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BREAKING THE TRANSSUBSTANTIVE PLEADING MOLD: PUBLIC INTEREST ENVIRONMENTAL LITIGATION AFTER *ASHCROFT V. IQBAL*

SCOTT FOSTER*

*The history of American freedom is, in no small measure,
the history of procedure.*¹

—Justice Felix Frankfurter

The Supreme Court's ruling in *Bell Atlantic Corp. v. Twombly*² upended decades of federal pleading standards jurisprudence. The consequences of this decision, which replaced the venerable “no set of facts” language and emphasis on notice from *Conley v. Gibson*³ with a “plausibility” requirement,⁴ were uncertain—until recently. While many commentators differed over the reach of *Twombly*,⁵ the Court's recent decision in *Ashcroft v. Iqbal* appears to settle the pleading standard debate firmly in favor of heightened pleading, defined by the plausibility standard.⁶

The implications of this decision raise potentially dire consequences for plaintiffs who seek access to courts in order to vindicate public interest concerns. Environmental plaintiffs particularly should be wary of the burdens plausibility places upon their claims. For some of these litigants, plausibility pleading may destroy their attempts to protect the health and safety of their community and environment.

A cursory glance at the citation record of these cases underscores the substantial shift in pleadings jurisprudence.⁷ Spreading beyond courts

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¹ *Malinski v. New York*, 324 U.S. 401, 414 (1954) (Frankfurter, J., concurring).

² 550 U.S. 544 (2007).

³ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

⁴ *Twombly*, 550 U.S. at 570.

⁵ See discussion *infra* Part I.B.

⁶ 129 S. Ct. 1937, 1949 (2009).

⁷ Only nine months after *Iqbal* was handed down, federal courts have cited the decision 6,268 times. Courts cited *Twombly*, as of Feb. 18, 2010, 24,471 times. This information was obtained from a Westlaw search from each date of decision through Feb. 18, 2010, performed on Mar. 3, 2010.

and legal circles, the *Twombly* and *Iqbal* decisions awakened new interest in the pleading standard debate in the media,⁸ and even moved into the halls of Congress.⁹ The reason for this vast amount of attention on a procedural interpretation case is the scope of its application.

Federal pleading standards are transsubstantive¹⁰ and therefore applicable to claims brought under all substantive areas of the law. This note will focus on this connection between pleading standards and substantive law. Increasing the pleading burden on plaintiffs through plausibility imperils both the principles underlying the transsubstantive nature of the Federal Rules of Civil Procedure and environmental public interest litigation. This friction between the Rules' normative origins and the plausibility standard provides an opening to explore whether the reasoning for applying transsubstantive pleading standards still maintains coherency when examined in the context of public interest environmental litigation.

Because the current environmental regulatory schema of the United States leans upon environmental public interest litigation (also known as citizen suits) for enforcement,¹¹ the danger to the environmental regulatory structure becomes readily apparent. Already, the courts are beginning to use plausibility pleading to evaluate—and dismiss—citizens' attempts to enforce environmental regulations or recover damages.¹² With this standard barring more citizen suits from the federal courthouse, the goals of environmental regulation are less likely to be achieved.¹³ A heightened pleading standard also constricts the future function of public interest litigation in regulating greenhouse gas emissions and asphyxiates the innovation of alternative enforcement models.¹⁴ In view of these challenges, the purpose of public interest environmental litigation is understandably at odds with the current *Twombly* standard.

To gain a broader vision of the role public interest environmental litigation plays, this note also examines pleading standards in other

⁸ See, e.g., Ashby Jones, *Sick of Iqbal, Part II: House Dems Working to Override Scotus Ruling*, WALLST. J.L. BLOG (Oct. 28, 2009, 5:58 PM), <http://blogs.wsj.com/law/2009/10/28/sick-of-iqbal-part-ii-house-dems-working-to-override-scotus-ruling/>.

⁹ See, e.g., Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Open Access to Courts Act of 2009, H.R. 4115, 111th Cong. (2009).

¹⁰ FED. R. CIV. P. 8. See discussion *infra* Part I.C.

¹¹ See discussion *infra* Part II.A.

¹² See, e.g., *Benzman v. Whitman*, 523 F.3d 119 (2d Cir. 2008) (reversing an environmental class action against the Environmental Protection Agency ("EPA") that survived a motion to dismiss at the district court—before *Twombly*—for failure to state a claim at the appellate level—after *Twombly*).

¹³ See discussion *infra* Part III.A.

¹⁴ See discussion *infra* Part III.B.

jurisdictions outside the United States. In turn, this provides greater insight into the relationship between the underlying motives of pleading standards and the environmental enforcement schema. Comparative analysis can help to determine whether *Iqbal's* extension of *Twombly* best fits the purposes of transsubstantive rules and environmental public interest litigation. Additionally, pleading standards abroad¹⁵ highlight the increasing importance of creating procedural rules that further the interests of the public in enforcing environmental regulation through litigation.

In sum, much of the disturbance caused by *Twombly* and *Iqbal* retraces the familiar arguments against a transsubstantive pleading standard. The heart of these arguments may be traced to the early goals of the Federal Rules of Civil Procedure, “uniformity” and “flexibility,” which were thought to be met by the notice pleading standard.¹⁶ More importantly, transsubstantive rules were originally justified as the best way to achieve “substantive justice.”¹⁷ After the reappearance of “fact pleading” in the plausibility standard, however, other priorities seem to displace these goals.¹⁸

This note argues that the plausibility standard thwarts the purpose or substantial justice of public interest environmental litigation.¹⁹ This creates dissonance between the goals of transsubstantive rules and the pleading standard. The justifications for transsubstantive rules evaporate because justice for the public interest in environmental litigation is less obtainable.²⁰ In answer to this pleading problem, this note puts forward a solution that calls for the partition of the current *Twombly* pleading standard. Instead of plausibility, public interest environmental litigation will return to notice pleading. After viewing all of the arguments in context, notice pleading is better suited to the unique purposes of public interest environmental litigation.²¹ Although problems exist with the implementation of this break, this note will attempt to provide justification for the necessity of choosing this more difficult path.

Part I of this note explores the development of transsubstantive pleading standards in the federal court system. Part II examines the rise of public interest environmental litigation and the escalating importance

¹⁵ See discussion *infra* Part IV.

¹⁶ See discussion *infra* Part I.C.

¹⁷ See Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 551, 564–67 (1939) [hereinafter Clark, *Fundamental Changes*].

¹⁸ See discussion *infra* Part I.C.

¹⁹ See discussion *infra* Part V.A.1.

²⁰ See discussion *infra* Part V.A.

²¹ See discussion *infra* Part V.

of litigating future environmental issues. Part III demonstrates the friction between the goals of environmental litigation and the heightened pleading standard articulated by *Twombly*. Part IV compares the United States' pleading standard with other nations' pleading standards in order to gain insight into the procedural structure that allows both heightened pleading and environmental litigation. Finally, Part V argues that public interest environmental litigation in the United States necessitates a return to notice pleading, thus demonstrating the need for multiple pleading standards dependent on the underlying purpose of the substantive area of the law.

I. CONTEXTUALIZING PLEADING STANDARDS AND THE
TRANSSUBSTANTIVE DEBATE

Rule 8 of the Federal Rules of Civil Procedure sets out the pleading standard for civil litigation in federal courts.²² Described by some as a "jewel in the crown of the Federal Rules,"²³ Rule 8 serves an important purpose in the structure and principles underlying the Rules. Crucial to an understanding of the controversies surrounding its latest developmental iteration, the history of the creation of Rule 8 informs the current debates concerning its function and formulation. Only then can one begin the more difficult task of weighing the underlying values of the federal pleading standard against the underlying purposes of public interest environmental litigation.

A. *Development of Federal Pleading Standards*

No examination of American pleading standards can begin without an understanding of the United States' procedural heredity. Immigrants to the rediscovered world's colonies brought judicial procedures adapted from the English village tribunals familiar to them.²⁴ As these founding British settlements matured, professional judges and lawyers trained in the mother country's courts settled down to practice civil litigation.²⁵ By the end of the War of Independence, the newly minted United States contained a cadre of lawyers versed in a uniquely American, but still recognizably British, form of civil procedure.²⁶ Then, the individual states and,

²² FED. R. CIV. P. 8 (titled "General Rules of Pleading").

²³ Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998).

²⁴ GEOFFREY C. HAZARD, JR. & MICHELE TARUFFO, AMERICAN CIVIL PROCEDURE 1 (1993).

²⁵ See *id.* at 3.

²⁶ See *id.*

what became by 1787 the federal government, were left to choose their own procedural path.²⁷

Like the early colonists before them, the recently independent states and the lawyers crafting their legal systems continued to adopt civil procedural forms familiar to them, specifically the division between actions in common law and bills in equity.²⁸ Common law developed out of the body of English court decisions that created actions or writs to prosecute against defendants in the courts.²⁹ Writs described specific wrongs committed by the defendant against the plaintiff and provided the court's authority to adjudicate the dispute.³⁰ The common law procedural system placed emphasis on the distinction between questions of facts and law, using the writs to identify both types of issues and place them properly before a judge or jury.³¹

Chancery courts, by contrast, heard bills in equity.³² Bills submitted to the court were simple narratives of the facts.³³ Judges then received the defendant's side of the story.³⁴ These courts concerned themselves with seeking "justice" because the disputes before them usually had no remedy at common law.³⁵ Decisions were orders to act or refrain from acting consistent with the just decision of the court.³⁶

Pleading standards in each court related to the function of the court in acting upon the dispute; writs separated issues of law and fact for common law judges and juries to decide.³⁷ This resulted in highly specified pleading formulations.³⁸ By contrast, bills of equity presented a plain statement of the facts to the court, so the judge could investigate any wrongful conduct on the part of the defendant.³⁹ American courts inherited these distinctions and subsequently applied them in their own courts.⁴⁰

The state courts procedural evolution became more influential to the development of federal pleading standards due to the Conformity Act

²⁷ *See id.* at 26–27.

²⁸ *Id.* at 15.

²⁹ *Id.* at 16–17.

³⁰ HAZARD & TARUFFO, *supra* note 24, at 15–19.

³¹ *See id.* at 17.

³² *Id.* at 15.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 14, 16.

³⁶ HAZARD & TARUFFO, *supra* note 24, at 15.

³⁷ *Id.* at 16–17.

³⁸ *See id.*

³⁹ *Id.* at 17.

⁴⁰ *Id.* at 3.

of 1789.⁴¹ Federal pleading standards at common law were tied to the state jurisdiction where the court was located.⁴² Reform to traditional procedure was slow in coming to the states, but the subsequent creation of the Field Code in 1848, and its adoption by over half the states, led to a substantial break with past pleading practices.⁴³

The Field Code, named after its principle draftsman David Dudley Field, was devised in New York.⁴⁴ Removing the highly technical and antiquated forms of action from common law, the Field Code's draftsman required plaintiffs to plead "in ordinary and concise language without repetition."⁴⁵ Assuming this language, however, to be an adoption of equity procedural goals would be a mistake. For Field, "procedure had to intermesh with the rights, in order for the rights to be delivered."⁴⁶ Outcomes were to be swift and predictable, based upon carefully articulated rights in the substantive area of the law.⁴⁷ Though some equity procedural mechanisms were merged into the Field Code,⁴⁸ the chief end of the draftsman was to provide certainty.⁴⁹ In their view, equity courts, along with their goals of justice, flexibility, and judicial discretion, were better left forgotten as relics of legal antiquity.⁵⁰

Vestiges of the Field Code continued to impact federal civil procedure until Congress passed the Rules Enabling Act of 1934.⁵¹ Charles Clark, then Dean of Yale Law School, was selected to be the Reporter of the Supreme Court Advisory Committee that would draft the new Federal

⁴¹ Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93 ("[M]odes of process . . . in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same."); see Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 391–92 (1935).

⁴² See Clark & Moore, *supra* note 41, at 391.

⁴³ See HAZARD & TARUFFO, *supra* note 24, at 24.

⁴⁴ *Id.*

⁴⁵ Act of Apr. 12, 1848, Ch. 379, 1848 N.Y. Laws 521 (simplifying and abridging the practice, pleadings, and proceedings of the court).

⁴⁶ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 936 (1987).

⁴⁷ See *id.*

⁴⁸ *Id.* at 934 ("The Code liberalized a party's ability to amend pleadings and to enter evidence at variance with a pleading. It expanded the number of potential parties, causes of action, and defenses that could be joined in one suit. It provided discovery mechanisms and permitted the court to grant the plaintiff any relief consistent with the case made by the complaint, and embraced within the issue.") (internal citations omitted).

⁴⁹ See *id.*

⁵⁰ *Id.* at 934.

⁵¹ See generally Subrin, *supra* note 46, at 943–74 (discussing the development of uniform federal rules).

Rules authorized by the Act.⁵² Clark's experience of pleading under the Field Code "was a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law administered by regal judges."⁵³ His vision of procedural law encompassed "uniformity" and "flexibility" as central attributes in a system that allows parties to get to the heart of the legal dispute.⁵⁴ It is in this environment that Rule 8 of the Federal Rules of Civil Procedure was fashioned.

A pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁵⁵ Rule 8 does not mention "facts" or "cause of action" requirements, unlike Code pleadings.⁵⁶ Under the Field Code, "facts" were subject to debate and, if not properly supported by evidence, a pleading could be dismissed as improper.⁵⁷ Moreover, "cause of action" imported certain legal effects, when Clark's goal was to move beyond stating forms of action.⁵⁸ In the final version, pleadings' function were narrowed significantly so that the complaint served to provide notice to the defendant.⁵⁹ Other traditional pleading functions were transferred to other rules.⁶⁰

Though resistance continued among some courts and scholars,⁶¹ the Supreme Court provided a broad playing field for the pleading rule. In *Conley v. Gibson*, the Court articulated the notice pleading standard, which states that complaints are not dismissed for insufficient pleading unless "no set of facts" can support entitlement to relief.⁶² Confirming this

⁵² *Id.* at 961.

⁵³ *Id.* at 973.

⁵⁴ *Id.* at 976–77.

⁵⁵ FED. R. CIV. P. 8(a)(2).

⁵⁶ See Subrin, *supra* note 46, at 976.

⁵⁷ Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1753 (1998) [hereinafter Marcus, *The Puzzling Persistence*].

⁵⁸ See Subrin, *supra* note 46, at 976.

⁵⁹ See *id.*

⁶⁰ 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1202 (3d ed. 2004). Traditionally pleadings served four purposes: "(1) giving notice of the nature of a claim or defense; (2) stating the facts each party believes to exist; (3) narrowing the issues that must be litigated; and (4) providing a means for speedy disposition of sham claims and insubstantial defenses." *Id.* Pre-trial conferences, discovery, partial and full summary judgment assume more efficiently the burden of these purposes. *Id.*

⁶¹ See 1952 Ninth Circuit Judicial Conference Report, *Claim or Cause of Action: A Discussion of the Need for Amendment to Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253 (1952); Archie O. Dawson, *The Place of the Pleadings in a Proper Definition of the Issues in the "Big Case,"* in PROCEEDINGS OF THE SEMINAR ON PROTRACTED CASES, reprinted in 23 F.R.D. 430, 433–35 (1958).

⁶² 355 U.S. 41, 45–46 (1957).

articulation of the pleading standard over the intervening decades since *Conley*, the Court emphasized the transsubstantive nature of Rule 8 in the face of many significant and substantively diverse challenges.⁶³ Then suddenly, the tide of Supreme Court jurisprudence turned swiftly against notice pleading with the advent of a consumer class action case alleging antitrust conspiracy against telecommunication providers.⁶⁴

B. The Devolution of Pleading in Twombly and Iqbal

Plaintiffs William Twombly and Lawrence Marcus, representing a class of local telephone and high-speed internet customers, brought a class action suit for restraint of trade against defendants Bell Atlantic, Southwestern Bell Corporation, and other incumbent local providers.⁶⁵ The pleadings alleged that the defendants “engaged in . . . parallel conduct” in order to prevent other companies from entering the market.⁶⁶ After dismissal for failure to state a claim and the court of appeals’ reversal, the Supreme Court affirmed the district court’s ruling, declaring *Conley*’s language to be a “negative gloss on an accepted pleading standard.”⁶⁷ The Court found that pleadings must contain “facts to state a claim to relief that is plausible on its face.”⁶⁸

The Court’s pronouncement in *Twombly* provoked strong reactions; one facet of the discussion construes plausibility pleading to apply only to antitrust cases,⁶⁹ or possibly only extendable to analogous substantive areas of law.⁷⁰ Other scholars found the decision to be an interment of notice pleading, establishing plausibility as a new procedural bar for the

⁶³ See, e.g., *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) (holding that the courts may not apply a heightened pleading standard in illegal search cases alleging municipal liability); *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002) (holding that an age discrimination pleading does not require specific facts to establish a prima facie case for discrimination).

⁶⁴ See discussion *infra* Part I.B.

⁶⁵ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007).

⁶⁶ *Id.* at 548–51.

⁶⁷ *Id.* at 563.

⁶⁸ *Id.* at 570.

⁶⁹ See Keith Bradley, *Pleading Standards Should Not Change After Bell Atlantic v. Twombly*, 102 NW. U. L. REV. 117, 117 (2007) (“[I]t is a misreading of *Twombly* to extend ‘plausibility’ beyond that [antitrust law] context.”).

⁷⁰ See Kendall Hannon, Note, *Much Ado About Twombly?: A Study on the Impact of Bell Atlantic v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (“Antitrust cases comprised only 3.7% (40 out of 1075) of all cases citing *Twombly* in this study; the remainder is representative of every substantive area of law.”).

heightened pleading of facts.⁷¹ The Court's insistence in the opinion that the decision was merely a better formulation of Rule 8 garnered support from those who believe that pleadings were always more stringent than *Conley* suggested.⁷² In light of these varying implications and interpretations, the Court soon made its views clear, answering and inciting more challenging questions.

Ashcroft v. Iqbal provided a definitive answer to those who questioned *Twombly*'s scope.⁷³ Plausibility is now the pleading standard and the key to unlocking court access.⁷⁴ In applying this standard, *Iqbal* requires courts to weigh the factual allegations dependent upon their "judicial experience and common sense."⁷⁵ When viewing the pleadings, courts must separate out the conclusory statements as insufficient allegations to meet the plausibility standard.⁷⁶

Examples of the far reach of plausibility pleading can be summoned from many substantive areas of law, but most pertinent to this note's analysis are instances where *Twombly* and *Iqbal* are now invoked to attempt dismissal of public interest environmental litigation for failure to state a claim.⁷⁷ The resultant change of federal pleading standards underscores the power of transsubstantive pleading, and yet it also potentially cracks

⁷¹ See A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) [hereinafter Spencer, *Plausibility Pleading*] ("Notice pleading is dead."). See also *Twombly*, 550 U.S. at 577 (J. Stevens, dissenting) ("If Conley's 'no set of facts' language is to be interred, let it not be without a eulogy.").

⁷² See Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1063–65 (2009). Professor Smith argues that:

The Court has made plain that, in its opinion, the Federal Rules always required that at a minimum plaintiffs must state a claim that is logically coherent—i.e., the allegations in plaintiffs' complaint must be both necessary and sufficient to establish defendant's liability[] [and] [t]his Article maintains that this . . . requirement is largely the aim of the Court's plausibility standard, that the Court correctly held that this requirement was mandated by the Federal Rules

Id. at 1064.

⁷³ See Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 458–62 (2009) [hereinafter Dodson, *Comparative Convergences*].

⁷⁴ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'") (internal citations omitted).

⁷⁵ *Id.* at 1950.

⁷⁶ *Id.* at 1949–50.

⁷⁷ See, e.g., *Bishop v. Brewer Env'tl. Indus., LLC*, Nos. 06-00612 HG-LEK & 08-00558 HG-LEK, 2009 WL 1544581 (D. Haw. June 2, 2009) (applying the plausibility standard to Comprehensive Environmental Response, Compensation, and Liability Act litigation).

the foundation upon which the transsubstantivity of the Federal Rules of Civil Procedure repose.

C. *Transsubstantivity and the Federal Rules of Civil Procedure*

The Federal Rules of Civil Procedure were fashioned to eradicate arbitrary legal distinctions.⁷⁸ By removing these barriers, courts may advance claims to the evidence-gathering phase of litigation in order to undertake a more substantive analysis of the plaintiff's allegations. To achieve this end, uniformity and flexibility of process were invoked by the Rules' draftsmen to maintain coherency across all substantive areas of law subject to civil litigation.⁷⁹

Rule 8, the pleading standard, is the "keystone" which upholds the entire procedural structure.⁸⁰ Forcing *Twombly's* plausibility pleading standard to fit into this structure weakens the load-bearing capacity of transsubstantive justifications underpinning the entire operation of civil actions. Thus, the effects of *Iqbal* upon the justifications for transsubstantive pleading, uniformity and flexibility, must be examined. It seems that the uniformity element of Rule 8 is left untouched by plausibility pleading.⁸¹ Flexibility, however, is another matter.

Notice pleading under *Conley* cast a wide net giving Rule 8 great flexibility.⁸² The standard was over-inclusive, relying upon other procedural rules to further define or weed out bad claims.⁸³ Plausibility requires "a complaint to plead facts [beyond those] that are 'merely consistent with' a defendant's liability."⁸⁴ The slightest increase in the factual pleading burden implies an inclusivity gap between notice-emphasized pleading

⁷⁸ See Subrin, *supra* note 46, at 977.

⁷⁹ See *id.* at 976–77.

⁸⁰ See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS, § 66, at 456, § 68, at 467–68 (5th ed. 1994).

⁸¹ *Iqbal*, 129 S. Ct. at 1950. *Twombly* left this question unanswered which created counter-arguments against the standard based upon violation of the uniformity principle. *Iqbal* resolved this dispute. See *supra* notes 69–75 and accompanying text.

⁸² See Marcus, *The Puzzling Persistence*, *supra* note 57, at 1754. Professor Marcus identified data that suggest that pleading motions lead to final termination in three percent to six percent of cases. *Id.*

⁸³ See FED. R. CIV. P. 11(c) (sanctions for frivolous filings), 12(b) (motion to dismiss), 12(c) (motion for judgment on the pleadings), 12(e) (motion for more definite statement), 16 (pre-trial conference), 26 (discovery), and 56 (motion for summary judgment). See also Wright & Miller, *supra* note 60.

⁸⁴ *Iqbal*, 129 S. Ct. at 1949 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

and plausibility-emphasized pleading. Because *Twombly*'s plausibility standard requires more than consistent factual allegations, it is under-inclusive when compared to *Conley*'s lower requirement. It follows that the net cast by *Twombly* is narrower, and removes support for transsubstantive pleading on flexibility grounds when compared to notice pleading.

Critics of the transsubstantive approach to pleading argue that uniformity is a flawed value with which to justify transsubstantive rules.⁸⁵ Uniform rules retard the development of substantive law⁸⁶ and in practice are not "uniform" because of the "bewildering array of local rules, standing orders, and standard operation procedures, to say nothing of case law."⁸⁷ These arguments are rooted in the view that substance is bound tightly to procedure, and separation harms both.⁸⁸

Supporters counter these arguments by recounting the difficulties and injustices of Code pleading before the Federal Rules were enacted.⁸⁹ They also maintain that uniformity encourages procedural learning and subsequent sharing across substantive areas.⁹⁰ Moreover, the challenge of constructing the alternative substance-specific procedural rules is daunting.⁹¹ Perhaps most important of all, arguments could be made that flexibility provides greater assurance that claims will reach beyond the pleading stage to receive some substantive analysis, even though the complaint itself will not be optimized to efficiently execute the underlying purposes of the substantive law.

Iqbal, however, weakened fatally the flexibility justification for transsubstantive pleading standards. Now that heightened pleading under the guise of plausibility drives the application of Rule 8, uniformity stands alone. At best, uniformity provides a thin veneer that disguises the swirling undercurrents and tensions differing substantive interests create. Professor Cover best describes this dilemma:

⁸⁵ See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 732–33 (1975).

⁸⁶ See *id.*

⁸⁷ Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 715 (1988). Professor Burbank also argues that the transsubstantive approach actually hinders true uniform enforcement. *Id.*

⁸⁸ *Id.* at 714.

⁸⁹ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2082–83 (1989).

⁹⁰ See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 778 (1993).

⁹¹ See *id.*

Our norms for minimal process, expressed in the constitutional rubric of procedural due process, are generally conceded to constitute a substance-sensitive calibrated continuum in which the nature of the process due is connected to the nature of the substantive interest to be vindicated; yet our primary set of norms for optimal procedure, the procedure available in our courts of general jurisdiction, is assumed to be largely invariant with substance.⁹²

The question for procedural policy stakeholders then becomes: is uniformity sufficient to outweigh other interests in applying unique pleading standards to substantive areas of the law? Public interest environmental litigation draws out these substantive interests, throwing their strength against the procedural boundaries meant to hold them in check. The resultant dilemma makes the perfect case study to analyze whether the underlying purpose of the law and litigation is more important than the remaining transsubstantive justifications.

II. ENVIRONMENTAL LITIGATION AND THE PUBLIC INTEREST

The importance of notice pleading cannot be ignored when conducting an examination of the interaction between pleading and substantive law. "Modern products liability, toxic tort, and environmental litigation would be simply inconceivable without the combination of liberal pleading, liberal joinder, and liberal discovery."⁹³ The underlying purposes of public interest environmental litigation challenge the current pleading trend on transsubstantive grounds. By reviewing the history and current function of environmental regulation and litigation, the hardships that a plausibility standard of pleading engenders can no longer be justified when litigation is brought in pursuit of the public's environmental interest.

A. *Understanding Environmental Advocacy in the United States*

It is difficult to imagine a time when the American wilderness was left to fend for itself. However, in order to investigate the beginnings of environmental law, one must look to the acts of individuals that long

⁹² See Cover, *supra* note 85, at 732.

⁹³ Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2242 (1989).

preceded federal government's legislative actions.⁹⁴ For example, forest husbandry and other resource management demonstrated Americans' efforts to regulate the natural environment.⁹⁵ This led to preservation and conservation movements driven by private individuals, which accounted for many of the early environmental reforms.⁹⁶ Yet, for most of the nation, entrenched in the industrial development era, the perils facing America's natural treasures hid behind the smokescreen of life in the city.⁹⁷ Change in the environmental movement did not occur until Americans began to see their natural world with new eyes.⁹⁸

After the end of World War II, prosperity bred leisure, interest, and opportunity to explore the world outside urban and suburban centers.⁹⁹ As public awareness manifested growing concerns about the disadvantaged legal protections afforded to their natural playgrounds, more people began to recognize the rebound effect poor environmental stewardship would have upon their lives.¹⁰⁰

The 1970s saw the advent of citizen activism and mass media coverage pushing congressional leaders to give higher priority to environmental issues.¹⁰¹ In response, twenty-seven federal laws and hundreds of administrative regulations moved through Congress and the executive branch.¹⁰² Over time, the increasing complexity of environmental concerns were forced to retreat in the face of potentially devastating economic impacts upon communities.¹⁰³

The United States' current regulatory schema for the environment is generally considered "command and control."¹⁰⁴ The government

⁹⁴ See KARL BOYD BROOKS, *BEFORE EARTH DAY, THE ORIGINS OF AMERICAN ENVIRONMENTAL LAW, 1945–1970*, at 10–11 (2009).

⁹⁵ *Id.*

⁹⁶ See THOMAS MORE HOBAN & RICHARD OLIVER BROOKS, *GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS* 2 (2d. ed. 1996).

⁹⁷ See *id.* at 3.

⁹⁸ See *id.*

⁹⁹ *Id.*

¹⁰⁰ See *id.*

¹⁰¹ See BROOKS, *supra* note 94, at 15, 167–68; NANCY K. KUBASEK & GARY S. SILVERMAN, *ENVIRONMENTAL LAW* 123 (3d ed. 2000).

¹⁰² KUBASEK & SILVERMAN, *supra* note 101, at 123.

¹⁰³ See HOBAN & BROOKS, *supra* note 96, at 5 (noting examples where environmental concerns threatened the automobile industry and a region's major employer).

¹⁰⁴ Avery E. Carson, *Integrating Conservation Uses into Takings Law: Why Courts Should View Conservation as a Possible Highest and Best Use*, 86 N.C. L. REV. 274, 287 (2007); see Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1235 (1995); see David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 290–91 (1998).

regulates pollution amounts through permits and requires standardization when better equipment or technology is available to dilute the problem.¹⁰⁵

This regulatory structure is riddled with problems. Agencies charged with supervisory powers are prone to “capture” by the very industries they regulate.¹⁰⁶ Bureaucracy is also prone to “rent-seeking” or self-interested behavior, generally when a person chooses to advance their own power over acting fully in the public’s interest.¹⁰⁷ The political leadership of regulatory agencies can also result in questionable or inconsistent policy implementation.¹⁰⁸

Many scholars criticize the current regulatory structure.¹⁰⁹ Yet, while the search for a more effective model continues, public interest litigation propels well-founded and emergent environmental concerns into the public domain for resolution. The public may side step regulatory agencies’ inherent flaws and participate directly in resolving their concerns; thus the public becomes its own advocate.

B. The Function of Public Interest Litigation in Environmental Regulation and Enforcement

Of the many forms environmental public interest litigation assumes, the citizen suit exemplifies the function this type of litigation performs in tending the nation’s environment. Citizen suits are “a mechanism for controlling unlawfully inadequate enforcement of the law.”¹¹⁰ The citizen suit provision allows citizens with standing to initiate suits in court to enforce certain environmental regulations.¹¹¹

¹⁰⁵ Orts, *supra* note 104, at 1235.

¹⁰⁶ See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 448–49 (1987).

¹⁰⁷ *Id.* at 450.

¹⁰⁸ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007) (illustrating the undercurrent of political tension where several states sued then-President George W. Bush’s Environmental Protection Agency in order to enjoin its regulation of carbon dioxide and other greenhouse gases as pollutants, at a time when Bush’s political party generally stood against regulation of greenhouse gases).

¹⁰⁹ Orts, *supra* note 104, at 1236–41; see, e.g., Michael S. Greve, *Friends of the Earth, Foes of Federalism*, 12 DUKE ENVTL. L. & POL’Y F. 167, 181 (“Environmental regulation in particular rests on the premise that an infinitely complex, fragile, and precious environment can be protected only through a centralized, ‘Soviet-style’ command-and-control scheme.”).

¹¹⁰ Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 165 (1992).

¹¹¹ Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL’Y F. 39, 46 (2001).

Within the environmental regulatory structure, these suits serve several purposes. Environmental regulation is premised upon market failure, which occurs when businesses are not forced to assume the externalized costs of their illegal pollution.¹¹² Citizen suits can help to guard against these externalized costs by increasing business accountability.¹¹³ They also empower citizens to act as private attorneys general.¹¹⁴ Probably most important of all, citizen suit litigation helps to de-politicize the regulation process.¹¹⁵

Congress authorized extensive citizen suit provisions in many major environmental statutes, including most notably the Clean Air Act (“CAA”),¹¹⁶ the Clean Water Act (“CWA”),¹¹⁷ and the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”).¹¹⁸ Citizen plaintiff relief includes injunctions, penalties, and consent decrees.¹¹⁹ Recent studies show that a majority of citizen suits are filed by small local environmental groups.¹²⁰ Defendants are more often private parties, but studies indicate that approximately one-third of filed citizen suits list public defendants.¹²¹ Overall, data show the continuing use and importance of citizen suits in implementing regulatory policy against varied defendants by means of the statutory remedies at their disposal.¹²² This lays the down the track on which substantive environmental law collides with the new procedural standard.

¹¹² *Id.* at 42.

¹¹³ *Id.* at 42–43.

¹¹⁴ *Id.* at 43.

¹¹⁵ *Id.* at 44.

¹¹⁶ 42 U.S.C. § 7604(a) (2006).

¹¹⁷ 33 U.S.C. § 1365(a) (2006).

¹¹⁸ 42 U.S.C. § 9659(a) (2006). Other significant environmental laws that contain citizen suit provisions are the Emergency Planning and Community Right to Know Act (“EPCRA”), 42 U.S.C. § 11046(a)(1) (2006); the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6972 (2006); the Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2006); and the Toxic Substances Control Act, 15 U.S.C. § 2619 (2006). The widespread inclusion of these provisions lends the appearance of congressional approval to their efficacy in neutralizing the aforementioned problems with the regulatory schema. *But see* Michael S. Greve, *The Private Enforcement of Environmental Law*, 65 TUL. L. REV. 339, 341 (1990) (arguing that congressional support for citizen suits is merely “an outgrowth of interest group politics”).

¹¹⁹ JEFFERY G. MILLER, ENVTL. LAW INST., *CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS* 73–94 (1987).

¹²⁰ Kristi M. Smith, *Who’s Suing Whom?: A Comparison of Government and Citizen Suit Environmental Enforcement Actions Brought Under EPA-Administered Statutes, 1995–2000*, 29 COLUM. J. ENVTL. L. 359, 392 (2004).

¹²¹ *Id.*

¹²² *See id.* at 395–96.

III. FRICTION BETWEEN HEIGHTENED PLEADING AND PUBLIC INTEREST ENVIRONMENTAL LITIGATION

Understanding the development and underlying purposes of pleading standards compared with the function of public interest environmental litigation contextualizes the age-old problem of whether pleading standards should be derived from the substantive law underlying the claim. In order to demonstrate that the interests of transsubstantive pleading no longer outweigh the interests of environmental litigation, this note assesses the impact of plausibility pleading on current litigation. First, it scrutinizes whether the *Twombly* heightened pleading standard frustrates current public interest litigation. Then it tries the standard against potential future developments and concerns of environmental plaintiffs.

A. *Iqbal Pleading's Impact on Current Public Interest Environmental Litigation*

Contemplating heightened pleading standards in environmental litigation is not entirely novel. In the early 1990s some judges imposed heightened pleading requirements on environmental plaintiffs, generally limited to claims under CERCLA.¹²³ The source for this shift away from notice pleading was the influential opinion of Judge Keeton in *Cash Energy, Inc. v. Weiner*.¹²⁴ The instances where such a standard would likely be applied were limited to those pleadings with elements similar to fraud,¹²⁵ which is the one substantive action given its own pleading standard, Rule 9(b).¹²⁶ Not all jurists, however, agreed with Judge Keeton and therefore continued to apply traditional notice pleading to those claims.¹²⁷

¹²³ Carl W. Tobias, *Elevated Pleading in Environmental Litigation*, 27 U.C. DAVIS L. REV. 357, 361 (1994).

¹²⁴ 768 F. Supp. 892 (D. Mass. 1991). Here, the plaintiff, a condominium project owner, brought suit against a neighboring property owner for violations of CERCLA because the neighboring property was contaminated. *Id.* at 893, 895.

¹²⁵ *Id.* at 897–900. Judge Keeton found countervailing tendencies against notice pleading in the Federal Rules of Civil Procedure because of the different pleading standard for fraud in Rule 9(b) coupled with Rule 8(f)'s promotion of substantial justice (which he considered to be an authorization to use judicial discretion for pleading standards). Although he admitted the analogy to fraud was "strained, CERCLA involves many of the circumstances that have led courts to invoke higher standards of specificity in other contexts." *Id.* at 900.

¹²⁶ The Rule states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b).

¹²⁷ See Tobias, *supra* note 123, at 365–67.

The lesson to be learned by the previous pleading developments is that even uniform standards may cause inconsistent legal outcomes. These past diverging views and results indicate the path *Twombly* pleading will have for future environmental litigants.

For example, in *Goliad County v. Uranium Energy Corp.*¹²⁸ the plaintiff, Goliad County, filed a citizen suit under the Safe Drinking Water Act (“SDWA”)¹²⁹ against the Uranium Energy Corp. (“UEC”) who attempted to obtain an “injection” permit for wells located at the mining site within Goliad County.¹³⁰ The plaintiff alleged that UEC failed to properly seal boreholes into these wells, subsequently allowing storm water to enter the wells and pass through into the Evangeline Aquifer, contaminating the county’s drinking water.¹³¹ The court, however, found the pleadings, which stated “UEC’s ‘pattern of intentional disregard of these plugging requirements is sufficient to lead to the inference of intent to emplace fluids in the subsurface,’” lacked sufficient *factual* allegations under *Iqbal* to state a claim.¹³²

By contrast, the court in *Environmental World Watch, Inc. v. Walt Disney Co.* found similar allegations satisfied the plausibility pleading for CWA and the Resource Conservation and Recovery Act (“RCRA”) violations.¹³³ The plaintiffs alleged that Disney added chemicals to the water used in their studio’s air conditioning system.¹³⁴ As the cooling water was pumped from the ground and returned through well water disposal lines and pipes, hexavalent chromium (“Cr VI”) discharged “into the land, water, and air surrounding the Studio Lot.”¹³⁵ Disney attacked the pleadings through a 12(b)(6) motion because the plaintiff failed to allege any discharge of Cr VI at toxic levels, as required by statute.¹³⁶ The court

¹²⁸ *Goliad Cnty. v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688 (S.D. Tex. June 5, 2009).

¹²⁹ 42 U.S.C. §§ 300f-300j (2006).

¹³⁰ *Goliad Cnty.*, 2009 WL 1586688 at *1, *4.

¹³¹ *Id.* at *1.

¹³² *Id.* at *10–*11 n.7. “Nowhere in Goliad County’s complaint can the Court identify any *factual* allegation supporting the conclusion that UEC knew or intended that its erroneous plugging actions would result in the subsurface runoff complained of here.” *Id.* at *11 n.7 (emphasis in original). It must also be noted the court had already ruled the action unripe, but conducted this further analysis under the assumption plaintiff’s claims were appropriately ripe, and that plaintiff had proper standing. *Id.* at *7–8. The pleading standard analysis did not depend upon the case’s disposition as to ripeness or standing.

¹³³ No. CV 09-04045 DDP, 2009 WL 3365915 (C.D. Cal. Oct. 19, 2009).

¹³⁴ *Id.* at *1.

¹³⁵ *Id.*

¹³⁶ *Id.* at *2, *4–5.

disagreed, finding under *Iqbal* that a reasonable inference supports allegations of toxic discharge.¹³⁷

Though the substantive law underlying the claims differed in each suit, the pleading standard analysis employed by each court was very similar. Both judges placed great emphasis on *factual* allegations sufficient to move the claims into the realm of plausibility. The decisions reached provoke the question of why there were such divergent outcomes? Both courts found allegations under the pleadings to be lacking some specific fact: the intention of UEC to contaminate water and the toxicity of level of Disney's Cr VI discharge. Interestingly, the court in *Goliad* was unable to infer the missing fact, but the court in *Disney* was.¹³⁸ The *Goliad* case represents an entire class of cases where potentially meritorious claims cannot move into discovery on the basis of pleading a fact that has not, but might, come to light.

The concerns exemplified by these cases are not, of course, limited to public interest environmental litigation.¹³⁹ A recent empirical study shows, after *Iqbal*, the probability for a successful Rule 12(b)(6) motion is "more than twice as likely" than under notice pleading.¹⁴⁰ In another example, the heightened pleading standards imposed by the Private Securities Litigation Reform Act of 1995 ("PSLRA")¹⁴¹ are now argued to impose a greater threat of dismissing meritorious claims.¹⁴² It has been argued that notice pleading rules decrease the number of meritorious claims dismissed.¹⁴³ Not surprisingly, within the context of public interest environmental litigation, the increased burden of heightened pleading

¹³⁷ *Id.* at *5.

¹³⁸ This note does not mean to imply that one example of divergent application of a standard is conclusive evidence that the standard is flawed. But, it does suggest that, on the margins, *Iqbal*'s pleading burden has the potential to screen out meritorious claims, demonstrating the under/over-inclusive paradox.

¹³⁹ The United States Senate Judiciary Committee recently held a hearing to discuss whether *Iqbal* and *Twombly* should be overturned by legislation. *Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Sen. Feingold, Member, S. Judiciary Comm.), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=4189>.

¹⁴⁰ Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 602, 620–21 (2010).

¹⁴¹ Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).

¹⁴² See Steven A. Ramirez, *Arbitration and Reform in Private Securities Litigation: Dealing with the Meritorious as Well as the Frivolous*, 40 WM. & MARY L. REV. 1055, 1087–88 (1999).

¹⁴³ Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 161 (2011) (demonstrating that empirical data show a likely increase in dismissal of meritorious claims under plausibility pleading); Spencer, *Plausibility Pleading*, *supra* note 71, at 481.

will impact the enforcement of environmental norms by reducing both the threat and consummation of citizen suits. Nevertheless, the current regulatory state is not the only area of concern as the role of public interest litigation in future causes of action develops.

B. The Day After Tomorrow: The Future of Public Interest Environmental Litigation

In discussing the ramifications of the pleading standard shift on the future role of public interest litigation, many potential problems exist. Without oracular powers of divination, unwritten laws and policies that do not yet exist are difficult to analyze procedurally. The purpose of this section is to include the far reaching effects of *Iqbal* pleading as applied to future, if not looming, environmental challenges in the environmental litigation pleading standard discussion.

1. Public Interest Litigation and Global Climate Change

Hardly a scholarly environmental article exists that does not mention or account for the brooding presence that global climate change has over the future of environmental issues.¹⁴⁴ The reason for this pervasive concern would seem obvious. Yet federal courts, when applying procedural doctrine, are creeping towards greater engagement, or perhaps entanglement, with the myriad challenges climate change poses.¹⁴⁵ Already, some environmental law practitioners find that pleading climate change actions may be very onerous under *Iqbal*.¹⁴⁶

The difficulty for climate change plaintiffs, perhaps more than any other, is how to construct pleadings that avoid the type of “conclusory” allegations barred by *Iqbal*.¹⁴⁷ Threading this judicially constructed needle may

¹⁴⁴ See, e.g., Margaret Rosso Grossman, *Climate Change and the Law*, 58 AM. J. COMP. L. SUPP. 223, 223–24, 231 (2010).

¹⁴⁵ See, e.g., *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009) (class action lawsuit by landowners along the Mississippi Gulf Coast against oil and energy companies for emitting greenhouse gasses, allegedly exacerbating the destructive effect of Hurricane Katrina); see also *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp.2d 863 (N.D. Cal. 2009) (suit by Eskimo village against energy companies for emitting greenhouse gases, allegedly melting protective Arctic Sea ice around the village); *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309 (2d Cir. 2009) (suit by several states against fossil fuel-burning electric plants for contributing to the public nuisance of global warming).

¹⁴⁶ Seth Jaffe, *GHG Nuisance Claims? Yes? No? Maybe?*, L. & ENV'T (Oct. 19, 2009, 8:21 AM), <http://www.lawandenvironment.com/2009/10/articles/climate-change/ghg-nuisance-claims-yes-no-maybe/>.

¹⁴⁷ See *supra* Part I.B.

be more than current scientific evidence gathering methods can sustain,¹⁴⁸ particularly when the factual pleading bar is determined by the individual judge's "experience."¹⁴⁹ No doubt even the best good faith efforts by judges to make "plausible inferences" will potentially suffer the same over-and-under-inclusive fate as current public interest environmental claims.¹⁵⁰

Additionally, the purpose of climate change litigation may grow to encompass more functionality than just vindicating the environmental rights of individual plaintiffs. Recent scholarship demonstrates a new purpose for litigating climate change claims-enforcing emission controls through "diagonal regulation."¹⁵¹ Because of the nature of United States' dual sovereignty federalism, horizontal and vertical regulatory relationships may be shaped diagonally.¹⁵² *Massachusetts v. Environmental Protection Agency* exemplifies the diagonal regulation interests outlined in climate litigation.¹⁵³ Local, state, and federal jurisdictions, each with different priorities and regulatory mechanisms, may benefit from the opportunity to settle regulation boundary disputes through court access. It is possible that these diagonal regulatory interests might be extendable beyond emissions regulation to green building, manufacturing, energy, and other areas, such as land use policy. Thus, climate change litigation's role in shaping and enforcing climate change policy becomes more prominent than ever.¹⁵⁴

2. Developing New Regulatory Models

The effect of heightened pleading standards also implicates the feasibility to create alternative models of environmental regulation and enforcement. The first model is the potential establishment of environmental

¹⁴⁸ Francis J. Menton, *Issues of Proof in Climate Change Litigation*, N.Y. L.J. (Dec. 29, 2009), available at <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202437294161> (arguing that even if pleadings are accepted, the scientific data and their underlying validity are subject to attack on scientific consensus grounds). The difficulty for judges will be in determining who or what constitutes a consensus to establish factual allegations in pleadings.

¹⁴⁹ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

¹⁵⁰ See discussion *supra* Part II.A.

¹⁵¹ Hari M. Osofsky, *Is Climate Change "International"? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 590-91 (2009).

¹⁵² *Id.* at 617-21.

¹⁵³ 549 U.S. 497 (2007). See also Osofsky, *supra* note 151, at 616-28.

¹⁵⁴ See John Schwartz, *Courts Emerging as Battlefield for Fights Over Climate Change*, N.Y. TIMES, Jan. 27, 2010, at A1, available at <http://www.nytimes.com/2010/01/27/business/energy-environment/27lawsuits.html>.

“rights.”¹⁵⁵ Scholars have proposed the development of environmental rights for United States citizens as a better foundation for environmental protection and enforcement, than the ad hoc, problem by problem, regulatory schema of today.¹⁵⁶ If such a system did develop, then more individual rights would be subject to litigation. Already, an overwhelmingly disproportionate number of individual right-based actions are dismissed for failure to state a claim under Rule 12(b)(6).¹⁵⁷ If the foundational structure upon which environmental rights are to be enforced or vindicated is subject to such a high pleading burden, then *Iqbal* pleading has the propensity to extinguish the feasibility of some alternative regulatory structures.

Market-based and other economic incentive programs are another model of environmental regulation that may considerably change the landscape of environmental policy in the United States. These types of approaches already include cap-and-trade programs, “pollution taxes and subsidies, deposit-refund systems, and regulatory waiver or variance programs.”¹⁵⁸ Past trends in implementing these forms of regulation indicate the growing potential for their implementation; for example, a 1997 survey found a 150% increase to over 100 different incentive mechanisms from the survey five years previously.¹⁵⁹

Going forward with these solutions, however, increases opportunities for market failures to adversely impact those environments and communities with lower economic power.¹⁶⁰ Critical to mitigating the disparate effects will be providing information to affected communities of potential harms.¹⁶¹ Citizen suits provide access to this information, but only if they are not dismissed for failure to make sufficient factual allegations in their pleadings.¹⁶² *Iqbal* pleading does and will dismiss more citizen suits, thus preventing the dissemination of information to plaintiffs; and further growth of market-based solutions to regulate the

¹⁵⁵ See Daveed Gartenstein-Ross, *An Analysis of the Rights-Based Justification for Federal Intervention in Environmental Regulation*, 14 DUKE ENVTL. L. & POL'Y F. 185, 190 (2003).

¹⁵⁶ See *id.* at 188–90.

¹⁵⁷ See Hatamyar, *supra* note 140, at 556.

¹⁵⁸ STEPHEN M. JOHNSON, *ECONOMICS, EQUITY, AND THE ENVIRONMENT* 2 (2004).

¹⁵⁹ See ROBERT C. ANDERSON & ANDREW Q. LOHOF, *THE UNITED STATES EXPERIENCE WITH ECONOMIC INCENTIVES IN ENVIRONMENTAL POLLUTION CONTROL POLICY* § 12-1 (1997), available at [http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0216a-4.pdf/\\$file/EE-0216a-4.pdf](http://yosemite.epa.gov/ee/epa/erm.nsf/vwAN/EE-0216a-4.pdf/$file/EE-0216a-4.pdf).

¹⁶⁰ JOHNSON, *ECONOMICS, EQUITY, AND THE ENVIRONMENT*, *supra* note 158, at 362.

¹⁶¹ See Stephen M. Johnson, *Economics v. Equity: Do Market-Based Environmental Reforms Exacerbate Environmental Injustice?* 56 WASH. & LEE L. REV. 111, 153–56 (1999).

¹⁶² See *id.* at 156.

environment will be less viable in the face of intensified adverse impacts on disparate communities.¹⁶³

Though plausibility pleading is young for a Supreme Court precedent, its force is already being felt in many current environmental litigation issues,¹⁶⁴ and its subsequent effects have the potential to drastically alter the course of public interest environmental litigation in this country.

IV. COMPARATIVE PROCEDURAL INSIGHT: INTERNATIONAL EXAMPLES OF PLEADING IN ENVIRONMENTAL LITIGATION

Before reaching any conclusions in balancing the purposes of public interest environmental litigation with the values of transsubstantive pleading standards, this note next examines how other countries regulate their own environmental concerns through litigation. Despite apparent stark contrasts, a comparative procedural study provides insight into the balancing acts other countries perform when contending with the normative goals of both environmental and procedural law. The structural choices of these countries highlight the imbalance of *Iqbal* pleading and further erode the justifications for maintaining a transsubstantive pleading standard.

A. *Pleading Burdens and Civil Justice Structure*

The United States pleading standard is, without a doubt, the most liberal and exceptional in the world.¹⁶⁵ At first glance, this would seem to neutralize any beneficial insights gained from a comparative study with other procedural systems. For example, a pleading for a simple negligence case in Germany for an automobile accident would include:

1. specific allegations of precisely how and why the accident occurred,
2. an identified source of proof for each allegation,
3. the amounts of damage set forth with precision,
4. attached copies of bills, police and medical reports, and even photographs to support the allegations.¹⁶⁶

¹⁶³ See Hatamyar, *supra* note 140, at 621; JOHNSON, ECONOMICS, EQUITY, AND THE ENVIRONMENT, *supra* note 158, at 362.

¹⁶⁴ See, e.g., *Goliad Cnty. v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688 (S.D. Tex. June 5, 2009).

¹⁶⁵ Dodson, *Comparative Convergences*, *supra* note 73, at 443.

¹⁶⁶ PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 198 (2004).

The shocking level of detail and evidence submitted with a German pleading seems diametrically opposed to the Federal Rules example: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff. . . . As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of \$ _____.¹⁶⁷ *Iqbal*, unfortunately, changes everything.¹⁶⁸

Plausibility pleading moves the United States closer to the pleading requirements of other countries.¹⁶⁹ This convergence opens new avenues for procedural exploration. In the context of environmental litigation, however, the United States does not converge in other procedural or civil justice structures that compensate for the higher pleading burdens imposed upon environmental plaintiffs. Therefore, any policy motivations underlying *Iqbal*'s shift fail to address the unintended consequences of higher pleading standards that other countries systemically compensate for in multiple ways.

1. Active Judges

The German Civil Justice system provides an excellent place to start the examination of alternative procedures that mitigate the impact of higher pleading burdens. Environmental actions may be brought in either the Administrative Courts (*Verwaltungsgerichte*)¹⁷⁰ or the courts of general jurisdiction (*ordentliche Gerichte*).¹⁷¹ The pleading standards for these courts are higher than even the *Iqbal* standard, requiring “particulars of factual circumstances supporting the petitions . . . [and] the designation of the evidence to be relied upon by the party to prove or rebut statements of fact.”¹⁷² This high pleading burden would be devastating to environmental plaintiffs who lack sufficient preliminary evidence to bring a suit in court. Yet, unlike American judges considering motions to dismiss under the *Iqbal* standard, the active role of German judges allows for greater

¹⁶⁷ FED. R. CIV. P. app. 11.

¹⁶⁸ Note that Form 11 has not been revised after the *Iqbal* decision as of yet.

¹⁶⁹ See Dodson, *Comparative Convergences*, *supra* note 73, at 443.

¹⁷⁰ See MURRAY & STÜRNER, *supra* note 166, at 44.

¹⁷¹ See *id.* at 47.

¹⁷² OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 170–72 (Oscar G. Chase & Helen Hershkoff eds., 2007) (using translations from CHARLES E. STEWART, *GERMAN COMMERCIAL CODE AND CODE OF CIVIL PROCEDURE IN ENGLISH* (2001) and S.L. GOREN, *THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY OF JANUARY 30, 1877 AND THE INTRODUCTORY ACT FOR THE CODE OF CIVIL PROCEDURE RULES OF JANUARY 30, 1877* (1990) to translate *Zivilprozeßordnung* [ZPO] §§ 130 no. 3, 5).

substantive analysis before a claim is dismissed based on the pleadings.¹⁷³ Thus, German environmental plaintiffs are likely to receive more information and further consideration of their claims.

In Germany, cases do not proceed in the compartmentalized fashion of the Anglo-American legal tradition with its heavy emphasis on pretrial and trial proceedings; instead, the German model consists of a series of hearings, ordered and structured by the court.¹⁷⁴ When a court receives the plaintiff's complaint, the judicial panel assigned to the case determines the type of hearing and whether the case should proceed by written briefs or preliminary hearing.¹⁷⁵ The duty of the judges throughout these hearings is "to provide clarification" (*Aufklärungspflicht*) in the processing of the parties' case.¹⁷⁶ In order to do this, the court may raise additional issues, require the appearance of parties, documents, and other objects.¹⁷⁷ In sum, the active judicial role places the impetus for evidence-gathering onto the court.¹⁷⁸

When an environmental suit is potentially subject to dismissal, the German court has already investigated the claim.¹⁷⁹ A hypothetical example would be an environmental plaintiff who has factual evidence of toxic chemical residues in her backyard. She may bring an action and expect the court to investigate the connection between her yard and the neighboring manufacturer, who produces the toxic substance and whom she names as a defendant. In contrast, a United States district judge evaluating a 12(b)(6) motion considers only the plaintiff's complaint and any exhibits attached thereto.¹⁸⁰ The greater pleading burden in Germany is counterbalanced with greater opportunity for the judge to view additional evidence when reaching a decision; the U.S. judge's scope of review is limited to the pleadings.¹⁸¹

Further complicating the American judge's determination is the United States Supreme Court's insistence on winnowing out the conclusory allegations from the nonconclusory ones in order to make a "reasonable

¹⁷³ See David S. Clark, *The Selection and Accountability of Judges in West Germany: Implementation of a Rechtsstaat*, 61 S. CAL. L. REV. 1797, 1808 (1988).

¹⁷⁴ See MURRAY & STÜRNER, *supra* note 166, at 165.

¹⁷⁵ *Id.* at 209–10.

¹⁷⁶ *Id.* at 165.

¹⁷⁷ *Id.* at 166.

¹⁷⁸ See John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 824 (1985).

¹⁷⁹ See MURRAY & STÜRNER, *supra* note 166, at 164–66.

¹⁸⁰ FED. R. CIV. P. 10(c).

¹⁸¹ See *id.*; MURRAY & STÜRNER, *supra* note 166, at 164–66.

inference” of a plausible claim based on “judicial experience and common sense.”¹⁸² While “common sense” is not to be undervalued in judicial decision-making, it is odd for a court to require more factual allegations but rely upon “experience” rather than evidence.

A United States environmental plaintiff with insufficient information to plead certain factual allegations will not receive further opportunity for discovery or investigation by the court.¹⁸³ As a result, the case would likely be dismissed under Rule 12(b)(6). Instead, active judges, like those in the German system, may make more informed decisions about the merits of the case. The structural relationship between pleading standards and judicial roles is significant to the ability of environmental plaintiffs to continue successful enforcement of environmental norms through litigation.

2. Pre-action Discovery

Moving westward across the English channel to America’s legal progenitor, one might expect to find a more familiar notice pleading standard. English courts, however, require “a concise statement of the facts on which the claimant relies.”¹⁸⁴ The rules place emphasis upon *factual* pleadings.¹⁸⁵ Now that *Iqbal* requires a similar focus, understanding how English courts afford plaintiffs access to information is salient to a comparative analysis.

In 1996, Lord Woolf, Master of the Rolls, published a significant report on the civil justice system in England and Wales.¹⁸⁶ Tackling the problems of congestion and excessive cost, Woolf proposed sweeping reforms by restructuring the entire civil litigation process.¹⁸⁷ As a result, the English Civil Procedure Rules (“CPR”) were established by Act of Parliament.¹⁸⁸

¹⁸² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

¹⁸³ *See, e.g., Goliad Cnty. v. Uranium Energy Corp.*, No. V-08-18, 2009 WL 1586688 (S.D. Tex. June 5, 2009). The district judge’s determination for dismissal was based upon his inability to infer a certain fact based upon the pleadings. *Id.* This represents an example of U.S. courts’ inability to further develop the evidence underlying the sufficiency of the plaintiff’s pleadings.

¹⁸⁴ Civil Procedure Rules, 1998, S.I. 1998/3132 Rule 16.4(1)(a)9 (Eng.) [hereinafter CPR], available at http://www.justice.gov.uk/civil/procrules_fin/pdf/parts/part16.pdf.

¹⁸⁵ *See id.* at Rule 16.4.

¹⁸⁶ LORD WOOLF, ACCESS TO JUSTICE, FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES (1996), available at <http://www.dca.gov.uk/civil/final/>.

¹⁸⁷ GARY SLAPPER & DAVID KELLY, THE ENGLISH LEGAL SYSTEM 340 (8th ed. 2006).

¹⁸⁸ Civil Procedure Act, 1997, c. 12 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1997/12>.

Contained within the new rules, a simplified pleading form eliminated excessive procedural hurdles in order to initiate claims.¹⁸⁹ More importantly, the rules extended discovery (renamed “disclosure”) to parties prior to filing the pleading.¹⁹⁰ This new pre-action discovery procured a prominent role in ensuring parties to potential litigation made decisions founded on “the information they need.”¹⁹¹

The underlying justification for pre-action discovery was to encourage well-informed settlement discussions.¹⁹² Before filing a pleading with the court, an English plaintiff sends a letter to the defendant stating, among other things, “the basis on which the claim is made (i.e. why the claimant says the defendant is liable) . . . a clear summary of the facts on which the claim is based . . . [and] what the claimant wants from the defendant.”¹⁹³ The letter goes on to contain “the essential documents on which the claimant intends to rely . . . [and] identif[ies] and ask[s] for copies of any relevant documents not in the claimant’s possession and which the claimant wishes to see.”¹⁹⁴ Parties who fail to respond to pre-action discovery requests may be subject to sanction by the court.¹⁹⁵

Pre-action discovery eliminates “information asymmetry” because plaintiffs may request information necessary to meet their pleading burden.¹⁹⁶ Environmental plaintiffs safeguarding the public interest could potentially avoid costly and unbeneficial litigation. If information “disclosed” by opposing parties does substantiate the plaintiff’s claims, then the heightened pleading burden of *Iqbal* is less likely to prove fatal to a claim with merit. In either case, England’s civil procedure structure compensates environmental plaintiffs for the burden placed upon their pleadings. The United States does not.¹⁹⁷

¹⁸⁹ See SLAPPER & KELLY, *supra* note 187, at 358. See also CPR, *supra* note 184, at Rule 16.4.

¹⁹⁰ WOOLF, *supra* note 186, at ch. 9–10.

¹⁹¹ *Id.* at ch. 10, para. 6.

¹⁹² *Id.* at ch. 10, paras. 1, 6.

¹⁹³ CPR Practice Direction: Pre-Action Conduct Annex A § 2.1 (Oct. 2009), available at http://www.justice.gov.uk/civil/procrules_fin/pdf/practice_directions/pd_pre-action_conduct.pdf.

¹⁹⁴ *Id.* § 2.2.

¹⁹⁵ *Id.* § 2, paras. 4.5–4.6.

¹⁹⁶ Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 88–89 (2010) [hereinafter Dodson, *New Pleading, New Discovery*].

¹⁹⁷ England is not the only country to require “disclosure” prior to filing a pleading with the court. Japan’s civil law system implemented pre-action discovery requests based in part on informal exchanges that already occurred among Japanese lawyers. Luke Nottage, *Civil Procedure Reforms in Japan: The Latest Round*, 22 RITSUMEIKAN L. REV. 81, 83–84

3. Specialized Courts

Besides changing the role of judges and information-sharing among parties, some countries devised separate court structures for those who wish to bring environmental actions. Germany, for instance, has separate administrative courts that encapsulate all levels of trial and review for certain environmental claims.¹⁹⁸ Starting from courts of first instance, litigants may seek review in intermediate appellate courts culminating in a final appeal to the Federal Supreme Administrative Court.¹⁹⁹ French litigants navigate claims through more than just a civil-criminal divide; they also contend with courts of public and private law.²⁰⁰ Sweden, however, is the first country to establish an independent environmental court system.²⁰¹ In an effort to balance the interests of environmental plaintiffs and defendants, Sweden has utilized specialized courts.²⁰² An examination between the pleading burden placed upon environmental plaintiffs in Sweden and the role of their specialized courts proves constructive to a comparative analysis.

Sweden's pleading standard, with its factual emphasis, is comparable to the other heightened pleading burdens discussed previously.²⁰³ The difference lies in the judicial panel reviewing the submitted pleadings. Environmental courts in Sweden are made up of "one professional judge, one environmental technician, and two experts,"²⁰⁴ one with experience in the disputed area in the Swedish Environmental Protection Agency and one with industrial or local government experience.²⁰⁵ The purpose of this

(2005). Professor Nottage believes these reforms are part of a larger procedural convergence toward earlier disclosure of factual information. *Id.* at 86.

¹⁹⁸ See MURRAY & STÜRNER, *supra* note 166, at 44.

¹⁹⁹ *Id.*

²⁰⁰ See CHASE ET AL., *supra* note 172, at 116–22.

²⁰¹ Jan Darpö, *Environmental Justice Through Environmental Courts? Lessons Learned from the Swedish Experience*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 176, 177 (Jonas Ebbesson & Phoebe Okowa eds., 2009).

²⁰² See *id.* at 176–77.

²⁰³ See *supra* Part III. Swedish pleadings must contain, "1. a distinct claim, 2. a detailed account of the circumstances invoked as the basis of the claim, 3. a specification of the means of evidence offered and what shall be proved by each means . . ." Rättegångsbalken [RB] [Code of Judicial Procedure] 42:2 (Swed.), available at <http://www.regeringen.se/content/1/c4/15/40/472970fc.pdf> (English translation published by the Swedish Ministry of Justice). The requirement for specifying evidence relied upon in the claim is similar to the German requirement. See *supra* note 172 and accompanying text.

²⁰⁴ Darpö, *supra* note 201, at 179.

²⁰⁵ Miljöbalk [MB] [Environmental Code] 20:4 (Swed.), available at <http://www.regeringen.se/content/1/c6/02/28/47385ef12a.pdf> (English translation published by the Swedish

arrangement allows the court to reach determinations with credible knowledge of the dispute.²⁰⁶ This structure elicits one very important implication for plaintiffs, namely that the judicial panel reviewing the pleadings has a greater depth of knowledge to draw upon.²⁰⁷ The resultant decisions of these courts inspire greater confidence in their ability and accuracy to evaluate the pleadings.

By contrast, *Iqbal* placed the generalist federal judges considering environmental claims in a quandary.²⁰⁸ In order to advance pleadings to discovery, judges must assess the nature of the allegations by ascertaining whether “reasonable inferences”²⁰⁹ based upon their “experience” may be drawn from them.²¹⁰ Unlike their Swedish counterparts, there are no “experts” or “advisors” with actual “*judicial* experience” in the disputed matter.²¹¹ Nor is the public interest environmental litigation docket large enough to likely foster similar experience with the United States federal bench.²¹² Unsurprisingly, the probable result is inconsistent at best or wildly divergent at worst. Inferences regarding pleading allegations will lead to exclusion of meritorious plaintiffs and inclusion of unmeritorious ones.²¹³ The Swedish model, with its emphasis on specialized knowledge

Ministry of Justice). The professional judge determines the make-up of the expert position, choosing either the industrial or government expert. *Id.* The experts are nominated by their respective field’s authorities. Darpö, *supra* note 201, at 179. The panel may be extended to include an additional professional judge and environmental advisor. MB 20:4 *supra*.

²⁰⁶ Darpö, *supra* note 201, at 179.

²⁰⁷ *Id.*

²⁰⁸ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Although it is true that the federal judges may determine from the pleadings, attached exhibits, and in some cases oral argument from the parties whether or not the pleading burden has been satisfied, Fed. R. Civ. P. 10(c), there will be (assuming the judge has little or no prior experience with the issue) no substantial *judicial* experience related to the environmental issue, merely the potential for “expert” advocacy.

²¹² See Smith, *supra* note 120, at 385. From 1995 to 2000 there were only 287 environmental citizen suits initiated under the major environmental regulatory acts; furthermore, the federal government only prosecuted 610 cases over the same period. *Id.*

²¹³ A recent study comparing administrative law judges (“ALJs”) with generalist state and federal judges indicates that the “intuitive” knowledge that generalist judges rely upon often leads to “erroneous decisions.” Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1479 (2009). At the pleading stage it is feasible to assume these erroneous decisions would include both over- and under-inclusive dismissals for failure to state a claim. *But see* Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667 (2009) (arguing that the empirical literature supporting specialized courts needs more development and that in its limited state, the data cannot support a broad embrace of specialized courts as “proven” to be more efficient and accurate than generalist ones).

through specialized courts, lessens the burden fact pleading places upon its citizens.

B. The Convergent Rise of Access to Environmental Justice

Plausibility pleading in *Iqbal* regulates plaintiff access to the federal courts.²¹⁴ Its transsubstantive application to environmental claims begins to diverge from the growing international trend of broadening access to environmental justice. By examining the measures undertaken and normative choices other countries make to increase this access, further evaluative steps are taken in balancing the interests of uniform pleading standards against the purpose and function of environmental litigation.

1. The Aarhus Convention

The United Nations Economic Commission for Europe (“UNECE”) Aarhus Convention²¹⁵ is the first international treaty to focus on the rights and obligations of governments to provide their citizens an oversight role in protecting the environment.²¹⁶ Upholding this objective are the three pillars of the Convention, “access to information, public participation, and access to justice.”²¹⁷ At its core, the Aarhus Convention is the legatee of several human-rights-based environmental agreements.²¹⁸ Thus,

²¹⁴ Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 876 (2009).

²¹⁵ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 [hereinafter Aarhus Convention].

²¹⁶ Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 1, 1 (2007).

²¹⁷ Jeremy Wates, *The Aarhus Convention: A Driving Force for Environmental Democracy*, 2 J. FOR EUR. ENVTL. & PLAN. L. 2, 2 (2005). See also Aarhus Convention, *supra* note 215, at art. I.

²¹⁸ Christian Schall, *Public Interest Litigation Concerning Environmental Matters Before Human Rights Courts: A Promising Future Concept?*, 20 J. ENVTL. L. 417, 432–33 (2008).

The text of the Aarhus Convention itself notes that the parties are:

[r]ecalling principle 1 of the Stockholm Declaration on the Human Environment, [r]ecalling also principle 10 of the Rio Declaration on Environment and Development, [r]ecalling further General Assembly resolutions 37/7 of 28 October 1982 on the World Charter for Nature and 45/94 of 14 December 1990 on the need to ensure a healthy environment for the well-being of individuals, [and] [r]ecalling the European Charter on Environment and Health adopted at the First European Conference on

Aarhus is the culmination of the “rights-based approach” to environmental enforcement.²¹⁹

While the pillar dichotomy implies equal importance, “access to justice” requires preeminence in order to buttress the other pillars of Aarhus and “empower[] [the] citizens and NGOs [Non-Governmental Organizations] to assist in the enforcement of the law.”²²⁰ Currently there are forty-four parties and forty signatories to the Convention.²²¹ Upon joining:

[e]ach Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.²²²

The implementation of Aarhus is not without its difficulties. Germany, for instance, struggled to reconcile the access to justice provisions with its “protective norm doctrine (*Schutznormtheorie*),” which leaves little room for private enforcement of environmental regulation.²²³ Potential resolutions, however, exist for procedural friction between the

Environment and Health of the World Health Organization in Frankfurt-am-Main, Germany, on 8 December 1989.

Aarhus Convention, *supra* note 215, at prmb1.

²¹⁹ Wates, *supra* note 217, at 2. *See also* Benjamin W. Cramer, *The Human Right to Information, the Environment and Information About the Environment: From the Universal Declaration to the Aarhus Convention*, 14 COMM. L. & POL'Y 73, 93 (2009).

²²⁰ Schall, *supra* note 218, at 433.

²²¹ Chapter XXVII Environment 13, United Nations Treaty Collection, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (the nations are Albania, Armenia, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, European Community, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Kazakhstan, Kyrgyzstan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Tajikistan, The Former Yugoslav Republic of Macedonia, Turkmenistan, Ukraine, and the United Kingdom of Great Britain and Northern Ireland).

²²² Aarhus Convention, *supra* note 215, at art. III.

²²³ Schall, *supra* note 218, at 436.

requirements of Aarhus and a nation's current legal system.²²⁴ Whatever the mode of implementation, the Aarhus Convention exemplifies the expanding prominence of public interest environmental litigation in regulating and enforcing environmental norms by establishing new avenues for environmental justice.²²⁵

2. Rights-Based Development in Public Interest Litigation

Public interest litigation on behalf of the environment continues its march toward countries with economies in transition based on environmental rights. India, for example, has a constitutional right to life, which has been interpreted to include the right to a "wholesome environment."²²⁶ Pushed by public interest litigation, the Indian Supreme Court has developed the "public trust doctrine,"²²⁷ which it invokes when determining issues involving the air, sea, water, or forests.²²⁸ The extension of this doctrine to these environmental resources further opened the Indian courts to safeguard communities from government and private actors who now receive judicial accountability.²²⁹ Although many variations of environmental litigation exist throughout the world, one particular theme is common: countries are continuing to make procedural investments to provide access to environmental justice. The United States would do well to recognize this trend.

²²⁴ *Id.* at 436–38. The author suggests that Germany may be able to expand its standing considerations, which are problematic to plaintiffs (and thus access) under *Schutznormtheorie*, by redefining the subjective rights (which affect standing) under their current environmental laws. *Id.*

²²⁵ Wates, *supra* note 217, at 6. "The third pillar . . . aims to provide access to justice in three contexts: [] review procedures with respect to information requests; [] review procedures with respect to specific (project-type) decisions which are subject to public participation requirements; [] challenges to breaches of environmental law in general." *Id.* Aarhus also contains procedural requirements for these contexts, namely that they be "fair, equitable, timely and not prohibitively expensive." *Id.* at 7.

²²⁶ Jona Razzaque, *Participatory Rights in Natural Resource Management: The Role of Communities in South Asia*, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 117, 120 (Jonas Ebbesson & Phoebe Okowa eds., 2009).

²²⁷ *Id.* at 122 ("This common law concept . . . allows the public to question ineffective management of natural resources . . . [because] certain natural resources . . . have such great importance to people as a whole that it would be unjustified to make them a subject of private ownership.").

²²⁸ *Id.*

²²⁹ *See id.*

V. RESUSCITATING NOTICE PLEADING FOR ENVIRONMENTAL PLAINTIFFS

In completing a puzzle, first one lays out all the pieces on the table. Next, the edge and corner pieces are separated out and connected together forming a frame of reference, delineating the boundaries of the scene. Finally, the difficult work begins as each puzzle piece is carefully selected and placed in the location that fits the prescribed shape and matches the corresponding surroundings. Understanding the relationship between the transsubstantive federal pleading standard and its impact on public interest litigation follows the same course.

First, this note laid out the context and development of transsubstantive pleading standards and rules “on the table.” Next, it identified points of friction between the *Iqbal* standard of pleading and the purposes of public interest litigation. It connected these points of interest by presenting the present and future boundaries of environmental public interest litigation and supplied alternate visions of those boundaries through international comparative examples and trends. Now, the difficult task begins, weighing the purposes of retaining a heightened transsubstantive pleading standard against the purposes of environmental public interest litigation in order to see which policy fits the most pieces into the final scene.

A. *Should Pleading Dissonance Be Resolved?*

1. Promoting Substantive Justice

The driving motivation behind the creation of the Federal Rules of Civil Procedure was “[t]he idea . . . that procedural rules are but means to an end, means to the enforcement of substantive justice, and therefore there should be no finality in procedural rules themselves except as they attain that objective.”²³⁰ Of course, Dean Clark and his fellow drafters were not unaware of the intricate and difficult relationship between substance and procedure, reflected in the oscillating war between the virtues of code and equity pleading.²³¹ Extrication from this dilemma lay in the new rules’ flexibility and uniformity, transsubstantively applied to all claimants.²³²

²³⁰ Clark, *Fundamental Changes*, *supra* note 17, at 551.

²³¹ Subrin, *supra* note 46, at 961–73. *See also* Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 297 (1938) (noting the continuing conflict between “substance and form”). Clark states his view of procedural form by quoting an English jurist, stating “that the relation of rules of practice to the work of justice is intended to be that of a handmaid rather than mistress.” *Id.*

²³² Subrin, *supra* note 46, at 961–73.

Until the Supreme Court's decision in *Twombly*, it appeared that *Conley's* interpretation of Rule 8 remained consistent with the drafters' underlying principles.²³³ However, when plausibility replaced notice, the harmony between promoting substantive justice and procedure became dissonant.²³⁴ If the normative choices underlying a substantive area of the law received less justice under plausibility, then it follows that *Twombly* and *Iqbal* as applied to certain claims violate the "liberal ethos"²³⁵ of the rule's original intentions. Therefore, the threshold determination in evaluating plausibility will be to ascertain whether substantive justice is thwarted in a given area of the law.

Environmental public interest litigation is a function of the United States' environmental regulatory policy.²³⁶ It is the sword against those who benefit from government oversight failures and the shield for parties in danger of suffering environmental harm.²³⁷ With the advent of plausibility pleading, environmental litigation now bears a greater factual burden with a greater likelihood of meritorious claims being dismissed.²³⁸ The substantive justice provided by this form of litigation is weakened and subsequently less effective.²³⁹ Plausibility pleading fails to promote environmental justice in violation of the spirit of the Federal Rules.

2. Measuring the Value of Uniformity

Violation of the spirit of the Federal Rules alone may not justify a dramatic departure from transsubstantivity, as to differentiate between environmental public interest litigation and other claims. After all, uniformity and flexibility were provided as further concrete justifications²⁴⁰ rather than vague overarching principles like the promotion of substantive justice. Flexibility, however, no longer remains as a dominant justification for transsubstantivity because fact pleading constitutes a higher (and more

²³³ See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 19–21 (2009) [hereinafter Spencer, *Understanding Pleading*].

²³⁴ *Id.* at 26.

²³⁵ Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 433, 439 (1986) [hereinafter Marcus, *The Revival*]. "Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'" *Id.* at 439. This policy language flies in the face of *Iqbal's* insistence that judges identify "conclusory" allegations. See *supra* Part I.B.

²³⁶ See *supra* Part II.B.

²³⁷ See *supra* Part II.B.

²³⁸ See *supra* Part III.

²³⁹ See *supra* Part III.B.2.

²⁴⁰ See *supra* Part I.C.

rigid) bar for plaintiffs to meet.²⁴¹ Uniformity, it seems, will be required to do the heavy lifting on the justification front. Accordingly, the next analytical step must be to weigh uniformity over and against the underlying purposes of environmental litigation, both present and future.

Adversarial legalism, a shorthand form for the nature of American justice and its legal system, captures the important role litigation can play in furthering substantive justice.²⁴² The United States body politic suffers from hyper-contradictory political goals, a mistrust of centralized governmental power, yet has an insatiable thirst for governmental protection from harm (for example, environmental danger).²⁴³ In order to prevent these diametrical forces from creating a political impasse, litigation (particularly public interest litigation) supplies the safety valve.²⁴⁴ Reducing this release function just to maintain uniformity increases political antagonism, an undesirable consequence.²⁴⁵

The consequence of the unique part that litigation plays is the world's most responsive judiciary,²⁴⁶ which allows the ultimate source of authority for any action to be the people that have a stake in the issue.²⁴⁷ When viewed in this context, it is necessary for environmental litigation to be especially sensitive to the need for ultimate democratic control, because the protected resources, like water and air, are commonly owned by the public.²⁴⁸ A rise in the pleading standard diminishes court access to

²⁴¹ See *supra* Part III.A.

²⁴² ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 1 (2001).

²⁴³ *Id.* at 15.

²⁴⁴ See *id.* at 15–16.

²⁴⁵ Professor Kagan would disagree with this implication. It is his argument that adversarial legalism increases antagonism between the regulated and the regulators. See *id.* at 202–06.

²⁴⁶ *Id.* at 16. This note does not tackle the issue of whether this is the “best” or most reliable judicial system. Kagan himself makes many arguments critical of the current system and the economic and social costs it imposes upon U.S. society. See *id.* at 207–28. Instead, this note puts forward suggestions on how to work *within* the current system.

²⁴⁷ See ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL* 85 (1982). To exercise final control over the agenda, “[a] large scale democratic system might . . . [allow] the agenda of each demos . . . [to] complement others in such a way that, taking into account the agendas of every demos to which each citizen belonged, every citizen is able to partake in final control over the combined agendas.” *Id.* Professor Dahl thought the above solution was the preferred method for federalist systems. *Id.* In general, Dahl sought to resolve issues of final or ultimate control, such as the very same “who shall have the last word” problem Professor Kagan highlights as extremely costly and inefficient in the public interest environmental litigation context. See KAGAN, *supra* note 242, at 207–28.

²⁴⁸ See Razzaque, *supra* note 226, at 122.

public interest plaintiffs. Consequently, democratic control of these resources is lessened. Thus, uniformity, though virtuous in isolation, does not appear so appealing when weighed against democratic control.

The nature of environmental litigation is also significant to this debate. Environmental public interest litigation is not a static force, but a dynamic one.²⁴⁹ Shifting environmental regulatory norms, such as climate change litigation, also weigh in favor of greater court access to plaintiffs.²⁵⁰ Future regulatory models that make use of “private attorneys general”²⁵¹ or rely upon economic or fundamental rights-based enforcement suffer from the narrowing gateway to pleading environmental claims.²⁵² If newer or more efficient enforcement methods are to take hold, uniformity of procedure should not stand in their way.

Another counterweight to the transsubstantive pleading standard is the convergent rise of public interest litigation internationally. Other countries with higher pleading standards scale their burdens according to other compensatory mechanisms, whether judicial role, pre-action discovery, or specialized courts.²⁵³ *Iqbal* pleading made one change in the civil justice structure without any systemic adjustments to compensate for the impact upon environmental public interest litigation. Increasingly, other nations are making procedural and structural changes to amplify the presence of environmental public interest litigation in their regulatory structures.²⁵⁴ Prospective plaintiffs, lawyers, and scholars alike should wonder why uniformity would be upheld as a value to justify divergent procedural choices. At the final weigh-in, uniformity fails to substantiate transsubstantive pleading standards when compared with the current function and future role of environmental public interest litigation.

3. Possible Objections

When sounding the alarm about the dangers plausibility pleading imposes upon public interest environmental litigation, some scholars’ response will simply be: “where’s the fire?” More than one academic has identified multiple substantive areas where lower courts, long before *Twombly* and *Iqbal*, applied varying degrees of a heightened pleading standard to

²⁴⁹ See *supra* Part III.B.

²⁵⁰ See *supra* Part III.B.

²⁵¹ See *supra* Part II.B.

²⁵² See *supra* Part III.B.

²⁵³ See *supra* Part IV.A.

²⁵⁴ See *supra* Part IV.B.

different substantive areas of the law.²⁵⁵ This contrary behavior on the part of some lower courts cannot be denied.²⁵⁶ However, of the laws surveyed in these studies, private actions appear to receive the brunt of the heightened burdens imposed.²⁵⁷ Until the advent of *Iqbal*, public interest litigation did not appear to suffer the same fate.²⁵⁸ Failure to address the distinction between public interest and private actions reduces the effectiveness of objections based on these arguments.

On pragmatic grounds, other potential objections are those voiced by the Court in *Twombly*, particularly that modern litigation requires some form of filter to prevent discovery abuses and “groundless suits.”²⁵⁹ Although these concerns are certainly serious,²⁶⁰ environmental plaintiffs operating through citizen suit provisions already face other court access challenges. The effect of these established restraints diminishes the necessity of imposing higher pleading burdens.

The first hurdle citizen plaintiffs must pass is sufficient notice to the regulatory agency.²⁶¹ Plaintiffs who fail to provide this notice will not

²⁵⁵ See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 988 (2003) (finding many areas of the law where courts have required general or targeted heightened pleading). Included in his survey are antitrust, CERCLA, civil rights, conspiracy, copyright, defamation, negligence, and RICO claims. *Id.* at 987, 1011–51. See also Marcus, *The Puzzling Persistence*, *supra* note 57, at 1778 (arguing that judges conceal their heightened pleading standards through “common-law activity” in different areas of the law).

²⁵⁶ See *supra* notes 124–26 and accompanying text. Although, it is also clear that the Supreme Court has emphatically supported notice pleading in its cases up until *Twombly* and *Iqbal* were handed down. See Spencer, *Understanding Pleading*, *supra* note 233, at 4–5.

²⁵⁷ See Fairman, *supra* note 255, at 1011–59. Even the CERCLA claims assessed by Fairman only correspond to portions of the statute that pertain to private causes of action. *Id.* at 1021–22.

²⁵⁸ See *id.* at 1011–59.

²⁵⁹ See Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1232–34 (2008) (“[T]he *Twombly* majority repeated [its] concern over ‘groundless’ suits by plaintiffs several other times, up to and including its closing explanation for why a more rigorous pleading standard is the necessary policy cure.”) (citation omitted).

²⁶⁰ *But cf.* Fairman, *supra* note 255, at 1059–61 (contending that frivolous suits are more perception than reality); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 520 (1997) (“We know remarkably little about frivolous litigation [because] [r]eliable empirical data is extremely limited, and casual anecdotal evidence [is] highly unreliable.”); Spencer, *Plausibility Pleading*, *supra* note 71, at 452 (decrying the *Twombly* opinion’s failure to distinguish between discovery costs and discovery abuse). “Further, and more importantly, discovery abuse in the form of impositional requests is not an evil unique to groundless or insufficiently pleaded claims.” *Id.*

²⁶¹ Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil*

be able to bring their claims in court.²⁶² The other major hurdle for these claimants is standing, which narrows the plaintiff pool to those who suffer “injury-in-fact, causation, and redressability.”²⁶³ Each mechanism filters claims that the government might otherwise redress, by way of notice provisions, or by filtering claims that are not brought by the “best” plaintiff (which might imply that acceptable standing confers greater possibility of non-meritorious claims in court). Most important of all, Congress and, by delegation, the EPA, may further customize regulations or statutory controls that screen public interest environmental litigation with the least detrimental effects, something a blanket heightened pleading burden certainly cannot do.²⁶⁴

There may be further possible objections that offer more potential justifications for maintaining transsubstantive pleading standards for environmental litigants. Yet, the weight of analysis in favor of public interest litigation commands an investigation into solutions that can ultimately resolve the current dissonance between pleading and the purpose of environmental litigation.

B. Moving Forward with Potential Solutions

At first impression, one might be led to advocate only one solution to this procedural gridlock, namely a return to *Conley*'s notice pleading standard for all plaintiffs. To effect that solution, however, would require the cooperation of either Congress or the Supreme Court. Neither body is likely to make such a wholesale revision.²⁶⁵ Consequently, other options must be examined.

1. Systemic Adjustments

So far the recurring theme of this note has been to present the normative case for reverting public interest environmental claims back

Procedure and the Sufficiency of Environmental Citizen Suit Notice, 78 OR. L. REV. 105, 108–09 (1999).

²⁶² *Id.* at 125. The Supreme Court held in *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), “that strict compliance with the sixty-day timing requirement was mandatory.” *Id.* at 126.

²⁶³ Francisco Benzoni, *Environmental Standing: Who Determines the Value of Other Life?*, 18 DUKE ENVTL. L. & POL'Y F. 347, 347 (2008). “The scope of citizens’ suit provisions in environmental regulations have been significantly curtailed by the standing doctrine.” *Id.* at 348.

²⁶⁴ See, e.g., Smith, *supra* note 120.

²⁶⁵ See Dodson, *New Pleading, New Discovery*, *supra* note 196, at 54–55.

to the notice pleading standard. But, this study would be remiss if it did not include other potential solutions that were more systemic in scope. Taking the comparative insights previously gathered from other nations' civil justice structures, one might glimpse potential solutions to the current pleading dilemma.

The first possible solution may be found in the role of the judge. Like the active judges discussed previously,²⁶⁶ a highly involved judge may be able to help clarify issues that may result in the resolution of the dispute (or at least mitigate the pleading burden on the plaintiff). Federal Rule of Civil Procedure 16 contains management provisions allowing the court to regulate pre-trial proceedings.²⁶⁷ Couple this power with a judge's discretion to allow limited discovery to proceed while a motion to dismiss is pending under Rule 26(c),²⁶⁸ and suddenly a judge has the ability to mitigate one of the detrimental impacts of heightened pleading.²⁶⁹ Now, plaintiffs may gain access to discoverable information and subsequently amend their pleading to meet the plausibility bar.²⁷⁰

While this solution receives high marks for ease of implementation within the existing rules structure, an active judge solution in this form suffers from one glaring problem: there is no *uniform* standard for its application.²⁷¹ While some judges may allow the discovery to proceed,

²⁶⁶ See *supra* Part IV.A.1.

²⁶⁷ FED. R. CIV. P. 16 (outlining the district court's role in scheduling, pre-trial conferences, and case management). In his *Twombly* dissent, Justice Stevens put forth several examples of Rule 16's potential uses:

Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, inter alia, "the elimination of frivolous claims or defenses," Rule 16(c)(1); "the necessity or desirability of amendments to the pleadings," Rule 16(c)(2); "the control and scheduling of discovery," Rule 16(c)(6); and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," Rule 16(c)(12).

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 593–94 n.13 (2007) (Stevens, J., dissenting).

²⁶⁸ FED. R. CIV. P. 26(c) ("A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending [e.g. a motion for summary judgment] The court may, for good cause, issue an order to protect a party . . . forbidding the disclosure or discovery."). The court *may*, but is not required to, stay discovery requests when a motion to dismiss is pending. *Id.*

²⁶⁹ See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 503–15 (2010).

²⁷⁰ *Id.* at 515.

²⁷¹ See Bone, *supra* note 214, at 930–35.

others may stay discovery until the motion to dismiss is adjudicated. Because there is no requirement to allow this discovery,²⁷² judges could rely upon any basis for denying its application. Plaintiffs lacking a minimal guarantee of this form of limited discovery find themselves back at the starting gate—hoping to outrun the danger of meritorious claim dismissal under plausibility pleading. For environmental public interest litigants, an active judge solution retains the same uncertainty of *Iqbal* with little assurance of change.

To account for the inherent flaws in relying on judicial discretion, another solution shifts the emphasis of reform to adjusting the structure and timing of discovery. Following the path of pre-action discovery,²⁷³ some scholars have advocated for procedural rules to implement discovery before commencing suit or before a motion to dismiss is determined.²⁷⁴ Currently, a small collection of state procedural systems implement versions of this pre-action discovery and consequently provide examples (and data) to evaluate the potential impact of a discovery rule change.²⁷⁵ In scrutinizing these systems, there is some evidence to suggest that plaintiffs may rely upon pre-action discovery to gather sufficient information to meet their pleading burden.²⁷⁶

The difficulty for federal rule sanctioned pre-action discovery is not the lack of clear guidelines that plagues reliance on an active judge solution. The deficiency lies in the scope of the solution. Greater discovery rights only treat one symptom, information asymmetry.²⁷⁷ The additional

²⁷² In contrast, the German judges have a mandatory duty to clarify the issues, even at their own instigation. See *supra* Part IV.A.1.

²⁷³ See *supra* Part IV.A.2.

²⁷⁴ See generally Dodson, *Comparative Convergences*, *supra* note 73.

²⁷⁵ See Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 236–46 (2007) (discussing states with pre-action discovery provisions, which include New York, Florida, Alabama, and Texas).

²⁷⁶ *Id.* at 278–79. Professor Hoffman concludes:

Examining the data from Texas demonstrates that there are plausible reasons to believe that lawyers and prospective claimants in Texas, as in most jurisdictions, may frequently be motivated to gather factual information before suit to evaluate the viability of filing and pursuing a case to settlement or judgment. The perceived need to satisfy formal legal requirements for bringing suit, as well as the pull of practical considerations, thus may plausibly explain the incidence of use of the state's presuit discovery rule for investigatory purposes.

Id.

²⁷⁷ See generally Dodson, *New Pleading, New Discovery*, *supra* note 196.

hardships environmental plaintiffs bear under *Iqbal* pleading remain untreated. To understand what these hardships are, one must revisit the Supreme Court's shift in emphasis from notice pleading to fact pleading.²⁷⁸ Raising the specter of code pleading, *Iqbal* leads courts back to parsing the difficult (and potentially harmful) distinctions made between factual and legal conclusions.²⁷⁹

The challenge of discerning conclusory and non-conclusory allegations is heightened by *Iqbal*'s formulation of pleading: plausibility. Judges are left to weigh their "judicial experience and common sense" to determine whether plausibility exists in light of the non-conclusory factual allegations.²⁸⁰ Notwithstanding the Court's disavowal,²⁸¹ this test wades into the realm of probability analysis.²⁸² By contrast, notice pleading, although still called upon to extract legal conclusions from entering the judicial calculus, avoids this fate by examining pleadings for any legal theory or set of facts under which a plaintiff could prevail.²⁸³

Defenders of plausibility pleading contend *Iqbal* requires no greater analytical burden to sort allegations than courts operating under *Conley* bore.²⁸⁴ Plausibility, in their view, is equivalent to the traditional requirement that factual inferences be "reasonable."²⁸⁵ Moreover, they insist that any argument against the ability of judges to perform this task is incongruous to judicial reality, especially when one considers that judges constantly

²⁷⁸ Dodson, *Comparative Convergences*, *supra* note 73, at 460.

²⁷⁹ See Marcus, *The Revival*, *supra* note 235, at 438 ("[T]he codifier's reformulation of pleading rules . . . invited unresolvable disputes about whether certain assertions were allegations of ultimate fact (proper), mere evidence (improper), or conclusions (improper).").

²⁸⁰ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

²⁸¹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage . . .").

²⁸² Bone, *supra* note 214, at 878 ("Properly interpreted, it requires no more than that the allegations describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type."). See also Spencer, *Plausibility Pleading*, *supra* note 71, at 444 ("Such a system of plausibility pleading requires that the complaint set forth facts that are not merely consistent with liability; rather, the facts must demonstrate 'plausible entitlement to relief.'").

²⁸³ *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) ("[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.").

²⁸⁴ See Hartnett, *supra* note 269, at 484 ("Courts have long held that legal conclusions need not be accepted as true on 12(b)(6) motions, [and they] have long insisted that pleaders are not entitled to unreasonable factual inferences . . .").

²⁸⁵ *Id.* at 484–85.

face difficult questions of differentiation between the boundaries of law and fact.²⁸⁶

This argument does not account for other language in *Iqbal* that appears to contradict the conclusion that a “reasonable inference is equivalent to a “plausible” one. Justice Kennedy states that *factual* allegations in a plausible claim must “permit the court to infer *more than the mere possibility of misconduct*” by “judicial experience and common sense.”²⁸⁷ Somewhat explicitly, this statement from the majority requires an undefined *higher* likelihood (or probability) that the facts plausibly establish the claim.²⁸⁸

If one accepts the argument that greater probability is required under *Iqbal*, then one thing is different between the proffered “difficult choices” and pleading analysis—timing. Up until *Iqbal*, probability determinations of factual sufficiency were found in consideration upon motions for summary judgment.²⁸⁹ Now that courts undertake these probability determinations at the pleading stage, motions to dismiss are effectively replaced with summary judgment determinations.²⁹⁰ The timing differential between the two motions impacts the procedural footing of the parties. Motions to dismiss may be decided upon the basis of little evidence or

²⁸⁶ *Id.* at 488–89 (“Mixed questions of law and fact . . . have long presented the greatest challenge. However they are properly handled for other purposes (such as allocating power between state court and federal habeas court, between judge and jury, or between trial court and appellate court) . . .”).

²⁸⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (emphasis added).

²⁸⁸ In the analysis of the facts in both cases, the Court uses language that indicates they found a probability that the alleged wrongful conduct occurred. In *Iqbal*, the Court finds that “[t]aken as true, these allegations are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.” *Id.* at 1951 (emphasis added). *See also* *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 565 (2007) (“The nub of the complaint, then, is the ILECs’ parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.”).

²⁸⁹ Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 833–34. *See also* Geoffrey P. Miller, *Pleading After Tellabs*, 2009 WIS. L. REV. 507, 534 (2009). Miller argues that while PSLRA’s heightened pleading rules may not “convert[] the motion [to dismiss] into one for summary judgment,” as a practical matter they come awfully close.” *Id.* (internal citations omitted).

²⁹⁰ Spencer, *Plausibility Pleading*, *supra* note 71, at 486. *See, e.g.*, Edward Brunet, *The Substantive Origins of “Plausible Pleadings”: An Introduction to the Symposium on Ashcroft v. Iqbal*, 14 LEWIS & CLARK L. REV. 1 (2010); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

procedural safeguards,²⁹¹ and, unlike motions for summary judgment,²⁹² the plaintiff's complaint bears the burden of sufficiency.

The detrimental impact of the probability requirement of *Iqbal* falls disproportionately upon the future of environmental litigation. Evolving claims are more susceptible to fail in their burden to plead facts that are "likely" or "plausibly" explained by the alleged wrongful conduct. Therefore, even systemic procedural adjustments to counter information asymmetry do not protect plaintiffs from all the harmful effects of plausibility pleading. For these reasons, this note puts forward a different solution to alleviating the impact of *Iqbal* on environmental plaintiffs.

2. Substantive Pleading

After evaluating the normative arguments for breaking up trans-substantive pleading and considering solutions that maintain uniformity, one is left with the decision to construct a substantive pleading standard linked to public interest litigation. To accomplish this, two paths of enactment are possible, proposal by the Rules Advisory Committee to the Supreme Court²⁹³ or congressional statute;²⁹⁴ it would not be the first time either body has carved out a pleading standard for a substantive area of the law.²⁹⁵

The first potential approach envisions a change in the Federal Rules of Civil Procedure. The rule (one might call it 9(i)) would state:

(i) Environmental Citizen Suits. In alleging a violation of law under an environmental citizen suit provision, the plaintiff may plead any set of facts consistent with providing notice to the defendant of the grounds for the plaintiff's entitlement to relief.

²⁹¹ See Clermont & Yeazell, *supra* note 289, at 834.

²⁹² The movant for summary judgment bears the initial burden. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

²⁹³ See FEDERAL RULEMAKING, U.S. COURTS, <http://www.uscourts.gov/RulesandPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited Mar. 2, 2011) (describing the specific steps in the rulemaking process).

²⁹⁴ U.S. CONST. art. III, § 1 (authorizing Congress to "ordain and establish" the lower federal courts).

²⁹⁵ The Advisory Committee's Rule 9(b) currently requires the party to "state with particularity the circumstances constituting fraud or mistake." FED R. CIV. P. 9(b). For private security actions, the congressionally enacted PSLRA requires that "the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4 (2006).

By emphasizing notice rather than plausibility, this rule provides plaintiffs opportunities to pass through the pleading gateway and into the federal courthouse.

The difficulties of this reform lie in the approval process. Even if the Rules Advisory Committee recognizes the need for a substance-specific pleading standard, the Supreme Court itself must approve the proposed rule.²⁹⁶ The Court's opinion in *Iqbal* suggests that the Court still believes plausibility is subsumed within notice.²⁹⁷ Therefore, routing environmental substantive pleading through the Federal Rules process is less likely to succeed.

Alternatively, Congress may wade into the debate and secure a return to notice pleading for environmental plaintiffs. Similar to a rule change, Congress could enact an amendment to environmental statutes that provide environmental citizen suit provisions. The language would be similar to the proposed rule, emphasizing that a "plaintiff may plead any set of facts consistent with providing notice to the defendant." Congress would be able to target specific areas where public interest litigation plays a vital role in effecting the regulation of environmental norms.

Current citizen suit statutes will provide easily identifiable causes of action to be amended by the new pleading provision. As new environmental regulations and statutes are developed, Congress may safeguard the role of public interest litigation against federal judges struggling to apply the currently challenging and unclear pleading standard. Moreover, the very nature of the congressional approach, applying pleading standards to specific actions, allows for more rigorous scrutiny of the unintended effects such a change might entail.

In advancing these solutions, this note does not undertake a full normative account of the value of substantive procedural rules.²⁹⁸ However, improving the pleading fortunes of environmental plaintiffs by anchoring the bar to notice suggests some beneficial results. The first area of improvement might be clarity. Because the probability requirement of plausibility pleading is ambiguous, judges face a difficult challenge in weighing their "judicial experience" to land on the appropriate level of factual allegations required by the standard.²⁹⁹ Some scholars argue that *Iqbal* is an attempt to provide a method to ascertain each pleading based on a different

²⁹⁶ See FEDERAL RULEMAKING, *supra* note 293.

²⁹⁷ See Hartnett, *supra* note 269, at 483–86.

²⁹⁸ This will be the task for another article, where it might be shown that this note's frame of argument might justify substantive pleading in other areas of the law.

²⁹⁹ See *supra* Part III.A.

substantive area of the law through a contextual framework.³⁰⁰ Unfortunately, this judicial experience basis is not very transparent, to either judges or plaintiffs. Instead, the clear emphasis on notice will enable courts to ascertain the alleged violations as a function of the notice they provide defendants, removing probability (as far as possible) from the equation.

A derivative implication of clarity is the notice provision's opportunity to provide consistency. The clear emphasis on notice will enable courts to ascertain the alleged violations and provide plaintiffs a much smaller window of uncertainty in successful pleading. For public interest plaintiffs to function as private attorneys general properly, they must be able to rely upon a consistent application of pleading standards within the environmental context.³⁰¹

Another benefit of the pleading provisions will be the potential for a substance specific body of case law to develop. Because the United States shows no inclination to move environmental public interest litigation claims into specialized courts, judges will continually face the challenge of understanding some potentially complex and scientific environmental disputes. By deciding environmental pleading cases on specific statutory grounds, the courts will develop, over time, a body of case law that can further instruct generalist judges.

Whatever the normative justifications, the legal net cast by this new targeted pleading standard better empowers the full spectrum of environmental public interest actions. In this way, the purpose and function of public interest environmental litigation may be secure.

CONCLUSION

The implications of *Twombly* and *Iqbal's* plausibility pleading standard are far reaching. Currently, all plaintiffs are subject to the same pleading rules, yet, not all plaintiffs' litigation serves the same function. For litigants who seek to vindicate the public's environmental interest

³⁰⁰ See Hartnett, *supra* note 269, at 498–503. “Notice that in *Twombly* itself, the Court did not rest its evaluation of plausibility solely on its own intuitive sense of the way the world naturally works, or its sense of ‘common economic experience.’ It also relied on the particular history of the telecommunications industry . . .” *Id.* at 501 (internal citations omitted).

³⁰¹ Professor Burbank makes a similar argument. See Burbank, *supra* note 87. “Federal Rules that avoid policy choices and that in essence chart ad hoc decision-making by trial judges are uniform and hence trans-substantive in only the most trivial sense. More important, the banner of simplicity and predictability under which they fly is by now false advertising.” *Id.* at 715 (internal citations omitted).

through litigation, *Twombly* and *Iqbal* stand as a potential hazard that may inadvertently thwart meritorious environmental claims.

Because public interest environmental litigation continues to play a crucial role in the regulatory structure of the United States, the consequences of this procedure and substance collision loom ever larger. With global trends showing increased awareness of the important function such litigation performs, the United States would be ill-advised to step back from a leadership role in maintaining the mechanisms necessary for its citizens to continue to enforce environmental policies. By breaking down the trans-substantive pleading barriers that hold meritorious plaintiffs hostage, the United States may still “protect human health and . . . safeguard the natural environment—air, water and land—upon which life depends.”³⁰²

³⁰² *History: Timeline*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/history/timeline/index.htm> (last visited Mar. 2, 2011).