

NOTES

FOLLOWING THE LEADER: *TWOMBLY*, PLEADING STANDARDS, AND PROCEDURAL UNIFORMITY

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In Bell Atlantic Corp. v. Twombly, the Supreme Court retired Conley v. Gibson's longstanding, seminal interpretation of Federal Rule of Civil Procedure 8(a) and strong endorsement of notice pleading. In place of Conley-style notice pleading, the Court substituted a vague "plausibility standard" that has confounded the legal community since its inception. This Note approaches Twombly from the perspective of the twenty-seven states that have modeled their procedural systems after Conley and the Federal Rules, and considers whether these states' courts should adopt plausibility pleading. Using a reverse-Erie analysis, this Note first challenges commentators' assertions that a dual state-Conley and federal-Twombly paradigm will lead to forum shopping when federal claims are adjudicated in state courts. In considering whether Twombly should govern state claims, this Note urges states to carefully consider the interplay between pleading standards and existing discovery mechanisms, and the normative value of Conley-style notice pleading. Finally, this Note traces the evolution of federal-state intrastate procedural uniformity and concludes that the traditional arguments in favor of conformity are inapt.

INTRODUCTION

In *Bell Atlantic Corp. v. Twombly*, the U.S. Supreme Court retired *Conley v. Gibson's* once "accepted rule" of notice pleading and motions to dismiss: "[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* . . . which would entitle him to relief."¹ Reinterpreting to some degree Federal Rules of Civil Procedure 8(a) and 12(b)(6)—which together govern civil complaints and dismissals of claims—*Twombly* established a "plausibility standard" that requires plaintiffs to "nudge[] their claims across the line from conceivable to plausible" in order to survive.² This new paradigm has confounded the legal community since its inception.³ But while commentators to date have focused upon the propriety

1. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968 (2007) (emphasis added) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

2. *Id.* at 1974. This Note refers to the *Twombly* standard as "raised" pleading. This term is distinct from "heightened" pleading. See *infra* note 75 and accompanying text.

3. See, e.g., *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) ("We are not alone in finding the opinion confusing."); *Iqbal v. Hasty*, 490 F.3d 143, 155–57 (2d Cir. 2007) (noting uncertainty in interpretation because of "conflicting signals"); Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 Va. L. Rev. In Brief 135, 141–42 (2007), at <http://virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (on file

of the Court's decision and the scope of its holding,⁴ *Twombly* has wider implications that reach beyond federal fora. As Justice Stevens noted in dissent, "Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates."⁵ Indeed, beyond adopting *Conley*'s language, the majority of states have patterned their entire systems of civil procedure after the Federal Rules, to varying degrees.⁶ They now face the choice of whether to stand or break with *Conley* notice pleading, perhaps the most distinctive feature of the federal model.

This Note argues that a state should not abandon *Conley* simply to preserve uniformity between state and federal interpretations of Rules 8(a) and 12(b)(6). To be sure, factors other than uniformity may drive a state's decision—it may simply find *Twombly*'s rationale unpersuasive or, conversely, it may welcome the beneficial effects that plausibility pleading is expected to have on crowded dockets.⁷ But looking past these policy questions and adopting *Twombly*'s rhetoric solely for the sake of uniformity⁸ is misguided. State courts must first consider whether to apply *Conley* or *Twombly* to federal claims. But contrary to some commentators' concerns, a "reverse-*Erie*" analysis reveals that dual pleading standards create minimal risk of forum shopping and will not transform state courts into havens for speculative lawsuits. In deciding whether to apply *Twombly* in adjudicating state law claims, state courts must also consider the unique circumstances of their dockets and local procedural experimentation that presumed *Conley*'s continuation.

Taking *Twombly*'s plausibility-pleading standard at face value, this Note contends that each individual state must determine whether the standard comports with its existing system of procedure and preserves the proper balance of rights between litigants. These arguments are advanced independently of whether the *Twombly* rule is on its own terms cost-justified—that is, whether it is correct in striking a balance more in

with the *Columbia Law Review*) (listing lingering questions); Ettie Ward, *The After-Shocks of Twombly: Will We "Notice" Pleading Changes?*, 82 *St. John's L. Rev.* 893, 918–19 (2008) (same).

4. See, e.g., *The Supreme Court, 2006 Term—Leading Cases*, 121 *Harv. L. Rev.* 305, 309–15 (2007) [hereinafter *Leading Cases*].

5. *Twombly*, 127 S. Ct. at 1978 (Stevens, J., dissenting).

6. See generally John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 *Wash. L. Rev.* 1367 (1986) (examining extent of adoption of Federal Rules among states); John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 *Nev. L.J.* 354 (2002) (updating survey of state adoption in light of recent Federal Rules amendments).

7. See Richard A. Halloran, *A Return to Fact Pleading?: Viable Complaints After Twombly*, *Ariz. Att'y*, Sept. 2007, at 20, 24 (praising *Twombly*'s ability to confront the "strain that rising caseloads and tight fiscal constraints have imposed on [Arizona] courts").

8. See, e.g., Brian J. Pollock, *Sensible Pleading Requirements: Arizona Courts Should Adopt Twombly*, *Ariz. Att'y*, Sept. 2007, at 26, 26 ("[P]rocedural uniformity is a desirable and important objective." (quoting *U S W. Commc'ns, Inc. v. Ariz. Dep't of Revenue*, 14 P.3d 292, 295 (Ariz. 2000))).

favor of defendants than *Conley* by shielding them from the cost of litigating implausible claims into the discovery phase.⁹

This Note proceeds in three parts. Part I briefly traces the creation and proliferation of the Federal Rules and the central role of uniformity in that process. It argues that states adopted *Conley* in the spirit of uniformity and that *Twombly* threatens this harmony in a fundamental way that prior deviations have not. Part II then considers the tensions raised by a federal-*Twombly* and state-*Conley* dichotomy. It explores and concretely defines the scope of the forum-shopping concern thought to arise out of disuniformity with respect to federal claims adjudicated in state courts. Turning to the question of the proper standard for adjudicating state claims in state courts, Part II also offers a construct for analyzing the relationship between pleading standards and discovery. Finally, Part III finds that the benefits of uniformity, while perhaps powerful in theory, are insufficient to compel states to recast their pleading standards in the federal image.

I. COMING TOGETHER, GROWING APART: A BRIEF HISTORY OF PROCEDURAL UNIFORMITY

The goal of creating both federal *interstate* uniformity¹⁰ and federal-state *intrastate* uniformity¹¹ has a rich tradition. Indeed, the advent of the Federal Rules of Civil Procedure in 1938 was in large part a product of this movement. This Part traces the historic struggle to achieve procedural uniformity and demonstrates the central role uniformity played in the Rules' wide assimilation. Part I.A of this Note briefly recounts efforts to create uniform procedural rules. Part I.B focuses specifically on uniformity in pleading requirements. Part I.B.1 documents the high degree to which states have relied explicitly on *Conley*'s interpretation of notice pleading, and Part I.B.2 briefly demonstrates the extent to which *Twombly* creates disuniformity.

A. *The Triumph of Uniformity and Its Subsequent Balkanization*

1. *Early Attempts at Uniformity.* — Having established the federal judiciary,¹² Congress passed the first Conformity Act in 1789, which required the procedures for common law claims in the new federal courts to “be the same in each state respectively as are now used or allowed in the

9. See *infra* Part II.B.1–2.

10. By “federal interstate uniformity” this Note refers both to uniform procedures across federal district courts and consequently across states as well. Professor Subrin separates these types of uniformity into “interdistrict court uniformity” and “interstate uniformity,” respectively. Stephen N. Subrin, *The New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1650 (1981) [hereinafter Subrin, *New Era*].

11. By “federal-state intrastate uniformity” this Note refers to the use of uniform procedural rules within a particular state’s trial courts, whether state or federal.

12. See Judiciary Act of 1789, ch. 20, 1 Stat. 73.

supreme courts of the same.”¹³ Admiralty and equity claims, by contrast, were to continue “follow[ing] ‘the course of civil law.’”¹⁴ The original Conformity Act, and other Conformity Acts passed to update it, governed federal court procedure until the implementation of the Federal Rules.¹⁵

Although the early proponents of the Conformity Acts chiefly sought to defuse tensions both between states¹⁶ and between the state and federal governments,¹⁷ the Acts also reflected a certain pragmatism that sounded strongly in uniformity. Because it was “obvious that any project for a general system of jurisprudence, coextensive with the Union, could only have engendered discontents . . . [and] occasioned endless perplexity,”¹⁸ Congress settled for federal-state intrastate uniformity. The Conformity Act of 1792 facilitated this result to a degree.¹⁹ The “forms of writs, executions and other process” of federal courts were to be the “same as are now used in . . . [state] courts respectively in pursuance of the [Conformity Act of 1789].”²⁰ In other words, the Act wedded federal procedure to a state’s procedure *as it existed in 1789*, creating “static” uniformity.²¹ Yet Congress realized that differences existed between the two judicial systems and authorized federal courts to make “such alterations and additions [to state procedure] . . . deem[ed] expedient.”²²

These provisions of the Act allowed disuniformity to surface and ultimately resulted in the “endless perplexity” Congress had attempted to avoid.²³ As state procedures evolved, federal courts’ static application of

13. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93. Commentators regularly refer to the statute as the “Conformity Act” or “Process Act.” See, e.g., 4 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1002, at 11 (3d ed. 2002).

14. Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. Kan. L. Rev. 347, 381 (2003) (quoting Act of Sept. 29, 1789 § 2). See generally Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, 914–21 (1987) (providing overview of law and equity systems).

15. For excellent histories of these Acts, see generally 4 Wright & Miller, *supra* note 13, § 1002; Charles Warren, *Federal Process and State Legislation* (pts. 1 & 2), 16 Va. L. Rev. 421, 546 (1930).

16. Warren, *supra* note 15, at 426–27 (raising likelihood of “endless jealousy and inconvenience” (quoting *Brown v. Van Braam*, 3 U.S. 344, 352 (1797))).

17. *Id.* at 427–28 (expressing that federalism values informed statute’s drafting).

18. *Van Braam*, 3 U.S. at 352.

19. Uniformity was a central consideration in drafting the Conformity Act of 1792. See 2 *Annals of Cong.* 1845 (1834) (pledging that Congress would “consider . . . how far the uniformity which in other cases is found convenient in the administration of the General Government through all the States, may be introduced” into federal judiciary).

20. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.

21. Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 *Notre Dame L. Rev.* 1291, 1325 (2000). The Supreme Court likewise shared this interpretation of the Acts. See *Wayman v. Southard*, 23 U.S. 1, 49–50 (1825) (arguing that state laws passed subsequent to Conformity Acts could not bind federal courts).

22. § 2, 1 Stat. at 276.

23. *Van Braam*, 3 U.S. at 352; see also Sward, *supra* note 14, at 382 (describing state of federal procedure as “confusing mishmash”).

1789 state procedures caused the two systems to diverge,²⁴ especially after widespread state adoption of the Field Code, which merged law and equity into a common system of code pleading.²⁵ And while the 1872 Act remedied the complications of static conformity by implementing dynamic conformity,²⁶ its flaws²⁷ frustrated the realization of the anticipated degree of uniformity.²⁸ By the late nineteenth century, the failure of the Conformity Acts had become readily apparent.²⁹

2. *Federally Led Uniformity.* — In 1911, the American Bar Association (ABA) adopted a resolution calling for the establishment of federal procedural rules³⁰ and sparked the effort that culminated in the passage of the Rules Enabling Act (REA).³¹ The central role of uniformity within this movement can hardly be overstated.³² As Professor Sunderland—later a drafter of the Rules—described it, “[T]he movement for federal rule-making power . . . was not undertaken primarily for the purpose of substituting judicial for legislative regulation of federal procedure

24. See Daniel S. Tomson, Note, Rule 58’s Dirty Little Secret: The Problematic Lack of Uniform Enforcement of Federal Rule of Civil Procedure 58 Within the Federal Court System, 36 Val. U. L. Rev. 767, 772 (2002) (“[A] majority of the states began to abandon the Act in favor of their own codes.”).

25. Field Code, ch. 379, 1848 N.Y. Laws 497. While the Code was not an explicit attempt to create uniformity, it is noteworthy because of its prevalence among states and weighty influence on civil procedure. See Sward, *supra* note 14, at 382–83 (noting Code “was enormously influential” and served as bridge between common law procedure and Federal Rules).

26. The 1872 Act directed federal courts to “conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding *existing at the time in like causes* in the courts of record of the State within which such circuit or district courts are held.” Act of June 1, 1872, ch. 255, § 5, 17 Stat. 196, 197 (emphasis added).

27. See Charles E. Clark & James Wm. Moore, A New Federal Civil Procedure, 44 Yale L.J. 387, 401–07 (1935) (detailing purpose of 1872 Conformity Act and its inevitable failure in face of state procedural reform); Edson R. Sunderland, The Grant of Rule-Making Power to the Supreme Court of the United States, 32 Mich. L. Rev. 1116, 1122 (1934) (acknowledging that Conformity Act “contained the seeds of its own destruction as a remedial device”).

28. See *Nudd v. Burrows*, 91 U.S. 426, 441 (1875) (“The purpose of the provision . . . was to bring about uniformity in the law of procedure The evil [of studying two systems] was a serious one. It was the aim of the provision in question to remove it The remedy was complete.”).

29. In a Senate Judiciary Committee report arguing for the simplification of procedure, then-Senator Sutherland described the existing procedural system as “unscientific and obstructive.” S. Rep. No. 64-892, pt. 1, at 2 (1917).

30. Report of the Committee on Judicial Administration and Remedial Procedure [hereinafter ABA Report], reprinted in Report of the Thirty-Fifth Annual Meeting of the American Bar Association 434, 434–35 (1912).

31. Pub. L. No. 73-415, 48 Stat. 1064 (1934) (current version at 28 U.S.C. § 2072 (2000)); see Tomson, *supra* note 24, at 773 n.23 (recounting ABA’s role).

32. See Thomas O. Main, Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure, 46 Vill. L. Rev. 311, 311–18 (2001) (“Indeed, both of the major reform movements in American procedural history were bred primarily of efforts to establish procedural uniformity.”).

[T]he primary purpose . . . was the attainment of local uniformity in trial court practice between the state and federal courts.”³³

Establishing federal rules would clearly create federal interstate uniformity, but arguably at the cost of federal-state intrastate uniformity.³⁴ Echoing arguments supporting the early Conformity Acts, Senator Walsh, the chief critic of federally led uniformity, clung to the notion that the status quo prevented the evils inherent in a dual system, one state and one federal, and defeated the ABA’s proposals over the next twenty years.³⁵ Reformers, however, were confident that intrastate uniformity could be maintained because the future federal system would serve as a model for states.³⁶ Indeed, there was little doubt within the movement that states would eagerly embrace the Federal Rules, which would be prepared by none other than the U.S. Supreme Court.³⁷

With Senator Walsh’s death in 1933, the scene became ripe for the passage of the REA, and soon after, the Federal Rules.³⁸ But whether the model would be well received by the states remained uncertain.³⁹ Noth-

33. Sunderland, *supra* note 27, at 1117.

34. See Subrin, *New Era*, *supra* note 10, at 1650 (“[T]he price of this interfederal court uniformity was the loss of intrastate uniformity, for there would be different state and federal procedures.”). That is, if states rejected the proposed system of federal rules, state and federal procedure would have no explicit tie.

35. Jay S. Goodman, *On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?*, 21 *Suffolk U. L. Rev.* 351, 355 (1987) [hereinafter Goodman, *Drafters’ Intent*]. Senator Walsh’s skepticism was not ungrounded. Even after the REA was passed, it was not clear whether the Supreme Court would abolish the federal division between law and equity. Unlike the Field Code’s explicit rejection of this distinction, see *supra* text accompanying note 25, the REA left this decision to the Supreme Court, see § 2, 48 Stat. at 1064 (“The court *may* at any time unite the general rules prescribed by it for cases in equity with those in actions at law as to secure one form of civil action and procedure for both.” (emphasis added)). Because a majority of states were using the Field Code’s simplified “civil action,” they were unlikely to return to a law-and-equity paradigm. See Sunderland, *supra* note 27, at 1125 (noting unlikelihood that states would “perpetuate the outworn distinctions between legal and equitable methods of conducting litigation”). Furthermore, other considerations counseled against state adoption of a system of federal rules. See *id.* at 1126 (pointing to preservation of judicial integrity and independence).

36. See ABA Report, *supra* note 30, at 434 (proposing system of civil procedure for use in federal courts and “as a model”); Clark & Moore, *supra* note 27, at 387 (recognizing “unusual opportunity” for “developing a procedure which may properly be a model to all the states”); Subrin, *New Era*, *supra* note 10, at 1650 (“Proponents retorted that the uniform federal rules would be a model adopted by the states.”).

37. See S. Rep. No. 64-892, pt. 1, at 21 (1917) (stating that both convenience and merit would lead to state adoption); Thomas Wall Shelton, *A New Era in Judicial Relations*, 23 *Case & Comment* 388, 393 (1916) (predicting that states which did not follow would “suffer” if not “perish”); Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 *U. Pa. L. Rev.* 1999, 2006, 2026 (1999) [hereinafter Subrin, *Procedural Patterns*] (“The federal rules were to be an enlightened magnet.”).

38. For a brief overview of the passage of the REA and the Federal Rules, see Goodman, *Drafters’ Intent*, *supra* note 35, at 355–64.

39. See *supra* note 35.

ing prevented them from freely rejecting the Rules without legal consequence. Indeed, states' systems of procedure had functioned competently for over a century as the dominant paradigm under the Conformity Acts.⁴⁰ Thus, the possible loss of federal-state intrastate uniformity—or at least what some believed to be an existing conformity in theory despite actual divergence under the Conformity Acts—loomed large.

3. *Uniformity's Golden Years and Decline.* — These concerns, however, were quickly put to rest. In 1940, Arizona became the first “federal replica”—that is, a state with a procedural system modeled after the Federal Rules—when its supreme court adopted the Rules verbatim.⁴¹ Other states were quick to follow.⁴² Surveying the landscape a mere ten years after the Rules went into effect, their principal draftsman concluded that “[t]he hope . . . that code pleading would lose its distinctive characteristics in a general American system has already reached a considerable degree of fulfillment in the success of the federal reform and its increasing impact upon the states.”⁴³ A more thorough survey performed by Professor Wright in 1960 provided evidence of the Rules' continued success.⁴⁴ Buoyed by the federal model's tremendous initial effect on states and confident that “[t]he movement for procedural reform [was] far from having spent its force,” he proudly observed that in many jurisdictions there was “but one procedure for state and federal courts.”⁴⁵ Notably, the benefits of intrastate uniformity played a central role in the consideration of the Rules in various states.⁴⁶

Yet universal adoption never occurred. Building on the previous scholarship, Professors Oakley and Coon sought to determine in 1986 if

40. See Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (instructing federal courts to mirror existing state practice and procedure); see also *supra* text accompanying notes 20–21.

41. See generally Lyle Roger Allen, *The New Rules in Arizona*, 16 F.R.D. 183, 183–87 (1955) (recounting Arizona's adoption of the Federal Rules).

42. See Charles E. Clark, *Handbook of the Law of Code Pleading* § 10, at 50–54 (2d ed. 1947) (cataloguing contemporaneous state procedural reforms).

43. *Id.* § 9, at 31. Professor Clark would confirm his prognosis in 1958 when he wrote that “the trend of state adoption [was] proceeding apace.” Charles E. Clark, *The Federal Rules of Civil Procedure, 1938–1958: Two Decades of the Federal Civil Rules*, 58 *Colum. L. Rev.* 435, 435 (1958).

44. William W. Barron & Alexander Holtzoff, *Federal Practice and Procedure with Forms* §§ 9–9.53 (Charles Alan Wright ed., 1960) (giving brief accounts of then-current state procedural reforms). Despite being credited as an editor, Professor Wright thoroughly revised, rewrote, and expanded Barron and Holtzoff's earlier treatise such that the 1960 edition was “a thoroughly new work.” John P. Frank, *Federal Practice and Procedure*, 76 *Harv. L. Rev.* 1704, 1704 (1963) (book review). This Note thus appropriately attributes this work to Professor Wright. See *id.*

45. Barron & Holtzoff, *supra* note 44, § 9, at 44–45.

46. Main, *supra* note 32, at 321 & n.45. For an account of Arizona's adoption of the Federal Rules and explicit debate regarding the values of federal-state intrastate uniformity, see Subrin, *Procedural Patterns*, *supra* note 37, at 2026–28.

the nation truly had “but one procedure.”⁴⁷ The results were startling even to the authors. Only a minority of states were found to be true federal replicas.⁴⁸ And while the authors pointed to a silver lining,⁴⁹ they reluctantly concluded that “the era of an ‘accelerating trend’ of state court reform of civil procedure in the image of the Federal Rules ha[d] ended.”⁵⁰ Professor Oakley’s 2002 update presented even starker results.⁵¹ This study, which tracked state adoption of thirteen recent Federal Rules amendments, lamented that “the era of federal procedural hegemony ha[d] ended.”⁵² Indeed, the demise of the Federal Rules model was clear: “It is the Federal Rules that have appeared to have moved away from the states, rather than vice versa.”⁵³ Commentators have attributed this widening divide to a discontentment with recent changes to federal procedure⁵⁴ and the reassertion of local legal culture.⁵⁵

Yet despite the low degree to which states have adopted recent Federal Rules amendments, today many federal replicas still feel that their procedural jurisprudence should mirror that of the U.S. Supreme Court.⁵⁶ This dynamic is especially evident in the widespread state es-

47. Oakley & Coon, *supra* note 6, at 1372 (citation omitted). Oakley and Coon distinguished their scholarship by classifying states based on (1) whether a state employed notice pleading and (2) whether the state codified its procedure. Eight categories were devised, on a sliding scale beginning with true federal replicas and ending with states that required fact pleading within a code-based procedural system. See *id.* at 1372–76 (describing methodology). The degree to which the states needed to be categorized, a process which the authors themselves described as “unexpectedly complicated,” *id.* at 1369, is itself a testament to balkanization in state adoption.

48. See *id.* at 1377–79, 1424–27 (summarizing results). Furthermore, when the population of replica states was considered, states with the largest populations tended to shun the Federal Rules. *Id.* at 1426. It should be noted, however, that the vast majority of states had abandoned fact pleading for notice pleading, which is arguably the hallmark of the Federal Rules. *Id.* at 1425–26.

49. See *id.* at 1369, 1427 (noting “pervasive influence of the Federal Rules”).

50. *Id.* at 1427 (citation omitted). In fact, this era was determined to have ended a decade earlier in 1975. See *id.* at 1426 (stating that collected data indicated trend stalled ten years earlier).

51. Oakley, *supra* note 6. While this Note focuses on federal-state intrastate uniformity, much of the existing scholarship focuses on the decline of federal interstate uniformity through district courts’ use of local rules. See, e.g., Subrin, *Procedural Patterns*, *supra* note 37, at 2037–38 (describing Arizona’s use of local rules in both federal and state courts); Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 *Ariz. St. L.J.* 1393, 1398 (1992) [hereinafter Tobias, *Balkanization*] (finding 5,000 local rules across ninety-four federal districts).

52. Oakley, *supra* note 6, at 383.

53. *Id.* at 359; see also Main, *supra* note 32, at 322–25 (recounting decline of intrastate uniformity).

54. See, e.g., Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 *Ariz. St. L.J.* 615, 627 (2002) [hereinafter Tobias, *Discovery Dilemma*].

55. See, e.g., Oakley, *supra* note 6, at 384.

56. See *infra* Part I.B.1.

pousal of *Conley*'s interpretation of pleading standards, which is explored next.

B. *Pleading Standards and Intrastate Uniformity: From Conley to Twombly*

1. *States' Adoption of Conley and Notice Pleading.* — States that model their procedural systems after the Federal Rules typically look to federal courts'—particularly the U.S. Supreme Court's—interpretation of the Rules as a default, or at least give them due consideration.⁵⁷ “Because [our state] has substantially adopted the Federal Rules,” one state court has reasoned, “we give great weight to the federal interpretations of the rules.”⁵⁸ And while adherence to federal jurisprudence is far from blind,⁵⁹ “procedural uniformity is [recognized as] a desirable and important object, absent serious disagreement with [the U.S. Supreme] Court's reasoning.”⁶⁰

Federal-state accord is perhaps greatest when it comes to Rules 8(a) and 12(b)(6)—which govern federal pleadings and the threshold at which these pleadings can be dismissed for failure to state a claim—and the adoption of *Conley*'s “no set of facts” language.⁶¹ All told, twenty-six

57. E.g., *Adams v. Robertson*, 676 So. 2d 1265, 1268 (Ala. 1995); *Brehm v. Eisner*, 746 A.2d 244, 267 (Del. 2000) (Hartnett, J., concurring); *Faggins v. Fischer*, 853 A.2d 132, 142 (D.C. 2004) (Schwelb, J., dissenting); *Matsuura v. E.I. du Pont de Nemours & Co.*, 73 P.3d 687, 703 (Haw. 2003); *Thomas v. Thomas*, 357 P.2d 935, 937 (Idaho 1960); *Cent. Realty, Inc. v. Hillman's Equip., Inc.*, 246 N.E.2d 383, 387 (Ind. 1969); *Tuttle v. Dep't of State Highways*, 243 N.W.2d 244, 245 (Mich. 1976); *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 n.1 (Miss. 1983); *Dennis v. Berens*, 54 N.W.2d 259, 261 (Neb. 1952); *United Nuclear Corp. v. Gen. Atomic Co.*, 629 P.2d 231, 278 (N.M. 1980); *Worthington v. Bynum*, 290 S.E.2d 599, 606 (N.C. 1982) (Britt, J., dissenting); *Byron v. Gerring Indus.*, 328 N.W.2d 819, 821 n.3 (N.D. 1982); *Taylor v. Baker*, 566 P.2d 884, 886 n.2 (Or. 1977); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987). But see *Harvey v. Eastman Kodak Co.*, 610 S.W.2d 582, 584 (Ark. 1981) (agreeing to a “significant departure” from the Federal Rules despite identical rule language).

58. *Edwards v. Young*, 486 P.2d 181, 182 (Ariz. 1971).

59. See *McDonough Constr. Co. v. McLendon Elec. Co.*, 250 S.E.2d 424, 428 (Ga. 1978) (holding that despite identity of state and federal rule, federal interpretation would contravene intent of state law).

60. *U S W. Commc'ns, Inc. v. Ariz. Dep't of Revenue*, 14 P.3d 292, 295 (Ariz. 2000).

61. See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (“[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts . . . which would entitle him to relief.”). This harmony may be explained by the steadfastness of Rule 8(a)'s requirement of a “short and plain statement.” Unlike a host of other rules that have been habitually amended, the language of Rule 8 has remained unchanged. Even in the restyling of the Federal Rules that occurred on December 1, 2007, the Advisory Committee transposed the sixty-nine-year-old language of Rule 8(a) verbatim, thereby implicitly indicating that the Rule needed no clarification. *Comm. on Rules of Practice & Procedure of the Judicial Conference of the United States, Excerpt of the Report of the Civil Rules Advisory Committee 30–32 (2006)*, at http://www.uscourts.gov/rules/supct1106/Excerpt_CV_Style.pdf (on file with the *Columbia Law Review*); see also Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 *Suffolk U. L. Rev.* 851, 855 (2008) (noting that December 1, 2007 sample form complaints appended to the Rules were verbatim copies of those supplied in 1963 Rules revision). Moreover, while other

states and the District of Columbia interpreted their pleading rules according to *Conley* at the time the Court decided *Twombly*.⁶² Aside from the sheer number of *Conley* followers—especially in light of the general demise of federal-state intrastate uniformity⁶³—Justice Stevens’s long *Twombly* footnote listing these states⁶⁴ is remarkable because a trio of code-pleading states are included alongside federal replicas.⁶⁵

Whatever implications might be drawn from this result, it is clear that federal-state intrastate uniformity is still alive with respect to notice pleading. This Note now considers the *Twombly* decision and describes how it is likely to threaten this longstanding uniformity.

2. *Twombly and the Retirement of Conley*. — In *Bell Atlantic Corp. v. Twombly*, the Supreme Court explicitly “retired” *Conley*’s oft-quoted “no set of facts” phrasing.⁶⁶ The case involved a putative class of local telephone and high-speed internet subscribers who alleged that incumbent local exchange carriers (ILECs)⁶⁷ had illegally conspired to restrain trade in violation of section 1 of the Sherman Antitrust Act.⁶⁸ In their complaint, the plaintiffs first averred that the ILECs “‘engaged in parallel conduct’ . . . to inhibit the growth of upstart [competitive local exchange carriers (CLECs)],” arguing that in the absence of the alleged parallel conduct, the CLECs would have made greater market inroads.⁶⁹ Plaintiffs also contended that the ILECs’ failure to pursue profitable dealings evinced an agreement not to compete.⁷⁰

Rules have seen marked shifts in judicial interpretation—for example, Rule 56(c) and the standard for granting summary judgment—the *Conley* interpretation of Rule 8(a) had stood for fifty years. Finally, perhaps the widespread adoption of *Conley* in state courts stems from a faithfulness to the concept of notice pleading, which is arguably the hallmark of the Federal Rules. Subrin, *Procedural Patterns*, supra note 37, at 2030; see also Oakley & Coon, supra note 6, at 1375 (“[T]he Federal Rules are a model of ‘notice pleading.’”).

62. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1978 (2007) (Stevens, J., dissenting).

63. See supra Part I.A.3.

64. *Twombly*, 127 S. Ct. at 1978 n.5 (Stevens, J., dissenting) (cataloguing *Conley* jurisdictions).

65. Florida, Louisiana, and Nebraska are listed in the footnote, *id.*, but are generally considered code-pleading jurisdictions, see Oakley & Coon, supra note 6, at 1378. Interestingly, one scholar has highlighted the courts of three code-pleading states—whose procedural systems are recognized as being most unlike the Federal Rules—that nevertheless tracked the jurisprudence of the state’s federal courts with respect to pleading standards and summary judgment. See generally Main, supra note 32 (examining intrastate uniformity in practice in Illinois, Nebraska, and Pennsylvania).

66. For a more detailed explication of the *Twombly* decision, see *Leading Cases*, supra note 4, at 305–09.

67. The divestiture of the American Telephone & Telegraph Company in 1984 led to the creation of regional monopolies known as “Baby Bells.” *Twombly*, 127 S. Ct. at 1961. In exchange for regional control, the Baby Bells were excluded from competing in the long-distance service market. Federal legislation in 1996, however, allowed each ILEC to offer long-distance service in exchange for offering to share its network with CLECs. *Id.*

68. 15 U.S.C. § 1 (2000).

69. *Twombly*, 127 S. Ct. at 1962 (citation omitted).

70. *Id.*

The legal question before the Court was narrow: “We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.”⁷¹ But en route to holding that the plaintiffs must plead “enough facts to state a claim to relief that is *plausible* on its face,” the Court interred *Conley*.⁷² Justice Souter, writing for the Court, declined to take the “no set of facts” language literally because of antitrust class actions’ typically massive discovery scope and expense.⁷³ To avoid costly fishing expeditions by plaintiffs, it followed, Rule 12(b)(6) motions to dismiss were to be granted unless the pleadings reached a level of “plausibility.”⁷⁴ The Court further disavowed the notion that it was imposing a heightened pleading standard.⁷⁵

Academics, practitioners, and courts alike have struggled to define this new plausibility standard.⁷⁶ The confusion presents two facets: first, whether *Twombly* upsets notice pleading and substitutes a new benchmark; and second, if so, whether it should be limited to its antitrust facts. One panel of the Court of Appeals for the District of Columbia has “conclude[d] that *Twombly* leaves the long-standing fundamentals of notice pleading intact.”⁷⁷ By contrast, the Court of Appeals for the First Circuit found that *Twombly* “recently altered the Rule 12(b)(6) standard in a manner which gives it more heft.”⁷⁸ As to applicability, some have taken a narrow view and confined *Twombly* to its antitrust facts,⁷⁹ while others

71. *Id.* at 1963.

72. *Id.* at 1969, 1974 (emphasis added).

73. *Id.* at 1967.

74. See *id.* (“[I]t 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 . . .”).

75. See *id.* at 1973 n.14 (“[W]e do not apply any ‘heightened’ pleading standard . . .”).

76. See, e.g., *Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc.*, 525 F.3d 8, 15 & n.3 (D.C. Cir. 2008) (noting that “[m]any courts have disagreed about the import of *Twombly*” and cataloguing decisions); *Iqbal v. Hasty*, 490 F.3d 143, 155–59 (2d Cir. 2007) (“The nature and extent of that alteration is not clear because the Court’s explanation contains several, not entirely consistent, signals . . .”). To date, the Court has not granted certiorari in any case that would provide further guidance, save for *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (*per curiam*), but that case arguably provides little clarification. See *infra* notes 79–80. The Court also has yet to grant, vacate, and remand any such case. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Cohane*, 128 S. Ct. 641 (2007) (denying certiorari outright).

77. *Aktieselskabet*, 525 F.3d at 15.

78. *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008); see also A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. Rev. 431, 448–50 (2008) (describing three “zones” of pleading after *Twombly*).

79. See, e.g., J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 St. John’s L. Rev. 849, 851–53 (2008). This constricted interpretation certainly has some grounding. The Court framed the question presented narrowly, and its discussion spoke specifically about the antitrust context. See *supra* text accompanying note 71. Furthermore, one must consider the Court’s decision in *Erickson*, which cites *Twombly* for the proposition that the pleadings “need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon

have advanced a more expansive reading.⁸⁰ In practice, as Judge Colleen McMahon of the Southern District of New York explains, “District courts have applied *Twombly* to every conceivable type of claim found on their dockets, including patent and trademark infringement claims, Section 1983 actions, free exercise claims, housing discrimination actions, Individuals with Disabilities Education Act and ERISA claims, and immigration matters.”⁸¹

Whether *Twombly* represents a “dramatic departure from settled procedural law”⁸² remains to be seen. Yet it is not necessary for this Note to concretely define the scope of its holding. Admittedly, a broader reading creates a greater divergence from *Conley*’s precedential interpretation of the Rules, which in turn creates a greater possibility of disuniformity. What is clear, however, is that even if *Twombly* applies only to the smallest range of cases, the decision represents a dramatic shift in tone—the *Conley* notice-pleading monolith has cracked.⁸³ Given this change, this Note posits that states now face an important decision: Should they accept *Twombly* or retain *Conley*’s explication of Rule 8(a)?⁸⁴ Part II ex-

which it rests.” 127 S. Ct. at 2200 (quoting *Twombly*, 127 S. Ct. at 1964); see also McMahon, *supra* note 61, at 860–61 (discussing Court’s “schizophrenic[]” decision that approvingly cited *Conley* and its liberal pleading standard). Another possibility is that *Twombly* simply reiterates the existing rule that plaintiffs may plead themselves out of court but requires plaintiffs in antitrust cases to rely on more than a theory of parallelism. See Michael Dorf, *The End of Notice Pleading?*, Dorf on Law, May 24, 2007, at <http://michaeldorf.org/2007/05/end-of-notice-pleading.html> (on file with the *Columbia Law Review*) (discussing possibility that Court rightly affirmed dismissal if *Twombly* complaint relied solely on allegation of parallelism).

80. See, e.g., *Phillips v. County of Allegheny*, 515 F.3d 224, 230–35 (3d Cir. 2008) (“[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context.”); *Iqbal*, 490 F.3d at 157 n.7 (“[I]t would be cavalier to believe that the Court’s rejection of the ‘no set of facts’ language from *Conley*, which has been cited by federal courts at least 10,000 times in a wide variety of contexts . . . applies only to section 1 antitrust claims.”); *Anticancer Inc. v. Xenogen Corp.*, 248 F.R.D. 278, 281–82 (S.D. Cal. 2007) (cataloguing decisions that dismissed non-antitrust claims under plausibility standard); *Dodson*, *supra* note 3, at 138 (“[T]he Court’s opinion presages more expansive application.”). Commentators, meanwhile, have distinguished *Erickson* because of the specific Eighth Amendment circumstances and the plaintiff’s pro se status, a class to which courts have accorded a certain liberalism. See *Spencer*, *supra* note 78, at 455–57.

81. McMahon, *supra* note 61, at 859 (citations omitted).

82. *Twombly*, 127 S. Ct. at 1975 (Stevens, J., dissenting). But see Steve Lash, *Reach of Antitrust Ruling Debated*, *Chi. Daily L. Bull.*, Nov. 15, 2007, at 3 (discussing view of practicing attorney that “‘*Twombly* is not any kind of seismic shift at all’”).

83. See *Dodson*, *supra* note 3, at 138 (“Clearly, *Conley*’s ‘no set of facts’ language is dead, at least as to the meaning that was customarily ascribed to it.”); McMahon, *supra* note 61, at 858 (“The commentators did not believe for a minute that *Twombly* wrought no change in *Conley*, no matter what the Supreme Court said.”).

84. Shortly before this Note’s publication, Massachusetts became the first state to face the question directly. After quoting multiple passages from *Twombly*, the state’s Supreme Judicial Court noted, without elaborating further, that it would follow the Supreme Court’s persuasive interment of *Conley*’s “no set of facts” language in favor of *Twombly*’s clarification. See *Iannacchino v. Ford Motor Co.*, 888 N.E.2d 879, 890 (Mass. 2008).

plores two major factors—forum-shopping concerns and the relationship between notice pleading and discovery—that states must consider in answering this question.

II. FACT AND FICTION: *TWOMBLY* AND STATE COURTS

Against the background of uniformity discussed in Part I, commentators have debated *Twombly*'s adoption in state courts⁸⁵ with two themes emerging. First, they have touted federal-state intrastate uniformity as a way to prevent forum shopping.⁸⁶ Second, some have recognized that a substitution of pleading standards must be done while considering the effect on the procedural system as a whole.⁸⁷ These concerns touch upon the two facets of the *Twombly* question facing states: The forum-shopping rationale for uniform pleading standards asks what pleading standard state courts should apply in adjudicating federal law claims; the procedural system point relates to whether *Twombly* should be uniformly adopted such that it will govern adjudication of state law claims.

This Part entertains both themes independent of whether the *Twombly* rule is justified on its own terms. Part II.A seeks to clarify the forum-shopping concern using a methodology proposed by Professor Kevin Clermont. It concretely determines the circumstances in which savvy litigants can use a federal-state intrastate pleading standard dichotomy to forum shop. Part II.B turns to whether states should apply *Twombly* to state claims by considering the relationship between pleadings, motions to dismiss, and discovery. It then offers a construct for understanding the interaction of these pretrial mechanisms. Ultimately, this Part argues that the Supremacy Clause significantly minimizes the forum-shopping concern, thus undercutting the uniformity rationale for adopting *Twombly* in state courts. It further concludes that *Twombly*'s cost-benefit analysis may not comport with many existing state systems of procedure, specifically with the mechanisms provided for pretrial discovery.

A. Reverse-Erie Doctrine and Forum Shopping

That forum shopping is a concern for *Conley* states is unsurprising. Doctrinal uncertainties aside, *Erie Railroad Co. v. Tompkins* and its progeny

85. See, e.g., Andrée Sophia Blumstein, A Higher Standard, Tenn. B.J., Aug. 2007, at 12, 14–15 (predicting “*Twombly*’s influence will likely come to be felt in state civil litigation”); The Fact of the Matter: *Twombly* and a Battle over Pleading, Ariz. Att’y, Sept. 2007, at 18, 18 (introducing debate).

86. Pollock, *supra* note 8, at 26 (“Without such uniformity, litigants would be encouraged to shop for the more procedurally friendly forum.”); see also *Brown v. Credit Ctr., Inc.*, 444 So. 2d 358, 364 n.1 (Miss. 1983) (“A disparity in interpretation [of identical rules] would inevitably lead to forum shopping, which has been a perceived evil for at least half a century.” (citation omitted)).

87. See Mark Samson, Arizona Should Avoid *Twombly*’s Pernicious Effects, Ariz. Att’y, Sept. 2007, at 27, 28 (underscoring Arizona’s commitment to notice pleading in relation to state discovery reforms).

have delivered a consistent, core message: The danger of forum shopping emerges when state claims are considered in federal fora under diversity jurisdiction.⁸⁸ Indeed, the Court's current explication of the *Erie* doctrine raises the possibility that forum shopping might occur if state and federal pleading standards differ.⁸⁹ But would the same danger arise in the reverse-*Erie* context in which federal claims are heard in state fora?⁹⁰ This Note asserts that the danger, if any, is minimal.

88. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 74–77 (1938) (exploring discrimination that had developed in diversity claims).

89. This subpart focuses on forum shopping in the state adjudication of federal claims. An important question with forum-shopping implications, however, arises when a federal court sitting in diversity adjudicates a state claim. Under *Hanna v. Plumer*, if state procedure and a Federal Rule of Civil Procedure conflict, the federal rule prevails, provided that it satisfies the Constitution and federal statutes. See 380 U.S. 460, 463–65 (1965). Thus, would *Twombly* apply in a federal diversity action if *Conley* would normally govern in state court? And if so, would this application of Rule 8 potentially violate the Rules Enabling Act (REA)? See 28 U.S.C. § 2072(b) (2000) (“Such rules shall not abridge, enlarge or modify any substantive right.”). These unsettled questions are themselves noteworthy and deserving of extensive treatment. Short of providing a full analysis, I briefly outline the arguments pertinent to forum shopping here.

At bottom, the debate is about the meaning of the word “substantive” in the REA. Compare John Hart Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 718–38 (1974) (viewing “substantive” expansively through federalism lens), with Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015, 1025–26, 1122–25 (1982) (viewing “substantive” narrowly through separation-of-powers lens). The Court initially narrowed the substantive rights proviso to a significant degree. See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13–14 (1941). But recent decisions have questioned the presumptive validity of the Rules, clearly recognizing, but ultimately not holding, that certain interpretations of individual rules might violate the REA. See, e.g., *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 503–04 (2001) (unanimous decision) (refusing to interpret Rule 41(b) in way that might “abridge” right under REA); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (construing Rule 23(b)(1)(B) to “minimize[] potential conflict with the Rules Enabling Act, and [to] avoid[] constitutional concerns”); see also Note, *The Rules Enabling Act and the Limits of Rule 23*, 111 Harv. L. Rev. 2294, 2294 n.5 (1998) (listing dissents that argue Court's interpretation of some rules violates REA). Thus far the Court has managed to interpret the questioned rules in ways that avoid the REA's substantive rights proviso. A conflict between *Conley* and *Twombly*, however, arguably presents a binary choice with little interpretive wiggle room.

Applying *Twombly* to a federal diversity case in lieu of a state's *Conley* standard may raise a direct challenge to the REA. A judgment finding a violation of the statute would not lead to a forum-shopping situation because *Conley* would govern in either fora. A finding of no violation, however, would mean application of different pleading standards in state and federal courts, allowing a litigant to forum shop. This outcome would give some force to the pro-*Twombly* camp's forum-shopping concern. And yet, its central fear that disuniformity will result in a state court becoming a haven for speculative lawsuits, see Pollock, *supra* note 8, at 26, is inapt because federal court will remain the preferred forum for defendants who wish to invoke a raised pleading standard. A dual federal-*Twombly* and state-*Conley* construct leaves a state no more open to an influx of cases than uniform application of plausibility pleading.

90. Others have used the descriptions “converse-*Erie*,” e.g., Alfred R. Light, *Lifting Printz Off Dual Sovereignty: Back to a Functional Test for the Etiquette of Federalism*, 13 BYU J. Pub. L. 49, 67 (1998), or “inverse-*Erie*,” e.g., Gregory Gelfand & Howard B. Abrams, *Putting Erie on the Right Track*, 49 U. Pitt. L. Rev. 937, 941 n.10 (1988).

1. *The Reverse-Erie Problem.* — The reverse-*Erie* doctrine tackles the same type of choice-of-law question that the *Erie* doctrine explores: In state court, does state or federal procedural law govern a federal claim?⁹¹ Most often, the Supreme Court has developed its reverse-*Erie* jurisprudence in the context of civil claims under the Federal Employers' Liability Act (FELA)⁹² and section 1983 of the Civil Rights Act of 1871.⁹³ Specifically, four leading cases⁹⁴ have considered whether federal procedure should follow a federal claim into state court.⁹⁵

The first, and most pertinent to this Note's discussion, is *Brown v. Western Railway of Alabama*.⁹⁶ The plaintiff was injured while working in a railroad yard and brought suit in Georgia state court under the FELA.⁹⁷ At the time, the Georgia rule of practice directed courts to construe

91. Some commentators, however, dispute this framing of the question. See, e.g., Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 *Brook. L. Rev.* 1057, 1109–10 (1989) (finding fault in idea that state court's choice-of-law decision in adjudicating federal claims is "mirror image" of federal court's decision in diversity cases). It is useful to clarify and focus the scope of inquiry here. State claims can be filed in state court or, if they meet the requirements for diversity, be removed to or filed in federal court. In the former scenario, there is no alternative to the application of state procedural rules. The latter, meanwhile, presents the classic *Erie* scenario. See *supra* note 89 (discussing *Twombly* under *Erie* analysis). In contrast, federal claims may be filed in federal court under federal question jurisdiction or in state courts under general jurisdiction. Federal claims filed in state court are generally removable to federal court, save for certain exceptions. See 28 U.S.C. § 1441. There are three general categories of nonremovable claims. First, federal law explicitly designates as nonremovable claims brought under three federal statutes and state workmen's compensation laws. See *id.* § 1445. Second, state courts are deemed to have exclusive jurisdiction over certain federal claims. See, e.g., *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1150 (4th Cir. 1997) (granting exclusive state court jurisdiction to claims brought under Telephone Consumer Protection Act of 1991). Finally, defendants that assert a federal defense to a state law claim will be trapped in state court under the well-pleaded complaint rule. See *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908) (finding no jurisdiction over plaintiff's state law claim even though federal defense was asserted). The forum-shopping concern is limited to those federal law claims that may be brought initially in either federal or state court, but for which removal to federal fora is prohibited, a small subset of civil actions.

92. 45 U.S.C. §§ 51–60 (2000); see also Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 458 (5th ed. 2003) [hereinafter Fallon, Meltzer & Shapiro, *Federal Courts*] (noting frequency of reverse-*Erie* FELA cases).

93. 42 U.S.C. § 1983 (2000).

94. *Johnson v. Fankell*, 520 U.S. 911 (1997); *Felder v. Casey*, 487 U.S. 131 (1988); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952); *Brown v. W. Ry. of Ala.*, 338 U.S. 294 (1949).

95. Kevin M. Clermont, *Federal Courts, Practice & Procedure: Reverse-Erie*, 82 *Notre Dame L. Rev.* 1, 23 (2006) (listing cases). See generally Paul J. Katz, *Comment, Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-Erie Analysis*, 99 *Nw. U. L. Rev.* 1315, 1333–40 (2005) (reviewing FELA and § 1983 case law).

96. 338 U.S. 294.

97. *Id.*

pleading allegations “most strongly *against* the pleader.”⁹⁸ Because the pleadings did not specify that the plaintiff’s vision was somehow obscured or that he could not have avoided the railcar part that caused his injury, the Georgia state courts granted and then affirmed the general demurrer to the complaint.⁹⁹ In essence, Georgia imposed a raised pleading standard that required the plaintiff to assert facts supporting, and not simply noticing, a claim of negligence attributable to his employer.

Two concepts central to the reverse-*Erie* doctrine are found here. First, the Court’s focus on uniformity responded directly to the forum-shopping concern. In its own words, it granted certiorari specifically because “the implications of the dismissal were considered important to a correct and *uniform* application of the federal act in the state and federal courts.”¹⁰⁰ The Court then rejected Georgia’s contention that state courts “are free to follow their own rules of ‘practice’ and ‘procedure.’”¹⁰¹ Otherwise, it reasoned, litigants could employ local rules to abridge congressionally granted rights under the FELA.¹⁰² Indeed, if the Georgia court instead had considered the claim under the Federal Rules, Brown would have met the notice requirement of Rule 8(a).¹⁰³ Thus, invocation of the Federal Rules, instead of application of the Georgia rule, would have upheld the granted statutory rights as Congress intended. Similar to the *Erie* context, if state courts refused to apply federal procedure when adjudicating federal claims, a plaintiff could choose a more procedurally friendly forum and thereby gain an unfair advantage.¹⁰⁴

Second, Justice Black touched upon the key difference between the *Erie* and reverse-*Erie* scenarios: the Supremacy Clause.¹⁰⁵ After holding specifically that strict state pleading standards could not frustrate the attainment of federally granted statutory rights, he generalized the sentiment in stating that “the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.”¹⁰⁶

98. *Id.* (emphasis added). Federal practice, in contrast, construes the facts *in favor* of the pleader. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 325 (1991) (“[W]e must assume the truth of the material facts as alleged in the complaint.”).

99. *Brown*, 338 U.S. at 294–95.

100. *Id.* at 295 (emphasis added).

101. *Id.* at 296.

102. *Id.*

103. See *id.* at 298 (“Certainly these allegations are sufficient to permit introduction of evidence from which a jury might infer that petitioner’s injuries were due to the railroad’s negligence . . .”).

104. If Brown did consciously forum shop, strangely he did so to his disadvantage. See Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 *Colum. L. Rev.* 489, 509 n.63 (1954) (“The irony of the cases cited [including *Brown*] . . . is that the plaintiffs, to whose benefit the rulings redounded, had deliberately chosen state court, and the statute under which they sued was one of the few in which Congress had expressly prohibited removal.”).

105. U.S. Const. art. VI, cl. 2.

106. *Brown*, 338 U.S. at 298–99.

If local practice trumped federal law, then “desirable uniformity in adjudication of federally created rights could not be achieved.”¹⁰⁷ Although Justice Black did not explicitly invoke the Clause, his diction reflects the spirit of preemption when he described the absurdity of state procedural law “defeat[ing]” federal rights.¹⁰⁸

In contrast to *Brown*, the Court in *Johnson v. Fankell* more recently narrowed the reach of federal procedure into state courts under a different methodology.¹⁰⁹ There, the plaintiff brought a § 1983 due process claim against Idaho liquor-licensing officials.¹¹⁰ After the trial court denied the State’s motion to dismiss, which asserted a qualified immunity defense, the defendants appealed. Ordinarily under federal procedure, and indeed the rules of numerous states, such rulings on qualified immunity defenses are subject to interlocutory appeal.¹¹¹ But the Idaho Supreme Court dismissed the appeal under its own state laws, which did not classify the trial court’s decision as a requisite final judgment and thus foreclosed interlocutory appeal.¹¹²

In affirming the decision, the U.S. Supreme Court created an inconsistency—would-be appellants in Idaho state courts were denied an interlocutory appeal, while defendants appealing a similar decision in federal (or even other state) courts are allowed to appeal. Furthermore, unlike the plaintiff in *Brown*,¹¹³ it was the defendants who were disadvantaged by the forum, which they had no power to change. Nevertheless, the Court rejected the “different outcomes” argument. In balancing the competing sovereigns’ interests, a technique not used in *Brown*, the Court found the federal interest in providing a qualified immunity defense to be weak when compared to the state interest in managing the scope of interlocutory appeal.¹¹⁴

The Court’s reliance on both implied preemption under the Supremacy Clause (*Brown*) and judicial balancing (*Johnson*) creates some uncertainty as to the reach of federal procedure into state courts. While these examples offer paradigmatic reverse-*Erie* scenarios and show that

107. *Id.*

108. *Id.*

109. 520 U.S. 911 (1997).

110. *Id.* at 913.

111. See *id.* at 914 (“[Petitioners] pointed out that some state courts, unlike the Idaho Supreme Court, allow interlocutory appeals of orders denying qualified immunity on the theory that such review is necessary to protect a substantial federal right.”).

112. *Id.* at 913–14. To be clear, the decision characterized the motion to dismiss as one for summary judgment. See *id.* at 914 n.1.

113. See *supra* note 104.

114. *Johnson*, 520 U.S. at 919–20, 922–23. Professor Herman advocates for balancing interests in the § 1983 context. See Herman, *supra* note 91, at 1113 (“In sum, there is simply no substitute for a careful balancing of the state and federal interests involved on a case-by-case basis.”); see also *infra* note 117 (discussing alternative approaches). But see Martin H. Redish & Steven G. Sklaver, Federal Power to Commandeer State Courts: Implications for the Theory of Judicial Federalism, 32 *Ind. L. Rev.* 71, 104–05 (1998) (finding judicial ad hoc balancing unpredictable and ill-suited for reverse-*Erie* questions).

federal procedure can invade state fora—a fact that moderates the forum-shopping concern—they also demonstrate that federal preemption is not a per se rule. This Note now turns to a methodology for determining when federal claims will arrive in state courts with federal procedure in tow.

2. *A Reverse-Erie Methodology*. — The academy has made few comprehensive efforts to offer a reverse-*Erie* methodology in comparison to its *Erie* obsession.¹¹⁵ “While everyone has an *Erie* theory and stands ready to debate it,” Professor Clermont laments, “almost no one has a theory of reverse-*Erie*, and no one at all has developed a clear choice-of-law methodology for it: reverse-*Erie*, often misunderstood, mischaracterized, and misapplied by judges and commentators, goes strangely ignored by most scholars.”¹¹⁶ To fill the void, Professor Clermont recently formulated a methodology for studying the reverse-*Erie* context, of which this section provides a brief overview.¹¹⁷ Notably, the approach amalgamates the pre-

115. In fact, it was not until the mid-1950s that the first major scholarly work linked this circumstance specifically to the emerging *Erie* doctrine. Alfred Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 *Ohio St. L.J.* 384, 384–85 (1956) (“Two recent cases in the Supreme Court have induced speculation as to whether a development corresponding to *Erie* is taking place on the state court level in FELA actions and perhaps in all actions involving the assertion of federally-created rights.”).

116. Clermont, *supra* note 95, at 2.

117. While this Note draws heavily from Professor Clermont’s work, it also recognizes the longstanding disagreement about reverse-*Erie* in the legal academy. See generally Scott T. Schutte, Note, *How Far Is Too Far: Analyzing the Collateral Law Applicable in State Court Section 1983 Litigation*, 72 *Chi.-Kent L. Rev.* 875, 888–910 (1997) (offering approaches to reverse-*Erie* problem in § 1983 context). Professor Hart argues that “federal law takes the state courts as it finds them,” provided that the state rule does not “nullify the asserted rights.” Hart, *supra* note 104, at 508. This outlook may also help to explain the lack of interest in creating a reverse-*Erie* methodology. See *supra* notes 115–116 and accompanying text. One of the current authors of Professor Hart’s own federal courts textbook, however, has criticized this view because it “reflect[s] either a complete denial of federal constitutional power to reach state procedures, or a presumption of working federalism that should rarely if ever be disturbed.” Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 *Harv. L. Rev.* 1128, 1176 (1986). Furthermore, the fifth edition of Hart and Wechsler’s textbook strongly suggests that any analogy to *Erie* is “more misleading than helpful, since the respective obligations of state and federal courts are not, in view of the Supremacy Clause, symmetrical.” Fallon, Meltzer & Shapiro, *Federal Courts*, *supra* note 92, at 461; see also Herman, *supra* note 91, at 1109–13 (seeing analogy between *Erie*/diversity and reverse-*Erie*/section 1983 cases as inapt). Resolving whether this area of jurisprudence should be viewed solely in terms of preemption alone or preemption mixed with choice-of-law principles under the reverse-*Erie* banner is well beyond the scope of this Note. Professor Clermont’s work, which takes the latter tack, however, informs the *Twombly* discussion by drawing explicit connections between the familiar *Erie* scenario and the reverse-*Erie* problem, see *supra* notes 88–91 and accompanying text, and highlighting the key differences between them. Analyzing *Twombly* and the choice facing *Conley* states through this lens most directly addresses the fear of forum shopping that some commentators believe will occur if states reject *Twombly*. See *supra* note 86 and accompanying text.

emption and balancing approaches exemplified by *Brown* and *Johnson*.¹¹⁸ This section provides the analytical framework through which this Note will discuss the *Conley-Twombly* dichotomy and forum-shopping concern.

The analysis begins with the *Erie* doctrine, specifically identifying when a federal court has a choice between federal and state procedural law. There are generally three categories. First, the Constitution may simply mandate a given practice,¹¹⁹ and because the Constitution cannot invalidate itself, these directives are presumptively valid and binding.¹²⁰ In the next category, Congress explicitly chooses the procedure, or authorizes a delegate to do so. Here, a federal court has a role in reviewing the constitutionality of Congress's action, but it still has no power to choose the procedure because Congress's decision is likewise binding.¹²¹ Only in the third category, where neither the Constitution nor Congress has given direction, does a federal court decide whether to apply state or federal law.¹²² In doing so, the federal court applies the Supreme Court's judicial choice-of-law methodology developed under *Erie* and its progeny, which is part of the federal common law.¹²³

Reverse-*Erie* analysis uses the same three-tiered categorization, but the distinguishing factor is the Supremacy Clause.¹²⁴ In the first two categories where the Constitution or Congress has spoken, a choice to use federal procedural law is binding on the state court under the Supremacy Clause. Although in the second category Congress may expressly preempt state laws, implied preemption is more likely to inform the reverse-*Erie* scenario when pleading standards are involved.¹²⁵ The Court in *Brown*, for instance, did not find that Congress explicitly inserted federal procedural law into the FELA; rather, it clearly expressed the view that Georgia's local pleading practice interfered with the realization of a fed-

118. See *infra* text accompanying note 128. But see Richard H. Fallon, Jr., Daniel J. Meltzer & David L. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 74 (Supp. 2007) (arguing that question is really one of preemption).

119. The Seventh Amendment is one such example. See Clermont, *supra* note 95, at 10.

120. See *id.*

121. See *id.*

122. *Id.* at 11.

123. See *id.* at 13–17. Under Professor Clermont's view of the *Erie* doctrine's evolution, the Court appeared to favor a balancing of state and federal interests to create general federal rules until the decision in *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996) thrust the doctrine toward "specific interest balancing." *Id.* at 17.

124. U.S. Const. art. VI, cl. 2. Because federal substantive law is the predicate for reverse-*Erie* analysis, the Supremacy Clause plays a pivotal role in the analysis. See Katz, *supra* note 95, at 1327 ("[A] reverse-*Erie* analysis must always focus on the import of the Supremacy Clause.").

125. The preexisting Federal Rules govern the vast majority of substantive federal laws. Express preemption—which occurs, for example, under the Private Securities Litigation Reform Act of 1995 (PSLRA), see 15 U.S.C. § 78u-4(b)(1)–(2) (2006) (requiring plaintiffs to state with particularity facts regarding violation and scienter)—is likely to be an anomaly. See generally Christopher M. Fairman, *Heightened Pleading*, 81 *Tex. L. Rev.* 551, 596–612 (2002) (explaining genesis of statutory heightened pleading under PSLRA).

eral goal.¹²⁶ These are the easy cases where preemption of some sort ends the analysis.¹²⁷

That leaves the third category, where neither the Constitution nor Congress has spoken. The dominance of the Supremacy Clause might lead one to conclude that state courts are unable to rebuff the intrusion of federal law, but as Professor Clermont notes, “A role for preemption is obvious, but there is a role for judicial choice of law too.”¹²⁸ Though this third category does not involve federal constitutional or statutory law, the Supremacy Clause still governs because “the reverse-*Erie* choice-of-law methodology is a federal common law creation of the U.S. Supreme Court that the state courts must follow.”¹²⁹ That is, if the Court has already provided an answer to the choice-of-law question, as it had in *Johnson*,¹³⁰ its controlling decision constricts state court discretion. Only when a state court resolves a new federal common law question does it employ choice-of-law methodologies acting largely as a federal court.¹³¹

3. *The Narrow Scope of Twombly’s Forum-Shopping Concern.* — Applying this methodology to *Twombly* and pleading standards, this Note argues—while recognizing the open question presented by the traditional *Erie* scenario¹³²—that the forum-shopping concern is minimal. Generally, through the reverse-*Erie* doctrine, a “great amount of federal law—be it constitutional, statutory, or common law—flows down to apply in state courts,” thus removing the opportunity to apply different procedure.¹³³ Furthermore, the analysis leads to the conclusion that in practice “[f]ederal rights and duties should not vary from state to state.”¹³⁴

These statements lose no force when applied specifically to pleading standards. The ability to remove federal cases significantly reduces forum-shopping opportunities. If plaintiffs believe that they can take advantage of a pure notice-pleading standard, they will file in state court.¹³⁵ But, as noted above, the majority of these claims are removable to federal

126. See *supra* notes 96–108 and accompanying text.

127. That is not to say the determination of whether implied preemption has in fact occurred is an easy question. See generally Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 5.2 (3d ed. 2006) (exploring problems of identifying preemption). For example, scholars are divided on the type of preemption used in *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952). Compare Clermont, *supra* note 95, at 40 (asserting that *Dice* used conflict preemption), with Redish & Sklaver, *supra* note 114, at 102–05 (asserting that *Dice* used choice-of-law balancing).

128. Clermont, *supra* note 95, at 20.

129. *Id.*

130. See *supra* notes 109–114 and accompanying text.

131. Clermont, *supra* note 95, at 30–32.

132. See *supra* note 89.

133. Clermont, *supra* note 95, at 21.

134. *Id.* at 36. Professor Clermont explains that because parties typically can access federal court equally, the larger danger is horizontal interstate forum shopping. *Id.* Thus, intrastate forum shopping, the chief concern of current pro-*Twombly* state reformers, is the less likely possibility.

135. But see *supra* note 104 (describing peculiar choice of plaintiff in *Brown*).

court under federal question jurisdiction.¹³⁶ Therefore, even though plaintiffs initially may shop for a state court's notice-pleading standard, in practice most federal claims will be removed and adjudicated under the plausibility standard in federal court because defendants will prefer a more stringent pleading standard.

With respect to FELA cases, the U.S. Supreme Court has already provided clear guidance. *Brown* held that state courts should not apply a local raised pleading standard; rather, the federal pleading standard presumptively follows the federal law into state court.¹³⁷ Accordingly, under reverse-*Erie* analysis the Supremacy Clause binds state courts to this decision.¹³⁸

The same reasoning governs civil pleading standards in other contexts. In both *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit* and *Swierkiewicz v. Sorema N.A.*, the Court unanimously held that federal courts' imposition of heightened pleading standards when adjudicating federal claims contravened Rule 8(a)'s "short and simple statement" requirement.¹³⁹ State courts—which function simply as federal courts when entertaining such claims in light of the Supremacy Clause¹⁴⁰—must read these decisions as authoritative. And because the Court unequivocally rejected heightened pleading standards regardless of the federal substantive law—save for Rule 9(b) and federal statutes demanding specific pleadings¹⁴¹—*Twombly*'s preservation of these decisions¹⁴² suggests that state and federal courts should ultimately apply an identical standard to federal civil claims generally.

Yet, even assuming that no federal court has provided guidance with respect to pleading standards under a specific federal law—that is, when a state court finds itself in Professor Clermont's third reverse-*Erie* category, where a new federal common law question presents itself—the forum-shopping concern is only temporary. Neighboring federal courts

136. See *supra* note 91.

137. *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298–99 (1949); see *supra* notes 96–108 and accompanying text (tracing Court's rejection of local raised pleading standard in *Brown*).

138. One may argue that the scenario in *Brown* (aiding *plaintiffs* by applying lower federal pleading standard) does not inform the present situation regarding *Twombly* (aiding *defendants* by applying raised pleading standard). This distinction, however, ultimately proves untenable. See *infra* notes 148–151 and accompanying text.

139. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (declining to find exception to "Rule 8(a)'s simplified pleading standard"); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1992) ("Rule [8(a)] meant what it said . . ."). Although § 1983 cases have provided scholars with a large set of cases for analyzing the reverse-*Erie* doctrine, *Leatherman* does not directly inform the forum-shopping concern here because these claims are removable to federal court. See 28 U.S.C. § 1443 (2000) (providing for removal of civil rights cases); *supra* note 91 (focusing on class of cases that potentially allow forum shopping).

140. See *supra* text accompanying note 131.

141. *Sorema*, 534 U.S. at 513 (noting that Rule 8(a) applied to "all civil actions, with limited exceptions" such as Rule 9(b)).

142. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1973 n.14 (2007).

will eventually consider these federal claims.¹⁴³ And while it remains unclear whether state courts are bound by local federal circuit or even district court decisions,¹⁴⁴ the reverse-*Erie* doctrine counsels state courts to arrive at the probable holding the U.S. Supreme Court would reach if it considered the question.¹⁴⁵ If a state court elects to wait for clear guidance on each individual federal law, the Court will likely provide guidance to promote the federal interests strongly recognized in *Brown*.¹⁴⁶

Twombly, however, presents one significant distinguishing factor. *Brown* again illustrates the point. There the Court struck down the use of Georgia's heightened pleading standard because that practice prevented litigants from vindicating rights granted under the FELA as Congress intended.¹⁴⁷ With *Twombly* the situation is reversed—the plausibility standard would govern in federal courts, while the more liberal notice-pleading standard would apply in *Conley* states.¹⁴⁸ In other words, the state standard would benefit rather than burden the plaintiff. Thus, one might argue that this situation is distinguishable and normatively acceptable because it allows more plaintiffs to air their alleged grievances. The Court's decision in *Atlantic Coast Line Railroad v. Burnette*, however, precludes this reasoning.¹⁴⁹ In that case, the Court reversed a state court's decision to grant an extension under state law beyond the two-year statute of limitations Congress had chosen for FELA actions. Regardless of issues of supremacy, the Justices explained, “[W]hen a law that is relied on as a source of an obligation in tort . . . sets a limit to the existence of what it creates, other jurisdictions naturally have been *disinclined to press the obligation farther*.”¹⁵⁰ Courts could not modify the limitation without

143. For example, it is unlikely that all parties will file all FELA claims in perpetuity in a given jurisdiction in state court (rendering them nonremovable), thus preventing federal courts from opining on the applicable pleading standard.

144. See *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (explaining that while Arkansas trial court is bound by U.S. Supreme Court and Arkansas appellate courts, its decision to follow Eighth Circuit was voluntary); Charles Alan Wright & Mary Kay Kane, *Law of Federal Courts* § 45, at 294 n.25 (6th ed. 2002) (providing citations to sources that discuss “interesting question of the weight state courts should give to decision of lower federal courts when the state court is applying federal law”).

145. See *supra* text accompanying note 131.

146. See *supra* notes 106–107 and accompanying text; cf. *Michigan v. Long*, 463 U.S. 1032, 1042 n.8 (1983) (“[Because state courts] necessarily create a considerable body of ‘federal law’ . . . this Court has become more interested in the application and development of federal law by state courts . . .”).

147. See *supra* text accompanying notes 96–108.

148. Cf. Fallon, Meltzer & Shapiro, *Federal Courts*, *supra* note 92, at 464 (discussing FELA cases where state procedural rules were disallowed because of their generosity).

149. 239 U.S. 199 (1915).

150. *Id.* at 201 (emphasis added) (citations omitted). The Supreme Court of North Carolina waived the statute of limitations because under state law the defendant failed to affirmatively raise this defense in its answer. See *Burnett v. Atl. Coast Line R.R. Co.*, 79 S.E. 414, 415–17 (N.C. 1913), *rev'd*, 239 U.S. 199 (1915). A state could, though, provide increased protection for matters of state law if there is an independent state ground. See

harming the balance of interests Congress purposefully wrote into the statute.¹⁵¹

Applied here, it is immaterial that a *Conley* state's relatively looser pleading standard actually enlarges the right instead of defeating it as in *Brown*. As *Burnette* demonstrates, just as the scales cannot be weighted in favor of the defendant, they similarly cannot be weighted in favor of the plaintiff.¹⁵² Both parties must take the federal law with the prescribed federal procedure—whether implicit or explicit—that Congress assumed would apply when creating the federal right.¹⁵³

Ultimately, a state that finds *Twombly* unjustified should not abandon its preference in the interest of uniformity because little to no risk of forum shopping arises. Conversely, a state that finds *Twombly* preferable to *Conley* should not change its pleading standard under the false impression that it also will prevent (or even reduce) forum shopping, but rather because it finds the paradigm cost-justified on its own terms. The next section argues, though, that states should bring to bear additional considerations in making this decision. In particular, states must ensure that their discovery mechanisms map those of the current Federal Rules in order to apply and reach the same cost-benefit result as *Twombly*.

B. *Balancing Procedural Rules*

1. *Pleadings and Discovery*. — A shift in pleading standards necessarily has an impact on the whole of pretrial procedure.¹⁵⁴ When the U.S. Supreme Court decided *Conley* and expressed its commitment to notice pleading, it did so while recognizing that a federal rule cannot be considered in isolation: “Such simplified ‘notice pleading’ is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim

Long, 463 U.S. at 1037–45 (holding that U.S. Supreme Court will not review state court decision if based on state and not federal precedents).

151. See *Burnette*, 239 U.S. at 201 (recognizing that Congress may limit these obligations for “special reasons”).

152. See *supra* text accompanying notes 149–151.

153. See Frank H. Easterbrook, *Substance and Due Process*, 1982 Sup. Ct. Rev. 85, 112–13 (“Substance and process are intimately related. The procedures one uses determine how much substance is achieved, and by whom. Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained.”).

154. Watson Clay, *May the Federal Civil Rules Be Successfully Adopted to Improve State Procedure?*, 24 F.R.D. 437, 439 (1960) (describing Rules as “interlocking scheme of procedure” with “any change in one rule . . . adversely affect[ing] the application or interpretation of other rules”); Thomas E. Skinner, *Alabama’s Approach to a Modern System of Pleading and Practice*, 20 F.R.D. 119, 121 (1958) (“No change would be recommended by the Commission without knowing the effect such changes would have upon the present practice”); cf. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 Colum. L. Rev. 1681, 1721–23 (2005) (noting “the way in which the separate provisions of a single statute work together, united by their contribution to a common statutory purpose”).

and defense and to define more narrowly the disputed facts and issues.”¹⁵⁵ This statement takes notice pleading as a constant and allows the trial judge, through discretionary discovery rules and other pretrial mechanisms,¹⁵⁶ to adjust the procedural construct accordingly to accommodate a “short and simple statement” under Rule 8(a).

In contrast, *Twombly* focused on the relationship between pleadings and discovery from the reverse viewpoint and qualified the dynamic described in *Conley*. In order to address the cost of discovery in antitrust suits,¹⁵⁷ Justice Souter began with that concern as a constant and adjusted the mechanisms preceding the discovery phase of litigation to achieve the desired result.¹⁵⁸ In effect, *Twombly* added the corollary that simplified notice pleading is made possible by liberal discovery rules, *but only if discovery costs are not excessive*. When the risk of high costs appears to be significant in the opinion of the district court judge, courts must sacrifice notice pleading.

This interplay between procedural rules is not lost on *Conley* states. One Arizona attorney has argued that adopting *Twombly* and its plausibility-pleading standard would not comport with the state discovery reforms of the early 1990s, known more commonly as the “Zlaket Rules.”¹⁵⁹ Although by the end of the article the author also rejected *Twombly*’s policy rationale, his objection to adopting the plausibility standard rested firmly upon its incompatibility with the Zlaket Rules, which were drafted with Arizona’s “strong historical commitment to ‘notice pleading’” in mind.¹⁶⁰

2. *The 800-Million-Email Gorilla in the Room*. — Justice Souter’s opinion clearly identifies the risk in *Twombly* to be the difficulty in managing and paying for e-discovery. Indeed, the paragraph discussing the rela-

155. *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957); see also *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (“The new rules . . . restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role . . .”).

156. The *Conley* Court names several examples of “other pretrial procedures”: Rule 12(e) (motion for a more definite statement); Rule 12(f) (motion to strike portions of the pleading); Rule 12(c) (motion for judgment on the pleadings); Rule 16 (pre-trial procedure and formulation of issues); Rules 26–37 (depositions and discovery); Rule 56 (motion for summary judgment); Rule 15 (right to amend).

355 U.S. at 48 n.9.

157. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966–67 (2007) (“[It is] quite another [thing] to forget that proceeding to antitrust discovery can be expensive.”); *Iqbal v. Hasty*, 490 F.3d 143, 156–57 (2d Cir. 2007) (“[T]he Court placed heavy emphasis on the ‘sprawling, costly, and hugely time-consuming’ discovery . . .” (quoting *Twombly*, 127 S. Ct. at 1967 n.6)); *Leading Cases*, supra note 4, at 309 (“[W]hat drove the majority’s opinion was not a lack of faith in trial judges’ abilities to manage discovery; rather, it was a lack of confidence in the Federal Rules’ system of discovery itself.”).

158. See *Samson*, supra note 87, at 28 (viewing *Twombly* as “[giving] in to a result-oriented approach”).

159. See *Tobias*, *Discovery Dilemma*, supra note 54, at 623–27 (noting leadership of Arizona Chief Justice Zlaket in reforming state discovery rules).

160. *Samson*, supra note 87, at 28.

tionship between pleadings and discovery concludes by stating the obviousness of the potential for abuse—discovery for the enormous putative class of plaintiffs and thousands of Baby Bell employees involved would have produced “reams and gigabytes of business records” covering seven years.¹⁶¹ These statements suggest the notion that discovery of this magnitude may make notice pleading, while historically feasible, ill-suited for the electronic age.¹⁶²

States are not immune to the growing cost of e-discovery in civil litigation.¹⁶³ While Arizona may deem its current discovery reforms able enough to address Justice Souter’s cost concerns in *Twombly*, not all *Conley* states are similarly situated with respect to their discovery rules.¹⁶⁴ Each state must survey its own system of procedural rules and decide whether reforming discovery rules or abandoning *Conley*’s notion of notice pleading will better address the challenges of e-discovery.¹⁶⁵

3. *A Construct for Analysis.* — This Note proposes a simple matrix to examine the relationship between states’ pleading standards and discovery rules:

161. *Twombly*, 127 S. Ct. at 1967.

162. Many commentators have analogized electronic means of storage to more familiar terms. For example, a single gigabyte can hold 500,000 typewritten pages, with typical hard drives containing 100 gigabytes of memory. See Salvatore Joseph Bauccio, E-Discovery: Why and How E-mail Is Changing the Way Trials Are Won and Lost, 45 Duq. L. Rev. 269, 271–72 (2007). Assuming a reviewer’s average rate of fifty emails per hour, it would take a hundred people over half a century to review one billion emails without electronic assistance and over half a year with electronic assistance. This work would translate to a cost of \$20 million just for a first-level review. See George L. Paul & Jason R. Baron, Information Inflation: Can the Legal System Adapt?, 13 Rich. J.L. & Tech. 10, ¶ 20 (2007), at <http://law.richmond.edu/jolt/v13i3/article10.pdf> (on file with the *Columbia Law Review*) (discussing discovery costs and time requirements of email review).

163. See *infra* note 179 (discussing similarities and differences between state and federal civil litigation dockets).

164. See Seymour Moskowitz, Rediscovering Discovery: State Procedural Rules and the Level Playing Field, 54 Rutgers L. Rev. 595, 604–05 (2002) (noting that while all states use basic discovery devices codified in Federal Rules, substantial variation exists and is increasing).

165. As mentioned above, notice pleading—embodied by congressional approval in Rule 8(a) and then jurisprudentially in *Conley*—was a hallmark of the Federal Rules. See *supra* note 48. Although the costs of litigation have challenged procedural reformers since the promulgation of the Rules, solutions had always come in the form of changes to the scope and requirements of discovery, and not to notice pleading until *Twombly*. See Christine L. Childers, Note, Keep On Pleading: The Co-existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1), 36 Val. U. L. Rev. 677, 687–93 (2002) (providing history of discovery from common law to 2000 reforms).

	Broad Discovery	Constricted Discovery
Low (<i>Conley</i>) Pleading	Traditional Federal Rules & States Group I	States Group II
Raised (<i>Twombly</i>) Pleading	Current Federal Rules Under <i>Twombly</i>	[No Examples Yet]

Traditionally the Federal Rules employed liberal pleading standards as explicated by *Conley*. In light of past rejections of heightened pleading standards,¹⁶⁶ these standards may aptly be characterized as “low” (Low Pleading). After *Twombly*, however, the pleading standard is a higher plausibility standard (Raised Pleading), though according to the Court not a heightened pleading standard.¹⁶⁷ This standard will apply at a minimum in the antitrust context and perhaps across a healthy number of civil claims.¹⁶⁸ Because by definition no *Conley* state has adopted *Twombly*, these states fall into the Low Pleading category.

As the counterpart to notice pleading, discovery under the Federal Rules¹⁶⁹ was also traditionally broad, especially in comparison to prior federal court practice.¹⁷⁰ Consequently, federal replicas likewise came to have broad discovery systems. Over time, however, two general trends have emerged.¹⁷¹ First, a number of states have retained the more traditional, broader federal discovery provisions but have not kept pace with the numerous amendments of the last decades (States Group I).¹⁷²

166. See *supra* notes 139–141 and accompanying text.

167. See *supra* note 75.

168. See *supra* notes 79–81 and accompanying text (discussing scope of *Twombly*).

169. Although discovery rules make up a significant portion of the Federal Rules, this Note focuses on a smaller number of significant provisions: Rule 16 (governing pre-trial conferences and discovery schedules), Rule 26 (providing general provisions governing discovery and disclosure), Rule 30 (limiting depositions to ten), and Rule 33 (limiting interrogatories to twenty-five).

170. See *Hickman v. Taylor*, 329 U.S. 495, 500–01 (1947) (expounding on new discovery rules as “significant innovations” that changed civil litigation such that “trials . . . no longer need[ed] to be carried on in the dark”). See generally Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691 (1998) (tracing roots and drafting of liberal federal discovery rules).

171. These trends are indeed general and this Note does not suggest a hermetic seal between the two categories of broad and constricted discovery. For example, Colorado has retained many of the traditional rules, but in certain types of cases its courts use a “simplified procedure.” See *infra* notes 174–175 and accompanying text.

172. This subset of states truly exemplifies Professor Oakley’s statement that “[i]t is the Federal Rules that have appeared to have moved away from the states, rather than vice versa.” Oakley, *supra* note 6, at 359. In fact, his 2002 study found that a shockingly low number of replica states adopted the Federal Rules amendments beginning with the 1993 discovery reforms. See *id.* at 383–84. They ranged from South Dakota, which adopted none of the tracked amendments, to Utah, which, although being nearest to federal replica status, was unquestionably “the last one standing.” *Id.* Most states currently fall in

Meanwhile, other states have swung to the other end of the spectrum by constricting their scope of discovery to a marked degree (States Group II).¹⁷³ For example, Colorado Rule of Civil Procedure 16.1 provides for “Simplified Procedure” in “civil actions that are class actions, domestic relations, juvenile, mental health, probate, water law, forcible entry and detainer.”¹⁷⁴ In addition to a damages ceiling and comprehensive disclosure requirements, the Rule specifies that “[n]ormally, no depositions, interrogatories, document requests or requests for admission are allowed.”¹⁷⁵ Thus, the traditional discovery mechanisms found in the Federal Rules and within States Group I are wholly removed from the litigation process, expediting the discovery phase. Such systems of simplified procedure, however, remain the exception, and today most states belong to States Group I.¹⁷⁶

the middle of the spectrum. See *id.* app. While some seem to be stuck in the past, as evidenced by Alabama’s patterning of its discovery provisions (except for Rule 16) on the 1970 Federal Rules, *id.* at 362, others have been more faithful to the Federal Rules amendments but still retain broader discovery than even the Federal Rules currently allow. Perhaps the most common practice is for states to adopt Rules 30 and 33 and raise, if not eliminate, the cap on the number of depositions and/or interrogatories. Among the federal replicas identified in 1986, Alabama, Arizona, Colorado, the District of Columbia (interrogatories only), Hawaii, Idaho, Indiana, Kentucky, Montana, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, and Wyoming (interrogatories only) have chosen this route. See *id.* at 361–75. Only Maine, which allows only five depositions, is more stringent than the Federal Rules. See Me. R. Civ. P. 30(a). On the whole, these examples demonstrate that numerous states have retained even broader discovery than the Federal Rules, which have retained their characteristic liberalism. See Childers, *supra* note 165, at 696 (“Under the new [2000] Rule 26(b)(1), the scope of discovery remains as broad as it was prior to the amendment.”).

173. Examples include Alaska’s expedited and limited pretrial system for claims under \$100,000, see Alaska R. Civ. P. 26(g), Arizona’s use of alternative procedures in medical malpractice cases, see Ariz. R. Civ. P. 26.2, and Colorado’s “Simplified Procedure,” see Colo. R. Civ. P. 16.1. That is not to say these states have returned to what Justice Murphy in *Hickman* might have described as the dark ages. See *supra* note 170. Through a system of comprehensive initial disclosure, litigants in theory will receive the same amount of pertinent information while also gaining brevity and lessening discovery costs.

174. Colo. R. Civ. P. 16.1(b)(1).

175. *Id.* 16.1(a)(2).

176. For a general overview of other states’ constrictive reforms and select state case studies, see Moskowitz, *supra* note 164, at 613–37. One exception to moderation is Michigan, a state listed in Justice Stevens’s long *Twombly* footnote as a *Conley* state but not identified by Professors Oakley and Coon as a federal replica. Under the Michigan rule generally governing discovery, the *de facto* position is to deny any discovery in district courts; it reads, “In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.” Mich. Ct. R. 2.302(A)(2). Notably, this system does not seem to provide for alternative means of information gathering such as comprehensive initial disclosure. See *supra* note 173.

Finally, in light of *Twombly*'s emphasis on litigation costs, the 2006 e-discovery updates to the Rules provide an interesting discussion point.¹⁷⁷ Of the federal replicas identified by Professors Oakley and Coon in 1986, only Arizona, Indiana, Montana, Ohio, and Utah have adopted the amendments.¹⁷⁸ Nothing suggests that the challenges of the electronic age do not affect states,¹⁷⁹ and the extent to which these reforms are or will be incorporated into state procedural systems may significantly inform a state's examination of its pleading standard.

Despite different procedural methodologies, the various state systems aim for (and perhaps even achieve) the same goal: to "secure the just, speedy, and inexpensive determination of every action."¹⁸⁰ To be sure, states have taken different routes and have crafted discovery rules to meet local circumstances. Yet, to date all have retained notice pleading as their baseline and adjusted their subsequent procedural mechanisms accordingly. *Twombly*, however, opens the door to another route that states may seriously consider.

4. *Making the Move.* — Already some commentators are pining for the benefits they expect *Twombly* to bring to courts burdened with heavy

177. See generally Kenneth J. Withers, Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure, 4 Nw. J. Tech. & Intell. Prop. 171 (2006) (providing overview of ways amendments may reduce discovery costs).

178. See Order Amending Rules 16(b), 16(c), 16.3, 26(b), 26.1, 26.2, 33(c), 34, 37(g), and 45, Ariz. Rules of Civil Procedure, No. R-06-0034 (Ariz. Sept. 5, 2007), available at http://www.supreme.state.az.us/rules/ramd_pdf/r-06-0034.pdf (on file with the *Columbia Law Review*); Order Amending Rules of Trial Procedure, No. 94S00 (Ind. Sept. 10, 2007), available at <http://www.in.gov/judiciary/orders/rule-amendments/2007/trial-091007.pdf> (on file with the *Columbia Law Review*); In re Proposed Revisions to the Mont. Rules of Civil Procedure with Respect to Discovery of Elec. Info., No. AF 07-0157 (Mont. Feb. 28, 2007), available at <http://www.montanacourts.org/orders/AF07-0157.pdf> (on file with the *Columbia Law Review*); Proposed Amendments to the Ohio Rules of Appellate Procedure, Ohio Rules of Criminal Procedure and Ohio Rules of Civil Procedure, available at <http://www.sconet.state.oh.us/Rules/amendments/practiceProcedureOct07.pdf> (last visited Aug. 7, 2008) (on file with the *Columbia Law Review*); In re Proposed Amendments to Rules 16, 23A, 26, 33, 34, 35, 37, 45, 101, 106 and Form 40 of the Utah Rules of Civil Procedure, No. 20070591-SC (Utah July 29, 2007), available at <http://www.utcourts.gov/resources/rules/approved/20071101/> (on file with the *Columbia Law Review*).

179. For instance, litigation under New York's Donnelly Act, N.Y. Gen. Bus. Law §§ 340–347 (McKinney 2004), an analogue to the Sherman Act at issue in *Twombly*, may face the same discovery pressures Justice Souter identified. But that is not to say there are no differences. As one Vermont attorney noted, "[S]ome of the benefits of the Federal Rules are not required because the dockets in [my] state are not crowded." Note, The Bar Favors Uniform State and Federal Rules of Civil Procedure, 18 Temp. L.Q. 145, 155 (1943) [hereinafter *Bar Favors Uniform Procedure*]; see also Stephen N. Subrin, Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits, 49 Ala. L. Rev. 79, 83 (1997) (noting difference in caseload and personnel); cf. Thomas D. Rowe, Jr., A Comment on the Federalism of the Federal Rules, 1979 Duke L.J. 843, 843–45 (urging states to consider federal-specific nuances in the Rules when adopting).

180. Fed. R. Civ. P. 1.

dockets. As one practitioner has remarked: “Is this what the drafters of the Federal Rules had in mind? Probably not. But is requiring plaintiffs to present plausible grounds for relief before commencing discovery a good thing? Probably.”¹⁸¹ These benefits are certainly attractive, but, putting aside whether *Twombly* is advisable on policy grounds, adopting raised pleading standards without fully considering the impact on a procedural system as a whole may have pernicious effects.¹⁸²

One may take a lesson from Judge Niemeyer, who, in reflecting on his ongoing work as Chair of the Civil Rules Advisory Committee in 1999, found the Committee could not escape the shadow of “the 1938 experiment of notice pleading coupled with broad discovery because that formula has become embedded in the infrastructure of American civil procedure.”¹⁸³ In his mind, any reforms must take notice pleading as a given.¹⁸⁴ This statement is significant not only because it reinforces the idea that notice pleading and broad discovery anchor modern American civil procedure;¹⁸⁵ perhaps more importantly, the strength of this liberalism evinces a commitment to the values—such as the promotion of dignity and equality—which, at least to some commentators, have come to characterize the Federal Rules.¹⁸⁶ Procedural systems represent a sover-

181. Halloran, *supra* note 7, at 24.

182. Cf. *Leading Cases*, *supra* note 4, at 309 (“The Court relied on an ad hoc cost-benefit analysis that failed to account for all of the effects that the new plausibility requirement might have on civil litigation.”). To be clear, this Note does not argue that states should reject *Twombly* because the decision is unwise or plainly wrong. In other words, it does not advocate for the points Justice Stevens raises in dissent regarding the majority’s interpretation of *Conley*, the process of amending the Rules, or the seeming inconsistency with precedent. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1977–84 (2007) (Stevens, J., dissenting); see also *Leading Cases*, *supra* note 4, at 309–15 (explicating Stevens’s dissent). Instead, this Note seeks to elicit the factors that states should consider when making the inevitable choice between inviting in or sending away *Twombly*. Similar caution was urged during the widespread state adoption of the Federal Rules. See Rowe, *supra* note 179, at 843–45 (“It seems best . . . for the state rulesmakers to make these decisions [regarding the Federal Rules] with full awareness of their implications rather than by default and in ignorance of the sometimes exclusively federalist considerations that influenced their federal counterparts.”).

183. Paul V. Niemeyer, *Here We Go Again: Are the Federal Discovery Rules Really in Need of Amendment?*, 39 B.C. L. Rev. 517, 520 (1998).

184. *Id.*

185. Judge Louis Goodman of the Northern District of California felt that these mechanisms inspired the “new spirit in Federal Civil Procedure.” Louis E. Goodman, *The New Spirit in Federal Court Procedure*, 7 F.R.D. 449, 449–50 (1948).

186. See *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (upholding nearly incomprehensible pro se complaint to avoid depriving non-English-speaking litigant his day in court); Helen Hershkoff, *Poverty Law and Civil Procedure: Rethinking the First-Year Course*, 34 *Fordham Urb. L.J.* 1325, 1348–49 (2007) (noting equalizing effect of Federal Rules and notice pleading for under-resourced litigants); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 *Cardozo L. Rev.* 1865, 1879–82 (2002) (describing ability of notice pleading and broad discovery to have equality-enhancing effects); cf. Tobias, *Balkanization*, *supra* note 51, at 1423–25 (explaining negative effect of disuniformity on resource-poor). That is not to say these values are no longer present in

eign's choice to pursue these values,¹⁸⁷ and the states' very act of adopting *Conley* and the Federal Rules likewise entailed a conscious rejection of code pleading and its procedural games.¹⁸⁸

It follows that any decision to move away from a notice-pleading-centric system of civil procedure should only come after considerable thought. For example, Arizona courts must take into account the degree to which the Zlaket Rules of 1992¹⁸⁹ and the federal e-discovery amendments of 2006¹⁹⁰ already manage the costs of discovery. While moving to a plausibility-pleading standard will certainly narrow the number of cases that proceed to the discovery phase, this result is not an end in itself. Indeed, shifting to *Twombly* without the correct justification and consideration of the procedural system as a whole may swing the pendulum too far in favor of defendants.

Such is the danger for those states considering a move into States Group II—that is, those *Conley* states that have already responded to discovery pressures by constricting the use of traditional discovery mechanisms. Again consider Colorado's Simplified Procedure,¹⁹¹ which by and large has been welcomed by the state's legal community.¹⁹² Adopting a raised pleading standard would require litigants to plead facts with some

the federal procedural system under *Twombly*. This Note merely suggests that a plausibility standard qualifies *Conley*'s strong commitment to giving litigants their "day in court" if there is *any* set of facts upon which their claims may warrant relief.

187. Cf. Easterbrook, *supra* note 153, at 112–13 ("Procedural rules are usually just a measure of how much the substantive elements are worth, of what we are willing to sacrifice to see a given goal attained.").

188. See, e.g., Allen, *supra* note 41, at 184, 188 (listing goal of Arizona reform committee as "liberalization" because at the time "artifice prevailed over truth"); Daniel L. Herrmann, *The New Rules of Procedure in Delaware*, 18 F.R.D. 327, 327, 341 (1956) (proclaiming proudly that "the Courts of Delaware shook off the 'shackles of mediaeval scholasticism'" in adopting the Rules); Thomas Keely, *How Colorado Conformed State to Federal Civil Procedure*, 16 F.R.D. 291, 308 (1955) (noting that new Colorado procedure, modeled on Rules, contained elements that served as "guideposts and turning-points which divide and distinguish the modern procedural way from the abandoned State Code way").

189. See Tobias, *Discovery Dilemma*, *supra* note 54, at 623–27 (reviewing Arizona discovery reforms).

190. See Withers, *supra* note 177, at 191–209 (discussing amendments).

191. See *supra* text accompanying notes 174–175.

192. Documentation of the program's success is only anecdotal, 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, 1209–10 (2005) (noting dearth of empirical study), but it has been well received, see Richard P. Holme, *Back to the Future—New Rule 16.1: Simplified Procedure for Civil Cases Up to \$100,000*, *Colo. Law.*, May 2004, at 11, 12, 14, available at http://www.courts.state.co.us/userfiles/File/Supreme_Court_Committees/analysis16.1_holme_1.pdf (on file with the *Columbia Law Review*) (observing that several non-pilot-county judges requested and were granted permission to use simplified procedure); Mary J. Mullarkey, Chief Justice, *Colo. Supreme Court*, *Address on the State of the Judiciary 3* (Jan. 14, 2005) (transcript on file with the *Columbia Law Review*) (noting popularity and success).

degree of specificity,¹⁹³ but would provide limited or no traditional discovery methods. To be sure, this system may be “speedy and inexpensive,” but will it strike the right balance with justice? Public perception of the inherent fairness of the process arguably is no less integral to the legitimacy of a judicial system.¹⁹⁴ At bottom, these states must consider whether they wish to retreat from *Conley* notice pleading and its liberalism.¹⁹⁵ Coupling already constricted discovery with a raised pleading standard simply for the sake of increased expediency may strike an uneasy balance between the burden of litigation and the vindication of rights in a just society.¹⁹⁶

States Group I—that is, the group of *Conley* states with broad discovery—faces similar questions but has the advantages inherent in federalism. Because most of these states have lagged behind even the Federal Rules amendments, and in particular have not yet adopted those concerning e-discovery, they may look to the reforms already instituted at the federal level and in neighboring states, just as other federal replicas did in keeping better pace with Federal Rules amendments.¹⁹⁷ But more importantly, while some states in States Group II may come to feel they have already reached the limits of discovery reform and therefore need to retire *Conley*, States Group I has plenty of reform room left. They might, for example, simply constrict their discovery and move to States Group

193. Or, in the words of Justice Souter, it requires litigants to “nudge[] their claims across the line from conceivable to plausible.” *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

194. See, e.g., *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1950) (Frankfurter, J., concurring) (“No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it [It] generat[es] the feeling, so important to a popular government, that justice has been done.”); Charles E. Clark, *The Handmaid of Justice*, 23 *Wash. U. L.Q.* 297, 299 (1938) [hereinafter *Clark, Handmaid of Justice*] (“Regular procedure is necessary to secure equal treatment for all; it is necessary, too, for the quite as important factor of the *appearance* of equal treatment for all.”); Tom R. Tyler & E. Allan Lind, *A Relational Model of Authority in Groups*, 25 *Advances Experimental Soc. Psychol.* 115, 133–40 (1992), reprinted in Stephen N. Subrin et al., *Civil Procedure* 37, 37–38 (3d ed. 2008) (“[W]hat is critical to good decision making is the appearance of fairness, and fairness is most obviously achieved when procedures that are accepted as just are used to generate the decision.”).

195. See *supra* note 188 and accompanying text (noting states’ rejection of code pleading and its negative consequences in preference of notice pleading and its benefits).

196. Professor Spencer argues that *Twombly* coupled with the “narrowing scope of discovery” places the entire system in danger: “[It] has dealt what may be a death blow to the liberal, open-access model of the federal courts espoused by the early twentieth century law reformers. A judicial administration model, or what one may term a ‘restrictive’ or ‘efficiency-oriented’ ethos, now seems firmly established in its place.” Spencer, *supra* note 78, at 433.

197. See *supra* text accompanying note 178 (identifying five federal replicas that adopted e-discovery amendments).

II.¹⁹⁸ This flexibility allows them to meet discovery challenges by reforming other areas of the procedural system, yet retain their commitment to notice pleading and its inherent values.

* * *

This Part has explored the fiction of the forum-shopping concern and discussed the need for states to consider their systems of procedural rules as an integrated whole. In Part III, this Note argues that the remaining benefits of uniformity, both in theory and practice, do not compel *Conley* states to adopt the new *Twombly* standard.

III. STEADY AS SHE GOES: LEAVING *TWOMBLY* TO FEDERAL COURTS

In 2000, the Arizona Supreme Court faced the difficult decision of accepting new Federal Rules amendments or breaking its longstanding fidelity to them by opting for well-received, state-initiated discovery reforms.¹⁹⁹ Rejecting the amendments would have shifted the state away from Federal Rules modeling. Professor Tobias framed the tension perfectly: “The Arizona Justices must in essence choose whether it is better to be uniform or right.”²⁰⁰

This Part likewise asks whether the historical benefits of uniformity—a driving consideration in the formation of the Federal Rules and the states’ adoption of them²⁰¹—should persuade states to adopt *Twombly*. Part III.A first reviews the traditional arguments for uniformity. Part III.B then applies these arguments to the present question and finds them wanting. Finally, Part III.C considers criticisms of a dual federal-*Twombly* and state-*Conley* paradigm. This Part contends that the theoretical benefits that previously have flowed from a uniform civil procedure across state and federal courts will not materialize if state courts adopt *Twombly*’s plausibility-pleading standard. Moreover, this Part finds that the underpinnings supporting the theoretical benefits of uniformity have slipped, making them far less compelling today.

A. *The Benefits of Uniformity in Theory*

The legal community has identified the following as benefits of either federal interstate or federal-state intrastate procedural uniformity:

1. *Predictability of Result*. — That the law be clear and predictable is an obvious goal²⁰²—the litigant gains from knowing the likely outcome of

198. See Stephen N. Subrin, Reflections on the Twin Dreams of Simplified Procedure and Useful Empiricism, 35 W. St. U. L. Rev. 173, 178–82 (2007) (discussing benefits of simplified procedure).

199. See Tobias, Discovery Dilemma, *supra* note 54, at 616–17 (“[T]he Arizona bench and bar may believe that their discovery system is superior to the existing federal scheme . . .”).

200. *Id.* at 627.

201. See *supra* Part I.A.

202. See Patrick M. McFadden, Fundamental Principles of American Law, 85 Cal. L.

a potential claim because risk can be gauged *ex ante*, while the lawmaker necessarily intends a specific result when he grants a substantive right or promulgates a procedural rule to facilitate the realization of that right.²⁰³ Although the judiciary is a bystander at this prelitigation stage, it too benefits because parties can anticipate the outcome of potential claims, in essence on the merits, without court involvement.²⁰⁴

Uniformity also facilitates predictability in creating a common knowledge base. This factor has become increasingly important as complex litigation has broken free of state lines. For practitioners representing clients in matters filed in various states, the proceedings, while technically foreign, will share a common bond and will be familiar.²⁰⁵ Uniformity, in short, “reduces surprise.”²⁰⁶

2. *Consistent Administration of Justice.* — Related to predictability, similarly-situated litigants should receive the same justice regardless of forum or judge.²⁰⁷ Although this consideration includes the forum-shopping concern, its reach is broader. Forum shopping focuses on the litigant’s choice of where to file suit and only implicates a jurisdiction to the extent that the courts have held consistently to a known interpretation of law. Uniformity also affects the source of forum shopping by promoting judicial restraint: Judges are less inclined to stray off the beaten path if uniform persuasive opinions abound.²⁰⁸

3. *Refinement and Quality.* — Although the Federal Rules significantly improved civil practice and the Court’s involvement in their creation lent initial credibility,²⁰⁹ proceduralists readily acknowledged that amend-

Rev. 1749, 1754 (1997) (“Without clarity and predictability, the law becomes corrosively unfair to us all.”).

203. See Anthony D’Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1, 5–6 (1983) (recognizing that “uncertain law may deter activity that the state wants to encourage” and “leave persons unsure of their entitlements”); Maurice E. Stucke, *Better Competition Advocacy*, 82 St. John’s L. Rev. 951, 1000 (2008) (“One cornerstone of the rule of law is that enforcement authorities apply the clear legal prohibitions to particular facts with sufficient transparency, uniformity, and predictability, so that private actors can reasonably anticipate what actions would be prosecuted and fashion their behavior accordingly.”).

204. See Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 Am. Econ. Rev. 311, 313 (1988) (positing that litigation is not filed when clear law makes probable fate of claim known).

205. See *Bar Favors Uniform Procedure*, *supra* note 179, at 147 (arguing that if uniform system of procedure governed both forums, an attorney practicing in both forums “need learn only one procedure and the job is done”).

206. Robert E. Keeton, *The Function of Local Rules and the Tension with Uniformity*, 50 U. Pitt. L. Rev. 853, 860 (1989).

207. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77 (1938) (noting the “injustice and confusion” that *Swift v. Tyson*, 41 U.S. 1 (1842), had occasioned).

208. See Keeton, *supra* note 206, at 860 (“[N]ationally uniform rules protect (though of course not fully) against the tyranny of any unduly willful renegades among us trial judges.”); Felix S. Cohen, *Law and the Modern Mind*, 17 A.B.A. J. 111, 112 (1931) (reviewing Jerome Frank, *Law and the Modern Mind* (1930)) (“[U]niformity of decision is the only practical guarantee against the tyrannical exercise of prejudice . . .”).

209. See *supra* notes 36–37 and accompanying text.

ments would be necessary to refine, clarify, and continually improve the Rules.²¹⁰ They argued that over time, uniformity would bring together the best procedural mechanisms, resulting in an increasingly enlightened system of procedure.²¹¹ As the size of the engaged legal community grew, the level of refinement would likewise increase.²¹² As Professor Clark remarked, “Uniformity in procedure will be a boon to all; and the growth of habits and customs whereby there is an interchange of ideas as to noteworthy advances in practice between the various state and federal systems is eminently desirable.”²¹³

4. *Cost and Efficiency.* — The primary goal from the time of the original Conformity Act was to spare the bench and bar from having to work within two procedural systems.²¹⁴ It was thought that forcing a lawyer to learn an entirely new set of rules for a single claim would lead to unnecessary costs and delays.²¹⁵ The time and expense dedicated to the task could only impede the delivery of “substantial justice.”²¹⁶

Creating a single system was the obvious and practical solution. “Insofar as the federal and state schemes are identical or similar,” Professor Tobias argues, “these phenomena facilitate procedural compliance, make discovery simpler, and limit the expense and time which are needed to conclude discovery and complete cases.”²¹⁷ Ultimately, uniformity presents a “win-win” for all but the resource-rich, who might use disuniformity to their advantage.²¹⁸

210. See *infra* text accompanying notes 250–251.

211. See William J. Brennan, Jr., *The Continuing Education of the Judiciary in Improved Procedures*, Address Before the Judicial Conference of the Tenth Circuit, (July 5, 1960), in *Proceedings of the Seminar on Practice and Procedure Under the Federal Rules of Civil Procedure*, 28 F.R.D. 37, 48 (1960) (expressing hope that Federal Rules would adopt New Jersey, California, and Michigan pretrial requirements); Marlyn E. Lugar, *Federal Civil Rules Replace West Virginia Common Law Procedure*, 26 F.R.D. 90, 108 (1961) (appreciating imperfections in new system and State’s dedication to constant improvement).

212. In the context of interstate federal district court uniformity, this argument cautions against the parochialism of local court rules because they have not passed muster under presumably more rigorous national-level scrutiny. See Keeton, *supra* note 206, at 860 (“[A] uniform rule is ordinarily developed with the benefit of contributions from more sources and by a process more thoroughly deliberative than is characteristic of the fashioning of local rules.”). This idea of refinement draws implicitly on two seminal descriptions of the American federal system: Madison’s *Federalist* 51, see *The Federalist* No. 51 (James Madison), and Justice Brandeis’s famous description of the states as laboratories for democracy, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

213. Clark, *Handmaid of Justice*, *supra* note 194, at 307.

214. See *supra* text accompanying notes 16–18.

215. See *supra* text accompanying note 18 (foreseeing “endless perplexity”).

216. *Brown v. Van Braam*, 3 U.S. 344, 352 (1797).

217. Tobias, *Discovery Dilemma*, *supra* note 54, at 628.

218. See Tobias, *Balkanization*, *supra* note 51, at 1423–25 (noting that balkanization particularly disadvantages public-interest litigants).

B. *The Benefits of Uniformity Applied*

Taking the theoretical benefits of uniformity at face value, this Note argues that they will not accrue if states adopt *Twombly*.²¹⁹ For over half a century, Rule 8(a)'s "short and plain statement" requirement and *Conley*'s "no set of facts" interpretation of that language have anchored American civil procedure.²²⁰ Indeed, *Leatherman* and *Sorema* recently strengthened the reliability of these procedural hallmarks.²²¹ Predictability, then, was something easily gleaned from Chief Justice Rehnquist's unequivocal statement that "Rule [8(a)] meant what it said."²²² Uniform adoption of *Twombly*, however, will not produce predictable results—more than a year after the Court issued the opinion, commentators and judges continue to struggle with its "conflicting signals."²²³ Ironically, the only predictable outcome of adopting *Twombly*, at least for the discernable future until the Court clarifies its holding, is continued confusion.²²⁴

This confusion also informs the consistent administration of justice and refinement arguments. Although widespread application of *Twombly* may help the U.S. Supreme Court refine plausibility pleading, it arguably thrusts state courts back a step. Currently state courts employ a time-tested standard that has wavered little, if at all, since *Conley*.²²⁵ Adopting *Twombly* will force state courts to join in on the federal judiciary's challenging effort to clarify the plausibility standard.²²⁶

Going forward, *Conley* states may appear to lose the federal courts' assistance in refining notice pleading. This loss, however, is minimal for

219. There are numerous counterarguments to the acclaim of such strict conformity. In a submission to the Temple Law Quarterly, Professor McCaskill referenced the difficulty of preserving uniformity in the face of amendments, the cost of sacrificing local tailoring, and the lack of flexibility in a uniform regime. See Bar Favors Uniform Procedure, *supra* note 179, at 148–49. But because this Note argues against adopting *Twombly* solely for the sake of uniformity, the thrust of the discussion centers on whether the benefits of uniformity would materialize were states to employ plausibility pleading.

220. See *supra* note 61. Of course, Justice Souter took a markedly different view in arguing that "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

221. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002) (rejecting imposition of heightened pleading standard); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1992) (same); *supra* notes 139–142 and accompanying text.

222. *Leatherman*, 507 U.S. at 168.

223. See *supra* notes 3, 76–82 and accompanying text.

224. See *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) ("The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come."); Mary Swanton, *Plausible Pleadings: High Court Offers Defendants Relief from Frivolous Claims*, *Inside Couns.*, Aug. 2007, at 16, 18 (estimating uncertainty for ten years due to inconsistent application).

225. See *supra* note 61.

226. Granted, the states will need to do some legwork when they adjudicate federal claims that require raised pleading. See *supra* Part II.A. But in rejecting *Twombly* with regard to state claims, the constant need to explore the bounds of its holding would be greatly diminished.

two reasons. First, the constancy of *Conley* and Rule 8(a) suggests that further significant refinement is unnecessary. Indeed, *Conley* stood unchanged for fifty years. And when states have found it necessary to consult federal court interpretations of analogous rules, the inquiries have concerned nonpleading standard rules.²²⁷ Furthermore, because courts have interpreted *Twombly* to apply in “those contexts where such amplification is needed to render the claim *plausible*,”²²⁸ presumably some version of notice pleading will continue to govern the remaining federal civil claims that do not require amplification. Thus, the federal judiciary is unlikely to shift its attention exclusively to the new plausibility standard and will continue to work in tandem with states.²²⁹

Commentators who favor *Twombly* in state courts may resurrect the argument that disuniformity brings with it the cost of working in two procedural systems.²³⁰ Yet such reasoning proves less forceful today. When states first considered adopting the Federal Rules, many jurisdictions retained code or even common-law pleading systems that were unquestionably distinct from notice pleading.²³¹ *Twombly*, however, presents a choice between two interpretations of a single rule’s identical language, not two entire systems. By the time *Twombly*’s plausibility standard becomes clear, the bench and bar should be sufficiently knowledgeable of and comfortable with the new model.²³² If cost is the chief concern, a shift in state pleading standards will create uncertainty within both state and federal court, leading to more time and expense in the initial filing of litigation.²³³

227. See *supra* note 57–60 and accompanying text (cataloguing state reliance on federal decisions).

228. *Iqbal v. Hasty*, 490 F.3d 143, 157–58 (2d Cir. 2007); see also McMahon, *supra* note 61, at 861–62 (noting that five other circuits have cited approvingly this explication of *Twombly*).

229. *Twombly*’s holding strongly suggests that the federal judiciary will need to split its attention. In retiring the “no set of facts” language, the Court cast some doubt as to the requirements of notice pleading in general. Although *Erickson* has led some to argue that notice pleading as it once existed still applies, others are awaiting further guidance because of distinguishing factors. See *supra* notes 79–80 (citing examples).

230. See, e.g., Clay, *supra* note 154, at 438 (noting at time of Kentucky’s adoption of Rules that “state procedure closely geared to federal procedure is of vast benefit to lawyers who practice in both courts”).

231. See, e.g., Herrmann, *supra* note 188, at 336 (“Before 1948, Delaware adhered to the common law system of pleading as it had been developed and existed in England at the time of the separation of the American colonies.”). But see Alfred C. Clapp, *Making the Federal Rules a Part of New Jersey’s Practice*, 16 F.R.D. 39, 43–44 (1955) (conveying sense that New Jersey’s adoption did not bring about dramatic change in existing state practice).

232. Arguably the legal community already has experience with heightened pleading standards despite *Leatherman* and *Sorema*. See Fed. R. Civ. P. 9(b) (requiring specific facts in fraud complaints). See generally Christopher M. Fairman, *The Myth of Notice Pleading*, 45 *Ariz. L. Rev.* 987 (2003) (arguing that Court has failed to fully shut door to heightened pleading standards which courts still use).

233. Cf. Epstein, *supra* note 204, at 313 (discussing how clarity of legal rules affects attorney behavior and legal costs in product liability context).

Moreover, under reverse-*Erie* analysis, federal-*Twombly* claims will continue to flow into state courts.²³⁴ In the end, regardless of whether a state displaces *Conley*, it will inevitably work within two procedural systems and bear the necessary costs. The current choice for states, in other words, is not whether to keep *Twombly* in or out; it is a choice of whether notice or plausibility pleading will act as the default rule. This Note argues that this decision to a large extent defines the tenor of a state's judicial system and exemplifies the balance struck between expediency and justice.²³⁵

C. Criticisms: *Legitimacy and History*

1. *An Unsure Footing.* — *Conley* states, critics can argue, may face the challenge of retaining a standard the Court has explicitly interred.²³⁶ But to date, this criticism has failed to gather steam. No commentator has argued for state rejection of *Conley* on grounds of illegitimacy.

To be sure, the mere absence of criticism alone does not necessarily redeem the states' continued use of *Conley*, but there are a number of explanations for this absence that may provide some comfort. States have retained a longstanding commitment to notice pleading—indeed, they have built whole systems of procedure upon it—which will not easily be disturbed by a single decision. Parts of the legal community simply see the decision as erroneous²³⁷ and have reaffirmed their commitment to notice pleading, as Justice Stevens did in quoting Professor Clark: “I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings”²³⁸ While there are certainly advocates for raised pleading, they advance their position by emphasizing the merits of its comparative convenience.²³⁹ On the whole, *Conley* continues to be described in positive terms.²⁴⁰

234. If a state adopts *Twombly*, federal-*Conley* claims adjudicated in state court must use the lower pleading standard under *Brown*. See supra note 137 and accompanying text. If a state retains its notice-pleading standard and a federal claim requiring amplification is adjudicated in state court, the *Twombly* standard will apply under *Burnette*. See supra notes 148–151 and accompanying text.

235. See supra notes 186–188 and accompanying text.

236. See Dodson, supra note 3, at 141 (“[T]here may be much rethinking to be had in the state courts to the extent their state procedures are built upon a now-repudiated federal standard.”).

237. See Samson, supra note 87, at 28 (characterizing Court as “turn[ing] its back on the Federal Rules”).

238. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1983–84 (2007) (Stevens, J., dissenting) (quoting Charles E. Clark, *Special Pleading in the “Big Case”*, 21 F.R.D. 45, 46 (1957), reprinted in *Procedure—The Handmaid of Justice* 147, 148 (Charles Alan Wright & Harry M. Reasoner eds., 1965)).

239. See Halloran, supra note 7, at 24 (welcoming effect of plausibility pleading on “strain that rising caseloads and tight fiscal constraints have imposed on [Arizona] courts” while recognizing tension with drafters of Rules’ intent).

240. See, e.g., Dodson, supra note 3, at 135 (using the word “venerable”).

2. *The Myth of Uniformity*. — Proponents of uniformity are fierce in their advocacy and decry any procedural balkanization.²⁴¹ Admittedly, the importance of uniformity in driving a century of procedural reform is difficult to ignore. The benefits discussed above are certainly compelling in theory and once were equally so in practice, as evidenced by the widespread adoption and influence of the Rules.²⁴² Arguably, then, discounting the pull of conformity should be done with prudence.

But the defenders of a unitary procedural system across all courts draw too heavily on the effects of the Federal Rules' proliferation and gloss over the caveats in adoption. Although Professor Wright's description of the Rules' successful propagation from his 1960 survey is often quoted in the literature,²⁴³ an oft-ignored passage from the same work proves quite illuminating in cautioning that "[u]niformity is not an end in itself."²⁴⁴ He explained, "The states can be expected to adopt rules based on the federal model, then, not merely for the sake of uniformity with the federal rules, but only if the system of procedure embodied in the federal rules is seen to be clearly superior to the existing state systems."²⁴⁵ Professor Wright for one has provided a clear answer to Professor Tobias's Arizona discovery dilemma question:²⁴⁶ It is better to be correct than uniform.

States acted consistently with this philosophy in adopting the Rules. The Reporter for New Jersey's Rules Advisory Committee noted that it rejected four of the Federal Rules due to "uncertainties of a personal opinion."²⁴⁷ Similarly, in Kentucky and Colorado, reformers failed to agree on the degree of uniformity to be sought, with both states ultimately opting for general, but not exact, conformity to the Federal

241. Indeed, these proponents pursue their goal so ardently that at times it is difficult to distill their arguments against accepting any degree of disuniformity. See Connor Hall, *Uniform Law Procedure in Federal Courts*, 33 W. Va. L.Q. 131, 132 (1927) ("[They] speak of uniformity as if it were some excellence in itself, something transcendental and absolute; or at least as an undoubted blessing, as health, happiness or virtue. No reason is given why uniformity . . . would be of advantage to any litigant . . ."); Main, *supra* note 32, at 311–12 ("So deeply is the idea of uniformity embedded in American legal thought that many proceduralists find it difficult or unnecessary to explain why uniformity is thought to be good.").

242. See *supra* Part I.A.3.

243. See *supra* notes 44–45 and accompanying text (discussing Professor Wright's conclusion that in a growing number of jurisdictions there was "but one procedure for state and federal courts").

244. Barron & Holtzoff, *supra* note 44, § 9, at 44.

245. *Id.*; see also Joseph C. Hutcheson, *Federal v. State Rules*, 2 F.R.D. 101, 106 (1943) ("My concern is that we do it in the best and most acceptable way. I would not cast or urge a single vote for the Federal rules on the ground of uniformity alone.").

246. See *supra* text accompanying note 200.

247. Clapp, *supra* note 231, at 64–67 (explaining failure to adopt federal rules on waiver of jury, reservation of decision on motion for directed verdict, declaratory judgments, and expert witnesses).

Rules.²⁴⁸ As the torchbearer for Kentucky procedural reform later recalled, “[I]t was not with the thought of completely abolishing a state system in the interest of uniformity that Kentucky pursued the federal pattern.”²⁴⁹

Moreover, at least one state recognized that the era of uniformity would inevitably come to an end. The New Mexico bench and bar generally welcomed the adoption of the Federal Rules,²⁵⁰ but nevertheless recognized the difficulty of keeping pace with frequent updates to the model. After describing the process as “endless,” one attorney posited that “[w]hile the advantages of uniformity *per se* [were] readily apparent . . . the time may well come when some qualification on this policy should be considered.”²⁵¹ Clearly, New Mexico contemplated anything but blind adherence.

As states begin to consider whether *Twombly* comports with their procedural systems, they should do so understanding that the pull of uniformity is not as great as some would have it appear. From the outset, states have rejected portions of the Federal Rules because they did not comport with state public policy. And in light of the era of uniformity’s end,²⁵² states should place even less weight on the theoretical benefits of uniformity. Accordingly, acceptance of *Twombly* should rest on the attendant benefits of plausibility pleading—provided, as this Note argues, that they are compatible with a state’s existing procedural system²⁵³—and should not hinge on any notion of fidelity to a tradition of uniformity.

Proponents of uniformity still can take comfort in the fact that the Federal Rules had a substantial, positive impact. Aside from the widespread adoption of notice pleading and the elimination of procedural games, even code pleading states drew upon the Rules.²⁵⁴ In the end, the

248. See Clay, *supra* note 154, at 438 (reviewing Kentucky adoption); Keely, *supra* note 188, at 297–98 (Colorado adoption).

249. Clay, *supra* note 154, at 438.

250. See George Robertson, *New Mexico Rules of Civil Procedure for the District Courts*, 16 F.R.D. 489, 496–98 (1955).

251. *Id.* at 498.

252. In addition to the passing of the era of federal-state intrastate uniformity, see *supra* Part I.A, scholars have documented the balkanization of procedure across federal courts, see *supra* note 51. Thus, while state adoption of *Twombly* might bring about conformity in theory, local variations in both federal and state courts necessarily dictate that courts can only achieve a superficial uniformity. But despite this loss of uniformity at a granular level, this Note submits that notice pleading has continued to characterize American civil procedure, and that a shift from notice to plausibility pleading represents a larger, more significant loss of uniformity.

253. See *supra* Part II.B.

254. For example, California and Louisiana, two states that continue to use code pleading, see Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 *Harv. BlackLetter L.J.* 85, 100 (1994); Oakley & Coon, *supra* note 6, at 1378, nevertheless co-opted discovery and joinder provisions from the Federal Rules, see Barron & Holtzoff, *supra* note 44, § 9, at 44. In a little more than a decade after the Rules took effect, forty-one jurisdictions had adopted some version of Rule 16 regarding pretrial conferences. *Id.* § 9, at 44 n.12.1; Charles E. Clark, *Federal Procedural Reform*

Federal Rules did and, in many respects, continue to serve as a procedural model—that is, a starting point—for state systems of civil procedure.²⁵⁵

CONCLUSION

The *Twombly* decision presents *Conley* states with perhaps the most critical civil procedure decision since they chose to adopt the Federal Rules. Notice pleading has formed the core of modern American civil procedure and has weathered courts' attempts to impose judicially-created raised or heightened pleading standards—at least until now. Regardless of whether one agrees with the Court's contested opinion, this Note has argued that the principles of uniformity need not dictate a state's answer to the *Twombly* question.

Taking the often conclusory assertion that the loss of uniformity creates pernicious effects, such as forum shopping, this Note demonstrates how the Supremacy Clause differentiates the reverse-*Erie* and *Erie* contexts and eliminates this concern. While it has not denied the stark reality that *Twombly* could be a powerful tool in managing crowded dockets and costly litigation, this Note has offered a more encompassing mode of analysis that looks past this simple end, considers the interplay between key provisions of the Federal Rules, and recognizes the balance its drafters struck between expediency, cost, and fairness. Finally, this Note has demonstrated that while uniformity may be beneficial in theory, these benefits are unlikely to be realized if *Conley* states adopt *Twombly*.

States may very well decide that the imposition of raised pleading standards is appropriate; but they ought to make this decision without false conceptions. The flame of federal-state intrastate procedural uniformity has dwindled in the past decades. As in any system of federalism, states must be free to tailor their laws and institutions to meet local exigencies. In the case of civil litigation, the balance of fair, speedy, and inexpensive justice may tilt awkwardly if blind adherence to a federal model in the name of uniformity trumps careful consideration of local practices and values.

and States' Rights; to a More Perfect Union, 40 Tex. L. Rev. 211, 214–15 (1961) [hereinafter Clark, States' Rights] (“[T]he famous pre-trial rule, Rule 16, is almost universally available.”).

255. Writing in 1961, Professor Clark confidently asserted, “It is not here necessary to go into the details of the accomplishments made by the rules; they are now known to the profession generally.” Clark, States' Rights, *supra* note 254, at 214. He was, however, compelled to elaborate as to their “total effect”: “Not only did they revolutionize the procedure [in federal courts], . . . but additionally they have been widely copied in the several states . . . It is an interesting fact, whenever there is agitation for improvement, the federal system is assumed to be the model which must be studied.” *Id.* at 214–15.