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# FLYING BLIND: THE LACK OF UNIFORMITY IN FEDERAL PLEADING AFTER *TWOMBLY* AND *IQBAL*

RYAN CHARLSON\*

## I. THE DEATH OF A PLEADING STANDARD

*Conley's* “no set of facts” language has been questioned, criticized, and explained away long enough . . . and after puzzling the profession for 50 years, this famous observation has earned its retirement.<sup>1</sup>

If *Conley's* “no set of facts” language is to be interred, let it not be without a eulogy. That exact language, which the majority says has “puzzl[ed] the profession for 50 years,” has been cited as authority in a dozen opinions of this Court and four separate writings. In not one of those 16 opinions was the language “questioned,” “criticized,” or “explained away.” Indeed, today’s opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation.<sup>2</sup>

Congress granted the Supreme Court the power to establish the Federal Rules of Civil Procedure (the “Federal Rules”),<sup>3</sup> which govern pleadings in federal court.<sup>4</sup> Ever since the power to promulgate the Federal Rules was delegated to the Court, commentators have disagreed about the Court’s role in interpreting them.<sup>5</sup> Regardless of the debate, the Court has freely

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1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007).
2. *Id.* at 577-78 (Stevens, J., dissenting) (emphasis in original).
3. *See* 28 U.S.C. § 2072 (2006) (stating that the Supreme Court has the power to make rules related to procedure and evidence in the district and appellate courts); *see also* *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9-10 (1941) (holding that Congress may exercise the power of regulating the procedure of the federal courts by delegating the authority to make rules to the Supreme Court or other courts).
4. *See* FED. R. CIV. P. 8(a) (stating that “a pleading . . . must contain: (1) a short and plain statement of the grounds for the court’s jurisdiction . . . ; (2) a short and plain statement of the claim showing the pleader is entitled to relief; and (3) a demand for relief sought . . .”).
5. *Compare* Karen Nelson Moore, *The Supreme Court’s Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1093 (1993) (suggesting that the Court should have the power to interpret the

interpreted the Federal Rules since their inception, and the rule regarding pleading has been no exception.<sup>6</sup>

According to Rule 8 of the Federal Rules, “a pleading that states a claim for relief must contain a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>7</sup> The Court gives the Federal Rules their plain meaning, and the Court’s inquiry into them is complete if they find the text clear and unambiguous.<sup>8</sup> Although the words of Rule 8 may seem clear and unambiguous, the Court has recently changed their meaning.<sup>9</sup> And in doing so, it ignored over fifty years of precedent.<sup>10</sup>

This Comment will begin by exploring the Federal Rules of

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Federal Rules freely because of the Court’s role in promulgating them), with Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1102 (2002) (suggesting that the delegation of rulemaking authority should constrain the Court’s interpretation of the Federal Rules).

6. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (holding that a complaint should not be dismissed unless no set of facts can be proved to entitle a plaintiff to relief); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 (2002) (holding that an employment discrimination claim does not need to contain specific facts, but only a short and plain statement showing that the plaintiff is entitled to relief); *Twombly*, 550 U.S. at 555 (holding that although a complaint does not need detailed factual allegations, it requires more than labels and conclusions); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (holding that a complaint must contain enough factual information to show that it is plausible that a plaintiff is entitled to relief).

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

8. *Bus. Guides, Inc. v. Chromatic Comm’n Enter., Inc.*, 498 U.S. 533, 540-41 (1991).

9. *Compare Conley*, 355 U.S. at 47 (holding that Rule 8 requires a statement of the claim that will give a defendant fair notice of what the claim is and what grounds upon which it rests), with *Iqbal*, 129 S. Ct. at 1949 (holding that the pleading standard of Rule 8 does not require factual allegations, but it does require sufficient factual matter to state a claim that is plausible).

10. See, e.g., *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 235 (1959) (citing *Conley*, 355 U.S. at 47-48) (holding that although the petitioner’s complaint may have been too vague, that is not grounds for dismissing his action); see also *Jenkins v. McKeithen*, 395 U.S. 411, 422-23 (1969) (citing *Conley*, 355 U.S. at 45-46) (stating that the petitioner’s complaint, although inartfully drawn, should not be dismissed unless he could prove no set of facts that would entitle him to relief); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980) (citing *Conley*, 355 U.S. at 45-46) (reversing an appellate court’s dismissal of a claim and holding that *Conley*’s no set of facts standard applies to Sherman Act claims); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (citing *Conley*, 355 U.S. at 47) (holding that the heightened pleading standards of Rule 9(b) do not apply to § 1983 actions against municipalities under the concept of *expressio unius est exclusio alterius*); *Swierkiewicz*, 534 U.S. at 512 (citing *Conley*, 355 U.S. at 47) (reversing the appellate court’s dismissal of petitioner’s complaint and holding that the appellate court’s higher pleading standard for employment discrimination cases conflicted with Rule 8 and *Conley*).

Civil Procedure. It will pay particular attention to Rule 8 and how the Supreme Court has interpreted its meaning over time. The section will end with a discussion of the new pleading standard set forth in *Twombly*<sup>11</sup> and expanded in *Iqbal*.<sup>12</sup> Next, by examining how the new pleading standard is being applied in different circuits, this Comment will illustrate that there is no longer a uniform pleading standard. It will discuss the ramifications of this lack of uniformity and will show how the Supreme Court erred by ignoring the process of amending the Federal Rules and by not following precedent. Lastly, this Comment will propose that a new, uniform pleading standard be created by rewriting Rule 8.

## II. THE EVOLUTION OF FEDERAL PLEADING

### A. From King to Code

The first pleading system was the English common law system.<sup>13</sup> At early common law, if someone had a grievance with another, he sought justice from the king, who would issue a *writ*.<sup>14</sup> Eventually, as the common law developed, a plaintiff had to fit his claim into one of eleven categories<sup>15</sup> and then choose between a court of law or a court of equity.<sup>16</sup> The common law pleading system had its issues, one of which was providing many advantages to a defendant.<sup>17</sup> Moreover, “the pleading contest was the primary source of dispute resolution, and the ‘trial itself was

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11. See *Twombly*, 550 U.S. at 570 (holding that the plaintiff’s claims must be dismissed because they did not state enough facts to move the complaint across the line from conceivable to plausible).

12. See *Iqbal*, 129 S. Ct. at 1953 (stating that the Court’s “decision in *Twombly* expounded the pleading standard for all civil actions.”).

13. See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE CASES AND MATERIALS 465 (Revised 9th ed. 2008) (illustrating that modern pleading traces its roots to the English common law system, and that an understanding of the historical foundations of pleading can lead to a better understanding of the modern substantive law).

14. See *id.* at 467 (stating that in order to get before a royal court, the king would issue a *writ*, which would order the “person before the king’s judges to answer the complaint.”).

15. See Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 872 n.25 (2008) (citing ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 526 (2003)) (listing the eleven categories as trespass, trespass on the case, debt, detinue, replevin, trover, ejectment, covenant, account, special assumpsit, and general assumpsit).

16. *Id.* at 873.

17. See *id.* at 873-74 (listing the advantages to the defendant in the common law pleading system including: the limited number of categories the complaint had to fit into, selecting the proper forum, separating issues of law from issues of fact, and providing the defendant with all the information needed to bring a defense at the pleading stage).

something of an afterthought.”<sup>18</sup>

In the mid-nineteenth century, both England and the United States recognized the inadequacies of the common law pleading system, and efforts were undertaken to reform it.<sup>19</sup> In England, an Act of Parliament, known as the Hilary Rules, both reduced the number of defenses allowed under a plea and restored special pleading.<sup>20</sup> In the United States, the state of New York enacted a Code of Civil Procedure, known as the Field Code, which served as a model that many other states followed.<sup>21</sup> The Field Code contributed greatly to the law of procedure, and its influence can be seen in the Federal Rules to this day.<sup>22</sup> The Field Code required a plaintiff's complaint to provide facts showing the cause of action and a demand for relief.<sup>23</sup> What was thought to be simple in theory, however, was not in reality, and the Field Code was abandoned for an even simpler form of pleading.<sup>24</sup>

### B. The Solution Arrives

The Federal Rules came into effect on September 16, 1938.<sup>25</sup> The process of their formation began in 1934 when Congress passed the Rules Enabling Act, which gave the Supreme Court the

18. *Id.* at 874 (quoting Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 437 (1986)).

19. See FRIEDENTHAL ET AL., *supra* note 13, at 501-02 (stating that procedural reform began in England between 1825 and 1834, culminating with what became known as the Hilary Rules. In the United States, the New York Constitution of 1846 called for a revision of the civil procedure within the state).

20. *Id.* at 502 (citing 2 C. & M. 1-30, 149 Eng.Rep. 651-63 (1834)).

21. See *id.* (stating that the Field Code served as a prototype for similar codes in more than half of the states and as a precursor to the Federal Rules); see also Josephson, *supra* note 15, at 874 (stating that the Field Code was a model of reform for more than half of the states, and some states retain parts of it to this day).

22. See Josephson, *supra* note 15, at 874 (citing ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE: CASES AND PROBLEMS 535 (2003)) (suggesting that the Field Code's contributions to procedural law can be found in the Federal Rules and include: "(1) the merger of courts of law and equity; (2) the creation of a single cause of action: the civil action; (3) the liberal rules regarding joinder of claims and parties; and (4) limiting the types of pleadings to complaints, answers, demurrers, and replies.").

23. See FRIEDENTHAL ET AL., *supra* note 13, at 505 (quoting N.Y.Laws 1849, c. 438, § 142) (stating that "the complaint shall contain: . . . (2) a statement of the facts constituting the cause of action, in ordinary and concise language . . . ; (3) a demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.").

24. See Josephson, *supra* note 15, at 875 (stating that the distinctions between facts needed for pleading purposes and those that were evidence of legal conclusions resulted in a system that did not promote "a resolution of disputes on the merits").

25. FRIEDENTHAL ET AL., *supra* note 13, at 511.

power to make rules for the federal courts.<sup>26</sup> The Court began the rule-making process by appointing an advisory committee of lawyers, law professors, and judges pursuant to another section of the Act.<sup>27</sup> The advisory committee submitted a final report in 1937 after receiving public feedback on two previous drafts.<sup>28</sup> After reviewing the proposed rules and making a number of changes, the Court submitted them to Congress in early 1938.<sup>29</sup> Congress took no action on the rules, so they became effective when it adjourned pursuant to the Rules Enabling Act.<sup>30</sup> The scope and purpose of the Federal Rules is articulated in Rule 1,<sup>31</sup> and the general rules of pleading are set forth in Rule 8.<sup>32</sup>

### C. *The Life and Times of Rule 8*

#### 1. *Rule 8 Defined by the Other Federal Rules*

In keeping with the spirit of the Federal Rules articulated in Rule 1,<sup>33</sup> Rule 8(a)(2) calls for “a short and plain statement of the claim showing that the pleader is entitled to relief.”<sup>34</sup> Moreover, Rule 8(e) states that “pleadings must be construed so as to do justice.”<sup>35</sup> The more liberal pleading standards of Rule 8 were adopted in response to the failed pleading systems of the common law and the Field Code.<sup>36</sup> The pleading standards of old, however,

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26. See 28 U.S.C. § 2072(a) (authorizing the Supreme Court “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts.”).

27. See 28 U.S.C. § 2073(a)(2) (2006) (stating that the Court “may authorize the appointment of committees to assist [them] by recommending rules to be prescribed under section[] 2072 . . . . Each such committee shall consist of members of the bench and the professional bar, and trial and appellate judges.”).

28. FRIEDENTHAL ET AL., *supra* note 13, at 511.

29. *Id.*

30. *Id.*

31. See FED. R. CIV. P. 1 (stating that the “rules govern the procedure in all civil actions and proceedings in the United States district courts . . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”).

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

33. See FED. R. CIV. P. 1 (stating the purpose and scope of the Federal Rules).

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

35. FED. R. CIV. P. 8(e).

36. See *generally* FRIEDENTHAL ET AL., *supra* note 13, at 465-513 (explaining the history of pleading from the *writs* of eleventh-century England, the evolution of the common law, the Hilary Rules of 1834, the Field Code and Code Pleading, and the formation of the Federal Rules and suggesting that the liberal pleading standard was a direct result of the earlier failed pleading standards); see also Josephson, *supra* note 15, at 872-78 (giving a summary of pleading history including the common law pleading system and the Field Code with comparisons to the Federal Rules and suggesting that Rule 8 was adopted because experience had showed that the specificity of fact pleading

served multiple important purposes,<sup>37</sup> and the Federal Rules were drafted with this in mind. For example, in order to discourage baseless or improper claims,<sup>38</sup> Rule 11 requires that pleadings be signed,<sup>39</sup> in order for relevant facts to be discovered, Rule 26 provides for liberal discovery;<sup>40</sup> and in order for a court to have the ability to screen out a claim on the merits before it reaches the trial stage, Rule 56 provides for summary judgment.<sup>41</sup> Clearly, the drafters of the Federal Rules saw Rule 8's primary function as providing notice to the other party.<sup>42</sup>

## 2. Rule 8 Defined by the Supreme Court

### a. The Birth of *Conley's* "No Set of Facts" Standard

Almost immediately after the Federal Rules were adopted, courts began to clarify the meaning of Rule 8.<sup>43</sup> For instance, in

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did not provide relief on the merits).

37. See FRIEDENTHAL ET AL., *supra* note 13, at 513 (listing the four traditional functions of pleadings as: "(1) providing notice of the nature of a claim or defense; (2) identifying baseless claims; (3) setting each party's view of the facts; and (4) narrowing the issues.").

38. See FED. R. CIV. P. 11(b) (stating that, by presenting a pleading to a court, a party certifies: (1) there is not an improper purpose; (2) the claims are warranted by law; (3) the facts have support through evidence and; (4) denials are based on evidence).

39. See FED. R. CIV. P. 11(a) (requiring that "every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. The paper must state the signer's address, e-mail address, and telephone number.").

40. See FED. R. CIV. P. 26(b)(1) (stating that the "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.").

41. See FED. R. CIV. P. 56(a) (stating that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

42. See FRIEDENTHAL ET AL., *supra* note 13, at 513 (suggesting that the other Federal Rules have taken the place of the prior functions of pleading except providing notice to the other party); see also Josephson, *supra* note 15, at 876 (suggesting that under the Federal Rules, the main purpose of pleadings is notice); JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8 App.01 (2009) (stating that the policy behind Rule 8 is notice-pleading).

43. See, e.g., *Leimer v. State Mut. Life Assurance Co.*, 108 F.2d 302, 306 (8th Cir. 1940) (holding that a complaint should not be dismissed for insufficiency of statement unless there is certainty that a plaintiff would not be entitled to relief under "any state of facts which could be proved in support of the claim"); see also *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944) (stating that the pleading requirement under the Federal Rules does not require stating "facts sufficient to constitute a cause of action"); *Cont'l Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942) (holding that the function of a complaint under the Federal Rules is to provide notice to the defendant of the basis and nature of the claim).

1940, in *Leimer v. State Mutual Life Assurance Co.*,<sup>44</sup> the Eighth Circuit reversed the district court's dismissal of the plaintiff's complaint stating that, even if proving her claim was improbable, she was entitled to try.<sup>45</sup> Then, in 1942, in *Continental Collieries, Inc. v. Shober*,<sup>46</sup> the Third Circuit relied on *Leimer* when it reversed the district court's dismissal of the plaintiff's breach of contract claim.<sup>47</sup> Similarly, in 1944, in *Dioguardi v. Durning*,<sup>48</sup> the Second Circuit unequivocally rejected the notion that facts necessary to state a cause of action had to be pled in order to survive a motion to dismiss.<sup>49</sup> It is within the context of these cases that the Supreme Court took up the issue of what was required by Rule 8.<sup>50</sup>

b. The Life of *Conley's* "No Set of Facts" Standard

In 1957, the Supreme Court made it clear that fact-pleading was dead.<sup>51</sup> In *Conley v. Gibson*,<sup>52</sup> the Court coined the term

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44. 108 F.2d at 306.

45. The Eighth Circuit reasoned that the district court did not understand the purpose and effect of dismissing the complaint, and that the lower court was focused on whether the plaintiff would prevail instead of whether the complaint "stated a claim upon which relief could be granted." *Id.* at 304.

46. 130 F.2d at 635.

47. The defendant in this case moved to dismiss stating that the contract which formed the basis for the claim was unenforceable. *Id.* at 632. The Third Circuit reasoned that the defendant's argument should have been pled as an affirmative defense and the motion to dismiss should have been denied. *Id.* at 636.

48. 139 F.2d at 775.

49. The complaint in this case was written by a *pro se* plaintiff who alleged negligence when his merchandise was allegedly sold for a lower price by the defendant. *Id.* at 774-75. The district court dismissed the action stating that it "fail[ed] to state facts sufficient to constitute a cause of action." *Id.* at 774. When the Third Circuit reversed the decision of the district court they cited the language of Rule 8(a). *Id.* at 775.

50. *See Conley*, 355 U.S. at 46 n.5 (citing *Leimer*, *Continental Collieries*, and *Dioguardi* as support for the holding in the case).

51. *See id.* at 47 (holding that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.").

52. This class action lawsuit was originally brought in a federal district court in Texas by black railroad employees who alleged that the defendants, the union that the workers belonged to and some of its officials, had violated their right to fair representation because the union gave better protection to whites in the area of discriminatory discharges. *Id.* at 42-43. The district court dismissed the complaint for jurisdictional reasons, and the Fifth Circuit affirmed. *Id.* at 43-44. The Supreme Court reversed the Fifth Circuit on the question of jurisdiction, and then went on to address the two other reasons for dismissal cited by the defendants: (1) the lack of an indispensable party defendant; and (2) "failing to state a claim upon which relief could be given." *Id.* at 43-45. It was during the analysis of the defendant's motion to dismiss for failure to state a claim that most of the language and holdings relevant to this discussion were articulated by the Court. *Id.* at 45-48.



“notice-pleading” and articulated that all the Federal Rules required in a complaint is fair notice to the defendant “of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>53</sup> The Court went on to define Rule 8 and stated that a “complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>54</sup> The “no set of facts” standard lived on for fifty years,<sup>55</sup> was cited as authority in numerous federal cases,<sup>56</sup> and served as the standard for dismissal of a complaint in twenty-six states and the District of Columbia.<sup>57</sup> And then, one day, it was gone.

### c. The Death of *Conley*’s “No Set of Facts” Standard

The first blow to the “no set of facts” standard came in 2007. In *Bell Atlantic Corp. v. Twombly*,<sup>58</sup> the Supreme Court suggested that the “no set of facts” standard was being replaced with a “plausibility” standard.<sup>59</sup> Specifically, the Court stated that the plaintiffs needed to plead enough facts to nudge their claim “across the line from conceivable to plausible.”<sup>60</sup> The Court attacked *Conley*’s “no set of facts” language stating that it “is best forgotten as an incomplete, negative gloss on an accepted pleading standard.”<sup>61</sup> The Court, however, never provided a definition of the new standard,<sup>62</sup> so the question became when the “plausibility”

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53. *Id.* at 47.

54. *Id.* at 45-46.

55. *See Twombly*, 550 U.S. at 562-63 (stating that *Conley*’s “no set of facts” standard has been the standard for fifty years).

56. *See supra* note 10 (showing a selection of cases over a forty-year span that have cited *Conley* as authority).

57. *Twombly*, 550 U.S. at 577-78 (Stevens, J., dissenting).

58. This class action lawsuit was brought by subscribers of local telephone and Internet services against local carriers alleging that they were participating in parallel conduct in order to stifle competition in violation of the Sherman Act. *Id.* at 550-51. The United States District Court for the Southern District of New York dismissed the complaint stating that “allegations of parallel business conduct, taken alone, do not state a claim under [the Sherman Act].” *Id.* at 552. The court went on to say that the plaintiff would need to allege additional facts. *Id.* The Second Circuit reversed the district court holding that they applied the wrong standard using the “no set of facts” language of *Conley*. *Id.* at 553. The Supreme Court stated that they granted certiorari to “address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct,” and, after review, they reversed the Second Circuit and dismissed the complaint. *Id.*

59. *See id.* at 557 (stating that pleadings in the case needed allegations that plausibly suggest agreement).

60. *Id.* at 570.

61. *Id.* at 563.

62. *See generally Twombly*, 550 U.S. 544 (showing that “plausibility” is never defined).

standard applied and what it meant.<sup>63</sup>

The legal community did not have to wait long to find out when the new standard applied. In May 2009, in *Ashcroft v. Iqbal*,<sup>64</sup> the Court held that because *Twombly* was an interpretation of Rule 8, it “govern[ed] the pleading standard in all civil actions.”<sup>65</sup> The Court cited *Twombly* throughout its decision and made it clear that *Twombly*’s “plausibility” standard had replaced *Conley*’s “no set of facts” standard for good.<sup>66</sup> However, the opinion did not specify a test to determine when a complaint is “plausible,” but instead stated that doing so would be a “context-specific task that [would] require[] the reviewing court to draw on its judicial experience and common sense.”<sup>67</sup> It is that ambiguous language and lack of guidance by the Court in determining when a complaint is “plausible” that has led to lower courts flying blind.

#### d. The Resurrection of *Conley*?

On July 22, 2009, shortly after the decision of the Supreme Court in *Iqbal*,<sup>68</sup> former Senator Arlen Specter of Pennsylvania introduced a bill entitled the Notice Pleading Restoration Act of 2009.<sup>69</sup> The bill’s purpose was to reestablish *Conley*’s “no set of facts” standard as the pleading standard in federal courts and

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63. See, e.g., Saritha Komatireddy Tice, *Recent Developments: A “Plausible” Explanation of Pleading Standards*, 31 HARV. J.L. & PUB. POL’Y 827, 827-30 (2008) (suggesting that the term “plausibility” is ambiguous and lower courts will determine its meaning); see also Ettie Ward, *The Future of Pleading in the Federal System: Debating the Impact of Bell Atlantic v. Twombly: The After-Shocks of Twombly: Will We “Notice” Pleading Changes?*, 82 ST. JOHN’S L. REV. 893, 905 (2008) (stating that over 9400 court cases have not completely worked out what “plausibility” means); Damon Amyx, *The Toll of Bell Atlantic Corp. v. Twombly: An Argument For Taking the Edge Off the Advantage Given Defendants*, 33 VT. L. REV. 323, 323 (2008) (stating that the decision in *Twombly* has caused disagreement among the courts about its meaning).

64. This lawsuit was brought by a man, who was detained after the September 11, 2001, terrorist attacks, against former Attorney General John Ashcroft and other government officials alleging that he was detained because of his race, religion, or national origin in violation of the Constitution. *Iqbal*, 129 S. Ct. at 1943-44. The defendants filed a motion to dismiss based on qualified immunity, and the district court denied the motion using *Conley*’s “no set of facts” language. *Id.* The Second Circuit affirmed stating that the “no set of facts” standard did not apply, but that *Twombly* called for factual allegations only when needed to make a claim “plausible.” *Id.* The Court granted certiorari to address the correct pleading standard at the request of an appellate court concurrence and reversed. *Id.* at 1945.

65. *Id.* at 1953.

66. See generally *Iqbal*, 129 S. Ct. 1937 (citing to *Twombly*’s “plausibility” standard throughout the case).

67. *Id.* at 1950.

68. See *id.* (showing that the Supreme Court decided the case on May 18, 2009).

69. S. 1504, 111th Cong. (2009) (as introduced by Sen. Arlen Specter, July 22, 2009).

undo the Supreme Court's decisions in *Twombly* and *Iqbal*.<sup>70</sup> Specifically, the bill stated that "a federal court shall not dismiss a complaint under rule 12(b)(6)<sup>71</sup> or (e)<sup>72</sup> of the Federal Rules . . . , except under the standards set forth by the Supreme Court . . . in *Conley v. Gibson*, 355 U.S. 41 (1957)."<sup>73</sup> In his introductory remarks, Mr. Specter stated that the reason he proposed the bill was because the recent decisions "effectively authorized federal judges to indulge their 'subject[ive] judgments' in evaluating an allegation's plausibility."<sup>74</sup> He also expressed discomfort with how the Supreme Court arbitrarily created a new pleading standard and ignored the process of amending the Federal Rules.<sup>75</sup>

### III. THE CURRENT STATE OF FEDERAL PLEADING

An analysis of how the lower courts are interpreting the "plausibility" standard illustrates that federal judges are indeed "indulg[ing] their subject[ive] judgments in evaluating an allegation's plausibility."<sup>76</sup> Examining how the Federal Rules are amended and when the Supreme Court normally overturns precedent will show that the Court did indeed ignore the process of amending the Federal Rules when it changed the pleading standards.

#### A. What Are Plausible Facts? Depends on Who You Ask

##### 1. Approaches Related to Fact-Pleading

A case from the Eleventh Circuit sums up the confusion.<sup>77</sup> In *Sinaltrainal v. Coca-Cola Co.*,<sup>78</sup> the court was considering a complaint of conspiracy between a trade union leaders' employer

70. See *id.* (stating that the purpose of the bill is to ensure that federal courts will not dismiss complaints under any standard except the one expounded by the Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957)).

71. See FED. R. CIV. P. 12(b)(6) (stating that a party may assert by motion that a complaint "fail[s] to state a claim upon which relief can be granted.>").

72. See FED. R. CIV. P. 12(e) (allowing a party to bring a motion for a more definitive statement if a pleading "is so vague and ambiguous that the party cannot reasonably prepare a response.>").

73. S. 1504.

74. 155 CONG. REC. S7871, 7891 (daily ed. July 22, 2009) (statement of Sen. Specter) (quoting Prof. Stephen Burbank, U. of Penn. Law School).

75. See *id.* (illustrating that Sen. Specter was concerned that the Supreme Court did an end run around the process of amending the Federal Rules, which was designed by Congress and ends "with the Supreme Court present[ing] a proposed rule change to Congress for approval.>").

76. *Id.*

77. See generally *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252 (11th Cir. 2009) (containing a discussion of pleading standards where the court cites the language of Rule 8, but then goes on to say that another standard beside the one articulated in the rule applies to pleadings in federal cases after *Iqbal*).

78. *Id.*

and the Colombian government.<sup>79</sup> During its analysis, the court stated that Rule 8(a)(2) required “a short and plain statement of the claim . . . in order to give the defendant fair notice,” but added that “the facts as pleaded must state a claim for relief that is plausible on its face.”<sup>80</sup> Ultimately, the court dismissed the plaintiffs’ complaint stating that the facts as pled did not show a plausible claim.<sup>81</sup> The Eleventh Circuit, while acknowledging the notice-pleading language of Rule 8(a)(2), nonetheless applied a fact-pleading standard to the complaint in light of *Iqbal*.

The Second Circuit, where *Iqbal* originated,<sup>82</sup> has a somewhat different view. In *Panther Partners, Inc. v. Ikanos Communications, Inc.*,<sup>83</sup> the court was considering whether a complaint alleging false statements in connection with an initial public offering should have been dismissed.<sup>84</sup> Although the court affirmed the district court, it stated that the district court had misapplied *Twombly* because it applied a “practicality” standard instead of a “plausibility” standard,<sup>85</sup> illustrating that “plausibility” may mean one thing to one court and something different to another.

In its analysis, the Second Circuit did not discuss the language of Rule 8, but quoted *Twombly* and said that “Rule 8 requires that a plaintiff allege in its complaint ‘enough facts to

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79. This lawsuit was brought by trade union leaders against their employer under the Alien Tort Statute and the Torture Victims Protection Act for allegedly collaborating with the Colombian government to murder and torture the union leaders. *Id.* at 1257. The district court dismissed the case for lack of subject matter jurisdiction and for insufficiently pleading factual allegations; the plaintiffs appealed. *Id.*

80. *See id.* at 1268. (showing that the court tried to reconcile the standard of notice pleading and fact pleading by stating that, although Rule 8(a)(2) only requires notice to the defendant, at the same time the facts pled must state a plausible claim).

81. *Id.* Specifically, the court stated that the reason the facts pled did not show a plausible claim was because they were vague and conclusory and did not have to be taken as true for the analysis. *Id.*

82. *See generally Iqbal*, 129 S. Ct. 1937 (showing that the case was granted review on writ of certiorari to the Second Circuit).

83. No. 08-3398, 2009 U.S. App. LEXIS 20652 (2d Cir. Sept. 17, 2009) (unpublished).

84. The plaintiffs here brought suit alleging that the defendant had made false statements in connection with the company’s initial public offering, violating the Securities Act of 1933. *Id.* at \*2. Specifically, the complaint alleged that the defendant knew that there was a high failure rate of computer chips (defendant’s product) before the offering. *Id.* at \*4. The district court, which applied a “particularity” standard, dismissed the complaint. *Id.* at \*2. Moreover, the district court denied the plaintiffs leave to amend the complaint and a motion to reconsider. *Id.* The plaintiffs appealed. *Id.*

85. Specifically, the court stated that, in order for the plaintiffs’ complaint to be sufficient, it needed only to state that the defendant knew of the abnormally high failure rates before the offering, not that it knew the failure rates were twenty-five to thirty percent. *Id.* at \*5.

state a claim to relief that is plausible on its face.”<sup>86</sup> Moreover, the court articulated that “*Twombly* and *Iqbal* raised the pleading requirements substantially.”<sup>87</sup> It seems that the Second Circuit is more concerned with the language of the Supreme Court’s opinions than with the language of Rule 8.

Like the Second Circuit, the Third Circuit seems to acknowledge that notice-pleading has given way to a form of fact-pleading.<sup>88</sup> In *Fowler v. UPMC Shadyside*,<sup>89</sup> the court had to determine whether a district court correctly dismissed an employment discrimination claim.<sup>90</sup> The court focused its analysis on what it considered the major difference between *Conley*’s “no set of facts” standard and *Twombly* and *Iqbal*’s “plausibility” standard: Pleading legal conclusions alone will not suffice.<sup>91</sup>

The court held that a complaint cannot just *allege* entitlement to relief, “it must *show* such an entitlement with its *facts*.”<sup>92</sup> The Third Circuit reversed the district court, stating that it erred because it focused on what the plaintiff could prove, not whether her pleading was appropriate.<sup>93</sup> Curiously, in a statement that sounds strikingly similar to notice-pleading, the court opined that “so long as the complaint *notifies* the defendant of the claimed

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86. *Id.* at \*4 (quoting *Twombly*, 550 U.S. at 570).

87. *Id.* at \*12. The court announced this in the later part of its opinion when it granted plaintiff leave to amend the complaint. *Id.* It also articulated that it would proceed cautiously in regards to pleading in order to ensure justice. *Id.*

88. See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 209-10 (3d Cir. 2009) (stating that pleading standards have recently “shifted from simple notice pleading to a more heightened form . . . requiring a plaintiff to plead more than the mere possibility of relief to survive a motion to dismiss.”).

89. *Id.*

90. The plaintiff in this case was a janitor for a hospital who was injured on the job and placed on medical leave. *Id.* at 206. Soon thereafter, the hospital provided the plaintiff with a job doing clerical work, but the job was later eliminated and the plaintiff was terminated. *Id.* The plaintiff then brought suit against the hospital for violating her rights under the Rehabilitation Act. *Id.* at 205. The district court dismissed the complaint finding that it did not allege a disability under the Rehabilitation Act. *Id.* The plaintiff appealed the decision. *Id.*

91. See *id.* at 210 (stating that, under *Conley*’s “no set of facts” standard, if a complaint contained a recitation of a claim’s legal elements it could survive a motion to dismiss and contrasting that with the holding in *Twombly*, which stated that a mere recitation of the elements will not be enough to withstand a motion to dismiss).

92. *Id.* at 211 (emphasis added).

93. *Id.* at 213. In addition, because this case was an employment discrimination matter, the court asked the parties to address whether *Swierkiewicz* was still viable. *Id.* at 211. In that case, the Supreme Court held that there was not a heightened pleading standard for employment discrimination claims. *Swierkiewicz*, 534 U.S. at 514. The court concluded that because *Swierkiewicz* relied on *Conley*, as far as pleading is concerned, *Twombly* and *Iqbal* have repudiated it. *Fowler*, 578 F.3d at 211.

impairment, the substantially limited major life activity need not be specifically identified in the pleading.”<sup>94</sup> The Third Circuit, although focused on a form of fact-pleading, still occasionally uses the language of notice-pleading.

In the Fifth Circuit, the court applies a reasonableness standard in order to determine whether a complaint is plausible.<sup>95</sup> In *Gonzalez v. Kay*,<sup>96</sup> the court considered whether the district court erred when it dismissed a plaintiff’s claim for violation of the Fair Debt Collection Practices Act (FDCPA).<sup>97</sup> The issue was whether a letter sent by the attorney defendant and printed on his letterhead still violated the FDCPA even though it was not signed and included a disclaimer that it was only being sent for debt collection purposes.<sup>98</sup>

In its analysis, the court focused on how reasonable minds could differ about whether the letter was deceptive as a matter of law.<sup>99</sup> In reversing the district court’s decision, the Fifth Circuit stated that in close cases where reasonable minds could differ about the facts alleged, further inquiry is needed before a motion to dismiss can be granted.<sup>100</sup> This case illustrates that the Fifth Circuit takes facts pled as plausible when reasonable minds could differ about their legal outcome—far from a clear standard.

In contrast, the Sixth Circuit seems to use an altogether different approach. In *Hensley Manufacturing v. ProPride, Inc.*,<sup>101</sup> the court determined whether a complaint can withstand a motion to dismiss if facts *may* exist that could entitle a plaintiff to

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94. *Id.* at 214 (emphasis added).

95. *See Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (stating that “a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”) (quoting *Iqbal*, 129 S. Ct. at 1949).

96. 577 F.3d 600 (5th Cir. 2009).

97. 15 U.S.C. § 1692e (2006). The plaintiff in this case had failed to pay his mobile phone bill, and it was turned over to a collection agency. *Gonzalez*, 577 F.3d at 601. The collection agency used the defendant’s law office to help collect the debt. *Id.* The defendant sent the plaintiff a debt collection letter that was printed on the firm’s letterhead but had a disclaimer on the back that stated that the letter was to be used for collection purposes only and no lawyer with the firm had reviewed the account. *Id.* at 602. The plaintiff then brought suit against the defendant alleging violations of the Fair Debt Collection Practices Act. *Id.* at 603. The District Court for the Southern District of Texas dismissed the complaint for failure to state a claim, and the plaintiff appealed. *Id.*

98. *Id.* at 602.

99. *Id.* at 607. Specifically, the court noted that the disclaimer was not in the body of the letter, but instead was included in the “legalease” on the back of it. *Id.* The court reasoned that a consumer could be deceived into thinking that the letter was actually from a lawyer and that the disclaimer on the back might not be effective. *Id.*

100. *Id.*

101. 579 F.3d 603 (6th Cir. 2009).

relief.<sup>102</sup> The case dealt with trademark infringement and unfair competition.<sup>103</sup> The plaintiff was concerned that the use of the name of the inventor of the defendant's product would cause confusion to consumers because it was the same as the name of the plaintiff's company.<sup>104</sup> On appeal, the plaintiff stated that "facts may exist that establish a level of consumer confusion" and "facts may exist that establish that [the inventor's name] is not being used fairly and in good faith."<sup>105</sup> In affirming the district court's dismissal of the plaintiff's complaint, the court stated that it did not matter if facts might exist to support the plaintiff's allegations because it was the plaintiff's job to allege them in the complaint.<sup>106</sup>

In contrast to some of the other jurisdictions, the Ninth Circuit follows a more methodical approach.<sup>107</sup> In *Moss v. United States Secret Service*,<sup>108</sup> the court articulated that *Iqbal* set out a two-part approach to pleadings analysis.<sup>109</sup> The court understood the approach as follows: (1) exclude pleadings which are legal conclusions, then; (2) look at the remaining factual allegations and determine whether they state a plausible claim for relief.<sup>110</sup>

In this case, the court applied the test to plaintiffs' claims of

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102. *Id.* at 613.

103. Both the plaintiff and the defendant in this suit were trailer hitch manufacturers. *Id.* at 606. The plaintiff brought suit against the defendant for trademark infringement and unfair competition when one of their competitors began selling a trailer hitch, which was designed by the man who had originally designed one of the plaintiff's trailer hitches. *Id.* The issue arose when the defendant began to use the name of the designer of the trailer hitches, which was also the name of the plaintiff's company. *Id.* The district court dismissed the complaint, stating that the defendant's use of the designer's name "fell under the fair use exception to trademark infringement claim." *Id.*

104. *Id.* at 607.

105. *Id.* at 613 (emphasis in original).

106. *Id.* Specifically, the court stated that "mere speculation is insufficient" under the new pleading standards set forth in *Twombly* and *Iqbal*, and that mere speculation "fail[s] to state claim for relief that is 'plausible on its face.'" *Id.*

107. See *Moss v. United States Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009) (stating that *Iqbal* laid out a methodical approach that the court follows it when analyzing pleadings).

108. 572 F.3d 962 (9th Cir. 2009).

109. *Id.* at 970. The plaintiffs here brought a *Bivens* class action against two Secret Service agents alleging constitutional violations when they relocated their demonstration, which was critical of then-President Bush. *Id.* at 964-65. The plaintiffs alleged that when the Secret Service agents moved their anti-Bush demonstration but left the pro-Bush demonstration similarly situated, they violated their First Amendment rights. *Id.* at 965. They went on to allege that the Secret Service had this policy in place, although it was never written down on paper. *Id.* When the district court denied the defendants' motion to dismiss for qualified immunity, this interlocutory appeal followed. *Id.*

110. *Id.* at 970.

constitutional violations by Secret Service agents.<sup>111</sup> The court determined that most of the plaintiffs' allegations were conclusory,<sup>112</sup> and only two could be used to determine whether the claim was plausible.<sup>113</sup> The court held that the allegations failed to suggest a plausible action against the agents because, although the facts alleged suggested a possibility of wrongdoing, a possibility of wrongdoing is not enough to overcome a motion to dismiss.<sup>114</sup> The Ninth Circuit, in a way similar to the other circuits, interprets *Twombly* and *Iqbal* to mean that fact-pleading, in one form or another, has replaced notice-pleading.

## 2. An Approach Related to Notice-Pleading

So is notice-pleading gone for good? Some cases from the Seventh Circuit help to shed some light on this question. In *Smith v. Duffey*,<sup>115</sup> the court was considering whether the district court, which relied on *Twombly*, erred in dismissing the plaintiff's suit for fraud.<sup>116</sup> In its analysis, the court stated that it was initially "reluctant to endorse the district court's citation" of *Twombly* because it dealt with complex litigation and the present case did not.<sup>117</sup> The court went on to acknowledge that *Iqbal* had expanded *Twombly* but pointed out that *Iqbal* was special in its own way because it dealt with high level officials, which the Supreme Court did not want burdened with intrusive discovery.<sup>118</sup> In the end, the court affirmed the district court's dismissal of the complaint, but when it did so, it suggested that *Twombly* and *Iqbal* might not

111. See generally *id.* (illustrating that the court used the two-part test from *Iqbal* to determine whether or not the plaintiffs' complaint passed the plausibility test).

112. See *id.* (stating that the agents' alleged impermissible motive—the alleged Secret Service policy of suppressing speech critical of the President—and alleged viewpoint discrimination are all conclusory and do "nothing to enhance the plausibility" of the complaint).

113. See *id.* (stating that the non-conclusory claims were that the agents allegedly moved their demonstration but left the pro-Bush demonstration alone and that the diners in the inn where the President was were not screened or asked to leave despite their close proximity to him).

114. *Id.* at 971-72.

115. 576 F.3d 336 (7th Cir. 2009).

116. *Id.* The plaintiff in this case sold his interest in a medical-testing company to another company and received some stock-options as part of the consideration for the sale. *Id.* at 337. Three months later, the company filed for bankruptcy, and the stock options were eliminated as part of the reorganization. *Id.* The plaintiff then brought suit against three officers of the company alleging fraud. *Id.* The district court dismissed the complaint, and the plaintiff appealed. *Id.* at 336.

117. *Id.* at 339. Specifically, the court stated that *Twombly* dealt with complex litigation and was concerned with the high cost of discovery to the defendant. *Id.* at 340. In contrast, this was a simple case, and the defendant would not be burdened with high discovery costs. *Id.*

118. *Id.*



govern in this situation.<sup>119</sup> In suggesting that the “plausibility” standard might not apply in a case such as this, the court seemed to be suggesting that a reliance on notice-pleading and the “no set of facts” standard may sometimes be appropriate.

Another case from the Seventh Circuit seems to confirm that the circuit is still somewhat focused on notice-pleading.<sup>120</sup> In *Brooks v. Ross*,<sup>121</sup> the court was deciding whether the district court properly dismissed the plaintiff’s § 1983 claim.<sup>122</sup> The court started its analysis by stating the language of Rule 8<sup>123</sup> and articulating that that rule “reflects a liberal notice-pleading regime.”<sup>124</sup> It then discussed how the general notice-pleading requirement of Rule 8 was not repudiated by *Twombly*.<sup>125</sup> Lastly, it held that *Iqbal* illustrated that plaintiffs who do not plead specific facts to ground their legal claims are not providing the “showing” that Rule 8 requires.<sup>126</sup> The court concluded its analysis by synthesizing the cases into a three-part test, which has its focus in notice-pleading.<sup>127</sup> When the court applied the test to this case, it found that the plaintiff did not give the defendant sufficient notice and affirmed the district court.<sup>128</sup>

The above cases are just a few examples that highlight the different ways in which courts are interpreting the new “plausibility” standard, and there are many others.<sup>129</sup> What

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119. *See id.* (suggesting that the court is unsure whether *Twombly* and *Iqbal* apply in this type of case, but holding that it does not matter because the case has no merit, regardless).

120. *See Brooks v. Ross*, 578 F.3d 574, 580 (7th Cir. 2009) (stating that the question the court is deciding is whether the factual allegations in the complaint provide sufficient notice to the defendant).

121. 578 F.3d 574 (7th Cir. 2009).

122. *Id.* at 577. The district court’s primary ground for dismissal was that the plaintiff failed to plead personal involvement by the defendants. *Id.* at 580.

123. *See supra* note 3 (stating the requirements of Rule 8(a)(2) of the Federal Rules).

124. *Brooks*, 578 F.3d at 580.

125. *Id.* at 581 (citing *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)).

126. *Id.*

127. *See id.* (illustrating the three-part test as providing notice to defendants, taking facts as true and realizing that some facts are so implausible that they do not provide notice, and not accepting as true those factual allegations that are legal conclusions).

128. *Id.* at 582.

129. *See, e.g., Tyree v. Zenk*, No. 05-CV-2998, 2009 U.S. Dist. LEXIS 43872, at \*15-16 (E.D.N.Y. May 22, 2009) (holding that the pleading standard for a *pro se* plaintiff is the “no set of facts” standard, while also holding that the *pro se* plaintiff in the case needed to plead sufficient factual matter to make the claim plausible); *see also Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) (stating that because the assessment of qualified immunity at the stage of a motion to dismiss requires the evaluation of pleadings, the facts pleaded must show that it is plausible that a clearly established law has been violated); *S. Cherry St., LLC v. Hennessee Group, LLC*, 573 F.3d 98, 110 (2d Cir. 2009) (illustrating that there is a difference in the “plausibility” standard

becomes clear when synthesizing the cases is that there is no longer any uniformity in federal pleading.<sup>130</sup> Some courts focus on the language of Rule 8; others on the language of the Supreme Court's opinions.<sup>131</sup> Some courts use a methodical approach; others a more subjective one.<sup>132</sup> And, although there seems to be a general consensus that notice-pleading has given way to some sort of fact-pleading, some courts still incorporate notice-pleading language into their analyses.<sup>133</sup> Without the uniformity that existed in federal pleading during the *Conley* era, courts are indeed flying blind and indulging their "subject[ive] judgments."<sup>134</sup>

### B. *Stare Decisis? Who Cares!*

*Stare decisis*<sup>135</sup> is "[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation,"<sup>136</sup> and it was completely ignored by the Supreme Court when it decided *Twombly* and *Iqbal*. Although the Court has the authority to ignore the concept

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and the heightened pleading standards imposed by the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4 (2006)); *Atherton v. D.C. Office of the Mayor*, 567 F.3d 672, 681 (D.C. Cir. 2009) (holding that, in order to state a claim for invidious discrimination, a plaintiff must plead factual allegations that make it plausible that the defendant acted with a discriminatory purpose).

130. See discussion *supra* Part III.A. (comparing and contrasting cases from different circuits and illustrating that each circuit has its own interpretation of what the new "plausibility" standard means).

131. Compare *Sinaltrainal*, 578 F.3d at 1268 (explaining that the language of Rule 8 requires a "short and plain statement of the case"), with *Panther Partners, Inc.*, 2009 LEXIS 20652, at \*3-4 (illustrating that the court was concerned with the language of the Supreme Court opinions in *Twombly* and *Iqbal* and not with the language of Rule 8).

132. Compare *Moss*, 572 F.3d at 969 (showing that the Ninth Circuit follows a two-part test when analyzing pleadings), and *Brooks*, 578 F.3d at 581 (showing the Seventh Circuit follows a three-part test for pleadings analysis), with *Gonzalez*, 577 F.3d at 603 (showing that the Fifth Circuit uses a reasonableness test to determine whether or not a complaint can survive a motion to dismiss).

133. See, e.g., *Fowler*, 578 F.3d at 214 (suggesting that the Third Circuit is still concerned with notice-pleading in some form because it stated the complaint needed to notify the defendant); see also *Smith*, 576 F.3d at 340 (suggesting that the Seventh Circuit uses notice-pleading because the court opined that *Twombly* and *Iqbal* did not apply to this case); *Brooks*, 578 F.3d at 581 (illustrating that the Seventh Circuit uses a three-part test that is concerned with notice-pleading).

134. See 155 CONG. REC. S7871, *supra* note 74, at 7891 (suggesting that courts would be subjective when reviewing complaints without the uniformity that the *Conley*'s "no set of facts" standard provided).

135. A Latin term meaning "to stand by things decided." BLACK'S LAW DICTIONARY 1173 (Abridged 8th ed. 2005).

136. *Id.*

of stare decisis and overturn a prior decision,<sup>137</sup> it erred in overturning *Conley's* “no set of facts” standard because expectations were upset, it was not recently adopted, and prior experience with it did not point to shortcomings.<sup>138</sup> Moreover, the new pleading standard has created an environment of arbitrary decision making and judicial inefficiency—ironically, the two things stare decisis is designed to prevent.<sup>139</sup> The Court itself has stated that “any departure from the doctrine of stare decisis demands special justification,”<sup>140</sup> but it failed to provide one when it overturned *Conley*. This lack of justification has led the legal community, including Congressmen and Supreme Court justices, to condemn the Court for its activism and the mess it left behind because of it.<sup>141</sup>

#### IV. THE FUTURE OF FEDERAL PLEADING

Both Congress and the entire legal community can bring back uniformity in the area of federal pleading. Congress can pass a bill similar to The Notice Pleading Restoration Act of 2009,<sup>142</sup> which would have re-established *Conley's* “no set of facts” standard, effectively undoing *Twombly* and *Iqbal*.<sup>143</sup> But the legal

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137. See *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (stating that it is the Supreme Court alone that can overrule one of its own precedents).

138. See *id.* (suggesting that a departure from precedent may be appropriate where expectations are not upset, where the precedent is a judge-made rule that was recently adopted to improve court operations, and where experience has pointed to shortcomings).

139. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888)) (stating that “*stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion’”); see also *Hubbard v. United States*, 514 U.S. 695, 711 (1995) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921)) (stating “[a]s Justice Cardozo reminded us: ‘The labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.’”).

140. *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

141. See 155 CONG. REC. S7871, *supra* note 74, at 7891 (showing that Sen. Specter was concerned that the Court ignored the process of amending the Federal Rules); see also Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 20, 2009, [http://www.nytimes.com/2009/07/21/us/21bar.html?\\_r=1](http://www.nytimes.com/2009/07/21/us/21bar.html?_r=1) (quoting Justice Ruth Bader Ginsberg: “In my view, the Court’s majority messed up the federal rules.”); see also Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 416 (stating that the Court’s activism was striking because there was no amendment to the Federal Rules, there was no new statute changing pleading standards, and no party asked the Court to make a change).

142. S. 1504.

143. See *id.* (being introduced by Sen. Specter for the purpose of undoing the

community should go further. It should utilize the collective mind of the entire legal world and call upon judges, clerks of court, lawyers, professors, government agencies, Congresspersons, and other individuals and organizations to use their creativity and analytical skills to craft a new Rule 8—one that will address the flaws in the pleading system without throwing it into chaos—by utilizing the amendment process proscribed by the Rules Enabling Act.<sup>144</sup>

A. *The Quick Fix: Re-establish Notice-Pleading and Conley's "No Set of Facts" Standard*

The legal community could wait for the Supreme Court to redefine “plausibility” in a way that will not lead to different outcomes in different circuits.<sup>145</sup> But it should not do so. It took nineteen years after the Federal Rules were initially established for the Court to give a clear meaning to the language of Rule 8.<sup>146</sup> Litigants simply cannot wait that long for the Court to recreate the uniform standard in federal pleading that was destroyed with the overruling of *Conley*. This country has three branches of government—each with different areas of power—and a system of checks and balances to remedy situations where one of the branches abuses its power.<sup>147</sup> This is one of those situations. The Supreme Court, through its power of interpreting the Federal Rules, basically rewrote the pleading standard articulated in Rule 8.<sup>148</sup> It was Congress that gave the Court the power to establish

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Supreme Court decisions in *Twombly* and *Iqbal* and reestablishing the notice-pleading standard set forth in *Conley*).

144. 28 U.S.C. §§ 2071-2077 (2006); see STEVEN BAICKER-MCKEE, WILLIAM M. JANSSEN & JOHN B. CORR, A STUDENT’S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE 1243-47 (11th ed. 2008) (listing the steps taken to amend the Federal Rules: (1) consideration by the advisory committee, which includes considering suggestions for rules changes and drafting of proposed rule changes, (2) publication and public comment, (3) final approval by the advisory committee after consideration of the public comments, (4) approval by the standing committee, (5) judicial conference approval, (6) Supreme Court approval, and (7) Congressional review).

145. See discussion *supra* Part III.A. (comparing and contrasting how the different circuits are interpreting the “plausibility” standard and coming to different results); see also *supra* note 129 (providing more examples of how the courts are interpreting the “plausibility” standard in different ways).

146. See generally *Conley*, 355 U.S. 41 (showing that the “no set of facts” standard and the notice-pleading standard were firmly established by the Court in 1957, nineteen years after the Federal Rules were adopted in 1938).

147. See generally U.S. CONST. arts. I-III (establishing a federal system of government with an executive, legislative, and judicial branch, each with different responsibilities, and a system of checks and balances that prevents one branch from either abusing or obtaining too much power).

148. Compare FED. R. CIV. P. 8(a)(2) (stating that a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief), with *Twombly*, 550 U.S. at 556 (holding that a complaint must contain

and interpret the Federal Rules through the Rules Enabling Act.<sup>149</sup> And it is Congress that must now step in to remedy the abuse of that power.

The solution has already presented itself in the form of The Notice Pleading Restoration Act of 2009.<sup>150</sup> As noted above, the bill sought to reestablish uniformity in pleading standards by undoing the subjective “plausibility” standard of *Twombly* and *Iqbal* and replacing it with the tried and true “no set of facts” standard established in *Conley*.<sup>151</sup> However, after the bill was introduced, it was read twice and referred to the Committee on the Judiciary, but unfortunately, there was no further action on the bill.<sup>152</sup> Congress should move quickly to remedy the abuse of power by the Supreme Court by passing a bill similar to The Notice Pleading Restoration Act of 2009. Once this type of legislation is passed, the legal community can turn to the more difficult and time consuming task of crafting a new federal pleading standard—one that remedies the current problems in civil litigation.

*B. The Right Fix: Create a New Rule 8 through the  
Amendment Process*

“The pervasive and substantial impact of the rules on the practice of law in the federal courts demands exacting and meticulous care in drafting rule changes.”<sup>153</sup> If the Supreme Court wanted to change the federal pleading standard, it should have done so by suggesting to the advisory committee for the Federal Rules that an amendment was necessary.<sup>154</sup> Then, by following the process of amending the Federal Rules articulated by the Rules Enabling Act,<sup>155</sup> the legal community as a whole could have contributed to the drafting of the new rule and the problems associated with a lack of uniformity could have been avoided. That is what needs to happen now.

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enough factual matter to show that a claim is plausible), and *Iqbal*, 129 S. Ct. at 1952 (holding that even if there are well-pled facts that give rise to “plausibility,” if they are conclusory in nature they do not have to be taken as true for the purposes of evaluating a motion to dismiss).

149. 28 U.S.C. §§ 2071-2077.

150. S. 1504.

151. See discussion *supra* Part II.C.2.d. (illustrating that the purpose of the Notice Pleading Restoration Act of 2009 is to reestablish *Conley*'s “no set of fact” standard).

152. S. 1504; THE LIBRARY OF CONGRESS, *Bill Summary & Status*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN01504:@@X> (last visited Apr. 5, 2011).

153. STEVEN BAICKER-MCKEE ET AL., *A STUDENT'S GUIDE TO THE FEDERAL RULES OF CIVIL PROCEDURE* 1244 (11th ed. 2008).

154. See 28 U.S.C. § 331 (authorizing the Judicial Conference of the United States to recommend amendments or additions to the Federal Rules as part of its duty to “carry on a continuous study of the operation and effect of the general rules of practice and procedure.”).

155. *Id.* § 2071.

Rule 8 should be amended to create a heightened pleading standard for those causes of action that can potentially lead to burdensome discovery. It appears the Supreme Court had this in mind when it created the “plausibility” standard.<sup>156</sup> For example, in *Twombly*, the Court stated that, even though a claim that did not meet the “plausibility” standard could be weeded out early in the discovery process, this was not a good enough reason to allow the complaint to survive a motion to dismiss.<sup>157</sup> The Court went on to say that the threat of expensive discovery could push defendants to settle even frivolous cases before they reached the summary judgment stage.<sup>158</sup> In *Iqbal*, the Court flatly rejected the notion that careful case management in the discovery stage could free certain officials from the burdens of litigation.<sup>159</sup> The Court was correct to create a higher pleading standard for those cases that could lead to burdensome and expensive discovery.<sup>160</sup> They were incorrect in creating one that was as prone to subjectivity as “plausibility” and in expanding it to “all civil actions.”<sup>161</sup> The amendment to Rule 8 must correct these errors by requiring fact-pleading for those causes of action that could require burdensome or expensive discovery and notice-pleading for all other types of civil actions.

The “plausibility” standard is fact-pleading<sup>162</sup> in disguise. Because the Court avoided the process of amending the Federal Rules, it could not rewrite Rule 8 outright, even though that has been the effect of the opinions in *Twombly* and *Iqbal*.<sup>163</sup> The result

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156. See *Twombly*, 550 U.S. at 558 (stating that part of the reason the Court was dismissing *Conley*’s “no set of facts” standard was that it was “one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.”); see also *Iqbal*, 129 S. Ct. at 1953 (stating that the qualified immunity doctrine is in place to free certain officials from the burdens of litigation, including “disruptive discovery”).

157. *Twombly*, 550 U.S. at 559.

158. *Id.*

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

160. Discovery abuse is a common problem in civil litigation. See generally Abraham D. Sofaer, *Sanctioning Attorneys for Discovery Abuse Under the New Federal Rules: On the Limited Utility of the Punishment*, 57 ST. JOHN’S L.REV. 680 (1983) (highlighting some of the most common problems with the discovery process including: (1) the fact that the present system requires only nominal costs to sue and open the gates of discovery; (2) that a party can have as much discovery as it wants by paying only the costs of seeking it, while the opposing party pays the costs of compliance and; (3) that the low cost of seeking discovery leads all parties to engage in excessive discovery).

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

162. Fact-pleading is “a procedural system requiring that the pleader allege merely the facts of the case giving rise to the claim, not the legal conclusions necessary to sustain the claim.” BLACK’S LAW DICTIONARY 970 (Abridged 8th ed. 2005).

163. See discussion *supra* Part III.A. (showing that most federal courts have

was a standard that changes from case to case and from court to court and is completely dependent on a federal judge's "judicial experience and common sense."<sup>164</sup> This lack of uniformity in federal pleading cannot stand. By amending Rule 8, the legal community can provide a partial remedy to the problems of burdensome and expensive discovery without shielding the fact-pleading required to do so behind a vague pleading standard that creates confusion. Exactly which types of suits should require fact-pleading should be decided during the first three steps of the rule making process where the entire legal community comes together to brainstorm and create.<sup>165</sup> It seems clear, however, that antitrust suits and those involving qualified immunity should be on the list because those were the types of cases the Supreme Court considered when it developed the "plausibility" standard. Other types of suits that should be considered include those dealing with complex commercial litigation, toxic tort, product liability, and class actions. All other types of suits should require notice-pleading, and to avoid confusion, the "no set of facts" standard from *Conley* should be incorporated into the new rule.

#### V. CONCLUSION

The decisions in *Twombly* and *Iqbal* overturned over fifty years of precedent, destroyed uniformity in federal pleading, and created a pleading standard that is defined only by the subjective view of the judge reviewing the complaint at issue. Congress should pass a bill similar to The Notice Pleading Restoration Act of 2009, and the legal community should work together to amend Rule 8. Only by amending Rule 8 to require fact-pleading for suits involving burdensome or expensive discovery and notice-pleading for all others can uniformity be restored to federal pleading. Only then can litigants and judges in the federal courts stop flying blind.

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abandoned the notice-pleading language of Rule 8 and are dealing with fact-pleading in one form or another).

164. *Iqbal*, 129 S. Ct. at 1950.

165. See BAICKER-MCKEE ET AL., *supra* note 153, at 1244-47 (describing the first three steps of the rule-making process as a collaboration of the entire legal community, including judges, clerks, lawyers, professors, government agencies, and others).