

THE NEW SUMMARY JUDGMENT MOTION:
THE MOTION TO DISMISS UNDER *IQBAL* AND *TWOMBLY*

by
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This Symposium Article argues that the motion to dismiss is the new summary judgment motion. In Iqbal v. Ashcroft and Bell Atlantic Corp. v. Twombly, the Supreme Court created a new standard for granting motions to dismiss under Rule 12(b)(6). Under the standard, a court decides whether a claim is plausible. This new plausibility standard is converging with the standard for summary judgment under Rule 56. Not coincidentally, the motion to dismiss appears to be having some of the same effects as summary judgment, including on the dismissal of employment discrimination claims. Moreover, as a result of the similarities between the motion to dismiss and the summary judgment standards, the Supreme Court case of Swierkiewicz v. Sorema N.A., which concerned the standard by which courts dismiss employment discrimination claims under Rule 12(b)(6), effectively may be dead. This Article concludes that the differences between the motion to dismiss and summary judgment call into question the propriety of Iqbal and Twombly.

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I. INTRODUCTION

Civil procedure scholars have extensively discussed the new Rule 12(b)(6) standard articulated by the Supreme Court in *Ashcroft v. Iqbal*¹ and *Bell Atlantic Corp. v. Twombly*.² In this discourse, however, an

¹ 129 S. Ct. 1937 (2009).

² 127 S. Ct. 1955 (2007); see Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) [hereinafter Bone, *Pleading Rules*] (arguing *Twombly*'s plausibility standard is not a significant change and can be justified); Robert G. Bone, *A Proceduralist's Perspective on Court Access After Twombly*, GCP: ONLINE MAG. FOR GLOBAL POL'Y (NO. 2), July 2009 (same); Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1467799> (arguing that *Iqbal* is a stricter, less justifiable standard than *Twombly*); Stephen Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1469638> (arguing that the importance of plausibility analysis has been overstated); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535 (2009) [hereinafter Burbank, *General Rules*] (commenting on Geoffrey Miller's *Tellabs* article, as well as *Twombly* and *Iqbal* prior to final *Iqbal* decision); Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109 (2009) (revising and extending Wisconsin article after *Iqbal*); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010), available at <http://ssrn.com/abstract=1448796> (arguing that *Iqbal* and *Twombly* set up a new test, that is unpredictable and disruptive to the civil litigation system); Scott Dodson, *Federal Pleading and State Presuit Discovery*, 14 LEWIS & CLARK L. REV. 43 (2010) (discussing presuit discovery as possible solution to new pleading rules); Robin J. Effron, *The Plaintiff Neutrality Pleading Principle: Complex Litigation in the Era of Twombly and Iqbal*, 51 WM. & MARY L. REV. (forthcoming 2010), <http://ssrn.com/abstract=1522171> (discussing the impact of *Iqbal* and *Twombly* on class actions); Richard A. Epstein, *Twombly, After Two Years: The Procedural Revolution in Antitrust That Wasn't*, GCP: ONLINE MAG. FOR GLOBAL POL'Y (NO. 2), July 2009 (arguing that *Twombly* will not have a significant effect on antitrust or civil procedure); Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1452875> (arguing that *Iqbal* and *Twombly* need not be viewed as constituting significant changes to procedure); Mark Herrmann, James M. Beck & Stephen B. Burbank, *Debate, Plausible Denial: Should Congress Overrule Twombly and Iqbal*, 158 U. PA. L. REV. PENNUMBRA 141 (2009) (debating the propriety of *Iqbal* and *Twombly*); Arthur R. Miller, *Access v. Efficiency: Reflections on the Consequences of Twombly and Iqbal*, GCP: ONLINE MAG. FOR GLOBAL POL'Y (NO. 2), July 2009 (arguing that the pleading standards in *Iqbal* and *Twombly* impede access to federal courts); Caroline Mitchell & David Wallach, *Ashcroft v. Iqbal: Taking Twombly a Step Further*, GCP: ONLINE MAG. FOR GLOBAL POL'Y (NO. 2), July 2009 (stating that after *Iqbal* and *Twombly*, courts have more discretion to dismiss cases and the impact of the decisions will not be clear until more courts of appeals cases are decided); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. (forthcoming 2010) (discussing the impact of *Iqbal* and *Twombly* on civil rights and employment discrimination cases); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1477519> (setting forth a pleading framework for employment discrimination plaintiffs after *Iqbal*); Dawinder S. Sidhu, *First Korematsu and now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. (forthcoming

interesting development has not been explored.³ The standard for the motion to dismiss has evolved in such a way as to make the motion to dismiss the new summary judgment motion. Despite different words in Federal Rules of Civil Procedure 12(b)(6)⁴ and 56⁵ and no discovery before dismissal under 12(b)(6), the 12(b)(6) dismissal standard is converging with the standard for summary judgment. Moreover, the motion to dismiss under the new summary judgment-like standard may have effects similar to those experienced under summary judgment, including a significant use of the procedure by courts, a related increased

2010), available at <http://ssrn.com/abstract=1478787> (arguing that *Iqbal* was incorrectly decided and making analogies to *Korematsu*); Douglas G. Smith, *The Evolution of a New Pleading Standard: Ashcroft v. Iqbal*, 88 OR. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1463844> (describing *Twombly* and *Iqbal* and arguing that correctly weak claims will not survive); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185 (2010) (criticizing *Iqbal* for eroding the taking-facts-as-true assumption of motion to dismiss and the liberal ethos of civil procedure); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1442786> (arguing that his “plain pleading theory” reconciles pre-*Twombly* cases, *Twombly*, and *Iqbal*); Howard M. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010) (discussing the influence of *Iqbal* and *Twombly* on civil rights litigation).

³ I briefly concluded after *Twombly* that “[t]he motion to dismiss is fast becoming the new summary judgment motion.” Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1890 (2008). Professor Benjamin Spencer also discussed this change, stating that “the *Twombly* Court effectively has moved the summary judgment evaluation up to the pleading stage.” A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 486–87 (2008). Professors Clermont and Yeazell have stated that, with the significant difference that no discovery occurs before the motion to dismiss, the new plausibility test for the motion to dismiss otherwise “appears equivalent to the standard of decision for summary judgment Both motions ask whether a factual assertion is reasonably possible.” Clermont & Yeazell, *supra* note 2 (manuscript at 15–16). Professors Clermont and Yeazell also distinguish the two standards stating that the motion to dismiss standard tests only the ultimate liability inference whereas the summary judgment standard also tests the plausibility of alleged facts. *See id.* (manuscript at 16 n.47).

Professor Richard Epstein has argued differently that prior to discovery, a court should dismiss a case where the claim is based solely on easily accessible public information, the defense relies on like information, and the court finds the claim implausible based on this information. *See* Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61 (2007). Epstein argued that in *Twombly*, the motion to dismiss was a disguised summary judgment motion because the information that the Court used to find the claim implausible was publicly available and included information outside of the pleadings. *See id.* He argued that these types of dismissals before discovery should occur regularly, particularly in complex cases where the claims are based solely on public information. *See id.* Professor Epstein’s argument can be distinguished from the argument in this Article. This Article argues that the motion to dismiss is the new summary judgment motion because the motions have similar standards and possibly similar effects. I also argue more generally that the new standard is inappropriate for several reasons. *See infra* Part III.

⁴ FED. R. CIV. P. 12(b)(6).

⁵ FED. R. CIV. P. 56.

role for judges in litigation, and a corresponding increased dismissal of employment discrimination cases. This Article describes the similarities between the motion to dismiss and the motion for summary judgment, and also explains how, as a result of these similarities, *Swierkiewicz v. Sorema N.A.*⁶ effectively may be dead. This Article further proposes that convergence of the standards at the same time that there are significant differences in the motions, including discovery, cost, and the role of the courts, calls into question the propriety of the changes under *Iqbal* and *Twombly*.

II. THE NEW SUMMARY JUDGMENT MOTION

The motion to dismiss is the new summary judgment motion. To understand how this metamorphosis has occurred, this Part discusses the standard for the motion for summary judgment and the standard for the motion to dismiss, and then compares the two standards. Next, this Part describes how the motion to dismiss may have some of the same effects as summary judgment. Finally, this Part shows how employment discrimination pleading may be affected by this shift to a summary judgment-like standard.

A. *Similar Standards Under Summary Judgment and the Motion to Dismiss*

1. *The Motion for Summary Judgment*

Scholars previously have described the history of the development of summary judgment in the United States. Briefly, the American procedure has been said to take its roots from a mid-nineteenth century English procedure.⁷ To expedite the collection of debt owed to the plaintiff by the debtor defendant, the plaintiff could move for summary judgment against the defendant where no dispute existed regarding the existence of an agreement between the plaintiff and the defendant.⁸ American summary judgment significantly expanded the English procedure, among other things, to permit all parties to move for summary judgment and to permit summary judgment in all types of cases.⁹ Under Federal Rule of Civil Procedure 56(c), adopted in 1938, a court orders summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material

⁶ 534 U.S. 506 (2002).

⁷ See, e.g., FED. R. CIV. P. 56 advisory committee’s note (1937); John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating’s Act*, 31 IND. L.J. 329 (1956); Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 592, 602 (2004).

⁸ See, e.g., Burbank, *supra* note 7; Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day In Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1016–17 (2003).

⁹ See, e.g., Burbank, *supra* note 7, at 592.

fact and that the movant is entitled to judgment as a matter of law.”¹⁰ In describing summary judgment prior to 1986, the year when the Supreme Court decided the trilogy of summary judgment cases,¹¹ Judge Wald stated that:

The prevailing wisdom for many decades was that summary judgment was the exception, not the rule, and courts were expected to be tougher on the movants than on the parties resisting it. A movant was required to point to actual evidence in the record showing an absence of a disputed issue of material fact.¹²

This wisdom seemed to change in 1986, when the trilogy of Supreme Court cases on summary judgment began to guide summary judgment.¹³ While scholars disagree on the path that procedure was already taking when the trilogy was decided in 1986,¹⁴ courts use the standards set forth in the trilogy on a daily basis.¹⁵ In the first case, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, the plaintiffs alleged that defendants had conspired, in violation of the antitrust laws, to sell televisions in Japan for artificially high prices and also to sell televisions in the United States for low prices to drive the plaintiffs from the television market.¹⁶ The district court granted the defendants’ motion for summary judgment, and the Third Circuit reversed.¹⁷ The Supreme Court established that after the party moving for summary judgment has satisfied its burden, the non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts.”¹⁸ The

¹⁰ FED. R. CIV. P. 56(c). Professor Burbank has described Rule 56 as a “radical new rule” and as “an experiment backed up by little relevant experience, let alone data.” Burbank, *supra* note 7, at 592, 602.

Although the defendant may move for summary judgment at any time until thirty days after the close of all discovery, courts have tended to entertain the motion after discovery. *See* FED. R. CIV. P. 56(c); *cf.* Epstein, *supra* note 3, at 70.

¹¹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

¹² Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1905 (1998) (footnote omitted) (citing CHARLES ALLEN WRIGHT ET AL., 10A FEDERAL PRACTICE AND PROCEDURE § 2728, at 178–93 (2d. ed. 1983)); *see, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (holding that the moving party has the burden to show the absence of a disputed issue of material fact).

¹³ *See* Wald, *supra* note 12, at 1907.

¹⁴ *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 140 n.3 (2007) (comparing Professor Redish’s argument that the trilogy was at least responsible in part for the reduction in the number of trials with Professor Burbank’s argument that summary judgment began to affect the reduction in trials prior to the trilogy, and with Joseph Cecil’s data that the trilogy has not had the effect on the increase of summary judgment that was previously thought).

¹⁵ *See, e.g., Adam N. Steinman, The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81 (2006) (discussing the impact of the trilogy on federal litigation).

¹⁶ 475 U.S. at 577–78.

¹⁷ *See id.* at 578–80.

¹⁸ *Id.* at 586.

Court emphasized the language in Rule 56(e) that the non-movant “must come forward with ‘specific facts showing that there is a *genuine issue for trial.*’”¹⁹ The Court held that no genuine issue for trial exists if, when looking at all of the evidence, “a rational trier of fact” could not find for the non-moving party.²⁰ A claim cannot be “implausible” and must be more than simply “consistent” with illegal behavior.²¹ When reviewing the motion, the court must look at “the inferences to be drawn from the underlying facts . . . in the light most favorable” to the non-moving party.²² However, the inferences favoring the non-movant must be viewed “in light of the competing inferences.”²³ In the absence of other evidence that would make the conspiracy plausible, the Court decided that the motion for summary judgment should be granted on remand.²⁴ Under the evidence presented, conspiracy by the defendants was not plausible because defendants had no rational motive to conspire. Moreover, the Court stated that the defendants’ conduct was consistent with “equally plausible” legal action.²⁵ In the dissent, Justice White, joined by Justices Brennan, Blackmun, and Stevens, criticized the plausibility standard set forth by the majority stating that the standard permitted the weighing of evidence which the Court had not previously accepted as part of the standard for summary judgment.²⁶ The dissent further described the plausibility standard as one whereby judges improperly determined whether inferences of conspiracy were “more probable than not.”²⁷

In the next case, *Anderson v. Liberty Lobby, Inc.*, the plaintiff sued the defendants for libel in connection with the defendants’ publication of two articles that described the plaintiff as, among others things, a neo-Nazi.²⁸ The defendants moved for summary judgment, arguing that the plaintiff could not prove actual malice.²⁹ The district court granted the motion, and the D.C. Circuit affirmed in part and reversed in part.³⁰ In its review of the decision below, the Supreme Court stated that “*some* alleged factual dispute” was insufficient for the plaintiff to survive summary

¹⁹ *Id.* at 587 (quoting FED. R. CIV. P. 56(e) (2006) (amended 2007) (emphasis added)).

²⁰ *Id.*

²¹ *Id.* at 587–88.

²² *Id.* at 587 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

²³ *Id.* at 588. The district court had found that the inferences of conspiracy were not reasonable because evidence showed that the plaintiffs were not injured. Moreover, the defendants’ behavior more plausibly was to compete, not to monopolize. *See id.* at 579. The court of appeals reversed, finding evidence of a conspiracy though the Supreme Court noted in its review that the court of appeals did not decide whether legal behavior was as likely as illegal behavior. *See id.* at 581.

²⁴ *See id.* at 597–98.

²⁵ *Id.* at 596–97.

²⁶ *Id.* at 598–607 (White, J., dissenting).

²⁷ *Id.* at 600–01.

²⁸ 477 U.S. 242, 244–45 (1986).

²⁹ *Id.* at 245.

³⁰ *Id.* at 246–47.

judgment.³¹ There must be a genuine issue of material fact, and such an issue exists if “a reasonable jury could return a verdict for the nonmoving party.”³² If the plaintiff’s evidence was “not significantly probative,” summary judgment could be granted.³³ The Court further stated that “the ‘genuine issue’ summary judgment standard [was] ‘very close’ to the ‘reasonable jury’ directed verdict standard.”³⁴ The difference was mainly “procedural,” with summary judgment occurring on documentary evidence and the directed verdict occurring after evidence had been admitted at trial.³⁵ The question under both was “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”³⁶ The Court further stated that “the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.”³⁷ The Court also stated that the facts of the plaintiff were to be taken as true, and “justifiable inferences” were to be drawn for the plaintiff.³⁸ The Court held that the plaintiff must prove actual malice by clear and convincing evidence at the summary judgment stage in First Amendment cases, just as the plaintiff was required to do at trial,³⁹ and the Court vacated and remanded the case.⁴⁰ In his dissent, Justice Brennan criticized the summary judgment standard set forth by the majority, including that a judge decides whether a reasonable jury could find for the plaintiff or whether the evidence is one-sided for a party or significantly probative.⁴¹ Justice Brennan stated that the standard established by the majority was more difficult than the requirement in *Matsushita* of only “more than ‘some metaphysical doubt as to the material facts.’”⁴² He concluded that:

In my view, the Court’s result is the product of an exercise akin to the child’s game of “telephone,” in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary

³¹ *Id.* at 247–48.

³² *Id.* at 248.

³³ *Id.* at 249–50.

³⁴ *Id.* at 251 (quoting *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 745 n.11 (1983)).

³⁵ *See id.*

³⁶ *Id.* at 251–52.

³⁷ *Id.* at 252. Thus, “a scintilla of evidence” is not enough to survive summary judgment. *Id.*

³⁸ *Id.* at 255.

³⁹ *Id.* at 255–56.

⁴⁰ *See id.* at 257.

⁴¹ *See id.* at 258–68 (Brennan, J., dissenting).

⁴² *See id.* at 260–61 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

judgment test, but with each repetition, the original understanding is increasingly distorted.⁴³

He stated that while the majority said that courts were not to weigh evidence, the standard established by the majority required courts to perform such an analysis.⁴⁴ Justice Rehnquist, joined by Chief Justice Burger, also dissented. He criticized the application of the clear and convincing standard to the summary judgment stage, including that courts would have difficulty applying this standard.⁴⁵

In the third case in the trilogy, *Celotex Corp. v. Catrett*, the plaintiff sued the defendant asbestos company, among others, for the wrongful death of her husband who had been exposed to asbestos.⁴⁶ The district court granted the defendants' motion for summary judgment, and the D.C. Circuit reversed.⁴⁷ In reviewing the decision below, the Supreme Court stated that the moving party was not required to "negat[e]" the non-moving party's claim.⁴⁸ The non-moving party had the burden to show the essential elements of her claim for which she had the burden of proof at trial, and where she did not, there was no genuine issue of material fact.⁴⁹ The Court quoted language from *Anderson* that the "standard [for granting summary judgment] mirrors the standard for a directed verdict."⁵⁰ Here, the Court remanded the case for a determination of whether the plaintiff had met her burden.⁵¹ The Court emphasized that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"⁵² It further stated that given notice pleading, summary judgment was the procedure by which "factually insufficient" claims could be dismissed before trial.⁵³ In the dissent, Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, criticized that it was unclear what the

⁴³ *Id.* at 264–65.

⁴⁴ *See id.* at 266–67. Justice Brennan also stated his concern that the jury trial right may be violated. *See id.* at 267–68. Additionally, Justice Brennan discussed the difficulty of distinguishing between the preponderance and the clear and convincing standards. *See id.* at 267–68.

⁴⁵ *See id.* at 268–73 (Rehnquist, J., dissenting).

⁴⁶ 477 U.S. 317, 319 (1986).

⁴⁷ *Id.*

⁴⁸ *Id.* at 322–23.

⁴⁹ *See id.* Judge Wald discussed the "prevailing wisdom" prior to the trilogy regarding the burdens of summary judgment motions. *See supra* text accompanying note 12. Judge Wald was a part of the panel that decided *Celotex* in the D.C. Court of Appeals and whose opinion was reversed by the Supreme Court. *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985), *rev'd sub nom. Celotex Corp.*, 477 U.S. 317.

⁵⁰ *Celotex Corp.*, 477 U.S. at 323 (alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

⁵¹ *Id.* at 326–28.

⁵² *Id.* at 327 (quoting FED. R. CIV. P. 1).

⁵³ *Id.*

majority required the party moving for summary judgment to prove.⁵⁴ Justice Brennan also stated that the defendant had not met its burden in moving for summary judgment.⁵⁵ The plaintiff had presented evidence that the decedent was exposed to the defendant's asbestos, and the defendant did not show the inadequacy of this evidence.⁵⁶

2. *The Motion to Dismiss*

Prior to the promulgation of the Federal Rules of Civil Procedure, various pleading rules existed under English law, state law and federal law that included technical pleading and code pleading.⁵⁷ Under English law, plaintiffs were required to plead the correct form of the action, and under the subsequent code pleading in the United States, plaintiffs were required to plead the cause of action and facts specific to the elements of the cause of action.⁵⁸ These pleading standards were criticized, and under the Federal Rules, the pleading requirements were changed to require only notice of a claim.⁵⁹ Under Rule 8(a)(2), "[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,"⁶⁰ and under Rule 12(b)(6), the defendant may move to dismiss by asserting that the plaintiff has "fail[ed] to state a claim upon which relief can be granted."⁶¹

*Conley v. Gibson*⁶² governed the interpretation of the motion to dismiss under Rules 8 and 12(b)(6) for fifty years prior to the decisions in *Iqbal* and *Twombly*.⁶³ In *Conley*, the plaintiffs, who were black employees of a railroad, alleged that the railroad had illegally discharged them and that the defendant union had breached its duty of fair representation under the Railway Labor Act.⁶⁴ By not helping them as they did white employees, the defendant discriminated against them because of their

⁵⁴ See *id.* at 329–37 (Brennan, J., dissenting).

⁵⁵ *Id.*

⁵⁶ *Id.* at 334–37. Justice Stevens dissented separately on the basis of the defendant's original reason for moving for summary judgment regarding whether the plaintiff could prove exposure. See *id.* at 337–39 (Stevens, J., dissenting).

After studying summary judgment under the trilogy in her Circuit, Judge Wald expressed concern regarding summary judgment "being stretched far beyond its originally intended or proper limits." Wald, *supra* note 12, at 1917. She argued that both the purpose of the rule as well as the text bring into question the interpretation of summary judgment. *Id.* at 1897–98, 1917. See also generally EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE (3d ed. 2006) (discussing summary judgment).

⁵⁷ See, e.g., 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202, at 93 (3d ed. 2004 & Supp. 2009); Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and Conley v. Gibson*, 52 HOW. L.J. 73, 76 (2008).

⁵⁸ See, e.g., 5 WRIGHT & MILLER, *supra* note 57, § 1202, at 93.

⁵⁹ See, e.g., *id.* § 1202, at 93–94.

⁶⁰ FED. R. CIV. P. 8(a)(2).

⁶¹ FED. R. CIV. P. 12(b)(6).

⁶² 355 U.S. 41 (1957).

⁶³ See 5 WRIGHT & MILLER, *supra* note 57, at 93–94.

⁶⁴ See *Conley*, 355 U.S. at 43.

race.⁶⁵ The district court granted the defendant's motion to dismiss, and the Fifth Circuit affirmed.⁶⁶ Among other things, the Supreme Court considered whether the plaintiffs had failed to state a claim upon which relief could be granted under Rule 12(b)(6).⁶⁷ The Court stated:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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.⁶⁸

The Court also stated that "specific facts" in support of the general allegations were not required because Rule 8 did not require more than notice.⁶⁹ The Court quoted the "short and plain statement of the claim" language of Rule 8 requiring that defendant be given only fair notice of the claim, and the Court cited the forms appended to Rule 8 as illustrative of this simple notice requirement.⁷⁰ The Court also mentioned "the liberal opportunity for discovery" as a way by which disputed issues could be narrowed later in a case and, in support, cited, among other things, the summary judgment rule.⁷¹ Quoting Rule 8(f) that "all pleadings shall be so construed as to do substantial justice," the Court concluded that Rule 8 had been satisfied, and the motion to dismiss under 12(b)(6) should not be granted.⁷² Under the precedent of *Conley*, the wisdom was that a case was rarely dismissed upon a motion to dismiss for failure to state a claim.⁷³

In *Bell Atlantic Corp. v. Twombly*, fifty years later in 2007, the Supreme Court significantly changed the standard for the motion to dismiss.⁷⁴ The

⁶⁵ *Id.*

⁶⁶ *Id.* at 43–44.

⁶⁷ *See id.* at 45.

⁶⁸ *Id.* at 45–46. The Court cited three cases in support of this proposition, including *Leimer v. State Mutual Life Assurance Co.*, 108 F.2d 302 (8th Cir. 1940). In *Leimer*, the Eighth Circuit explained that a defendant making a Rule 12(b)(6) motion "admit[s] the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by limitations." *Id.* at 305–06.

⁶⁹ *Conley*, 355 U.S. at 47.

⁷⁰ *Id.* (quoting FED. R. CIV. P. 8(a)(2))

⁷¹ *Id.* at 47–48.

⁷² *Id.* at 48 (quoting FED. R. CIV. P. 8(f) (2006) (amended 2007)).

⁷³ *See* 5B WRIGHT & MILLER, *supra* note 57, § 1357, at 557. This wisdom has been called into question by a recent study which suggests that courts granted motions to dismiss much more often than was thought under *Conley*. Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. (forthcoming 2010) (manuscript at 31), available at <http://ssrn.com/abstract=1487764>.

⁷⁴ 127 S. Ct. 1955 (2007).

plaintiffs brought a class action suit against defendant telephone companies alleging that the companies had conspired to stay in their own markets and to keep other companies out of their markets in violation of the antitrust laws.⁷⁵ The plaintiffs described parallel conduct by the companies in support of their claims. The district court granted defendants' motion to dismiss, and the Second Circuit reversed the decision.⁷⁶ In reviewing the decision below, the Supreme Court stated that while the facts must be "taken as true," the facts must suggest a "plausible" claim.⁷⁷ While no "probability requirement" was imposed to survive a motion to dismiss, the Court stated that there must be "enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim]."⁷⁸ More than facts consistent with the claim were required, and more than the possibility that the claim had occurred was required.⁷⁹ The Court stated that the requirement of plausibility was compatible with the text of Rule 8 requiring that the pleader show entitlement to relief. Facts that are only consistent with the allegations did not cross "the line between possibility [or conceivability] and plausibility."⁸⁰ The Court also emphasized the expense of discovery and stated that case management by judges had not proven sufficiently effective.⁸¹ The Court also was concerned that defendants would settle cases that they should not settle to avoid discovery costs.⁸² The Court defended the use of the plausibility standard and cited the standard applied in other cases including the summary judgment decision in *Matsushita*.⁸³ The Court also criticized the "no set of facts" language in *Conley* as permitting a complaint with only "a wholly conclusory statement of [the] claim" to survive and specifically "retire[d]" the *Conley* standard.⁸⁴ In analyzing the plausibility of the claims, the Court permitted the use of inferences that it found favored the defendant in addition to those that it found favored the plaintiff.⁸⁵ The Court held that the claim was not plausible and should be dismissed, because it lacked additional facts showing agreement beyond parallel conduct.⁸⁶ Justice Stevens dissented, writing also for Justice Ginsburg.⁸⁷ He described as "well settled" that the courts were to accept the allegations in a complaint as true, but he said that in effect the Court permitted the dismissal of the complaint without accepting the

⁷⁵ *Id.* at 1962–63.

⁷⁶ *Id.* at 1963.

⁷⁷ *Id.* at 1965.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1966.

⁸⁰ *Id.*

⁸¹ *See id.* at 1966–67.

⁸² *Id.* at 1967.

⁸³ *Id.* at 1968 & n.7; *see also id.* at 1964.

⁸⁴ *Id.* at 1968–69.

⁸⁵ *Id.* at 1972–73 & n.13.

⁸⁶ *Id.* at 1971–74.

⁸⁷ *Id.* at 1974–89 (Stevens, J., dissenting).

allegations as true.⁸⁸ The companies were not even required to deny the allegations, and the complaint was dismissed “based on the assurances of company lawyers that nothing untoward was afoot.”⁸⁹ Moreover, Justice Stevens stated that the parallel conduct by the defendants could show agreement.⁹⁰ He opined that the cost of the litigation, in addition to the concern that jurors would decide parallel conduct was sufficient for legal liability, had motivated the majority to assess the plausibility of the facts as opposed to their legal sufficiency under 12(b)(6).⁹¹ He also showed how *Conley* had been applied consistently over the years by the Court, and that the defendants had not requested its overruling.⁹² Justice Stevens noted that if the defendants had moved for summary judgment after discovery and presented only the evidence set forth in the complaint, dismissal would have been appropriate.⁹³ However, discussing *Matsushita*, he pointed out the significant difference between decisions on motions for summary judgment and motions to dismiss, and stated that the plausibility standard was inconsistent with Rule 8.⁹⁴

Two years later, in *Ashcroft v. Iqbal*, the Supreme Court again considered the standard to dismiss a complaint for failure to state a claim upon which relief may be granted.⁹⁵ After September 11, 2001, Iqbal was imprisoned by federal authorities for identification fraud.⁹⁶ Iqbal was placed in a special detention facility after he was designated a person “of high interest.”⁹⁷ After pleading guilty and being removed to Pakistan, from where he originated, Iqbal brought a complaint against several defendants. Two of the defendants, former Attorney General Ashcroft and Federal Bureau of Investigation Director Mueller, moved to dismiss the complaint against them on the basis of qualified immunity.⁹⁸ Iqbal, who was a Muslim, had alleged that Ashcroft and Mueller had violated the Constitution by designating him a person of “high interest” and subjecting him to special detention because of his race, religion, and or national origin.⁹⁹ He alleged that Ashcroft was the architect of the policy, and Mueller was involved in every stage of the policy. The district court denied the motion based on *Conley*, and the Second Circuit denied the

⁸⁸ *Id.* at 1975.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 1978–79.

⁹³ *Id.* at 1983 (after stating that the majority required “competing inferences” to be considered, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), the dissent stated that “[e]verything today’s majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described”).

⁹⁴ *Id.* at 1982–83.

⁹⁵ 129 S. Ct. 1937 (2009).

⁹⁶ *Id.* at 1943.

⁹⁷ *Id.*

⁹⁸ *Id.* at 1942, 1944.

⁹⁹ *Id.*

motion based on *Twombly*, which had been decided after the district court decision.¹⁰⁰ In reviewing the decision of the Second Circuit, the Supreme Court repeated much of the standard set forth in *Twombly*, including that non-conclusory allegations should be taken as true and that a court should decide whether the claim is plausible.¹⁰¹ The Court stated that 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,” and the Court added that a court must “draw on its judicial experience and common sense” in making the plausibility determination.¹⁰² Given the facts here where the defendants were government officials, the Court was also concerned about the cost to the government because of the time that such officials would be required to spend on the case.¹⁰³ In evaluating the complaint, the Court decided first that certain allegations were conclusory and thus need not be taken as true though the allegations were not rejected on the basis that they were “unrealistic or nonsensical.”¹⁰⁴ The Court then stated that Iqbal’s other allegations, while consistent with illegally designating Iqbal “high interest” because of his race, religion, and/or national origin, did not cross the line to raise a plausible claim given the defendants’ legitimate purpose to arrest and detain those with possible terrorist connections.¹⁰⁵ The Court pointed out that the September 11th attacks were by Arab Muslims so it was likely that many Arab Muslims would be arrested and detained, in the absence of an illegal purpose.¹⁰⁶ Further,

¹⁰⁰ *Id.* at 1944.

¹⁰¹ *Id.* at 1949–50. After deciding that it had subject matter jurisdiction, the Supreme Court discussed the standard for official liability under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which permits suits against individual government officials. *Iqbal*, 129 S. Ct. at 1945–49. In reviewing the case, the Court stated that officials must purposefully engage in the unconstitutional acts, not just have knowledge of the acts, to be liable. *Id.* at 1949.

¹⁰² *Id.* at 1949–50.

¹⁰³ *Id.* at 1953.

¹⁰⁴ *Id.* at 1951. The Court stated that the following allegations were conclusory: “that petitioners ‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’ . . . that Ashcroft was the ‘principal architect’ of this invidious policy, and that Mueller was ‘instrumental’ in adopting and executing it.” *Id.* (alterations in original, citations omitted) (quoting First Amended Complaint and Jury Demand at ¶¶ 10, 11, 96, *Elmaghraby v. Ashcroft*, No. 04-CV-01809-JG-SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)).

¹⁰⁵ *See id.* at 1952. The Court stated the following allegations were not plausible: “‘the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11’ . . . [and] that ‘[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were “cleared” by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.’” *Id.* at 1951 (alteration in original) (quoting First Amended Complaint and Jury Demand, *supra* note 104, at ¶¶ 47, 69).

¹⁰⁶ *Id.* at 1951–52.

even if it was plausible that Iqbal's arrest was illegal, the plaintiff had not alleged that the arrest was illegal but rather had alleged that the designation as "high interest" and placement in special detention were illegal.¹⁰⁷ With respect to these allegations, however, the plaintiff did not further allege that the defendants purposefully acted because of his race, religion, and/or national origin.¹⁰⁸ At most, the plaintiff had alleged that the defendants had sought to place those suspected of terrorism in secure facilities until they were cleared of such activity.¹⁰⁹ In discussing some of plaintiff's arguments, the Court specifically rejected that the plausibility pleading requirement in *Twombly* applied only to antitrust cases.¹¹⁰ In his dissent, joined by Justices Steven, Ginsburg and Breyer, Justice Souter disagreed that the plaintiff's allegations were implausible.¹¹¹ While the defendants had claimed that "such high-ranking officials 'tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command,'" Justice Souter stated that regardless of a court's skepticism of the plaintiff's claim, *Twombly* required the facts to be taken as true, as opposed to deciding whether they were "probably true."¹¹² Justice Souter concluded that unlike *Twombly*, the facts here were not conclusory nor were the facts consistent with legal conduct.¹¹³

3. *A Comparison of Summary Judgment and the Motion to Dismiss*

On first glance, the standards for summary judgment and the motion to dismiss look very different. Indeed, the actual words in the rules are different. To survive summary judgment, there must be a "genuine issue as to any material fact."¹¹⁴ If there is no genuine issue and "the movant is entitled to judgment as a matter of law," summary judgment is granted.¹¹⁵ In contrast, only "a short and plain statement of the claim showing that the pleader is entitled to relief" is required to survive a motion under Rule 12(b)(6) and Rule 8.¹¹⁶ A motion to dismiss is granted if there is a "failure to state a claim upon which relief can be granted."¹¹⁷ In addition to different words in the rules, the facts considered for the motions are also different. The facts before a court under summary judgment include information outside of the complaint

¹⁰⁷ *Id.* at 1952.

¹⁰⁸ *Id.*

¹⁰⁹ The Court stated that "his only factual allegation against petitioners accuses them of adopting a policy approving 'restrictive conditions of confinement' for post-September-11 detainees until they were "cleared" by the FBI." *Id.* (quoting First Amended Complaint and Jury Demand, *supra* note 104, at ¶ 69).

¹¹⁰ *Id.* at 1953.

¹¹¹ *Id.* at 1954–61 (Souter, J., dissenting).

¹¹² *Id.* at 1959.

¹¹³ *Id.* at 1958–61.

¹¹⁴ FED. R. CIV. P. 56(c).

¹¹⁵ *Id.*

¹¹⁶ FED. R. CIV. P. 8(a)(2); *see* FED. R. CIV. P. 12(b)(6).

¹¹⁷ FED. R. CIV. P. 12(b)(6).

presented by both parties, in contrast to the facts before the court under the motion to dismiss, which includes only facts in the complaint.¹¹⁸

Despite these differences in language and facts considered under the motions, the Court has emphasized the importance of controlling the cost faced by the defendants in litigation as the reason for both motions.¹¹⁹ Additionally and as a possible consequence of this similar concern over cost, the Supreme Court has established standards for summary judgment and for the motion to dismiss that are substantially the same. First, under both standards, a court determines the plausibility of the claim.¹²⁰ One might argue, however, that the term “plausible” is not used in all summary judgment decisions by the Court, and thus, “plausible” is not the standard for summary judgment. While *Matsushita* employed “plausible,” *Anderson* and *Celotex* did not explicitly refer to this term. Also Professor Brunet has argued that “plausible” was used substantively as part of antitrust law in *Matsushita*,¹²¹ and in the trilogy, the Court adopted the directed verdict test for summary judgment. With that

¹¹⁸ See FED. R. CIV. P. 56; FED. R. CIV. P. 12(b)(6). The facts considered upon a motion to dismiss include those in documents to which the complaint refers and that which may be judicially noticed. See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007). This is subject to qualification where the courts appear to use inferences from the facts argued for by the defendant.

Despite the similar “plausibility” language for the motions, one might also argue that the standards for the motion to dismiss and summary judgment are not truly similar, because a pleading or motion to dismiss standard is different than an evidentiary or summary judgment standard. *Swierkiewicz v. Sorema N.A.*, decided prior to *Iqbal* and *Twombly*, distinguished pleading and evidentiary standards, and thus this difference between the motion to dismiss and summary judgment. 534 U.S. 506 (2002); see *infra* Part II.C. While certainly there is no discovery considered under the motion to dismiss, the use of a plausibility analysis is common to both summary judgment and motion to dismiss decisions.

¹¹⁹ See *supra* text accompanying notes 52, 81–82. Indeed, in *Twombly*, Justice Stevens emphasized the concern over cost as a reason that the majority adopted the new plausibility standard for the motion to dismiss. See *supra* text accompanying note 91.

¹²⁰ See *supra* text accompanying notes 18–25, 77–86, 101–10. “[P]lausible” inference was also used in *Galloway v. United States*, a case involving the directed verdict. 319 U.S. 372, 387 (1943).

The Supreme Court has stated that in deciding a summary judgment motion, if no reasonable jury could believe a version of the facts, a court should not accept those facts as true. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). In *Twombly*, in deciding a motion to dismiss, the Court had stated that it need not accept the conclusory allegations as true. 127 S. Ct. 1955, 1965–66 (2007). As the motion to dismiss becomes the new summary judgment motion, the Court may expand *Iqbal* and *Twombly* and may adopt the language from *Scott* for the motion to dismiss under which a court would assess the allegations in the complaint to determine whether a reasonable jury could believe them, and if not, those allegations would not be taken as true.

¹²¹ Thus, Professor Brunet has argued that Justice Souter incorrectly incorporated this standard as a procedural standard in *Twombly*. See Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 510–11 (2009); BRUNET & REDISH, *supra* note 56, § 9:6, at 322–35.

said, there is no indication that the Court rejected *Matsushita's* language of “plausible” in *Anderson* and *Celotex*.¹²² To add to this discussion, several courts have required nonmovants with the burden of production upon motions for summary judgment to show that their claims are plausible.¹²³ Moreover, the use of “plausible” in *Twombly* and its citation of *Matsushita* confirms the continuing relevance of the plausibility standard to summary judgment.¹²⁴

The second similarity in the motion to dismiss and summary judgment standards is that under both, while it appears that courts should view the facts in the light most favorable to the nonmoving party, in assessing whether a claim is plausible, courts assess both the inferences favoring the moving party and the inferences favoring the nonmoving party.¹²⁵

¹²² See *supra* text accompanying notes 28–56.

¹²³ Cf. BRUNET & REDISH, *supra* note 56, § 9:6, at 326–27 & n.22 (citing, as examples of courts incorrectly using plausibility standard outside of antitrust cases, *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (use of “implausible” in breach of contract case); *Firststar Bank Sioux City, N.A. v. Beemer Enters., Inc.*, 976 F. Supp. 1233, 1240 (N.D. Iowa 1997) (use of “implausible” in case involving breach of contract, breach of duty, and RICO claims)); *In re Chavin*, 150 F.3d 726, 728 (7th Cir. 1998) (in case involving fraud allegations, Judge Posner stating “[a] denial of knowledge may be so utterly implausible in light of conceded or irrefutable evidence that no rational person could believe it”).

¹²⁴ See *supra* text accompanying note 83. The meaning of “plausible” is open to argument. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, in deciding what “strong inference” of scienter meant, which was required to plead a securities fraud claim under the Private Securities Litigation Reform Act of 1995 (PSLRA), the Supreme Court stated “[t]o qualify as ‘strong’ within the intendment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” 127 S. Ct. 2499, 2504–05 (2007) (quoting PSLRA, Pub. L. No. 104-67, § 21D(b)(2), 109 Stat. 737, 743 (codified in scattered sections of 15 U.S.C.)). The majority stated that a strong inference was an inference “at least as likely as any plausible opposing inference.” *Id.* at 2513. But in their concurrences, Justices Scalia and Alito stated to qualify as a strong inference of scienter, the inference must be “more plausible” than the opposing inference. *Id.* (Scalia, J., concurring); *id.* at 2515–16 (Alito, J., concurring). The majority criticized this standard as being summary judgment-like, which did not make sense in the absence of explicit direction from Congress. See *id.* at 2510 n.5 (majority opinion).

Arguably, then, there is merely conceivable wrongdoing, plausible wrongdoing, and strong wrongdoing. However, both *Iqbal* and *Twombly* refer to the plausibility requirement as more than likely. See *supra* text accompanying notes 77–86, 101–10. This reading would then require more under *Iqbal* and *Twombly* than under heightened pleading under the PSLRA, which would be “ridiculous.” Burbank, *General Rules*, *supra* note 2, at 551–52. Professor Burbank argues that “[t]he answer to this puzzle lies in *Twombly's* substantive-law context and in the Court’s reading of the complaint.” *Id.* at 552. Other decisions had required more than parallel conduct to constitute a conspiracy, and the Court found only parallel conduct in the complaint. *Id.*

¹²⁵ See *supra* text accompanying notes 22–23, 77–94, 101–113; see also Thomas, *supra* note 3, at 1862.

A final similarity in the standards is that while the Court has held specifically that a court should not use its own opinion of the sufficiency of the evidence to decide whether summary judgment should be granted, it appears now that under both motions, courts do use their own opinions of sufficiency to determine whether a claim is plausible. In a previous article, I argued that upon motions for summary judgment, judges use their own opinions of the sufficiency of the evidence to decide the motions. I have argued that we see judges state why they think the evidence is insufficient to prove a claim, we see judges interchangeably use different terms with different meanings, including whether “a reasonable jury” could find and whether “a reasonable juror” could find, and finally, we see judges disagree about whether summary judgment should be granted, all suggesting that judges are using their own opinions to assess the sufficiency of the evidence.¹²⁶ Now, in the determination of whether a claim is plausible, the Supreme Court has explicitly stated that, upon a motion to dismiss, courts are to use their “judicial experience and common sense.”¹²⁷ This language in *Iqbal* seems to permit judges to use their own opinions to assess the sufficiency of facts to decide motions to dismiss similar to what we see judges do in deciding summary judgment.

B. Similar Effects of Summary Judgment and the Motion to Dismiss

At the same time that the standards for summary judgment and the motion to dismiss are converging, the motions, not coincidentally, may have some of the same effects. Summary judgment is moved for and granted frequently.¹²⁸ Similarly, it seems likely that motions to dismiss will be moved for and granted more frequently.¹²⁹

Another related and possible similar effect under summary judgment and the motion to dismiss is an increased role for judges in litigation. As stated above, the standards for summary judgment and the motion to dismiss both now involve judges’ own opinions in assessing the

¹²⁶ Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009).

¹²⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009); see *supra* text accompanying note 102.

¹²⁸ Thomas, *supra* note 14, at 140 n.3 (citing law review articles regarding general use of summary judgment).

¹²⁹ See *supra* Part II.A.3; see also Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 20, 2009, at A10 (“[It is] much easier for judges to dismiss civil lawsuits right after they are filed”). Tom Goldstein, a lawyer who litigates before the Supreme Court, has predicted that *Iqbal* is “going to be the most cited Supreme Court case in a decade.” Jess Bravin, *New Look at Election Spending Looms in September*, WALL ST. J., July 2, 2009, at A4; Liptak, *supra* (quoting Goldstein); Tony Mauro, *Groups Unite to Keep Cases on Docket*, THE NAT’L L.J., Sept. 21, 2009, at 31 (“With remarkable speed and success, ‘*Iqbal* motions’ to dismiss because of insufficient pleadings have become commonplace in federal courts, already producing more than 1,500 district court and 100 appellate court decisions according to a Westlaw search. Many more are pending.” (emphasis added)).

plausibility of claims.¹³⁰ In discussing the specific language in *Iqbal* that judges should use their “judicial experience and common sense,”¹³¹ Professor Burbank has criticized that “it obviously licenses highly subjective judgments. . . . This is a blank check for federal judges to get rid of cases they disfavor.”¹³²

Employment discrimination may be one of the areas most affected by the increased role of judges in deciding motions to dismiss, and this effect of the motion to dismiss on employment discrimination may be similar to the effect of summary judgment on employment discrimination. Judges dismiss employment discrimination cases more often under motions for summary judgment than most other types of cases.¹³³ In the 1990s, several articles discussed the specific effect of summary judgment on the dismissal of employment discrimination cases.¹³⁴ More recently, the Federal Judicial Center found that courts granted 62.6% of summary judgment motions on employment discrimination claims in 2006.¹³⁵

The scholarship on the effect of the motion to dismiss on employment discrimination cases is still developing but looks similar so far. Professor Hatamyar studied the grants of motions to dismiss in a random set of cases in the two-year period before and after *Twombly* and in the period after *Iqbal* from May to August 2009.¹³⁶ She found a greater effect of the motion to dismiss on employment discrimination cases than most other types of cases, and “[t]he rate of granting 12(b)(6) motions in Title VII cases went from 42% under *Conley* to 54% under *Twombly* to 53% under *Iqbal*.”¹³⁷ Other scholars previously had studied the effect of *Twombly* on employment discrimination cases before *Iqbal* was decided. Professor Seiner studied the dismissal of employment discrimination cases in the years before and after *Twombly* upon a motion to dismiss.¹³⁸

¹³⁰ See *supra* text accompanying notes 126–27.

¹³¹ *Iqbal*, 129 S. Ct. at 1950; see *supra* text accompanying note 102.

¹³² Liptak, *supra* note 129 (quoting Stephen B. Burbank).

¹³³ See, e.g., Burbank, *supra* note 7, at 622; Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 128 & n.68 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004); Schneider, *supra* note 2; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007); cf. Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 886–89 (2007) (studying civil rights cases more generally).

¹³⁴ See, e.g., Thomas, *supra* note 14, at 141 n.5 (citing articles on effect of summary judgment on hostile environment, disability, Title VII, and ADEA cases).

¹³⁵ See Seiner, *supra* note 2 (manuscript at 21) (citing email from Federal Judicial Center to Joseph A. Seiner, Assistant Professor, University of South Carolina School of Law (May 19, 2008) (on file with Joseph A. Seiner)).

¹³⁶ Hatamyar, *supra* note 73 (manuscript at 21–24 & n.168, 170).

¹³⁷ *Id.* (manuscript at 38).

¹³⁸ See Joseph A. Seiner, *The Trouble With Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (2009); see also Sherwin,

He showed that in the year prior to *Twombly*, 54.5% of motions to dismiss were granted in Title VII cases, whereas in the year after *Twombly*, 57.1% of such motions were granted.¹³⁹ In another article, Professor Seiner demonstrated that there has been an even more substantial effect after *Twombly* on disability cases.¹⁴⁰ In the year prior to *Twombly*, 54.2% of motions were granted, and in the year after *Twombly*, 64.6% of motions were granted.¹⁴¹ Kendall Hannon also studied the effect of *Twombly* on civil rights cases, which included employment discrimination cases under certain statutes and under the Constitution, in the seven month period after *Twombly*.¹⁴² He found that under *Conley*, 41.7% of motions to dismiss were granted and under *Twombly*, 52.9% of motions to dismiss were granted.¹⁴³ Hatamyar, Seiner, and Hannon studied both claims that were dismissed with and without prejudice, and thus some of the claims indicated in the statistics ultimately may have survived.¹⁴⁴ Also, they all acknowledged imperfections in their data.¹⁴⁵

Regardless, given the similarity of the motion to dismiss standard to the summary judgment standard and the propensity of judges to dismiss employment discrimination cases under summary judgment, it seems likely that the trends that Hatamyar, Seiner, and Hannon have found for the motion to dismiss in employment discrimination cases will continue, and that courts may grant motions to dismiss with prejudice with some regularity in employment discrimination cases.¹⁴⁶ Indeed, in *Twombly*, the Supreme Court did not remand to plead and thus, although not an

supra note 57, at 95–98 & 111 (concluding by discussing potential effect of stricter pleading standards on civil rights cases).

¹³⁹ See Seiner, *supra* note 138, at 1029–31. The study included Title VII federal district court cases that cite *Conley* in the year before *Twombly* and those that cite *Twombly* in the year after *Twombly*. See *id.* at 1027–29.

¹⁴⁰ Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. (forthcoming 2010) (manuscript at 8–9), available at <http://ssrn.com/abstract=1372296>.

¹⁴¹ *Id.* (manuscript at 27, 30).

¹⁴² Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1834 n.152 (2008) (examining, among other claims, civil rights actions under 42 U.S.C. §§ 1981, 1983, 1985, *Bivens* claims, equal protection clause claims, and due process clause claims); see also Wasserman, *supra* note 2 (discussing impact of *Iqbal* and *Twombly* on civil rights cases).

¹⁴³ Hannon, *supra* note 142, at 1837 tbl.3. For Hannon's methodology, see *id.* at 1828–35.

¹⁴⁴ See Hatamyar, *supra* note 73 (manuscript at 21–24, 38); Seiner, *supra* note 138, at 1027–29; Seiner, *supra* note 2 (manuscript at 24–26); Hannon, *supra* note 142, at 1828–35.

¹⁴⁵ See *supra* note 144. Such imperfections can also occur because of the data used, including information on Westlaw and LEXIS. For example, grants of motions are reported more often than denials of motions. See, e.g., Burbank, *supra* note 7, at 603–05.

¹⁴⁶ See, e.g., *Guirguis v. Movers Specialty Servs., Inc.*, No. 09-1104, 2009 WL 3041992 (3d Cir. Sept. 24, 2009) (affirming grant of motion to dismiss with prejudice of national origin employment discrimination claim).

employment discrimination case, *Twombly* is some indication that dismissals with prejudice may occur.¹⁴⁷

C. *Pleading Employment Discrimination*

The effect of *Iqbal* and *Twombly* on employment discrimination cases, which was discussed in the previous Part, is tied to what courts will now require employment discrimination plaintiffs to plead to survive a motion to dismiss. Prior to *Iqbal* and *Twombly*, the Court decided *Swierkiewicz v. Sorema N.A.*¹⁴⁸ In *Swierkiewicz*, the plaintiff alleged that the defendant employer discriminated against him because of his national origin and age.¹⁴⁹ The district court dismissed the complaint stating that the plaintiff had not alleged facts supporting a prima facie case of discrimination under the *McDonnell Douglas* test, and the Second Circuit affirmed the decision.¹⁵⁰ In reviewing the Second Circuit's decision, the Supreme Court held that the plaintiff need not allege a prima facie case of discrimination to survive a motion to dismiss but need include only "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁵¹ In deciding this, the Court described *McDonnell Douglas* as an "evidentiary standard, not a pleading requirement."¹⁵² The Court emphasized that employment discrimination cases must be treated in the same manner as other cases upon a motion to dismiss, and the Court relied on the liberal pleading standard for claims, not subject to heightened pleading, that the Court had established in *Conley*.¹⁵³ The Court stated that the "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims."¹⁵⁴ Towards the end of the opinion, the Court responded to the defendant's argument that "conclusory allegations" should not survive.¹⁵⁵ The Court did not state that the plaintiff's allegations were not conclusory but rather the Court stated that:

Whatever the practical merits of [the defendant's] argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater

¹⁴⁷ Antitrust is another area in which summary judgment and the motion to dismiss may have similar effects. Summary judgment has been granted more often in antitrust cases than in many other types of cases, see Thomas, *supra* note 14, at 141 n.5, and given that *Twombly* was an antitrust case, motions to dismiss may be granted more in antitrust cases.

¹⁴⁸ 534 U.S. 506 (2002).

¹⁴⁹ *Id.* at 509.

¹⁵⁰ *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

¹⁵¹ *Id.* at 510–12 (quoting FED. R. CIV. P. 8(a)(2)).

¹⁵² *Id.* at 510. The Court also stated that *McDonnell Douglas* might not apply to the particular case but instead the mixed motive analysis may apply. *Id.* at 511–12.

¹⁵³ *Id.* at 512–14.

¹⁵⁴ *Id.* at 512.

¹⁵⁵ *Id.* at 514–15.

specificity for particular claims is a result that “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”¹⁵⁶

At least one circuit has held that *Swierkiewicz* remains good law after *Twombly*. Upon an interlocutory appeal of a *Bivens* action that the lower court did not dismiss under Rule 12(b)(6), the Ninth Circuit stated that the Court in *Twombly* “reaffirmed the holding of *Swierkiewicz*” by rejecting “heightened fact pleading.”¹⁵⁷ In that case, the panel stated that the plaintiff had pleaded a plausible claim against defendant Attorney General Ashcroft, one of the defendants in *Iqbal*.¹⁵⁸ Some scholars have weighed in on the issue of whether *Swierkiewicz* is good law. Professor Seiner and Steinman have stated separately that although *Iqbal* did not cite *Swierkiewicz*, it did not overrule it, and indeed *Twombly* positively cited *Swierkiewicz*.¹⁵⁹ Professor Steinman also has argued that *Swierkiewicz* did not rely on *Conley*’s “no set of facts” language, which *Twombly* had “retire[d].”¹⁶⁰

Despite these assertions, it can be reasoned that based on the language in *Swierkiewicz*, *Iqbal*, and *Twombly*, and based on the similarities in the summary judgment and motion to dismiss standards that *Swierkiewicz* effectively does not survive. As a result, employment discrimination plaintiffs will effectively need to plead a prima facie case and possibly more to survive a motion to dismiss. As to the language in the decisions, first, *Swierkiewicz* differs from *Iqbal* and *Twombly* regarding how conclusory allegations should be treated. *Swierkiewicz* appeared to permit conclusory pleading,¹⁶¹ while in *Iqbal* and *Twombly*, the Court

¹⁵⁶ *Id.* (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)); see also *Leatherman*, 507 U.S. at 168–69 (summary judgment and discovery, not the motion to dismiss, are intended to “weed out unmeritorious claims”).

¹⁵⁷ *Al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009); see also *Reyes v. Fairfield Props.*, No. 08-CV-0074, 2009 WL 3063082, at *10 (E.D.N.Y. Sept. 24, 2009) (positively citing *Swierkiewicz* for no need to plead prima facie case); *Gilman v. Inner City Broad. Corp.*, No. 08 Civ. 8909, 2009 WL 3003244, at *3 (S.D.N.Y. Sept. 18, 2009) (stating that, in this employment discrimination case, *Swierkiewicz* is good law after *Iqbal* given *Twombly*’s citing of *Swierkiewicz* and given *Iqbal*’s reliance on *Twombly*).

¹⁵⁸ See *al-Kidd*, 580 F.3d at 975–76.

¹⁵⁹ See Seiner, *supra* note 2 (manuscript at 17–19); see Steinman, *supra* note 2 (manuscript at 31–32).

¹⁶⁰ See Steinman, *supra* note 2 (manuscript at 30–32); see *supra* text accompanying note 84. In his article, Professor Steinman also emphasized the Court’s differentiation between evidentiary and pleading standards in *Swierkiewicz* to argue that evidentiary standards do not apply on a motion to dismiss. See Steinman, *supra* note 2 (manuscript at 42–43). Among other things, Professor Steinman also argued that when “a complaint contains non-conclusory allegations on every element of a claim for relief, the plausibility issue vanishes completely,” and he set forth a proposed definition for “conclusory” allegations. See Steinman, *supra* note 2 (manuscript at 26, 37–58).

¹⁶¹ See *supra* text accompanying notes 155–56.

specifically rejected that “conclusory” allegations in a complaint would be sufficient upon a motion to dismiss.¹⁶²

Second, the majority’s requirement of plausibility in *Iqbal* and *Twombly* was in effect heightened pleading that does not comport with *Swierkiewicz*. While the Court in *Twombly* attempted to reconcile *Swierkiewicz* by stating that “[h]ere, in contrast [to the Court of Appeals opinion in *Swierkiewicz* which was rejected by the Supreme Court], we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face,”¹⁶³ the dissent stated that this was what the majority had in effect done by establishing a plausibility standard.¹⁶⁴ Professor Benjamin Spencer also has asserted that “[t]he plausibility pleading standard announced by the Court in *Twombly* is no different from the Second Circuit’s heightened pleading standard that the Court rejected in *Swierkiewicz*.”¹⁶⁵

Third, in *Iqbal*, the Court emphasized that Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,” and “does not turn on the controls placed upon the discovery process.”¹⁶⁶ This was different from *Swierkiewicz*, which had emphasized “liberal discovery” citing *Conley*.¹⁶⁷

Fourth, *Swierkiewicz* discussed the liberal notice pleading requirements and relied on, at least in part, the “no set of facts” language from *Conley*¹⁶⁸ and *Hishon v. King & Spalding*¹⁶⁹ to decide that the complaint in *Swierkiewicz* satisfied Rule 8.¹⁷⁰ As previously stated, *Twombly* had “retire[d]” this language on which the Court relied.¹⁷¹

For these reasons, while *Iqbal* and *Twombly* did not expressly overrule *Swierkiewicz*, the differences between those cases and *Swierkiewicz* suggest that *Swierkiewicz* effectively is dead. The Third Circuit has discussed this issue of whether *Swierkiewicz* is good law. The court stated that *Swierkiewicz* “expressly adhered to *Conley*’s then-prevailing ‘no set of facts’ standard” in deciding heightened pleading was not required.¹⁷² The court also stated that *Swierkiewicz* cited *Conley* for the proposition that Rule 8 relies on “liberal discovery” and summary judgment.¹⁷³ The court concluded “that because *Conley* has been specifically repudiated by both

¹⁶² See *supra* text accompanying notes 84, 101–110; Seiner, *supra* note 2 (manuscript at 16–17).

¹⁶³ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007).

¹⁶⁴ *Id.* at 1983 (Stevens, J., dissenting) (“a heightened pleading burden”).

¹⁶⁵ Spencer, *supra* note 3, at 476.

¹⁶⁶ Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950, 1953 (2009).

¹⁶⁷ *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (citing *Conley v. Gibson*, 355 U.S. 41, 47–48 (1957)); see *supra* text accompanying note 153.

¹⁶⁸ *Conley*, 355 U.S. 41.

¹⁶⁹ *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

¹⁷⁰ *Swierkiewicz*, 534 U.S. at 514 (citing *Conley*, 355 U.S. at 48; *Hishon*, 467 U.S. at 73).

¹⁷¹ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007).

¹⁷² Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).

¹⁷³ *Id.*

Twombly and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.¹⁷⁴

In addition to these differences in the language in the decisions that show that *Swierkiewicz* may not be good law, the similarity between the summary judgment and the motion to dismiss standards under *Iqbal* and *Twombly* also tends to show that *Swierkiewicz* is effectively dead. Because courts perform a plausibility analysis under both standards and assess inferences favoring the plaintiff as well as inferences favoring the defendant, it is likely that courts will use similar analyses for the motion to dismiss as they do for summary judgment. Under Supreme Court case law, plaintiffs have a significant burden to survive summary judgment in employment discrimination cases. Under the *McDonnell Douglas* test, the plaintiff must prove the prima facie case, and the plaintiff must show that the defendant's reason for the adverse employment decision was pretext for discrimination.¹⁷⁵ It seems likely given the similarities between the motion for summary judgment and the motion to dismiss that courts may begin to perform this type of searching analysis at the motion to dismiss stage—whether the courts are explicit that they are doing so or not.¹⁷⁶

Indeed, *Iqbal* and *Twombly* suggest that this type of extensive analysis of a claim will be conducted by the courts upon a motion to dismiss. In those decisions, the Court appeared to require the plaintiffs to rebut alternative explanations to survive the respective motions to dismiss in the same manner that the Court has required employment discrimination plaintiffs to rebut alternative explanations to survive summary judgment. In *Iqbal*, the plaintiff was required to and failed to rebut the alternative explanation that the detention policy was to combat terrorism,¹⁷⁷ and in *Twombly*, the plaintiff was required to and failed to

¹⁷⁴ *Id.*

¹⁷⁵ See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). The mixed motive analysis may apply instead of the *McDonnell Douglas* analysis. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075 (codified as amended 42 U.S.C. § 2000e-2 (2006)).

¹⁷⁶ See *Fletcher v. Phillip Morris USA, Inc.*, No. 3:09CV284-HEH, 2009 WL 2067807 (E.D. Va. July 14, 2009) (granting motion to dismiss forty-five page first amended complaint holding that plaintiff did not satisfy the *McDonnell Douglas* prima facie case for neither discrimination or retaliation, and therefore the claims were not plausible); Spencer, *supra* note 3, at 476–77 (“[P]lausibility pleading is heightened particularized pleading plain and simple.”). Professor Spencer has argued that many lower courts did not follow *Swierkiewicz* prior to *Twombly*. See A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 118–24 (2008). At the same time that the Court decided *Twombly*, the Court decided *Erickson v. Pardus*, regarding the requirements of pleading for a pro se plaintiff. 551 U.S. 89 (2007). Given that *Iqbal* confirms that plausibility is required for all complaints, there is now some question what it takes for a pro se complaint to survive a motion to dismiss. Cf. Hatamyar, *supra* note 73 (manuscript at 45) (“The percentage of 12(b)(6) motions granted in all cases brought by pro se plaintiffs grew from *Conley* (65%) to *Twombly* (69%) to *Iqbal* (85%).”).

¹⁷⁷ See *supra* text accompanying notes 95–110.

rebut the alternative explanation that the parallel behavior was simply market forces at work.¹⁷⁸ Thus, what has been required under *Iqbal* and *Twombly* suggests that a plaintiff in an employment discrimination suit who is subject to a motion to dismiss will be required to plead facts to rebut the reason offered by the defendant for its employment decision, in addition to pleading the prima facie case, despite the Court's decision to the contrary in *Swierkiewicz* that a plaintiff need not even plead the prima facie case.

III. THE IMPROPRIETY OF THE NEW SUMMARY JUDGMENT MOTION

In prior work, I have argued that the motion to dismiss under *Twombly* is unconstitutional.¹⁷⁹ Because the Court repeated the *Twombly* standard in *Iqbal*, the analysis for the constitutionality of *Iqbal* is the same, and the *Iqbal/Twombly* standard is unconstitutional.¹⁸⁰ Putting aside these constitutional issues, the question remains whether the change under *Iqbal* and *Twombly* from *Conley*, especially given the resulting similarities of the standards for summary judgment and the motion to dismiss, is appropriate.

With respect to rule construction, this change seems inconsistent with the intentions of the rule-makers given the difference in language in the rules and the complaint forms appended to the Rules.¹⁸¹ It might be argued though that regardless of the difference in the language of the motion for summary judgment and the motion to dismiss, both are pretrial dismissal standards and thus the same pretrial dismissal standards, albeit at different stages, are appropriate. The Court appeared to support this type of result in *Anderson v. Liberty Lobby, Inc.*¹⁸² There, despite the difference between the Rule 50 directed verdict standard, which included language of whether "a reasonable jury" could find, and the Rule 56 summary judgment standard, which did not include this "reasonable jury" language, the Court emphasized that the rules were different only because the motions occurred at different times in the litigation.¹⁸³ Accordingly, the Supreme Court adopted the reasonable jury language for the interpretation of Rule 56.¹⁸⁴ What has happened to the

¹⁷⁸ See *supra* text accompanying notes 74–86; cf. Seiner, *supra* note 2 (manuscript at 29–32) (discussing unique role of summary judgment in employment discrimination cases, non-discriminatory alternative reason for policy in *Iqbal*, and alternative explanation for conspiracy allegations in *Twombly*).

¹⁷⁹ See Thomas, *supra* note 3.

¹⁸⁰ See *id.*

¹⁸¹ See *supra* text accompanying notes 114–117.

¹⁸² 477 U.S. 242 (1986).

¹⁸³ See *supra* text accompanying notes 34–35.

¹⁸⁴ See *supra* text accompanying notes 31–40. The text of judgment as a matter of law is as follows: "If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the

motion to dismiss in the last few years looks similar to what happened to summary judgment. In *Twombly*, despite the obvious difference in the text of the motion to dismiss and summary judgment rules, the Court stated that the same plausibility standard that applied to summary judgment in *Matsushita* was appropriate at the motion to dismiss stage.¹⁸⁵

While the Court has adopted the same standard for the motion to dismiss and summary judgment in the manner that it adopted the same standard for summary judgment and judgment as a matter of law (formerly the directed verdict), summary judgment and judgment as a matter of law are more similar than the motion to dismiss and summary judgment. Discovery has occurred under summary judgment and judgment as a matter of law, as opposed to under the motion to dismiss. As a result, the same evidence is presented under summary judgment and judgment as a matter of law, though sometimes in different forms, for example, live witnesses under judgment as a matter of law versus documentary evidence under summary judgment. In contrast, none of this same evidence is available for the motion to dismiss. It seems likely then that under the plausibility standard, motions to dismiss may be granted inappropriately in at least some cases where facts may be discovered that would make the claim plausible under a summary judgment motion.¹⁸⁶

In addition to different rule constructions, the justifications for the motion for summary judgment and the motion to dismiss also should be viewed differently. While both motions have been justified on the grounds of cost to the defendant,¹⁸⁷ there are different costs to the defendant under the motions. If a court does not grant summary judgment, the defendant must pay to go to trial or will settle. If a court does not grant a motion to dismiss, the cost is less than when the court does not grant summary judgment; the defendant will pay for discovery but has another opportunity to request that the court dismiss the case before trial upon a motion for summary judgment.¹⁸⁸ As a side issue

party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.” FED. R. CIV. P. 50(a)(1).

¹⁸⁵ Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1968 (2007); see *supra* text accompanying notes 77–86. Indeed, while the Court has not yet adopted the “whether a reasonable jury could find for the nonmoving party” language for Rule 12(b)(6), it may be that this reasonable jury language may also be adopted at some later time for the motion to dismiss as it was for summary judgment, although this Article is not the place to explore this possibility. See *supra* note 120.

¹⁸⁶ See Spencer, *supra* note 3, at 487–88.

¹⁸⁷ See *supra* text accompanying notes 52, 81–82; cf. Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004) (arguing that prohibiting settlement prior to the filing of a summary judgment motion will prevent nuisance-value settlements).

¹⁸⁸ Cf. Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 54 (2008); Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 132–33 (2009) (identifying cost characteristics of different types of suits).

regarding cost, the cost of individual employment discrimination cases pale in comparison to cases such as class action antitrust cases, and thus, the same cost justification that has been offered by the Court for the summary judgment and the motion to dismiss standards in class action antitrust cases seems particularly inappropriate for much less costly individual employment discrimination cases.¹⁸⁹

¹⁸⁹ Cf. Stancil, *supra* note 188, at 146–55 (recommending notice pleading standards for claims that are “not likely to engender substantial cost disparities favoring plaintiffs”); Herrmann, Beck & Burbank, *supra* note 2, at 151–52 (Professor Burbank arguing that there is a lack of empirical evidence that cost of discovery has been significant problem and quoting Professor Robert Gordon that “[c]areful studies demonstrate that the ‘litigation explosion’ and ‘liability crisis’ are largely myths” (quoting Robert W. Gordon, *The Citizen Lawyer—A Brief History of a Myth with Some Basis in Reality*, 50 WM. & MARY L. REV. 1169, 1199 (2009))). *But see id.* at 146 (Herrmann arguing that “[a]ll fair observers acknowledge the skyrocketing cost of discovery”).

Professor Hylton has addressed cost and the propriety of summary judgment and the motion to dismiss. While he did not address the similarity between the motion to dismiss and summary judgment standards, he nevertheless has a different view regarding the relationship of the motions. He has argued for an interconnection between the treatment of the motion to dismiss and the motion for summary judgment because of cost. *See* Hylton, *supra* note 188, at 54. First, he explained that “pleading-stage dismissals should occur more often for more costly claims. . . . For example, if the plaintiff’s claim imposes relatively high costs on the defendant, say by severely damaging his business or by imposing exorbitant discovery costs, the threshold level of merit should be correspondingly high.” *Id.* at 52. Thus he argued that “[w]here the summary judgment standard is relatively high, in terms of the factual support required, the pleading stage requirements should be relatively high. Conversely, where the summary judgment stage requirements are relatively low, the courts should be liberal at the pleading stage.” *Id.* at 55–56. Hylton uses employment discrimination and antitrust cases as two examples. He states that discrimination claims do not require much evidence to withstand summary judgment, while on the other hand antitrust claims require significant evidence. As a result, he argues that pleading requirements for discrimination claims should not be as rigorous as pleading requirements for antitrust cases. *Id.* at 56–62. What Hylton states seems to support in part a difference in the treatment of employment discrimination and antitrust cases upon motions to dismiss. *Cf.* Epstein, *supra* note 3, at 62–72, 81–82 (discussing particular expense of antitrust cases and proposing more dismissals at motion to dismiss stage of cases which are based on publicly available information); Spencer, *supra* note 3, at 488–89 (acknowledging legitimate concern about the cost of modern litigation but arguing that the plausibility requirement is not the right standard to properly address this concern because some claims with merit will not survive).

Antitrust and employment discrimination, more generally, may be viewed differently. Antitrust law assumes rational conduct on behalf of the actors. Much has been written, however, that argues that this same rational conduct cannot be assumed in the employment context. According to this literature, employers discriminate regularly. *See, e.g.,* Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477 (2007); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945 (2006). Of course, other literature disputes this finding. *See, e.g.,* Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006). In any event, the former literature calls into question whether the same standard used in an antitrust context is appropriate in an employment discrimination context.

In addition to differences in rule construction and cost justification, summary judgment and the motion to dismiss are dissimilar based on the role of the courts, though both motions, as stated previously, increase the role of courts in litigation. At the summary judgment stage, courts examine the evidence developed by the parties to determine whether the claim is plausible. On the other hand, at the motion to dismiss stage, courts have only the facts set forth in the complaint to determine whether the claim is plausible. This type of inquiry at the pleading stage gives the courts themselves more power over the parties than at the summary judgment stage where the parties themselves have developed the evidence in the cases, which the courts use to decide the motions.

Moreover, courts wield more power in relationship to the legislature under the motion to dismiss than under summary judgment. Now, using *Iqbal* and *Twombly*, courts will likely dismiss more cases based on statutes that the legislature has enacted before additional evidence has been developed. For example, in the area of employment discrimination, Congress has prohibited discrimination on the basis of various traits.¹⁹⁰ Now, it may be that some claims of discrimination, which were created under Congress's legislative authority, will be dismissed on motions to dismiss, some of which again may not have been dismissed upon summary judgment.¹⁹¹

IV. CONCLUSION

A new time is upon the federal rules after *Iqbal* and *Twombly*. The motion to dismiss is now the new summary judgment motion, in standard and possibly effect. Under both dismissal standards, courts assess the plausibility of a claim, using inferences favoring the plaintiff and inferences favoring the defendant, and under both, courts use their own opinions of the evidence to decide the plausibility question. As a result of the similarity in the standards, the summary judgment motion and the motion to dismiss may have similar effects, including the significant use of the procedures by courts, a related increased role of judges in litigation, and a corresponding increased dismissal of employment discrimination cases. These similarities of the standards and possibly the effects of the motions call into question whether *Iqbal* and *Twombly* were decided properly. It may not be appropriate to treat summary judgment

Putting aside the comparison of summary judgment and the motion to dismiss, the new plausibility standard will not necessarily save costs for defendants overall. While a defendant may save costs if the defendant prevails on a motion to dismiss, to determine whether there is an overall cost saving, one would also need to examine the cost of bringing the motions and the probability of winning the motions.

¹⁹⁰ See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (2006).

¹⁹¹ Cf. Notice and Pleading Restoration Act of 2009, S. 1504, 111th Cong. (2009); Bone, *Pleading Rules*, *supra* note 2 (arguing that rule-makers or Congress, not Supreme Court should resolve pleading issue).

and the motion to dismiss similarly because of the difference in the availability of discovery under the motions, the difference in cost surrounding the motions, and the difference in the role of the courts under the motions, both in relationship to the parties as well as in relationship to the legislature.