in dispute.¹⁵³ He then organized the *Twombly* notice analysis into two prongs: first, separate the “factual” allegations, which provide notice, from the “conclusory” allegations, which do not; and second, add up the factual allegations to determine whether they “plausibly give rise to an entitlement to relief.”¹⁵⁴ In a manner recalling Judge Clark’s principle that what constitutes notice depends on the circumstances of the case,¹⁵⁵ Kennedy described the inquiry as a “task that requires the reviewing court to draw on its judicial experience and common sense.”¹⁵⁶

In separating the factual from the conclusory allegations, Justice Kennedy examined each allegation with an eye toward its eventual place in the story of the plaintiff’s case. The allegations that “the [FBI], under the direction of [one of the defendants], arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11” and “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by [the defendants] in discussions in the weeks after September 11, 2001,” each provided notice to the defendant about how the plaintiff intended to prove those elements of his case.¹⁵⁷ Both of them would have guided the discovery process toward particular facts to prove or disprove.

The complaint did not state a claim, however, because it lacked the final, crucial piece of the story. The claims “rest[ed] solely on their ostensible ‘policy of holding post-September-11th detainees’ . . . once they were categorized as ‘of high interest.’”¹⁵⁸ To finish this story, the plaintiff needed to show “that petitioners purposefully adopted a policy of classifying post-September-11 detainees as ‘of high interest’ because of their race, religion, or national origin.”¹⁵⁹ None of the allegations in the complaint provided notice of what facts had led the plaintiff to believe that the defendants had acted with a discriminatory state of mind.¹⁶⁰

¹⁵² *Id.* at 1947.

¹⁵³ *See supra* Part I.B.

¹⁵⁴ *Iqbal*, 129 S. Ct. at 1950.

¹⁵⁵ CLARK, CODE PLEADING, *supra* note 23, § 38.

¹⁵⁶ *Iqbal*, 129 S. Ct. at 1950.

¹⁵⁷ *Id.* at 1951 (third alteration in original).

¹⁵⁸ *Id.* at 1952.

¹⁵⁹ *Id.*

¹⁶⁰ If the plaintiff had no objective reason to believe this, then these pleadings violated Rule 11. *See infra* Parts III.A.1, III.B.2.

The dissent, written by *Twombly*'s author, Justice Souter, contested Kennedy's treatment of certain conclusory statements. Justice Souter contended that the Court had "no principled basis" for disregarding allegations attributing an improper motive to the defendants.¹⁶¹ The statements he would have credited alleged that "after September 11, the FBI designated Arab Muslim detainees as being of 'high interest' 'because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity,'" and that the defendants "'knew of, condoned, and willfully and maliciously agreed' to that discrimination."¹⁶²

The principled basis distinguishing what the majority regarded as factual from what it regarded as conclusory comes from the traditional understanding of fair notice. The statements that the majority and the dissent agreed are factual explain what the plaintiff would endeavor to prove. For example, the allegation about the defendants crafting a detainment policy "in discussions in the weeks after September 11, 2001,"¹⁶³ though not very specific, puts the defendants in a position to admit or contest a fact. The defendants can answer this allegation by contesting or conceding whether the "discussions" actually took place. The two statements Justice Souter disputed merely claimed that the defendants had a particular state of mind without providing any supporting facts.¹⁶⁴ The defendants presumably knew whether they committed the alleged discrimination, but these statements did not inform them of the facts that led the plaintiff to infer the defendants' wrongful intent. Discovery and judgment, though, would focus not on the defendants' actual mental state but on facts that would resolve the issue under an external standard.¹⁶⁵

The comparison between these statements demonstrates the connection between the duty to provide notice and the right to undertake discovery. The nonconclusory statements, though broad, defined the scope of potential discovery by identifying facts for discovery to confirm or refute. The conclusory statements anticipated an open-ended discovery, wherein the plaintiff could have conducted any inquiry that might uncover a fact relevant to

¹⁶¹ *Iqbal*, 129 S. Ct. at 1961 (Souter, J., dissenting).

¹⁶² *Id.*

¹⁶³ *Id.* at 1944 (majority opinion).

¹⁶⁴ *See id.* at 1952 ("[R]espondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind.")

¹⁶⁵ *See generally* HOLMES, *supra* note 24, at 130–63 (describing how, although intentional torts often feature apparently moral elements such as "malice," the law adjudicates them based on objective standards susceptible to factual inquiry rather than subjective standards that examine the defendant's psychology).

the defendants' mental state. Any confirmation of these conclusory statements could only come about indirectly. That is, if the allegations about the defendants' mental states are accurate, then some directly confirmable fact must exist from which a court could infer the defendants' wrongful intent. Presumably, the plaintiff chose a formulation that the majority understood as "conclusory" because he could not allege any particular facts to illustrate the defendants' intent. Instead, he was merely guessing that it was true without any objective basis for a good-faith allegation—a violation of Rule 11.¹⁶⁶ Without providing such facts, the plaintiff did not fulfill his duty to provide notice, which would have entitled him to discovery.

B. The Court's Policy Rationale as Deference Principle

The question of whether the complaint has a notice gap does not fully dispose of the issue. In both *Twombly* and *Iqbal*, the Court detailed the consequences, both for the particular defendants and for the system as a whole, of wrongly allowing each of those cases to proceed to discovery despite the notice gaps in their respective complaints.¹⁶⁷ In neither case did the holding depend on the policy rationale. The Court described its methodology strictly in terms of plausible notice.¹⁶⁸ Nonetheless, the Court chose to discuss the importance of its reaching the correct result in each case, even at the risk of inviting charges of bad faith. Cynics might assume that the ostensible holding operated as a pretext for a political agenda that in fact decided the cases.

This Comment argues that the Court's reasoning about policy should control in cases where the complaint has notice gaps that do not impose the kind of unfair burdens that the Court described in *Twombly* and *Iqbal*. A reading of these cases as requiring dismissal of all complaints that contain notice gaps is also consistent with those cases' holdings. However, such a reading would render the Court's policy arguments redundant and rest the case less easily on the traditions of pleading. At the core of both David Dudley Field's pleading reforms and Judge Clark's updates to them was an overriding

¹⁶⁶ See *infra* Parts III.A.1, III.B.2.

¹⁶⁷ See *Iqbal*, 129 S. Ct. at 1954 ("[W]e are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) ("[O]nly by taking care to require allegations that reach the level suggesting conspiracy [can we] hope to avoid the potentially enormous expense of discovery . . .").

¹⁶⁸ See *Iqbal*, 129 S. Ct. at 1954 ("Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery . . ."); *Twombly*, 550 U.S. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

mandate to resolve cases on the merits rather than on technicalities.¹⁶⁹ The notice-gap inquiry itself affords some flexibility to infer facts that are “presumed or may properly come from the other side.”¹⁷⁰ Supplementing this with a principle of fairness to moderate notice-gap dismissal would better situate *Twombly-Iqbal* jurisprudence in the Rules, the first of which demands a construction that secures not only the “speedy” and “inexpensive” determination of cases but also the “just.”¹⁷¹

This Comment derives from the two policy arguments in *Twombly* and *Iqbal* a broader principle of deference to defendants in all cases where complaints deficient in notice would impose unfair burdens on them. In *Twombly*, the Court inferred that the open-ended, expensive discovery process, coupled with the high degree of uncertainty that the discovery would reveal anything relevant to the case, would likely preclude a resolution of the case on the merits.¹⁷² Instead, the Court expected the suit to settle for its nuisance value, which would have inflicted an unfair burden on the defendant.¹⁷³ In *Iqbal*, similar notice gaps would have allowed the plaintiff, but for the Court’s intervention, to make an end run around qualified immunity and harass a top official over what was essentially a political rather than a legal dispute.¹⁷⁴ Punishing an official for pursuing a controversial but not illegal policy, by exposing him to the burdens of defense and discovery, would both unduly harm him and compromise his ability to serve the public interest.¹⁷⁵

1. *Protection of Private Interests in Bell Atlantic Corp. v. Twombly*

Once the Court had established that the complaint in *Bell Atlantic Corp. v. Twombly* did not tell the full story of the claim against the defendants, it considered the likely harms that the defendants, as well as other defendants in similar cases, would suffer from allowing such deficient complaints to proceed to discovery. Deficient complaints present jurisdictional problems. They ask courts not to command discovery to prepare disputes already in existence for trial, but rather to attempt to develop inchoate disputes to maturity. This indulgence can allow “a plaintiff with a largely groundless claim . . . to take up

¹⁶⁹ See *supra* Parts I.B, I.C.1.

¹⁷⁰ CLARK, CODE PLEADING, *supra* note 23, § 38; see also *supra* note 56 and accompanying text.

¹⁷¹ FED. R. CIV. P. 1.

¹⁷² See *supra* Part II.A.1; *infra* Part II.B.1.

¹⁷³ See *supra* Part II.A.1; *infra* Part II.B.1.

¹⁷⁴ See *infra* Part II.B.2.

¹⁷⁵ See *infra* Part II.B.2.

the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”¹⁷⁶

The scope and expense of *Twombly*'s prospective discovery impressed upon the Court the importance of preventing abuse. Justice Souter described the scale of the likely costs as “obvious enough”:

[P]laintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.¹⁷⁷

The prospect of systemic problems, which would arise from a rule allowing plaintiffs to proceed against defendants in like cases, counsels against a permissive attitude toward deficient complaints. The Court embraced a policy that “this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.”¹⁷⁸ This follows the rule of construction promoting “just, speedy, and inexpensive determination.”¹⁷⁹ In support of this policy, Justice Souter cited the “unusually high cost of discovery,” which can account for “as much as 90 percent of litigation costs when discovery is actively employed.”¹⁸⁰ Justice Souter also noted that once cases reach discovery, judges can do little to manage the costs.¹⁸¹

Contrasted against Justice Stevens's dissent, the majority's test becomes a conscious choice to defer to defendants rather than to plaintiffs. Justice Stevens began Part II of his dissent by reminding the reader that *Conley* reversed a decision dismissing a complaint by black railway workers alleging workplace discrimination during the Civil Rights Era.¹⁸² Only after substituting these sympathetic plaintiffs could he argue that a “no lawsuit left behind” policy would fit a case like *Twombly*. Setting aside the *Twombly* majority's assertion that the *Conley* complaint would survive a *Twombly*

¹⁷⁶ Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558 (2007) (internal quotation marks omitted).

¹⁷⁷ *Id.* at 559.

¹⁷⁸ *Id.* at 558 (alteration in original).

¹⁷⁹ FED. R. CIV. P. 1.

¹⁸⁰ *Twombly*, 550 U.S. at 558, 559.

¹⁸¹ *Id.* at 559–60 & n.6.

¹⁸² *Id.* at 576 (Stevens, J., dissenting).

motion to dismiss, Justice Stevens overlooked the possibility that a flexible deference principle could distinguish between a *Conley* and a *Twombly*.¹⁸³ The language from his dissent quoting Adam Smith about tradesmen conspiring against the public evinced a cavalier attitude toward charges of commercial malfeasance.¹⁸⁴ This perhaps explains his willingness to defer to plaintiffs rather than defendants in *Twombly* and similar cases.

A political question also underlies *Twombly*'s controversy. The Court mentions in passing that "Congress may have expected" some of the defendants to compete with the others but judges that "the disappointment does not make conspiracy plausible."¹⁸⁵ To put the point more directly, Congress attempted to introduce more competition to the telecommunications industry,¹⁸⁶ but its efforts did not meet expectations. Inasmuch as the plaintiffs attempted to bootstrap this failed policy into a conspiracy by *res ipsa loquitur*,¹⁸⁷ they would have usurped from Congress the responsibility to amend a poorly conceived law. This should give some pause to a Court with constitutional jurisdiction over cases and controversies rather than political questions, and the Court rightly avoids "expressing lack of the respect due coordinate branches of government"¹⁸⁸ by leaving the matter for Congress to fix, should it choose to do so.

In constructing a deference principle from *Twombly*, the two factors above should weigh in courts' deference analysis for complaints with notice gaps. Judges should dismiss complaints describing inchoate disputes whose merits are so remote as to settle primarily on the basis of nuisance value. In other words, discovery burdens become unfair when a careful inquiry into the complaint eliminates any conclusion other than that the plaintiffs are pursuing the case primarily for opportunistic reasons.

2. *Protection of Public Interests in Ashcroft v. Iqbal*

Ashcroft v. Iqbal served as *Twombly*'s public-interest counterpart by raising, in a suit against public officials, discovery burdens analogous to those

¹⁸³ See *infra* Part III.B.

¹⁸⁴ See *supra* notes 128–29 and accompanying text.

¹⁸⁵ *Twombly*, 550 U.S. at 569 (majority opinion).

¹⁸⁶ *Id.* at 544.

¹⁸⁷ The *Twombly* plaintiffs were attempting an end run around *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), in which the Court held that this congressional policy did not expand the scope of telecommunications companies' antitrust liability.

¹⁸⁸ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

leveled against private parties in *Twombly*. Unlike *Twombly*, *Iqbal* involved a genuine dispute antecedent to the filing of the action, in which the plaintiff accused federal law enforcement officers of egregious civil rights violations.¹⁸⁹ The question that reached the *Iqbal* Court on certiorari, however, did not involve these concrete allegations. Instead, it took up an ancillary claim. The *Iqbal* plaintiff had attempted to shoehorn top officials at the Department of Justice into the case, including the Attorney General of the United States, by way of an unsubstantiated conspiracy theory.¹⁹⁰

Iqbal demonstrates how the same policies that have generated special evidentiary standards, such as the “plus factors” in *Twombly*’s antitrust claim¹⁹¹ or the wrongful intent here needed to overcome qualified immunity,¹⁹² require corresponding pleading standards. As Justice Kennedy explains, “[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including ‘avoidance of disruptive discovery.’”¹⁹³ Further,

[i]f a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to . . . a national and international security emergency unprecedented in the history of the American Republic.¹⁹⁴

The key to understanding the Court’s policy here comes from Justice Kennedy’s assertion that qualified immunity protects government officials not just from liability but from “litigation.” Otherwise, discovery could have proceeded. Assuming it would fail to turn up any evidence to prove the defendants’ wrongful intent, qualified immunity would mandate judgment for the defendants and vindicate their right to avoid liability.

¹⁸⁹ Ashcroft v. *Iqbal*, 129 S. Ct. 1937, 1943–44 (2009).

¹⁹⁰ *Id.* at 1944.

¹⁹¹ See *supra* Part II.A.1.

¹⁹² See *supra* Part II.A.2.

¹⁹³ *Iqbal*, 129 S. Ct. at 1953.

¹⁹⁴ *Id.* (internal quotation marks omitted).

Failing to construe substantive-law evidentiary requirements as protections against litigation, not merely liability, and thereby failing to enforce them as pleading requirements, robs them of their value in promoting the public policies that underlie them. Had this case proceeded through discovery, even a favorable summary judgment would have handed the defendants only a Pyrrhic victory. By then, the damage Justice Kennedy described would have been done. Especially in a suit for money damages, the difference between “discovery costs” and “liability” can become a matter of form rather than substance. If a defendant were to settle a suit that he would have won on the merits because the litigation costs would exceed the settlement offer, he would suffer a monetary loss just as if the protection from liability did not exist. The only difference would be the dollar amount. Moreover, qualified immunity doctrine exists to promote the public interest in the “proper execution of the work of the Government,” benefitting public officials only incidentally.¹⁹⁵ Only by barring discovery to plaintiffs who cannot provide notice of how they would overcome qualified immunity at trial could courts “give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.”¹⁹⁶

Iqbal's subtext also presents a political question best handled through the political branches of government. A looser pleading standard on state of mind for supervisory liability would allow any plaintiff with a claim against a government employee to yank a cabinet member or similarly high-ranking official into litigation, no matter how attenuated the connection, by alleging that the claim arose from a deliberate, wrongful policy crafted by that high official. The need to generate a return on investment at least places some limits on entrepreneurial strike suits like *Twombly*. Anyone long on money and short on scruples could finance frivolous litigation to punish officials for making unpopular policy decisions, even to the point of driving them out of office.¹⁹⁷

Iqbal points to two factors that should play a role in deference analysis. When cases directly affect the public interest through discovery that would burden public officials or public resources, courts should not indulge plaintiffs who cannot tell a complete story to define the dispute. This serves as

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 1954.

¹⁹⁷ Cf. Kevin Bohn, *Ethics Complaints Follow Palin*, CNN (July 24, 2009, 11:23 PM), <http://www.cnn.com/2009/POLITICS/07/24/palin.ethics/index.html> (relating a former Alaska governor's claim that an avalanche of frivolous ethics complaints caused her to retire before finishing her term).

something of a corollary to the political question factor,¹⁹⁸ which was also in play in *Iqbal*. A complaint is no substitute for a ballot. Courts subvert the integrity of the democratic process when they grant the losers a second vote through litigation. Additionally, the presence of a political dimension common to each of these cases suggests that the deference principle may counsel strict dismissal only in a narrow band of cases. This would minimize *Twombly-Iqbal*'s disruption of the status quo ante.

III. TWO PRINCIPLES OF PLEADING JURISPRUDENCE

As this Comment has demonstrated,¹⁹⁹ the *Twombly-Iqbal* pleading jurisprudence consists of two major concepts: probing the complaint for gaps in the notice it provides and determining whether the court should defer to the defendant on the basis of unfair burdens that discovery would impose. This Part extrapolates these two concepts, from the history of pleading as filtered through *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*,²⁰⁰ into a notice-gap principle and a deference principle. The notice-gap principle judges a complaint's notice deficient when the facts as stated, along with any reasonable inferences those facts would support, do not comprise a complete story of how the defendant came to be liable to the plaintiff. The deference principle counsels the court to dismiss the complaint for failure to state a claim only when, as a result of the complaint's deficiencies, the court could not fairly ask the defendant to assume the burdens of litigation.

This Comment organizes these two principles into a two-step process. First, the judge determines whether the complaint provides the defendant sufficient notice. Different kinds of legal disputes can revolve around wrongdoing ranging from a single instance of harm to misconduct on a grand scale. The kinds of facts that make up a well-pleaded complaint will likewise vary from claim to claim.²⁰¹ The judge uses "judicial experience and common sense"²⁰² in weighing the inferences from the plaintiff's allegations against countervailing inferences. This allows him to figure whether the complaint describes a genuine antecedent dispute or merely seeks to create a dispute through discovery. Second, if the judge determines that the complaint has a gap in the notice that it provides, he then ascertains whether the notice gap

¹⁹⁸ See *supra* Part II.B.1.

¹⁹⁹ See *supra* Part II.

²⁰⁰ *Iqbal*, 129 S. Ct. 1937 (2009); *Twombly*, 550 U.S. 544 (2007).

²⁰¹ CLARK, CODE PLEADING, *supra* note 23, § 38.

²⁰² *Iqbal*, 129 S. Ct. at 1950.

would impose any unfair burden on the defendant were the case to proceed to discovery. The plaintiff might seek to exploit the expense of discovery in extorting an “*in terrorem* increment of the settlement value,”²⁰³ to gain access to the defendant’s valuable secrets without any good-faith intent to use them in the present case, or simply to harass the defendant. When the judge senses any of these injustices, he should defer to the defendant’s right to privacy and dismiss the complaint. This deference principle operates as an equitable rule of reason, keeping meritorious cases in court and frivolous cases out.

A. *The Notice-Gap Principle*

This section describes the purpose and the methodology of implementing the notice-gap principle. The notice-gap principle provides that, by examining the story of the plaintiff’s case for any gaps in the notice it provides, the judge can determine whether the plaintiff seeks to move an already existing, good-faith dispute into the court or whether he hopes to use the court’s powers compelling discovery to develop an inchoate dispute into a cognizable claim. To accomplish this, the judge construes the pleadings liberally, making inferences to connect the plaintiff’s facts to the legal conclusions that would constitute a claim. These inferences might be supplied by the plaintiff as conclusory statements or, as in *Dioguardi v. Durning*,²⁰⁴ by the judge himself. Judges should use these inferences to flesh out the facts in the story of the case except when strong countervailing inferences provide compelling reasons to disbelieve it.

1. *The Genuine Antecedent Dispute Requirement*

The presence of an antecedent dispute distinguishes discovery in private civil actions from the kinds of investigatory powers that congressional committees, administrative agencies, and grand juries possess. Rule 8 does not allow a plaintiff to bring suit on suspicion that he is entitled to relief; rather, he must show that he is entitled to relief, or else his case will not survive a motion to dismiss.²⁰⁵ Without the threshold requirement of a genuine antecedent dispute, private litigants could command the broad investigatory powers of a government body free from the political and institutional constraints that check public actors. Equitable factors afford litigants a broad exception to this

²⁰³ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975).

²⁰⁴ See *supra* notes 68–70 and accompanying text.

²⁰⁵ FED. R. CIV. P. 8(a)(2).

rule,²⁰⁶ but the court need not consider them if the complaint provides adequate notice in the first place.

When Rule 8 asks for “a short and plain statement of the claim showing that the pleader is entitled to relief,”²⁰⁷ it both articulates the plaintiff’s duty to provide notice (“showing that the pleader is entitled to relief”) and limits the duty to a “short and plain statement.” These two parts of the Rule apparently conflict when fair notice seems to require a statement that is long and elaborate. This represents a mistaken understanding of “short and plain” as an absolute rather than relative term. A short and plain Hemingway novel²⁰⁸ might measure hundreds of pages. A paragraph that lasts even a single page is long. “Short and plain” means that courts should not require complaints any longer or more elaborate than necessary to provide fair notice to the defendant. Courts need only determine how much notice is necessary.

The increasing complexity of some civil claims has forced this issue. The original theory of notice pleading envisioned a light burden at the pleading stage both for plaintiffs and defendants. The former would be free to plead in plain language. The latter would receive a concise, straightforward explanation of the charges against them. As new and complex causes of action developed,²⁰⁹ this complexity had to fall on either plaintiffs or defendants. If plaintiffs could plead complex causes of action in filings as simple and short as before, then those pleadings would not give defendants the full story of the claims against them that they had previously enjoyed. If pleadings’ detail and length increased in proportion to the complexity of the newer causes of action, then plaintiffs would need to gather more information before they could craft pleadings that would bring their disputes into the courts’ jurisdiction. The increased difficulties of providing notice, along with similar difficulties of making do without it, require reexamining from the bottom up how much notice the system can practically expect plaintiffs to give defendants.

Complaints involving traditional causes of action rarely require a subtle understanding of notice. Field modeled pleading to allow “any plain man, hearing the parties’ own statements [to] get a better understanding, in half an hour, of the points in dispute between them, than the most astute lawyer can

²⁰⁶ See *infra* Part III.B.

²⁰⁷ FED. R. CIV. P. 8(a)(2).

²⁰⁸ See, e.g., ERNEST HEMINGWAY, *THE SUN ALSO RISES* (1926) (a veteran, emasculated by a war wound, falls for a lovely alcoholic, but malaise and anatomy preclude consummation).

²⁰⁹ For instance, neither the antitrust claim in *Twombly* nor the civil rights claims in *Conley* and *Iqbal* resemble the simple disputes in the Forms. See *supra* Part II.

get from our modern records.”²¹⁰ As such, the plaintiff’s story contains notice gaps if and only if it lacks details that a reasonable person would expect the plaintiff to possess.

Consider a scenario in which the defendant punches the plaintiff, leading the plaintiff to sue him for battery. Barring exceptional circumstances, plaintiffs in such cases always know the time, place, and manner of the battery. If the plaintiff were relating the incident to another person in an everyday conversation unrelated to any legal proceeding, his interlocutor would expect to hear these details. Upon hearing them, she would, like any good American, tell the plaintiff, “You should sue.” This is what it means to state a claim. The plaintiff relates some facts. These facts lead to the inference that the defendant is liable to the plaintiff.

Now imagine the alternative version of this conversation, in which conclusions precede facts. The plaintiff tells his interlocutor that the defendant has committed a battery against him. She asks him what happened. He replies, “I’m not sure, but I’m taking the defendant to court to find out.” This would elicit a skeptical reaction from a reasonable person. Although as a matter of fact the defendant may have committed a battery, the plaintiff has not here articulated his story as a cognizable legal dispute. Moreover, the incongruous absence of pertinent information does not suggest to the interlocutor that the details are out there waiting to be found so much as that there are no details. All complaints meriting dismissal fit this pattern. The only difference between a simple tort like battery and an intricate one like conspiracy in restraint of trade is that the complexities of the latter case allow the plaintiff to conceal this basic truth within a Gordian Knot of conclusory allegations.

The prior two examples serve to illustrate that legal conclusions need factual support because, in and of themselves, they provide no notice. A legal conclusion at its most basic would consist merely of an allegation that the defendant is liable to the plaintiff. A bare recital of the cause of action would situate the case in a particular area of law but still tell the defendant nothing about the circumstances that led to the accusation. The Court recognized this in *Twombly*, explaining that a defendant wishing to prepare an answer to a set of factual allegations would know what to say, but a defendant trying to answer conclusory allegations would have “no clue.”²¹¹

²¹⁰ FIELD, *supra* note 22, at 244; *see also supra* Part I.B.

²¹¹ Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 565 n.10 (2007).

Instead of relying on the kind of abstruse distinctions that reigned under Code pleading, a court using the notice-gap model of analysis can differentiate a fact from a conclusion by asking whether the defendant has any way to answer the allegation. Factual allegations frame the discovery process. For each such allegation, the defendant must make an admission or denial, with the denials identifying the factual disputes to be resolved during discovery. Conclusory allegations do not aid the efficient administration of litigation. The defendant cannot admit them without yielding the ultimate question of liability. When the defendant denies these conclusory allegations, discovery has no obvious way to proceed. The plaintiff has neither committed himself to any particular manner of proving liability nor articulated “a reasonable expectation that discovery will reveal evidence” of the alleged wrongdoing.²¹²

This analysis connects the breach of duty—in providing insufficient notice—to the harm—discovery abuse. The fewer facts the plaintiff needs to nail down before he acquires rights of discovery against the defendant, the more valuable to him—and the more burdensome on the defendant—those rights of discovery become. It also shows how the defendant’s unclean hands (e.g., by destroying information that the defendant could have accessed even without discovery and that would have allowed the defendant to substantiate his story) might deny him Rule 12(b)(6) relief.²¹³ Common law and Code pleading focused on ritual at the expense of substance. Fair notice pleading should not delve into abstract questions of meaning except insofar as they relate back to the concrete problem of ensuring substantial fairness to litigants.

The Court’s “plausibility” analysis also depends on notice. The term “plausibility” is not merely unhelpful here but inaccurate.²¹⁴ Cases that turn on issues of plausibility, although they too involve insufficient notice, implicate Rule 11, which requires the claimant to certify that “factual contentions . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery,”²¹⁵ rather than Rule 8. Prior to *Iqbal*, in *Tooley v. Napolitano (Tooley I)*, the D.C. Circuit incorrectly reversed a dismissal of a pro se plaintiff’s conspiracy theory on the grounds that his complaint met “the federal rules’ notoriously loose pleading criteria.”²¹⁶ The plaintiff had claimed that after complaining to an airline that

²¹² *Id.* at 556.

²¹³ *See infra* Part III.B.1.

²¹⁴ *See supra* note 106.

²¹⁵ FED. R. CIV. P. 11(b)(3).

²¹⁶ 556 F.3d 836, 840 (D.C. Cir. 2009).

lax security could allow a terrorist to put a bomb on a plane, the government began to monitor him through wiretaps, radio tags, and men in black.²¹⁷ As Chief Judge Sentelle described in his dissent, the plaintiff

would have us hold that he has adequately alleged unlawful wiretapping of an entire extended family, including at least nine separate phone lines based on no apparent source of belief other than “problematic phone connections, including telltale intermittent clicking noises.” I note in passing that there is no reason to believe that wiretaps even cause problematic connections or intermittent clicking sounds.²¹⁸

In *Twombly* and *Iqbal*, the Court held that the complaints were implausible because they provided too little factual substantiation (i.e., notice). Here, each of the complaint’s bizarre allegations pushed the plaintiff’s case further into the realm of the fantastical, as the D.C. Circuit noted in a post-*Iqbal* rehearing that overruled its prior disposition of the case.²¹⁹

A complaint can be, as in *Twombly*, implausible because it is incomplete or, as in *Tooley*, incomplete because it is implausible. Whether the court focuses its inquiry on either plausibility or completeness of notice, it should, in principle, reach the same result. However, an analysis that meets the notice gap directly rather than circumspectly avoids the unnecessary complications that come from treating complaints filed in bad faith as though they were nonsense. The small sample of pleading cases that have recently come before the Supreme Court, including not just *Twombly* and *Iqbal* but also *Dura Pharmaceuticals, Inc. v. Broudo*,²²⁰ all implicate incompleteness more than implausibility. Despite the D.C. Circuit’s misapplication of *Twombly* in *Tooley I*, the true implausibility cases tend to be more straightforward and less consequential than the incompleteness cases. Common sense alone can guide the court most, if not all, of the way to the proper resolution of the former. For the more difficult and important cases, however, the notice-gap concept better assists courts in resolving them correctly and coherently.

²¹⁷ *Id.* at 837.

²¹⁸ *Id.* at 843–44 (Sentelle, C.J., dissenting).

²¹⁹ *Tooley v. Napolitano (Tooley II)*, 586 F.3d 1006, 1009 (D.C. Cir. 2009).

²²⁰ *See Dura Pharms.*, 544 U.S. 336, 347 (2005) (dismissing a private securities action for failure to allege loss causation adequately, when the complaint alleged only one, irrelevant economic loss and “nowhere else provide[d] the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [underlying] misrepresentation”).

Although the Court did not choose to characterize its analysis this way, lower courts can use the notice-gap method consistently with *Twombly* and *Iqbal* because the same determinations that resolved the plausibility inquiry also would have disposed of those cases had the Court considered the matter as a notice problem. In either case, but for the plaintiff's conclusory allegations about the claim's plus factors, the conduct described in the complaint's factual statements would not have given rise to liability. For the notice method, just as for the two-pronged analysis the Court suggests,²²¹ the judge first determines which of the allegations are factual (or provide notice) and credit them as true. Then, instead of engaging in a fraught determination of whether the sum of all these allegations amounts to a "plausible" story, a judge using notice-gap analysis examines all of the necessary elements of the claim. For each element, he asks whether the plaintiff's factual allegations would satisfy that element. If he detects any gaps, either because the plaintiff pleaded certain elements in conclusory statements or failed to mention anything relevant to those elements at all, then he should determine that the plaintiff has not, in the language of Rule 8, established his right to relief.

2. *The Strong Countervailing Inference Test*

The principal challenge in applying pleading requirements under Rule 8 lies in the determination of which inferences to afford the plaintiff. Between *Conley* and *Twombly*, the Court correctly overruled lower court decisions that, balking at *Conley*'s no set of facts standard, attempted to solve discovery-abuse problems piecemeal by imposing particularity requirements on certain disfavored causes of action.²²² Recall that Rule 9 codified a particularity requirement for allegations of fraud or mistake, which originated in the common law and also appeared in the Field Code.²²³ Although misread as an implied repudiation of fact pleading,²²⁴ Rule 9 supports a negative inference that all allegations other than fraud or mistake need not be "state[d] with particularity."²²⁵

²²¹ See *supra* text accompanying note 154.

²²² See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (overruling heightened pleading standard for employment discrimination claims); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (same for civil rights claims against municipalities); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (same for Title VII claims).

²²³ CLARK, CODE PLEADING, *supra* note 23, § 39 (describing common law and Code requirements for particularity when alleging certain causes of action).

²²⁴ See *supra* note 74 and accompanying text.

²²⁵ FED. R. CIV. P. 9(b).

This Comment proposes a “strong countervailing inference” test to balance the need for reasonable specificity against the textual prohibition of a particularity requirement. This Comment derives this test from *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,²²⁶ a case decided shortly after *Twombly*. *Tellabs* dealt with a cause of action that “requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter.”²²⁷ The Court held that this standard required judges to assemble the alleged facts into a story of the case.²²⁸ Judges would then compare the inference necessary to credit that story against other plausible inferences to determine that inference’s strength.²²⁹ A complaint would survive a motion to dismiss only if the inference were “at least as compelling as any opposing inference one could draw from the facts alleged.”²³⁰ If *Tellabs* represents a heightened pleading standard, then a liberal pleading standard would accept the plaintiff’s desired inference unless it were considerably less compelling than an opposing inference.

The judge, then, should allow an inference for the plaintiff unless the facts give rise to a strong countervailing inference. In a suit about a car accident, the allegation that at a particular date and place “the defendant negligently drove a motor vehicle against the plaintiff”²³¹ sufficiently states a claim for negligence.²³² This allegation would probably contain a notice gap under the *Tellabs* standard. These facts are also consistent with the inference that the plaintiff’s negligence, rather than the defendant’s, caused the accident. The judge would probably need to take judicial notice of negligence statistics in car accidents to cross that notice gap. The plaintiff could secure his day in court only by alleging additional facts, e.g., that the plaintiff was walking through a designated crosswalk while the walk sign was lit and the traffic light controlling the defendant was red. Such a pleading requirement would be inappropriate for most cases, adding superfluous details to complaints and then spurring Code-style litigation over whether complaints adequately plead to a formalistic level of specificity.

²²⁶ 551 U.S. 308 (2007).

²²⁷ *Id.* at 313.

²²⁸ *Cf. id.* at 322 (“The inquiry . . . is whether *all* of the facts alleged, taken collectively, give rise to a strong inference . . .”).

²²⁹ *Id.* at 323–24.

²³⁰ *Id.* at 324.

²³¹ FED. R. CIV. P. Form 11 (2007).

²³² *See supra* note 64 and accompanying text.

The “strong countervailing inference” test presents no such difficulties because these facts do not support a strong countervailing inference that the defendant was not negligent. These facts are consistent with either party’s negligence. No fact gives any particular reason to discredit the plaintiff’s inference. Moreover, these facts, taken as true, necessarily would give rise to a genuine antecedent dispute. In a situation like this, the plaintiff could fail to state a claim only by pleading himself out of court with additional allegations claiming, for example, that the plaintiff had jumped in front of the defendant’s car immediately before the defendant struck him.

Note that, under *Conley*’s no set of facts standard, this last allegation would not keep the plaintiff out of court. Even though this version of the complaint gives no reason to believe that the defendant’s negligence caused the accident and strong reason to believe that the plaintiff’s negligence did, it does not appear beyond doubt that the defendant’s negligence could not also have contributed enough to the accident to incur liability. This would not qualify as a genuine antecedent dispute. The plaintiff has essentially alleged himself the wrongdoer in the incident by stating the defendant’s potential claim against him. It would not become a real “dispute” unless and until the “defendant” were to make it one by seeking damages against the “plaintiff.” The “strong countervailing inference” test strikes a balance between *Tellabs*’s particularity standard, which would be inappropriately stringent for most types of claims, and *Conley*’s no set of facts standard, which would be inappropriately lax.

B. *The Deference Principle*

Although the foregoing test would suffice to resolve cases under the *Twombly-Iqbal* doctrine, this Comment proposes an additional equitable principle of deference to defendants who would bear unfair burdens from discovery. This principle answers the question of what a court should do when a complaint has a harmless or minimally harmful notice gap, on the basis of the Court’s stated rationale for the *Twombly-Iqbal* rule. In both *Twombly* and *Iqbal*, the Court considered prospective discovery that would have unfairly burdened the defendants, given the plaintiffs’ inability to bridge the notice gap by substantiating their allegations.²³³ The Court did not have occasion to consider whether a court should dismiss a complaint for insufficient notice even when the prospective discovery would be minimally burdensome.

²³³ See *supra* Part II.A.

This Comment's proposed principle of deference states that courts should only dismiss complaints for failure to state a claim if the complaint has a notice gap and if proceeding to discovery would impose an unfair burden on the defendant. This principle comes not from any part of the holding in *Twombly* or *Iqbal* but from the dicta in each case about how discovery would harm each defendant.²³⁴ When discovery promises that kind of harm, the judge should dismiss the claim until the plaintiff can substantiate his claim well enough to justify the intrusion into the defendant's affairs.

This equitable principle calls on judges to apply their judicial experience and common sense to keep meritorious cases in court and frivolous cases out. A judge should not dismiss a case strictly on technical grounds. If the defendant's wrongdoing causes the notice gap, then the court should not dismiss the complaint. The defendant should not profit from his wrongdoing. He also vitiates the purpose of notice when he demonstrates such consciousness of guilt. Some areas of law, such as bankruptcy, have inherent disincentives to curb discovery abuse, and there too dismissal for all but the most egregious notice gaps would be improper. As for keeping frivolous cases out, the deference principle will mandate dismissal mainly in one particular class of case, the "private prosecution." This Comment defines the term to describe a type of case in which an enterprising plaintiff brings suit either in bad faith or on mere suspicion of wrongdoing, seeking to use liberal discovery as a sort of ersatz grand jury. Just as judges in criminal cases are mindful of the burdens that those proceedings place upon the accused, they should show similar deference to civil defendants in cases that take on some of the character of criminal prosecutions.

1. Keeping Meritorious Cases In

The deference principle should excuse notice-gap problems when the notice gap comes from the defendant's wrongdoing itself or when the notice gap would cause little harm to the defendant. For an example of the former, consider *Wilson v. City of Chicago*, in which the court denied a motion to dismiss when the plaintiff in a conspiracy case did not know the particular wrongdoers among a group of defendants but could otherwise plead the full

²³⁴ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (explaining that forcing officials to devote their time to discovery rather than government would run against the public interest); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 546 (2007) (worrying about undertaking expensive discovery without adequate justification).

story of the alleged conspiracy.²³⁵ According to the complaint, the police-officer defendants coerced two witnesses into testifying against the plaintiff in a murder trial, but the plaintiff did not know which officer did what.²³⁶ The court correctly rejected the defendants' argument that the plaintiff could not force each defendant individually to respond to the allegations in the complaint, noting that the complaint otherwise provided enough factual detail for each officer to admit or deny the allegations.²³⁷

The notice gap in this case came from the nature of the alleged tort itself, and denying discovery for a minor defect here would have unfairly prejudiced the plaintiff's ability to vindicate his substantive rights. Unlike *Twombly*, in which the plaintiff could adequately allege neither the wrong nor the wrongdoer, here the plaintiff succeeded in alleging the harm. Because conspiracy inherently involves concealing information, i.e., the roles of the conspirators, crediting the complaint's allegation of conspiracy implies excusing that information's absence from the complaint. The *Wilson* court illustrated this problem with the following scenario:

Two police officers arrest a person, and after handcuffing him and placing him on the ground, one officer kicks the arrestee in the head. It would be patently unfair and illogical to force such a person to identify which of the two officers committed the act before taking discovery. Carried to the extreme, Defendants' position would prevent any plaintiff from engaging in any court-assisted discovery without knowing the exact perpetrator of a tort against him.²³⁸

In this situation, the erroneously accused group-member defendant finds himself on the same footing as any other factually innocent defendant. A plaintiff might have a good-faith but mistaken belief that a defendant injured him, and a well-pleaded complaint laying out these allegations would allow the plaintiff discovery. It is a feature of the American legal system as a whole, rather than pleading doctrine specifically, that defendants bear some of the costs of these good-faith errors.

Even for cases in which the plaintiff caused the notice gap, the deference principle does not mandate dismissal when the defendant would suffer minimal

²³⁵ No. 09-C-2477, 2009 WL 3242300 (N.D. Ill. Oct. 7, 2009).

²³⁶ *Id.* at *1.

²³⁷ *Id.* at *2. The *Wilson* court cited Seventh Circuit precedent reaffirming, after *Iqbal*, the sensible rule not to dismiss a claim whose only defect is that the defendant cannot identify an "unknown member of a collective body." *Id.* (quoting *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009)).

²³⁸ *Id.*

harm from litigating the case. The prime example of this situation comes from bankruptcy law. Several features of bankruptcy proceedings protect litigants from the same problems that prompted *Twombly-Iqbal*, making the latter mostly redundant. Bankruptcy cases can only last for as long as the debtor has assets left to distribute to its creditors. The creditors have an incentive not to waste the bankruptcy estate's time and money on frivolous litigation. Any resources that go toward litigation become unavailable for creditors to collect, and again, this is especially true of the zero-sum liquidation game. The trustee's or debtor in possession's fiduciary duty toward the bankruptcy estate prevents it from initiating litigation without any reasonable prospects of enhancing and maintaining the estate's value. A court should dismiss for failure to state a claim only when exceptional circumstances give the court good reason to believe that a particular case will bypass those safeguards.

The alternative to reading the deference principle into the Court's dicta would be to rigidly apply the *Twombly-Iqbal* standard even in cases that could not possibly lead to the kind of unfairness that prompted the Court's action in those two cases. *Angell v. BER Care, Inc. (In re Caremerica, Inc.)*,²³⁹ in which the court relied on *Twombly* and *Iqbal* to dismiss an adversary complaint for failure to state a claim, shows why the notice analysis is inappropriate for bankruptcy cases. The *Angell* court reasoned that because *Iqbal* showed that the *Twombly* rule applied beyond antitrust law,²⁴⁰ it should apply equally to bankruptcy practice.²⁴¹ In reaching this conclusion, the court rejected pre-*Twombly* authority on pleading standards, even though that authority rested on the same language from *Conley* that the *Twombly* Court had quoted approvingly.²⁴² The *Angell* court ignored the policy rationale of *Twombly* and *Iqbal*, dismissing out of hand the complainant's argument that the court should not strictly apply the *Twombly-Iqbal* standard because it would not further those cases' policy goals.²⁴³ This decision recalls the Code pleading era, ritualistically applying a pleading standard to accomplish nothing more than prevent a potentially meritorious claim from moving forward.

²³⁹ 409 B.R. 737, 746 (Bankr. E.D.N.C. 2009).

²⁴⁰ *Id.*

²⁴¹ *Id.* at 748–50.

²⁴² Compare *id.* at 748–49 (citing *Brandywine Apartments v. Official Comm. of Unsecured Creditors of The IT Group (In re The IT Group, Inc.)*, 313 B.R. 370, 374 (Bankr. D. Del. 2004) (noting that the complaint should provide “fair notice of what the plaintiff’s claim is and the grounds upon which it rests”)), with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (same)).

²⁴³ *Angell*, 409 B.R. at 754.

Courts should not follow the *Angell* decision and instead ought to consider how to apply *Twombly-Iqbal* with the Court's policy goals in mind. Although bankruptcy perhaps provides the purest example of litigation in equilibrium, courts should look to similar features of other types of cases to determine whether they can relax *Twombly-Iqbal*'s pleading standards without subjecting the defendant to undue harm. The presence of structural safeguards that already protect defendants vitiates the risk of unfair burdens that led to the Court's *Twombly-Iqbal* jurisprudence.

2. *Keeping Frivolous Cases Out*

Having shown how the deference principle affords judges the flexibility to implement *Twombly-Iqbal* as liberally as a fair reading of those cases allows, this Comment turns to the question of when courts should apply *Twombly-Iqbal* strictly. This Comment understands *Twombly-Iqbal* as a narrow solution to a particular problem that Judge Clark had not anticipated in adapting the Rules from David Dudley Field's prototype. This narrow reading minimally upsets established practice and avoids any unintended consequences that might come from a needlessly labored interpretation of the Rules' austere language, which for the most part has endured the several decades since its enactment without requiring any judicial renovations.

This Comment characterizes this problem as the phenomenon of the "private prosecution." The practice of suing based on suspicion of wrongdoing, without a further basis of information and belief, defines the private prosecution. Private prosecutions tend to attack diffuse rather than individualized wrongdoing. They accomplish this either directly through the class-action process or indirectly against actors perceived to commit widespread harms beyond the subject matter of the particular case. Traditional common law litigation—a plaintiff suing in tort who seeks to be made whole through a sum that represents the harm inflicted—rights wrongs by reversing the wrongdoer–victim relationship into the plaintiff–defendant relationship.

Private prosecutions target defendants with concentrated economic or political power to achieve the best "return" on the litigation resources plaintiffs "invest." This litigation lasts until the costs of pursuing it begin to eat into the marginal returns. This makes liberal discovery lucrative because it places burdens on defendants out of proportion to the effort plaintiffs exert to secure a

return.²⁴⁴ A private prosecution need not reach the merits to serve this purpose.²⁴⁵ The diffuse interests involved, along with both plaintiffs and defendants being repeat players in litigation, add a public dimension to private prosecutions.²⁴⁶ The contours of the liability these suits impose can guide defendants' subsequent behavior, acting as de facto regulation.²⁴⁷

Both *Twombly* and *Iqbal* involved private prosecutions. Although private plaintiffs brought those cases, the Department of Justice could have chosen to investigate the underlying allegations of misconduct.²⁴⁸ Unlike private citizens, these agencies have broad investigatory powers and need not rely on civil discovery to build their cases.²⁴⁹ In principle, these agencies can (and arguably do) use those powers to harass and to burden parties like the defendants in *Twombly* or *Iqbal*, but policy and political considerations can discourage them from undertaking prosecutions manifestly not in the public interest.

No such constraints limit opportunistic civil plaintiffs. Once an opportunist gains access to the discovery process, liberal discovery obligates the target to yield his privacy in much the same way as the target of a federal investigation. In either case, failure to comply with discovery proceedings would put the defendant in contempt of court. Without some kind of bulwark at the pleading stage, anyone with the resources to finance a legal team could become a private attorney general and pursue targets of opportunity for monetary or political gain.

The deference principle curtails this kind of abuse by restricting would-be private prosecutors to a limited institutional role. A plaintiff with enough access to non-public information about a target defendant to provide adequate notice could find himself in a better position to file suit and conduct an investigation through discovery than the appropriate government agency. A government agency might also uncover information that could form a basis for private liability but elect not to sue, in which case a private prosecutor might

²⁴⁴ *Twombly*, 550 U.S. at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).

²⁴⁵ “[T]he principle that the purpose of pleading is to facilitate a proper decision on the merits” comes from no less an authority than *Conley v. Gibson* itself. 355 U.S. 41, 48 (1957).

²⁴⁶ See *supra* Part II.B.

²⁴⁷ See *supra* Part II.B.

²⁴⁸ See 15 U.S.C. § 4 (2006) (granting United States attorneys power to prosecute antitrust violations); 18 U.S.C. § 242 (2006) (defining deprivation of civil rights under color of law as a felony).

²⁴⁹ See 5 U.S.C. § 556(c) (2006) (enumerating administrative agencies' investigatory powers).

use the Freedom of Information Act²⁵⁰ to learn enough to litigate the matter himself.

Private prosecutions call for the most exacting application of the *Twombly-Iqbal* standard. Courts should always remember that private prosecutions yield broad enforcement and regulatory powers to citizens acting on behalf of personal or special interests. The statutes giving individuals powers concurrent to those of the government contain protective elements to prevent their abuse, but as in *Iqbal* and *Twombly*,²⁵¹ plaintiffs may try to exploit low pleading standards when access to discovery is valuable enough in itself to encourage frivolous lawsuits. Defending the pretrial litigation process from attempts by plaintiffs to co-opt it promotes the long-term viability of its other liberal features, such as broad discovery.

As a matter of probability, *Twombly-Iqbal* dismissal will in some cases prevent discovery that would have revealed wrongdoing, even though the complaint could not articulate any reason to expect it. Nonetheless, such cases are not “meritorious” in any meaningful sense, because for the purposes of pleading “merit” means merit at the outset rather than at judgment. The meritorious cases distinguish themselves from the frivolous on the basis of their prospective worth in competing for the judiciary’s limited resources. The fact that a stopped clock is right twice a day should not stop us from fixing it. Characterizing litigation in this manner—strictly on the basis of its final outcome—would also mean classifying the losing side’s case as retrospectively frivolous. It would ignore the purpose of the civil justice system: to resolve disputes civilly regardless of outcome. The Rules accomplish this when a plaintiff earns his day in court by stating a claim that would entitle him to relief.

Moreover, a fair reading of the Federal Rules precludes the practice of pleading on suspicion rather than genuine information or belief. Recall Rule 11’s requirement that the pleader before the court must certify that “the factual contentions have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”²⁵² Contentions in complaints with notice gaps *ipso facto* lack “evidentiary support.” A litigant certifying the complaint must then have some objective reason to believe that they “will likely have evidentiary support.” If so, the

²⁵⁰ 5 U.S.C. § 552 (2006).

²⁵¹ See *supra* Part II.

²⁵² FED. R. CIV. P. 11(b)(3).

plaintiff can put that reason into the complaint to bridge the notice gap. Otherwise, he would defraud the court by certifying the allegations. Even under the assumption that private prosecutions of unsubstantiated claims serve some public interest to justify relaxing Rule 8, a plaintiff cannot bring such a claim without making a false certification to the court. This characteristic of private prosecutions further distinguishes them from most other civil actions under the Rules. Perhaps a new Rule built around the conscious goal of maximizing their systemic benefits and minimizing their systemic costs would better handle this sort of litigation than a method that attempts to work private prosecution into a Rule designed with a different class of cases in mind. Consider that the failure of *Twombly-Iqbal* to curb discovery abuse would necessitate further reforms, whose collateral effects on meritorious claims could prove far costlier.

CONCLUSION

This Comment represents a project of reconciliations. *Twombly* and *Iqbal* seem to their critics an abrupt step back to a less rational past. A more thorough study of the history, though, shows that the reformers on the Supreme Court sought the same goals as the drafters of the Federal Rules. They in turn were continuing the project begun in the nineteenth century by David Dudley Field, the great legal reformer of his era. Though the particularities of its implementation have changed in the intervening decades, the ethic that Field laid down has persevered. This Comment merely adapts that ethic into principles that address the problems of contemporary pleading.

The concept of the notice gap focuses courts on the complaint's role, as understood prior to *Conley*. The plaintiff must tell the defendant and the court the story of his case. This requires enough factual detail so that all involved can understand who committed the wrong and what, where, when, and how it occurred. Any complaint that tells this story, without any gaps, provides fair notice to the defendant and allows the plaintiff to proceed to discovery. Courts should consider dismissing a complaint only when it fails to provide notice and would subject the defendant to the kind of abusive discovery that the *Twombly* and *Iqbal* defendants faced.

Adding the deference principle as an equitable rule of reason to the bare notice analysis reclaims some of the benefits of the overbroad *Conley* doctrine. This Comment understands *Twombly* as mandating a change in priorities, not necessarily an abandonment of the concerns that animated the *Conley* Court.

Once a judge ensures in a particular case that the abuses that *Twombly-Iqbal* sought to prevent are absent, he should then apply the permissive version of the *Conley* standard to the extent compatible with *Twombly-Iqbal* and consistent with procedural fairness. Using these two doctrines in concert directs the court toward the exercise of its gate-keeping powers for the benefit of either party, as justice requires.

Developing a pleading rule means, ultimately, reconciling the wronged plaintiff's desire for the courts to redress his injury against the innocent defendant's desire for the courts to let him alone. As the continuous invention of new rights insinuates the courts into more and more formerly private disputes, consider whether we should not welcome a small step in the opposite direction.

This Comment stands on the shoulders of civil procedure's giants: David Dudley Field in the nineteenth century and Judge Clark in the twentieth. They foresaw most of the same problems with pleading that the profession now faces today. This Comment only begins the process of updating the full scope of their ideas into today's pleading doctrine.

ADAM McDONELL MOLINE*

* Articles Editor, *Emory Law Journal*; J.D. Candidate, Emory University School of Law (2011); B.A., Cornell University (2006). I thank my advisor, Professor Thomas C. Arthur, for his guidance and support as this project increasingly departed from the conventional wisdom. I also thank Professor Richard D. Freer, Professor Timothy P. Terrell, Professor Alexander Volokh, and Professor Frederick Tung, as well as my colleagues on the *Emory Law Journal*, without whose gracious advice and suggestions this Comment would not have been the same. Finally, I thank my friends and family for their confidence and encouragement.