The New Summary Judgment Motion:  
The Motion to Dismiss Under Iqbal and Twombly  
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Introduction  

Civil procedure scholars have extensively discussed the new 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 interesting development has not been explored.³ The standard for the motion to dismiss has evolved in such a way as to make

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¹ Professor of Law and Mildred Van Voorhis Jones Faculty Scholar, University of Illinois College of Law. Thanks especially to Joseph Seiner for his extensive comments regarding this article. Thanks also to the following for helpful discussions or comments regarding the article: Edward Brunet, Susan Harthill, Michael Solimine, and Adam Steinman. I also benefitted from discussions on the *Iqbal* topic on the civil procedure listserv. I welcome any comments regarding this draft.  
⁴ I briefly concluded after *Twombly* that “the 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).

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.
the motion to dismiss the new summary judgment motion. Despite different words in Federal Rules of Civil Procedure 12(b)(6) and 56 and no discovery before dismissal under 12(b)(6), the new 12(b)(6) dismissal standard now tracks 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 role for judges in litigation and a corresponding increased dismissal of employment discrimination cases. This essay 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 may no longer be good law. This essay further proposes that differences in the motions, including discovery, cost and the role of the courts, may call into question the propriety of the changes under Iqbal and Twombly.

I. THE NEW SUMMARY JUDGMENT MOTION

The motion to dismiss is the new summary judgment motion. To understand how this metamorphosis has occurred, this section 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 section describes how the motion to dismiss may have some of the same effects as summary judgment. Finally, this section 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. 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. American summary judgment significantly expanded the English procedure, among other things, to permit all parties to move for summary judgment against the defendant where no dispute existed regarding the existence of an agreement between the plaintiff and the defendant. 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.

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 effects. I also argue more generally that the new standard is inappropriate for several reasons. See infra text accompanying notes 173-83.

4 FED. R. CIV. P. 12(b)(6).
5 FED. R. CIV. P. 56.
9 See, e.g., Burbank, supra note 7, at 592.