

# ODDBALL *IQBAL* AND *TWOMBLY* AND EMPLOYMENT DISCRIMINATION

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*This brief Essay argues that Bell Atlantic Corp. v. Twombly was an oddball case, a massive antitrust action with significant costs and asymmetry of costs, much different than the vast majority of cases in the federal courts. While the Supreme Court and some scholars, including Professor Richard Epstein, have largely justified the new plausibility standard in Twombly on the basis of these costs, they have not shown why the new standard should apply transsubstantively to cases without these same costs, including typical employment discrimination cases. This Essay further argues that Ashcroft v. Iqbal, like Twombly, was an oddball case, though with different types of costs than Twombly. Finally, contrary to Professor Epstein, this Essay argues that the standard under Iqbal and Twombly is likely to be procedurally revolutionary, particularly in employment discrimination cases. Indeed, the new standard could lead to a revolution due to the convergence of the new motion to dismiss standard with summary judgment and the effective death of Swierkiewicz v. Sorema N.A.*

## I. INTRODUCTION

This brief Essay adds to my previous scholarship that the new plausibility pleading standard in *Ashcroft v. Iqbal*<sup>1</sup> and *Bell Atlantic Corp. v. Twombly*<sup>2</sup> violates the Seventh Amendment jury trial right<sup>3</sup> and impro-

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1. 129 S. Ct. 1937 (2009).  
2. 550 U.S. 544 (2007).  
3. See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

perly is “the new summary judgment motion.”<sup>4</sup> This Essay argues that the Supreme Court and some scholars, including Professor Richard Epstein, have justified the new standard on the basis of the costs in *Twombly*, an “oddball” case—with massive costs and significant asymmetry of costs—and have not shown that the new standard should apply transsubstantively to cases that do not have such costs, including typical employment discrimination cases.<sup>5</sup> This Essay also shows that *Iqbal*, while different than *Twombly* in types of costs, is similarly “oddball” in nature. Moreover, this Essay argues that, despite the lack of significant justification for why the new standard should apply transsubstantively, and also contrary to a prediction of Professor Epstein, the new standard will likely have a revolutionary impact on cases, without the same types of costs as *Iqbal* and *Twombly*, including employment discrimination cases.<sup>6</sup> Because the new standard is akin to summary judgment with much less information, more dismissals are likely to occur at the motion to dismiss stage. Additionally, because *Swierkiewicz v. Sorema N.A.*<sup>7</sup> may effectively be dead, plaintiffs in employment discrimination cases may need to plead at least a prima facie case of discrimination, which may very well lead to more dismissals. Previous data on the effect of summary judgment on employment discrimination cases in addition to new preliminary

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4. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010).

5. See Richard A. Epstein, *Of Pleading and Discovery: Reflections on Twombly and Iqbal with Special Reference to Antitrust*, 2011 U. ILL. L. REV. 187 [hereinafter Epstein, *Of Pleading and Discovery*]; Richard A. Epstein, *Twombly, After Two Years: The Procedural Revolution in Antitrust that Wasn't*, GCP: ONLINE MAG. FOR GLOBAL COMPETITION POL'Y, July 2009 [hereinafter Epstein, *After Two Years*]; Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2007) [hereinafter Epstein, *(Disguised) Summary Judgments*].

For example, in one of his articles on *Twombly*, Professor Epstein states that “[t]here is no reason to confine the logic of the decision to antitrust cases—which makes it all the more critical that the Supreme Court adopt the proper rationale on the question.” Epstein, *(Disguised) Summary Judgments*, *supra*, at 64–65. And he goes on to state in the corresponding footnote that “[t]his includes suits brought against government officials for various constitutional violations, or suits brought against private defendants for violations of, for example, antidiscrimination laws, which turn on complex evidence of party motive on the one hand and industry structure on the other.” *Id.* at 65 n.12. He concludes this thought by stating “[t]he nub of the difficulty is that the notice pleading regime of 1938 performs erratically in the context of modern complex litigation.” *Id.* at 65; see also *infra* Part II.B (quoting Professor Epstein).

After I wrote a draft of this Essay, in conversation and emails with Professor Epstein, Professor Epstein has disagreed with my characterization of his work as arguing that *Iqbal* and *Twombly* have broad application. He stated that he is “ambivalen[t]” about employment discrimination and that the new standard should “apply in few cases, not many.” E-mail from Richard Epstein, Professor of Law, New York University School of Law, to Suja Thomas, Professor of Law, University of Illinois College of Law (Oct. 3, 2010, 8:02 PM CDT) (on file with author). With that said, Professor Epstein did not offer to change his Essay in this same issue to eliminate references to the similarity of proof in employment discrimination cases and to references to other cases. See *infra* Part II.B. Moreover, as mentioned in this Essay, Professor Epstein previously made explicit statements in other articles about the applicability of *Iqbal* and *Twombly* to employment discrimination cases. See *infra* Part II.B.

6. In an article on *Twombly* and *Iqbal*, Professor Epstein discounted the effect of the cases when he stated that “[t]he seeds of a procedural revolution are not here.” Epstein, *After Two Years*, *supra* note 5, at 12.

7. 534 U.S. 506 (2002).

data on the effect of *Iqbal* and *Twombly* on employment discrimination cases suggest that the revolution in employment discrimination may indeed occur.

## II. ODDBALL *IQBAL* AND *TWOMBLY*

### A. *Twombly* and Cost

When the Supreme Court decided *Twombly*, it changed the standard for the motion to dismiss for all cases from a decision of whether there was “no set of facts in support of [a] claim which would entitle [the pleader] to relief”<sup>8</sup> under *Conley v. Gibson*,<sup>9</sup> to a decision of whether a claim was “plausible.”<sup>10</sup> *Twombly* was far from typical, however.

In *Twombly*, the plaintiffs sued several phone companies.<sup>11</sup> These defendant phone companies occupied the vast majority of the market—ninety percent of the local phone and internet business in the United States.<sup>12</sup> Likewise, the plaintiffs were a large group, consisting of a putative class of subscribers to local phone and internet business from early 1996 through 2003.<sup>13</sup> Thus, the complaint included the major telephone companies in the United States and almost every person with local telephone and internet service in the United States.

The Court responded to this vast case with a rejection of the complaint and also by the establishment of a new standard to govern the motion to dismiss.<sup>14</sup> Cost was the force behind the decision. The Court stated

[t]hat potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America’s largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.<sup>15</sup>

The Court emphasized that judges did not have the ability to curb discovery in such a case and instead “the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”<sup>16</sup>

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8. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)) (internal quotation marks omitted). This phrase from *Conley* was “retire[d].” *See id.* at 563.

9. *Conley*, 355 U.S. 41.

10. *Twombly*, 550 U.S. at 556, 560–63.

11. *See id.* at 550 & n.1.

12. *See id.* at 550 n.1.

13. *See id.* at 550.

14. *See id.* at 560–70.

15. *Id.* at 559; *see also id.* at 558 (“[P]roceeding to antitrust discovery can be expensive.”).

16. *Id.* at 559.

In his dissent, Justice Stevens, who also wrote in part for Justice Ginsburg, asserted that cost inappropriately drove the decision.<sup>17</sup> He stated that “[p]rivate antitrust litigation can be enormously expensive” and that this concern had motivated the majority.<sup>18</sup> He did not think, however, that cost should justify the change in the motion to dismiss standard, including the far-reaching change here from a standard of legal sufficiency to one of factual sufficiency.<sup>19</sup> Indeed, neither the defendants nor amici requested that *Conley* be retired, and any changes could have been considered under the rulemaking process instead of made exclusively by the judiciary.<sup>20</sup> Additionally, Justice Stevens stated (this part not joined by Justice Ginsburg) that while the Court had stressed Congress’s intent in another recent decision, here the Court did not follow the intent of the drafters of the involved statutes or the motion to dismiss rule.<sup>21</sup> Moreover, Justice Stevens complained that the Court had not even suggested that it had made this change in response to Congress.<sup>22</sup> Justice Stevens concluded that

in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges’ independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.<sup>23</sup>

The Court had changed precedent and had established heightened pleading for this “Big Case,”<sup>24</sup> which sought to protect corporations. Justice Stevens stated that

[t]he transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.<sup>25</sup>

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17. See *id.* at 570–97 (Stevens, J., dissenting).

18. *Id.* at 573. Justice Stevens also discussed a concern about the evidence presented to the jury in an antitrust case like this. He stated that “there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions.” *Id.*

19. See *id.*; cf. Epstein, *Of Pleading and Discovery*, *supra* note 5, at 188 (discussing change).

20. See *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting). Professor Miller criticized the Court’s “legislative-like decisions in *Twombly* and *Iqbal*” and discussed the value of the rulemaking process. See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84–103 (2010).

21. See *Twombly*, 550 U.S. at 595–96.

22. See *id.* at 596.

23. *Id.* at 596–97.

24. *Id.* at 587–88 (joined by Justice Ginsburg) (internal quotation marks omitted) (describing that paper trial should not substitute for live trial even in big cases like antitrust cases (citing JUDGE CHARLES E. CLARK, *Special Pleading in the “Big Case”?*, in *PROCEDURE—THE HANDMAID OF JUSTICE* 147, 148 (Charles Alan Wright & Harry M. Reasoner eds., 1965))).

25. *Id.* at 596 (not joined by Justice Ginsburg). Some of the defendants had rejected the plaintiffs’ proposal for limited discovery in phases. See *id.* at 593 (joined by Justice Ginsburg). The dissent stated that “[t]he potential for ‘sprawling, costly, and hugely time-consuming’ discovery is no reason to throw the baby out with the bathwater.” *Id.* at 593 n.13 (citation omitted) (quoting *id.* at 560 n.6 (majority opinion)).

The decisions of both the majority and the dissent show that cost at least significantly drove the decision in *Twombly* and thus the decision to change the motion to dismiss standard. Although the majority and dissent did not specifically discuss the differences in the costs that the plaintiffs and the defendants faced, the Justices' concern about cost was tied to the significant asymmetry in discovery costs, in addition to the significant costs themselves.<sup>26</sup> The defendants in *Twombly* would face extensive essentially one-way discovery by the plaintiffs.<sup>27</sup>

### B. *Twombly Versus Employment Discrimination*

As stated above, high cost and significant asymmetry in costs drove the new plausibility standard in *Twombly*. It follows from *Twombly* then that typical employment discrimination claims—individual disparate treatment claims—should be subject to the new standard if those claims create high cost and significant asymmetry in costs.

Professor Epstein has written on the topic of *Twombly* and employment discrimination. While he suggests that “the vast majority of [civil] cases . . . cannot be dismissed for factual insufficiency before taking depositions,”<sup>28</sup> Professor Epstein attempts to draw parallels between the type of claim dismissed in *Twombly* and employment discrimination claims.<sup>29</sup> He states that the “no set of facts” language in *Conley* made sense at a time when most claims did not require lots of discovery.<sup>30</sup> Professor Epstein contrasts those types of claims with “[m]any modern caus-

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26. See, e.g., *Swanson v. Citibank, N.A.*, 614 F.3d 400, 405 (7th Cir. 2010) (“We realize that one powerful reason that lies behind the Supreme Court’s concern about pleading standards is the cost of the discovery that will follow in any case that survives a motion to dismiss on the pleadings. The costs of discovery are often asymmetric, as the dissent points out, and one way to rein them in would be to make it more difficult to earn the right to engage in discovery.”); *id.* at 411 (Posner, J., dissenting in part) (“Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation (similar to that created by class actions, to which Rule 23(f) of the civil rules was a response) that such an asymmetry creates.” (citations omitted)); see also Miller, *supra* note 20, at 61–71 (discussing *Twombly*’s emphasis on the costs to defendant).

An argument could be made that in *Twombly* the Court was interested or also motivated by *Conley*, instead of or in addition to being motivated by cost. The majority and dissent differed in their views on whether *Conley* had caused significant trouble in the lower courts. See *Twombly*, 550 U.S. at 560–64 & n.8 (majority discussion of *Conley*); *id.* at 577–88 (Stevens, J., dissenting) (dissent discussion of *Conley*).

27. Justice Stevens stated that “[i]t would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs.” *Twombly*, 550 U.S. at 596 n.15 (Stevens, J., dissenting) (citing FED. R. CIV. P. 54(d)(1)). In the same year that *Twombly* was decided, the Court decided *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). There, the majority expressed concerns about the costs in securities fraud litigation suits that have some of the same characteristics as *Twombly*, with again essentially one-way discovery. See *id.* at 313 (“Private securities fraud actions . . . can be employed abusively to impose substantial costs on companies and individuals . . .”); *cf. id.* at 335 (Stevens, J., dissenting) (discussing congressional concern about costs as underlying heightened pleading in the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.)).

28. Epstein, *Of Pleading and Discovery*, *supra* note 5, at 205.

29. As noted previously, Professor Epstein has disagreed with the author’s characterization of his arguments on the question of how broadly the plausibility standard applies. See *supra* note 5.

30. See Epstein, *Of Pleading and Discovery*, *supra* note 5, at 190–91.

es of action, [that] are heavily dependent upon proof of motive or upon amassing large amounts of data in order to reach a conclusion about the legality of some state of affairs,”<sup>31</sup> and he discusses employment discrimination claims as one example of this type of cause of action.<sup>32</sup> Professor Epstein states that *Conley* itself, an employment discrimination case, depended upon such significant proof.<sup>33</sup> Drawing on Professor Epstein’s assertions, which imply that the new standard in *Twombly* should apply to typical employment discrimination cases, this Essay uses employment discrimination as an example of an area with much different costs than those presented in *Twombly* and thus to argue that it has not been adequately shown that *Twombly* should apply transsubstantively.

In his statements about *Twombly* and employment discrimination cases, Professor Epstein makes a few assertions regarding the cost of such discrimination cases. According to Professor Epstein, modern disparate treatment cases turn on intent, and therefore “demands in discovery are arduous.”<sup>34</sup> He continues that

[t]hey are also asymmetrical. In disparate treatment cases, the plaintiff has to be able to compare his or her treatment with others in the same class. . . . By comparison, there is much less, especially in disparate impact cases, that a defendant can do in these cases to obtain evidence from a plaintiff through discovery, whether by deposition or interrogatory. But extensive discovery is, of course, the norm against defendants, which may be divisions of larger entities that have operated under multiple managers in the firm. The struggles in these cases are extensive. The plaintiffs in past cases claimed that the information from discovery was indispensable to make out the case; the defendants claimed that discovery was a tool of oppression and abuse. Both claims are surely true in some cases, but each can be exaggerated in others.<sup>35</sup>

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31. *Id.* at 191.

32. *See id.* at 191–92; *see also* Epstein, (*Disguised*) *Summary Judgments*, *supra* note 5, at 65 n.12.

33. *See* Epstein, *Of Pleading and Discovery*, *supra* note 5, at 191. Professor Epstein, however, believes that the Supreme Court correctly upheld the complaint in *Conley*. *Cf.* Epstein, *After Two Years*, *supra* note 5, at 9 (“This close division fairly reflects the difficulty of [*Iqbal*]. Unfortunately, neither side sees why this case falls midway between *Conley* and *Twombly*. Like *Conley*, *Iqbal* contains key allegations of discrimination, which is as hard to prove in the one case as it is in the other. So as a first cut, it looks as though *Iqbal* has said enough to advance to at least one round of discovery. But the institutional context reveals a different texture. *Conley* arose in a context in which private individuals with a strong racist background had every incentive to conceal their discrimination, free of any institutional constraints. In light of that past history, the odds were exceedingly high that they breached their duty of fair representation under the [Railway Labor Act]. But that sad state of affairs does not describe the DOJ and the FBI, which are subject to huge internal reviews administered by public officials, most of whom are strongly committed to discharging their constitutional obligations.”).

34. Epstein, *Of Pleading and Discovery*, *supra* note 5, at 192. Professor Epstein also argues that discovery is extensive in disparate impact cases. *See id.*

35. *Id.* While Professor Epstein points out an important change to the substantive law in the establishment of more and more causes of action that require evidence of motive and thus more extensive discovery, Professor Epstein does not recognize that this shift to more extensive discovery may have resulted partly from the shift from a live trial of causes of action to the paper trial of causes of

While intent will be the litigated issue, the discovery will be quite limited in a single plaintiff case, contrary to Professor Epstein's assertions. The plaintiff will seek to discover those documents that can show the intent of the defendant to discriminate against the plaintiff, and the defendant usually will possess only a small number of documents that relate to the plaintiff's employment generally and performance on the job more specifically. The plaintiff will also seek to take the depositions of those people who might have information about the plaintiff's work performance, including the limited set of people who have supervised the plaintiff and/or who have worked with the plaintiff. In addition to this discovery, the plaintiff will seek discovery about people, not in the protected class, whom defendant treated better than the plaintiff. Finally, the plaintiff may seek discovery about the treatment of other people in the protected class. Discovery may be very important to plaintiffs who may not know the exact parameters of the discrimination that occurred; for example, wages are not publicized in most workplaces.

The sum of these discovery costs is not comparable to the costs of a business litigation, which requires extensive discovery of documents and many depositions. In a recent study by the Federal Judicial Center, though not a random sample and conducted by interview, the authors concluded that the "[v]olume of discovery is a primary force driving the costs of litigation."<sup>36</sup> This general statement suggests that cases with less discovery will be less costly. As stated above, individual employment discrimination cases fall into this category of cases with less discovery, and thus they should be less costly.

Professor Epstein may indeed be correct that the discovery in employment discrimination cases can be somewhat asymmetrical. The defendant generally possesses more information for the plaintiff to discover than the defendant will discover from the plaintiff. Typically, the defen-

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action. A paper trial requires more evidence because the parties are not permitted to present their evidence at trial before the factfinder who can assess credibility, for example. If we continue to rely on paper trials, we may need to continue to have extensive discovery. If we shift back to more live trials, less discovery may be possible.

In England in the eighteenth century, from where our jury trial originates, there could be no assessment of the sufficiency of the facts before a live trial occurred, and when there was a decision that facts were insufficient, a live trial occurred again. See Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 157-58 (2007).

With respect to asymmetry, symmetry has never been a necessary or realistic characteristic of our litigation system. One party often will have more to discover than the other. Thus, it is likely that in many cases cost asymmetries will exist.

36. See THOMAS E. WILLGING & EMERY G. LEE III, FED. JUDICIAL CTR., IN THEIR WORDS: ATTORNEY VIEWS ABOUT COSTS AND PROCEDURES IN FEDERAL CIVIL LITIGATION 3 (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/\\$file/costciv3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/costciv3.pdf/$file/costciv3.pdf). Some plaintiffs' lawyers indicated that discovery can be costly for them when defendants are large corporations with vast resources with lawyers who bill by the hour with little incentive to be efficient. See *id.* at 8. In employment discrimination cases, the plaintiffs can recover attorney's fees and costs if they prevail, different from the typical American rule. See 42 U.S.C. § 2000e-5(k) (2006). Also, the defendant can recover attorney's fees and costs in an unusual employment discrimination case. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

dant will ask for the employment-related documents that the plaintiff possesses, which usually is a very small amount, less than a box. Also, the defendant will depose only a very limited set of people and possibly only the plaintiff.

However, in ordinary employment discrimination cases, the asymmetry in costs will not be significant, particularly in comparison to the asymmetry in *Twombly*-like antitrust cases. Professor Paul Stancil concluded that the *Conley* notice pleading rule was more appropriate for employment discrimination claims, which he characterized as “low-risk,” because the claims are “not likely to engender substantial cost disparities favoring the plaintiffs.”<sup>37</sup> Without cost asymmetries, only information asymmetries, which favor the defendant, are in place, and a requirement of only notice pleading would permit the plaintiff to proceed fairly onto discovery.<sup>38</sup>

These findings regarding the differences in costs between typical employment discrimination claims and the claim in *Twombly* suggest that *Twombly* was an “oddball” case with respect to costs.<sup>39</sup> Accordingly, it was unconvincing for the Court and scholars like Professor Epstein seemingly to apply the new motion to dismiss standard transsubstantively on the basis of cost.<sup>40</sup> It may be, however, if there are no other problems

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37. See Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 146–47 (2009).

38. See *id.* Under the information asymmetry, the plaintiff lacks information in the defendant’s possession that may be vital to the proof of his case, see *id.* at 114–15, and under the cost asymmetry, the defendant faces larger costs because of her possession of most of the possibly relevant discovery, see *id.* at 116. In his article, Professor Stancil also argued that “high-risk” claims should be subject to “strict pleading,” *id.* at 147–49, which may be “plausibility” pleading, or the plaintiff should be required to file a bond, see *id.* at 150–64. See also ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 125–57 (2003); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUPREME CT. ECON. REV. 39, 56–62 (2008) (emphasizing less rigorous pleading should be required for employment discrimination claims than antitrust claims).

39. Different from the thesis in this Essay, Professor Joseph Seiner has argued that the “allegations [in *Iqbal* and *Twombly*] . . . on their face seem somewhat extraordinary” and are “somewhat fantastic claims.” Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 204 (2010).

40. There is, however, some comparison to be made between antitrust and employment discrimination because both have been areas in which summary judgment has been granted with frequency. See Thomas, *supra* note 35, at 141 n.5 (discussing scholarship on use of summary judgment in employment discrimination and antitrust cases).

In some ways costs appear to have generally increased due to *Twombly*. Plaintiffs will file longer complaints, and defendants possibly will file longer answers. See EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR. ATTORNEY SATISFACTION WITH THE FEDERAL RULES OF CIVIL PROCEDURE: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 11–12 (Mar. 2010). Moreover, defendants will file more motions to dismiss because of the likelihood of increased dismissal, which will increase costs for both sides. See WILLGING & LEE, *supra* note 36, at 3 (“Some reported an increase in the number of motions filed without an increase in the likelihood that a motion would be granted. This activity has increased the costs of litigating their cases.”). Justice Stevens indeed suggested that the legal fees to bring the motion to dismiss could be higher than the cost for limited discovery. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 596 (2007) (Stevens, J., dissenting).

Also, if the case does not settle and the defendant wins, the defendant can seek costs under Federal Rule of Civil Procedure 54(d)(1). See FED. R. CIV. P. 54(d)(1) (“[C]osts—other than attorney’s fees—should be allowed to the prevailing party.”); *Twombly*, 550 U.S. at 596 n.15 (Stevens, J., dissenting). Another rule that will help decrease costs is the new rule on inadvertent disclosure of discovery.

with the new standard,<sup>41</sup> that an atypical employment discrimination case with vast discovery costs and significant asymmetry in costs may be more comparable to oddball *Twombly*.<sup>42</sup>

### C. A Word About *Iqbal* and Cost

*Iqbal*, unlike *Twombly*, was a discrimination case. It presented, however, very different costs than a typical employment discrimination case.<sup>43</sup> In *Iqbal*, the plaintiff, who had been arrested and detained by federal authorities, sued, among other defendants, the former Attorney General of the United States and the Director of the Federal Bureau of Investigation for constitutional violations.<sup>44</sup> The government had placed the plaintiff in special maximum security detention because of the government's designation of the plaintiff as a person with potential information about the September 11th attacks.<sup>45</sup>

The Supreme Court rejected the plaintiff's allegations, although, unlike *Twombly*, the Court remanded the case for a determination by the court of appeals on whether the case should be remanded and the plaintiff should be permitted to replead.<sup>46</sup> Here, in some ways similar to *Twombly*, the Court emphasized the cost of discovery—in this case, the cost to the government officials in terms of their time—in addition to the

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*See* FED. R. EVID. 502. Moreover, in class actions, there may be cost-sharing if there is unduly burdensome discovery pursuant to Federal Rule of Civil Procedure 26(c). FED. R. CIV. P. 26(c); *see also* FED. R. CIV. P. 34 advisory committee's note. The impact of electronic discovery is unclear; it could decrease costs in some circumstances and increase costs in other circumstances. *See also* Miller, *supra* note 20, at 61–77 (discussing the other benefits to litigation that counter costs).

41. *See supra* note 3 and accompanying text (the new motion to dismiss standard is unconstitutional under the Seventh Amendment); *see also infra* note 42.

42. The *Wal-Mart* case may or may not be an example of such a case. *See* *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010). While the case involves millions of women in a class action alleging sex discrimination, and thus would be costly, it is not costly in the same way that *Twombly* is costly. Among other things, in *Wal-Mart*, there is only one major defendant employer.

Although some cases with significant costs and asymmetries may be more comparable to *Twombly* than others, those cases are not necessarily properly the subject of a motion to dismiss under *Twombly*. *Cf.* Stephen B. Burbank & Stephen N. Subrin, *Litigation and Democracy: Restoring a Realistic Prospect of Trial*, 46 HARV. C.R.-C.L. L. REV. (forthcoming 2011) (manuscript at 10–11) (on file with authors). Professors Burbank and Subrin argue, among other things, that pursuant to the federal rules and federally created causes of action, Congress intended to grant plaintiffs the opportunity to proceed to discovery when claims were legally valid. *Id.* Professors Burbank and Subrin argue for Congress to eliminate the *Iqbal/Twombly* standard and enact, among other things, rules that permit courts to limit discovery in “simple” cases. *See id.* at 14–20.

Professor Burbank also has previously spoken and written about the problem of the *Iqbal* and *Twombly* standard and employment discrimination cases. *Has the Supreme Court Limited Americans' Access to Court?: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 96–97 (2009) (prepared statement of Stephen B. Burbank, Professor, University of Pennsylvania Law School); *cf.* Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1192 n.16 (describing heightened requirement that lower courts imposed on employment discrimination cases after *Swierkiewicz*).

43. *See* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination* 21–22 (Seton Hall Pub. Law Research Paper No. 1657872, 2010), available at <http://ssrn.com/abstract=1657872>.

44. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

45. *See id.* at 1943.

46. *See id.* at 1954.

importance of the officials' time devoted to an issue of utmost importance—that of national security, combating the September 11th attacks.

If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, “a national and international security emergency unprecedented in the history of the American Republic.”<sup>47</sup>

Four of the Justices wrote in dissent, with Justices Breyer and Souter from the majority in *Twombly* joining the dissenters from *Twombly*.<sup>48</sup> In a separate dissent, Justice Breyer emphasized that cost was a driving factor of the decision but should not have been. Justice Breyer stated that

As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and “mindful of the need to vindicate the purpose of the qualified immunity defense,” can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials.<sup>49</sup>

There were different types of costs in *Iqbal* and *Twombly*. But in many ways the cases were similar. They presented facts very different than the typical case in federal court. Now, however oddball the facts were in *Iqbal* and *Twombly*, the cases represent the law for the motion to dismiss for all cases.

### III. THE POSSIBLE PROCEDURAL REVOLUTION IN EMPLOYMENT DISCRIMINATION

Although Professor Epstein appears to believe that the *Iqbal* and *Twombly* plausibility standard should apply to all cases, Professor Epstein also believes that *Iqbal* and *Twombly* have not sewn “[t]he seeds of a procedural revolution.”<sup>50</sup> To explore whether his assertion is true, it is helpful to examine similarities and differences between the new motion to dismiss standard and summary judgment.

While there may be debate on what constitutes a procedural revolution, the effect of summary judgment on employment discrimination ap-

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47. *Id.* at 1953; see *supra* note 33 (describing Professor Epstein's evaluation of *Iqbal*).

48. See *id.* at 1954–61 (Souter, J., dissenting).

49. *Id.* at 1961 (Breyer, J., dissenting).

50. Epstein, *After Two Years*, *supra* note 5, at 12.

pears to be such a revolution. Defendants move for summary judgment as a matter of course in this area.<sup>51</sup> Indeed, previous studies have shown that employment discrimination cases are often dismissed on motions for summary judgment. Professor Joseph Seiner, with assistance from the Federal Judicial Center, found that in 2006, courts granted in whole or in part 80% of defendants' motions for summary judgment in employment discrimination cases,<sup>52</sup> and courts granted 62.6% of the motions in whole.<sup>53</sup> The Federal Judicial Center also found that courts grant motions for summary judgment more often in employment discrimination cases than in most other types of cases.<sup>54</sup>

Now, a similar procedural revolution in employment discrimination may occur at the pleading stage, because the standard for the motion to dismiss has converged with the standard for summary judgment such that the motion to dismiss under *Iqbal* and *Twombly* is "the new summary judgment motion."<sup>55</sup> The motion to dismiss is "the new summary judgment motion," because, for both motions, courts decide whether claims are plausible.<sup>56</sup> Moreover, for both motions, in the determination of whether claims are plausible, courts use their own opinions of the facts and examine the inferences that favor the defendants in addition to inferences that favor the plaintiffs.<sup>57</sup> Different from this argument that the standards for both motions are now effectively the same, Professor Epstein has argued that when the Supreme Court dismissed the claim in *Twombly*, the procedure was a "disguised" summary judgment motion (not a motion to dismiss), because the Court used publicly available information not included in the pleadings to dismiss the complaint.<sup>58</sup>

Putting aside Professor Epstein's argument about the "disguised" summary judgment motion and instead focusing on "the new summary judgment motion" argument that the standards are now effectively the same, under this new standard, it is likely easier to dismiss an employ-

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51. WILLGING & LEE, *supra* note 36, at 3 ("[S]ummary judgment motions are filed routinely . . .").

52. See Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1033.

53. See *id.* "The FJC's search of employment discrimination cases terminated in the federal district courts during fiscal year 2006 where a defendant filed a motion for summary judgment that was decided by the district court revealed a total of 3983 summary judgment orders." *Id.*

54. See Memorandum from Joe Cecil & George Cort, Fed. Judicial Ctr. Estimates of Summary Judgment Activity in Fiscal Year 2006 (June 15, 2007); see also Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* 16–19 (Cornell Law Sch. Research Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373>.

55. Thomas, *supra* note 4; see also A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 486–87 (2008); Thomas, *supra* note 3, at 1890.

56. See Thomas, *supra* note 4, at 29–31.

57. See *id.* at 30–31; see also Miller, *supra* note 20, at 29–33 (discussing *Iqbal* standard of "judicial experience and common sense").

58. See generally Epstein, (*Disguised*) *Summary Judgments*, *supra* note 5. Indeed, Professor Epstein has argued that the courts should use publicly available information more often in this manner to dismiss cases. See Epstein, *Of Pleading and Discovery*, *supra* note 5.

ment discrimination case upon a motion to dismiss.<sup>59</sup> First, the new plausibility standard is more difficult for plaintiffs to meet than the old notice pleading standard. Second, because many employment discrimination cases are dismissed under the summary judgment standard, many employment discrimination cases are likely to be dismissed at the motion to dismiss stage where the same summary judgment standard is used and indeed less facts are available. Support for this argument that it is likely that more employment discrimination claims will be dismissed upon a motion to dismiss comes from preliminary studies by Professor Patricia Hatamyar, Professor Seiner, and Kendall Hannon.<sup>60</sup> They all found that courts have increased their rate of dismissal of employment discrimination cases since *Twombly*.<sup>61</sup>

The argument that a revolution is likely is also derived from the state of the law for pleading in employment discrimination after *Iqbal* and *Twombly*. Prior to *Twombly*, in *Swierkiewicz v. Sorema N.A.*, the Supreme Court stated that an employment discrimination plaintiff was not required to plead a prima facie case to defeat a motion to dismiss.<sup>62</sup> While others disagree on the status of *Swierkiewicz*,<sup>63</sup> *Swierkiewicz* is “effectively . . . dead”<sup>64</sup> after *Iqbal* and *Twombly*.

*Swierkiewicz* appeared to permit conclusory pleading, while in *Iqbal* and *Twombly*, the Court specifically rejected that “conclusory” allegations in a complaint would be sufficient upon a motion to dismiss.

. . . [T]he majority’s requirement of plausibility in *Iqbal* and *Twombly* was in effect heightened pleading that does not comport with *Swierkiewicz*. . . .

. . . [*Iqbal*, which emphasized the limits of discovery,] was different from *Swierkiewicz*, which had emphasized “liberal discovery” citing *Conley*.

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59. See Thomas, *supra* note 4, at 31–34.

60. See Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553 (2010); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010); Seiner, *supra* note 52; Kendall W. Hannon, Note, *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 (2008).

61. See Hatamyar, *supra* note 60, at 608–09; Seiner, *supra* note 60, at 118; Seiner, *supra* note 52, at 1029–31; Hannon, *supra* note 60, at 1837 tbl.3; see also Miller, *supra* note 20, at 20–21 & nn.67–68 (discussing lawyers’ perception and initial empirical evidence of significant effect of new standard on dismissal of employment discrimination and other cases). A recent Federal Judicial Center study surveyed plaintiff’s discrimination lawyers about their experiences with the new plausibility standard under *Iqbal* and *Twombly*. See LEE & WILLGING, *supra* note 40, at 11–12. Of the lawyers surveyed, 70.1% stated that the cases had affected their practice, though only 7.2% of those who had filed an employment discrimination case stated that they had a case dismissed on a motion to dismiss. *Id.*

A case may win on summary judgment and lose on a motion to dismiss with more evidence gathered through discovery. See Thomas, *supra* note 4, at 39. The Federal Judicial Center has shown that a plaintiff at least partially survived summary judgment 37.4% of the time when a court issued a decision on summary judgment in 2006. See Seiner, *supra* note 39, at 198–99.

62. 534 U.S. 506, 510–12 (2002).

63. See Seiner, *supra* note 39, at 193–95; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1322–23 (2010).

64. See Thomas, *supra* note 4, at 36.

... *Swierkiewicz* discussed the liberal notice pleading requirements and relied on, at least in part, the “no set of facts” language from *Conley* [which was “retire[d]” in *Twombly*]... to decide that the complaint in *Swierkiewicz* satisfied Rule 8.<sup>65</sup>

The Third Circuit has also concluded that *Swierkiewicz* was “specifically repudiated by both *Twombly* and *Iqbal*.”<sup>66</sup> If *Swierkiewicz* is dead, at least the prima facie case of discrimination must be plead in an employment discrimination complaint, if not more.<sup>67</sup> With this additional requirement, it is likely that employment discrimination cases will be dismissed more often under the new motion to dismiss standard.

The convergence of the motion to dismiss and summary judgment standards in addition to the effective death of *Swierkiewicz* suggest that a procedural revolution in employment discrimination may well be here, despite Professor Epstein’s opinion to the contrary.

#### IV. CONCLUSION

This Essay argues that the Supreme Court took *Twombly*—an oddball case with atypical costs—and created a new motion to dismiss standard that applies to cases with very different costs, including typical employment discrimination cases. *Iqbal*, although not involving the same type of costs as *Twombly*, also was an oddball case—not typical of the vast majority of cases. This Essay further argues that the Supreme Court has likely begun a procedural revolution in employment discrimination under the new standard despite the difference in costs in *Twombly* and *Iqbal* and typical employment discrimination cases.

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65. *Id.* at 35–36.

66. *Id.* at 36–37 (quoting *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)) (internal quotation marks omitted). Some other courts have disagreed. See *Miller*, *supra* note 20, at 31 nn.116–17 (citing decisions).

67. See *id.* at 34–38.

