## Note

# Challenging the Plausibility Standard Under the Rules Enabling Act

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In *Bell Atlantic v. Twombly* and *Aschroft v. Iqbal*, the Supreme Court held that in order to survive a motion to dismiss for failure to state a claim, a complaint must be plausible.[1] To satisfy this plausibility standard, a complaint must plead sufficient facts to permit a reasonable inference that the defendant is liable for the alleged misconduct.[2] In dissent, Justice John Paul Stevens suggested that this standard would disrupt the long-standing uniformity between federal and state pleading standards.[3] Indeed, since *Twombly*, a number of state courts have explicitly rejected or declined to apply the plausibility standard.[4] As a result, there is an increasing number of conflicts between the pleading standards in state and federal courts.[5] This disuniformity will become the object of dispute as

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1. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007).

2. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 570.

3. *See Twombly*, 550 U.S. at 578 (Stevens, J., dissenting) ("Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears 'beyond doubt' that 'no set of facts' in support of the claim would entitle the plaintiff to relief.").

4. *See, e.g.*, Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 430 (Tenn. 2011) ("We decline to adopt the new plausibility standard and adhere . . . to the notice pleading standard . . . ."); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 864 (Wash. 2010) (holding that there is "no similar basis to fundamentally alter our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years and decline to do so here" (citations omitted)).

5. *See* Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE

federal district courts, hearing actions based solely on diversity of citizenship jurisdiction,[6] decide whether to apply state or federal pleading standards.

When faced with conflicting state and federal law in diversity cases, federal courts determine the applicable law according to the *Erie* doctrine which, speaking generally, instructs federal courts to apply state "substantive" law but federal rules of "procedure."[7] However, in the Supreme Court's most recent *Erie* doctrine decision, *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, the Court issued a fractured opinion with a majority of Justices agreeing in the result, but only a minority of Justices agreeing on how to interpret the Rules Enabling Act (REA)—the statute governing the validity of procedural and evidentiary rules in federal courts.[8] While Justice Antonin Scalia leaves almost no room for state law to apply when there is a controlling federal rule,[9] Justice Stevens would give some deference, albeit limited, to state specific policies engendered in procedural rules.[10] *Shady Grove*'s diverging opinions left unclear the status of federal rules that directly conflict with their state counterparts.[11] As a result, district courts lack

109, 109 ("Other states will have to decide the same issue in the months and years to come.").

6. 28 U.S.C. § 1332 (2006).

7. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state"); *id*. at 92 (Reed, J., concurring) (assuring that "[t]he line between procedural and substantive law is hazy but no one doubts federal power over procedure").

8. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431 (2010). Although *Shady Grove* resulted in a five-to-four majority decision, five of the nine Justices explicitly disagreed with plurality opinion's analysis. *See id*. at 1448–60 (Stevens, J., concurring); *id*. at 1460–73 (Ginsburg, J., dissenting).

9. *Id.* at 1442 (plurality opinion) (arguing that "Congress has undoubted power to supplant state law, and undoubted power to prescribe rules for the courts it has created, so long as those rules regulate matters 'rationally capable of classification' as procedure" (citing Hanna v. Plumer, 380 U.S. 460, 472 (1965))).

10. *Id.* at 1452 (Stevens, J., concurring) (arguing that a federal rule "cannot govern a particular case in which the rule would displace a state law that is procedural in the ordinary use of the term but so intertwined with a state right or remedy that it functions to define the scope of the state-created right").

11. *See* Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of* Shady Grove, 159 U. PA. L. REV. 17, 25 (2010) ("When the dust settled at the end of the [*Shady Grove*] opinions, little was resolved. The proper interpretive approach to the [Rules] Enabling Act remains an open question.").

clear guidelines to follow when choosing between such conflicting rules.

This Note argues that application of the plausibility standard violates the terms of the REA[12] when it conflicts with a more lenient state pleading rule. This Note does not argue for or against plausibility or notice pleading generally but simply takes vertically disuniform pleading standards as given and analyzes that conflict of law within the context of the REA. Part I first introduces relevant state and federal pleading standards and then proceeds to analyze and highlight their differences. Part II introduces the Court's *Erie* doctrine jurisprudence and the diverging approaches to interpreting the REA exhibited in *Shady Grove*, arguing that Justice Stevens's interpretation is more accurate than Justice Scalia's. Part III demonstrates that the REA does not "enable" the plausibility standard to displace state pleading rules that are sufficiently substantive, examines the advantages of this approach, and responds to potential criticisms. When a state pleading standard is more lenient than its federal counterpart, it may operate to define the scope of the state's substantive rights and therefore should apply in federal courts.

## I. PLEADING RULES: DISUNIFORM STANDARDS AND POLICIES

A review of both state and federal pleading standards is necessary to understand how courts should analyze the validity of the plausibility standard in diversity cases. This Part proceeds in two sections. First, it describes the Court's development of the plausibility standard. Next, it examines how state courts have responded to the plausibility standard and the differences between standards that have emerged from these reassessments.

### A. PLEADING IN FEDERAL COURTS: THE PLAUSIBILITY STANDARD

The Federal Rules of Civil Procedure (Federal Rules) first took effect in 1938.[13] One of the central features of these Federal Rules was the liberal pleading practice they encouraged.[14]

12. 28 U.S.C. § 2072 (2006).

13. *See generally* 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1004 (3d ed. 2011) (detailing the history of the drafting and enactment of the Federal Rules).

14. *See* Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play*

Prior to the Federal Rules, pleading was a technical process that often resulted in dismissal due to procedural missteps.[15] However, under the Federal Rules, a complaint is sufficient so long as it contains "a short and plain statement of the claim showing that the pleader is entitled to relief . . . ."[16] For example, a complaint of negligence need only state: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff. As a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred expenses of *$*."[17] Thus, Rule 8(a)(2) only requires that the plaintiff give the defendant notice of the plaintiff's allegations and the grounds for those allegations.[18] The general purpose of this liberal requirement is to encourage adjudication based on the merits of the facts and evidence, and to avoid technicality-based dismissal before those merits have a chance to be heard.[19]

To challenge the legal sufficiency of a complaint, a defendant may file a motion to dismiss for "failure to state a claim upon which relief can be granted."[20] When granted, the plaintiff generally has a chance to amend the complaint.[21]

*on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 5 (2010) (reporting that "[g]eneralized pleadings, broad discovery, and limited summary judgment became integral, interdependent elements of the pretrial process").

15. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1218 (3d ed. 2011) (stating that the distinctions between "facts," "evidence," and "conclusions" that were the hallmarks of code pleading resulted in "traps for the unwary or the inexperienced pleader and tactical advantages for the adroit pleader that were unrelated to the merits of the particular case").

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

17. FED. R. CIV. P. Form 11. The forms appended to the Federal Rules are intended serve as examples of what the rules require. *See* FED. R. CIV. P. 84 ("The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.").

18. Conley v. Gibson, 355 U.S. 41, 47 (1957) (stating that "all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests").

19. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 557–58 (2010) (noting that the purpose behind the language choice in Rule 8(a)(2) was "an attempt to create a standard that would reach the merits of a dispute rather than one that would terminate a plaintiff's case on technical grounds at the outset"); *see also* Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (emphasizing that dismissing a case due to pleading insufficiency results in depriving the plaintiff "of his day in court").

20. FED. R. CIV. P. 12(b)(6).

21. *See, e.g.*, Polich v. Burlington N., Inc., 942 F.2d 1467, 1472 (9th Cir.

In two recent cases, the Supreme Court addressed the proper standard for dismissing a complaint for failure to state a claim. In *Twombly*, the Court dismissed a Sherman Act complaint that lacked sufficient facts to show that the defendants' anticompetitive conduct was intentional rather than a product of coincidental "independent action."[22] In *Ashcroft v. Iqbal*, the Court dismissed a *Bivens* action alleging unconstitutional treatment based on race because the complaint lacked "any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind."[23]

In the process of dismissing these claims, the Court conducted in-depth analyses of the proper pleading practices in federal courts, and employed new language, holding that a complaint must be "plausible on its face."[24] Emphasizing precedent and commentary, the Court held that a legally sufficient complaint must rise above mere speculation of wrongdoing and must contain more than a bare "recitation of a cause of action's elements."[25] To meet these requirements the complaint must contain enough factual content to "nudge" the claim "across the line from conceivable to plausible."[26] This "nudge" takes the form of an inference; a claim is plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[27]

Between *Twombly* and *Iqbal*, two major aspects of pleading practices emerge. First, both opinions employ pleading standards as a method of controlling discovery costs and abuse. According to the Court, the cost of discovery encourages defendants to settle claims, even where the complaint may be frivolous.[28] And in both cases, the Court rejected the adequacy of discovery management techniques as a method of limiting such abuses.[29] The plausibility standard, therefore, is necessary

1991) (ruling that "[d]ismissal without leave to amend is improper unless it is clear . . . that the complaint could not be saved by any amendment").

22. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

23. Ashcroft v. Iqbal, 556 U.S. 662, 682 (2009).

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

25. *Id*. at 545.

26. *Id*. at 570.

27. *Iqbal*, 556 U.S. at 678.

28. *See Twombly*, 550 U.S. at 559 (worrying that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings").

29. *See id.* at 559 (arguing that because judicial management of discovery

to curb discovery abuses by requiring complaints to meet a threshold level of plausibility before granting plaintiffs access to discovery procedures.[30]

Second, the Court established a general framework for assessing the sufficiency of a complaint. First, the court brackets any legal conclusions it finds within the complaint.[31] Under traditional motion-to-dismiss practice, only factual allegations are entitled to a presumption of truth when determining the sufficiency of a complaint.[32] Thus, when assessing a complaint's facial plausibility, a court must first divest it of any conclusory content.[33] Second, the court proceeds to determine whether those facts state a claim for relief that is plausible on its face.[34] Under *Iqbal*, a claim is facially plausible when it provides a reasonable inference that the defendant is liable for the alleged misconduct.[35] This inference is informed by "judicial experience and common sense."[36] Hence, in both *Twombly* and *Iqbal*, the

abuse has been "modest," "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through 'careful case management'"); *Iqbal*, 556 U.S. at 685 (arguing that deferring discovery for petitioners under the qualified immunity doctrine would be fruitless because "it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position").

30. *See Twombly*, 550 U.S. at 559 ("Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery [in frivolous cases].").

31. *Iqbal*, 556 U.S. at 678–79 (stating that usual practice of "accept[ing] as true all of the allegations contained in a complaint is inapplicable to legal conclusions" and that "Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions").

32. *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 540 (1988) (stating that on a motion to dismiss, "we accept all of the factual allegations in petitioners' complaint as true and ask whether, in these circumstances, dismissal of the complaint was appropriate").

33. Precisely what constitutes a fact as opposed to a legal conclusion has been the subject of some debate since *Iqbal*. *See, e.g.*, Miller, *supra* note 14, at 24–25 (demonstrating that since *Iqbal*, the conclusion category is being applied to "allegations that one reasonably might classify as factual"). However, this is an old debate, mirroring debates that coincided with the drafting of the Federal Rules of Civil Procedure. *See generally, e.g.*, Walter Wheeler Cook, *'Facts' and 'Statements of Fact'*, 4 U. CHI. L. REV. 233, 236–46 (1937) (arguing the distinction between "statements of fact" and "mere conclusion of law" is merely a difference of degree and that such distinctions "can do little more than generate doubt and uncertainty and provoke controversy and litigation").

34. *Iqbal*, 556 U.S. at 678–79.

35. *Id*.

36. *Id*. at 679.

Court dismissed the complaint, in part, because of "more likely,"[37] or "obvious alternative"[38] explanations.[39] If the factual allegations provide for an inference of wrong-doing, based on the judge's experience and common sense, the complaint will survive a motion to dismiss. If, on the other hand, there is no such inference, a court will dismiss the complaint.

The *Twombly-Iqbal* approach to pleading generated substantial commentary. Many—though not all—commentators read plausibility as a shift in pleading standards.[40] Accordingly, state courts are increasingly asked to decide between "notice" and "plausibility" pleading.[41]

### B. STATE COURTS RESPOND TO PLAUSIBILITY

Although some state courts have accepted plausibility as the proper standard,[42] a majority of state appellate courts have either rejected the plausibility standard[43] or declined to apply

37. *Id*. at 681.

38. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 567–68 (2007).

39. In *Twombly*, the Court dismissed the case in large part because there were more natural explanations for the service providers' conduct than anti-competitive agreements. Specifically, the Court argued that because these companies were originally "born" into a world filled with monopolies, the companies were likely more comfortable refraining from competition. *See id.* Similarly, in *Iqbal*, the Court argued that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Iqbal*, 556 U.S. at 682. Because this is a more "likely" alternative explanation, the Court decided that "discrimination is not a plausible conclusion." *See id.*

40. *Compare, e.g.*, Miller, *supra* note 14, at 10 (arguing that after *Twombly* and *Iqbal*, "[t]o a significant degree, the liberal-procedure ethos of 1938 has given way to a restrictive one"), *with* Bradley Scott Shannon, *I Have Federal Pleading All Figured Out*, 61 CASE W. RES. L. REV. 453, 455 (2010) (arguing that "[t]he Supreme Court's rulings in *Twombly* and *Iqbal* probably did not result in a significant change in the overall federal-court pleading scheme").

41. *See, e.g.*, Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 430 (Tenn. 2011) ("We decline to adopt the new plausibility standard and adhere . . . to the notice pleading standard . . . .").

42. *See, e.g.*, Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) (adopting *Twombly*'s "refinement" of *Conley*); Doe v. Bd. of Regents of the Univ. of Neb., 788 N.W.2d 264, 277–78 (Neb. 2010) (concluding that *Twombly* "provides a balanced approach for determining whether a complaint should survive a motion to dismiss"); Sisney v. Best Inc., 754 N.W.2d 804, 809 (S.D. 2008) (adopting the plausibility standard).

43. *See* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 345 (Ariz. 2008) (rejecting *Twombly*); Century Mortg. Co. v. Morgan Stanley Mortg. Capital Hold-

it.[44] This Part examines three important themes that have emerged from recent decisions in these states. First, some states reject *Twombly* and *Iqbal*'s strict fact-conclusion dichotomy. Second, some state courts consider it improper to apply judicial experience and common sense to determine a complaint's sufficiency. Last, some state courts are not convinced that discovery management should be a central policy informing their pleading doctrines. This discussion concludes that by rejecting the plausibility standard, state courts aim to permit more plaintiffs to access discovery procedures and have the merits of their complaints tested.

1. Rejecting *Iqbal*'s Fact-Conclusion Dichotomy

While *Iqbal* and *Twombly* require a court to parse through each section of a complaint and disregard every conclusion,[45] state courts tend to reject this strict dichotomy. Most dramatically, in West Virginia "a plaintiff is not required to set out facts upon which the claim is based."[46] Similarly, a number of states only require "allegations from which an inference may

ings LLC, 27 A.3d 531, 537 (Del. 2011) (holding that "the governing pleading standard in Delaware . . . is reasonable 'conceivability'" not plausibility); Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012) (rejecting the plausibility standard); Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 500 (Mont. 2012) (holding that determining the sufficiency of a complaint under Montana law is "distinct from the issue" of a complaint's sufficiency under the plausibility standard); Madrid v. Vill. of Chama, 283 P.3d 871, 876 (N.M. Ct. App. 2012) (rejecting the plausibility standard); Sacksteder v. Senney, No. 24993, 2012 WL 4480695, at *11 (Ohio Ct. App. Dec. 28, 2012) (holding that it was error for the trial court to apply the plausibility standard); *Webb*, 346 S.W.3d at 430 (rejecting the plausibility standard); Colby v. Umbrella, 955 A.2d 1082, 1086 n.1 (Vt. 2008) (declaring that Vermont courts "are in no way bound by federal jurisprudence in interpreting our state pleading rules" and affirming Vermont's "notice pleading" standard); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 864 (Wash. 2010) (refusing to adopt the plausibility standard); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189–90 n.4 (W. Va. 2010) (distinguishing between the plausibility standard and West Virginia's "fair notice" standard); Syed v. Mobil Oil Mariana Islands, Inc., No. 090467, 2012 WL 6738436, at *4 (N. Mar. I. Dec. 31, 2012) (rejecting the plausibility standard).

44. *See* Crum v. Johns Manville, Inc., 19 So. 3d 208, 212–13 n.2 (Ala. Civ. App. 2009) (explaining that the plausibility standard does not apply unless the Alabama Supreme Court chooses to adopt it); Smith v. State, No. 104775, 2012 WL 1072756, at *7 (Kan. Ct. App. Mar. 23, 2012) (declining to apply the plausibility standard without authorization from the state legislature or the Supreme Court of Kansas).

45. *See supra* note 33 and accompanying text.

46. *Roth*, 700 S.E.2d at 189 (quoting State *ex rel*. McGraw v. Scott Runyan Pontiac-Buick, Inc., 461 S.E.2d 516, 522 (W. Va. 1995)).

fairly be drawn that evidence on . . . material points will be introduced at trial."[47] Allegations that may be more conclusory than factual are, nevertheless, permitted so long as it is fair to infer that supporting evidence will be provided in the future. Although the Supreme Court of Tennessee acknowledged that a court is not required to accept the veracity of so-called conclusions,[48] this is not the same as the federal *requirement* to disregard them.[49] By rejecting the strict fact-conclusion dichotomy, these state pleading standards are designed to allow more complaints to proceed than would be permitted under the plausibility standard.

2. Excluding Judicial Experience and Common Sense

State courts also tend to disavow *Iqbal's* plausibility prong. While *Iqbal* requires application of judicial experience and common sense[50] and requires "more than the mere possibility of misconduct,"[51] Washington courts simply ask "if it is *possible* that facts could be established to support the allegations in the complaint."[52] Similarly, courts in Arizona and Tennessee are restricted to "an examination of the pleadings alone."[53] By restricting their pleading standard to the contents of the complaint, these states prohibit the court from weighing external considerations such as judicial experience and common sense.

Restricting a court's analysis to the four corners of the pleading also serves to permit more complaints to proceed to discovery. Significantly, the *McCurry* court argued that apply-

47. *Webb*, 346 S.W.3d at 427 (quoting Leach v. Taylor, 124 S.W.3d 87, 92 (Tenn. 2004)); *see also Cullen*, 189 P.3d at 346 ("Courts must also assume the truth of the well-pled factual allegations and indulge all reasonable inferences therefrom."); *Smith*, 2012 WL 1072756, at *7 (stating that the first task when assessing a complaint's sufficiency is to "accept the facts alleged by the plaintiff as true, along with any inferences that can reasonably be drawn therefrom" (internal quotation marks omitted)).

48. *Webb*, 346 S.W.3d at 427 (clarifying that "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions'").

49. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (asserting that mere conclusions "are not entitled to the assumption of truth").

50. *See id.* (describing the process of assessing a claim's plausibility as involving application of "judicial experience and common sense").

51. *Id*.

52. McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 862 (Wash. 2010) (emphasis in original).

53. *Webb*, 346 S.W.3d at 426; *see also* Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 346 (Ariz. 2008) ("Arizona courts look only to the pleading itself and consider the well-pled factual allegations contained therein.").

ing experience or common sense may result in dismissal of legally sufficient complaints because the judge nevertheless believes the claim is implausible.[54] Whereas federal courts should dismiss claims where experience or common sense suggests more likely explanations for the defendant's conduct,[55] Tennessee and Washington courts consider such determinations inappropriate because they are external to the complaint and irrelevant to the question of its legal sufficiency. Like their rejection of the fact-conclusion dichotomy, these states worry that the plausibility standard would narrow the range of complaints that could survive a motion to dismiss. These courts emphasize that because plausibility looks beyond the complaint itself, that standard enhances the risk of denying a remedy despite the truth of the plaintiff's allegations.[56]

3. Deemphasizing Discovery Concerns

Different policy concerns inform state pleading rules than those that inform the Federal Rule. Most importantly, while *Iqbal* and *Twombly* sought to protect defendants from the costs associated with unwarranted discovery abuse, many state courts remain unconvinced that discovery costs justify a narrower pleading standard.[57] Most notably, the Supreme Court of

54. *See McCurry*, 233 P.3d at 863 (arguing that the plausibility standard "adds a determination of the likelihood of success on the merits, so that a trial judge can dismiss a claim, even where the law does provide a remedy for the conduct alleged by the plaintiff, if that judge does not believe it is plausible the claim will ultimately succeed"); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 197 (W. Va. 2010) (Benjamin, J., dissenting) (worrying that applying judicial experience and common sense requires "a judge to make a value determination on the likelihood of whether a claim will ultimately succeed or not before meaningful discovery occurs, even if the law provides a remedy for the conduct alleged" and observing that a variety across levels of judicial experience may create inconsistency).

55. *See supra* notes 36–39 and accompanying text.

56. *McCurry*, 233 P.3d at 863 (observing that the motion to dismiss for failure to state a claim "weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy" and that the plausibility standard adds to this "a determination of the likelihood of success on the merits").

57. *See* Hawkeye Foodservices Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012) (remaining unpersuaded that Iowa courts face "systemic" discovery pressures); *McCurry*, 233 P.3d at 863 (concluding that discovery abuse is not sufficiently prevalent in Washington courts to justify a shift in pleading practices); Syed v. Mobile Oil Mariana Islands, Inc., No. 090467, 2012 WL 6738436, at *4 (N. Mar. I. Dec. 31, 2012) ("[W]e are not aware of any evidence demonstrating the presence of rampant discovery abuse by plaintiffs in the Commonwealth that would justify adopting the 'plausibil-

Tennessee has articulated the policies that broader pleading rules pursue. First, the court emphasized the virtue of maintaining the status quo which "allows individuals to plan their affairs and to safely judge of their legal rights."[58] Second, courts should emphasize merit-based outcomes over the relative costs of that process and should conservatively protect the constitutional right to a jury trial.[59] Lastly, the court worried that the federal standard would limit access to state courts when the plaintiff has limited access to the *facts* necessary to state a plausible claim.[60] By emphasizing the rights and policies that broader pleading rules protect and deemphasizing discovery protections, these state court standards inevitably serve to permit more claims to proceed to discovery.

State courts have developed lower standards of pleading which reject the notion of plausibility and express a number of unique policies. Underlying each of the policies is a single value: allowing plaintiffs who may not yet have all the facts necessary to support their claim to access discovery procedures rather than risk terminating a potentially valid claim prematurely.[61] This difference between state and federal pleading standards is important for determining the validity of the federal plausibility standard under the REA.

These state opinions rejecting the plausibility standard have also created significant disuniformity between state and federal pleading standards. Some have projected that as this disuniformity evolves, federal courts will be asked with increasing frequency to apply state pleading standards in diversity cases.[62] Indeed, such requests have already emerged on a lim-

ity' standard.").

58. *Webb*, 346 S.W.3d at 431 (internal quotation marks omitted).

59. *See id*. at 432 (arguing that the application of judicial experience and common sense to weigh a complaint's facts "conflicts with the strong preference . . . that cases stating a valid legal claim brought by Tennessee citizens be decided on their merits," which "raises potential concerns implicating the Tennessee [c]onstitutional mandate that the right of trial by jury shall remain inviolate" (internal quotation marks omitted)).

60. *See id*. at 434–35 (listing types of claims which involve "information asymmetry" between the parties and worrying that these types of cases are particularly vulnerable to pre-discovery dismissal under the plausibility standard).

61. *See, e.g.*, Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 197 (W. Va. 2010) (Benjamin, J., dissenting) ("I believe we must also be weary [sic] of a procedure which could be harsh on *pro se* litigants or otherwise be viewed as imposing unnecessary hurdles at the courthouse door to the substantial rights of parties.").

62. *See* Z.W. Julius Chen, Note, *Following the Leader:* Twombly*, Pleading*

ited scale.[63] In order to answer whether a state or federal law applies in a diversity case, federal courts look to the *Erie* doctrine.

## II. WHEN DO FEDERAL RULES DISPLACE STATE RULES?

To understand how federal courts will treat conflicting pleading rules in diversity cases, this Part introduces the modern *Erie* doctrine, focusing primarily on the REA and the Court's most recent attempt to interpret it in *Shady Grove*. After introducing the doctrine, this Part highlights the differences between *Shady Grove's* plurality and concurring opinions and argues that Justice Stevens's opinion presents a more accurate textual reading of the REA and is not the radical departure from precedent that Justice Scalia paints it to be.

### A. CONFLICTED FEDERAL RULES AND THE REA

What is commonly referred to as the *Erie* doctrine, is actually two distinct lines of case law, one evolving out of *Erie Railroad Co. v. Tompkins*[64] and the Rules of Decision Act (RDA),[65] and the other evolving out of *Sibbach v. Wilson & Co.*[66] and the REA.[67] Though both doctrines address vertical conflicts of law, each does so in a different context.[68] When there is a vertical

*Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1432 (2008) (claiming that many states "now face the choice of whether to stand or break with *Conley* notice pleading"); Michalski, *supra* note 5, at 109 ("Other states will have to decide the same issue in the months and years to come.").

63. *See* Petition for Writ of Certiorari at *20, Seattle Collision Ctr., Inc. v. Am. States Ins. Co., 2011 WL 1155275 (No. 10-1189) (arguing that both the District Court for the Western District of Washington and the Court of Appeals for the Ninth Circuit erred in applying the federal plausibility standard instead of the Washington state pleading standard), *cert. denied*, 131 S. Ct. 2936 (2011); Brief for Appellants at *10–11, G&S Holdings LLC v. Cont. Cas. Co., 2011 WL 4542825 (7th Cir. 2011) (No. 11-1813) (arguing that *Erie* commands the application of a state pleading standard when a case is removed from a state court to federal court).

64. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

65. 28 U.S.C. § 1652 (2006) ("The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States . . . .").

66. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941) (holding that Federal Rule of Civil Procedure 35 is valid because it "really regulates procedure").

67. 28 U.S.C. § 2072 (2006) (delegating to the Supreme Court Congress's power to "prescribe general rules of practice and procedure" and requiring that "[s]uch rules shall not abridge, enlarge or modify any substantive right").

68. *See* Hanna v. Plumer, 380 U.S. 460, 469–71 (1965) (arguing that the *Erie* doctrine is not the "appropriate test of the validity and therefore the ap-

conflict created by federal judge-made law, the RDA, as interpreted by *Erie* and other cases, instructs a federal court to apply state law to the extent that this choice of law minimizes forum shopping,[69] enables equitable administration of the law,[70] and does not disrupt supervening federal interests.[71] On the other hand, if a Federal Rule of Civil Procedure creates the conflict, the REA instructs federal courts to apply that rule unless it is not arguably procedural[72] or it "abridges, enlarges or modifies any substantive right."[73] To demonstrate how courts should answer the question of conflicting pleading rules, this Part further introduces the modern REA analysis.[74] It then examines the recent *Shady Grove* decision and the diverging approaches contained therein.

When a federal procedural rule creates a vertical conflict of law, courts determine that rule's validity according to the REA. Pursuant to its constitutional power to create and maintain a system of federal courts[75] and the Necessary and Proper

plicability of a Federal Rule of Civil Procedure" and that the proper test is "the scope of the [Rules] Enabling Act and the constitutionality of specific Federal Rules"); *see also* John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 718 (1974) (arguing that "*Hanna*'s main point, however, was that when the application of a Federal Rule is at issue, the Rules Enabling Act—and not the Rules of Decision Act as construed by *Erie R.R. v. Tompkins* and other cases—should determine whether federal or state law is to be applied").

69. *See Hanna*, 380 U.S. at 467–68 (arguing that "choices between state and federal law are to be made . . . by reference to the policies underlying the *Erie* rule" and identifying "discouragement of forum-shopping" as one of those policies).

70. *See id.* at 468 (identifying "avoidance of inequitable administration of the laws" as the other policy "underlying the *Erie* rule").

71. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 538 (1958) (ruling that "the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court").

72. *See Hanna*, 380 U.S. at 472 (articulating the constitutional authority to create procedural rules as being limited to the "power to regulate matters which . . . are rationally capable of classification as either" substantive or procedural).

73. *See* 28 U.S.C. § 2072(b) (2006) (instructing the Supreme Court not to create procedural rules which "abridge, enlarge or modify any substantive right").

74. Because the Court's RDA analysis does not apply where there is a controlling rule of federal procedure, and because pleading in federal courts is controlled by Rule 8(a)(2), this Note does not further analyze the scope or implications of the RDA.

75. *See* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in . . . such inferior Courts as the Congress may from time to

Clause,[76] Congress enacted the REA, which delegates to the Supreme Court the congressional power to prescribe a system of procedural and evidentiary rules applicable in all district courts.[77] However, the Supreme Court cannot use this power to hide substantive law in a procedural code; all procedural rules must abide by both clauses of the REA.

The REA's first clause—"the enabling clause"—gives the Supreme Court the power to create procedural rules.[78] Although Congress delegated its rule-making responsibility to the Supreme Court, that power remains Congress's and, therefore, no Federal Rule may exceed Congress's power over procedure.[79] As the Supreme Court has admitted, however, the distinction between procedure and substance cannot be maintained consistently.[80] Rather than drawing a hard line between procedure and substance, the Court has stated that Congress's power to create procedural rules "includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are *rationally capable of classification as either*."[81] In other words, so long as a rule is "rationally capable of classification as procedur[al]," it is constitutionally valid and does not violate the REA's enabling clause.[82]

The REA's second clause—"the limiting clause"—states that no promulgated rule may "abridge, enlarge or modify any substantive right."[83] Thus, like the enabling clause, the limiting clause draws a distinction between substance and procedure.[84]

time ordain and establish.").

76. *See id.* art. I, § 8, cl. 18 (vesting in Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

77. 28 U.S.C. § 2072 (2006).

78. *Id.* § 2072(a) (2006) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.").

79. *See supra* notes 75–77 and accompanying text.

80. *See, e.g.*, Guar. Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables depending upon the particular problem for which it is used.").

81. Hanna v. Plumer, 380 U.S. 460, 472 (1965) (emphasis added).

82. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (internal quotation marks omitted).

83. 28 U.S.C. § 2072(b).

84. *See* Martin H. Redish & Dennis Murashko, *The Rules Enabling Act and the Procedural-Substantive Tension: A Lesson in Statutory Interpretation*, 93 MINN. L. REV. 26, 35–42 (2008) (analyzing possible interpretations of the

To determine whether or not a rule is procedural or substantive under the limiting clause, a court will ask whether it "really regulates procedure[]—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[85] As some have noted, this test appears tautological, i.e., "a matter is procedural if, by revelation, it is procedural."[86] However, the Court does not appear to struggle in its application. Indeed, the Court has never found a Federal Rule to violate either the enabling clause or the limiting clause.[87]

If a Federal Rule creates a vertical conflict of law, a court will ensure that the rule complies with both of the REA's clauses. Clear as this test appears, the most recent *Erie* decision—*Shady Grove*—demonstrates that there is considerable disagreement within the Court concerning how to apply multiple steps of the analysis.[88]

### B. *SHADY GROVE*

*Shady Grove* was a class action to recover unpaid "statutory" interest accrued on overdue insurance claim payments that Allstate Insurance Company allegedly routinely refused to pay.[89] The District Court dismissed the class action because under the New York procedural rules a class cannot recover a

REA implicated by its "procedural-substantive tension").

85. Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).

86. *See, e.g.*, 19 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4509 (3d ed. 2011).

87. *See Shady Grove*, 130 S. Ct. at 1442, (observing that the Court has "rejected every statutory challenge to a Federal Rule").

88. This disagreement begins when determining whether state and federal rules actually conflict. *Compare id*. at 1437–42 (holding that Rule 23 and the applicable state rule do conflict because they both address "whether a class action may proceed for a given suit" and criticizing the dissent's approach to the question because it would produce "confusion worse confounded" (internal quotation marks omitted)), *with id*. at 1461–69 (Ginsburg, J., dissenting) (arguing that the Court should avoid "immoderate interpretations of the Federal Rules that would trench on state prerogatives without serving any countervailing federal interest" and that the majority "finds conflict where none is necessary"). The Court's disagreement further extends to the importance of the state's purposes in creating the rule. *Compare id*. at 1442–48 (arguing that the proper REA analysis "leaves no room for special exemptions based on the function or purpose of the state rule"), *with id*. at 1448–56 (Stevens, J., concurring) (arguing that the Rule Enabling Act commands the Court to show "sensitivity to important state interests and regulatory policies" (internal quotation marks omitted)).

89. *Id*. at 1436.

"penalty."[90] The Second Circuit affirmed, holding that although Federal Rule 23 would permit the class action to proceed, the federal class action rule does not address the question of statutory penalties and therefore did not actually conflict with the state law.[91] Because the Second Circuit determined that New York's prohibition of class recovery of penalties was substantive and not procedural, the state law applied in federal court under *Erie* and the REA.[92] The Supreme Court overruled, holding that Rule 23 did address the question of statutory penalties because it allowed *all* class actions to proceed so long as the Rule's requirements are met.[93] Further, the Court held that Rule 23 does not violate the terms of the REA and therefore was valid and operated to displace New York's rule in federal courts.[94] Though a majority of Justices agreed that Rule 23 was valid and controlled the action before it, only a plurality agreed on how to determine the validity of federal rules against their conflicting state counterparts under the REA.

Justice Scalia nicely articulated the point of contention between himself and Justice Stevens: "compliance of a federal rule with the Enabling Act is to be assessed by consulting the Rule itself, and not its effects in individual applications."[95] According to Justice Scalia, the measure of a federal rule is simply whether or not it "really regulates procedure."[96] Federal rules are either valid or not;[97] any REA analysis should focus on the

90. *Id*. at 1437.

91. *Id*.

92. *Id*.

93. *Id*. at 1442 ("Rule 23 unambiguously authorizes *any* plaintiff, in *any* federal civil proceeding, to maintain a class action if the Rule's prerequisites are met."); *see also id*. at 1456 (Stevens, J., concurring) (stating that Rule 23 squarely answers the question of class certification in federal courts; "[t]hat is the explicit function of Rule 23"). The *Shady Grove* dissent disagreed on this point. *See id.* at 1461–66 (Ginsburg, J., dissenting). Justice Ginsburg's dissent argued that the Court has consistently read federal rules narrowly to avoid conflict with state rules and since Rule 23 does not explicitly address the type of remedies available, it should similarly be read narrowly to avoid conflict with a state rule that limits the remedies available. *See id*.

94. *Id*. at 1443 (holding that Rule 23 is valid under the REA's enabling clause, "at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action"); *see also id*. at 1457 (Stevens, J., concurring) (observing that it is "hard to see how § 901(b) could be understood as a rule that, though procedural in form, serves the function of defining New York's rights or remedies").

95. *Id*. at 1444.

96. *Id*. at 1442 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

97. *See id*. at 1444 (arguing that "[a] Federal Rule of Procedure is not valid in some jurisdictions and invalid in others").

content of the federal rule, without consideration of state rules or rights.[98] If a federal rule "regulates procedure . . . it is authorized by § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect on state-created rights."[99] Thus, the content of a state rule and whether it is "substantive" or "procedural" is irrelevant.[100] Under the REA, therefore, a federal rule is invalid only if the alleged substantive transgression occurs on the face of the rule itself.[101] This is incredibly unlikely because, as the Court previously observed, a facially invalid rule implies that "the Advisory Committee, [the Supreme] Court, and Congress erred in" enacting the rule.[102]

Justice Stevens, by contrast, reads the REA as allowing for as-applied challenges to federal rules. He reads the limiting clause as reflecting Congress's desire to respect each state's "definition of its own rights or remedies," and a federal rule which interferes with the scope of these rights or remedies is invalid.[103] Because a federal rule's validity is measured by reference to the content of particular state rights, the REA permits case-specific, as-applied challenges.[104] Justice Stevens's approach recognizes that although a state rule may take a procedural *form*,[105] it nevertheless may be "so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[106] In such instances, the REA

98. *See id*. at 1442 ("What matters is what the rule itself regulates.").

99. *Id*. at 1444.

100. *Id*. (arguing that "it is not the substantive or procedural nature of purpose of the affected state law that matters, but the substantive or procedural nature of the Federal Rule").

101. *See* Allan Ides, *The Standard for Measuring the Validity of a Federal Rule of Civil Procedure: The* Shady Grove *Debate Between Justices Scalia and Stevens*, 86 NOTRE DAME L. REV. 1041, 1044 (2011) (arguing that Justice Scalia's focus on "[t]he word 'itself' signals, albeit faintly, a distinction between facial challenges (i.e., the rule itself) and as-applied challenges (i.e., the effect of applying the rule in a particular context)").

102. Hanna v. Plumer, 380 U.S. 460, 471 (1965).

103. *See Shady Grove*, 130 S. Ct. at 1449 (Stevens, J., concurring) (arguing that the REA's substantive rights limitation "means only that federal rules cannot displace a State's definition of its own rights or remedies").

104. *See id*. at 1449–50 (claiming that the REA analysis is "applied to diversity cases" and "requires careful interpretation of the state and federal provisions at issue").

105. *See id*. at 1450 (recognizing that states may choose "to use a traditionally procedural vehicle as a means of defining the scope of substantive rights or remedies").

106. *Id*.

does not authorize application of a federal rule which would modify state rights.

While Justice Stevens would allow plaintiffs to bring as-applied challenges to particular federal rules, Justice Scalia rejects this approach. Because only some states have rejected the plausibility standard, plaintiffs can only succeed in challenging the plausibility standard's validity if courts permit them to bring as-applied challenges under the REA.

### C. THE REA AND AS-APPLIED CHALLENGES

Although there is a well-established analytical framework in REA cases, the *Shady Grove* opinion revealed that there is substantial disagreement as to the scope and meaning of the REA's substantive rights limitation. This Part compares and contrasts Justice Scalia's and Justice Stevens's interpretations of the REA and argues that Justice Stevens's approach shows greater fidelity to both Supreme Court precedent and the REA's text.

#### 1. *Sibbach v. Wilson & Co.* and As-Applied Challenges

In *Shady Grove*, both Justice Scalia and Stevens discussed the Court's interpretation of the REA in *Sibbach v. Wilson & Co*. While Justice Scalia reads *Sibbach* as barring any as-applied test to the validity of a federal rule, Justice Stevens reads *Sibbach* as upholding Federal Rules 35 and 37 against a *facial* challenge, thereby leaving room for litigants to challenge the validity of a federal rule in specific applications.

In *Sibbach v. Wilson & Co.*, the petitioner had sought damages for injuries sustained within the state of Indiana.[107] Pursuant to Federal Rule 35, the federal district court, which sat in Illinois, ordered Sibbach to submit to physical examinations to assess the injuries alleged.[108] When Sibbach refused to comply, the Court found Sibbach guilty of contempt.[109] At that time, the Illinois state courts did not permit such orders.[110] State courts in Indiana, however, followed the Federal Rule, and would have permitted a similar order.[111] To avoid the sanctions imposed, Sibbach argued that Rules 35 and 37 exceeded

107. Sibbach v. Wilson & Co., 312 U.S. 1, 4 (1941).
108. *Id.*
109. *Id.* at 6–7.
110. *Id.* at 7.
111. *Id.*

the rule-making power delegated by Congress through the REA.[112]

Sibbach, however, had brought an ill-fated appeal. If she succeeded in invalidating the Federal Rules, the RDA would dictate that Indiana law controlled, not Illinois law.[113] Thus, Sibbach would have been subject to compelled examination and potential sanctions whether or not her appeal succeeded. To avoid this result, Sibbach ignored the applicable state laws entirely. Instead, she conceded that Rules 35 and 37 were procedural, but insisted that they so intruded upon rights that generally were "important or substantial," so as to violate the REA's limiting clause.[114] Thus, Sibbach urged the Court to invalidate Rules 35 and 37 because the Rules themselves—without any examination of conflicting state law—transgressed important substantive rights. In other words, Sibbach brought a *facial* challenge to Rules 35 and 37.[115]

The Court easily rejected Sibbach's argument for the simple reason that Sibbach failed to identify any particular body of law that protected the supposedly important rights at issue. In the Court's words, the rights Sibbach identified were "[r]ecognized where and by whom?"[116] Permitting a federal rule to be invalidated based on how important an unidentified right is would result in "confusion worse confounded"[117] because in the absence of any applicable law there is no standard to determine whether a rule is important enough to remain inviolate against federal rulemaking. In the absence of any particular substantive right that a federal rule supposedly violates, the REA's limiting clause simply applies to the face of the federal rule in question and the only remaining standard to assess the rule's validity is whether it "really regulates procedure."[118]

112. *Id.* at 7–8.

113. *Id.* at 10–11.

114. *Id.* at 11.

115. *See* Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1454 (2010) (Stevens, J., concurring) (arguing that in *Sibbach* "[t]he petitioner raised only the facial question whether 'Rules 35 and 37 [of the Federal Rules of Civil Procedure] are . . . within the mandate of Congress to this Court' and not the specific question of 'the obligation of federal courts to apply the substantive law of a state'" (alteration in original)).

116. *Id.* at 13.

117. *Id.* at 14.

118. *Id.*; *see also* Ides, *supra* note 101, at 1057 (arguing that the "really regulates procedure" test should only be read as a "tag" on the Court's rejection of Sibbach's argument that important rights which are not recognized by any particular body of law can serve as the basis for an REA challenge).

Ignoring the fact that *Sibbach* involved a facial rather than an as-applied challenge, Justice Scalia reads *Sibbach* as rejecting any "test that turns on the idiosyncrasies of state law."[119] Hence, he states that Justice Stevens's approach to the REA would require overturning *Sibbach*.[120] This criticism is misplaced, however, because *Sibbach* did not hold that litigants could not bring as-applied challenges under the REA; there was no such challenge at issue. At most, *Sibbach* held that in order to implicate the REA's limiting clause, a litigant must identify a substantive right recognized somewhere by someone that the federal rule in question allegedly transgresses. As-applied challenges satisfy *Sibbach*'s rule so long as they identify a particular state right that the federal rule in question transgresses.

In fact, Justice Scalia agrees that exclusive focus on the federal rule is difficult to square with the REA's limiting clause.[121] But, he goes on to argue, Congress never modified the REA in light of *Sibbach*'s holding.[122] Moreover, allowing for as-applied challenges would produce endless litigation over "hundreds of hard questions" rather than the "single hard question" of a federal rule's facial validity.[123] But, as Justice Stevens pointed out, "[t]he question is what rule Congress established,"[124] and as *Sibbach* suggests, that rule—the REA—permits as-applied challenges.

2. Substance and Procedure in the REA

The meaning of "substance" and "procedure" in the REA is contentious[125] and well beyond the scope of this Note. It is clear, however, that the statute expresses a particular relationship between the concepts; namely, a relationship that is not mutually exclusive. The REA's enabling clause delegates to the Court the power to create rules that are "procedural."[126] The

119. *Shady Grove*, 130 S. Ct. at 1445.

120. *Id.* ("In reality, the concurrence seeks not to apply *Sibbach*, but to overrule it (or, what is the same, to rewrite it).").

121. *Id*. at 1445–46 ("[I]t is hard to understand how it can be determined whether a federal rule 'abridges' or 'modifies' substantive rights without knowing what state-created rights would obtain if the federal rule did not exist.").

122. *See id*. at 1446 (asserting that "Congress remains free to correct us . . . and adhering to our precedent allows it to do so" (citation omitted)).

123. *Id*. at 1447.

124. *Id.* at 1454.

125. *See* Redish & Murashko, *supra* 84, at 27 ("To this day, no real consensus has developed as to how the Act should be interpreted.").

126. 28 U.S.C. § 2072(a) (2006) ("The Supreme Court shall have the power

limiting clause excludes from this power any rule that would transgress any substantive right.[127] If the REA contemplated mutually exclusive spheres named "substance" and "procedure," the limiting clause would be redundant.[128] In other words, the power to promulgate rules of procedure would, by definition, not include the power to promulgate substantive rules. Unless one is willing to accept an expressly redundant statute, the REA must be read as permitting the promulgation of a certain set of rules collectively named "procedure," that nevertheless have the potential to modify a certain set of rights which the statute calls "substantive."

Justice Scalia's reading of the REA applies mutually exclusive conceptions of "substance" and "procedure" against the REA. "[T]he validity of a Federal Rule depends entirely upon whether it regulates procedure. If it does, it is authorized by § 2072 and is valid in all jurisdictions . . . ."[129] However, as Professor John Hart Ely observed, any determination of a federal rule's validity derived *solely* from classifying it as substantive or procedural "collapses" the two REA requirements into one.[130] By treating rules that fit within the scope of the statute's enabling clause as necessarily incapable of violating its limiting clause, Justice Scalia renders the latter toothless and construes it "as nothing more than a restatement of the first."[131]

Justice Stevens, on the other hand, fashions a test that gives full effect to both clauses. Where an ostensibly procedural federal rule is "intimately bound up in the scope of a substantive right or remedy," it is not authorized by the REA.[132] At the same time, Justice Stevens does not allow this limitation to

to prescribe general rules of *practice and procedure* . . . for cases in the United States district courts . . . and courts of appeals." (emphasis added)).

127. *Id.* § 2072(b) (2006) ("Such rules shall not abridge, enlarge or modify *any substantive right*." (emphasis added)).

128. *See* Redish & Murashko, *supra* note 84, at 28 (arguing that under "the notion of mutual exclusivity of procedure and substance . . . the [REA's] second provision effectively serves solely to place emphasis on the first").

129. *Shady Grove*, 103 S. Ct. at 1444 (citations omitted).

130. Ely, *supra* note 68, at 719 (arguing that under *Sibbach* "the Act's two questions were collapsed into one"). Like Justice Scalia, Professor Ely misread *Sibbach* as rejecting as-applied challenges of federal rules. However, unlike Justice Scalia, Professor Ely does not advocate this position. *See id*. at 722 (arguing that if *Sibbach*'s "wholesale defeat of the Enabling Act is to be avoided, [the statute's] interpretation must be geared . . . to the character of the state provision that enforcement of the Federal Rule in question will supplant").

131. Redish & Murashko, *supra* note 84, at 28.

132. *Shady Grove*, 103 S. Ct. at 1458 (Stevens, J., concurring).

swallow the enabling clause. A federal rule is only invalid if there is "little doubt" that its application will actually alter the scope of state rights.[133] In this way, Justice Stevens gives full effect to both the REA's clauses and, therefore, presents a more accurate reading of the statute.

## III. OBJECTING TO THE PLAUSIBILTY STANDARD IN FEDERAL COURTS

Justice Stevens's approach to determining the validity of a Federal Rule requires examining the conflicted state rule and any substantive policies or rights that it may engender or transgress. His concurrence does not, however, clarify when exactly a state procedural rule should be considered sufficiently interwoven with substantive law to render its displacement a violation of the REA. This Part demonstrates that the state pleading standards examined in certain state courts are sufficiently substantive to limit the plausibility standard's applicability. This Part then responds to likely objections to this conclusion, specifically that varied pleading standards undermine the goals of procedural uniformity and litigation on the merits of each case in federal courts. Lastly, this Part explains how applying such substantive state pleading standards in diversity cases resolves a troubling forum shopping problem raised by vertically disuniform pleading standards.

### A. PLEADING "BOUND UP WITH" SUBSTANTIVE RIGHTS

As argued above, there is an as-applied violation of the REA where application of a Federal Rule of Civil Procedure serves to "define the scope of the state-created right."[134] According to Justice Stevens, this determination should be made with "sensitivity to important state interests and regulatory policies."[135] Significantly, he clarifies that "[s]uch laws . . . may be seemingly procedural rules that make it significantly more difficult *to bring* . . . a claim."[136] Thus, a heightened pleading standard appears to be precisely the type of rule that Justice Stevens thinks could be vulnerable to an as-applied challenge. This Part argues that no matter how one defines the word "substantive," application of a federal pleading standard which

133. *Id*. at 1457.
134. *Id.* at 1452.
135. *Id*. (internal quotation marks omitted).
136. *Id*. at 1450 (emphasis added).

is higher than its state counterpart in a diversity case violates the REA's limiting clause.

According to some broad definitions of "substance," pleading standards that engender particular state policies would constitute "substantive rights." For example, one very broad definition of "substantive" proposes to encompass rights whose application would evoke "organized political attention of a group of litigants or prospective litigants who (reasonably) claim to be specially and adversely affected by the rule."[137] Thus, a state court's decision to apply a lower pleading standard in order to provide sufficient courthouse access to a class of potential plaintiffs[138] can be read as recognizing a substantive right.

Another slightly narrower definition of substantive rights reaches a similar conclusion. Professor Ely, for example, defined substantive rights as those recognized "for *some* purpose or purposes not having to do with the fairness or efficiency of the litigation process."[139] Thus, a state which chooses to apply a lower pleading standard in order to protect the expectations and affairs of its local citizens[140] can also be thought of as recognizing a substantive right. Under both of these broad definitions of "substantive rights," application of the plausibility standard would violate the terms of the REA's limiting clause because it would directly constrict a substantive right that the state pleading rule engenders.

Other, more restrictive definitions, however, may initially appear to exclude such engendered policies from the definition

137. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 308 (1989) (describing Walter Wheeler Cook's definition of substance and procedure).

138. *See* Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 434 (Tenn. 2011) (citing concern over "information asymmetry" inherent to certain types of claims, "including actions for violations of civil rights, employment discrimination, antitrust, and conspiracy"); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863 (Wash. 2010) (emphasizing access to the court "particularly in cases where evidence is almost exclusively in the possession of defendants"); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 196–97 (W. Va. 2010) (Benjamin, J., dissenting) (worrying about the plausibility standard's impact on pro se litigants); Syed v. Mobil Oil Mariana Islands, Inc., No. 090467, 2012 WL 6738436, at *4 (N. Mar. I. Dec. 31, 2012) (concluding that to adopt a heightened pleading standard "would prematurely close the doors of justice on plaintiffs").

139. Ely, *supra* note 68, at 725 (emphasis added).

140. *See Webb*, 346 S.W.3d at 431 (emphasizing stable procedural rules because "[s]tability in the law allows individuals to plan their affairs and to safely judge of their legal rights" (internal quotation marks omitted)).

of "substantive rights." One could imagine, for example, a definition of substantive rights limited only to those laws that create a cause of action. Or, less narrowly, rules that have a greater than incidental impact on activities "beyond the courthouse walls."[141] Under such definitions, a state that applies a particular pleading standard for the purposes of an open courthouse or to protect a particular class of litigants is unlikely to be considered as recognizing substantive rights.

However, even under these more narrow definitions of substantive rights, the determination of a complaint's plausibility represents, in some cases, a transgression of other rights that are substantive. As numerous state courts have worried, application of judicial experience and common sense, as required by the plausibility standard, risks dismissing a legally sufficient complaint simply because the judge does not believe it reaches a threshold level of plausibility, or because there are more plausible explanations for the alleged misconduct.[142] Even where a complaint's factual content, taken as true, satisfies the elements of a cause of action and would therefore proceed in state court, there remains the potential for dismissal in federal court.[143] In such instances, the federal pleading standard narrows the availability of a state-created substantive right or cause of action. Thus, although Rule 8(a)(2) may be a classically

141. *See* Martin H. Redish & Uma M. Amuluru, *The Supreme Court, the Rules Enabling Act, and the Politicization of the Federal Rules: Constitutional and Statutory Implications*, 90 MINN. L. REV. 1303, 1333 (2006) (describing the narrowest of three possible constructions of the REA).

142. *See* Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 609 (Iowa 2012) ("The only issue when considering a motion to dismiss is the petitioner's right of access to the district court, not the merits of his allegations." (internal quotation marks omitted)); *Webb*, 346 S.W.3d at 437 (concluding that the pleading practice in Tennessee is "particularly ill-suited for an evaluation of the likelihood of success on the merits or of the weight of the facts pleaded"); *McCurry*, 233 P.3d at 863 ("The new Fed.R.Civ.P. [sic] 12(b)(6) standard effectively reads 'plausible' into the rule, as follows: 'failure to state a [plausible] claim upon which relief can be granted.' This adds a determination of the likelihood of success on the merits, so that a trial judge can dismiss a claim, even where the law does provide a remedy for the conduct alleged by the plaintiff, if that judge does not believe it is plausible the claim will ultimately succeed." (alteration in original)); *Roth*, 700 S.E.2d at 197 (Benjamin, J., dissenting) (arguing that the plausibility standard "seem[s] to require a judge to make a value determination on the likelihood of whether a claim will ultimately succeed or not").

143. *See* Miller, *supra* note 14, at 29 (arguing that "[i]f unconstrained, [application of the plausibility standard] allows judges to deny access to a merits adjudication whenever an equivocal set of facts can be interpreted as 'more likely' to reflect lawful conduct").

procedural rule and may not itself be substantive, its *application* through the plausibility standard clearly serves to define the "scope" of other substantive rights at issue in certain diversity cases and, therefore, violates the REA's limiting clause.

One of the likely unforeseen consequences of the Supreme Court's development of the plausibility standard is that it has caused state courts to similarly reassess the process by which they determine the sufficiency of a complaint. These state courts have clarified the policies and rights implicated by local pleading rules. The courts in Tennessee and Washington in particular made clear that despite this inability to access certain "facts" which would otherwise be included in a complaint, the pleading standard should not operate to prevent these plaintiffs from pursuing their substantive rights in local courts.[144] In order to ensure broad court access for such plaintiffs, these courts retained a more liberal pleading standard than the federal plausibility standard. In this sense, these opinions express the judgment that pursuit of substantive rights should be available to all litigants, even those who cannot immediately plead particular types of facts.

Application of the federal standard in states emphasizing these values is contrary to the REA's limiting clause. As interpreted by the highest courts in these states, the local pleading standard serves the policy of broad protection of the substantive law and therefore operates to determine the scope of states' substantive rights and remedies. By effectively making it more difficult for particular types of cases to be brought by particular types of plaintiffs,[145] application of the plausibility standard rather than the local standard would narrow the scope of the substantive law because it may entirely prevent certain types of claims from proceeding.

144. *See Webb*, 346 S.W.3d at 434 (worrying that the plausibility standard would result in a "disproportionate dismissal" of claims where there is an "information asymmetry" between the plaintiff and defendant); *McCurry*, 233 P.3d at 863 (questioning whether curbing discovery costs warrants decreasing court access, "particularly in cases where evidence is almost exclusively in the possession of defendants").

145. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 459 (2008) (arguing that "plaintiffs may find that claims for which intent or state of mind is an element—such as discrimination or conspiracy claims—are more difficult to plead in a way that will satisfy the plausibility standard").

B. PROCEDURAL VALUES AGAINST THE REA'S TEXT

The strongest objection to applying state pleading standards in a diversity action is that this would undermine the value of procedural uniformity across district courts and across types of claims within a particular district. As Justice Scalia stated in *Shady Grove*, "[a] procedural rule is not valid in some jurisdictions and invalid in others—or valid in some cases and invalid in others . . . ."[146] This objection emphasizes that one of the original purposes of the Federal Rules and the REA was to establish uniform procedural practices and standards.[147] As the argument goes, applying state pleading standards in a federal court undermines this goal because district courts sitting in states such as Tennessee, Washington, and West Virginia would apply a different standard than district courts sitting in states such as Massachusetts.[148] Moreover, within those districts, there would be internal or "transsubstantive" disuniformity between diversity cases—where the state standard would apply—and non-diversity cases, where the federal standard would remain in effect.[149]

A second, more practical objection arises from the collateral effects of disuniform pleading standards: invalidating the plausibility standard in a particular application opens the door to costly and complex *Erie* disputes over the validity of other federal rules. Invalidating a single procedural rule would cause litigants to question the validity of many other rules and would require courts to reconsider the substantive or procedural nature of "countless state rules."[150] Invalidating particular applications the federal pleading standard would not only increase federal litigation, it would weigh courts down in the complex procedure-substance debate which has traditionally been troublesome. Lastly, such disputes detract from determining the

146. Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 130 S. Ct. 1431, 1444 (2010).

147. *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1040–42 (1982) (describing the earlier Conformity Act's failure to achieve a uniform procedure).

148. *Compare, e.g.*, *McCurry*, 233 P.3d at 864 (refusing to adopt the plausibility standard), *with* Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) (adopting *Twombly*'s "refinement" of *Conley*).

149. *See* Stephen B. Burbank, *Pleading and the Dilemmas of 'General Rules*,*'* 2009 WIS. L. REV. 535, 536 (2009) (arguing that "the 'general rules' required by the 1934 Rules Enabling Act should not only be uniformly applicable in all federal district courts, but uniformly applicable in all types of cases (transsubstantive)").

150. *Shady Grove*, 130 S. Ct. at 1447.

merits of a case which, like procedural uniformity, is a central tenet of the Federal Rules.[151]

The response to these objections is two-fold. First, as Justice Stevens succinctly explained, "that inquiry is what the Enabling Act requires."[152] In terms of procedural uniformity, the REA states that no federal rule may modify "*any* substantive right."[153] Thus, if a duly enacted federal rule would serve to modify any substantive right, the REA's limiting clause does not authorize displacement of the state law. Similarly, the concern for avoiding complex *Erie* disputes is misplaced because the substance-procedure determination is required by the REA's text, which limits the power to create *procedural* rules to the extent they do not have *substantive* effects. Thus, if there is a legitimate question regarding the substantive nature of a particular displaced state right, the REA requires a resolution, regardless of how much litigation it encourages or how complex that question is.

Second, the ad hoc nature of determining the validity of federal rules under as-applied challenges is a more effective way to ensure compliance with the REA's limiting clause. To be prescribed, a proposed federal rule endures multiple stages of revision and recommendation in successive committees.[154] This process requires that the public[155] and "interested parties"[156] have notice and an opportunity to comment. No matter how thorough such a vetting process may be, it is impractical and unwise to require or presume that the public, experts, and committees are capable of evaluating a proposed rule's substantive effect in every conceivable instance.[157] Even the most thorough examination of a proposed rule's effect will inevitably leave some contexts unexamined. After all, as the Court has

151. *See* Burbank, *supra* note 147, at 1066–67 (reporting that prior to the REA's enactment, the ABA emphasized that procedural rules should pursue litigation on the merits of each case).

152. *Shady Grove*, 130 S. Ct. at 1454 (Stevens, J., concurring).

153. 28 U.S.C. § 2072(b) (2006) (emphasis added).

154. *See generally* Nathan R. Sellers, Note, *Defending the Formal Federal Civil Rulemaking Process: Why the Court Should Not Amend Procedural Rules Through Judicial Interpretation*, 42 LOY. U. CHI. L.J. 327, 337–38 (2011) (describing the rules enactment process); *see also* 28 U.S.C. §§ 2071–2074.

155. 28 U.S.C. §§ 2071(b), 2073(c)(1).

156. *Id.* § 2073(c)(2).

157. *See* Redish & Murashko, *supra* note 84, at 94 (arguing that the Federal Rules should not be presumed valid because the process of enacting a rule "comes without a formalized and careful adversary presentation of all sides of the issue of the rule's validity").

repeatedly observed, the substantive or procedural nature of a particular law varies across contexts.[158] Litigation over such questions shines light on contexts which were not addressed during the rule's proposal period. In this way, allowing litigants to bring as-applied challenges supplements the process by which federal rules were originally enacted and helps ensure their validity.

More fundamentally, the determination of a rule's validity only reflects existing law at the time of that assessment. Assuming that the substantive effects of a rule could be exhausted during the proposal process, the rule's validity would be limited to a static composition of the legal landscape.[159] It is difficult to explain how a federal rule's substantive effects remain frozen while the landscape against which those effects were originally measured is fluid. In the pleading context, for example, not only has the Supreme Court introduced a new way of thinking about pleading,[160] but states are re-assessing their own standards, which may lead to substantive modifications. Thus, the only way to ensure that the application of the plausibility standard in federal courts does not have substantive effects is to measure the rule's continuing validity against emerging legal contexts.

### C. LIMITING EGREGIOUS FORUM-SHOPPING

One major advantage to applying state pleading rules in certain diversity cases is that it resolves a major issue in the context of the federal court's removal jurisdiction. When a plaintiff files an action in state court, but a federal court would have also been an appropriate forum, a defendant may remove the action to the federal court[161] without the consent of either

158. *See, e.g.*, Guar. Trust Co. v. York, 326 U.S. 99, 108 (1945) ("Neither 'substance' nor 'procedure' represents the same invariants. Each implies different variables upon the particular problem for which it is used.").

159. *See* Catherine T. Struve, *Institutional Practice, Procedural Uniformity, and as-Applied Challenges Under the Rules Enabling Act*, 86 NOTRE DAME L. REV. 1181, 1209 (2011) (observing that changes in the legal context may result in "a given procedural practice acquir[ing] a substantive rights valence that it previously lacked").

160. *Compare* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (observing that notice pleading "relies on liberal discovery rules and summary judgment to . . . to dispose of unmeritorious claims"), *with* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007) (stating that "[i]t is no answer to say that a claim just shy of a plausible entitlement to relief can . . . be weeded out early in the discovery process").

161. 28 U.S.C. § 1441 (2006), *amended by* Federal Courts Jurisdiction and

the state court or the plaintiff.[162] Removal has significant procedural effect because once in federal court, the Federal Rules displace the applicable state rules which previously controlled the course of the litigation.[163] Once an action is removed, the federal court may even unwind orders that the state court handed down prior to removal on the basis that there is a substantial difference between the applicable state and federal procedural standards.[164]

The federal court's removal jurisdiction, therefore, allows a diverse defendant to avoid a more lenient state pleading standard and avail himself of the federal plausibility standard.[165] Exacerbating this power to avoid state pleading standards is the district court's aforementioned power to unwind state court orders.[166] Assuming a defendant complies with all the applicable timing and filing requirements, this allows diverse defendants to take a "wait-and-see" approach to forum selection based on the outcome of a motion to dismiss. A defendant may file the motion in state court, promptly remove the action if the motion is denied, and subsequently refile the same motion in federal court under the more strict plausibility standard. Courts have upheld this approach to forum selection in the summary judg-

Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

162. *See* 28 U.S.C. § 1446(d) (2006), *amended by* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (stating that removal is effected and that the "State court shall proceed no further unless and until the case is remanded" once the defendant gives notice of the removal to the state court and all adverse parties).

163. FED. R. CIV. P. 81(c)(1) ("These rules apply to a civil action after it is removed from a state court.").

164. *See* 28 U.S.C. § 1450 (2006) ("All injunctions orders, and other proceedings had in such action prior to its removal shall remain in full force and effect *until dissolved or modified by the district court*." (emphasis added)); *see also* 14C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3738 (4th ed. 2011) (noting that "[o]rders or rulings issued by the state court prior to removal are not conclusive in the federal action after removal" and that "[a] federal court has particularly good reason to reconsider a state court determination where federal standards differ from state law standards on an issue").

165. *See* Maness v. Bos. Scientific, 751 F. Supp. 2d 962, 966 (E.D. Tenn. 2010) (granting the defendant's motion to dismiss for failure to state a claim and applying the federal plausibility standard instead of Tennessee's notice pleading standard).

166. *See supra* note 164.

ment context[167] and there is no reason to think that the procedure would not be permitted with respect to pleading. This wait-and-see approach is problematic because it undermines the authority and finality of the state court's judgment by permitting defendants to remove an action and refile their motion to dismiss simply because they do not like the state court's decision.

Applying less restrictive pleading standards in federal courts would alleviate this problem without undermining the purpose of removal jurisdiction. Defendants would still be able to access the federal forum through removal jurisdiction, thereby avoiding any local bias inherent to the state court.[168] However, defendants would not be able to evade the state court's pleading standard—or any previous state court pleading judgments—by doing so.

## CONCLUSION

The *Erie* doctrine and pleading standards are notoriously murky areas of civil procedure. Attorneys who have attempted to wade through these waters have harmed their clients' interests by failing to grasp how these doctrines interact.[169] In re-

167. *See* Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 531 (9th Cir. 2000) (holding that the district court did not abuse its discretion by granting the defendant's post-removal motion for summary judgment because the federal and state standards were sufficiently different).

168. One of the major purposes of removal jurisdiction is to ensure that defendants are not subject to a state court which may be hostile to a diverse party's interests. *See generally* 14B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3721 (4th ed. 2011) ("Like the diversity of citizenship and alienage jurisdiction of the federal courts, the original right to remove probably was designed to protect nonresidents from the local prejudices of state courts.").

169. Inexplicably, attorneys who have attempted to challenge the plausibility standard under the *Erie* doctrine have severely misapplied the law. In two recent appellate briefs, attorneys have cited the near-dead "outcome determinative" test to argue that *Erie* instructs federal courts to apply a state pleading standard. *See* Brief for Appellant at *19–25, Christiansen v. W. Branch Cmty. Sch. Dist., No. 11-1904, 2011 WL 2679065 (8th Cir. June 28, 2011) (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) and arguing that "the choice of pleading standard in Appellant's case is outcome determinative"); Brief for Appellants at *10–11, G&S Holdings LLC v. Cont. Cas. Co., No. 11-1813, 2011 WL 4542825 (7th Cir. Sept. 23, 2011) (arguing the same). The attorneys signing these briefs, however, succumbed to the very "fundamental flaw" that the Supreme Court highlighted almost fifty years ago in *Hanna v. Plumer*, 380 U.S. 460, 469–70 (1965). Not only did the *Hanna* court abrogate *Erie*'s old "outcome determinative test," *id.* at 466–67 ("'Outcome-determination' analysis was never intended to serve as a talisman."), it also

sponse, federal courts have dismissed *Erie* challenges to the plausibility standard without due consideration.[170] In order to give plaintiffs' complaints the best chance at surviving a motion to dismiss, attorneys must do a better job at understanding the law and thereby giving hurried courts reason to pause.

Fortunately, recent developments in state court pleading standards and the Supreme Court's *Erie* doctrine jurisprudence provide an avenue for successfully challenging the plausibility standard. Although pleading standards are quintessential procedural rules, they nevertheless serve to define the scope of certain substantive rights. Because the plausibility standard has the collateral effect of narrowing the reach of such rights, it violates the REA's limiting clause and, therefore, is not authorized to displace more lenient state pleading standards.

held that *Erie*—whose progeny included the outcome determinative test—did not direct the Court's analysis where there was a controlling federal rule of procedure, *id.* at 466–67, 473 ("[I]t cannot be forgotten that the Erie rule, and the guidelines suggested in York, were created to serve another purpose altogether."). Instead, where there is a controlling rule of federal procedure, courts simply ask whether that rule is a valid exercise of the power to promulgate procedural rules under the REA.

170. *See* Christiansen v. W. Branch Cmty. Sch. Dist., 674 F.3d 927, 938–39 (8th Cir. 2012) (stating without analysis that complaints in cases removed to federal court are "governed by the current federal pleading standard").