

# JUSTICE SOUTER AND THE CIVIL RULES

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## I. INTRODUCTION

On April 30, 2009, after almost twenty years on the U.S. Supreme Court, Justice David Hackett Souter announced his retirement.<sup>1</sup> A quiet personality never comfortable in the D.C. spotlight<sup>2</sup> (except, perhaps, during his confirmation hearings<sup>3</sup>), Justice Souter was rarely characterized as a force on the Court.<sup>4</sup> No doubt his legacy will be marked in large part—and perhaps unfairly—by his membership in the *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>5</sup> troika and his apparent Blackmun-like slide while on the Court from conservative to liberal (at least, as relative to the Court as a whole).<sup>6</sup>

Despite his momentous contribution to *Casey* and the role that that case has played,<sup>7</sup> we ought to be wary of remembering Justice Souter only as a co-author of that single case, a Republican disappointment, or a liberal savior. He did, after all, write 326 opinions while on the Supreme Court<sup>8</sup> (and lent an often crucial vote to hundreds more), including memorable

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1. See Nina Totenberg, *Supreme Court Justice Souter to Retire*, NPR.ORG, Apr. 30, 2009, <http://www.npr.org/templates/story/story.php?storyId=103694193>.

2. See Linda Greenhouse, *Justice Unbound*, N.Y. TIMES, May 3, 2009, at WK1.

3. See TINSLEY E. YARBROUGH, DAVID HACKETT SOUTER: TRADITIONAL REPUBLICAN ON THE REHNQUIST COURT, at ix (2005) (calling Souter's performance before the Judiciary Committee "masterful"); *id.* at 129–39, 142.

4. Some have gone so far as to call him "mediocre." See Todd Zywicki, *Justice Souter and Accidents of History*, THE VOLOKH CONSPIRACY, <http://volokh.com/posts/1241470524.shtml> (May 4, 2009, 4:55 PM) ("I don't think that anyone would champion Souter as a [sic] anything other than a mediocre Justice. . . . Souter is by any measure a weak link on the Court most would think."); *cf.* Orin Kerr, *A Different Take on Justice Souter*, THE VOLOKH CONSPIRACY, <http://volokh.com/posts/1241474985.shtml> (May 4, 2009, 6:09 PM) (disagreeing with the term "mediocre" but admitting that "he is not a great writer: His opinions don't 'sing'").

5. 505 U.S. 833 (1992).

6. See YARBROUGH, *supra* note 3, at x–xi, 190; Greenhouse, *supra* note 2, at WK6; *cf.* CONG. QUARTERLY, THE SUPREME COURT AT WORK 204–05 (1990) (documenting Justice Blackmun's similar movement).

7. See generally Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1322 (2009) (recounting the importance of *Casey* and arguing that the case "significantly settled the abortion dispute").

8. This figure was calculated using the Boolean search ("souter, j., filed" "souter, j., delivered") in WestLaw's SCT database.

opinions in areas of constitutional criminal law,<sup>9</sup> equal protection,<sup>10</sup> the First Amendment,<sup>11</sup> and federalism.<sup>12</sup> Even in the relatively apolitical world of federal procedure, Justice Souter left an impression. He wrote extensively on the Federal Arbitration Act,<sup>13</sup> voiced thoughtful views on the doctrine of standing,<sup>14</sup> and moved the law forward in the areas of preemption<sup>15</sup> and federal question jurisdiction.<sup>16</sup>

We should, therefore, consider more of Justice Souter in commenting on his legacy. I will not attempt a comprehensive look—I leave that for the biographers and Court-watchers. But I will strive to offer a different view of Justice Souter, one that is itself admittedly narrow, but at least is outside of the proverbial defining moments and thus provides, perhaps, an enriching perspective. I focus on Justice Souter's views on the federal civil rules.<sup>17</sup>

Justice Souter appears to have shied away from writing opinions that addressed the civil rules for most of his tenure on the Court. The first opinion he wrote—either for the Court or for himself—that directly addressed a federal civil rule was *Ortiz v. Fibreboard Corp.*,<sup>18</sup> issued almost a decade after he joined the Court. Over the next eight years, he authored only one other opinion on the civil rules, dissenting in *Mayle v.*

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9. See generally Scott P. Johnson, *The Judicial Behavior of Justice Souter in Criminal Cases and the Denial of a Conservative Counterrevolution*, 7 PIERCE L. REV. 1 (2008).

10. See, e.g., *Bush v. Gore*, 531 U.S. 98 (2000) (Souter, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (Souter, J., dissenting); see also Heather K. Gerken, *Justice Souter and the Voting Rights Act*, BALKINIZATION, <http://balkin.blogspot.com/2009/05/justice-souter-and-voting-rights-act.html> (May 5, 2009, 2:17 PM) (arguing that Souter's legacy is tied to his voting rights jurisprudence).

11. See, e.g., *McCreary Cnty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005).

12. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (Souter, J., dissenting); *Alden v. Maine*, 527 U.S. 706 (1999) (Souter, J., dissenting); *Printz v. United States*, 521 U.S. 898 (1997) (Souter, J., dissenting); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Souter, J., dissenting); *United States v. Lopez*, 514 U.S. 549 (1995) (Souter, J., dissenting).

13. See, e.g., *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009) (Souter, J., dissenting); 14 *Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (Souter, J., dissenting); *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (Souter, J., dissenting); *Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193 (2000).

14. See, e.g., *Hein v. Freedom from Religion Found.*, 551 U.S. 587 (2007) (Souter, J., dissenting); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (Souter, J., dissenting).

15. See, e.g., *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

16. See *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

17. I use the term "civil rules" to refer to the Federal Rules of Civil Procedure and the noncriminal rules in the Federal Rules of Appellate Procedure. I might also include noncriminal rules in the Federal Rules of Evidence as well, but, alas, Justice Souter wrote no independent opinions specifically addressing them.

18. 527 U.S. 815 (1999).

*Felix*.<sup>19</sup> After mid-2007, however, Justice Souter showed considerably more willingness to write on the civil rules. In the span of a little over two years, he authored the blockbuster pleadings case, *Bell Atlantic Corp. v. Twombly*;<sup>20</sup> a passionate dissent in *Bowles v. Russell*;<sup>21</sup> and a dissent in *Twombly*'s equally important progeny, *Ashcroft v. Iqbal*.<sup>22</sup>

A survey of these five opinions by Justice Souter reveals that he is not uniformly historicist, textualist, formalist, instrumentalist, pragmaticist, or minimalist when it comes to the civil rules. It does, however, manifest a commitment to construing the civil rules in a way that would treat litigants fairly in court.<sup>23</sup>

To be sure, there are many different conceptions of procedural fairness. One Justice's fairness may be another's folly. My aim is not to define and evaluate the merits of Justice Souter's somewhat ad hoc conception of individualized procedural fairness here (which might be quite different than, say, Justice Scalia's conception of fairness as discretion-limiting rules or, perhaps, Justice Breyer's conception of systemic fairness through pragmatism); rather, I aim to show only that he was committed to his particular version of it.

That commitment manifests itself most clearly through the words that Justice Souter chose to explain his reasoning in these cases.<sup>24</sup> In each one,

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19. 545 U.S. 644 (2005) (Souter, J., dissenting). Justice Souter also wrote for the Court in *Roell v. Withrow*, 538 U.S. 580 (2003), which construed the power of magistrate judges in civil cases under 28 U.S.C. § 636(c).

20. 550 U.S. 544 (2007).

21. 551 U.S. 205 (2007) (Souter, J., dissenting).

22. 129 S. Ct. 1937 (2009) (Souter, J., dissenting). Justice Souter also authored a lone concurrence and dissent in *Republic of Philippines v. Pimentel*, 128 S. Ct. 2180 (2008) (Souter, J., concurring & dissenting), but his opinion was but a paragraph that agreed in significant part with the Court's opinion and disagreed only with the outright reversal by the Court instead of vacating and remanding.

23. I surveyed only opinions that Justice Souter authored, not those that he silently joined. No doubt, a Justice's votes may represent his views just as well as his pen, but silent votes can also be misleading; just because a Justice joins an opinion does not mean that he joins all aspects of that opinion. It would be difficult to tell when a silent vote was an endorsement of the opinion's procedural philosophy and when it was motivated by other factors. Discerning that likely would depend upon a comparison to the Justice's authored opinions, so one might as well start with the authored opinions.

24. Those words are important—he largely wrote his own opinions and, by all accounts, chose his words deliberately. See YARBROUGH, *supra* note 3, at 68, 160; see also Kerr, *supra* note 4 (“[Justice Souter’s] words are 100% his own.”). As a light-hearted example, Justice Souter used the word “hub” thirteen times in twelve different opinions during his tenure on the Court. By contrast, in the entire history of the Court, all other justices have used it in only fifty-seven opinions. Of course, authored opinions may not wholly reflect a Justice's views if, for example, the author tempered his views to secure a majority, to comport with *stare decisis*, or for an underlying public purpose. Although I believe, as I explain more fully below, that Justice Souter's commitment to the fair treatment of litigants under the civil rules is reliable, I acknowledge that these other motivating factors could have played a role.

he consistently expressed that commitment in a variety of contexts, including concern for the fair treatment of unrepresented class members, pro se plaintiffs, parties relying on judicial decrees, defendants seeking to avoid burdensome discovery, and plaintiffs seeking access to civil justice. In short, Justice Souter's own words show his deep commitment to the fair procedural treatment of individual litigants in our civil justice system.

## II. JUSTICE SOUTER'S CIVIL RULES OPINIONS

Each of Justice Souter's five major opinions implicating the civil rules—*Ortiz*, *Mayle*, *Bowles*, *Twombly*, and *Iqbal*—shows his concern for the fair treatment of civil litigants.

### A. Ortiz

In *Ortiz*,<sup>25</sup> that concern was for absent class members faced with inadequate representation and the inability to opt out of the resulting settlement of their claims. *Ortiz* involved the certification of an asbestos class action submitted for settlement approval. The settlement was negotiated in the midst of the asbestos litigation crisis—hundreds of thousands of potential claimants existed, and asbestos manufacturers did not have the funds to pay all of the claims. Just a few years previously, in *Amchem Products, Inc. v. Windsor*, the Court had acknowledged the crisis and pleaded for a pragmatic legislative solution,<sup>26</sup> but that did not happen, and the crisis came to the Court again in *Ortiz*.

In *Ortiz*, the parties agreed to a settlement, whereby the principal defendant, Fibreboard (which was on the verge of bankruptcy), would fund a trust to process and pay class members' asbestos claims, but the entitlements would be substantially limited.<sup>27</sup> Fibreboard's looming insolvency and the need for an end to the asbestos crisis might have prompted some, such as Justice Breyer, to overlook some protections to unnamed class members in order to resolve the crisis pragmatically.<sup>28</sup>

But Justice Souter would not. Vacating the settlement order, Justice Souter held that the class action failed to meet the requirements of a so-called "limited fund" class under Rule 23(b)(1) because the settlement fund was limited by agreement rather than external factors. He expressed

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25. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

26. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997).

27. *Ortiz*, 527 U.S. at 827, 850, 852.

28. *See id.* at 867 (Breyer, J., dissenting).

concern that the fund was limited not by necessity, but by conflicted class counsel, to the detriment of the unnamed class members, who could not opt out of a biased settlement. In addition, fairness to the unnamed class members, who can neither opt out nor have their voices heard throughout the settlement negotiation process, required heightened attention to Rule 23(a)'s structural due process protections, which the *Ortiz* settlement did not meet.<sup>29</sup>

Justice Souter's opinion is meticulous, and its jurisprudence is varied. In places, he is traditionalist, hewing closely to the historical model of a "limited fund" in assessing its scope.<sup>30</sup> In others, he is originalist, conforming to the meaning that Rule 23 had at its adoption.<sup>31</sup> In still others, he is a dutiful follower of precedent, namely *Amchem*.<sup>32</sup> Overall, he is shockingly un-pragmatic. Unlike Justice Breyer, who—in dissent—suggested that he might relax the strictures of Rule 23 to deal with the crisis pragmatically, Justice Souter's opinion adheres rigidly to Rule 23 and the rulemaking process that produced it.<sup>33</sup>

But, tellingly, what underlay his formalism was a deep concern for unnamed class members and the overall fairness of the class litigation. He was skeptical of the class representatives' and counsels' assertions without a more thorough independent scrutiny of the fund and its fairness to all of the class plaintiffs.<sup>34</sup> As he wrote, "[W]e are not free to dispense with the safeguards that have protected mandatory class members . . . ."<sup>35</sup>

## B. *Mayle*

*Mayle v. Felix*<sup>36</sup> showed Justice Souter's conception of fairness in a different light—as a concern for pro se litigants. The issue in *Mayle* was whether Rule 15(c) of the Federal Rules of Civil Procedure allows a habeas petitioner to add an untimely claim to a petition that originally was filed timely. That issue was implicated by convicted felon Jacoby Felix, who filed, pro se, a timely civil habeas petition, alleging a violation of the

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29. *Id.* at 838, 848–49 (majority opinion).

30. *Id.* at 842 ("The prudent course . . . is to presume that when subdivision (b)(1)(B) was devised to cover limited fund actions, the object was to stay close to the historical model.")

31. *Id.* at 861 ("The nub of our position is that we are bound to follow Rule 23 as we understood it upon its adoption . . . .")

32. *Id.* at 861–64.

33. *Id.* at 858; *id.* at 861 ("[W]e are not free to alter it except through the process prescribed by Congress in the Rules Enabling Act.")

34. *Id.* at 857 & n.31.

35. *Id.* at 862.

36. 545 U.S. 644 (2005).

Sixth Amendment's Confrontation Clause.<sup>37</sup> Three months before the expiration of the habeas statute's one-year time limit,<sup>38</sup> the district court appointed him counsel. Five months after the time limit, and before any responsive pleading to his Confrontation Clause petition had been served, Felix's counsel filed an amended petition, adding a new claim for a violation of his Fifth Amendment right against self-incrimination.<sup>39</sup> Felix argued that Rule 15(c), which applies to habeas petitions generally,<sup>40</sup> allowed that claim to "relate[] back" to the time of the original petition because it "arose out of the [same] conduct, transaction, or occurrence" as the original pleading.<sup>41</sup>

The Court disagreed and held that Felix's amendment could not relate back because the grounds for relief were supported by facts that differed in both time and type from his timely Sixth Amendment claim. Therefore, his Fifth Amendment claim was time-barred by the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year statute of limitations.<sup>42</sup>

In dissent, Justice Souter, joined by Justice Stevens, suggested that text, congressional intent, and precedent all supported a contrary view, although he stated that none of these provided a sure answer.<sup>43</sup> He also noted, but did not rely on, a purposive argument: because statutes of limitations are designed to provide predictability and finality to those who may face claims, the filing of one habeas claim within the statute of limitations ought to lift the statute for all habeas claims by the same petitioner, for the state is already on notice and must defend the underlying decision.<sup>44</sup>

Instead, what seemed to be the deciding factor for Justice Souter was "the unfortunate consequence that the Court's view creates an unfair disparity between indigent habeas petitioners and those able to afford their

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37. *Id.* at 648.

38. 28 U.S.C. § 2244(d)(1) (2006).

39. *Mayle*, 545 U.S. at 648–49.

40. 28 U.S.C. § 2242 (2006) (providing that habeas petitions "may be amended . . . as provided in the rules of procedure applicable to civil actions"); *see also* R. GOVERNING § 2254 CASES 11 (permitting the application of the Federal Rules of Civil Procedure in habeas cases unless inconsistent with statute or the habeas rules).

41. *See* FED. R. CIV. P. 15(c)(1)(B); FED. R. CIV. P. 15(c)(2) (repealed 2007).

42. *Mayle*, 545 U.S. at 650. The Court characterized Felix's Fifth Amendment claim as a pretrial violation that was temporally and factually distinct from his trial-based Confrontation Clause claim. *Id.* at 660–61. In effect, the Court restricted Rule 15(c)(2) to claims united by a "common core of operative facts." *Id.* at 659 (internal quotation marks omitted).

43. *Id.* at 668 & n.2, 670–74 (Souter, J., dissenting); *see also id.* at 667 ("The text alone does not tell us the answer. . ."); *id.* at 676 n.9 (asserting that the text is "ambiguous").

44. *Id.* at 666.

own counsel.”<sup>45</sup> Noting that most habeas petitioners file their initial petitions pro se and that judges likely will not appoint counsel until after the AEDPA deadline has run, Justice Souter reasoned that the Court’s view handicapped appointed counsel’s professional judgment in adding additional claims, a handicap that a habeas petitioner represented at the outset would not face: “The rule the Court adopts today may not make much difference to prisoners with enough money to hire their own counsel; but it will matter a great deal to poor prisoners who need appointed counsel to see and plead facts showing a colorable basis for relief.”<sup>46</sup>

In sum, Justice Souter’s consequentialist construction of Rule 15 stemmed from his concern for the fair treatment of unrepresented habeas petitioners. “[T]he real consequences of today’s decision” he intoned, “will fall most heavily on the shoulders of indigent habeas petitioners who can afford no counsel without the assistance of the court.”<sup>47</sup>

### C. Bowles

In *Ortiz and Mayle*, Justice Souter’s concern for the fair treatment of individual litigants was mixed with a variety of other interpretative and jurisprudential heuristics. But in *Bowles v. Russell*,<sup>48</sup> his concern was front and center.

Keith Bowles was convicted by an Ohio jury of murder and received a sentence of fifteen years to life imprisonment. After exhausting his state appeals, Bowles timely filed a federal habeas corpus petition, which was denied. Bowles failed to appeal the district court’s denial within the deadline and instead moved to reopen the time to appeal under Federal Rule of Appellate Procedure 4(a)(6) and 28 U.S.C. § 2107(c). On February 10, 2004, the district court granted Bowles’s motion and reopened the time to appeal, giving Bowles until February 27 to file his notice of appeal. Bowles filed his notice of appeal on February 26. Although timely under the district court’s order, the notice of appeal was untimely under the rule and statute, which allow reopened time periods to persist for only fourteen days. Consequently, the State moved to dismiss the appeal as untimely. Bowles argued that his untimeliness should be

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45. *Id.* at 665.

46. *Id.* at 676.

47. *Id.* at 675.

48. 551 U.S. 205 (2007).

excused for justifiable reliance on the district court's order, but the court of appeals agreed with the State and dismissed the appeal.<sup>49</sup>

The Supreme Court affirmed, largely on the basis of precedent. The Court cited a string of cases dating back to 1848 and stated, "This Court has long held that the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'"<sup>50</sup> Because the time deadline was jurisdictional, it could not be excused for the reasons proffered by Bowles.<sup>51</sup>

In dissent, Justice Souter did not dispute this long-historical treatment. Instead, he focused on the particularly unfair consequences to Bowles in this case, as the opening of his dissent explains: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."<sup>52</sup> He continued later, "We have the authority to recognize an equitable exception to the 14-day limit, and we should do that here, as it certainly seems reasonable to rely on an order from a federal judge."<sup>53</sup>

Justice Souter concluded his dissent the same way he began it—bemoaning the unfairness of strictly applying the terms of Rule 4 to Bowles: "As a member of the Federal Judiciary, I cannot help but think that reliance on our orders is reasonable. I would also rest better knowing that my innocent errors will not jeopardize anyone's rights unless absolutely necessary."<sup>54</sup>

#### D. *Twombly* and *Iqbal*

If *Bowles* was the most forceful voicing of Justice Souter's concern for the fair treatment of civil litigants, it was not the last. *Ashcroft v. Iqbal*<sup>55</sup> and its forbear, *Bell Atlantic Corp. v. Twombly*<sup>56</sup>—together the biggest pleadings cases in fifty years—show Justice Souter's commitment to fair treatment at its most balanced.

In *Twombly*, two plaintiffs filed a class action complaint on behalf of all subscribers of local telephone or high-speed internet services against

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49. *Id.* at 207.

50. *Id.* at 209.

51. *Id.* at 213–14. For a criticism of this conclusion, see Scott Dodson, *The Failure of Bowles v. Russell*, 43 TULSA L. REV. 631 (2008).

52. *Bowles*, 551 U.S. at 215 (Souter, J., dissenting).

53. *Id.* at 220.

54. *Id.* at 220 n.7 (citation omitted).

55. 129 S. Ct. 1937 (2009).

56. 550 U.S. 544 (2007).

local exchange carriers for antitrust conspiracies, in violation of section 1 of the Sherman Act.<sup>57</sup> They alleged the conspiracy solely on grounds of conscious parallel conduct.<sup>58</sup> The defendants moved to dismiss for failure to state a claim upon which relief could be granted because, they argued, conscious parallel conduct is not itself illegal—the plaintiff must prove more than that in order to be entitled to relief.

Justice Souter, writing for the Court, agreed that the complaint should be dismissed because it failed to meet Federal Rule of Civil Procedure 8’s requirement that the allegations “show[] that the pleader is entitled to relief.”<sup>59</sup> In the process, he placed new gloss on Rule 8:

While a complaint . . . does not need detailed factual allegations, . . . a plaintiff’s obligation to provide the “grounds” of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level . . . .<sup>60</sup>

This gloss has come to be known as the “plausibility standard” of Rule 8,<sup>61</sup> and the plaintiffs in *Twombly* did not meet it.<sup>62</sup>

In creating the plausibility standard, Justice Souter only casually relied upon Rule 8’s textual requirement of “showing” entitlement to relief and instead focused more on prior gloss contained in the 1957 case *Conley v. Gibson*, which required pleaders to allege the “grounds” of their claims.<sup>63</sup> But in the same breath, Justice Souter interred other language from *Conley* that would have undermined dismissal in *Twombly*.<sup>64</sup>

Justice Souter’s real motivation for the plausibility standard was protecting defendants from burdensome discovery in meritless cases. “[A]ntitrust discovery can be expensive,” he asserted, and therefore “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.”<sup>65</sup>

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57. 15 U.S.C. §§ 1–7 (2006).

58. *Twombly*, 550 U.S. at 550, 554.

59. FED. R. CIV. P. 8(a)(2).

60. *Twombly*, 550 U.S. at 555 (internal quotation marks and citations omitted).

61. See Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 136 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

62. *Twombly*, 550 U.S. at 556–57.

63. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

64. *Twombly*, 550 U.S. at 562–63 (“retir[ing]” *Conley*’s famous “no set of facts” language).

65. *Id.* at 558.

In dissent, Justice Stevens pointed to the ability of a district judge to control discovery costs and oversee the discovery process if allegations are weak,<sup>66</sup> but Justice Souter responded that such judicial supervision is inadequate:

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. . . . [T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence.<sup>67</sup>

Unlike *Ortiz*, *Twombly* is nonoriginalist and pragmatic, looking to the problems of modern complex litigation and trying to solve them without resort to the rulemaking process.<sup>68</sup> But the two cases do share a common thread. Just as *Ortiz* was an attempt to ensure fairness to unnamed class members, *Twombly*'s plausibility standard is designed to protect defendants from unfair discovery costs in near-frivolous litigation.

But it is impossible to fully understand Justice Souter in *Twombly* without considering his dissent in its progeny, *Iqbal*, and consideration of that case along with *Twombly* makes Justice Souter's position clear. His position in the two cases represents the two sides of the fairness debate on pleadings. *Iqbal*<sup>69</sup> involved a Rule 12(b)(6) motion to dismiss a complaint by a federal detainee against John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the FBI. The complaint alleged that these defendants adopted an unconstitutional policy that subjected plaintiff *Iqbal* to harsh conditions of confinement on account of his race, religion, or national origin. The defendants raised the

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66. *Id.* at 593–95 & 593 n.13 (Stevens, J., dissenting).

67. *Id.* at 559 (majority opinion) (internal citations, alterations, and quotations omitted).

68. My thanks to Steve Burbank for raising this point. I note, as well, that this nonoriginalist approach was, perhaps, uncharacteristic of Justice Souter. See, e.g., Ernest A. Young, *Justice Souter's Conservatism*, ACSBLOG, <http://www.acslaw.org/node/13546> (June 9, 2009, 12:07 PM) (“Make no mistake: The best originalist on the Supreme Court is not Antonin Scalia or Clarence Thomas, but David Souter.”).

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

defense of qualified immunity and moved to dismiss for failure to meet the pleading strictures of Rule 8, as interpreted by *Twombly*.<sup>70</sup>

The Court held that *Twombly*'s plausibility standard applies transsubstantively to all claims, including Iqbal's. Further, the Court held that conclusory factual allegations are not entitled to deference at the motion to dismiss stage—that, instead, they may be ignored. Under these standards, the Court held that Iqbal had failed to state a claim because his nonconclusory factual allegations did not plausibly suggest that the defendants acted with a discriminatory motive.<sup>71</sup>

Dissenting, Justice Souter disagreed with the Court's decision in two ways that are important to my claim here. First, he disagreed with the Court's limited view of Iqbal's allegations. The Court discarded most of Iqbal's allegations as conclusory and thus not entitled to a presumption of truth. Justice Souter, on the other hand, believed that the complaint as a whole presented a plausible claim for relief.<sup>72</sup> As such, the satisfaction of the plausibility standard adequately protected the defendants against the unfair litigation costs that so concerned him in *Twombly*.

Second, Justice Souter would have accepted, for purposes of motions to dismiss, the concessions made by the defendants as to the legal scope of the relief available. Ashcroft and Mueller had conceded that their liability could stem from a supervisor's knowledge of a subordinate's unconstitutional conduct and deliberate indifference to that conduct. The Court nevertheless took the issue *sua sponte* and decided to the contrary.<sup>73</sup> But Justice Souter would have accepted the concession, at least out of fairness to Iqbal. He wrote:

Finally, the Court's approach is most unfair to Iqbal. He was entitled to rely on Ashcroft and Mueller's concession, both in their petition for certiorari and in their merits briefs, that they could be held liable on a theory of knowledge and deliberate indifference. By overriding that concession, the Court denies Iqbal a fair chance to be heard on the question.<sup>74</sup>

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70. *Id.* at 1944.

71. *Id.* at 1951–52.

72. *Id.* at 1960 (Souter, J., dissenting).

73. *Id.* at 1956.

74. *Id.* at 1957; *see also id.* at 1958 n.2 (“[I]ts approach is even more unfair to Iqbal . . . for Iqbal had no reason to argue the (apparently dispositive) supervisory liability standard in light of the concession.”).

Thus, Justice Souter's commitment to fair treatment of the litigants—indeed, for *both* the plaintiff and the defendants in *Iqbal*—was critical to his opinion.

### III. SOME THOUGHTS AND CONCLUSIONS

As I have highlighted above, Justice Souter's concern for the fair treatment of litigants animated his civil rules opinions. That concern protected unnamed and ill-represented class members from a potentially unfair settlement, tried to provide habeas petitioners with fair representation of counsel, insisted that the appellate timing rules not condone a judicial bait and switch, protected defendants from bearing unfair discovery burdens associated with truly meritless cases, and would have held that plaintiffs opposing motions to dismiss be entitled to rely upon concessions made by defendants about the right to relief.

Of course, a robust concern for the fair treatment of civil litigants is not the only concern or philosophy that Justice Souter espouses in those opinions. He is not so one-faceted, and I do not claim that Justice Souter is *only* concerned with procedural fairness to civil litigants. To the contrary, Justice Souter also exhibited textualist, historicist, pragmatist, minimalist, activist, deferential, and formalist approaches to the civil rules, though he did not employ any of them consistently.

But a common strand throughout all of the cases is an expressed concern that the civil rules treat each litigant fairly. That demonstrates that he at least *is* consistently concerned with procedural fairness to litigants and that that concern is a dominant feature of his civil rules jurisprudence.

In retrospect, one might have guessed that that concern would be apparent in Justice Souter's opinions. By all accounts, he personally values sincerity, politeness, and professionalism, and he exhibits great empathy for others.<sup>75</sup> He exhibited these traits himself while on the Supreme Court's bench; he consistently treated others with respect, dignity, and politeness, especially party litigants.<sup>76</sup> Unlike some of his colleagues, his oral argument questioning was insistent but not aggressive or condescending. Indeed, he seemed to have consciously avoided even appearing to be unduly aggressive toward litigants. In one instance, for example, while Justice Souter was a state judge, he wrote to an attorney to apologize for what he viewed as a particularly probing set of questions

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75. See YARBROUGH, *supra* note 3, at 13, 22, 25, 64, 127, 129, 134.

76. See *id.* at 54–55, 64, 155.

during oral argument.<sup>77</sup> It is no surprise, given the accounts of his character, that Justice Souter would understand and take into account the daunting challenges of civil litigation.

It also would not surprise me if other studies of Justice Souter's jurisprudence resulted in the conclusion that he was committed to procedural fairness to litigants in other areas. Indeed, my relatively narrow claim about the civil rules, if indicative of a broader commitment by Justice Souter, might help explain some anomalies in his jurisprudence in other areas.

Take the criminal context, for example. Although Justice Souter was seen as a moderately liberal justice for most of his tenure on the Court, the one area in which he was described as moderately conservative was criminal cases. But Justice Souter was most likely to side with a criminal defendant on procedural issues that affected the defendant's fair trial than on substantive issues.<sup>78</sup> It does not seem unlikely that the motivation to ensure fair treatment to civil litigants would also motivate Justice Souter to construe criminal procedural rules in the same vein.

Further studies will be necessary to flesh out a holistic picture of Justice Souter.<sup>79</sup> But, for now, these federal civil rules cases provide evidence of his commitment to the civil rules' fair treatment of litigants. They sketch the outline of Justice Souter, Proceduralist.

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77. *See id.* at 118.

78. *See id.* at 92, 234–37.

79. One other commentator has noted Justice Souter's commitment to the fair treatment of litigants, relying upon non-civil-rules decisions in his early years on the Court. *See* Liang Kan, Comment, *A Theory of Justice Souter*, 45 EMORY L.J. 1373 (1996).