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Law, Facts, and Power

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> *There is no logical distinction between statements which are grouped by the courts under the phrases "statements of fact" and "conclusions of law."* – Walter Wheeler Cook (1921)

> *[A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.* – Justice Anthony Kennedy (2009).

I. INTRODUCTION

In May of 2009, the U.S. Supreme Court decided *Ashcroft v. Iqbal*.[1] In the context of a claim arising out of detentions of Arab Muslim men in the immediate aftermath of the September 11th attacks, the Court announced sweeping changes in its interpretation of the rules governing pleadings.[2] Without actually amending the rules, without the advice of

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1. 129 S. Ct. 1937 (2009).

2. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), began the process but *Iqbal* confirmed that the Court's changes are generally applicable and reduced a vaguer plausibility test into a two-jump hurdle that all plaintiffs must clear.

the Advisory Committee on the rules, and despite the opinion below[3]—written by some of the most respected and politically diverse judges on the Second Circuit[4]—the Court formalized a new approach to evaluating the sufficiency of a plaintiff's complaint and the relationship between pleadings and discovery.

In a déjà vu sort of way, the Court returned us to a world in which facially possible (no "little green men," trips to Pluto, or time travel[5]) but very general allegations don't count. Here are the new marching orders for federal judges: 1) Identify allegations that are merely "conclusions of law" or "conclusory." Ignore them; 2) Take any remaining allegations as true, but if they are circumstantial—as they often will be, especially when "conclusory" statements are disregarded—look to see if they support a "plausible" inference that the plaintiff might be able to prevail. To be "plausible" in this sense, it must be at least as likely as other competing inferences, decided based on the judge's own experience and common sense.[6] If the pleaded circumstantial evidence is not sufficient, *Iqbal* instructs the trial judge to dismiss the case without allowing discovery.

The Supreme Court's opinion in *Ashcroft v. Iqbal* is wrong in many ways. This essay is about only one of them: the Court's single-handed return to a pleading system that requires lawyers and judges to distinguish between pleading facts and pleading law. This move not only resuscitates a distinction purposely abandoned by the generation that drafted the Federal Rules of Civil Procedure, but also serves as an example of the very difficulties created by the distinction. The chinks in the law-fact divide are evident in *Iqbal* itself—both in the already notorious pleading section of the opinion, and in the much less noted section on whether the Court even had jurisdiction over the case, which also turned on the distinction between law and fact. *Iqbal* further demonstrates the power issues that lurk below the "law" and "fact" labels. The Court's invocation of "it's all just law" allocates authority to judges rather than juries, and gives appellate judges the power to review those decisions with no deference to the trial court. In addition, by using a case to change the long-established interpretation of a procedure rule, *Iqbal* allowed the Supreme Court itself to avoid the transparent and participatory process for amending the Federal Rules of Civil Procedure, and altered the balance of power between the Court and Congress.

3. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).
4. *Id*. The panel consisted of Judges Newman, Cabranes & Sack.
5. *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting).
6. *Twombly*, 550 U.S. at 567; *Iqbal* 129 S. Ct. at 1950, 1951.

II. THE LESSONS OF HISTORY: LAW, FACTS, ANGELS AND PINHEADS

While each generation of lawyers may spend its time trying to correct the mistakes of the previous generation, it should not do so by returning to the errors of its grandparents' generation. The fruitless quest for the perfect pleading only of operative facts—not "legal conclusions," and not "evidence"—was abandoned in the 1930s for multiple reasons. From a utilitarian perspective, it bred countless inefficient motions and orders and appeals about the sufficiency of pleadings, consuming time and money without much systemic benefit. And from a jurisprudential perspective, the advent of legal realism demonstrated that the distinction was ephemeral. One could as easily calculate how many angels can dance on the head of a pin[7] as explain whether—for example—pleading that something constituted "valuable consideration" or that the defendant was "negligent" or that "B owes A $500" was a question of law or a question of fact.[8]

The instincts of the drafters of the Federal Rules of Civil Procedure on this issue have been confirmed by modern developments in cognitive science and its impact on further philosophical debate about the law-fact divide. It is theoretically possible to distinguish fact from law by defining fact as "a reality that exists independently of its acknowledgment by the conscious mind of a perceiver."[9] However, the legal system must operate within the limits of human language—the testimony of those perceivers—and people think and speak in terms of categories.[10] Consider, for example, the comments of the drafters of the Federal Rules of Evidence regarding the conclusions that are embedded in everyday language, which they referred to as "non-evidence facts":

> Every case involves the use of hundreds or thousands of non-evidence facts. When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes from non-evidence sources within himself, the supplementing information that

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7. RICHARD BAXTER, THE REASONS OF THE CHRISTIAN RELIGION 530 (1667) ("And Schibler with others, maketh the difference of extension to be this, that Angels can contract their whole substance into one part of space. . . . Whereupon it is that the Schoolmen have questioned how many Angels may sit upon the point of a Needle?"). The scholastic philosophers were not, of course, actually trying to count angels but to train students in abstract reasoning. Similarly, Justice Kennedy's opinion assumes that abstract reasoning can lead judges to distinguish between law and fact, or conclusory and non-conclusory assertions. *See* Ryan Patrick Alford, *How Do You Trim the Seamless Web: Considering the Unintended Consequences of Pedagogical Alterations*, 77 U. CIN. L. REV. 1273, 1293-94 & n.98 (2009).

8. *See* Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 416 (1921) (pointing to split between appellate courts on the issue).

9. Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 866 (1992).

10. Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 917-20 (1992) (responding to Lawson).

> the "car" is an automobile, not a railroad car, that is self-propelled, probably by an internal combustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on.[11]

"Car," then, is a conclusion. "Speeding" is a conclusion, as is "careless," as is "negligent." To label some of these conclusions as "law" and some as "fact" is an arbitrary exercise, the choice of a point along a continuum of specificity at which something fairly general is labeled a conclusion, something fairly specific a fact, and something in between a mixed question of law and fact. While commentators disagree about whether, at a philosophical level, there is a qualitative or ontological distinction between law and fact, there is a strong consensus that the distinctions courts draw are governed by policy rather than logic, and that they are not clearly and predictably drawn.[12]

Because there is no clear line between questions of law and questions of fact, court decisions that turn on the distinction are a morass of inconsistency. Despite sincere attempts to develop clear and predictable lines of precedent, cases differ for reasons that cannot be explained by some kind of inherent difference between an "ultimate fact" and a "conclusion of law," especially in the huge realm of mixed questions of law and fact. It should not be surprising, then, that the old code pleading cases forced to make those decisions generated thousands of cases but little clarity.[13]

Negligence cases provide examples of where an insistence on disregarding "legal conclusions" could lead. Many jurisdictions required quite specific allegations of factual theories of negligence, but permitted the pleader to characterize those allegations as negligently done, "and that characterization [was] held to show the breach of duty to plaintiff."[14] Other jurisdictions—and this is apparently where *Iqbal* directs us—held that the word "negligent" adds nothing, and should be ignored. One case following that pattern found that

11. Advisory Committee Notes to Federal Evidence Rule 201, citing KENNETH DAVIS, A SYSTEM OF JUDICIAL NOTICE BASED ON FAIRNESS AND CONVENIENCE, in PERSPECTIVES OF LAW 69, 73 (1964); Levin and Levy, *Persuading the Jury with Facts Not in Evidence: The Fiction-Science Spectrum*, 105 U. PA. L. REV. 139 (1956). *See also* THAYER, PRELIMINARY TREATISE ON EVIDENCE 279-80 (1898) ("In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgment and efficiency, is imputed to judges and juries as part of their necessary mental outfit.").

12. *See, e.g.,* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003); Henry P. Monaghan, *Constitutional Fact Reviews*, 85 COLUM. L. REV. 229 (1985).

13. Cook, *supra* note 8, *passim*.

14. Charles E. Clark, *Pleading Negligence*, 32 YALE L.J. 483, 486 (1922-23).

> an averment that the persons in charge of a locomotive engine carelessly and negligently and without giving warning ran it at a reckless and high rate of speed upon a switch track where the plaintiff was at work, and negligently and carelessly disconnected a freight car therefrom, leaving it to run with great force against other cars on the track and forced them against the plaintiff

did not adequately allege a duty to the plaintiff, because the conclusory terms "negligently" and "carelessly" were legal conclusions rather than facts.[15]

The Court was not unaware of this documented historical confusion. Justice Stevens invoked it specifically in his dissent in *Iqbal*'s precursor, *Bell Atlantic Corp. v. Twombly*.[16] Why, then, return to those problematic concepts? Perhaps Justice Kennedy and the majority really believe that courts can distinguish in a disciplined and consistent manner between conclusions of law—which are to be ignored—and statements of facts—which are evaluated to see whether they raise a plausible inference of defendant's breach of duty. If they believe this, however, they are choosing hope over experience. History—decisions from the code pleading era as well as the Court's own efforts—demonstrates that attempts to label various issues as law or fact are destined to fail. The Supreme Court itself, in other contexts, has confessed that the law-fact distinction is problematic, calling it "elusive," "slippery," and "vexing."[17] Its efforts, for example, have resulted in anomalies such as these:

- Damages: the excessiveness of punitive damages is a question of law, while the amount of compensatory damages is a question of fact.[18]

- State of Mind: the issue of actual malice in a defamation case is a question of law, as is the issue of voluntariness of a

15. Chicago & Erie Ry. v. Lain, 83 N.E. 632 (Ind. 1907). Flash forward and compare Branham v. Colgencorp., Inc., No. 6:09-CV-00037 (W.D. Va. 2009) (dismissing slip and fall case because plaintiff failed to allege how the liquid came to be on the floor, whether the defendant knew or should have known of its presence, and how the plaintiff's accident occurred, citing *Twombly* and *Iqbal*).

16. 550 U.S. 544, 573-76 (2008) (Stevens, J., dissenting).

17. Miller v. Fenton, 474 U.S. 104 (1985) (distinguishing the legal and factual matters with regard to whether a confession was voluntarily given); Thompson v. Keohane, 516 U.S. 99 (1995) (analyzing law-fact divide in a habeas corpus case); Pullman-Standard v. Swint, 456 U.S. 273 (1982) (considering whether intent to discriminate is an issue of law or fact).

18. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

confession, while the issue of intent to discriminate is a question of "ultimate fact."[19]

- Fact Issues Treated Like Law: the issue of whether a suspect is "in custody" (a "mixed question of law and fact qualifying for independent review") and whether a movie is "patently offensive," and thus pornographic ("essentially questions of fact")[20] get de novo review, which means that they are labeled as fact issues but treated as questions of law.

III. *ASHCROFT V. IQBAL* AS EVIDENCE OF CONFUSION

Even if we lacked this convincing history of dysfunction, Justice Kennedy's own opinion in *Iqbal* is Exhibit A for the absolute unworkability of the law-fact distinction. The incoherence is clear not only in the better-known portion of the opinion, the one dealing with the sufficiency of Iqbal's complaint. It is also clear in another section of *Iqbal* itself—the one explaining why the court has jurisdiction to review this interlocutory order. The language of the majority opinion creates illusory boxes of law and fact.

A. Legal Conclusions in the Complaint

Justice Kennedy's opinion parses the plaintiff's complaint and, viewing each allegation in isolation, holds that the following are mere conclusions that must be disregarded:

> 1) Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" Iqbal to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."
>
> 2) Ashcroft was the "principal architect" of this policy.
>
> 3) Mueller was "instrumental in the adoption, promulgation and implementation" of the policy.

These, on the other hand, were allegations of fact:

19. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984); *Miller*, 474 U.S. at 110; *Pullman-Standard*, at 286-88.

20. *Thompson*, 516 U.S. at 102; Jenkins v. Georgia, 418 U.S. 153, 160 (U.S. 1974).

> 1) The FBI, "under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11."
>
> 2) The "policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were "cleared" by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001."

The four dissenting Justices (Souter, Ginsberg, Stevens, and Breyer) disagree. They look at the complaint as a whole, and, considered in context, read Iqbal's complaint as alleging quite specific *facts* that provide adequate notice to the defendants and adequate shape to the lawsuit. In addition, the dissent points to inconsistencies in Justice Kennedy's decisions about what is law and what is fact: "the majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory."[21] Why are the first three allegations numbered above just legal conclusions, while the last one is an allegation of fact? Nine justices. Five vote legal conclusion. Four vote factual allegation. This is not an indicator of a clear line of demarcation.

B. Interlocutory Appeal

The first part of Justice Kennedy's decision has been less noted, as it concerns the less sexy question of whether the district court order refusing to dismiss the complaint against Ashcroft and Mueller was appealable. It was certainly not a final order in the normal sense, and so an exception was required to allow an interlocutory appeal: the collateral order doctrine. In the context of cases suing government officers who defend themselves based on a claim of qualified immunity, Supreme Court case law allows an interlocutory review of orders refusing to dismiss on immunity grounds, so long as the issue is a question of "law."[22]

Cases that the Court had reviewed under this exception in the past looked at the plaintiff's pleadings to see whether the complaint alleged a violation of a clearly established law. They thus involved an analysis of a legal proposition and its fit with the facts as alleged.[23] They did not involve a question of the factual specificity of those allegations.

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

22. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985);

23. Hartman v. Moore, 547 U.S. 250 (2006) (considering the elements of a retaliation claim); Wilkie v. Robbins, 551 U.S. 537 (2007) (deciding whether a *Bivens* claim can grow out of property rights).

However, the Court had also found interlocutory review unavailable in a case arguably more like *Iqbal*. In *Johnson v. Jones*,[24] the Court refused to allow immediate review of the denial of motion for summary judgment. *Johnson* was based on an allegation that five police officers had beaten the plaintiff, and the trial court had refused summary judgment because it found a genuine issue of material fact as to whether three of the defendants participated in the beating. As noted above, the special interlocutory appeal rule only applies to questions of law. However, a decision about whether there is a question of fact for the jury[25] is defined as a question of law, so the *Johnson* appeal should have satisfied the "question of law" requirement. In *Iqbal*, Justice Kennedy explains the Court's refusal to take the *Johnson* case like this: "Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said in *Johnson*, it is a 'fact-related' legal inquiry." So it turns out that fact issues sometimes infiltrate questions of law, and collateral orders are only final if they involve "abstract" rather than "fact-related" issues of law.[26]

The Court then had to apply the "abstract" vs. "fact-related" question of law analysis to the lower court's refusal to dismiss in *Iqbal*. Justice Kennedy concedes that "the categories of 'fact-based' and 'abstract' legal questions used to guide the Court's decision in *Johnson* are not well defined."[27] Nevertheless, he found it easy to distinguish *Johnson* from *Iqbal*: the former required the examination of a "vast pretrial record," while the latter considered only allegations within the "four corners of the complaint." Why that difference makes one more fact-ish[28] than the other, the opinion does not explain.[29]

It is unlikely that one could frame a convincing explanation of why facts in a complaint are different from facts in a larger record. Yet by returning to the pre-legal realist world view in which facts and law are conceptually and functionally distinct, the Court has forced lawyers and judges to draw these lines in every case. It is no accident that six months after *Iqbal* was decided it had been cited by courts 3312 times.

24. 515 U.S. 304 (1995).

25. This, of course, is another example of the strangeness of the law-fact distinction. Decisions about whether or not there is sufficient circumstantial evidence from which the jury could draw the inference required by the plaintiff look suspiciously like factual decisions.

26. *Iqbal*, 129 S. Ct. at 1947.

27. *Id*.

28. *Cf*. "truthy," the satirical watchword of political punditry on *The Colbert Report* (Comedy Central).

29. It can be explained, though, as an efficiency-based decision about interlocutory appeal. *See* section IV, *infra*.

Uncertainty breeds litigation. And no one should find that to be a surprise.

IV. THE LAW-FACT DISTINCTION ADOPTED BY *IQBAL* IS A JUDICIAL POWER-GRAB

Why, given the problems apparent from history and from *Iqbal* itself, is the court going down this road? In a word: power. In slightly more words, three kinds of power: the power of judges over juries; the power of appellate judges over trial judges; and the power of the Supreme Court itself over Congress and the Advisory Committee on the Federal Rules of Civil Procedure. While talking about fact and law, the Court is aware that this distinction is actually about the allocation of authority to decide.

In the past, when discussing the law-fact divide, the Court has at times pulled aside the curtain and revealed the real issue underlying its decisions. The real question is not the nature of the issue but the choice of preferred decision-maker. For example, in explaining why the voluntariness of a confession is a question of law, not fact, the Court noted that "the fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[30]

To illustrate the point, it helps to consider some of the contexts in which courts have identified particular questions as "law," despite the questions being quite fact-intensive. Sometimes they do so to give more power to the court of appeals than to the trial court.[31] For example, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Supreme Court held that the issue of whether a punitive damage award is excessive is a legal rather than a factual question, and so appellate courts should use a de novo standard of review rather than a standard that is deferential to the jury.[32] And while the Court attempted (unconvincingly) to explain why punitive damage decisions based on moral condemnation and deterrence are not really factual, its real point was to assign the final decision about punitive damages to appellate courts. In a similar way, the Court has treated certain kinds of facts in constitutional litigation—so-called "constitutional facts"—as if they were law, so they can be reviewed de novo.[33] As Judge Easterbrook

30. *Miller*, 474 U.S. at 114.

31. *See* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986). *See also* Kevin Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 990 n.59 (2006) (discussing artificial nature of the law-fact line in review of jurisdictional fact).

32. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

33. *See* Norris v. Alabama, 294 U.S. 587, 589-91 (1935).

once explained, "That admixture of fact and law, sometimes called an issue of 'constitutional fact,' is reviewed without deference in order to prevent the idiosyncrasies of a single judge or jury from having far-reaching legal effects."[34]

In other cases, issues are defined as "law" in order to allocate decisional power to the judge rather than the jury. In patent litigation, for example, the Supreme Court has decreed that the question of the scope of the claim is a question of law, even though it involves drawing factual inferences from extrinsic evidence.[35] The reason, again, is not a logical consideration of the difference between law and fact, but a decision that, for policy reasons, judges rather than juries are better equipped to make the decision, and because uniformity is desirable.[36]

Both of Justice Kennedy's law-fact discussions in *Iqbal* fit this power allocation model. The two-step analysis of pleading sufficiency puts both steps in the "law" category. The sorting of the complaint's allegations into law and fact boxes is a question of law. The decision about whether the factual allegations, taken as true, support a "plausible" inference is also a question of law. Therefore, the judge rather than the jury will make these decisions. If the case is appealed, the review of the trial judge's decision about the pleadings will be reviewed as a question of law: de novo, with no deference to the trial judge. The majority's magic trick has thus privileged judges over juries,[37] appellate judges over trial judges, and put the Court firmly at the top of the heap.[38] The same results flow from Justice Kennedy's placement of pleading issues in the "abstract" rather than "fact based" category of legal issues. Appellate courts get to police the trial courts' decisions, and get to do so immediately even when the trial judge refused to dismiss (and without the work of actually considering information revealed by discovery). It is based on concerns about power and efficiency, not about how close to the "fact" line a legal issue strays.

34. A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 689 (7th Cir. 2002) (explaining basis for de novo review of a district court's finding based on empirical studies that a state abortion law would create an undue burden). The doctrine of constitutional fact apparently derived from that of jurisdictional fact, a concept that allowed de novo review of facts on which the court's power depended. *See* Crowell v. Benson, 285 U.S. 22 (1932).

35. Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996).

36. *Id*. at 388-91.

37. *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, available at http://ssrn.com/abstract=1494683 (2009).

38. Judging from the oral arguments in *Iqbal*, part of the Court's rejection of managing discovery rather than dismissing cases comes from some Justices' distrust of trial judges. *See Ashcroft v. Iqbal*, Transcript at 50, 61.

Institutionally, adopting a radical change in the interpretation of the Federal Rules of Civil Procedure[39] through the decision of a case also bypasses the normal collaborative process through which rules are made.[40] Congress has the power, under Article III of the Constitution and the Necessary and Proper Clause, to make rules of practice and procedure for the federal district courts. By passing the Rules Enabling Act, Congress delegated that power to the court, and later legislation creates a committee structure and a process for adopting and amending rules. This process, however, is time-consuming. It involves committees whose membership is meant to represent various constituencies within the bar, as well as federal judges from various levels of courts. In recent times, it also involves empirical research designed to test the need (if any) for change and the merits of possible solutions. Proposed rules will be published, posted on the courts' website, written comments solicited and hearings held. As the proposals move through the process, committees may delay decision or make changes. Ultimately the proposal goes to Congress, which may if it wishes change or reject it. The Court's only role is to pass the proposal along to Congress, and in the past it has done so routinely so long as the correct process was followed. The Court thus has very little direct control over the content or timing of changes in the rules.

If the majority of the Court has been hoping for a change in the existing complaint-discovery relationship, they had another source of frustration: the Rules Advisory Committee has chosen not to do so several times already.[41] Even if the committee, whose members are appointed by the Chief Justice, becomes more sympathetic to such changes, it would be at least two to three years before any resulting changes in the rules would become effective.[42] Nor, except in the context of securities fraud claims, has Congress chosen to increase the burden of pleading by requiring heightened specificity or returning Rule

39. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, available at http://ssrn.com/abstract=1448796 (2009).

40. *See* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. L. REV. 1655 (1995) (describing evolution of rulemaking process).

41. *See, e.g.*, Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 17-18 (May 3-5, 1993) (discussing the possibility of heightened pleading requirements for certain types of cases); Judicial Conference of the United States, Advisory Committee on Civil Rules, Draft on Particularized Pleading (Sept. 17, 1993) (suggesting a variety of possible amendments to Rules 8 and 9 to magnify their requirements); Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 5-8 (Oct. 21-23, 1993) (continuing the discussion of possible amendments to restore heightened pleading requirements); Judicial Conference of the United States, Minutes of the Advisory Committee on Civil Rules 17-18 (Apr. 20, 1995) (discussing but rejecting at that time heightened pleading requirements).

42. McCabe, *supra* note 41 at 1671-72.

11 sanctions to their pre-1993 strength.[43] If the Court wanted action, it had to take matters into its own hands.[44]

Considered from this perspective, invoking the old code pleading concept of the conclusion of law is like waving a magic wand. "*Imperio*," as a wizard in a Harry Potter book would say, and the judges have full control. Without using empirical research about the prevalence of frivolous claims or the actual expense of discovery in most cases, or bipartisan input, or public notice and comment, the Court has handed federal judges up and down the line a powerful tool to stop lawsuits in their tracks.

Even those who think this is a good idea should worry about the device (the law-fact incantation) that Justice Kennedy has chosen for the purpose. First, it is logically the wrong one:

> there is no algorithm for generating correct conclusions about which is which, and so the courts muddle along attempting to rationalize a process whose primary purpose is allocative in terms of the nature of the entities. There is thus a mismatch between task and tool, leading to the perfectly predictable sense of chaos surrounding the matter.[45]

Second, it is extremely inefficient—a powerful but muddy doctrine creates incentives to file motions to dismiss in most cases, and dealing with those motions will require significant time and expense from courts and litigants. Third, because decisions will talk about one issue (law/fact) but really deal with another (balancing access to justice against the cost of litigation), no clarity can result either pragmatically or ideologically. It was a bad idea the last time, it's a bad idea now, and—ironically—*Iqbal* proves it.

43. The Private Securities Litigation Reform Act, Pub. L. No. 104-67, 109 Stat. 737 (Dec. 22 1995), did adopt heightened pleading requirements for securities fraud claims. However, other legislation failed to pass. *See, e.g.*, Lawsuit Abuse Reduction Act, H.R. 420, 109th Cong. (2005) (proposing amendments to Rule 11 that would apply in both federal and state court); Stop Trial Lawyer Pork Act, H.R. 7080, 110th Cong. (2008).

44. Some see this decision as part of a larger movement by the Court to chip away at the power of Congress. *See* Simon Lazarus, "Congress Pushes Back as Supreme Court Oversteps," *Roll Call* (Nov. 17, 2009) (also citing decisions regarding political contributions, proof of age discrimination, and arbitration clauses).

45. Allen & Pardo, *supra* note 11 at 1806.