

SYMPOSIUM PONDERING *IQBAL*

THE SUBSTANTIVE ORIGINS OF “PLAUSIBLE PLEADINGS”: AN INTRODUCTION TO THE SYMPOSIUM ON *ASHCROFT V. IQBAL*

by
*Edward Brunet**

Iqbal's use of the word "plausible" as the new standard for Rule 12(b)(6) motions is confusing at several levels. First, plausible, used as a procedural standard twenty-two times in the Iqbal majority opinion, comes with a substantive past. The Matsushita decision utilized plausible or variations on plausible in a substantive sense to mean that a claim "makes no economic sense." This use of plausible embraces economic theory and bears little resemblance to a procedural tool as set forth in Iqbal. Second, the Matsushita decision used plausible in the context of a defendants' motion for summary judgment. Indeed, Matsushita's majority used variations on plausible thirteen times, perhaps causing some lower courts to adopt plausibility as a surrogate new standard for assessing summary judgment. Of course, the 1986 summary judgment trilogy clearly articulated a new directed verdict standard for assessing Rule 56 requests. But all those plausibility usages in Matsushita created a feeling that the word has a significant procedural role to play and created further confusion. Was the Court in Twombly and Iqbal trying to collapse two standards, Rule 12(b)(6) and Rule 56 into one? This brief Essay argues that the choice of plausible in Iqbal and Twombly was a mistake and that this mistaken word selection should not affect summary judgment, a very different process than the motion to dismiss for failure to state a claim.

* Henry J. Casey Professor of Law, Lewis & Clark Law School. Thanks to Rochelle Martinsson and Wendy Hitchcock for valuable research, and Alexandra Lahav and John Parry for comments.

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I. INTRODUCTION

It comes as no surprise that this set of articles regarding *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² is diverse and, for the most part, individualistic. After all, these two blockbuster decisions have already spawned multiple interpretive essays searching to explain or rationalize the ambiguities presented by these cases.³ Every lawyer and scholar appears to have his or her own insight to *Twombly* and *Iqbal* and our numerous law reviews possess a keen appetite for the Holy Grail—the comprehensive answer to the riddle posited by these puzzling decisions. Readers of this set of articles are sure to be pleased. About the only missing article that I personally wish existed in this issue would be a careful study of the heightened pleading standard as used in so-called fact-pleading state jurisdictions. I welcome data regarding the impact of a heightened pleading standard in practice.

I confess to my own willingness to interpret these cases and offer my own idiosyncratic explanation of *Twombly* and *Iqbal* as part of my introduction. Read together, these two landmark decisions create a new procedural standard, that of plausibility, used to evaluate motions to dismiss brought under Rule 12(b)(6). I concede that the word plausible, as used and perhaps overused⁴ in Justice Kennedy's *Iqbal* opinion twenty-two times, sets forth this new standard. Yet, my contribution to this set of articles is to briefly chronicle the substantive origins of the word plausible. Focus on the earlier substantive use of plausibility might

¹ 127 S. Ct. 1955 (2007).

² 129 S. Ct. 1937 (2009).

³ See, e.g., Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873 (2009) (discussing *Twombly*'s cost and benefits and offering a theory that the heightened pleading goal is to screen cases that are truly meritless); Stephen B. Burbank, *Pleading and the Dilemmas of "General Rules,"* 2009 WIS. L. REV. 535 (2009) (analyzing court of appeals opinion in *Iqbal* and Supreme Court opinions in *Twombly*); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power Over Pleadings*, 88 B.U. L. REV. 1217 (2008) (exploring alternatives to *Twombly*); and A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1 (2009) (urging discovery solutions to cure changes in pleading norms).

⁴ See *infra* p. 8 tbl.1 for quantitative data on use of the "P" word, plausible, and its word forms (e.g., implausible, plausibility, plausibly, implausibly, implausibility).

advance our understanding of what has morphed into a quest to explain the vague “plausibility standard”⁵ now used to evaluate motions to dismiss under Rule 12(b)(6).⁶ I also explore and criticize the view that the “plausibility standard” set out for Rule 12(b)(6) motions is the same standard used to assess summary judgment requests.

In antitrust doctrine, the word plausible has been used to assess antitrust pleadings and proof in a manner that has less to do with the form of an allegation—“procedural plausibility”—and, in contrast, more to do with a substantive evaluation of proof or allegation advanced by a claimant. This contrasting and ambiguous use of what appears intended to be a critical procedural word—“plausible”—adds confusion and unnecessary complexity to the problem of how to coordinate motions to dismiss, summary judgment, and pre-motion discovery. The term plausible comes with a lengthy history and past origins that complicate what has become a difficult quest: the search for a coherent and explainable standard to govern Rule 12(b)(6) motions.

II. A SUBSTANTIVE HISTORY OF PLAUSIBLE PLEADINGS: A SECOND LOOK AT THE SUBSTANTIVE AND SURPRISING ORIGIN OF THE WORD PLAUSIBLE

Decades before *Iqbal* and *Twombly* the Supreme Court used the word plausible in a substantive way unrelated to procedural standards for both motions to dismiss for failure to state a claim for relief⁷ and motions for summary judgment.⁸ While I have set out a brief treatment of substantive plausibility previously,⁹ this brief Essay represents a more detailed attempt to explore the substantive use of a “plausible” pleading and proof requirement.

The word plausible played a starring role in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹⁰ an antitrust conspiracy decision that reinstated a district court grant of defendant’s motion for summary judgment. *Matsushita*, a major decision with both substantive antitrust and procedural importance, was mostly about the Court’s unwillingness to buy the plaintiff’s predation theory. The plaintiff alleged that a consortium of twenty-one Japanese television manufacturers had conspired to eliminate the plaintiff Zenith by selling their products for low prices in the target market, the U.S., while marketing the same products at artificially high prices in Japan.¹¹ The major problem with the

⁵ *Iqbal*, 129 S. Ct. at 1949.

⁶ FED. R. CIV. P. 12(b)(6).

⁷ FED. R. CIV. P. 12(b)(6).

⁸ FED. R. CIV. P. 56.

⁹ See Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 SMU L. REV. 493, 509–11 (2009); EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 322–35 (3d ed. 2006).

¹⁰ 475 U.S. 574 (1986).

¹¹ *Id.* at 577–78.

plaintiff's "high-low" case was its failure to proffer evidence of recoupment, the second element of a predation case.¹² The record showed the defendants losing money for a lengthy twenty-year period, step one of the predation phase, and never reaching predation Valhalla, the profitable period of recoupment.¹³

The *Matsushita* majority concluded that the plaintiff's proof was "implausible," a term said to mean the claim made "no economic sense."¹⁴ Indeed, the decision uses variations on the word plausible an amazing thirteen times,¹⁵ with the majority articulating multiple flaws in the plaintiff's case. As used here, the word implausible appears to be unbelievable in economic theory, seemingly a substantive use of plausible lacking a connection to specific pre-trial motions. In the words of the majority, the defendants "would most likely have to sustain their cartel for years simply to break even."¹⁶ The Court's skepticism toward predation cases was clear and it understandably relied on economic theory by citing and relying upon articles and books critical of predation.¹⁷

To an antitrust audience, the *Matsushita* decision represented a substantive repudiation of antitrust claims that alleged predation conspiracies. Antitrust scholars regarded the *Matsushita* decision as a rejection of cases advancing a predation theory¹⁸ and as requiring proof of "a reasonable prospect of recoupment."¹⁹ *Matsushita* also shed new light on the use of summary judgment as part of the trilogy of 1986

¹² *Id.* at 588–89; see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 340–41 (3d ed. 2005) (noting that "the discounted present value of the future period of monopoly pricing must be greater than the present losses that the predator incurs during the predatory period").

¹³ *Matsushita Elec. Indus. Co.*, 475 U.S. at 591. Of course, it may be argued that Japanese firms make decisions with a lengthy time assessment and as a cultural matter consider a period of twenty years a short duration. See Kanji Haitani, *Group Orientation and Japanese Business*, BUS. PERSPECTIVES, Jan. 22, 1990, at 13. However, the phase one price cutting period should take into account the likely duration, risks, and profitability associated with phase two, recoupment of lost profits. In a market as intensely competitive as the manufacturing of televisions and electronic goods generally, a twenty-year phase one seems an eternity. In the television factual context, predation presents a risky environment that challenges the story advanced by the plaintiff.

¹⁴ *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

¹⁵ *Id.* at 579, 581, 583, 587, 592–97.

¹⁶ *Id.* at 593.

¹⁷ *Id.* at 589–90 (citing Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); ROBERT H. BORK, *THE ANTITRUST PARADOX* 149–55 (1978)).

¹⁸ See, e.g., Harry S. Gerla, *A Micro-Microeconomic Approach to Antitrust Law: Games Managers Play*, 86 MICH. L. REV. 892, 892–93 (1988); and Wesley J. Liebeler, *Whither Predatory Pricing? From Areeda and Turner to Matsushita*, 61 NOTRE DAME L. REV. 1052, 1053 (1986) ("In *Matsushita*, the Supreme Court reminded us that predatory pricing is quite implausible.").

¹⁹ See Michael A. Salinger, *The Legacy of Matsushita: The Role of Economics in Antitrust Litigation*, 38 LOY. U. CHI. L.J. 475, 478 (2007).

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Supreme Court decisions that modernized Rule 56 and harmonized summary judgment with other procedural norms.²⁰

In addition to changing the substantive antitrust norms of predation, *Matsushita* contained several critical contributions to the evolution of pre-trial procedure. First, *Matsushita* probably laid to rest the narrow “slightest doubt” standard to evaluating summary judgment motions. Under this demanding yardstick a Rule 56 motion had to be denied if there was the slightest doubt regarding the existence of disputed factual issues.²¹ *Matsushita* exorcised this standard by requiring the nonmovant, Zenith, to demonstrate proof of the alleged predation conspiracy by “more than simply show[ing] that there is some metaphysical doubt as to the material facts.”²² While the substitution for the word “slightest” with the more erudite “metaphysical” creates a degree of uncertainty, the Court’s citations that follow the reference to “metaphysical doubt” make it very clear that slightest doubt is no longer the standard for summary judgment.²³ The majority confirmed its repudiation of slightest doubt by referring to an article by Charles Clark critical of decisions of his own circuit that employed the slightest doubt approach.²⁴

Justice Powell’s majority opinion replaced the doubt standard used to evaluate summary judgment motions with one identical to directed verdict. Whether the motion seeks “summary judgment or for a directed verdict, a [nonmovant] . . . must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.”²⁵ This major change was grounded in modern procedural theory. Procedure scholars Martin Louis and David Currie had each urged the merging of evaluative standards for summary judgment and directed verdict prior to the *Celotex* trilogy; Rule 56 decisions that employed a test identical to directed verdict were seen as a logical way to harmonize pretrial motions.²⁶ If, after a reasonable period of discovery, a pleader cannot

²⁰ The other two cases that complete the trilogy are: *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (adopting a directed verdict standard for the motion for summary judgment); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (requiring a burden shifting model for summary judgment).

²¹ See, e.g., *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945) (“A litigant has a right to a trial where there is the slightest doubt as to the facts . . .”); *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946).

²² *Matsushita Elec. Indus. Co.*, 475 U.S. at 586.

²³ See, e.g., *id.* at 586 (citing *Deluca v. Atl. Ref. Co.*, 176 F.2d 421, 423 (2d Cir. 1949) (Learned Hand, J.)).

²⁴ *Id.* at 586–87 (citing Charles E. Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 504–05 (1950)).

²⁵ *Id.* at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984)).

²⁶ See David P. Currie, *Thoughts on Directed Verdicts and Summary Judgment*, 45 U. CHI. L. REV. 72, 79 (1977) (asserting that the “purpose of rule 56 requires that summary judgment be granted if and only if the evidence before the court would justify a directed verdict if presented at trial”); Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974) (criticizing prevailing

advance proof supportive of the elements required by the burden of proof to be demonstrated at trial, a motion for summary judgment should be granted. *Matsushita* clearly adopts a more functional type of summary judgment rule, the mirror image of directed verdict except for timing, and a norm capable of foregoing trial where no disputed issues of material fact exist.

Moreover, the *Matsushita* decision should have laid to rest a supposed reluctance to grant summary judgment in complex cases involving a voluminous record. The record in the case contained a forty-one volume appendix, certainly large enough to be characterized as a complex case.²⁷ The case involved multiple parties and complicated theories of pricing that were proffered by expert testimony.

In contrast to the common sense inherent in the adoption of the directed verdict standard and the willingness to consider using Rule 56 in a complex antitrust case, other points in *Matsushita* have proved capable of achieving mischief and confusion. First and foremost, the majority's overuse of the word "plausible" was capable of misinterpretation and was read by some as setting forth a new standard for assessing summary judgment.

Several lower courts read the *Matsushita* decision as adopting a requirement that the nonmovant's evidence should demonstrate "plausible" proof.²⁸ Some cases mandate a plausibility showing in a diverse array of non-antitrust decisions such as breach of contract, RICO, ADA, and employment discrimination.²⁹

The *Matsushita* decision fails to adopt a standard of plausibility as a yardstick to assess summary judgment requests. Plausibility is not the standard used to assess summary judgment. To be sure, the majority opinion of Justice Powell flirted with the term "plausible" by using the

summary judgment doctrine because of its inability to intercept a factually deficient case or defense).

²⁷ *Matsushita Elec. Indus. Co.*, 475 U.S. at 577. The majority opinion referred to the case as "mammoth" and asserted that "[s]tating the facts of this case is a daunting task." *Id.* at 576, 579 n.3.

²⁸ See, e.g., *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 53 (3d Cir. 2007); *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1998) (noting in a breach of contract dispute "[i]f the factual context makes the non-moving party's claim of a disputed fact implausible, then that party must come forward with . . . evidence . . . to show that there is a genuine issue for trial"); *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (using implausibility as the standard of inquiry in an employment discrimination case).

²⁹ See, e.g., *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–02 (2002) (reversing a summary judgment for the employer in an ADA claim and describing the approach of a lower court as satisfying the "burden of production" by showing 'plausible accommodation' (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995))); *Firststar Bank Sioux City v. Beemer Enters., Inc.*, 976 F. Supp. 1233, 1243 (N.D. Iowa 1997) (denying summary judgment in a business dispute involving claims of fraud and breach of fiduciary duty because inferences from plaintiff nonmovant's proof were not implausible).

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word thirteen times.³⁰ But at no point does the *Matsushita* majority set forth a general summary judgment standard requiring Rule 56 proof opposing the motion to be plausible. Instead, the *Matsushita* majority clearly reaffirmed use of a directed verdict standard, a position also taken in *Anderson v. Liberty Lobby, Inc.*³¹

The Supreme Court also used the word “plausible” in a somewhat substantive manner in *First National Bank of Arizona v. Cities Service Co.*³² This 1968 decision affirmed a grant of summary judgment for defendants accused of conspiring to boycott plaintiff’s sale of Iranian oil, and, in so doing, displayed a willingness to employ summary judgment in antitrust conspiracy litigation despite an earlier celebrated warning to use the motion “sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators, and hostile witnesses thicken the plot.”³³ In distinguishing the expressed reluctance to use summary judgment in the cautionary *Poller v. CBS* decision, *Cities Service* viewed *Poller* as a decision in which “it was plausible for the [nonmovant] plaintiff to argue that CBS had embarked on a plan to drive him out of business.”³⁴ Here the word “plausible” appears to express a likelihood of conditions supporting predation, a seemingly substantive usage. As important, the word “plausible” also seems to bear no connection to summary judgment procedure.

The Supreme Court also utilized the “economic sense” requirement to assess whether a plaintiff’s prima facie claim was “plausible” in post-*Matsushita* decisions. In *Eastman Kodak Co. v. Image Technical Services, Inc.*,³⁵ citing *Matsushita*, the Court found it plausible to infer anticompetitive impact from Kodak’s refusal to sell replacement parts for its copy machines to the plaintiffs, independent copy machine service providers dependent on Kodak for their source of supply, and affirmed the court of appeals’ reversal of summary judgment.³⁶ Justice Blackmun’s majority opinion stressed the defendant’s market power and the difficulty of switching to non-Kodak copy machines, finding the plaintiffs’ summary judgment evidence to be “plausible.”³⁷ In *California Dental Ass’n*

³⁰ *Matsushita Elec. Indus. Co.*, 475 U.S. at 579, 581, 583, 587, 592–97.

³¹ 477 U.S. 242, 250–51 (1986) (emphasizing that the primary difference between summary judgment and directed verdict is that of timing).

³² 391 U.S. 253 (1968).

³³ *Poller v. CBS, Inc.*, 368 U.S. 464, 473 (1962).

³⁴ *Cities Serv. Co.*, 391 U.S. at 285.

³⁵ 504 U.S. 451, 477, 478 (1992) (affirming court of appeals reversal of summary judgment for defendant in antitrust dispute involving allegations of a monopoly).

³⁶ *Id.* at 456.

³⁷ *Id.* at 477 (emphasizing “locked-in customers, high information costs, and discriminatory pricing”). Justice Blackman’s majority opinion used “plausible” just once, when describing that the plaintiffs’ allegations of market power “make...economic sense.” *Id.* at 477–78 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

*v. FTC*³⁸ Justice Souter's majority opinion used plausible or variations on plausible seven times in reversing the court of appeals affirmance of an FTC order mandating a state dental association to stop restricting advertising.³⁹ Again, the word plausible seemed to have a substantive tone with the court asserting that the defendants's arguments "as a matter of economics" were "not implausible."⁴⁰

The Court has overused the word "plausible" and heightened confusion by using this ambiguous term in differing ways and contexts. Consider this table showing the use of plausibility in selective Supreme Court opinions.

TABLE ONE
USE OF "PLAUSIBLE" BY DECISION

YEAR	CASE	MAJORITY	DISSENT	TOTAL
2009	<i>Iqbal</i>	22	7	29
2007	<i>Twombly</i>	18	13	31
1999	<i>Cal. Dental</i>	7	3	10
1986	<i>Matsushita</i>	13	3	16
1968	<i>Cities Service</i>	2	0	2

The above table speaks for itself.⁴¹ It is purely quantitative. My reason for advancing the table is to demonstrate the disproportionate, repetitive use of the term in substantive decisions, such as *Matsushita*, and procedural decisions, such as *Twombly*.

Of course, the courts employ the word plausible and its variations routinely in a voice unrelated to Rule 12(b)(6) motions or substantive antitrust impact. The word "plausible" appeared at least three times in eight other Supreme Court opinions decided in 2008 and 2009.⁴² Most of these uses of the term were simply everyday usage, meaning believable or unbelievable.⁴³ In *Lujan v. Defenders of Wildlife*⁴⁴ the Court discussed the

³⁸ 526 U.S. 756 (1999).

³⁹ *Id.* at 771, 774–75, 778.

⁴⁰ *Id.* at 775. Justice Breyer's concurring and dissenting opinion used variations on plausible 3 times. *Id.* at 787, 790, 793.

⁴¹ Research regarding Table One on file with author.

⁴² If *Iqbal* is included, the total number of 2008 and 2009 opinions using variations on plausible is nine. See generally, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009); *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008); *Fla. Dep't of Rev. v. Piccadilly Cafeterias, Inc.*, 128 S. Ct. 2326 (2008); *United States v. Santos*, 128 S. Ct. 2020 (2008); *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008); *State of N.J. v. State of Del.*, 128 S. Ct. 1410 (2008); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

⁴³ See, e.g., *United States v. Santos*, 128 S. Ct. 2020, 2038 (2008) (asserting that "[t]here is no plausible reason why Congress would not have wanted the money laundering statute to apply to these financial transactions"). In another decision, *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), the Court reversed a summary judgment

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plausibility of harm risked by a summary judgment affiant who worked with a threatened species of animal but failed to cite prior plausibility precedents.⁴⁵ About the only pattern of use of “plausible” or its variations was repetitive reference to a statute construed in a “plausible” or “implausible” way.⁴⁶

My point is not to condemn everyday uses of the word plausible and its family. Rather, “plausible” strikes me as too general a word to be the basis of a judge-made revolution involving pleading and open access to courts, particularly when this word has had a previous specialized meaning in antitrust substantive doctrine.

Neither *Iqbal* nor *Twombly* develop, or even acknowledge, the substantive past of the word “plausible.” Justice Kennedy’s opinion in *Iqbal* fails to even cite *Matsushita*, the source of the “no economic sense” definition of plausibility. Justice Souter’s *Twombly* majority opinion cites *Matsushita* but fails to identify or discuss how the *Matsushita* Court focused on plausibility and even provided a prior working definition of plausibility.⁴⁷ The reader of these opinions cannot help but wonder whether the failure to analyze the substantive origins of plausibility was an unfortunate accident.

III. THE ROLE OF CHANGING SUBSTANTIVE LAW AND INFERENCES IN SUMMARY JUDGMENT

My thesis is that substantive legal rules have a major role in the mechanics of summary judgment. A textual reading of Rule 56(c) supports applying substantive norms to assess summary judgment motions. Summary judgment should not be granted unless there are no

for the employer in an ADA claim and characterized the approach of the court of appeals as satisfying the “burden of production” by showing ‘plausible accommodation,’” and by advancing proof that demonstrated that the proffered accommodation was “feasible for the employer.” *Id.* at 401–02 (quoting *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 138 (2d Cir. 1995) and citing *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 259 (1st Cir. 2001)). These citations in *Barnett* appear to be purely descriptive and not in any way intended to mark the anointing of a new feasibility or plausibility standard.

⁴⁴ 504 U.S. 555, 566–67 (1992).

⁴⁵ See also, *Wyoming v. Oklahoma*, 502 U.S. 437, 468 (1992) (briefly referring to whether Wyoming’s “speculations” regarding the proof were “plausible” in a motion for summary judgment raised in an interstate energy pollution dispute).

⁴⁶ See, e.g., *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1506 (2009) (asserting, in a Clean Water Act case, that the appellate court had made “a plausible interpretation of the statute”); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1840 (2009) (referring to “a plausible but constitutionally suspect interpretation of a statute” in a case involving FCC’s indecency doctrine); *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 543 (2008) (referring to an argument based on pre-emption of state trade practices legislation as an example of the pre-emption clause being “susceptible of more than one plausible reading”).

⁴⁷ *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968 (2007) (citing *Matsushita* as requiring something more than mere parallel conduct).

disputed questions of material fact and “the movant is entitled to judgment as a matter of law.”⁴⁸ While this familiar refrain seems mundane, it serves an efficient purpose of mandating a major role for the rule of law in the administration of summary judgment. Moreover, recognition that the rule of law is central to summary judgment legitimizes a concept of plausibility that includes substantive principles.

The importance of inference weighing bolsters the major role of substantive law in summary judgment. Substantive law may affect potential factual inferences relevant to a summary judgment motion. In a significant dictum, the *Matsushita* Court asserted that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.”⁴⁹ This important assertion cannot be limited to antitrust litigation and should be relevant to other types of civil cases. Moreover, this assertion again seems to empower judges with a substantive ability to fashion new norms by reconsidering factual inferences; with good reasons a judge can change a denial or grant of summary judgment based upon the existence of factual inferences into a new legal rule.⁵⁰

Consider the example of such a substantive limitation on inferences advanced in the *Matsushita* decision. In *Matsushita*, Justice Powell relied on *Monsanto v. Spray-Rite Service Corp.*,⁵¹ an antitrust conspiracy case, reasoning that conduct of the defendant that could be construed as either anticompetitive or precompetitive would not support a jury verdict.⁵² *Monsanto* provided an even clearer illustration when it asserted that a manufacturer’s receipt of complaints from licensed wholesalers about the performance of a rival licensed dealer would fail to support an inference of concerted action.⁵³ *Monsanto* created a new rule of antitrust conspiracy law by narrowing the range of inferences that in the past had been used to conclude proof of conspiracy and formulating a norm not allowing proof of complaints about a rival dealer to constitute an acceptable inference of conspiracy.⁵⁴

⁴⁸ FED. R. CIV. P. 56(c).

⁴⁹ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986); *cf.*, *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 771 (2008) (asserting that a statute may have a “range of plausible meanings” at the time of enactment (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000))). *See also*, Spencer Weber Waller, *Matsushita at Twenty: A Conference Introduction*, 38 LOY. U. CHI. L.J. 399, 401 (2007) (noting that plaintiff’s claim made little economic sense to the majority and that the “Court refused to allow any inference of unlawful conspiracy sufficient to defeat summary judgment”).

⁵⁰ Of course, a federal court must avoid making new law in the diversity jurisdiction context. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁵¹ 465 U.S. 752 (1984).

⁵² *Matsushita Elec. Indus. Co.*, 475 U.S. at 588.

⁵³ *Monsanto*, 465 U.S. at 764 (citing *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980)).

⁵⁴ The *Monsanto* decision went on to suggest that the dealer complaints did constitute proof of conspiracy but needed “additional evidence” to support a finding of conspiracy. *Id.* at 764 n.8. *See also*, Diane Wood Hutchinson, *Antitrust 1984: Five Decisions in Search of a Theory*, 1984 SUP. CT. REV. 69, 121 (1984) (describing *Monsanto*

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Antitrust is not the only type of substantive law used to affect the grant or denial of summary judgment based on limiting the range of inferences. At present the civil rights area of employment discrimination has been a fertile area of important legal changes that affect the disposition of motions for summary judgment. For example contemplate the considerable impact of the substantive burden-shifting paradigm required by *McDonnell Douglas Corp. v. Green*.⁵⁵ Once the plaintiff satisfies her prima facie proof requirements in a case relying on circumstantial evidence of discrimination, the burden of production shifts to the defendant who must advance a valid non-discriminatory reason for dismissing the plaintiff from employment.⁵⁶ If the defendant satisfies this requirement, the burden of production shifts back to the plaintiff who must show that the defendant’s reason for discharging her constitutes a pretext.⁵⁷

The burden shifting mandated by the *McDonnell Douglas* test is necessarily substantive. The paradigm deals with proof requirements and the allocation of proof between a plaintiff and a defendant. Inferences that might otherwise be relevant are eliminated and cabined by this burden shifting dynamic.

It is appropriate to emphasize that the *Iqbal* case itself was substantive. Several articles in this symposium issue view *Iqbal* as at least partially a substantive decision. Professor Nahmod’s contribution views the *Iqbal* decision as setting forth specific conditions on “supervisory liability under both § 1983 and *Bivens*” and asserts that this is a “substantive limitation.”⁵⁸ Professor Michael Dorf considers *Iqbal* to limit supervisory liability inappropriately in a context that is surely substantive.⁵⁹ Professor Tung Yin’s assertion that *Iqbal* “operates as a sort

as placing the “normal inference— independent action . . . squarely on the plaintiff” in conspiracy cases).

⁵⁵ 411 U.S. 792 (1973). The *McDonnell Douglas* decision “established an allocation of the burden of production . . . [in] discriminatory-treatment cases.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993). This allocation of proof responsibilities also applies to summary judgment motions. *See, e.g., Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000).

⁵⁶ *See, e.g., Wade v. Lerner New York, Inc.*, 243 F.3d 319, 322 (7th Cir. 2001) (affirming summary judgment for defendant in an age discrimination case and setting forth burden shifting paradigm).

⁵⁷ *See, e.g., Sanders v. Sw. Bell Tel., L.P.*, 544 F.3d 1101, 1105 (10th Cir. 2008), *cert. denied*, 130 S. Ct. 69 (2009) (setting out the *McDonnell Douglas* framework and explaining that a plaintiff who shows pretext proof “gets ‘over the hurdle of summary judgment’” (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997))); *Crawford v. City of Fairburn, Ga.*, 482 F.3d 1305, 1308 (11th Cir. 2007) (affirming summary judgment against a former police officer who had alleged a Title VII claim and asserting that if the employer proffers more than one legitimate reason for the adverse employment action, “the plaintiff must rebut each of the reasons to survive a motion for summary judgment”).

⁵⁸ Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability After Iqbal*, 14 LEWIS & CLARK L. REV. 279 (2010).

⁵⁹ Michael C. Dorf, *Iqbal and Bad Apples*, 14 LEWIS & CLARK L. REV. 217 (2010).

of judicial vouching for government official defendants” smacks of a substantive approach.⁶⁰ While there is nothing objectionable about raising points of substance and procedure in the same suit, it is questionable to mix new rules of substance into an opinion such as *Iqbal* in which a new standard of plausibility was advanced.

It is axiomatic that substantive norms can limit evidentiary inferences. In this Essay I emphasize that both antitrust law and civil rights law limit the range of inferences. Other areas of substantive law surely possess a similar impact. In this context, judicial use of a process like substantive plausibility that can screen allegations and proof for common sense seems appropriate.⁶¹ However, the next Part questions whether it is advisable to also use the same word, plausibility, as a working procedural yardstick.

IV. SHOULD THE STANDARD FOR MOTIONS TO DISMISS AND SUMMARY JUDGMENT BE IDENTICAL?

While the standard for summary judgment under the *Celotex* trilogy is clearly a directed verdict approach, the repetitive use of “plausible” in *Matsushita* has led some courts and commentators to consider “plausibility” the standard for Rule 56 motions.⁶² According to Judge Posner, only where the evidence is “utterly implausible” should the court feel unconstrained to use Rule 56.⁶³ *Iqbal* and *Twombly* advance the “plausibility standard” for evaluating the claimant’s allegations under Rule 12(b)(6).⁶⁴ Should these two leading procedures share the very same standard?⁶⁵

⁶⁰ Tung Yin, “*I Do Not Think [Implausible] Means What You Think It Means*”: *Iqbal* v. Ashcroft and Judicial Vouching for Government Officials, 14 LEWIS & CLARK L. REV. 203 (2010).

⁶¹ This assertion neither defends nor recommends use of the word plausible.

⁶² See *supra* notes 28–29. I note that even the Supreme Court has characterized summary judgment evidence as “plausible” in several decisions in a manner that could only be described as procedural. See, e.g., *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 568 (1994) (Ginsberg, J., dissenting) (concluding that FELA claims “should survive” summary judgment because plaintiffs “plausibly tied their afflictions to Conrail’s negligence”); *Profl Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 65 (1993) (describing nonmovant’s summary judgment argument in an antitrust dispute as a “plausible effort”).

⁶³ *In re Chavin*, 150 F.3d 726, 728–29 (7th Cir. 1998) (affirming summary judgment in a bankruptcy case and reasoning that the court had good reason to view the nonmovant’s evidence as “ridiculous”).

⁶⁴ FED. R. CIV. P. 12(b)(6); see *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (asserting that a “plausibility standard is not akin to a ‘probability requirement’” (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007))); *Twombly*, 127 S. Ct. at 1965 (2007).

⁶⁵ See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15 (2010) (noting similar standards for summary judgment and motions to dismiss).

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At a very personal level, I must admit that I shuddered the first time I read *Twombly* and *Iqbal*. My initial reaction was to question the rationale supporting the return to fact pleading and to oppose using the word “plausible” which, as here chronicled, had a prior very different use blocking plaintiff’s claims that failed to make economic sense. Why did Justices Souter and Kennedy have to use the word “plausible” and risk overlapping summary judgment and motion to dismiss standards?

A few days later I began to question my first reaction. Maybe the addiction to plausible was designed to harmonize these two different motions. Similarities between summary judgment and Rule 12(b)(6) exist: each is dispositive, each is used primarily by defendants, and each raises questions of timing relative to discovery essential to defeat the motion. Imagine a new rule that integrated these motions and harmonized discovery by permitting nonmovants who oppose a motion to dismiss to call a needed time out for focused and circumscribed discovery needed to defeat the motion, similar to requests under Rule 56(f).⁶⁶

Yet, there are several reasons to reject using the same standards for Rules 56 and 12(b)(6). We all know that motions to dismiss under Rule 12(b)(6) and motions for summary judgment under Rule 56 present contrasting terms and serve very different purposes.⁶⁷ Motions to dismiss assume the facts are true and summary judgment permits attacks on facts to eliminate a possible trial because the alleged facts are false. The summary judgment mantra of Judge Diane Wood, that “summary judgment ‘is the “put up or shut up” moment in a lawsuit,’”⁶⁸ occupies center stage in summary judgment purpose and represents a means to test the inadequacies of Rule 12(b)(6) challenges. Professor Friedenthal makes a similar point by asserting that “summary judgment serves the practical purpose of screening out doomed cases.”⁶⁹ Summary judgment safeguards, such as the need to weigh inferences against the movant,⁷⁰ appear restricted to summary judgment and inapplicable to motions to dismiss for failure to state a claim.

⁶⁶ Rule 56(f)(2) authorizes the court to “order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken . . .” FED. R. CIV. P. 56(f)(2).

⁶⁷ See Thomas, *supra* note 65, at 28–31.

⁶⁸ *Koszola v. Bd. of Educ. of Chicago*, 385 F.3d 1104, 1111 (7th Cir. 2004) (quoting *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003)).

⁶⁹ Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 116 (2002).

⁷⁰ See, e.g., *Island Software and Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 264–65 (2d Cir. 2005) (reversing, in part, summary judgment and asserting that district court needs to draw all inferences in favor of the nonmovant); *Plotke v. White*, 405 F.3d 1092, 1102 (10th Cir. 2005) (reversing summary judgment in a Title VII case because trial court failed to draw all inferences in favor of the nonmoving plaintiff).

V. CONCLUSION

This set of symposium articles presents diverse interpretations of the *Iqbal* and *Twombly* decisions. My introductory Essay focuses on the addition of the Court to the cryptic “plausibility standard.” The term has been overused and used in multiple contexts. I develop and tell a different and substantive story about “plausible,” namely that it has had a decades long use in antitrust substantive law as requiring a claim to make economic sense. Because of the prior substantive use of plausibility it seems highly questionable to re-use this term as a new procedural standard for assessing Rule 12(b)(6) motions to dismiss. Such repetitive usage of words that come with a history is misguided and only continues to confuse what already is a less than clear standard. Plausibility as a standard to test pleadings seems confused and should be scrapped.

It is surprising and more than a little disappointing that the *Iqbal* and *Twombly* opinions ignored the prior historical use of plausibility as a substantive word. The failure to at least acknowledge or explain plausible’s interesting past is, at the very least, a questionable way to forge a major shift in legal doctrine.

I also question a potential double dose of the plausibility standard in both motions to dismiss and summary judgment. Some may prefer using the same standard, that of “plausibility” to assess both a motion to dismiss and summary judgment. This approach blurs summary disposition, a device that attacks the lack of proof, with a 12(b)(6) motion, a procedure that attacks a far different defect, that of a failure to allege. Accordingly, summary judgment and motions to dismiss need to continue their distinctive roles and unique standards and should not utilize a common standard.