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2012

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Recommended Citation

Pelikan, Matthew J.M., "Plausible Defenses: Historical, Plain Meaning, and Public Policy Arguments for Applying Iqbal and Twombly to Affirmative Defenses" (2012). *Minnesota Law Review*. 420.
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Note

Plausible Defenses: Historical, Plain Meaning, and Public Policy Arguments for Applying *Iqbal* and *Twombly* to Affirmative Defenses

Matthew J.M. Pelikan∗

Five days before Christmas in 1994, Aldo Quadrini filed for disability benefits from the Social Security Administration.[1] Since that day, Quadrini and his family have received over $100,000 in disability benefits to which they are not entitled.[2] When the government attempted to reclaim the lost money in a lawsuit, Quadrini did not respond to four out of the forty-nine claims.[3] But he did claim eight affirmative defenses—in one sentence[4]—thus adding eight potential matters for discovery and contest at trial. Despite many courts' recent focus on eliminating frivolous legal activity,[5] this addition of affirmative de-

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1. Amended Complaint ¶ 12, United States v. Quadrini, No. 2:07-13227, 2007 WL 2805719 (E.D. Mich. Aug. 28, 2007).

2. *Id.* ¶ 24. The general claim is that Quadrini registered for disability when he was still able to work and, in fact, held gainful employment. In addition, his wife registered for support for their child as the dependent of a disabled worker. Both Quadrini and his wife subsequently received ongoing support for these various disability claims which were found to be invalid.

3. United States v. Quadrini, No. 2:07-CV-13227, 2007 WL 4303213 at *1 (E.D. Mich. Dec. 6, 2007).

4. Answer to Amended Complaint at 9, United States v. Quadrini, No. 2:07-13227, 2007 WL 4612318 (E.D. Mich. Oct. 1, 2007).

5. *See, e.g.*, Malack v. BDO Seidman, LLP, 617 F.3d 743, 755 (3d Cir. 2010) ("An increase in frivolous litigation drives up the overall costs of issuing securities . . . ."); Cuellar v. Joyce, 603 F.3d 1142, 1143 (9th Cir. 2010) ("Fee awards serve in part to deter frivolous litigation . . . ."); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 826 (2011) ("[E]ven if litigation incentives do not in fact increase the number of claims filed, judges may believe that they do. . . . [A] belief that litigation incentives are generating

fenses had the potential to force the government to prepare a defense to the bevy of new, almost certainly meritless, claims.

In 2004, about seventeen million civil actions were filed.[6] Much of the litigation resulting from this crush of complaints will be controlled by just 500 words.[7] The Federal Rules of Civil Procedure (FRCP) govern pleadings and state that to begin civil litigation a plaintiff must make a "short and plain statement of the claim" along with several other provisions.[8] The FRCP also outline a defendant's choices if she chooses to answer the complaint.[9] These include Rule 8(c) "Affirmative Defenses."[10]

For two generations, the Supreme Court precedent from *Conley v. Gibson* controlled the amount of information that needed to be included in a pleading,[11] applying a broad "possibility" standard: "[A] complaint should not be dismissed . . . unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim . . . ."[12] Generally, this standard was also referred to as "notice pleading," because the complaint's purpose was simply to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[13]

more and more lawsuits often goes hand-in-hand with an assumption that many of those lawsuits are frivolous.").

6. STEPHEN C. YEAZELL, CIVIL PROCEDURE 263 (7th ed. 2008).

7. The federal standard governing pleadings for civil complaints and answers is scarcely 500 words long. *See* FED. R. CIV. P. 8.

8. The full text of the applicable section governing complaints is:

> (a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:
>
> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
>
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
>
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

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

9. Defendants need not answer a complaint; they are allowed other avenues of response. *See, e.g.*, FED. R. CIV. P. 8(b), 12(b).

10. FED. R. CIV. P. 8(c).

11. 355 U.S. 41 (1957); *see also* Ryan Mize, Note, *From Plausibility to Clarity: An Analysis of the Implications of* Ashcroft v. Iqbal *and Possible Remedies*, 58 U. KAN. L. REV. 1245, 1245–46 (2010) (describing influence of *Conley*).

12. *Conley*, 355 U.S. at 45–46 (emphasis added); *see also* Swierkiewicz v. Sorema N.A., 534 US. 506, 513–14 (2002) (describing "liberal" pleading standard).

13. *Conley*, 355 U.S. at 47.

In 2009, the Supreme Court altered all civil litigation by revising this long-held possibility standard. In *Ashcroft v. Iqbal* the Court applied the "plausibility" standard, which the Court had originally laid out only for class-action cases, to all civil litigation and held that "mere" conclusory statements would now be grounds for dismissal,[14] thus creating a stricter—or "heightened"—pleading.[15] Although the Court made clear that the "plausibility" standard applies to all pleadings by plaintiffs, it is still unclear whether this new pleading standard also applies to defendants' use of affirmative defenses in their Rule 8 answers.[16]

This Note argues that under the *Iqbal* pleading standard courts should grant plaintiffs' motions to strike affirmative defenses that do not meet the new "plausibility" threshold and are merely conclusory recitations of the law. Part I introduces pleading standards, considers their historical evolution, and reviews developments that helped drive that evolution. Part II considers the rationale of the plausibility pleading standard with regard to the current use of affirmative defenses and offers an analysis of court decisions looking at the issue. Part III argues that affirmative defenses should continue to be held to the same standard as complaints. Thus, under the *Iqbal* plausibility regime, conclusory affirmative defenses should be struck. This Note asserts that for many of the same reasons the Supreme Court has raised the bar on plaintiffs, defendants should also face higher scrutiny at the early stages of litigation.

I. HISTORICAL DEVELOPMENT AND MODERN APPLICATION OF PLEADING STANDARDS

Civil procedure is often best understood within its historical context.[17] While our procedures can and do change, they

14. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

15. *See, e.g.*, Detroit Gen. Ret. Sys. v. Medtronic, Inc., 621 F.3d 800, 804–05, 810 (8th Cir. 2010) (dismissing under *Iqbal*); Hunter v. Hydrick, 500 F.3d 978, 1006 (9th Cir. 2009) (vacating under *Iqbal*). *See generally* Rajiv Mohan, *A Retreat from Decision by Rule in* Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009), 33 HARV. J.L. & PUB. POL'Y 1191 (2010) (examining the full implications of *Iqbal*).

16. *See, e.g.*, Rhonda Wasserman & Frederick B. Goldsmith, *Third Circuit Court Practitioners Guide to* Twombly *and* Iqbal, 12 LAWYERS J. 8, at 9 (June 18, 2010), *available at* http://www.acba.org/ACBA/pdf/TLJ/LJv12-13_061810r.pdf (noting that the Third Circuit has not yet ruled on this question).

17. *See generally* GEOFFREY C. HAZARD ET AL., PLEADINGS AND PROCEDURE 546–47 (9th ed. 2005) (describing historical background of pleadings); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORI-

continue to mimic and evolve from ancient roots. Changing social needs, perceived problems in the old system, and evolving technology all drive change.[18] Understanding the full history is critical to the specific issue of this Note for two reasons. First, while civil procedure uses modern terms, litigants have used essentially the same mechanisms for a very long time, so changing or altering them occurs within that context. Second, courts that have examined these issues have scrutinized both the terms and the underlying policy concerns, so understanding the heritage of the modern rules is key.

The exegesis of civil procedure is rarely conducted about an individual procedural rule[19] and so a review specifically geared towards affirmative defenses will provide valuable context. This Part will introduce the history of pleadings and affirmative defenses in three stages: the rich history of pleadings stretching from ancient England to the modern litigation era; the Supreme Court's most recent precedent on pleading standards; and the policy considerations and litigation realities that underpin the recent Court-led changes.

A. ENGLISH AND AMERICAN HISTORY OF PLEADING STANDARDS

The roots of American civil procedure reach deep into English law,[20] and so it is best to start at the beginning—the very beginning. The ancestor of American pleading began as an "elaborate ritual."[21] The earliest pleadings in England were

CAL PERSPECTIVE 3–64 (1952) (providing extensive history from ancient law through modern reforms); John P. Sullivan, Twombly *and* Iqbal*: The Latest Retreat from Notice Pleading*, 43 SUFFOLK U. L. REV. 1, 8–14 (2009) (laying out history of pleadings prior to 1938).

18. *See generally* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaws*, 84 MINN. L. REV. 505, 512–20 (2000) (providing history of changes to discovery rules and related policy concerns); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433, 442–70 (2010) (describing legal reforms and the realist quest to "advocate for transformational law reform to address dire social needs"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 162–70 (1988) (detailing policy concerns related to evolving role of civil juries).

19. *See, e.g.*, Sullivan, *supra* note 17 (generally reviewing pleadings).

20. *See* STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE 240–43 (2d ed. 2004).

21. MARGARET HASTINGS, THE COURT OF COMMON PLEAS IN FIFTEENTH CENTURY ENGLAND 185 (1947).

spoken aloud, rather than written.[22] The increasing complexity of pleadings eventually demanded that they be written, although the early written proceedings were "governed by the 'very same' rules" as oral proceedings.[23] In the early process, the parties pled various claims and defenses back and forth until the court could identify a real dispute in fact or law.[24] The court decided legal disputes and a jury usually decided factual disputes.[25] The pleadings began with the plaintiff's "*declaration*, . . . in which the plaintiff sets forth his cause of complaint at length . . . ."[26] The defendant could enter a demurrer, raising a dispute in law,[27] or enter a "plea," raising a dispute of fact.[28] The plea itself would usually be a "plea at bar,"[29] which could either be a "traverse or a plea in confession and avoidance."[30] The defendant carried the burden to prove any plea.[31]

These centuries-old concepts are closely paralleled in modern civil proceedings.[32] While it is indisputable that civil procedure has fundamentally changed since the old English courts of

22. ROSCOE POUND & THEODORE F.T. PLUCKNETT, READINGS ON THE HISTORY AND SYSTEM OF THE COMMON LAW 420–21 (3d ed. 1927) (quoting JOHN WILLIAM SMITH, AN ELEMENTARY VIEW OF THE PROCEEDINGS IN AN ACTION AT LAW 58–62 (2d ed., London, Saunders and Benning 1842)). There is also record of oral-only pleadings in the American colonies prior to 1647. Paul Samuel Reinsch, *English Common Law in the Early American Colonies*, 31 BULL. U. WIS. 397, 409 (1899).

23. POUND & PLUCKNETT, *supra* note 22, at 421.

24. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 916 (1987).

25. POUND & PLUCKNETT, *supra* note 22, at 420.

26. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 293 (Univ. Chicago Press 1979) (1768).

27. POUND & PLUCKNETT, *supra* note 22, at 424–25.

28. *Id.* at 422.

29. *Id.* (describing plea at bar and the much rarer 'plea in abatement').

30. *Id.*

31. LORD NOTTINGHAM'S "MANUAL OF CHANCERY PRACTICE" AND "PROLEGOMENA OF CHANCERY AND EQUITY" 116 (D.E.C. Yale ed.) (1965) [hereinafter NOTTINGHAM].

32. For example, the demurrer, which said the opposing party's claim was "not sufficient in law," POUND & PLUCKNETT, *supra* note 22, at 424, is akin to the modern 12(b)(6) motion to dismiss. HAZARD ET AL., *supra* note 17, at 565. The plea is generally equivalent to the modern answer. NOTTINGHAM, *supra* note 31, at 53. *See also* FED. R. CIV. P. 8(b)–(c) (describing modern answer). The traverse has evolved into an answer's general denials. Finally, confession and avoidance is akin to a modern affirmative defense. *See* SUBRIN ET AL., *supra* note 20, at 216.

law and equity,[33] the basic proceedings are still designed to distill the parties' issue to real disputes in law or fact.

Under the traditional system, once the defendant had pled in response to the declaration, the plaintiff had to consider the defendant's action and select their "replication" from this same menu of responsive options as the defendant.[34] The volleys would continue back and forth through "rejoinder, the defendant's answer to the replication; the surrejoinder, the rebutter, and the surrebutter, and so on."[35] Through this process the parties came "to a point which is affirmed on one side, and denied on the other, they are said to be at issue; all their debates being at last contracted into a single point . . . ."[36] Whoever had brought the most recent motion then bore the burden to prove it out.[37] In this earlier era, this entire, extensive exchange constituted the "pleading."[38]

Traditional pleading was only one component of a massive, unwieldy, and highly formal system.[39] Popular dissatisfaction with the system, and sometimes withering criticism,[40] produced calls for reform in both England and the United States.[41] In this country, David Dudley Field spearheaded the reform effort

33. Many of the sources so far have been specific to the English Chancery Courts; however, for the narrow purposes of this Note, similar procedure also developed in the Courts of Equity. *See, e.g.*, POUND & PLUCKNETT, *supra* note 22, at 453 (discussing pleas and answers in the Courts of Equity). For a brief explanation of the English Courts of Chancery (also called common law) and Equity, see SUBRIN ET AL., *supra* note 20, at 241–42. For in-depth background, see generally POUND & PLUCKNETT, *supra* note 22, at 55–218.

34. POUND & PLUCKNETT, *supra* note 22, at 423.

35. *Id.*

36. BLACKSTONE, *supra* note 26, at 313.

37. *Id.*

38. *Id.* at 310.

39. *See generally* A. H. MARSH, A HISTORY OF THE COURT OF CHANCERY AND OF THE RISE AND DEVELOPMENT OF THE DOCTRINES OF EQUITY (Toronto, Carswell & Co. 1890) (detailing later Chancery and Equity courts).

40. There is a great variety of criticism of the pre-reform systems in England and the United States. Perhaps the most famous lampooning was penned by Dickens in *Bleak House* where the infamous case *Jarndyce and Jarndyce* lasted so long the original parties died before they could benefit. CHARLES DICKENS, BLEAK HOUSE 19–23 (Signet Classic 1964) (1853). For American critiques, see Subrin, *supra* note 24, at 937–38 ("[C]omplaints about the expense, delay, and unwieldiness of equity cases were legion."); *see also* ROBT. LUDLOW FOWLER, CODIFICATION IN THE STATE OF NEW YORK *passim* (2d ed. 1884) (advocating for adoption of the Field Code).

41. *See* MILLAR, *supra* note 17, at 43–64 (providing course of reforms in England and the United States).

in the 19th century.[42] Field endeavored to craft a new system that could be codified, and the resulting eponymous Field Code became the model for "code pleading," which most states eventually adopted.[43]

The Field Code is best understood in the context of the "sociopolitical" agenda that drove the reform.[44] Specifically, the Code's proponents saw it as an effort to move away from the highly abstract and technical common law system.[45] Its drafters put a heavy emphasis on "facts" to make sure the pleadings would be stated in objective terms that could be measured and understood.[46] To get to "the real charge" and "the real defense,"[47] Field simplified the pleadings and restricted the defendant to only a demurrer or an answer.[48] Through its adoption, the Code also instituted a version of a modern affirmative defense by prescribing that an answer must state "any new matter constituting a defence."[49] To simplify the overall language from the earlier writ system, Field used the exact same language for both complaints and answers, stipulating that they must be a "statement . . . in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."[50] Field hoped to limit any abuse of these simplified standards by adding an oath requirement.[51]

42. *See* Subrin, *supra* note 24, at 931–39 (discussing the development of the Field Code).

43. The Field Code began as a reform process in New York, where it was adopted in 1848, and eventually spread. *See* HAZARD ET AL., *supra* note 17, at 247; SUBRIN ET AL., *supra* note 20, at 245.

44. *See* Stephen N. Subrin, *David Dudley Field and the Field Code: A Historical Analysis of an Earlier Procedural Vision*, 6 LAW & HIST. REV. 311, 311 (1988).

45. *Id.* at 329.

46. *Id.* at 328–29.

47. David Dudley Field, What Shall Be Done with the Practice of the Courts? (New York, John S. Voorhies 1847), *reprinted in* 1 SPEECHES, ARGUMENTS, AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, 226, 240 (A. Sprague ed., New York, Appleton and Co. 1884).

48. FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS § 121, at 148 (Albany, Charles Van Benthuysen, 1848) [hereinafter 1848 CODE].

49. *Id.* at 150.

50. *Id.*

51. Subrin, *supra* note 44, at 330.

Despite the efficiencies of Field's Code, litigants still found the process confusing and began to criticize the Code.[52] These concerns led to reform efforts in the first half of the twentieth century which produced the Federal Rules of Civil Procedure, adopted in 1938.[53] These new changes sought to bring dramatic change and focused on two aspects: making sure the pleadings gave the opposing party notice of claims or defenses, and using a vastly expanded discovery process to increase the efficiency of trials.[54] The FRCP revolutionized American civil procedure.[55]

The FRCP are most closely associated with attorney and jurist Charles Clark, who headed the drafting committee for the new Rules.[56] Clark changed the focus from 'facts' to 'claims' with the goal of opening the doors of the courtroom to any meritorious claim.[57] Rule 8 governs the initial pleadings.[58] The complaint must be a "short and plain statement of the claim show-

52. Specifically, the Field Code's reliance on facts came to be viewed as overly formalistic, and by the twentieth century, there were calls for further reform. Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 403 (1910). The Field Code, conceived as a reform for a complex system that disguised the real issues at litigation, overcompensated by focusing too much on finding the facts at issue. Subrin, *supra* note 44, at 328 (indicating that"[f]acts constituting a cause of action' was the pleading requirement" for the Field Code (quoting 1848 N.Y. Laws c. 379)). Applying the Code still resulted in confused parties and major inefficiencies in litigation. *See* Sullivan, *supra* note 17, at 13 ("If the final decision was made at the pleading stage, there was always the danger that the matter would have been resolved on the kind of technicalities endemic to common law pleading. On the other hand, if a case passed the pleading stage and went to trial, there was always the possibility that the trial would be a mishmash of evidence that would satisfy no legal claim or would establish a claim on evidence and legal theories that the defendant could never have reasonably anticipated."). Moreover, because each state was still in charge of adopting, modifying, or rejecting code pleading, the national legal system was still highly fragmented and complex. *See* SUBRIN ET AL., *supra* note 20, at 249–50.

53. *See generally* SUBRIN ET AL., *supra* note 20, at 249–53 (providing historical background leading up to the Federal Rules of Civil Procedure).

54. Sullivan, *supra* note 17, at 14.

55. Charles E. Clark, *Stability and Change in Procedure*, 17 VAND. L. REV. 257, 260 (1963) ("More has been done to improve the administration of justice in the past twenty-five years than in all our previous history.").

56. SUBRIN ET AL., *supra* note 20, at 251.

57. *See, e.g.*, Charles E. Clark, *The Influence of Federal Procedural Reform*, 13 LAW & CONTEMP. PROBS. 144, 154 (1948) (discussing pleading "as an aid to the understanding of a case rather than a series of restrictions on the parties or the court"); *see also* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (noting that "notice pleading" allows discovery for almost all claims and that summary judgment is the proper vehicle for disposing of unmeritorious claims).

58. FED. R. CIV. P. 8.

ing that the pleader is entitled to relief."[59] A general denial, is similarly a "short and plain [statement of] defenses to each claim asserted."[60] And "a party must affirmatively state any avoidance or affirmative defense."[61] While the FRCP clearly created separate motions for the various pleadings, the same general rules still apply to all pleading motions.[62] Since the adoption of the FRCP, Congress has only amended Rule 8 three times and never with a substantive change.[63] Thus, affirmative defenses are still governed by standards developed in a direct line from procedures of English common law. This historical perspective provides an essential framework for understanding how courts have applied the pleading standards under the FRCP.

B. DEVELOPMENT OF PLEADING STANDARDS IN KEY CASE LAW

Since Congress adopted the FRCP, the Supreme Court has considered pleading standards under the Rules in three landmark decisions, which have defined the modern pleading standard: *Conley v. Gibson*,[64] *Bell Atlantic Corp. v. Twombly*,[65] and *Ashcroft v. Iqbal*.[66]

1. *Conley v. Gibson*: The Era of Notice Pleading

After the FRCP were adopted, *Conley*, decided in 1957, established the pleading standard for the rest of the twentieth century.[67] In *Conley*, the Court acknowledged the FRCP's focus on "notice pleading"[68] and held that a claim should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[69] This broad standard for pleadings faced criti-

59. *Id.* at 8(a)(2).

60. *Id.* at 8(b)(1)(A).

61. *Id.* at 8(c)(1). "Affirmative defense" became the formal title for the historical confession and avoidance.

62. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2004 & Supp. 2011).

63. *Id.* § 1201.

64. 355 U.S. 41 (1957).

65. 550 U.S. 544 (2006).

66. 129 S. Ct. 1932 (2009).

67. *See, e.g.*, Mohan, *supra* note 15, at 1191 (indicating that *Conley*'s pleading standard "persisted until at least 2007").

68. *Conley*, 355 U.S. at 47.

69. *Id.* at 45–46.

cism as soon as it was issued, especially regarding the costs which could arise from a plaintiff's abuse of discovery.[70]

Post-*Conley*, the federal circuits used a unified pleading standard for Rule 8 pleadings, noting as recently as 2008 "[t]he pleading standard is *no different* simply because [something is] an affirmative defense."[71] One common approach was that, "[a]ffirmative defenses are pleadings and, therefore, are subject to all pleading requirements of the Federal Rules of Civil Procedure."[72]

Doubts about *Conley* and Clark's "notice pleading" were often most pronounced in the context of complex litigation.[73] One circuit court even said that a literal reading of *Conley* would "be tantamount to providing antitrust litigation with an exemption from [a motion to dismiss]."[74] It makes sense, then, that the Supreme Court's first major revisions to their *Conley* standard occurred in the context of the appropriate pleading standard for complex litigation, specifically antitrust.

2. *Bell Atlantic Corp. v. Twombly*: The Introduction of the Plausibility Standard

Twombly[75] was the first major alteration of *Conley* endorsed by the Court.[76] In 2007, the Court held that an antitrust complaint could not survive a 12(b)(6) motion to dismiss de-

70. *See* Sullivan, *supra* note 17, at 16–17. This critique parallels general concerns that predated *Conley* about the FRCP's liberal pleading standard. *See, e.g.*, New Dyckman Theatre Corp. v. Radio-Keith-Orpheum Corp., 16 F.R.D. 203, 206 (S.D.N.Y. 1954) ("[S]uch a complaint . . . becomes a springboard from which the parties dive off into an almost bottomless sea of [discovery].").

71. Tamayo v. Blagojevich, 526 F.3d 1074, 1090 (7th Cir. 2008) (emphasis added). *Tamayo* was decided post-*Twombly* but only briefly discusses affirmative defenses and is thus a clue primarily to the applicable preplausibility standard. *See also* Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) (invoking "fair notice" requirement of affirmative defenses under Rule 8 notice pleading).

72. Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1294 (7th Cir. 1989) (citing Bobbit v. Victorian House, Inc., 532 F. Supp. 734, 736–37 (N.D. Ill. 1982)).

73. Sullivan, *supra* note 17, at 17.

74. *Id.* at 18.

75. 550 U.S. 544 (2007).

76. *Id.* at 561–63 (comparing the Court's holding with the standard in *Conley*); *see also* Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (declining to endorse Fifth Circuit's "heightened pleading standard" because it is inconsistent with FRCP and *Conley*); James D. Cox et al., *There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements*, 61 VAND. L. REV. 355, 357 n.9 (2008) (noting that *Twombly* overruled *Conley*).

spite the plaintiff's host of specific allegations.[77] Whereas the pleadings in *Twombly* were sufficient under the long-held *Conley* standard,[78] the Court heightened pleading requirements with its move towards a new 'plausibility' standard.[79] This new standard was built on the premises that "'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[80] Although the Court established this new standard for pleadings[81] specifically for Sherman Act complaints and class actions,[82] the holding resulted in "mass confusion about its scope and meaning" for other cases.[83] However, the Court soon laid the confusion to rest in *Iqbal*.

3. *Ashcroft v. Iqbal*: Embracing the Plausibility Standard

In *Iqbal*,[84] the Court resolved any confusion regarding the breadth of application of the plausibility standard by explicitly articulating that the new plausibility standard applied to all civil litigation.[85]

The *Iqbal* pleading standard has two main components. First, a court must scrutinize whether pleadings are "conclusory."[86] The Court held that "the tenet that a court must

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

78. *Id.* at 592–93 (Stevens, J., dissenting).

79. *Id.* at 556 (majority opinion) (defending need for "plausible grounds").

80. *Id.* at 555.

81. *Id.* at 561–63 (retiring *Conley*'s "no set of facts" standard).

82. *Id.* at 556.

83. Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 458 (2010).

84. 129 S. Ct. 1937 (2009). *Iqbal* arose as a national security case. *Iqbal*, 129 S. Ct. at 1942 ("Respondent [was arrested] . . . [i]n the wake of the September 11, 2001, terrorist attacks . . . ."). After some of the government defendants made a motion to dismiss, Elmaghraby v. Ashcroft, No. 04-CV-1409, 2005 U.S. Dist. LEXIS 21434, at *5 (Sept. 27, 2005), and were denied under *Conley*, the subsequent appeals provided the Supreme Court the opportunity to consider the application of *Twombly's* pleading standard in the broader civil litigation context. *Iqbal*, 129 S. Ct. at 1949.

85. *Id.* at 1949. The case itself has been described at length in other places. *See* Symposium, *Pondering* Iqbal, 14 LEWIS & CLARK L. REV. 1 (2010). It has also been heavily critiqued. *See, e.g.*, Mark Herrmann, James M. Beck, & Stephen B. Burbank, Debate, *Plausible Denial: Should Congress Overrule* Twombly *and* Iqbal*?*, 158 U. PA. L. REV. PENNUMBRA 141 (2009), http://www.pennumbra.com/debates/pdfs/PlausibleDenial.pdf (debating merits of *Iqbal*); Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) (critiquing *Iqbal*'s Seventh Amendment implications).

86. *Iqbal*, 129 S. Ct at 1949.

accept as true all of the allegations contained in a complaint is *inapplicable to legal conclusions*."[87] Second, "only a complaint that states a plausible claim for relief survives a motion to dismiss."[88] Thus, pleadings in civil complaints must be made with sufficient facts that the claims are "plausible." This requirement shifts the emphasis from Clark's 'any meritorious claim' standard and creates a stricter standard that "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[89] The conjunction of *Twombly* and *Iqbal* has firmly established "plausibility" as the contemporary pleading standard in the United States.[90]

C. LITIGATION DEVELOPMENTS THAT LED TO THE PLAUSIBILITY STANDARD

Before turning to an analysis of affirmative defenses under the plausibility standard, it is important to specifically highlight some of the broader reasons the Court moved from *Conley* to *Iqbal*. Specifically, one of the Court's goals was to address the increase in litigation caused by notice pleading and the accompanying increase in discovery and litigation costs. Understanding this reasoning is especially key given the paucity of

87. *Id.* (emphasis added).

88. *Id.* at 1950.

89. *Id.*

90. *See* Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 628 n.6, 633 (describing implication of *Iqbal* and *Twombly* and asserting "plausibility lies at the heart" of the new standard). Because of *Iqbal's* two-part analysis beginning with assessing whether claims are conclusory, and thus not entitled to a presumption of truth, there has been some debate about the extent to which plausibility is actually the standard from *Iqbal*. Nicholas Tymoczko, Note, *Between the Possible and the Probable: Defining the Plausibility Standard After* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal, 94 MINN. L. REV. 505, 518–20 (2009). However, it is clear plausibility is still key. *Id.* at 539. Despite heavy debate and some criticism, *Iqbal* is currently the operative pleading standard in every circuit. For recent decisions upholding *Iqbal* in each circuit, see Wingo v. Mullins, 400 F. App'x 344, 347 n.3 (10th Cir. 2010); Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1233 (8th Cir. 2010); Kermanj v. Goldstein, 401 F. App'x 458, 460 (11th Cir. 2010) (per curiam); Reynolds v. CB Sports Bar, Inc., 623 F.3d 1143, 1146 (7th Cir. 2010) (per curiam); Akl v. Holeman, No. 10-7072, 2010 U.S. App. LEXIS 21844, at *2 (D.C. Cir. Oct. 20, 2010) (per curiam); Sheldon v. Khanal, 396 F. App'x 737, 739 (2d Cir. 2010); Dawson v. Frias, 397 F. App'x 739, 741 (3d Cir. 2010) (per curiam); Telesaurus VPC, LLC v. Power, 623 F.3d 998, 1003 (9th Cir. 2010); Tasker v. DHL Retirement Sav. Plan, 621 F.3d 34, 38–39 (1st Cir. 2010); Acorn Land, LLC v. Balt. Cnty., Md., 402 F. App'x 809, 816 (4th Cir. 2010) (per curiam); SEC v. Cuban, 620 F.3d 551, 553 n.6 (5th Cir. 2010); Albrecht v. Treon, 617 F.3d 890, 893 (6th Cir. 2010).

exegesis in many of the post-*Iqbal* district court decisions, and it will assist consideration of the implications for affirmative defenses in Part II.

The adoption of the FRCP, with its liberal notice-pleading standard, led to an increase in litigation.[91] The ease with which claimants could access the courthouse and, with it, this broad discovery regime, caused concern about escalating litigation frequency and costs.[92] This concern caused the circuits to curtail the broad notice pleading standard for some cases,[93] and, eventually, it drove the Supreme Court to make the next historical shift in pleading standards with the introduction of the plausibility threshold.[94]

In crafting the plausibility standard, the Court referred repeatedly to concerns about the burden of discovery and the cost of litigation.[95] The Court specifically noted "[l]itigation . . . exacts heavy costs in terms of efficiency and expenditure"[96] and referenced the "burdens of discovery"[97] before using these concerns to establish the plausibility standard.[98] The Court remarked that the plausibility standard was a good public policy move, because "deficiency should . . . be exposed at the point of minimum expenditure of time and money by the par-

91. *See* Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. PUB. POL'Y, 1107, 1119 (2010) (noting that "litigation was comparatively small" before the adoption of the FRCP).

92. *See* Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2000–01 (2010) (describing concern over complex litigation costs); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 61–71 (2001) (detailing concerns about costs and dispelling some); s*ee also* BROOKINGS INST., JUSTICE FOR ALL 5–7 (1989) (providing context for long-held concern over costs).

93. *See, e.g.*, Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) ("*Conley* has never been interpreted literally.").

94. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [a valid claim].").

95. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950, 1953 (2009); *Twombly*, 550 U.S. at 558; *see also* Asahi Glass Co. v. Pentech Pharm., Inc., 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) ("[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.").

96. *Iqbal*, 129 S. Ct. at 1953.

97. *Id.* at 1945.

98. *Id.* at 1953.

ties and the court."[99] Commentators have agreed that these considerations had a central role in the Court's adoption of the plausibility standard.[100] The next Part demonstrates that these same policy considerations justify the adoption of the plausibility standard for affirmative defenses.

II. THE CONTEXTUAL IMPLICATION ON AFFIRMATIVE DEFENSES

Since the Supreme Court articulated the plausibility standard in *Twombly* and *Iqbal*, courts have given only limited consideration to the implication of the new pleading standard for affirmative defenses.[101] As of the writing of this Note, no federal circuit has addressed the question.[102] However, district courts have begun to address the implications for affirmative defenses.[103] First, this Part examines how affirmative defenses are used in modern litigation and how the policy concerns underlying the adoption of the plausibility standard might apply. Second, this Part analyzes how district courts have treated affirmative defenses after the adoption of the plausibility standard and finds that while some courts have maintained the historical precedent of pleading standards, others have departed from this tradition post-*Iqbal*.

99. *Twombly*, 550 U.S. at 558 (quoting 5 WRIGHT & MILLER, *supra* note 62, § 1216).

100. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107 *passim* (2010); Bradley Lipton, Comment, *Trade Secret Law and the Changing Role of Judge and Jury*, 120 YALE L.J. 955, 960 (2011) ("*Twombly* reflected concerns exclusively about discovery. . . .").

101. *E.g.*, Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) (applying the heightened pleading standard set forth in *Iqbal* to affirmative defenses); Manual John Dominguez et al., *The Plausibility Standard as a Double-Edged Sword: The Application of* Twombly *and* Iqbal *to Affirmative Defenses*, FLA. B.J., June 2010, at 78–80 (asserting that *Twombly's* plausibility standard applies to affirmative defenses).

102. *See* Dominguez et al., *supra* note 101, at 80 ("It remains to be seen . . . [what] the federal circuit courts will [do] . . . in this evolving area of the law."). A search of LexisNexis by the author on April 18, 2012 confirmed that no circuit has yet addressed this question.

103. *See, e.g.*, *Hayne*, 263 F.R.D. at 648 (applying the heightened pleading standard set forth in *Iqbal* to affirmative defenses).

A. CONTEXTUAL ANALYSIS OF AFFIRMATIVE DEFENSES IN LITIGATION

This Section analyzes the development of affirmative defenses within the framework developed in Part I. This analysis has two aspects. First, it establishes that affirmative defenses developed as a form of pleadings. Second, it considers the use of affirmative defenses in modern litigation and weighs the applicability of the policy concerns that motivated the creation of the plausibility standard.

1. Affirmative Defenses in Context

Historically, affirmative defenses have been considered pleadings.[104] Pleading standards have developed on a uniform basis, with a few noted exceptions.[105] Thus, courts have judged affirmative defenses and their antecedents with the same pleading standard as complaints under Anglo-American jurisprudence at least as far back as written trial records exist.

Both complaints and affirmative defenses exist as "pleadings" under Rule 8, but their distinct usage by plaintiffs *or* defendants may make them seem more distinct than they really are. Given the historical context, the reality is that the predecessors of the modern complaint and affirmative defense initially functioned as the beginning of a long volley of pleadings.[106] In many ways, the pleadings were the real heart of litigation, with each side either denying facts the other had asserted, or admitting those facts but asserting that the claim still failed due to a fault in the law.[107] This historical context blurs any apparent distinction between the plaintiff's and the defendant's pleadings.[108] In fact, historically both sets of pleadings were viewed as exactly the same.[109] The essential element was not

104. FED. R. CIV. P. 8 (placing Rule 8(c) "Affirmative Defenses" under Rule 8 "General Rules of Pleading"); 5 WRIGHT & MILLER, *supra* note 62, *Table of Contents*, at 1, 4 (listing affirmative defenses under chapter titled "Pleadings and Motions").

105. There are distinct pleading standards for certain issues; these circumstances are listed separately in Rule 9, entitled "Pleading Special Matters." FED. R. CIV. P. 9; *see also* 5A WRIGHT & MILLER, *supra* note 62, §§ 1291, 1297 (3d. ed. 2004) ("Pleading Special Matters—In General" and "Pleading Fraud With Particularity—In General").

106. In one example, the course of pleadings was described as the declaration, the plea, the replication, the rejoinder, the surrejoinder, the rebutter, the "surrebutter, and so on." POUND & PLUCKNETT, *supra* note 22, at 423.

107. *Id.* at 424.

108. *See id.* at 423–25.

109. *See id.*

whether a party was a plaintiff or a defendant, but rather that in "due time, an issue either of law or fact is ultimately produced, and the object of the pleadings thus accomplished. For the object of the whole system of pleading is to bring the parties to an issue, to elicit the real points in controversy between them."[110]

It is with this backdrop that Field crafted his code.[111] Starting with a history of pleadings,[112] Field laid down requirements for the complaint and the answer in a section called "Of the pleadings in civil actions"[113]—including what we would call an affirmative defense:

Complaint:	**Answer/ Affirmative Defense:**
A statement of the facts constituting the cause of action, **in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.**[114]	**A statement** of any new matter constituting a defence [sic], **in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.**[115]

The operative pleading standard language for both is identical. This similarity is not surprising, given the long history of pleadings under the common law.[116] Yet these passages in the Field Code emphasize that Field continued the long tradition of identical pleading standards for complaints and affirmative defenses, by integrating identical standards into the first formalized civil procedure in the United States.[117]

This uniformity continued in the modern era with the adoption of the FRCP, which also uses identical operative language for claims and affirmative defenses.[118] It is clear that

110. *Id.* at 425.

111. SUBRIN ET AL., *supra* note 20, at 245.

112. *See* 1848 CODE, *supra* note 48, § 137–47 (discussing pleadings in civil actions).

113. *Id.* § 137.

114. *Id.* § 120(2), at 147 (emphasis added).

115. *Id.* § 128(2), at 150 (emphasis added).

116. *See* Sullivan, *supra* note 17, at 8–15 (discussing the history of pleadings).

117. Subrin, *supra* note 24, at 913 ("David Dudley Field and his 1848 New York Code were tied to a common law procedural outlook.").

118. *Compare* FED. R. CIV. P. 8(a)(1) ("a short and plain statement"), *with id.* 8(b)(1)(A) ("state in short and plain terms").

Clark and others involved in the adoption of the FRCP preserved the English heritage, as well as what is now the American codification of uniform pleading standards for claims and affirmative defenses.[119] With the historical analysis in place, this Section next considers the use of affirmative defenses in modern litigation.[120]

2. Use of Affirmative Defenses in Modern Litigation

In modern litigation, notice pleading permits defendants greater freedom to plead affirmative defenses than earlier litigation eras made available to them. In contrast to the English common law practice, defendants are not forced to choose between denying facts in the complaint and denying the plaintiff's legal claims.[121] The common law practice required a defendant to choose between the "traverse" *or* a confession and avoidance.[122] To "traverse," a defendant denied some essential facts of the plaintiff's case—this was a predecessor of the Rule 8(b) denial.[123] In a confession and avoidance, the defendant admitted the essential facts but denied their legal force due to some circumstance—a predecessor of the Rule 8(c) affirmative defense.[124] Because modern pleadings focus on notifying the parties of the disputed issue,[125] parties may plead any and all claims they have both in the complaint and in the answer.[126] The notice pleading standard has additional implications for affirmative defenses.

The modern focus on notifying parties of what is in dispute precipitated the requirement that defendants plead affirmative

119. *See* Subrin, *supra* note 24, at 976–77 (discussing the "Federal Rules' pleading requirement" and the concept of using unified terminology).

120. For purposes of this analysis "modern litigation" means the litigation environment as it developed in the latter half of the twentieth century. There is no clear line for this purpose between the *Conley* notice pleading era and the post-*Twombly* and *Iqbal* plausibility standard environment. *See* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Conley v. Gibson, 355 U.S. 41 (1957).

121. 5 WRIGHT & MILLER*, supra* note 62, § 1270, at 558–59.

122. *See* POUND & PLUNKNETT, *supra* note 22, at 422–23.

123. *Id.* at 423.

124. *See* BLACKSTONE, *supra* note 26, at 303; POUND & PLUNKNETT, *supra* note 22, at 423.

125. Sullivan, *supra* note 17, at 14; *see also* Subrin, *supra* note 24, at 947 (describing how Roscoe Pound, who heavily influenced Clark, thought "the sole office of pleadings should be to give notice" (citation omitted)).

126. Subrin, *supra* note 24, at 975–82 (detailing various methods that were accepted and rejected in the course of liberalizing the pleading system).

defenses or risk waiving them.[127] Affirmative defenses became standard issue, formulaic, or "boilerplate" because of several factors: Clark's focus on putting parties on notice of the legal claims, lax pleading standards, and the harsh consequences of not notifying the other party (waiver of the defense).[128]

Lastly, asserting and proving out affirmative defenses is part of the trial process,[129] and thus part of the associated costs of trial. Just as defendants must pay costs for attorneys and discovery even if they do not carry a burden of proof at trial,[130] plaintiffs must engage in discovery and prepare to contest any affirmative defense, or they risk losing their case.[131] While there is a dearth of research on the costs of affirmative defenses, because they must be asserted and proved at trial (or the claim is permanently lost) their reflexive pleading necessarily increases the costs and length of the litigation process.[132]

With this analysis in place regarding the role of affirmative defenses up to the advent of the plausibility standard, it is now possible to review how courts have considered affirmative defenses in the wake of *Twombly* and *Iqbal*.

127. *See* 5 WRIGHT & MILLER, *supra* note 62, § 1278, at 663–66 (discussing waiver of affirmative defenses). This requirement and the accompanying risk of forfeiture engendered disputes about what is and what is not an affirmative defense. *See generally id.* §§ 1270–71 (discussing the controversy over the issue of what constitutes an affirmative defense).

128. *E.g.*, Anthony J. Anscombe, *Pretrial Procedure in State and Federal Court: 90 Days Before Trial: Part 1*, CHI. B. A'SSN. REC., Oct. 2007, at 46, 47 ("For defendants, FRCP 8(c) does not require much more than boilerplate in the allegation of affirmative defenses." (citing Williams v. Jader Fuel Co., 944 F.2d 1388, 1400 (7th Cir. 1991))).

129. Safeco Ins. Co. of Am. v. O'Hara Corp., No. 08-CV-10545, 2008 WL 2558015, at *1 (E.D. Mich. June 25, 2008) ("Boilerplate defenses clutter the docket and, further, create unnecessary work. Opposing counsel generally must respond to such defenses with interrogatories or other discovery aimed at ascertaining which defenses are truly at issue and which are merely asserted without factual basis but in an abundance of caution.").

130. YEAZELL, *supra* note 6, at 429 (discussing the tactic of starting with less expensive discovery methods before progressing to more expensive methods).

131. *See* 5 WRIGHT & MILLER, *supra* note 62, § 1270, at 560–61 (discussing the purpose of affirmative defenses and explaining how an affirmative defense can defeat a plaintiff's claim).

132. *See* Anthony Gambol, Note, *The* Twombly *Standard and Affirmative Defenses: What Is Good for the Goose Is Not Always Good for the Gander*, 79 FORDHAM L. REV. 2173, 2198–99 (2011) (explaining the burdens of discovery related to "non-meritorious defenses").

B. DISTRICT COURTS' USE OF THE PLAUSIBILITY STANDARD AND AFFIRMATIVE DEFENSES

The district court decisions that discuss the applicable pleading standard for affirmative defenses post-*Twombly* and *Iqbal* can be grouped into two categories: (1) courts adopting a unified standard for pleadings, and (2) courts that bifurcate the pleading standard for claims and affirmative defenses. The decisions that have looked at this question have involved different types of parties, on diverse sides of litigation, including corporations, individuals, and government entities. This Section examines the reasoning used by courts in reaching one of the aforementioned outcomes.

1. Majority Position Continues to Be Application of a Unified Pleading Standard

The majority of courts to consider the pleading standard for affirmative defenses after *Twombly* and *Iqbal* have maintained a unified standard for pleadings.[133] The Eastern District of Michigan applied a unified standard in one of the first cases to deal with this question, *United States v. Quadrini*.[134] In *Quadrini*, the court treated the issue as a matter of first impression and cited only pre-*Twombly* precedent.[135] The court held that the test for reviewing motions to strike affirmative defenses was the same as the review under the 12(b)(6) standard for pleadings,[136] and thus that *Iqbal* and *Twombly* applied.[137] In other words, because the court had already been using a *unified* standard it did not see any reason to *bifurcate* its treatment of pleadings.[138] Analysis under the pre-*Iqbal* 12(b)(6) standard analysis was *part* of the review for a 12(f) motion to

133. *See, e.g.*, Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218, 2011 Wl 98573, at *1 (E.D. Va. Jan. 10, 2011) ("Courts of the majority view apply *Twombly/Iqbal* to affirmative defenses . . . ."); *see also* Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 649–50 (D. Kan. 2009) ("The majority of courts addressing the issue . . . have applied the heightened pleading standard . . . to affirmative defenses."). For a sampling of decisions, see *id.* at 649 n.14 (listing courts in the 'minority' holding a bifurcated standard applies); *id.* at 650 n.15 (listing courts in the 'majority' holding a unified standard applies).

134. 69 Fed. R. Serv. 953 (2007), *available at* No. 2:07-CV-13227, 2008 WL 4612318 (E.D. Mich. Dec. 6, 2007); *see also supra* notes 1–4 and accompanying text.

135. *Quadrini*, 69 Fed. R. Serv. *passim*.

136. *Id.* at 957.

137. *Id.*

138. *Id.* at 958.

strike.[139] The *Quadrini* court held that a unified approach "*must also apply to defendants in pleading affirmative defenses*, otherwise a court could not make a Rule 12(f) determination on whether an affirmative defense is adequately pleaded under Rules 8 and/or 9 and could not determine whether the affirmative defense would withstand a Rule 12(b)(6) challenge."[140]

The Southern District of Florida also applied a unified standard in *Home Management Solutions, Inc. v. Prescient, Inc.*[141] Like *Quadrini*, the court in *Prescient* treated the issue as a case of first impression and looked exclusively to *Twombly* and pre-*Twombly* precedent.[142] While the court stated that Rule 8 "clearly requires only notice pleading,"[143] the court also held that "a defendant must nevertheless plead an affirmative defense with enough specificity or factual support to give the plaintiff 'fair notice' of the defense that is being asserted."[144] The court based its reasoning on precedent from the Fifth Circuit that "[a]n affirmative defense is subject to the same pleading requirements as is the complaint."[145] From this pre-existing unified standard, the court went on to apply the plausibility standard from *Twombly*.[146] This existing unified standard in the Fifth Circuit has been used in other cases also applying a post-*Twombly* and *Iqbal* unified standard.[147]

The fact that a long-standing unified standard has existed in the circuits played a major role in early decisions that found a post-*Twombly* and *Iqbal* unified standard as well. The Southern District of New York continued that dynamic in *Aspex Eyewear, Inc. v. Clariti Eyeware, Inc.*[148] The court noted that the Second Circuit adopted a unified pleading standard prior to *Twombly* and *Iqbal*, and, based on this precedent, it reasoned "affirmative defenses are pleadings, and therefore, are subject

139. *Id.* at 957.

140. *Id.* at 958 (emphasis added).

141. No. 07-20608-CIV, 2007 WL 2412834, at *3 (S.D. Fla. Aug. 21, 2007).

142. *Id. passim*.

143. *Id.*

144. *Id.* (citing Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)).

145. *Id.* at *3 (quoting Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)).

146. *Id.* at *3–4.

147. *See, e.g.*, CTF Dev., Inc., v. Penta Hospitality, LLC, No. C 09-02429 WHA, 2009 WL 3517617 99538 at *7 (N.D. Cal. Oct. 26, 2009) (citing Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)); Teirstein v. AGA Med. Corp., No. 6:08cv14, 2009 WL 704138, at *2 (E.D. Tex. Feb. 13, 2009) (citing Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999)).

148. 531 F. Supp. 2d 620 (S.D.N.Y. 2008).

to all pleading requirements . . . ."[149] These relatively modern decisions thus uphold, or sustain, the unified pleading standard that has always been part of American jurisprudence, which was born from the historical development of our civil procedure.

District courts buttressed this reasoning by drawing on contemporary policy concerns, in addition to relying on the long-standing precedent of unified pleading standards.

In *Safeco Insurance v. O'Hara Corp.*,[150] the Eastern District of Michigan held that a unified pleading standard applied and appealed largely to policy considerations, noting that "[b]oilerplate defenses clutter the docket and, further, create unnecessary work."[151] Thus the court noted that not only was there strong precedent for a unified pleading standard but that the considerations that led the Supreme Court to evolve the pleading standard for complaints applied equally to the pleading of affirmative defenses.[152]

These policy arguments have played an increasingly important role for courts that hold in favor of a unified standard. The Western District of Oklahoma applied a unified standard, holding that "the desire to avoid unnecessary discovery . . . required to ascertain that boilerplate affirmative defense assertions are just that, *i.e.*, lack any factual basis and are not viable."[153] The Eastern District of Michigan, the same district that decided *Quadrini*, again applied a unified pleading standard in *Shinew v. Wszola*,[154] but began by considering policy concerns regarding "boilerplate" affirmative defenses.[155] The court also specifically invoked the high discovery costs and generally other problems of notice pleading, noting that "Twombly . . . also observed that discovery costs required to explore the factual basis for a pleaded claim or defense are a problem."[156] The court used these policy concerns to support its

149. *Id.* at 623 (quoting Shechter v. Comptroller of N.Y., 79 F.3d 265, 270 (2d Cir. 1996)).

150. No. 08-CV-10545, 2008 U.S. Dist. LEXIS 48399 (E.D. Mich. June 25, 2008).

151. *Id.* at *2.

152. *Id.*

153. Gibson v. Officemax, Inc., No. CIV-08-1289-R, 2009 U.S. Dist. LEXIS 127111, at *3 (W.D. Okla. Jan. 30, 2009).

154. No. 08-14256, 2009 U.S. Dist. LEXIS 33226, at *10–11 (E.D. Mich. Apr. 21, 2009).

155. *Id.* at *7 (discussing a case that illustrated difficulties created by affirmative defenses asserted in boilerplate fashion).

156. *Id.* at *9.

holding that the Supreme Court had announced a 'general' pleading standard in *Twombly*[157]—thus continuing the lengthy precedent of a unified pleading standard.

In addition to the precedent of unified pleading standards and public policy concerns, some courts have held that general principles of fairness in the legal system also call for a unified pleading standard. In one of the most recent decisions to address this question, the Southern District of Ohio held that the purpose for the pleadings was the same and found "no reason" to bifurcate the standard.[158] Other decisions have relied on this argument in holding a unified standard applies.[159]

Thus, courts that have applied a unified pleading standard have strong support for their holdings. First, a unified pleading standard is long-standing precedent. Second, while law—including pleading standards—is continuously evolving, the same policy concerns that drove the Supreme Court's decisions in *Iqbal* and *Twombly* also apply to affirmative defenses. And finally, all of those considerations, notwithstanding basic principles of fairness in the way parties are treated—and which initially led to notice pleading—also mean plaintiffs should be put on equal footing with defendants regarding the issues at play.[160] The courts that have applied a unified pleading stand-

157. *Id.* at *10–11.

158. Nixson v. Health Alliance, No. 1:10-CV-00338, 2010 U.S. Dist. LEXIS 133177, at *4 (S.D. Ohio Dec. 15, 2010) ("*Iqbal* and *Twombly* should not be construed to create a subset of rules that govern only complaints. In both claims and defenses, the purpose of pleading requirements is to provide sufficient notice to the other side that some plausible, factual basis exists for the assertion. The Court can find no reason why claims must be plausible but defenses, if not held to the Iqbal/Twombly standard, could have a mere suggestion of possibility of applicability to the case.").

159. Palmer v. Oakland Farms, Inc., No. 5:10cv00029, 2010 U.S. Dist. LEXIS 63265, at *15 (W.D. Va. June 24, 2010) ("[C]onsiderations of fairness, common sense and litigation efficiency underlying *Twombly* and *Iqbal* strongly suggest that the same heightened pleading standard should also apply to affirmative defenses."); s*ee also* Francisco v. Verizon South, Inc., No. 3:09cv737, 2010 U.S. Dist. LEXIS 77083, at *21–23 (E.D. Va. July 29, 2010) (finding the majority view adopted by the *Palmer* court "persuasive"). *But see* Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv1218 (JCC), 2011 U.S. Dist. LEXIS 2265, at *7–8 (E.D. Va. Jan. 10, 2011) (declining to extend the plausibility standard to affirmative defenses).

160. *See also* Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 650 (D. Kan. 2009) ("It makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses. In both instances, the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case."); Burget v. Capital

ard have used reasoning that is more far-reaching and that comes from several different sources. In contrast, the courts that have upheld a bifurcated pleading standard have relied on more limited support.

2. A Minority of Courts Have Applied a Bifurcated Pleading Standard to Complaints and Affirmative Defenses

Courts that have applied a bifurcated pleading standard after *Twombly* and *Iqbal* represent a minority—but still large—number of decisions. These courts have not drawn on the same wide-ranging reasoning as courts discussed in the previous Section. Instead, they have focused on a single, specific word choice in Rule 8: the presence of the word "show" in the standard for complaints under Rule 8(a)(2), and its corresponding absence from Rules 8(b) and (c), governing affirmative defenses. Courts applying a bifurcated standard generally hold this absence is the crux in the Supreme Court's application of the plausibility standard.

For example, a court in the split Eastern District of Michigan focused on this linguistic distinction in *First National Insurance Co. of America v. Camps Services, L.T.D.*,[161] one of the first decisions to apply a bifurcated pleading standard. Like early unified standard holdings, *Camps Services* treated the question as a case of first impression and cited only *Twombly* and pre-*Twombly* precedent.[162] After it decided that *Twombly* and the plausibility standard did not apply to Rule 8(c) defenses, the court applied pre-*Twombly* Sixth Circuit precedent that

West Sec., Inc., No. CIV-09-1015-M, 2009 U.S. Dist. LEXIS 114304, at *5 (W.D. Okla. Dec. 8, 2009) ("An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery.").

161. No. 08-cv-12805, 2009 U.S. Dist. LEXIS 149 (E.D. Mich. Jan. 5, 2009); *see also* Westbrook v. Paragon Sys., Inc., No. 07-0714-WS-C, 2007 U.S. Dist. LEXIS 88490, at *2 (S.D. Ala. Nov. 29, 2007) ("*Twombly* was decided under Rule 8(a) . . . .").

162. *Camp Servs.*, 2009 U.S. Dist. LEXIS, at *4–5 ("[Plaintiff] is correct that *Twombly* raised the requirements for a well-pled complaint under *Fed. R. Civ. P. 8(a)*'s 'short and plain statement' requirement. Similar, though not identical, language appears in *Rule 8(b)*'s requirement that a defendant's answer 'state in short and plain terms its defense to each claim asserted against it.' No such language, however, appears within *Rule 8(c)*, the applicable rule for affirmative defenses. As such, *Twombly's* analysis of the 'short and plain statement' requirement of *Rule 8(a)* is inapplicable to this motion under *Rule 8(c)*." (internal citation omitted)).

used the notice pleading standard to analyze affirmative defenses.[163]

Courts that have applied a bifurcated pleading standard do not provide much more in terms of reasons or analysis—the finding is usually in an abbreviated manner.[164] The heart of the argument can be restated easily, in full:

> Notably absent [for affirmative defenses] is a required 'showing that the pleader is entitled to relief.' Yet the Plaintiff's argument would have this Court reach such a requirement into [the Rule for defenses] on the basis of *Twombly* and *Iqbal*. Those opinions afford little reason for doing so. Neither *Twombly* nor *Iqbal*'s analyses even touch [defenses]; both begin and end with the interpretation of [complaints] . . . .[165]

As will be seen, this line of argument misreads the standards on several levels.

This reasoning continues to be the driving force for courts which apply a bifurcated pleading standard. The Eastern District of Virginia held that the small variation between Rules 8(a)(2) and 8(b) was sufficient to support a holding in conflict with the majority of courts in its own circuit.[166] However, the court also began to engage some of the policy questions. First, the court acknowledged the calls for fairness and equity and said "[s]uch policy considerations may be compelling,"[167] but held that "whether this Court agrees with them or not, it is first bound to apply the relevant rules of civil procedure as written."[168] Second, the court offered one of the first policy arguments for a bifurcated pleading standard:

> Balanced against [policy arguments for a unified standard], no doubt, are countervailing considerations of whether it is fair to apply the same pleading standard to plaintiffs, who have far more time to develop factual support for their claims, as to defendants, who have 21

163. *Id.* at *5 ("The affirmative defenses laid out . . . provide adequate notice." (citing Davis v. Sun Oil Co., 148 F.3d 606, 612 (6th Cir. 1998))).

164. *See, e.g.*, Romantine v. CH2M Hill Eng'rs, No.09-973, 2009 U.S. Dist. LEXIS 98699, at *3–4 (W.D. Pa. Oct. 23, 2009) ("The Supreme Court in *Twombly* was interpreting pleading requirements of Rule 8(a)(2). This court does not believe that *Twombly* is appropriately applied to affirmative defenses . . . .").

165. Lopez v. Asmar's Mediterranean Food, Inc., No. 1:10cv12181 (JCC), 2011 U.S. Dist. LEXIS 2265, at *6–7 (E.D. Va. Jan. 10, 2011).

166. *See id.* at *3 ("Most—including every Fourth Circuit court so far—have found that *Twombly*/*Iqbal* should apply to affirmative defenses . . . . This Court finds itself in the minority.").

167. *Id.* at *5.

168. *Id.*

> days to respond to a complaint, who did not initiate the lawsuit, and who risk waiving any defenses not raised . . . .[169]

These arguments provide a complete picture of the considerations used by courts that have applied a bifurcated pleading standard.[170]

These courts misread both *Iqbal* and the FRCP in context. First, it is simply not true that *Iqbal* did not "even touch" defenses. While it is true that the Supreme Court referenced the word "show" or some variety, they did so only six times and usually as a general statement.[171] However, the *Iqbal* majority referred to Rule 8 *in its entirety* ten times, and often to make clear that both *Iqbal* and *Twombly* applied to the entire Rule.[172]

When it comes to the FRCP's specific language, these district courts are correct to consider it very carefully. The plausibility standard is the Supreme Court's interpretation of the FRCP, which are in turn a federal statute.[173] Because of the statutory nature of the FRCP, the standard canons of interpretation apply in trying to understand them, especially if there is a reason to abrogate the historical implications described above.[174] The most common rule is that the "plain meaning" is to control,[175] and the Supreme Court has also indicated deference for the plain meaning.[176] Here, both complaints and af-

169. *Id.* at *5 n.5.

170. *See* Sewell v. Allied Interstate, Inc., No. 3:10-CV-113, 2011 U.S. Dist. LEXIS 983, at *18–21 (E.D. Tenn. Jan. 5, 2011) (citing pre-*Twombly* precedent and noting the Sixth Circuit has not weighed in on the debate, in its decision to apply a bifurcated standard); Charleswell v. Chase Manhattan Bank, N.A., No. 01-119, 2009 U.S. Dist. LEXIS 116358, at *12–13 (D.V.I. Dec. 8, 2009) (applying a bifurcated standard based on the presence of the word "show"); Henson v. Supplemental Health Care Staffing Specialists, No. CIV-09-0397-HE, 2009 U.S. Dist. LEXIS 127642, at *3–4 (W.D. Okla. July 30, 2009) ("*Twombly* . . . does not apply with the same force to a defendant's affirmative defenses . . . .").

171. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1940, 1949, 1950, 1952 (2009).

172. *Id.* at 1949, 1950, 1952–54.

173. For a history of the creation of the FRCP, see HAZARD ET AL., *supra* note 17, at 28–30; Clark, *supra* note 57, at 145–52.

174. *Cf.* Pioneer Investment Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 391–92 (1993) (using statutory interpretation to interpret the FRCP). *Contra* David Marcus, *When Rules are Rules: The Federal Rules of Civil Procedure and Institutions in Legal Interpretation*, UTAH L. REV. (forthcoming 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1852856.

175. RONALD B. BROWN & SHARON J. BROWN, STATUTORY INTERPRETATION 38 (N.I.T.A. ed. 2002).

176. *See, e.g.*, Smith v. United States, 508 U.S. 223, 228 (1993).

firmative defenses are governed by the same exact terms. The plain meaning would say the pleading standards are the same. And if "the meaning is plain," then interpretation cannot be based on any other source.[177] The focus of some courts on the word "show" seems misplaced in light of the fact that the operative language in the FRCP is the same—as it has been for hundreds of years. In this context the meaning seems plain.

If, in fact, the meaning is not plain and the FRCP's language must be parsed, another canon could well imply that affirmative defenses are subject to a *stricter* pleading standard than plaintiffs' complaints. The *Expressio Unius Est Exclussio Alterius* canon dictates that where a term is specified in one part, but not in another, the legislature intended to make such a distinction.[178] Both the Rule for complaints, 8(a)(2), and the Rule for general denials of fact, 8(b)(1), use the "short and plain" language where the Rule for affirmative defenses, 8(c), does not. While Rule 8(b)(1) is *presumed* to apply to affirmative defenses, the absence of the "short and plain" modifier from Rule 8(c) could well be read to mean that affirmative defenses must be *less* short and *less* plain than complaints under *Expressio Unius*. However, courts have generally accepted that, despite this, pleading standards for affirmative defenses are on the same level as complaints,[179] and this Note does not assert anything different. This is especially important because the courts that have bifurcated the applicable standard have done so out of concern for one difference they read into the various applicable rules.

This Part has analyzed both historical and modern litigation specifically regarding affirmative defenses. With this historical and modern context, it is now possible to fully consider in Part III the application of the plausibility standard to affirmative defenses.

III. APPLYING *IQBAL* AND *TWOMBLY* TO AFFIRMATIVE DEFENSES

The Supreme Court's move toward the plausibility standard for pleading has left an open question about whether this

177. BROWN & BROWN, *supra* note 175.

178. *Id.* at 81.

179. 5 WRIGHT & MILLER, *supra* note 62, § 1274 ("I have no doubt that the requirements for an affirmative defense are no more stringent than those for a complaint." (quoting Lehmann Trading Corp. v. J. & H. Stolow, Inc., 184 F. Supp. 21, 22–23 (D.C.N.Y. 1960))).

new standard applies to affirmative defenses as pleadings or if it is narrowly applied to plaintiffs' claims only. A unified pleading standard is supported by the historical context, statutory interpretation, and public policy, and thus the plausibility standard from *Iqbal* and *Twombly* should apply to affirmative defenses.

A. THE HISTORY AND LANGUAGE OF THE STANDARDS SUPPORT A UNIFIED PLEADING STANDARD

The evolution of pleading shows that affirmative defenses have been judged in the same light as complaints for hundreds of years. The more recent history on this issue, namely *Twombly* and *Iqbal*, also clarifies the proper interpretation. A uniform pleading standard is consistent with the historical roots of pleadings in English common law and every iteration of the rule in American civil procedure. The weight of history, the uniformity of pleading standards in the major American procedural reforms, and the apparent connection between the plausibility standard and all pleadings in the Supreme Court's most recent precedent,[180] support a unified pleading standard for complaints and affirmative defenses.

The courts that have so far bifurcated the standards have relied almost exclusively on a plain meaning reading of the word "show" in Rule 8(a)(1), which they construe to require a higher standard than that required by Rule 8(c). However, what is clear is that rather than provide a reason to diverge from the historical implication of a unified pleading standard, the canons of statutory interpretation underscore the likelihood that the same standard applies to both complaints and affirmative defenses.

The partial list of affirmative defenses contained in Rule 8(c) may make affirmative defense seem more straightforward or constrained than plaintiffs' potential complaints. However, the list of affirmative defenses in Rule 8 is not exhaustive.[181] Wright and Miller list eighty examples of affirmative defenses

180. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) ("Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. That Rule in turn governs the *pleading standard 'in all civil actions and proceedings in the United States* . . . .'" (emphasis added) (citation omitted)).

181. Jones v. Bock, 549 U.S. 199, 212 (2007); *see also* 5 WRIGHT & MILLER, *supra* note 62, § 1271 ("The list of nineteen affirmative defenses in Federal Rule 8(c) . . . is not intended to be exhaustive.").

which have been recognized but are not listed in the FRCP.[182] In other words, there is an almost unlimited supply of affirmative defenses, each one implicating a different potential fact pattern in order to absolve the defendant's supposed liability.

B. PUBLIC POLICY ALSO SUPPORTS APPLYING THE PLAUSIBILITY STANDARD TO AFFIRMATIVE DEFENSES

The public policy concerns at play in *Twombly* and *Iqbal* apply equally to complaints and affirmative defenses. Like the assertions made in a complaint, affirmative defenses must be proved at trial. The concerns of the Court regarding the costs of discovery apply equally to proving affirmative defenses. The costs and the delays of litigation are not problems exclusive to defendants.[183] Any assertion of an affirmative defense entails the risk of further discovery and extra litigation costs.[184] Even more significantly, the facts that are required to plead affirmative defenses would tend to be more within the defendant's sphere of knowledge than the plaintiff's, meaning that if an affirmative defense is well-grounded, it should not be burdensome for a defendant to meet the plausibility standard in their pleading.

One policy concern that is chief among practitioners regarding the solution presented in this Note is the risk of waiver if affirmative defenses are not pled at the earliest possible time.[185] Because the FRCP place such a priority on *notifying* the other party of claims, they create a rather severe penalty for failing to plead an affirmative defense. It is almost universally recognized that total failure to plead an affirmative defense means that one waives the ability to raise it at trial.[186] However, the FRCP grant parties, including defendants, leave to "freely amend" their filings as justice requires.[187] If defendants truly have new information that would allow them to plead a new affirmative defense with specificity, they would be allowed to amend their answer. Thus, applying the plausibility

182. *See* 5 WRIGHT & MILLER, *supra* note 62, § 1271.

183. *See, e.g.*, Philip G. Schrag, *Bleak House 1968: A Report on Consumer Test Litigation*, 44 N.Y.U. L. REV. 115 (1969) (arguing generally about delay for plaintiffs seeking assistance and need for more efficiency for them).

184. Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53, 64–65 (2010).

185. Interview with Justin McCarty, Associate, Mayer Brown, in Chi., Ill. (Aug. 28, 2010).

186. 5 WRIGHT & MILLER, *supra* note 62, § 1278.

187. FED. R. CIV. P. 15(a).

standard to affirmative defenses is completely in line with the efficiency goals that led the Court to establish the standard in the first place.

C. A UNIFIED PLAUSIBILITY STANDARD

Both *Twombly* and *Iqbal* articulated new "pleading" standards,[188] but each case only discussed the requirements of a plaintiff's complaint.[189] The Court's failure to discuss the application of the standard to affirmative defenses is understandable—both cases were about the standard for a 12(b)(6) motion to dismiss a plaintiff's complaint,[190] and overall both courts and commentators have been more concerned about unmeritorious claims by plaintiffs.[191] Nevertheless, both *Twombly* and *Iqbal* changed pleading standards generally, including affirmative defenses.

Twombly held that "[a]sking for plausible grounds . . . does not impose a probability requirement . . . *at the pleading stage* . . . ."[192] And also, that "we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."[193] The reference to a *claim* is best understood here relating to the procedural posture of the case, and given that understanding, the holding is almost certainly general in nature to the *pleadings*.

Iqbal is even more clear in its general application to pleadings. "[T]he pleading standard *Rule 8* announces does not require detailed factual allegations, but it demands more than an unadorned . . . accusation."[194] Also the Court clarifies that it is articulating "*Twombly*'s construction of *Rule 8*,"[195] thus directly applying the plausibility standard to Rule 8(c) affirmative

188. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) ("The pleading standard [that] *Rule 8* announces . . . demands more than an unadorned . . . accusation." (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007))); *Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (internal quotation marks omitted)).

189. *E.g.*, *Iqbal*, 129 S. Ct. at 1949 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (citing *Twombly*, 550 U.S. at 570)).

190. *Id.* at 1942; *Twombly*, 550 U.S. at 552.

191. *E.g.*, Miller, *supra* note 92, at 61.

192. *Twombly*, 550 U.S. at 556 (emphasis added).

193. *Id.* at 570.

194. *Iqbal*, 129 S. Ct. at 1949 (emphasis added).

195. *Id.* at 1950 (emphasis added).

defenses.

Thus, from Blackstone to Black, Dickens to Field, and Clark to Kennedy,[196] pleadings have evolved directly from basic common law roots. Affirmative defenses have evolved with complaints and the other pleadings under a unified standard. With each iteration of civil procedure, from ancient England to the contemporary Supreme Court, courts have considered pleadings as a unit and the pleadings evolved in parallel. Affirmative defenses are pleadings and should continue to be judged using a unified standard.

CONCLUSION

In *Twombly* and *Iqbal*, the Supreme Court significantly changed the pleading standard for plaintiffs in civil litigation. These holdings failed to address what standard applies to affirmative defenses. By examining the new plausibility standard in the context of the ongoing evolution of civil procedure, this Note demonstrates that policy and precedent support applying the new standard to affirmative defenses. Complaints and affirmative defenses have long had a unified pleading standard. Moreover, both the statutory language and the public policy support the application of the plausibility standard to affirmative defenses. Defendants should be required to plead 'plausible defenses' thus meeting the applicable standard for complaints, just as they always have.

196. Justices Black and Kennedy, respectively, authored the *Conley* and *Iqbal* majority opinions.