DIVERGING PATHS: THE MINNESOTA SUPREME COURT'S DECISION TO REJECT THE "PLAUSIBILITY" PLEADING STANDARD IN *WALSH V. U.S. BANK*

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I. INTRODUCTION

Pleading is the cornerstone of our adversarial process. It serves as the gateway into the American civil justice system, establishes the legal issues in dispute, and shapes the subsequent scope of the litigation process.[1] Perhaps no procedural development has been more fiercely debated than the United States Supreme Court's announcement of a heightened "plausibility" pleading standard in *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*.[3] *Twombly* and *Iqbal* retired the liberal notice pleading standard established under the Federal Rules of Civil Procedure, which was endorsed by the Court some fifty years earlier in *Conley v. Gibson*.[4]

Recently, in *Walsh v. U.S. Bank, N.A.*, the Minnesota Supreme Court considered whether to adopt the "plausibility" standard in order to reconcile Minnesota's pleading practice with the federal system in the wake of *Twombly* and *Iqbal*.[5] The court declined to do so, favoring the simplified notice pleading standard it had embraced since the Minnesota Rules of Civil Procedure were adopted in 1951.[6]

To appreciate the importance of the *Walsh* decision, it is necessary to understand the purpose and function of pleading. This Note begins by tracing the history of pleading systems from the common law system,[7] which initially influenced legal development in the United States, to the current system under the Federal Rules of Civil Procedure.[8] This Note then discusses two relatively recent United States Supreme Court's decisions, *Twombly* and *Iqbal*,[9] and provides a historical overview of Minnesota's pleading practice.[10] Next, this Note analyzes the Minnesota Supreme Court's decision in *Walsh*[11] and the resulting implications

1. *See* Charles E. Clark, *History, Systems and Functions of Pleading*, 11 VA. L. REV. 517, 517–18 (1925).
2. 550 U.S. 544, 556 (2007).
3. 556 U.S. 662, 678–79 (2009).
4. 355 U.S. 41, 45–46 (1957).
5. Walsh v. U.S. Bank, N.A. (*Walsh III*), 851 N.W.2d 598, 604–05 (Minn. 2014).
6. *Id.* at 604, 606.
7. *See infra* Part II.A.
8. *See infra* Part II.B.
9. *See infra* Part II.C.
10. *See infra* Part II.D.
11. *See infra* Part III.

for Minnesota state courts.[12] Finally, this Note argues that the notice pleading standard—as preserved by the *Walsh* court—better protects the founding principles of our modern civil justice system by promoting open access to the courts, equality among litigants, and consistency in the application of substantive law.[13]

II. THE HISTORY OF PLEADING SYSTEMS

A. Common Law Pleading

In England, litigation occurred historically in a two-court system: "common law" courts and "equity" courts.[14] Despite fundamental differences in each court's function and procedural framework, common law and equity courts often worked in tandem.[15] Equity courts, an extension of the king's authority, sought to cure unjust results handed down by the common law courts.[16] Compared to its common law counterpart, equity procedure was flexible.[17] Many of the procedural reforms that occurred in this country during the nineteenth and twentieth centuries were grounded in equity ideals.[18]

The common law system evolved gradually over several centuries following the Norman Conquest of England.[19] Originally

12. *See infra* Part IV.

13. *See infra* Part IV.A.

14. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914 (1987).

15. *Id.*; *see also* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 335–36 (1926) (comparing and contrasting the procedural framework of equity and common law courts); Clark, *supra* note 1, at 525–29 (describing the different procedural characteristics of the common law and equity systems).

16. Clark, *supra* note 1, at 528; *see also* Subrin, *supra* note 14, at 918 (discussing the role of equity courts in relieving petitioners from unjust applications of the common law's rigid system).

17. Clark, *supra* note 1, at 528–29; *see also* 1 ROSCOE POUND, THE HISTORY AND SYSTEMS OF THE COMMON LAW 71–73 (P.F. Collier ed., 1939) (discussing the development of a flexible equity system in response to the overly rigid common law system); Subrin, *supra* note 14, at 920 ("Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized.").

18. For an in-depth discussion of the equity system's influence on procedural reforms in the United States during the nineteenth and twentieth centuries, see generally Subrin, *supra* note 14.

19. Clark, *supra* note 1, at 519; *see also* EDSON R. SUNDERLAND, CASES ON PROCEDURE ANNOTATED: COMMON LAW PLEADING 1 (1914). For a brief overview of

conducted orally, by the sixteenth century, pleading had become a formal, written exercise.[20] The defining characteristics of common law procedure—the writ system and issue pleading—created a framework that was rigid in its application.[21]

The writ system and issue pleading developed simultaneously at common law.[22] A litigant seeking redress in the King's Court was first required to procure a writ from the office of the chancellor.[23] In issuing the writ, the king ordered the defendant to appear and conferred jurisdiction to a specific court.[24] Plaintiffs seeking writs often presented similar facts and theories of relief, making it convenient to "designate similar causes of action . . . by the same name."[25] Gradually, a defined set of "forms of action," or writs, were developed—each with their own "distinct procedural characteristics."[26] As the number of distinct forms grew, "[t]he process of issuing writs came to be strictly limited to cases where precedent existed, so that a litigant had to bring his claim within the limits set by some former precedent."[27] By the fourteenth century, the process of developing new writs had ceased.[28]

To prevail at common law, a plaintiff was required to select the correct form of action.[29] This choice often proved difficult as

the development of English law before the Norman Conquest, see 1 POUND, *supra* note 17, at 24–30.

20. 9 HOLDSWORTH, *supra* note 15, at 331; *see also* Clark, *supra* note 1, at 517–18; Peter Julian, Note, *Charles E. Clark and Simple Pleading: Against a "Formalism of Generality,"* 104 NW. U. L. REV. 1179, 1184 (2010).

21. *See* Clark, *supra* note 1, at 527; *see also* Subrin, *supra* note 14, at 914–17 (discussing the identifying characteristics of the common law system and noting overtime the common law system became too rigid in its application).

22. *See* Subrin, *supra* note 14, at 914–17. For a discussion of the evolution of the writ system in England, see SUNDERLAND, *supra* note 19, at 1–7.

23. Clark, *supra* note 1, at 527; *see also* 1 POUND, *supra* note 17, at 38; Subrin, *supra* note 14, at 915.

24. Clark, *supra* note 1, at 527.

25. JOHN JAY MCKELVEY, PRINCIPLES OF COMMON-LAW PLEADING 4 (New York, Baker, Voorhis & Co. 1894).

26. Subrin, *supra* note 14, at 915; *see also* 1 POUND, *supra* note 17, at 38 ("By the seventeenth century an elaborate system of writs had grown up, corresponding to the actions and proceedings which could be brought in the common-law courts.").

27. Clark, *supra* note 1, at 527. The common forms of action became "trespass, trespass on the case, trover, replevin and detinue in tort; and covenant, debt, account and assumpsit in contract." *Id.*

28. *Id.*

29. *See* Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of*

several of the writs overlapped.[30] Ultimately, the form selected by the plaintiff dictated the entire course of the lawsuit.[31] It determined the governing law, "set forth the facts the plaintiff had to allege and prove," established "the procedures the court would follow in deciding the case," and dictated the remedy available.[32]

Having selected the form of action, the parties then exchanged a series of pleadings back and forth, denying or affirming, until a single issue—either of law or fact—was reached.[33] Hence, at common law, pleading was efficient—producing only a single issue requiring resolution by a judge or jury.[34] Where the issue was one of fact, a jury trial was necessary. However, in resolving only a single issue, juries played a limited role.[35] A judge, on the other hand, resolved an issue of law in the absence of a jury trial.[36]

Despite its efficiency, issue pleading, as it became known, often proved "deficient in deciding cases accurately and justly on the merits" as parties frequently saw their claims dismissed based on legal technicalities.[37] Forced to prematurely select the form of action, plaintiffs often later discovered facts that would bar their claim.[38] The facts discovered may have supported a different claim; however, it was too late as the parties had already narrowed the single issue that would determine their dispute.[39] Defendants, frequently relying only on a plaintiff's fictitious assertions, knew

Civil Procedure, 86 COLUM. L. REV. 433, 437 (1986); *see also* James R. Maxeiner, *Pleading and Access to Civil Procedure: Historical and Comparative Reflections on* Iqbal*, a Day in Court and a Decision According to Law*, 114 PENN ST. L. REV. 1257, 1271 (2010).

30. Julian, *supra* note 20, at 1184.

31. Maxeiner, *supra* note 29, at 1271.

32. *Id.*

33. Clark, *supra* note 1, at 526; Marcus, *supra* note 29, at 437; Subrin, *supra* note 14, at 916.

34. Maxeiner, *supra* note 29, at 1272; *see also* Marcus, *supra* note 29, at 437.

35. Maxeiner, *supra* note 29, at 1272.

36. *Id.*

37. *Id.*; *see also* Clark, *supra* note 1, at 528 (arguing that the development of the "highly technical" common law system rarely provided litigants with "complete relief"); Marcus, *supra* note 29, at 437 ("As [common law] pleading practice prospered, decisions on the merits became increasingly infrequent.").

38. Maxeiner, *supra* note 29, at 1272.

39. *Id.*

little if anything about the basis of the claim and "would remain in the dark until trial because discovery was limited or nonexistent."[40]

By the nineteenth century, the substantive law contained in the forms of action became unsuitable for the "vast commercial developments" of the English and American economies.[41] The stagnate body of substantive law contained in the writs forced parties to "fit contemporary facts into obsolete forms."[42] Gradually, presenting even the simplest of grievances required a plaintiff "to use highly stylized verbal formulations" or risk dismissal of their claim.[43]

Public discontent with issue pleading's rigid formality grew, and by the nineteenth century, a reformation movement aimed at simplifying the pleading process was undertaken both in England and in the United States.[44]

B. From Code Pleading to Notice Pleading

1. Code Pleading Reform in the United States

In 1847, David Dudley Field—together with fifty members of the New York bar—appealed to the New York State Legislature "that a radical reform of legal procedure in all its departments [was] demanded by the interests of justice and by the voice of the people."[45] Having adopted a new constitution the previous year, the New York State Legislature was directed to appoint three commissioners "to revise, reform, simplify and abridge" the pleading standard and legal practices of the state.[46]

The following year, the Commission to Reform Procedure—led by David Dudley Field—submitted the first installment of the Code of Civil Procedure.[47] The code was adopted by the New York

40. Marcus, *supra* note 29, at 437.

41. Maxeiner, *supra* note 29, at 1272.

42. *Id.*

43. Marcus, *supra* note 29, at 437.

44. *Id.* at 438. For a brief overview of the reformation movement both in England and the United States, see Clark, *supra* note 1, at 529–37.

45. David Dudley Field, Memorial to the Legislature (Feb. 1847), *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD 261, 261 (A.P. Sprague ed., New York, D. Appleton & Co. 1884).

46. N.Y. CONST. of 1846, art. VI, § 24 (repealed 1850), *available at* http://nyconstitution.org/content/third-constitution-new-york-1846.

47. David Dudley Field, First Report of the Practice Commission (Feb. 29,

State Legislature in 1848 and became known informally as the "Field Code."[48]

In response to the labyrinth the pleading process had become at common law, "[t]he major goal of the Field Code was to facilitate the swift, economic, and predictable enforcement of discrete, carefully articulated rights"[49] and to end judicial decisions on the basis of mere technicalities.[50] The Field Code unified law and equity and abolished the intricate common law forms of action.[51] In its place, the Field Code provided "one form of action, for the enforcement or protection of private rights and the redress or prevention of private wrongs."[52] This single, blended "form of action [was] to be known as the *civil action*."[53] Importantly, the Field Code "provided the same procedure for all types of cases, regardless of substantive law, [or] the number of issues and parties."[54] It rejected the common law's "stylized search for a single issue"[55] and instead required parties to state the facts in a clear and concise manner.[56] In contrast to the issue pleading required under the common law, there was to be fact pleading under the Field

1848), *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, *supra* note 45, at 262, 262; *see also* Roscoe Pound, *David Dudley Field: An Appraisal*, *in* DAVID DUDLEY FIELD CENTENARY ESSAYS 3, 9 (A. Reppy ed., 1949).

48. Field Code, ch. 379, 1848 N.Y. Laws 497; *see also* Clark, *supra* note 1, at 533; Maxeiner, *supra* note 29, at 1273; Pound, *supra* note 47, at 10.

49. Subrin, *supra* note 14, at 934–35.

50. Marcus, *supra* note 29, at 438; *see also* DAVID DUDLEY FIELD, WHAT SHALL BE DONE WITH THE PRACTICE OF THE COURTS? (1847), *reprinted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, *supra* note 45, at 226, 226 ("We have ten different forms of action, each with its peculiar technical language. A mistake in the form of action is generally fatal to the case.").

51. Clark, *supra* note 1, at 533; *see also* Maxeiner, *supra* note 29, at 1273.

52. Field Code, ch. 379, § 62, 1848 N.Y. Laws at 510.

53. Clark, *supra* note 1, at 533 (emphasis in original); *see also* Field Code, ch. 379, § 62, 1848 N.Y. Laws at 510; Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 3 (1925) [hereinafter Clark, *Union of Law*].

54. Subrin, *supra* note 14, at 933–34.

55. *Id.* at 934; *see also* Marcus, *supra* note 29, at 437–38 (discussing the Field Code's rejection of the common law's overly technical issue pleading system in favor of a simplified pleading system).

56. Field Code, ch. 379, § 120(2), 1848 N.Y. Laws at 521. ("A complaint shall contain: A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."); *see also* Clark, *supra* note 1, at 533 ("[I]t was planned that the parties should in their pleading state the facts in simple and concise form.").

Code.[57] In effect, this eradicated the danger of premature choice that plagued the common law system.[58]

Beginning with Missouri in 1849, the system established by the Field Code spread across the United States, reaching Minnesota—an early adopter—in 1851.[59] Within twenty-five years of its enactment, code pleading was adopted by twenty-four states.[60] In total, thirty American jurisdictions embraced the Field Code in some form.[61]

Despite its focus on brevity and clarity, the Field Code was not without its own problems. Abolishing the common law's forms of action and its single-issue formation requirement led to the proliferation of issues without a "satisfactory provision for their narrowing."[62] This "[p]roliferation . . . not only multiplied the number of issues that courts had to address but presented many opportunities for surprises at trial, when litigants raised facts that their adversaries had not anticipated or created legal issues that they had not expected."[63] In *McFaul v. Ramsey*, a case involving a dozen causes of action, the United States Supreme Court remarked that code pleading had "destroy[ed] the certainty and simplicity of all pleadings, and introduce[d] on the record an endless wrangle in writing, perplexing to the court, delaying and impeding the administration of justice."[64]

To address this issue, Field and the other Commissioners for procedural reform advocated for the codification of substantive law.[65] However, the Commission's Civil Code was not adopted—

57. Clark, *supra* note 1, at 543 ("If the common law may be termed *issue pleading*, since its main purpose was the framing of an issue, code pleading may be referred to as *fact pleading* in view of the great emphasis placed under the [Field Code] upon getting the facts stated.").

58. Maxeiner, *supra* note 29, at 1274.

59. *Id.* at 534; *see also* Charles A. Wright, *Procedural Reform in the States*, 24 F.R.D. 85, 103–04 (1960) ("Few, if any, jurisdictions have enjoyed so continuously satisfactory systems of procedure as has Minnesota. The Field Code was adopted there in 1851 . . . and was interpreted sympathetically by the courts of the state, in contrast to the hostility toward the code . . . in many other jurisdictions.").

60. Clark, *supra* note 1, at 534.

61. Pound, *supra* note 47, at 10 ("Some thirty American jurisdictions adopted the Code of Civil Procedure with changes and additions seldom for the better and often not well advised."); *see also* 1 POUND, *supra* note 17, at 80–81.

62. Maxeiner, *supra* note 29, at 1274.

63. *Id.*

64. McFaul v. Ramsey, 61 U.S. 523, 525 (1857).

65. *See, e.g.*, David Dudley Field, First Report of the Code Commission (Feb.

passing the State Assembly three times only to fail in the Senate or be vetoed by the Governor.[66] If Field and the other Commissioners had successfully codified substantive law, it was presumed that "the number of possible causes of action would have been circumscribed and their content better defined."[67]

By 1850, enthusiasm for legal reform had faded in New York and the Act that created the Commission to Reform Procedure was repealed.[68] Ultimately, the procedural reform sought by Field and the Commission failed, as code pleading did not simplify the litigation process in the way its advocates envisioned.[69] Many attributed this early failure to "judicial sabotage."[70]

2. A New Movement

By the end of the nineteenth century, discontent with the American legal system was again growing. At the annual ABA convention of 1906, Roscoe Pound, then dean of the Nebraska College of Law and the future dean of Harvard Law School,

27, 1858), *in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, *supra* note 45, at 309, 309–14; *see also* Maxeiner, *supra* note 29, at 1274.

66. Maxeiner, *supra* note 29, at 1275.

67. *Id.* at 1274–75.

68. Pound, *supra* note 47, at 9.

69. Maxeiner, *supra* note 29, at 1276 ("By the early twentieth century, at one extreme, code pleading was little better than common law pleading: parties were subjected to premature issue narrowing. At the other extreme, the number of issues was boundless, unknowable, and productive of surprise at trial.").

70. Marcus, *supra* note 29, at 438 ("The high hopes for the Field Code were not realized. In part, one may attribute this failure to judicial sabotage."); *see also* McArthur v. Moffet, 128 N.W. 445, 446 (Wis. 1910).

> The cold, not to say inhuman, treatment which the infant Code received from the New York judges is matter of history. They had been bred under the common-law rules of pleading and taught to regard that system as the perfection of logic, and they viewed with suspicion a system which was heralded as so simple that every man would be able to draw his own pleadings. They proceeded by construction to import into the Code rules and distinctions from the common-law system to such an extent that in a few years they had practically so changed it that it could hardly be recognized by its creators.

Id.; *see also* Clark, *Union of Law*, *supra* note 53, at 2–3 ("Many of the early judges . . . bitterly objected to the principles of the Code."); Subrin, *supra* note 14, at 940 (stating that some judges ignored the merger of law and equity completely while others continued to interpret the complaint in terms of the common law forms of action).

delivered a famous address calling, once again, for procedural reform.[71]

In Pound's view, code pleading, like common law pleading before it, had become rigid, diminishing the role of the judiciary.[72] Pound believed that American judges—hampered by an inflexible procedural system—had been reduced to umpires, officiating over parties as to the "rules of the game" and unable to "search independently for truth and justice."[73] He argued that the system's complicated framework incentivized lawyers to take advantage of procedural technicalities, hindering the logical and just resolution of disputes.[74]

Pound advocated for a system that was more conducive to the administration of justice by removing procedural interference with the evolution of substantive law.[75] Following Pound's 1906 address, the Special Committee to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation, more commonly known as the "Committee of Fifteen," was created by the ABA.[76]

In 1911, Thomas W. Shelton, a lawyer from Virginia, began a campaign of "well-organized propaganda"[77] calling for the uniform

71. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 ANN. REP. A.B.A. 395 (1906).

72. *See* Subrin, *supra* note 14, at 947.

73. Pound, *supra* note 71, at 405; *see also* Subrin, *supra* note 14, at 945 (stating Pound believed that "it was the formalism of the common law writ system and its rigid and inflexible procedural steps that hindered the just application of substantive law and the adjustment of law to modern circumstances" and that "the judge should be left relatively unhampered to make law and decide cases").

74. Subrin, *supra* note 14, at 945 (citing Pound, *supra* note 71, at 404).

75. *See* Roscoe Pound, *The Etiquette of Justice*, 3 PROC. NEB. ST. B. ASS'N 231, 249 (1908) ("It might well be maintained, indeed, that as between arbitrary action of the law in nearly all cases, because of the complexity of procedure, and arbitrary action of the judge in some cases, the latter would be preferable."); *see also* Subrin, *supra* note 14, at 945 (discussing the themes of Pound's 1906 address and stating that procedural law "should not intermesh with substantive law and help deliver that law").

76. Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1045–46 (1981); *see also Report of the Committee on Judicial Administration and Remedial Procedure*, 32 ANN. REP. A.B.A. 491, 491 (1909); *Report of the Committee on Judicial Administration and Remedial Procedure*, 31 ANN. REP. A.B.A. 503, 503 (1908); Subrin, *supra* note 14, at 946 (noting Pound was appointed to the "Committee of Fifteen" after its inception).

77. Thomas W. Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free*, 73 CENT. L.J. 319, 319 (1911).

regulation of judicial procedure by the Supreme Court of the United States.[78] To Shelton, only the Supreme Court could pave the path to national uniformity.[79] Later that year, Shelton introduced a resolution calling for judicial uniformity at the annual ABA conference.[80] The resolution was adopted, creating the Committee on Uniform Judicial Procedure[81] and beginning a procedural uniformity movement that would last more than twenty years.[82]

Shelton's vision for a unified procedural system led by the Supreme Court was not realized during his lifetime. In 1934, four years after his death, Congress passed the Rules Enabling Act—empowering the Supreme Court to disseminate a uniform procedural system to be known as the Federal Rules of Civil Procedure.[83] President Franklin D. Roosevelt signed the Act eleven days later.[84]

78. *Id.*

79. *Id.* at 319–20.

80. *See Report of the Committee on Judicial Administration and Remedial Procedure*, 35 ANN. REP. A.B.A. 434, 434–35 (1912).

81. *Id.* at 435.

82. Charles Clark, discussing the reformation movement, later remarked:

> It was the culmination of one of the most persistent and sustained campaigns for law improvement conducted in [the United States], one sponsored by the American Bar Association since 1912, under the militant leadership of Mr. Thomas W. Shelton and his Committee on Uniform Judicial Procedure, and supported by some of the most distinguished of the legal profession.

Charles E. Clark & James W. Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 388 (1935). For a detailed overview of the reformation process from Pound's 1906 address to the formation of the Federal Rules of Civil Procedure, see Burbank, *supra* note 76, at 1045–97.

83. The Rules Enabling Act of June 19, 1934, indicated that "[t]he Supreme Court of the United States shall have the power to proscribe, by general rules, for the district courts of the United States and for the District of Columbia, the forms of process, writs, pleadings, and motions and the practice and procedure in civil actions at law." Rules Enabling Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2012)).

84. Burbank, *supra* note 76, at 1097. Upon signing the Rules Enabling Act, President Roosevelt called the Act "one of the most important steps ever taken in the improvement of our judicial system" and remarked "[f]or the complicated procedure of the past, we now propose to substitute a simplified, flexible, scientific, correlated system of procedural rules prescribed by the Supreme Court." Franklin D. Roosevelt, Statement on Signing Bill to Give the Supreme Court Power to Regulate Procedure in the Federal Courts (June 19, 1934), *in* 3 THE

3. The Federal Rules of Civil Procedure

The following year, Charles E. Clark, dean of the Yale Law School, was appointed Reporter to the Supreme Court's Advisory Committee on Rules for Civil Procedure.[85] In total, the Supreme Court appointed fourteen prominent lawyers and law professors from across the country to the committee charged with drafting the Federal Rules.[86] Within three years, the Federal Rules of Civil Procedure became law.[87]

Having devoted his career to the practice of civil procedure, Clark was all too familiar with past failures.[88] Clark applauded code pleading for unifying law and equity and eradicating the intricate forms of action found at common law.[89] He argued, however, that code pleading "had failed . . . to substitute fact pleading for the common law issue pleading."[90]

Like David Dudley Field before him, Clark envisioned a system where disputes were resolved only on the merits, not procedural technicalities.[91] Early in the drafting process, Clark advocated for a system void of pleading motions.[92] This view did not prevail.[93] The Federal Rules of Civil Procedure did, however, significantly minimize the role of pleadings, creating a more simplified, liberal standard than its predecessor.[94]

PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 303, 303–04 (1938).

85. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 915 (1976); Subrin, *supra* note 14, at 961.

86. Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 447 (1936).

87. *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts*, 24 A.B.A. J. 97, 97–98 (1938).

88. *See, e.g.*, Subrin, *supra* note 14, at 973 ("For Clark, procedural history was a sort of morality play in which the demon, procedural technicality, keeps trying to thwart a regal substantive law administered by regal judges.").

89. Maxeiner, *supra* note 29, at 1277.

90. *Id.*

91. *See* Marcus, *supra* note 29, at 439; Smith, *supra* note 85, at 916 (discussing Clark's "cardinal virtues" that "cases would be decided on the merits rather than by procedural rulings, and this would occur with an economy of time and resources").

92. Marcus, *supra* note 29, at 439.

93. *See id.*

94. *See id.* at 440 ("The liberality of the pleading requirements is reflected throughout the Federal Rules."); Subrin, *supra* note 14, at 942–43 (noting that the English pleading system was more simple and liberal than the Field Code and that this approach was incorporated into the Federal Rules of Civil Procedure); *see also*

In Clark's view, less should be expected of litigants at the pleading process.[95] He realized that in order to state with precision a legal claim, the litigant was often forced to rely on information gained during the discovery process.[96] To Clark, pleadings should assist—not restrain—the application of substantive law.[97]

In the end, Clark's liberal view triumphed.[98] Pleadings under the Federal Rules of Civil Procedure now require only "a short and plain statement of the claim showing that the pleader is entitled to relief."[99] To circumvent the complexity of code pleading, "Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'"[100] Hence, Rule 8, as

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002) ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim."); Henry S. Noyes, *Rise of Common Law of Federal Pleading*, 56 VILL. L. REV. 857, 861 (2012) (noting that the Federal Rules of Civil Procedure established a more liberal pleading standard).

95. *See* Clark, *supra* note 1, at 543 ("We still expect something of pleading but are more disposed to realize that there are difficulties in the way of complete achievement of its ends.").

96. Maxeiner, *supra* note 29, at 1277 (citing Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 260 (1926)).

97. Clark, *supra* note 1, at 542 ("Pleading should perform the office only of *aiding* in the enforcement of substantive legal relations. It should not limit the operation of the general law which defines rights and duties, privileges and powers of individuals, but should aid in the enforcement of such relations. It is a means to an end, not an end in itself—the 'handmaid rather than the mistress' of justice.").

98. *See* Subrin, *supra* note 14, at 973; *see also* Clark, *supra* note 86, at 450. In support of the proposed Federal Rules, Clark stated:

> The requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer. But if there results any indefiniteness about the issues or the points in dispute, it can be cleared up effectively (as no purely pleading rule has ever succeeded in accomplishing) by those devices of discovery and summary judgment.

Id.

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

100. Marcus, *supra* note 29, at 439. "To make the point clearer, the drafters prepared a series of form complaints that were by definition sufficient to satisfy the new standard. These forms were startlingly brief." *Id.* (citing FED. R. CIV. P. Form 9); *see also* Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 12 (1938) (discussing the intentional omission of the word "fact" and stating "[t]he reason for that is, nobody knows what 'facts' are; courts have been trying for five hundred years to find 'facts' and nobody has ever been able to draw a line between what were and what were not 'facts'").

drafted, did not require a plaintiff to allege specific facts,[101] but rather required a complaint only "provide notice to the defendant of the plaintiff's claims and the grounds on which they rest."[102] This more liberal standard became known as *notice pleading*.[103]

Notice pleading—considered the bedrock of the Federal Rules of Civil Procedure—was not the only major development.[104] The Federal Rules also provided for the more liberal joinder of parties and the expansion of discovery.[105] Together, these innovations dramatically altered the legal system in the United States.[106]

Although generally well received, the Federal Rules of Civil Procedure were not without their detractors in the years following their passage. Some argued that the liberal discovery provisions contained in the Federal Rules would be abused, which would result in "speculative litigation."[107] Others believed that the Federal Rules gave judges too much discretion in managing the litigation process.[108] Still others who favored the revival of code pleading called for the extinction of notice pleading altogether.[109]

101. *See, e.g.*, Conley v. Gibson, 355 U.S. 41, 47 (1957) ("[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

102. Noyes, *supra* note 94, at 857; *see also* Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514 (2002) (citing *Gibson*, 355 U.S. at 47) ("[P]etitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims."); Sunderland, *supra* note 100, at 12 (discussing the pleading standard under the Federal Rules and proclaiming that "[t]he test is whether information is given sufficient to enable the party to plead and to prepare for trial").

103. *See, e.g.*, *Gibson*, 355 U.S. at 47.

104. Ray Worthy Campbell, *Getting a Clue: Two Stage Complaint Pleading as a Solution to the* Conley-Iqbal *Dilemma*, 114 PENN. ST. L. REV. 1191, 1204 (2010).

105. *Id.*

106. *Id.*

107. *See* Edward R. Finch, *Some Fundamental and Practical Objections to the Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States*, 22 A.B.A. J. 809, 809 (1936); *see also* Marcus, *supra* note 29, at 445–46 ("Plaintiffs have an incentive to plead vaguely in hopes that discovery will turn up material on which to base a more specific charge.").

108. *See* Finch, *supra* note 107, at 817.

109. *See* Marcus, *supra* note 29, at 445 (discussing the Ninth Circuit Court of Appeals "guerilla attack" on notice pleadings in the 1950s and stating that the court "urged that Rule 8(a)(2) be amended to revive code pleading by requiring the plaintiff to allege 'the facts constituting a cause of action'").

With its 1957 decision in *Conley v. Gibson*,[110] the Supreme Court firmly embraced the "new liberal ethos" of notice pleading—quelling the effort to revive code pleading.[111] In *Conley*, the Court announced that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[112] The Court went on to hold that so long as the complaint gave notice to the defendant as to the nature of the claim, specific facts need not be alleged.[113] For the next fifty years, *Conley*'s "no set of facts" language became the "rallying cry"[114] of notice pleading—establishing a hurdle far lower than its predecessor.[115]

C. From Conley *to* Twombly *and* Iqbal

The low hurdle embraced by the *Conley* Court remained unscathed for fifty years despite attempts by lower courts to require a heightened pleading standard.[116] On several occasions during this period, the Supreme Court declared its preference for legislative action—not judicial action—as the means to bring about reform to the pleading process.[117] The Court's 2007 decision in *Bell Atlantic Corp. v. Twombly*,[118] however, marked a decisively different path in

110. 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

111. Marcus, *supra* note 29, at 433–40.

112. *Conley*, 355 U.S. at 45–46 (emphasis added).

113. *Id.* at 47–48.

114. Julian, *supra* note 20, at 1189.

115. Campbell, *supra* note 104, at 1206 ("*Conley* was understood to mean that the federal rules required far less than [code] pleading.").

116. *See, e.g.*, Swierkiewicz v. Sorema N. A., 5 F. App'x 63, 64–65 (2d Cir. 2001) (requiring a heightened pleading standard in employment discrimination cases), *rev'd*, 534 U.S. 506 (2002); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1058 (5th Cir. 1992) (requiring a heightened pleading standard in civil rights cases against municipalities under 42 U.S.C. § 1983), *rev'd*, 507 U.S. 163 (1993).

117. *See, e.g.*, *Swierkiewicz*, 534 U.S. at 515 (quoting *Leatherman*, 507 U.S. at 168); *see also* Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process."); Campbell, *supra* note 104, at 1212.

118. 550 U.S. 544 (2007).

the evolving interpretation of pleading requirements—retiring the liberal standard set by *Conley* fifty years earlier.[119]

1. Twombly*: The Birth of the "Plausibility" Standard*

In *Bell Atlantic Corp. v. Twombly*, consumers brought a class action lawsuit alleging the defendants, telecommunications companies, had conspired to restrain trade in violation of the Sherman Act.[120] The plaintiffs alleged that "parallel conduct" by the defendants demonstrated the existence of an anti-competitive conspiracy.[121] The Supreme Court noted that an illegal agreement between the defendants was not the only explanation for the parallel conduct—implying instead that the conduct at issue was consistent with "rational and competitive business strategy."[122]

The Court concluded that by relying only on a "conclusory" allegation of conspiracy, the plaintiffs had failed to plead any facts that indicated a *plausibility* that illegal behavior had occurred.[123] Interpreting and effectively rejecting the standard set by *Conley*, the Court held "that a plaintiff must allege 'enough facts to state a claim to relief that is plausible on its face.'"[124] Accordingly, the Court concluded that the claim must be dismissed because plaintiffs' conclusory assertions had failed to "nudge[] their claims across the line from conceivable to plausible."[125]

In deciding *Twombly*, the Court "imposed an entirely new test on the pleading stage, instituting a judicial inquiry into the pleading's convincingness."[126] The Court expressly denied, however, that the new test required a judicial assessment of a claim's probability of success.[127] Considered by most to be a clear break from the liberal standard established by *Conley*,[128] *Twombly* left

119. Campbell, *supra* note 104, at 1212.

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

121. *Id.* at 550.

122. *Id.* at 553–54.

123. *Id.* at 556–57.

124. Noyes, *supra* note 94, at 867 (quoting *Twombly*, 550 U.S. at 570).

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

126. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 827 (2010).

127. *See Twombly*, 550 U.S. at 545 ("Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

128. *See, e.g.*, *id.* at 577–82 (Stevens, J., dissenting).

many questions unanswered—particularly, the question of whether the heightened pleading standard announced was limited to antitrust actions.[129]

2. Iqbal*: "Plausibility" Confirmed*

Two years after deciding *Twombly*, the Court revisited its new "plausibility" standard. In *Ashcroft v. Iqbal*, the Court demonstrated that the "plausibility" standard applied to all federal civil complaints, not just complaints asserting antitrust violations.[130]

Iqbal involved a Pakistani Muslim arrested in the United States following the terrorist attacks of September 11, 2001.[131] Claiming that "he was deprived of various constitutional protections while in federal custody," Javaid Iqbal "filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation."[132] The complaint alleged that Ashcroft and Mueller had "adopted an unconstitutional policy that subjected [Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin."[133]

Ashcroft and Mueller moved to dismiss the complaint, arguing Iqbal had failed to allege specific facts demonstrating their involvement in the purported unconstitutional conduct.[134] Relying on the "no set of facts" standard set by *Conley*, the district court denied the motion.[135] On appeal, the Second Circuit Court of Appeals applied the "plausibility" standard just established by the Supreme Court's decision in *Twombly*, but nevertheless affirmed the lower court's denial of the motion to dismiss.[136]

129. *E.g.*, *id.* at 596 ("Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.").

130. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

131. *Id.* at 666.

132. *Id.*

133. *Id.*

134. *Id.* at 669.

135. *Id.*

136. *Id.* at 669–70. While an appeal to the Second Circuit Court of Appeals was pending, the Supreme Court issued its opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *Iqbal*, 566 U.S. at 669–70.

In an opinion by Justice Kennedy, the Supreme Court noted that the defendants' status as high-ranking government officials precluded a finding of liability "for the unconstitutional conduct of their subordinates."[137] Consequently, the Court found that to prevail, Iqbal had to "plead sufficient factual matter to show that [Ashcroft and Mueller] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."[138]

Applying the "plausibility" standard set by *Twombly*, the Court concluded that Iqbal's claim that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [him] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin" was conclusory and unworthy of an assumption of truth.[139] The Court then found that Iqbal's remaining allegations did not make plausible the claim that the defendants subjected him to harsh conditions of confinement *because of*—and not in spite of—his religion, race, or national origin.[140]

Again, the Court expressly denied that a claim's probability of success was a determining factor for the district courts to analyze.[141] Instead, the Court noted, determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense"[142] to establish whether the substance of non-conclusory factual allegations "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[143]

D. Minnesota's Pleading Standard

Following the 1938 enactment of the Federal Rules of Civil Procedure, the Minnesota Judicial Council recommended the adoption of the Federal Rules into state practice.[144] For the next

137. *Iqbal*, 566 U.S. at 675–76.
138. *Id.* at 677.
139. *Id.* at 680 (internal citations omitted).
140. *Id.* at 681–83.
141. *Id.* at 678.
142. *Id.* at 679.
143. *Id.* at 663, 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007)).
144. NEIL B. DAVIDSON, PIRSIG ON MINNESOTA PLEADING § 1.01 (Matthew

decade, however, the recommendation was generally ignored.[145] It was not until 1947 that the Minnesota Legislature conceded authority to the Minnesota Supreme Court to promulgate a uniform system of civil procedure for Minnesota state courts.[146] Four years later, the Minnesota Rules of Civil Procedure—based largely on the Federal Rules—were adopted.[147]

Like its federal counterpart,[148] Minnesota Rule 8.01 required a complaint to "contain a short and plain statement of the claim showing that the pleader is entitled to relief."[149] This language has remained unchanged since the Minnesota Rules of Civil Procedure were adopted in 1951.[150]

The Minnesota Supreme Court first interpreted the language of Rule 8.01 in *First National Bank of Henning v. Olson*.[151] In *Olson*, the court found: "[T]here is no justification for dismissing a complaint for insufficiency . . . unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."[152] The Minnesota Supreme Court expanded its understanding of Rule 8.01 in *Northern States Power Co. v. Franklin*.[153] The *Franklin* court explained:

> One of the fundamental changes intended by the adoption of our Rules of Civil Procedure, particularly as embodied in Rule 8, was to permit the pleading of events by way of a broad general statement which may express

Bender ed., 6th ed. 2014).

145. *Id.*

146. *See* MINN. STAT. § 480.051 (1949).

> The Supreme Court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, other than the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant.

Id.

147. *See* Maynard E. Pirsig, *Introduction to Symposium: The Minnesota Rules of Civil Procedure*, 36 MINN. L. REV. 565, 565 (1952).

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

149. MINN. R. CIV. P. 8.01 (1952) (amended 1985, revised 1988).

150. *Compare* MINN. R. CIV. P. 8.01, *with* MINN. R. CIV. P. 8.01 (1952) (amended 1985, revised 1988).

151. 246 Minn. 28, 74 N.W.2d 123 (1955).

152. *Id.* at 38, 74 N.W.2d at 129 (quoting Dennis v. Vill. of Tonka Bay, 151 F.2d 411, 412 (8th Cir. 1945)).

153. 265 Minn. 391, 122 N.W.2d 26 (1963).

> conclusions rather than, as was required under code pleading, by a statement of facts sufficient to constitute a cause of action. . . . No longer is a pleader required to allege facts and every element of a cause of action. A claim is sufficient against a motion to dismiss . . . if it is possible on any evidence which might be produced . . . to grant the relief demanded. To state it another way, under this rule a pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.[154]

The *Franklin* court's interpretation of Rule 8.01 echoed the "no set of facts" standard endorsed by the United States Supreme Court in *Conley*.[155] In the four years following *Iqbal*, the Minnesota Supreme Court did not formally endorse or reject the "plausibility" standard. This changed with the court's decision in *Walsh v. U.S. Bank*.[156]

III. THE *WALSH* DECISION

A. *Factual Background*

Despite its sweeping ramifications for Minnesota courts, the factual background of *Walsh v. U.S. Bank*[157] is fairly unremarkable. Plaintiff Laura Walsh "defaulted on her mortgage."[158] U.S. Bank, the mortgage holder, "began a nonjudicial foreclosure proceeding" against the property.[159] U.S. Bank served a notice of the foreclosure sale upon an "adult 'Jane Doe' who occupied the [p]roperty" but refused to identify herself or open the door to accept service.[160] The

154. *Id.* at 394–95, 122 N.W.2d at 29.

155. *See supra* notes 110–15 and accompanying text.

156. *Walsh III*, 851 N.W.2d 598 (Minn. 2014).

157. Walsh v. U.S. Bank, N.A. (*Walsh I*), No. 27-CV-12-25292, 2013 WL 9862192 (D. Minn. Mar. 6, 2013), *rev'd*, No. A13-0742, 2013 WL 6050427 (Minn. Ct. App. Nov. 18, 2013), *aff'd* 851 N.W.2d 598.

158. Walsh v. U.S. Bank, N.A. (*Walsh II*), No. A13-0742, 2013 WL 6050427, at *1 (Minn. Ct. App. Nov. 18, 2013).

159. *Id.*

160. *Walsh I*, 2013 WL 9862192, at *1.

notice was left at Walsh's door.[161] On April 2, 2012, the property was sold at a foreclosure sale.[162]

B. Lower Court Decisions

Walsh sued U.S. Bank asserting the foreclosure sale was defective because of improper service.[163] Walsh denied that the Jane Doe identified in the affidavit of service was, in fact, her, and argued service was improper because the notice of foreclosure was never physically accepted.[164] U.S. Bank moved to dismiss, pursuant to Minnesota Rule of Civil Procedure 12.02(e),[165] claiming Walsh had failed to state a claim upon which relief can be granted.[166] The district court held that service was proper as the Jane Doe, an adult female of suitable age, *occupied* the property on the day of service.[167] "[T]he fact that 'Jane Doe' refused to physically accept the papers" was of no consequence.[168] The district court then concluded that "[a]ll of the appropriately considered facts fail to establish improper service."[169] Adopting the "plausibility" standard announced in *Twombly* and affirmed in *Iqbal,* the district court held that Walsh "failed to establish any evidence or facts giving rise to a *plausible* claim for relief" and dismissed the complaint with prejudice.[170]

Walsh appealed to the Minnesota Court of Appeals.[171] The court of appeals focused its inquiry on the plain language of Minnesota's personal service requirements under Rule 4.03(a).[172]

161. *Walsh II*, 2013 WL 6050427, at *1.

162. *Walsh I*, 2013 WL 9862192, at *1.

163. *See Walsh II*, 2013 WL 6050427, at *1.

164. *See id.*

165. MINN. R. CIV. P. 12.02(e) is nearly identical to its federal counterpart, FED. R. CIV. P. 12(b)(6). *Compare id.* R. 12(b)(6) ("Failure to state a claim upon which relief can be granted . . . ."), *with* MINN. R. CIV. P. 12.02(e) ("Failure to state a claim upon which relief can be granted . . . .").

166. *See Walsh I*, 2013 WL 9862192, at *1.

167. *See id.* at *2.

168. *Id.* (citing Nielsen v. Braland, 264 Minn. 481, 119 N.W.2d 737, 739 (1963)).

169. *Id.*

170. *Id.* (emphasis added) (citing Bahr v. Capella Univ., 788 N.W.2d 76 (Minn. 2010)).

171. *Walsh II*, No. A13-0742, 2013 WL 6050427 (Minn. Ct. App. Nov. 18, 2013), *aff'd*, 851 N.W.2d 596 (Minn. 2014).

172. *See id.* at *2–3.

Under Rule 4.03(a), the court of appeals noted, substitute service requires serving a person "residing" at the "usual place of abode" of the individual to be served.[173] The affidavit of service, however, referred to the Jane Doe as an "occupant of the premises without addressing whether Jane Doe resided at the premises."[174] Walsh asserted, at the time of service, the only people residing at the residence were Walsh and her roommate.[175] Accordingly, the court of appeals—declining to apply the "plausibility" standard—reversed the district court's decision and concluded that "if Walsh might be able to produce evidence demonstrating that Jane Doe did not reside at the premises . . . the dismissal . . . was improper."[176]

C. The Minnesota Supreme Court

The Minnesota Supreme Court granted review to decide a question left unresolved by its jurisprudence in the wake of *Twombly* and *Iqbal*: whether the "plausibility" standard established by the United States Supreme Court applied to civil pleadings filed in Minnesota state courts.[177] The court's opinion focused on the plain language, purpose, and history of Minnesota's pleading standard under Rule 8.01.[178]

Interpreting the plain language of Rule 8.01, the court rejected U.S. Bank's assertion that the words "showing" and "entitled" provided textual support for the "plausibility" standard.[179] In defining each term, the court concluded that under Rule 8.01, a claimant must only "make some sort of demonstration that the claimant has a legal right to relief."[180] "Noticeably absent" from Rule 8.01 and the rest of Minnesota's Rules of Civil Procedure, the court remarked, was the word "plausible."[181] The court determined that the plain language of the rule required something less and "decline[d] to engraft the plausibility standard" into its traditional

173. *Id.* at *2 (citing MINN. R. CIV. P. 4.03(a)).
174. *Id.* (internal quotation marks omitted).
175. *Id.*
176. *Id.*
177. *Walsh III*, 851 N.W.2d 598, 600 (Minn. 2014).
178. MINN. R. CIV. P. 8.01.
179. *Walsh III*, 851 N.W.2d at 603–04.
180. *Id.* at 604.
181. *Id.*

interpretation of Rule 8.01, asserting that to do so would violate a basic rule of statutory interpretation.[182]

Turning to the purpose and history of Rule 8.01, the court declared the state's "preference for non-technical, broad-brush pleadings."[183] This preference, the court argued, was evident in its adoption of Rule 8.01, which allowed pleading by way of broad general statements giving notice to the opposing party as to the grounds of the claim—a less demanding standard than was required under the code pleading system.[184] The court reasoned that, in contrast to Rule 8.01's preference for "non-technical, broad-brush pleadings," the "plausibility" standard demanded something more—"factual enhancement"—which set the two standards in direct conflict.[185]

Based on Rule 8.01's plain language, purpose, and history, the court declined to overrule its decisions in *Olson* and *Franklin* and reaffirmed its traditional notice pleading standard for civil actions in Minnesota state courts.[186]

IV. IMPLICATIONS AND ANALYSIS

In *Walsh*, the petitioners urged the Minnesota Supreme Court to adopt the "plausibility" standard in order to reconcile Minnesota's pleading practice with the federal system in the wake of *Twombly* and *Iqbal*.[187] By declining to do so, the *Walsh* court's decision created a clear rift between federal and state pleading practice in Minnesota.

As the *Walsh* court noted, the Federal Rules of Civil Procedure and the interpretations of those rules by federal courts are not binding on state courts.[188] In an attempt to create national uniformity, however, many states—including Minnesota—have historically followed the Federal Rules of Civil Procedure and their subsequent federal court interpretations.[189] At the time *Twombly* was

182. *Id.*
183. *Id.*
184. *Id.* at 604–05.
185. *Id.* at 605.
186. *Id.* at 606.
187. *Id.* at 604–05.
188. *Id.* at 603.
189. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (Stevens, J., dissenting); John P. Sullivan, *Do the New Pleading Standards Set out in* Twombly *and* Iqbal *Meet the Needs of the Replica Jurisdictions?*, 47 SUFFOLK U. L. REV. 53, 75 (2014); *see also* Roger

decided, twenty-six states and the District of Columbia modeled their pleading requirements after the federal practice.[190]

Since *Iqbal*, there has been a schism among these jurisdictions.[191] Some have fully embraced *Iqbal*, adopting the "plausibility" test into their local pleading practice.[192] Others have cited *Twombly* and *Iqbal* but stopped short of adopting the heightened standard.[193] Some jurisdictions, like Minnesota, have declined to adopt or affirmatively rejected the "plausibility"

Michael Michalski, *Tremors of Things To Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 109–10 (2010); Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1439 (2008).

190. *Twombly*, 550 U.S. at 578 ("Taking their cues from the federal courts, [twenty-six] [s]tates and the District of Columbia utilize as their standard for dismissal . . . the very language the majority repudiates: whether it appears 'beyond doubt' that 'no set of facts' in support of the claim would entitle the plaintiff to relief.").

191. For a state-by-state overview of which jurisdictions have adopted or rejected the "plausibility" standard, or not addressed the issue at all, see Sullivan, *supra* note 189, at 64–70. For a detailed discussion of the Washington Supreme Court's decision to reject the "plausibility" standard and the resulting implications for Washington state courts, see generally Michalski, *supra* note 189.

192. Jurisdictions that have adopted the plausibility standard include: the District of Columbia, Massachusetts, Maine, and South Dakota. *See, e.g.*, Potomac Dev. Corp. v. Dist. of Columbia, 28 A.3d 531, 550 (D.C. 2011) ("Like the plaintiff in *Iqbal*, appellants would need to allege more by way of factual content to nudge [their claim] across the line from conceivable to plausible." (alteration in original) (internal quotation marks omitted)); Bean v. Cummings, 2008 ME 18, ¶ 10, 939 A.2d 676, 680 (adopting *Twombly*'s heightened pleading standard in a civil perjury case); Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 889–90 (Mass. 2008) ("While we have concluded that the plaintiffs' complaint is insufficient on the basis of the standard described in *Nader v. Citron*, we take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*." (citations omitted)); Sisney v. Best Inc., 2008 SD 70, ¶¶ 7–8, 754 N.W.2d 804, 808–09 (noting the similarities between South Dakota's pleading practice and the federal practice and deciding to adopt the "plausibility" standard).

193. Prior to its decision in *Walsh*, the Minnesota Supreme Court had cited *Twombly* three times, but never formally adopted or rejected the "plausibility" standard. *See* Bahr v. Capella Univ., 788 N.W.2d 76, 80 (Minn. 2010); Hebert v. City of Fifty Lakes, 744 N.W.2d 226, 235 (Minn. 2008); Lorix v. Crompton Corp., 736 N.W.2d 619, 631 n.3 (Minn. 2007). The Minnesota Supreme Court had never cited *Iqbal*.

standard in favor of their traditional pleading practice.[194] Still many others have yet to address the issue altogether.[195]

Iqbal and the resulting divergence of pleading standards across this country have "shatter[ed] any remaining semblance of national procedural uniformity."[196] Procedural variation across jurisdictions, to be sure, is not a new phenomenon, as the Federal Rules of Civil Procedure were never universally embraced.[197] *Iqbal*, however, has ushered a "new era of procedural diversity."[198] The *Walsh* court's rejection of the "plausibility" standard presents both opportunities and cause for concern for Minnesota state courts. Both are addressed in turn.

194. These jurisdictions include: Arizona, Delaware, Minnesota, Tennessee, Utah, Vermont, Washington, and West Virginia. *See, e.g.*, Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 345 (Ariz. 2008) ("We granted review to dispel any confusion as to whether Arizona has abandoned the notice pleading standard . . . in favor of the recently articulated standard in [*Twombly*]. We hold that Rule 8, as previously interpreted by this Court, governs the sufficiency of claims for relief."); Cambium Ltd. v. Trilantic Capital Partners III L.P., No. 363, 2011, 2012 WL 172844, at *1 (Del. Jan. 20, 2012) ("[N]otwithstanding the holdings in *Iqbal* and *Twombly*, the governing pleading standard in Delaware . . . is reasonable conceivability." (footnotes omitted) (internal quotation marks omitted)); *Walsh III*, 851 N.W.2d 598, 600 (Minn. 2014) ("We granted review in this case to decide a question of great interest and consequence to parties and their lawyers in civil cases: whether the plausibility standard announced in [*Twombly*] and [*Iqbal*] applies to civil pleadings in Minnesota state court. We conclude that it does not."); Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 424 (Tenn. 2011) ("We decline to adopt the new *Twombly/Iqbal* 'plausibility' pleading standard . . . ."); Peak Alarm Co. v. Salt Lake City Corp., 2010 UT 22, ¶ 70 n.13, 243 P.3d 1221, 1245 n.13 (Our holding here is not an indication that we adopt the Supreme Court's plausibility standard."); Colby v. Umbrella, Inc., 2008 VT 20, ¶ 5 n.1, 955 A.2d 1082, 1086 n.1 ("[W]e have relied on the *Conley* standard for over twenty years, and . . . are unpersuaded . . . that we should now abandon it for a heightened standard." (citations omitted)); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863 (Wash. 2010) (noting that the United States Supreme Court has recently heightened pleading requirements but declining to adopt the "plausibility" standard into its state practice); Roth v. DeFelicecare, 700 S.E.2d 183, 189 n.4 (W. Va. 2010) (recognizing a heightened federal pleading standard but declining to adopt it in favor of the state's traditional notice pleading standard).

195. *See* Sullivan, *supra* note 189, at 64–70.

196. Michalski, *supra* note 189, at 110.

197. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 578 (Stevens, J., dissenting); Sullivan, *supra* note 189, at 54 (discussing the twenty-three "replica jurisdictions" that have adopted the Federal Rules and noting there are an additional four jurisdictions which have incorporated the Federal Rules in statutory codes).

198. Michalski, *supra* note 189, at 111.

A. Opportunities

1. Protection of Our Adversarial System

At the very foundation of the Federal Rules of Civil Procedure is the idea that substantive law, not procedural technicalities, should define a litigant's fate.[199] The proverbial "day in court" principle that guided Charles E. Clark and the other drafters of the Federal Rules of Civil Procedure was not new, however. David Dudley Field had envisioned the same in drafting the Field Code.[200] Central to this principle is the notion that trial by jury is the "gold standard" of our adversarial system.[201]

In many ways, *Twombly* and *Iqbal* can be seen as reactions to a civil litigation system that no longer resembles the system in place when the Federal Rules of Civil Procedure were promulgated. Litigation at the time of enactment typically consisted of "a single plaintiff and a single defendant jousting about what usually were relatively simple matters."[202] Advancements in technology, science, civil rights, and the growth of our ever expanding and interconnected economy—both domestically and internationally—have created a federal litigation system that is exceedingly complex.[203] Enormous pressure has been placed on the federal courts to preserve efficiency within our existing procedural framework.[204] To offset the trend of growing civil dockets filled with

199. *See, e.g.*, Clark, *supra* note 86, at 450 ("The requirements of pleading and allegation should not be strict, so that no person shall be deprived of his rights by the chance act or ignorance of his lawyer.").

200. *See* Field, *supra* note 47, at 262.

> The object of every suit . . . is to place the parties, whose rights are involved in it, in a proper and convenient manner, before the tribunal by which they are to be adjudicated; to present their conflicting allegations plainly and intelligibly to each other and to the Court; to secure by adequate means a trial or hearing of the contested points; to obtain a judgment or determination adapted to the justice of the case; and to effect the enforcement of that judgment by vigorous and efficient means.

Id.

201. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 289–90 (2013).

202. *Id.* at 290.

203. *Id.* at 289–90.

204. *Id.* at 296.

increasingly complex cases, the federal judiciary has arguably worked to give the existing rules more procedural bite.

First came a trilogy of cases decided by the United States Supreme Court in its 1986 term addressing the summary judgment standard.[205] The trilogy transformed the summary judgment motion, which had been left dormant for much of its history, into "a powerful tool for early resolution of litigation."[206] In the years since, much has been written about the actual effect of the trilogy on federal practice. However, one thing is clear: it has become more attractive for defendants to seek summary judgment as a tool to terminate cases before trial.[207] In effect, the trilogy moved the goal line, demanding more of plaintiffs earlier in the litigation life cycle.[208] *Twombly* and *Iqbal* finished the job, placing a greater burden on the plaintiff at the earliest stage of litigation—pleading.[209]

For better or worse, *Iqbal* and *Twombly* mark a decidedly different path than the drafters of the Federal Rules of Civil Procedure envisioned.[210] Trial by jury—the "gold standard" of our civil justice system—for many litigants has vanished.[211] Most

205. These cases are often referred to as the "*Celotex* Trilogy" and include: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). For an in-depth discussion of the "*Celotex* Trilogy" and the resulting implications, see generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

206. Miller, *supra* note 205, at 984.

207. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) ("The three decisions in one term sent a clear signal to the legal profession that Rule 56 provides a useful mechanism for disposing of cases short of trial when the district judge feels the plaintiff's case is not plausible. Many courts responded to this invitation with considerable receptivity.").

208. *See* Miller, *supra* note 205, at 984.

209. Miller, *supra* note 207, at 15 ("With Twombly and Iqbal, the favored disposition technique has moved earlier in time from summary judgment to the motion to dismiss.").

210. *See supra* notes 85–106 and accompanying text.

211. *See* Arthur R. Miller, *Are the Federal Courthouse Doors Closing? What's Happened to the Federal Rules of Civil Procedure?*, 43 TEX. TECH L. REV. 587, 591 (2010); *see also* Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 518–19 (2010); Patricia Lee Refo, *The Vanishing Trial*, LITIG., Winter 2004, at 1, 1–2 (noting that federal courts tried fewer civil cases in 2002

troubling are *Twombly* and *Iqbal*'s implications in employment discrimination and civil rights cases, where the defendant is typically in possession of the evidence necessary to establish the claim.[212] As Professor Arthur R. Miller noted in discussing employment discrimination claims in a post-*Iqbal* world, "How does the plaintiff show discriminatory conduct let alone a pattern of discrimination—whether it's race, gender, age, or disability—without access to the history of the employer's conduct regarding other employees?"[213] Liberal discovery, as provided by the Federal Rules of Civil Procedure during the *Conley* era, was key to the plaintiff gathering the necessary evidence in Professor Miller's hypothetical.[214] Under the "plausibility" standard, these claims are more difficult to establish.[215]

Twombly and *Iqbal* have fashioned a federal civil justice system increasingly concerned with efficiency and earlier case disposition based on less information.[216] The Minnesota Supreme Court's decision in *Walsh* preserves Minnesota's adversarial system in the way the drafters of the Federal Rules of Civil Procedure envisioned. By rejecting the "plausibility" standard, the *Walsh* court's decision better ensures that substantive law, not procedural hurdles, will continue to determine a litigant's fate in Minnesota state courts.

than they did in 1962, despite a fivefold increase in the number of filings).

212. *See generally* Schneider, *supra* note 211 (discussing the "disparate impact" *Twombly* and *Iqbal* have had on litigants in civil rights and employment discrimination cases).

213. Miller, *supra* note 211, at 596–97.

214. *See, e.g.*, *id.* at 588.

215. *See, e.g.*, Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (noting a significant increase in the number of Rule 12(b)(6) motions granted in employment discrimination and civil rights cases post-*Iqbal*); Miller, *supra* note 211, at 596–97; Schneider, *supra* note 211, at 524–25 ("In virtually every phase of the [litigation] process, now ranging from pleading to appeals, there appears to be a disparate impact on employment discrimination and civil rights cases.").

216. Miller, *supra* note 211, at 596; Schneider, *supra* note 211, at 518; *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 479 (2008) ("The *Twombly* standard is troubling because . . . the Court appears to have exalted goals of sound judicial administration and efficiency above the original core concern of the rules: progressive reform in favor of expanding litigant access to justice.").

2. Consistency and Avoidance of the Judicial Discretion Problem

One of the many criticisms leveled at *Twombly* and *Iqbal* is that the "plausibility" standard gives judges too much discretion in controlling a claim's fate.[217] *Iqbal* outlined a two-step method aimed at determining whether a complaint satisfied the new standard.[218] In applying the "plausibility" standard, Justice Kennedy wrote, judges are first to distinguish legal conclusions from factual allegations, accepting only the latter as true.[219] Next, drawing on their "judicial experience and common sense," they are to determine whether the nonconclusory factual allegations—accepted as true—give rise to a plausible claim for relief.[220]

Legal commentators were quick to question the veracity of this two-step approach noting, "'judicial experience and common sense' [are] highly ambiguous and subjective concepts largely devoid of accepted—let alone universal—meaning."[221] As one district court judge remarked in the wake of *Twombly*, "We . . . suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim."[222] Predictably, federal courts have applied the "plausibility" standard inconsistently.[223]

The federal pleading standard, once "uniform dogma," has been "fragmented on a circuit-by-circuit—or sometimes a judge-by-judge—basis."[224] Central to the Federal Rules of Civil Procedure was the goal of consistency in the application of substantive law.[225] In a post-*Iqbal* world, it is more likely that virtually identical complaints would garner different outcomes based on the subjective views of individual judges as to what allegations are plausible.[226]

217. *See, e.g.*, Miller, *supra* note 207, at 22 ("[P]lausibility pleading . . . has granted virtually unbridled discretion to district court judges.").

218. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009).

219. *Id.*

220. *Id.* at 679.

221. Miller, *supra* note 207, at 26.

222. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v. Twombly, 41 SUFFOLK U. L. REV. 851, 853 (2008).

223. *See id.* at 858–61.

224. *Id.* at 853.

225. *See supra* notes 85–106 and accompanying text.

226. Miller, *supra* note 207, at 30.

By rejecting the "plausibility" standard, Minnesota state courts avoid this pervasive judicial discretion problem. The decision also protects one of the core concerns of the Federal Rules—promoting open access to the court system for litigants. Further, the *Walsh* court's decision promotes consistency in the application of substantive law, as Minnesota state courts have the benefit of nearly sixty years of established precedent interpreting Rule 8.01's plain language. Thus, by continuing to interpret Rule 8.01 in ostensibly the same manner as when the rule was adopted in 1951, the *Walsh* court's decision fosters stability and transparency in the court system.

B. Concerns

1. Lack of Uniformity and Forum Shopping

Procedural uniformity, among the federal courts and among the federal and state courts operating intrastate, was a goal entrenched in the Federal Rules of Civil Procedure.[227] Uniformity—it was believed—would better promote the consistent application of substantive law, foster fairness and efficiency, and discourage forum shopping.[228] At the core of the uniformity movement was the notion that, regardless of the forum selected or the judge presiding, similarly situated litigants should obtain the same result.[229]

States that once embraced national uniformity, post-*Iqbal*, have set off in divergent directions,[230] diminishing the "remaining

227. *See, e.g.*, Clark, *supra* note 86, at 449.

> It is thought that the country is now more ready for uniformity than at any earlier time . . . . The one single system envisaged by the [Federal Rules of Civil Procedure] will not seem greatly different from the procedures of most, if not all, of the states, but will appear, as it is, merely the logical extension of already existing state practice systems.

Id.

228. *See* Robert E. Keeton, *The Function of Local Rules and Tension with Uniformity*, 50 U. PITT. L. REV. 853, 860 (1988).

229. *See* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1191 (2005); *see also* Miller, *supra* note 207, at 5 ("The Rules were intended to support a central philosophical principle: the procedural system of the federal courts should be premised on equality of treatment of all parties and claims in the civil adjudication process.").

230. *See supra* notes 189–95 and accompanying text.

semblance of national procedural uniformity."[231] In a post-*Iqbal* world, forum shopping is an increasingly worthy concern. Procedural variation between state and federal courts, in fact, encourages forum shopping.

Under the *Erie* doctrine, Minnesota's federal courts sitting in a diversity action would apply the federal (i.e. plausibility), not state (i.e., notice) pleading standard.[232] Thus, plaintiffs "not constrained by" issues of federal court subject-matter jurisdiction are encouraged to file in Minnesota state courts, thereby avoiding the heightened federal standard.[233]

A reverse-*Erie* analysis presents a similar issue. In a federal subject-matter case filed in Minnesota state court, state procedures would govern, provided the procedures do not "impose unnecessary burdens" on federal rights.[234] In *Brown v. Western Railway of Alabama*, the United States Supreme Court held that states may not apply local, heightened pleading standards when adjudicating federal claims.[235] Whether states can apply a lower pleading standard—as would be the case in Minnesota post-*Walsh*[236]—is a question left unresolved. Since the application of a less rigorous pleading standard would support, not restrict, the attainment of federal rights, it likely conforms to *Brown*'s central holding.[237] As such, forum shopping is a viable concern in Minnesota post-*Walsh* in both *Erie* and reverse-*Erie* situations.

Since 2006, several empirical studies have been conducted to determine the effect of *Twombly* and *Iqbal* on both the success of motions to dismiss under the plausibility standard and on removal

231. Michalski, *supra* note 189, at 110. To be sure, national uniformity was never obtained, as the Federal Rules of Civil Procedure were not universally embraced. However, this Note argues that *Twombly* and *Iqbal* mark the end of what was a limited system of uniformity created in the seventy years after the Federal Rules of Civil Procedure were adopted.

232. *See* Hanna v. Plumer, 380 U.S. 460, 465 (1965) (discussing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)). Under *Hanna,* if a state procedural rule and a Federal Rule of Civil Procedure conflict, the federal rule prevails, provided that it conforms with federal law and the Constitution. *Id.* at 463–65; *see also* Michalski, *supra* note 189, at 115–17.

233. *See* Michalski, *supra* note 189, at 109, 121 (discussing a similar dynamic in Washington after the Washington Supreme Court rejected the "plausibility" standard in favor of its traditional pleading practice).

234. *See* Brown v. W. Ry. of Ala., 338 U.S. 294, 298–99 (1949).

235. *Id.*

236. *Walsh III*, 851 N.W.2d 598 (Minn. 2014).

237. *See id.*; *Brown*, 338 U.S. at 298–99.

rates—an indicator used to determine the prevalence of forum shopping.[238] Almost universally, studies show some increase, whether statistically significant or not, in the number of motions to dismiss for failure to state a claim filed in federal courts post-*Iqbal*, and the success of those motions.[239] The data on removal rates, however, is less prevalent or clear.

One study published in 2013 focused solely on the question of whether an increase in removal rates had occurred post-*Twombly* and *Iqbal*.[240] The study examined monthly removal rates (i.e., the rate at which defendants removed litigation filed in state courts to federal courts) across all fifty states and the District of Columbia, during two periods: before and after *Twombly* and *Iqbal*.[241] Contrary to the researchers' expectations, no clear trend of an increase in removal rates post-*Twombly* and *Iqbal* emerged[242]—suggesting that, in practice, forum shopping has not become the problem feared by many legal commentators.[243]

One potential explanation for the absence of an upward trend in removal rates may be a preexisting preference for the federal court system (pre-*Twombly* and *Iqbal*) among defense attorneys.[244] This perceived preference is believed to be especially true for corporate and business-related entities.[245] As such, it is possible that defense attorneys would choose to remove a case to federal court whenever possible—even without the prospect of a heightened pleading standard. *Twombly* and *Iqbal*, however, have certainly made

238. More than twenty studies analyzing the empirical impact of *Twombly* and *Iqbal* ("Twiqbal") have been published. For a discussion of several of these studies, see generally David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN L. REV. 1203, 1204 n.7 (2013).

239. For an overview of eight leading studies assessing the impact of *Twombly* and *Iqbal*, see Jill Curry & Matthew Ward, *Are* Twombly *and* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 841–48 (2013).

240. *Id.* at 849 n.5.

241. *Id.* at 868.

242. *Id.* at 872.

243. *See, e.g.*, Miller, *supra* note 207, at 83.

244. Curry & Ward, *supra* note 239, at 872.

245. *See, e.g.*, Adam N. Steinman, *What Is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 248–49, 297 (2008) ("[It is] conventional wisdom that plaintiffs fare better in state court and defendants, [who often possess corporate and business interests], fare better in federal court. Empirical data comparing win-rates and recoveries in state and federal court support this notion.").

this proposition more attractive. Of course, the number of cases that can actually be removed to federal court is circumscribed, as a case needs to either invoke a federal question or satisfy both the diversity and amount-in-controversy requirements.[246]

As the authors of the study note, further research in a post-*Iqbal* world is needed.[247] Yet the study, however limited, provides at least incremental evidence that where federal-state procedural variation exists, forum shopping—despite its potential post-*Iqbal* appeal—has not, as predicted, become more prevalent.[248] In Minnesota, time will tell if the *Walsh* court's decision to reject the plausibility standard will lead to an increase in forum shopping.[249] At the moment, however, it appears that the concern, if any, is minimal.

2. Discovery Abuse and the Cost of Litigation

The impetus behind the plausibility standard can be traced, in large part, to the "drumbeat" of concern over the perceived abundance of frivolous lawsuits, abusive discovery practices, and the growing cost of litigation.[250] These concerns are certainly not new. Much ink has been spilled on these subjects since the Federal Rules of Civil Procedure were proposed.[251] It is clear that the liberal ethos of the Federal Rules of Civil Procedure has transformed

246. *See* 28 U.S.C. §§ 1331, 1332(a)(1)–(4) (2012).

247. Curry & Ward, *supra* note 239, at 872.

248. *Id.*

249. *Walsh III*, 851 N.W.2d 598, 600 (Minn. 2014).

250. *See, e.g.*, Miller, *supra* note 207, at 9; *see also* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) ("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 . . . success of judicial supervision in checking discovery abuse has been on the modest side." (internal quotation marks omitted)); THE AM. COLL. OF TRIAL LAWYERS TASK FORCE ON DISCOVERY & THE INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYSTEM, FINAL REPORT 2–3 (2009). *See generally* Miller, *supra* note 205, at 984 (discussing the "loudly trumpeted" but unproven claims of an explosion in excessive and frivolous litigation and the accompanying perceived costs).

251. *See, e.g.*, Finch, *supra* note 107, at 809 (arguing that the liberal pleading standard under the Federal Rules of Civil Procedure would lead to frivolous and speculative litigation); James A. Pike, *Objections to Pleadings Under the New Federal Rules of Civil Procedure*, 47 YALE L. J. 50, 71–72 (1937) (arguing that the liberal pleading requirements under the Federal Rules will lead to needless delay and expense). *See generally* Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 635–37 (1989).

American litigation over the past seventy-five years. An increasingly complex and interconnected economy and the birth of e-discovery have certainly played a role as well.[252]

Whether these concerns present a serious risk to the federal court system or whether they are overstated is a debate that rages on and is one beyond the scope of this Note. What is clear, however, is that *Twombly* and *Iqbal* are just the latest in a series of Supreme Court decisions that have "favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits."[253] The liberal ethos of the Federal Rules of Civil Procedure, in many ways, has been replaced by a fairly constricted one.[254]

Twombly and *Iqbal* follow what has been characterized as an unsuccessful attempt to establish more effective pre-trial case management[255] and rein in the "discovery problem" through the rulemaking process.[256] Federal Rules 16 and 26 have both been amended several times in the past quarter century to address their perceived shortcomings.[257] The effectiveness of these changes, however, has been questioned. Justice Souter, writing for the majority in *Twombly*, opined: "[T]he success of judicial supervision in checking discovery abuse has been on the modest side."[258] With *Twombly* and *Iqbal*, the Supreme Court indicated that the rulemaking process has been deficient in fixing what the Court's majority viewed as serious problems affecting the federal system.[259]

The Minnesota Supreme Court has also taken affirmative steps to address these prevailing concerns but has opted for legislative reform over judicial interpretation. In November 2010, the court established the Civil Justice Reform Task Force.[260] The Task Force

252. *See supra* note 203 and accompanying text.

253. Miller, *supra* note 207, at 9–10.

254. *Id.*

255. *See* FED. R. CIV. P. 16.

256. *See id.* R. 26.

257. Rule 16 was amended in 1983 and 1993. *Id.* R. 16. Rule 26 was amended in 1993, 2000, and 2006. *Id.* R. 26. For more information about the amendments, see *id.* R. 16 advisory committee notes and *id.* R. 26 advisory committee notes.

258. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007). Justice Stevens' dissenting opinion argued that Justice Souter and the *Twombly* majority "vastly underestimate[d] a district court's case-management arsenal." *Id.* at 593 n.13 (Stevens, J., dissenting).

259. *See* Miller, *supra* note 207, at 94–95.

260. Order Establishing Civil Justice Reform Task Force, ADM10-8051 (Minn.

was ordered to recommend changes aimed at facilitating the efficient and cost-effective processing of all civil cases in the state.[261]

In its final report submitted in December 2011, the Task Force provided several recommendations, including the integration of a proportionality consideration for discovery, the adoption of an expedited procedure for nondispositive motions, an expedited litigation track pilot program, and the Complex Case Program.[262] Based on the recommendations, the Minnesota Supreme Court directed the Task Force to prepare the proposed rule changes, which were submitted in a May 2012 supplemental report.[263] On February 4, 2013, the Minnesota Supreme Court issued amendments to the Minnesota Rules of Civil Procedure and the General Rules of Practice for the District Courts.[264]

The amendments, which took effect July 1, 2013,[265] adopted many of the Task Force's recommendations, including adding a proportionality determination into the scope of discovery,[266] compelling automatic disclosures,[267] requiring attorneys to prepare a discovery plan,[268] and creating an expedited process for nondispositive motions.[269] Arguably, the biggest advancement is the creation of the Complex Case Program.[270]

Under the Complex Case Program, certain cases are designated as "complex" early in the litigation process to promote more effective judicial management, avoid unnecessary delay and expense, and foster the efficient administration of justice.[271] Notably, antitrust claims, like the one at issue in *Twombly*, are

Nov. 24, 2010).

261. *Id.* at 1.

262. MINN. SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE, FINAL REPORT 17–31 (2011), *available at* http://archive.leg.state.mn.us/docs/2012/other/120214.pdf.

263. MINN. SUPREME COURT CIVIL JUSTICE REFORM TASK FORCE, SUPPLEMENTAL REPORT (2012), *available at* http://www.mncourts.gov/Documents/0/Public/Court_Information_Office/Civil_Justice_Ref_Task_Force_Supp_Rpt_May_2012.pdf.

264. Order Adopting Amendments to the Rules of Civil Procedure and General Rules of Practice Relating to the Civil Justice Reform Task Force, ADM10-8051, ADM09-8009, ADM04-8001 (Minn. Feb. 4, 2013).

265. *Id.* at 1.

266. MINN. R. CIV. P. 1.

267. *Id.* R. 26.01.

268. *Id.* R. 26.06(c).

269. MINN. GEN. R. PRAC. 115.04(d).

270. *Id.* R. 146.

271. *Id.* R. 146.01.

presumptively designated as complex.[272] Complex cases are subject to a more rigorous set of pre-trial management standards.[273]

In practice, it will take time to determine if the recent changes to Minnesota's procedural system, particularly the Complex Case Program, help better achieve the goal announced in Rule 1 of the Minnesota Rules of Civil Procedure—"the just, speedy, and inexpensive determination of every civil action."[274] For now, the changes appear to be a more just solution than what was handed down in *Twombly* and *Iqbal*.

Unlike the federal system in the wake of *Iqbal*, which broadly requires heightened pleadings in all civil actions regardless of their complexity, Minnesota's solution attempts to directly address the problem—identifying complex cases early in their life cycle—and works to ensure their just resolution without needless delay or expense. By maintaining the liberal ethos imbedded in the notice pleading system, Minnesota state courts are better positioned to facilitate the founding principles of our modern civil justice system, promoting public access to the courts and ensuring equality among all litigants.

V. CONCLUSION

In *Walsh*, the Minnesota Supreme Court declined to adopt the "plausibility" pleading standard, placing Minnesota's pleading practice in direct conflict with the federal system in the wake of *Twombly* and *Iqbal*. As this Note argues, however, the notice

272. The following types of claims are considered presumptively complex under the Complex Case Program:

> (1) Antitrust or trade regulation claims; (2) Intellectual property matters, such as trade secrets, copyrights, patents, etc.; (3) Construction defect claims involving many parties or structures; (4) Securities claims or investment losses involving many parties; (5) Environmental or toxic tort claims involving many parties; (6) Product liability claims; (7) Claims involving mass torts; (8) Claims involving class actions; (9) Ownership or control of business claims; or (10) Insurance coverage claims arising out of any of the claims listed in (c)(1) through (c)(9).

Id. R. 146.02(c)(1)–(10).

273. These standards include: the assignment of a single judge based on the judge's ability, interest, and experience with complex cases; a mandatory case management conference; and strict scheduling orders for all subsequent procedural devices and proceedings. *Id.* R. 146.03–.05.

274. MINN. R. CIV. P. 1.

pleading system, as preserved by the *Walsh* court, better protects the founding principles of our modern civil justice system—promoting open access to the courts and equal treatment of litigants.[275] Furthermore, the *Walsh* court's decision better ensures consistency in the application of substantive law—avoiding the pervasive judicial discretion problem imbedded in the federal system in the wake of *Twombly* and *Iqbal*.[276] To be sure, a lack of procedural uniformity between the federal and state courts can create problems.[277] However, the most significant potential issue—forum shopping—appears, at the moment, to be of minimal concern.

It will take time to determine if the Minnesota Supreme Court's recent efforts to address the efficiency of the court system through the rule making process foster a more efficient and cost-effective system. For now, Minnesota's effort to tackle the "efficiency problem" through the Rules presents a more just solution than what was handed down in *Twombly* and *Iqbal*.

275. *See supra* Part IV.A.1.
276. *See supra* Part IV.A.2.
277. *See supra* Part IV.B.1.