MEASURING THE IMPACT OF PLAUSIBILITY PLEADING

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INTRODUCTION

ASHCROFT v. Iqbal[1] and its predecessor, *Bell Atlantic Corp. v. Twombly*,[2] introduced a change to federal pleading standards that had remained essentially static for five decades.[3] Both decisions have occupied the attention of academics, jurists, and practitioners since their announcement. *Iqbal* alone has, as of this writing, been cited by more than 95,000 judicial opinions, more than 1,400 law review articles, and innumerable briefs and motions.[4] Many scholars have criticized *Iqbal* and *Twombly* for altering the meaning of the Federal Rules of Civil Procedure outside the traditional procedures contemplated by the Rules Enabling Act.[5] Almost all commentators agree that *Iqbal* and *Twombly* mark a break from the liberal pleading doctrine enunciated in 1957 by *Conley v. Gibson*.[6]

It is hard to avoid this conclusion, given the difference between the standards applied in the cases. *Conley* instructed courts to find pleadings sufficient where they provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests," and to dismiss complaints only

[1] 556 U.S. 662 (2009). In the interest of full disclosure, I, with others, litigated the *Iqbal* case from its inception in the U.S. District Court for the Eastern District of New York, arguing on behalf of the plaintiff in that court, the U.S. Court of Appeals for the Second Circuit, and the U.S. Supreme Court.

[2] 550 U.S. 544 (2007).

[3] The pleading standard for Federal Rule of Civil Procedure 8(a), first announced in *Conley v. Gibson*, 355 U.S. 41 (1957), had remained in place despite intermittent attempts to heighten pleading requirements in specific kinds of litigation. See, e.g., Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987, 998–1011 (2003) (summarizing different categories of heightened pleading).

[4] These figures were generated using the KeyCite function in the Westlaw database on August 11, 2015.

[5] See, e.g., Stephen B. Burbank, Summary Judgment, Pleading, and the Future of Transsubstantive Procedure, 43 Akron L. Rev. 1189, 1189–90 (2010); Helen Hershkoff & Arthur R. Miller, Celebrating Jack H. Friedenthal: The Views of Two Co-authors, 78 Geo. Wash. L. Rev. 9, 28–29 (2009); Arthur R. Miller, From *Conley* to *Twombly* to *Iqbal*: A Double Play on the Federal Rules of Civil Procedure, 60 Duke L.J. 1, 84–89 (2010); cf. James E. Pfander, Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court, 159 U. Pa. L. Rev. 493, 538–39 (2011) (suggesting that the Court's decisions in *Iqbal* and *Twombly* might reflect its own frustration with the rulemaking process).

[6] See Alexander A. Reinert, The Costs of Heightened Pleading, 86 Ind. L.J. 119, 121–25 & nn.11–24 (2011) (reviewing literature). But see, e.g., William H.J. Hubbard, A Theory of Pleading, Litigation, and Settlement 24 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 663, 2013) (concluding, after surveying empirical data and pleading jurisprudence, that "the effects of *Twombly* and *Iqbal* on pleadings practice in the federal courts has been modest").

where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[7] *Twombly* explicitly rejected the latter formulation and *Iqbal* clarified that a "plausibility" analysis applies to all Federal Rule of Civil Procedure 12(b)(6) motions for failure to state a claim.[8] Now, a claim will be dismissed if, after taking as true all nonconclusory allegations, no plausible entitlement to relief can be shown on the face of the complaint.[9]

The central question that continues to be widely debated is whether the introduction of *Iqbal* and *Twombly*'s plausibility framework has significantly affected the outcome of litigation in district courts.[10] Most recent work addressing this problem has focused on comparing across time the rate at which motions to dismiss are granted—if the rate increases between a pre-plausibility and post-plausibility time period, then one might draw the conclusion that plausibility pleading has increased the likelihood that a motion to dismiss will be granted. This is the approach that the Federal Judicial Center ("FJC") and many academics have used, with differing results.[11] Studies of opinions published in

[7] *Conley*, 355 U.S. at 45–47.

[8] *Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 561–63.

[9] *Iqbal*, 556 U.S. at 678.

[10] A minority of commentators has suggested that *Iqbal* and *Twombly* are not necessarily as consequential as most academics seem to believe. See generally Edward A. Hartnett, Taming *Twombly*, Even After *Iqbal*, 158 U. Pa. L. Rev. 473 (2010) (arguing for limited reading of *Iqbal* and *Twombly*); Adam N. Steinman, The Pleading Problem, 62 Stan. L. Rev. 1293 (2010) (suggesting that *Iqbal* and *Twombly* can be read consistently with prior precedent).

[11] The FJC released a study that concluded that *Iqbal* has not resulted in a statistically significant increase in dismissals in most categories of cases. Joe S. Cecil et al., Fed. Judicial Ctr., Motion to Dismiss for Failure to State a Claim After *Iqbal* (Mar. 2011), http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf [hereinafter Cecil et al., March 2011]; see also William H.J. Hubbard, Testing for Change in Procedural Standards, with Application to *Bell Atlantic v. Twombly*, 42 J. Legal Stud. 35, 57–58 (2013) (concluding that *Twombly* did not increase dismissal rates overall or the rates at which motions to dismiss were granted, but not studying impact of *Iqbal*). The FJC's data have limitations that I discuss below, see infra Section II.C, and the data themselves can be interpreted as supporting the finding that *Iqbal* has negatively affected plaintiffs. Jonah B. Gelbach, Note, Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery, 121 Yale L.J. 2270, 2277–78 (2012). Other scholarship suggests that *Iqbal* and *Twombly* are having a significant impact on the quality and quantity of federal litigation. See, e.g., Raymond H. Brescia, The *Iqbal* Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation, 100 Ky. L.J. 235, 239–41 (2012) (reporting that dismissal rates in housing and employment discrimination cases increased after *Iqbal*, but not after *Twombly*); Scott Dodson, A New Look: Dismissal Rates of Federal Civil Claims, 98 Judicature 127, 132 (2012) (reporting an overall increase in dismis-

online databases such as Westlaw or Lexis suggest a marked increase in the granting of motions to dismiss decided after *Iqbal* or *Twombly*, particularly in civil rights cases.[12] The FJC's 2011 study of all motions resolved—published or available only on PACER[13]—in twenty-three representative districts found an increase in the rate of civil rights dismissals that was not statistically significant.[14]

Unfortunately, each of these prior attempts to estimate *Iqbal* and *Twombly*'s effects has its own methodological weaknesses.[15] Indeed, some authors have suggested that the entire empirical enterprise is misguided, because of the dynamic relationship between legal change and litigant behavior.[16] For these scholars, simply measuring the change in the rate at which filed motions to dismiss are granted will not accurately reveal the extent to which plausibility pleading has changed the playing field. I will address some of these concerns below. But for the moment one need not go so far as to conclude that studying the success rate of motions to dismiss has no value[17] to appreciate that additional and better-designed studies are necessary.

sal rate of specific claims, with a higher dismissal rate based on factual insufficiency); Patricia W. Hatamyar, The Tao of Pleading: Do *Twombly* and *Iqbal* Matter Empirically?, 59 Am. U. L. Rev. 553, 556 (2010) (estimating that motions to dismiss were four times more likely to be granted after *Iqbal* as they were during the *Conley* era, after controlling for relevant variables); Reinert, supra note 6, at 161–63 (suggesting that *Iqbal* and *Twombly* standards will not provide a better filter for weeding out meritless cases).

[12] See Brescia, supra note 11, at 260–61; Hatamyar, supra note 11, at 556.

[13] Public Access to Court Electronic Records ("PACER") is an electronic public-access service that allows users, for a fee, to obtain case and docket information from federal appellate, district, and bankruptcy courts. The entire universe of opinions and orders filed in federal civil cases will be docketed and available in some form on PACER.

[14] The FJC concluded that any increase in dismissal rate in civil rights cases was less concerning because dismissals without prejudice increased, suggesting that plaintiffs were given the opportunity to amend their complaint. Cecil et al., March 2011, supra note 11, at 12–13. As I show below, this assumption is undercut by the data reported here, which suggest that plaintiffs did not or were not able to take advantage of their opportunity to amend in civil rights cases.

[15] See generally David Freeman Engstrom, The *Twiqbal* Puzzle and Empirical Study of Civil Procedure, 65 Stan. L. Rev. 1203 (2013) (critiquing empirical studies of the impact of plausibility pleading).

[16] See id. at 1223–24; Hubbard, supra note 11, at 36; Jonah B. Gelbach, Selection in Motion: A Formal Model of Rule 12(b)(6) and the *Twombly-Iqbal* Shift in Pleading Policy 31 (Aug. 29, 2012) (unpublished manuscript, available at http://ssrn.com/abstract=2138428); Morgan L.W. Hazelton, Procedural Postures: The Influence of Legal Change on Strategic Litigants and Judges (Preliminary Results) 3 (Aug. 24, 2012) (unpublished manuscript, on file with author).

[17] See Engstrom, supra note 15, at 1213–14.

This Article avoids the pitfalls of earlier research, presenting the most comprehensive analysis of the problem to date. The data presented here strongly support the conclusion that dismissal rates have increased significantly post-*Iqbal*, and in addition suggest many other troubling consequences of the transition to the plausibility standard. Based as it is on an analysis of more decisions than any prior research has canvassed in detail—opinions and orders from more than 4,000 counseled and 1,200 pro se cases—the results reported herein have considerable consequences for the ongoing debate about the impact of the plausibility pleading standard.

Focusing on decisions on motions to dismiss rendered in 2006 (pre-*Twombly*) and 2010 (post-*Iqbal*) in fifteen representative district courts that span the country,[18] this Article uses a methodology that is significantly different from prior studies. Like the FJC, and unlike other researchers, this Article examines the potential change wrought by *Iqbal* and *Twombly* in the entire universe of decisions—unpublished as well as published opinions *and* orders—made in 2006 and 2010 in a discrete set of district courts.[19] This eliminates the potential selection bias that undermines the studies based only on opinions published in online databases such as Westlaw or Lexis.[20] Unlike the FJC, however, this Article

[18] The results reported here reflect data gathered from the following courts: the Eastern District of Arkansas, Northern District of California, District of Colorado, District of the District of Columbia, Middle District of Florida, Northern District of Illinois, Southern District of Indiana, District of Kansas, District of Maryland, District of Massachusetts, Eastern District of New York, Southern District of Ohio, Eastern District of Pennsylvania, District of Rhode Island, and Northern District of Texas. Thus, district courts from every general-jurisdiction circuit court of appeals are represented.

[19] As explained below, I was able to capture the universe of cases in the districts studied by using the PACER system. See infra Part III. And although the FJC study covered more districts, this Article contains data on over 2,000 more opinions than the FJC, in part because of the different criteria used for inclusion and because the FJC collected cases only from the first six months of 2006 and 2010.

[20] See, e.g., Engstrom, supra note 15, at 1214–15 (noting that judges may be more likely to publish in Westlaw and Lexis opinions interpreting new cases like *Iqbal* and *Twombly*, as well as more likely to publish opinions involving full-scale dismissals, thus resulting in an overstatement of *Iqbal* and *Twombly*'s effects); Pauline T. Kim et al., How Should We Study District Judge Decision-Making?, 29 Wash. U. J.L. & Pol'y 83, 96–99 (2009) (discussing selection bias inherent in focusing on published opinions); Mehmet K. Konar-Steenberg & Anne F. Peterson, Forum, Federalism, and Free Markets: An Empirical Study of Judicial Behavior Under the Dormant Commerce Clause Doctrine, 80 UMKC L. Rev. 139, 151 (2011) (acknowledging and attempting to account for selection bias); Kimberly D. Krawiec & Kathryn Zeiler, Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories, 91 Va. L. Rev. 1795, 1832 & n.100 (2005) (acknowledging selection biases

focuses solely on cases that involve the sufficiency of pleading, and disregards cases that involve dismissals for statutes of limitations, inadequate legal theories, and the like. The plausibility framework, after all, principally marks a change in approach to pleading claims, not to other common defenses raised by Rule 12(b)(6) motions. Finally, this Article analyzes district court decisions using many variables that prior research in this area has ignored, including the institutional status of the plaintiff and defendant, characteristics of the judges who decided the motions to dismiss, and the ultimate outcome of the cases in which the motions were filed.[21] This study thus tests the assumptions and conclusions of prior research in this area, while also identifying new areas of inquiry in civil dispute resolution.

The data reported here suggest that many of the prior studies have failed to adequately capture the full impact of *Iqbal* and *Twombly* on the resolution of motions to dismiss in federal court. Contrary to the conclusions reached by the FJC in its 2011 study, this Article provides data showing that dismissals of employment discrimination and civil rights cases have risen significantly in the wake of *Iqbal*. These results remained even after controlling for potential confounding factors. This on its own would be significant, but the data also show that many other factors may influence the resolution of a motion to dismiss, including, perhaps most importantly, the institutional status of the plaintiff and defendant. Indeed, this Article suggests that individuals have fared poorly under the plausibility regime, at least when compared to corporate and governmental agents and entities. Individual plaintiffs were more likely to have their cases dismissed under the plausibility regime, while corporate and governmental plaintiffs generally did not see their dismissal rates change significantly between 2006 and 2010. These effects were of significant magnitude and again remained even after controlling for several potentially confounding variables. Finally, by analyzing data on the progress of cases *after* a motion to dismiss has been adjudicated, this Article adds two critical insights to the changes instituted by *Iqbal* and

inherent when using Westlaw and Lexis but arguing that they do not invalidate study of only publicly available databases); Richard E. Moberly, Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win, 49 Wm. & Mary L. Rev. 65, 84–85 (2007) (surveying entire population of cases to avoid selection bias problems); Martin H. Redish, Peter Julian & Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 Fla. L. Rev. 617, 652 n.163 (2010) (expressing caution in interpreting studies based solely on Westlaw and Lexis).

[21] See Engstrom, supra note 15, at 1221–22.

Twombly: (1) It shows that even where judges have dismissed cases without prejudice post-*Iqbal*, the denomination "without prejudice" does not guarantee that a plaintiff will take or be given the opportunity to amend her pleading after dismissal; and (2) the advent of heightened pleading has not resulted in higher quality claims, at least as measured by the ultimate resolution of those claims.

From these correlations flows not just an important descriptive account of the impact that plausibility pleading has had on the course of federal litigation. These data also provide support for two important normative arguments about the nature and role of pleading doctrine. The first depends in part on one's perception of the importance of vindicating the rights at stake in traditional public law disputes. For while one should not be shocked by the observation that civil rights and employment discrimination claims suffer under the plausibility pleading regime,[22] one could still be troubled by it given the historical role that federal courts have played in such cases.[23] There is a second normative frame through which to view these data, however, resting not on the importance of vindicating public law rights but rather on the less contested view that access to justice should not hinge on one's institutional identity. To the extent that the plausibility regime has exacerbated inequality in the courts between individual litigants on the one hand and corporate and governmental entities on the other, there should be wider agreement that such a change is to be lamented. Indeed, the data suggest that the Court accomplished through plausibility pleading what corporate interests could not, despite their best efforts, accomplish through the more

[22] After all, *Iqbal* was a civil rights case in which the Court found fault with the complaint's failure to adequately allege the defendants' culpable state of mind. The case therefore bore similarities to the many civil rights and employment discrimination cases that turn on allegations of a prohibited state of mind, and to that extent one should expect that plausibility pleading will have a disparate impact on those particular categories of cases.

[23] See, e.g., Elizabeth M. Schneider, The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 527–36, 556–62 (2010) (detailing the burden that the new pleading standard will impose on civil rights and employment discrimination plaintiffs); Lewis M. Steel & Miriam F. Clark, The Second Circuit's Employment Discrimination Cases: An Uncertain Welcome, 65 St. John's L. Rev. 839, 873 (1991). For an example of the Supreme Court's perception of the importance of the federal forum for employment discrimination cases, see *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974).

open, transparent, and deliberative rulemaking process.[24] Therefore, this Article provides a unique and heretofore-unexplored basis for questioning the wisdom of the transition initiated by *Twombly* and solidified by *Iqbal*.

The Article proceeds as follows: In Part I, I briefly review the changes to pleading wrought by *Iqbal* and *Twombly*. In short, those cases moved pleading jurisprudence from an emphasis on the notice provided to defendants to a focus on the plausibility of the plaintiff's claims. In Part II, I summarize and critique prior attempts to assess *Iqbal* and *Twombly*'s impact. Methodological weaknesses in those studies limit the value of their conclusions, although the FJC's study is by far the most comprehensive and thorough. In Part III, I describe the methodology of the study reported here, emphasizing the aspects that differentiate it from prior analyses. In Part IV, I discuss the significant results from the study. They reveal that the application of the plausibility pleading framework was associated with a significant increase in dismissal rates overall, and in civil rights and employment discrimination cases in particular. The correlation between plausibility pleading and increased dismissal in public law and related cases remains significant even after controlling for potentially confounding variables such as the district of origin, institutional status of plaintiff or defendant, and the political party of the president who nominated the decision-making district judge. In addition, the advent of plausibility pleading is associated with a significant increase in the disparity between individual litigants and corporate and governmental litigants. This relationship also remains significant after controlling for potential confounders.

In Part IV, I also consider various explanations that might be offered to minimize or defend the results observed here. Contrary to suggestions by other researchers, I show that these results cannot be minimized by examining whether dismissals are with or without prejudice. Rather, the effective dismissal rate of employment discrimination and civil rights cases has increased in 2010, even after taking into account whether a dismissal is categorized as with or without prejudice. In addition, I show that the common defense of heightened pleading—that it will result in higher quality lawsuits—is not supported by the data collected here. In

[24] See Mark Moller, Procedure's Ambiguity, 86 Ind. L.J. 645, 692–93 (2011) (suggesting that "stasis" among rulemakers is a consequence of the antagonism between the plaintiffs' bar and corporate interests).

other words, the empirics provide many reasons to question the advent of plausibility pleading and few if any reasons to celebrate it.

I. A BRIEF HISTORY OF PLEADING

As a doctrinal matter, there is little question that *Iqbal* and *Twombly* mark a change in pleading requirements. The Federal Rules of Civil Procedure, adopted in 1938, ushered in modern pleading rules, seeking to eradicate technical, claim-specific pleading that had dominated legal practice for decades.[25] Rule 8, requiring only a "short and plain statement of the claim showing that the pleader is entitled to relief,"[26] played a central role in the transition.[27] The Federal Rules were meant to displace "fact" pleading, which the rulemakers thought too often "led to wasteful disputes about distinctions that . . . were arbitrary or metaphysical, too often cutting off adjudication on the merits."[28] With Rule 8 setting out the factual detail required of pleadings, Rule 12 would act as a gatekeeper by testing the legal sufficiency of complaints by asking whether there was a legal claim that could be supported by the facts alleged.[29]

The interrelating roles of Rules 8 and 12 were established by *Conley v. Gibson*,[30] the Supreme Court's seminal case interpreting the federal pleading rules. In *Conley*, the Court construed Rule 8 to guarantee that sufficient notice be given to the defendant of the nature of the plaintiff's lawsuit.[31] A complaint satisfied Rule 8 without "set[ting] out in detail

[25] See Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 Colum. L. Rev. 433, 438–40 (1986). For an overall history of the Federal Rules, see generally Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 943–74 (1987).

[26] Fed. R. Civ. P. 8(a)(2).

[27] The goal of the Federal Rules was to create both simplicity and uniformity in pleading and to prevent premature dismissals. See Marcus, supra note 25, at 439 ("Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases 'fact,' 'conclusion,' and 'cause of action.'").

[28] Mark Herrmann, James M. Beck & Stephen B. Burbank, Plausible Denial: Should Congress Overrule *Twombly* and *Iqbal*?, 158 U. Pa. L. Rev. PENNumbra 141, 148 (2009) (providing Stephen Burbank's rebuttal).

[29] As such, Rule 12(b)(6) motions were meant to address the rare circumstance in which a plaintiff's claim for relief could be supported by no valid legal theory. See, e.g., Stephen B. Burbank & Stephen N. Subrin, Litigation and Democracy: Restoring a Realistic Prospect of Trial, 46 Harv. C.R.-C.L. L. Rev. 399, 407 (2011); Burbank, supra note 5, at 1191–92.

[30] 355 U.S. 41, 47–48 (1957).

[31] Id. at 47–48.

the facts upon which [the claimant] base[ed] his claim."[32] Additional facts could be obtained through Rule 12(e), among other devices.[33] The Court understood the role of Rule 12(b)(6) motions to be true to the original understanding of the drafters of the Federal Rules: Complaints could not be dismissed for failure to state a claim "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[34] Rule 12(b)(6) was to be used in those rare cases in which no viable legal theory supported a plaintiff's claim. A complaint could therefore satisfy Rule 8 and nonetheless be subject to dismissal under Rule 12(b)(6).[35]

In the lower courts, Rule 8's notice pleading standard dominated the resolution of prediscovery motions, at least rhetorically, for decades.[36] Until *Iqbal* and *Twombley*, the Supreme Court maintained a consistent commitment to *Conley*'s notice pleading rule, twice unanimously rejecting heightened pleading standards that lower courts had introduced in civil rights and employment discrimination cases,[37] even as it acknowledged that heightened fact pleading might have "practical merit[]."[38]

Everything changed with the Court's decisions in *Iqbal* and *Twombly*, in which the lower courts had adhered to the Court's prior remonstrations that heightened pleading standards may be obtained only "by the

[32] Id. at 47.

[33] Id. at 48 & n.9.

[34] Id. at 45–46.

[35] Bank of Abbeville & Trust Co. v. Commonwealth Land Title Ins. Co., 201 F. App'x 988, 990 (5th Cir. 2006) (per curiam); Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041 (7th Cir. 1999).

[36] Christopher Fairman has argued that notice pleading has rarely been the rule, at least in practice, pointing to examples from many areas of law in which lower courts have constructed a variety of heightened pleading standards. See Fairman, supra note 3, at 998–1011 (summarizing different categories of heightened pleading).

[37] See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512–13 (2002) (explaining that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits); Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993) (stating that the heightened pleading standard for § 1983 claims against municipalities is "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules"); see also Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

[38] *Swierkiewicz*, 534 U.S. at 514–15.

process of amending the Federal Rules," not by judicial fiat.[39] *Twombly* introduced three notable changes to pleading jurisprudence. First, the Court "retire[d]" the language from *Conley* that tested a Rule 12(b)(6) motion by whether "the plaintiff can prove no set of facts" consistent with the defendant's liability.[40] Second, *Twombly* replaced *Conley*'s standard with a "plausibility" inquiry,[41] a term foreign to Rule 12 adjudications.[42] Finally, the *Twombly* Court incorporated into its Rule 12 standard concerns that threats of burdensome discovery extracted settlements from defendants, even for claims of dubious merit.[43] In the Court's view, district courts had failed in reducing these risks through "careful case management."[44]

Initially, *Twombly* was subject to conflicting interpretations. Some observers and lower courts treated it as limited to cases in which the costs of discovery were likely to be high and settlement forcing.[45] For others, *Twombly* was interpreted to apply broadly to all civil actions.[46] *Iqbal* resolved this short-lived dispute by making it clear that plausibility pleading applied in all civil cases, not just antitrust claims.[47]

Iqbal also articulated a two-step process for evaluating the sufficiency of a complaint.[48] First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion.[49] Second, and consistent with *Twombly*, courts

[39] Id. at 515 (quoting *Leatherman*, 507 U.S. at 168) (internal quotation marks omitted); Iqbal v. Hasty, 490 F.3d 143, 158 (2d Cir. 2007); Twombly v. Bell Atl. Corp., 425 F.3d 99, 106–08 (2d Cir. 2005).

[40] *Twombly*, 550 U.S. at 561–63 (reviewing criticisms of *Conley* and concluding that expansive language of the case "has been questioned, criticized, and explained away long enough").

[41] Id. at 556–57.

[42] See Edward Brunet, The Substantive Origins of "Plausible Pleadings": An Introduction to the Symposium on *Ashcroft v. Iqbal*, 14 Lewis & Clark L. Rev. 1, 3–8 (2010) (reviewing use of word "plausible" in summary judgment context).

[43] *Twombly*, 550 U.S. at 558–59.

[44] Id. at 559 (internal quotation marks omitted).

[45] See, e.g., Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 488–89 (6th Cir. 2009) (quoting Gunasekera v. Irwin, 551 F.3d 461, 466 (6th Cir. 2009), in suggesting that *Twombly* was limited to "expensive, complicated litigation" (internal quotation marks omitted)).

[46] See, e.g., Abdullahi v. Pfizer, Inc., 562 F.3d 163, 172 n.6 (2d Cir. 2009); Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield, 552 F.3d 430, 434 n.2 (6th Cir. 2008).

[47] *Iqbal*, 556 U.S. at 684.

[48] Id. at 678–80.

[49] Id. In announcing this new gloss on pleading, the Court also held that allegations of state of mind, despite the explicit language of Rule 9(b), must be alleged with some factual detail.

must conduct a plausibility analysis that assesses the fit between the nonconclusory facts alleged and the relief claimed.[50] The judge may assess plausibility by calling on her "judicial experience and common sense,"[51] a surprising turn from the judicial role contemplated in *Conley*.[52]

Despite these changes, the *Iqbal* and *Twombly* Courts disclaimed any intent to adopt a heightened fact pleading standard.[53] Unsurprisingly, however, lower courts are confused as to the precise ramifications of the cases.[54] As the Ninth Circuit recently noted, the contrast is "perplexing" and leaves courts unsure whether to apply "the more lenient or the more demanding standard."[55] The confusion is caused both by inconsistencies within the opinion in *Iqbal* itself and a linguistic departure from the meaning the Court had previously given to terms like "conclusory" and "plausible."[56]

In sum, *Iqbal* and *Twombly* adopt "plausibility" pleading instead of *Conley*'s notice pleading, taking the relatively distinct roles accorded Rules 8, 12(b)(6), and 12(e), and conflating them to introduce a heightened fact pleading regime in direct conflict with the original purposes of the Federal Rules.[57] In so doing, the Court may have made "factual screening" a function of Rule 12(b)(6) and made Rule 12(e) "essentially irrelevant."[58] Under notice pleading, a complaint was sufficient if the al-

Id. at 686–87 (interpreting Fed. R. Civ. P. 9(b) to require more than "general" allegations for state of mind even where neither fraud nor mistake is alleged). The *Iqbal* Court's interpretation of Rule 9(b) "is arguably at odds with both the Rule's text and the Advisory Committee notes to Rule 9." Alexander A. Reinert, Pleading as Information-Forcing, 75 Law & Contemp. Probs. 1, 7 n.43 (2012).

[50] *Iqbal*, 556 U.S. at 678–80.

[51] Id. at 679.

[52] See *Conley*, 355 U.S. at 47–48.

[53] See *Iqbal*, 556 U.S. at 681; *Twombly*, 550 U.S. at 570.

[54] See, e.g., Horras v. Am. Capital Strategies, Ltd., 729 F.3d 798, 807 (8th Cir. 2013) (Colloton, J., concurring in the judgment in part and dissenting in part) ("*Iqbal* says that *Twombly* applies to all civil actions, . . . but *Swierkiewicz*, . . . reaffirmed by *Twombly*, . . . provides that the simplified notice pleading standard of Rule 8(a) likewise applies to all civil actions . . . ."); Luevano v. Wal-Mart Stores, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); In re Ins. Brokerage Antitrust Litig., 618 F.3d 300, 319 n.17 (3d Cir. 2010) (noting disagreement within Third Circuit regarding how to interpret *Swierkiewicz* in light of *Iqbal*); Swanson v. Citibank, N.A., 614 F.3d 400, 403 (7th Cir. 2010) (stating that courts are "still struggling" with how to apply plausibility pleading).

[55] Starr v. Baca, 652 F.3d 1202, 1215–16 (9th Cir. 2011).

[56] Reinert, supra note 49, at 22–28.

[57] Burbank, supra note 5, at 1191–92.

[58] Id. at 1192.

legations, taken as true, created the possibility that the pleader would be entitled to some kind of relief. Under *Iqbal* and *Twombly*, what might have passed muster under *Conley* may no longer be sufficient.

II. EMPIRICAL STUDIES OF THE PLAUSIBILITY EFFECT

Even if *Iqbal* and *Twombly* announced new standards to apply to pleading disputes, this does not establish that these cases have significantly changed how motions to dismiss in general are resolved. Since the decisions were announced, therefore, numerous scholars have attempted to measure their effects on pleading doctrine and practice. Anecdotally, there seemed to be overwhelming agreement that *Iqbal* and *Twombly* together worked significant changes in pleading practice.[59] But empirical studies have been mixed. The studies fall into three broad categories: (1) those based on opinions reported in the Westlaw and Lexis electronic databases, which generally found significant increases in dismissal rates in subsets of cases like civil rights and employment discrimination; (2) the FJC's 2011 study based on opinions and orders available through the PACER website, in which the authors found little evidence of an increase in dismissal rates post-*Iqbal*; and (3) studies that focused not on dismissal rates but on other measures of legal change. Although the FJC's study is in many ways more comprehensive than any other, even it has certain methodological limitations that are addressed below.

[59] See, e.g., Robert G. Bone, Plausibility Pleading Revisited and Revised: A Comment on *Ashcroft v. Iqbal*, 85 Notre Dame L. Rev. 849, 867–85 (2010) (maintaining that *Iqbal* has extended the plausibility analysis of *Twombly* in a dangerous direction); Kevin M. Clermont, Litigation Realities Redux, 84 Notre Dame L. Rev. 1919, 1932–34 (2009) (stating that in *Twombly*, the Court acted "with no empirical support that a problem existed, and with no exploration of the dimensions of that problem or the efficacy of the Court's newfangled cure"); Brooke D. Coleman, What If?: A Study of Seminal Cases As if Decided Under a *Twombly/Iqbal* Regime, 90 Or. L. Rev. 1147 (2012); Victor D. Quintanilla, Beyond Common Sense: A Social Psychological Study of *Iqbal*'s Effect on Claims of Race Discrimination, 17 Mich. J. Race & L. 1 (2011); Elizabeth M. Schneider, The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases, 158 U. Pa. L. Rev. 517, 527–36, 556–62 (2010) (detailing the burden that the new pleading standard will impose on civil rights and employment discrimination plaintiffs); A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. Rev. 431, 460–86 (2008) (criticizing *Twombly* on numerous grounds, including for imposing a standard that would screen out meritorious as well as meritless claims); see also Colleen McNamara, Note, *Iqbal* As Judicial Rorschach Test: An Empirical Study of District Court Interpretations of *Ashcroft v. Iqbal*, 105 Nw. U. L. Rev. 401 (2011) (arguing that decisions have created inconsistency because of their subjectivity).

A. Studies Based on Opinions Published in Electronic Databases

Both Joseph Seiner and Patricia Hatamyar Moore authored studies shortly after *Iqbal* and *Twombly* that purported to assess the effect of the decisions on resolutions of motions to dismiss.[60] Moore selected 500 district court opinions at random from the two years preceding *Twombly*, 500 decisions at random between the announcement of *Twombly* and *Iqbal*, and an additional 200 randomized opinions announced post-*Iqbal*.[61] Moore estimated that motions to dismiss were four times more likely to be granted after *Iqbal* was decided than they were during the *Conley* era, even after controlling for pro se status, circuit of origin, and type of civil case.[62] Moore has since updated the results of her study to account for some of the criticisms raised by the FJC, and she still reports findings consistent with a statistically significant increase in dismissal rates post-*Iqbal*.[63]

Like Moore, Seiner identified opinions through the Westlaw database, focusing on disability rights and employment discrimination cases decided a year before and after *Twombly*.[64] Seiner concluded that the rate at which motions to dismiss were granted (or the "grant rate") had increased after *Twombly* was decided, but that the correlation was not statistically significant.[65] Notably, Seiner included pro se litigants within his data, but he did not separately analyze dismissal rates for this category of plaintiffs.[66] Kendall Hannon also released a study immediately after *Twombly*—relying on data collection methods similar to Seiner's and

[60] See Hatamyar, supra note 11; Joseph A. Seiner, Pleading Disability, 51 B.C. L. Rev. 95 (2010) [hereinafter Seiner, Disability]; Joseph A. Seiner, The Trouble With *Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 U. Ill. L. Rev. 1011 [hereinafter Seiner, *Twombly* Trouble].

[61] Hatamyar, supra note 11, at 585. After excluding certain cases, Hatamyar (now Patricia Hatamyar Moore) ended up with 1,039 cases in her database. Id.

[62] Id. at 556, 589–90.

[63] See Patricia Hatamyar Moore, An Updated Quantitative Study of *Iqbal*'s Impact on 12(b)(6) Motions, 46 U. Rich. L. Rev. 603, 605 (2012).

[64] Seiner, Disability, supra note 60, at 116; Seiner, *Twombly* Trouble, supra note 60, at 1027–28.

[65] Seiner, Disability, supra note 60, at 118–19; Seiner, *Twombly* Trouble, supra note 60, at 1031–32.

[66] Seiner, Disability, supra note 60, at 117; Seiner, *Twombly* Trouble, supra note 60, at 1029 n.134.

Moore's—that found that the grant rate for civil rights cases was 41.7% pre-*Twombly* and 52.9% post-*Twombly*.[67]

Scott Dodson's 2012 study, also based on Westlaw opinions, is unique and informative in at least two respects: first, Dodson coded dismissals by claim rather than by case; and second, he distinguished between dismissals for legal insufficiency and those for factual insufficiency.[68] Dodson coded for several potential confounding variables, including the political party affiliation of the judge's appointing president, whether the plaintiff was represented by counsel, and case type.[69] Dodson did not, however, code for the presence of an amended complaint, a variable that proved important in the FJC's study.[70] Dodson reported an overall increase from 73% to 77% in the rate at which motions to dismiss were granted, with a more substantial 13 percentage point increase in the grant rate for factual insufficiency.[71] Indeed, his data revealed a decrease in dismissal rates for legal insufficiency post-*Iqbal*.[72]

More recently, Raymond Brescia examined the impact of *Iqbal* on grant rates in employment and housing discrimination cases found in the Lexis database over the 41-month period prior to *Twombly*, the 24-month period between *Twombly* and *Iqbal*, and the 19-month period between the decision in *Iqbal* and when the study began.[73] Brescia found that, although *Twombly* seemed to have no impact on grant rates, *Iqbal* had some impact.[74] Brescia also found that, consistent with the FJC's

[67] 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, 1837 (2008).

[68] Dodson, supra note 11, at 130–31. Dodson randomly selected 100 pre-*Twombly* and 100 post-*Iqbal* cases from each circuit, after conducting a broad search of Westlaw intended to identify all cases involving motions to dismiss. Id.

[69] Id. at 131 (coding cases as Civil Rights, Employment Discrimination, Tort, Contract, Intellectual Property, and Other). Dodson did not code financial instruments claims separately, see id., but other research suggests that this particular category of claims experienced an increased dismissal rate after *Twombly* and *Iqbal*. See, e.g., Cecil et al., March 2011, supra note 11, at 15 (finding increase in dismissal rates in financial instruments cases). In some of these cases, increased rates of dismissal could be related to the fact that they often involve allegations of fraud, which must be pleaded with particularity under Rule 9(b); both Dodson and I excluded claims that were subjected to a Rule 9(b) pleading standard. See Dodson, supra note 11, at 131.

[70] Dodson, supra note 11, at 132.

[71] Id. These correlations remained statistically significant after controlling for potential confounders. Id.

[72] Id.

[73] Brescia, supra note 11, at 262. Brescia, like this author, represented Mr. Iqbal in his litigation against the federal government and its employees. Id. at 238 n.11.

[74] Id. at 268, 269 tbl.1, 274–75, 276 tbl.7, 284.

study, litigants in discrimination cases were more likely to face motions to dismiss post-*Iqbal*.[75] Along the same lines, Victor Quintanilla studied claims involving allegations of employment discrimination on the basis of race and concluded that, at a statistically significant level, African American plaintiffs experienced a grant rate post-*Iqbal* that was more than twice as high as the rate pre-*Twombly*.[76]

Judged based on the collection of these studies alone, *Iqbal* and *Twombly* would appear to have had a significant impact on civil litigation in the federal courts, particularly in the critical area of civil rights litigation.[77] Nonetheless, because of the limitations of these studies discussed below, their results must be treated with caution.

B. Federal Judicial Center Study

In March 2011, the FJC released a long-anticipated study of the resolutions of motions to dismiss after *Iqbal*.[78] Using PACER, the FJC examined the resolution of motions to dismiss for the first six months of 2006 and 2010 in twenty-three different district courts (two district courts in each generalist circuit, plus the U.S. District Court for the District of Columbia).[79] The FJC initially excluded from its analysis prisoner cases, pro se cases, cases involving qualified or sovereign immunity, and motions to dismiss directed at counterclaims and crossclaims.[80] In

[75] Id. at 281, 284.

[76] Quintanilla, supra note 59, at 36, 39–40 (finding that dismissal rate increased from 20.5% pre-*Twombly* to 54.6% post-*Iqbal* for African American plaintiffs' claims of race discrimination and that white judges dismissed such claims at a higher rate than did African American judges).

[77] It is worth noting that one Westlaw-based study found no change either in overall dismissal rate or the rate at which motions to dismiss were granted. See Hubbard, supra note 11, at 49–50, 57–58. Hubbard's study, however, focused only on *Twombly*'s potential impact, which weakens its conclusions because of the serious question post-*Twombly* but pre-*Iqbal* regarding whether plausibility pleading was intended to be transsubstantive or to be reserved for complex cases like the antitrust action at issue in *Twombly*. Hubbard also evaluated data provided by the Administrative Office of the United States Courts, which I discuss below in Section III.D.

[78] Cecil et al., March 2011, supra note 11. The FJC study was updated in November 2011. See Joe S. Cecil et al., Fed. Judicial Ctr., Update on Resolution of Rule 12(b)(6) Motions Granted with Leave to Amend 1 (Nov. 2011), http://www.fjc.gov/library/fjc_catalog.nsf [hereinafter Cecil et al., November 2011].

[79] Cecil et al., March 2011, supra note 11, at 5.

[80] Id. at 6, 41–42 app. c; Cecil et al., November 2011, supra note 78, at 13–14 app. c. In its updated study, the FJC provided additional data regarding pro se filings, prisoner filings, and motions directed at counterclaims and crossclaims. See id. at 13–14.

addition to district of origin and time of decision, the FJC coded according to case type (Tort, Contract, Employment Discrimination, Civil Rights, Financial Instruments, or Other), how the motion was resolved (Grant All Relief, Deny All Relief, or Grant Some Relief), whether plaintiffs remained in the case (all, some, or none) and whether leave to amend was provided.[81] The FJC also contemplated coding for institutional status of the plaintiff or defendant (Individual, Corporation, Government, or Other), but did not report any analysis of whether those variables correlated with any outcomes.[82] Although the FJC observed that motions to dismiss were fifty percent more likely to be filed post-*Iqbal* and that the grant rate of such motions increased overall and in certain specific case types, it minimized these results for several reasons.[83]

First, after conducting regression analysis, the FJC concluded that most of the increase in grant rates was associated with cases involving financial instruments.[84] The FJC reasoned that because of the mortgage crisis associated with the recent recession, there were far more weak cases brought in 2010 by homeowners desperate to avoid foreclosure.[85] Second, the FJC determined that even in those cases in which motions to dismiss were granted, courts were far more likely in 2010 than in 2006 to provide that their dismissals were conditioned on an opportunity to amend the pleading.[86] In November 2011, the FJC released a study following up on cases in which plaintiffs sought leave to amend and concluded that the results did not alter the conclusions of the March 2011 study.[87] The November 2011 study also provided analysis of some of the cases the FJC had excluded in its March 2011 study, namely, prisoner cases, pro se cases, and cases involving claims or counterclaims, alt-

[81] Cecil et al., March 2011, supra note 11, at 5, 10 tbl.2, 14 tbl.4.

[82] See id. at 42 app. c, fig.c-1 (providing coding sheet). Joe Cecil reports that the study authors initially wanted to code for institutional affiliation, but were not confident that it could be accurately coded. E-mail from Joe Cecil to author (May 9, 2013) (on file with author).

[83] Cecil et al., March 2011, supra note 11, at 8, 13. The increase in filing rate was statistically significant at the $p<0.01$ level. Id. at 8, 9 tbl.1. The increase in the overall grant rate was statistically significant at the 0.01 level, as was the increase in grant rate for financial instruments cases. Id. at 14 tbl.4. The increase in grant rate for Contracts and Other categories of cases was statistically significant at the 0.05 level. Id. Although the FJC did not report actual *p*-values, this author determined that the increase in grant rates for civil rights cases was associated with a *p*-value of 0.06.

[84] Id. at 21.

[85] Id. at 21–22.

[86] Id. at 13.

[87] Cecil et al., November 2011, supra note 78.

hough these results were not disaggregated by case type other than prisoners' rights cases.[88]

C. Limitations of Prior Studies of Change in Grant Rates

Some of the pitfalls found in the studies described above were thoroughly catalogued by David Engstrom, causing him to conclude that recent empiricism has taught us "sadly . . . not much" about the impact of *Iqbal* and *Twombly* on litigation practice and procedure.[89] The primary weakness of research based exclusively on judicial opinions made available on Westlaw or Lexis is selection bias. The entire universe of denials or grants of motions to dismiss is not captured by those databases, and there is no reason to believe that opinions are randomly selected for inclusion in electronic databases.[90] Moore at least has recognized this difficulty in her most recent work and has concluded that there is little evidence of selection bias, but Brescia's results are to the contrary.[91] In any event, as will be discussed below, it is far better, resources permitting, to analyze the entire universe of decisions resolving motions to dismiss rather than the limited universe reflected in electronic databases.

A second weakness, applicable to both the FJC's studies and those conducted by legal scholars, is that studying the rate of dismissal may be of limited relevance if parties are changing their behavior as a result of changes in legal rules.[92] For example, one might expect post-plausibility

[88] See id. at 13–14 app. c.

[89] Engstrom, supra note 15, at 1213–14.

[90] Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 Iowa L. Rev. 821, 839 n.66 (2010) (detailing potential selection bias in the Hatamyar, Seiner, and Hannon studies); Engstrom, supra note 15, at 1214–15 (noting that judges may be more likely to publish in Westlaw and Lexis opinions interpreting new cases like *Iqbal* and *Twombly*, as well as more likely to publish opinions involving full-scale dismissals, thus resulting in an overstatement of *Iqbal* and *Twombly*'s effects); see also sources cited supra note 20. The potential bias present by focusing only on written opinions, whether published or unpublished, as opposed to orders, also was avoided by the methodology used here. See Kim et al., supra note 20, at 99–101.

[91] Brescia, supra note 11, at 259–61 (reporting increase in dismissal rate with and without prejudice that exceeds FJC's observed dismissal rates); Hatamyar Moore, supra note 63, at 608.

[92] See Hubbard, supra note 11, at 36 (stating that "in response to (for example) a new Supreme Court decision, plaintiffs and defendants may change their litigation strategy, settling cases that previously would have been litigated and litigating cases that previously would have settled," thereby changing the substance of decided cases); Gelbach, supra note 16, at 31 (demonstrating that if parties "respond to perceived changes in pleading policy," it is difficult to conclude much of anything from changes in outcomes of motions to dismiss); Ha-

attorneys to be more selective, filing fewer cases with fewer claims.[93] Moreover, the economic downturn might be expected to have an impact on the quality and quantity of claims pending in 2010 as compared to 2006, as well as on the economic stakes for the litigants.[94] Defendants might also be emboldened by *Iqbal* and *Twombly* to file motions to dismiss in cases that they never would have in the *Conley* era.[95] I discuss all of these potential limitations in greater detail below, after summarizing the data.

Third, the FJC's March 2011 study declined to include sets of cases that one might suspect would be most affected by *Iqbal*'s standard: pro se cases, prisoners' rights cases, and cases involving qualified immunity. Although the November 2011 update included pro se cases and prisoner cases, the FJC offered little additional analysis of these cases.[96] Moreover, it is not clear whether the FJC was successful in isolating judicial decisions deciding motions to dismiss based solely on the pleadings rather than motions to dismiss based on preemption, exhaustion of administrative remedies, and so on. Because the FJC has not yet released its dataset to the public, it has been impossible for this author to evaluate the quality of the FJC's data selection.[97]

Fourth, most other studies have not used multivariate regression to account for numerous variables, including case types, litigants, pro se status, courts of origin, and judges.[98] All of the prior studies failed to code for significant terms or they excluded significant areas of case law. For instance, many of the studies that relied on published cases did not separately analyze dismissals in pro se cases. Some focused on specific areas of litigation rather than all civil litigation. None of the prior studies focused on particular characteristics of the plaintiff, defendant, or judge deciding the motion. Other than Dodson's 2012 study, none of the prior studies provided detailed coding when a motion was partially granted or

zelton, supra note 16, at 3 ("[T]heory indicates that we likely do not have random samples before and after important changes in the legal system: litigants should adapt to change and such adaption can lead to bias results when only votes or rulings are considered.").

[93] See Engstrom, supra note 15, at 1223–24.

[94] See id. at 1212–13.

[95] Lonny Hoffman, *Twombly* and *Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss, 6 Fed. Cts. L. Rev. 1 (2012); Reinert, supra note 6.

[96] See Cecil et al., November 2011, supra note 78, at 13–14 app. c.

[97] I have been informed by the FJC researchers involved in the study that the data may be made publicly available in the future.

[98] See Engstrom, supra note 15, at 1218–19 (criticizing studies that fail to conduct multivariate analysis).

denied. And other than the FJC's limited review of outcomes of motions for leave to amend, none of the prior studies examined what happened in the litigation after resolution of the motion to dismiss, leaving a gap in our knowledge about how plausibility pleading is affecting the course of litigation outside of Rule 12(b)(6) motions.

D. Other Approaches to Studying the Plausibility Effect

The studies described to this point have focused principally on evaluating changes in the rate at which motions to dismiss are granted. Some scholars, however, question the wisdom of using changes in the grant rate as the measure of plausibility pleading's impact, because parties may have changed their behavior as a result of the announcement of *Iqbal* and *Twombly*. As noted above, the studies evaluating changes in grant rate cannot account for this potential confounder. Two studies are worth singling out for discussion here.

First, William Hubbard, in addition to examining published Westlaw opinions, also conducted an analysis of data from the Administrative Office of the United States Courts regarding cases filed before and after *Twombly*.[99] He tested the hypothesis that if *Twombly*'s standard was having an impact, the rate at which cases were dismissed by a motion to dismiss should increase post-*Twombly*, all else being equal.[100] By comparing dismissal rates between cases that were filed in a one-month period one year before *Twombly* and the one-month period leading right up to the announcement of *Twombly*, Hubbard sought to reduce the potential that any selection effect might explain differential experiences of the case. His data showed no change in the rate at which cases were dismissed by a motion to dismiss.[101]

There are limitations to Hubbard's study, some of which he acknowledges. First, even if cases are being dismissed at or near the same rate under plausibility pleading, that does not mean that the plausibility standard is having no impact on litigation. Plaintiffs may be limited to bringing fewer claims because more are subject to dismissal, even if some small part of the case survives. And plausibility pleading may impose additional costs on plaintiffs, again even if the plaintiff does not have her entire case dismissed. Second, there are methodological limita-

[99] See Hubbard, supra note 11, at 49–50 & app.
[100] See id. at 55.
[101] See id. at 55–56.

tions to Hubbard's analysis. As Hubbard recognized, the Administrative Office does not code specifically for Rule 12(b)(6) dismissals—instead they code such dismissals as "judgment on motion before trial," presumably including at least Rule 56 and Rule 12(c) motions within this code.[102] Nor does the Administrative Office coding distinguish between dismissals for legal versus factual insufficiency,[103] a distinction that is critical to evaluating the impact of plausibility pleading.[104] Finally, Hubbard excluded cases dismissed on grounds that he viewed to be "procedurally antecedent to a Rule 12(b)(6) motion," including dismissals for lack of jurisdiction or for failure to prosecute.[105] But these categories of dismissals do not necessarily precede resolution of a Rule 12(b)(6) motion.[106]

Like Hubbard, Jonah Gelbach has attempted to take account of party behavioral changes, but through a different lens. Relying on data produced in the FJC's study, Gelbach created a theoretical model to account for the probability that parties have changed their behavior in light of the plausibility standard.[107] Applying this model to the results of the FJC study, Gelbach calculated that the "lower bound" of plaintiffs negatively affected by plausibility pleading was 21.5% of all cases in which a motion to dismiss was found.[108] Gelbach's findings depend on some key assumptions,[109] but overall they demonstrate that where the rate at which

[102] Id. at 52. Gillian Hadfield reports that the Administrative Office's coding for pretrial dismissal is "reasonably reliable," although significantly more reliable in cases brought by individuals than in cases brought by organizations. See Gillian K. Hadfield, Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases, 57 Stan. L. Rev. 1275, 1307–08, 1307 tbl.7 (2005). Hubbard created what he described as an "arbitrary" line based on time to disposition to distinguish between which dismissals were under Rule 12(b)(6) and which were by summary judgment; but although arbitrary, he stated without elaboration that his results were not sensitive to adjusting the time frame. Hubbard, supra note 11, at 52–53.

[103] Id. at 52 n.22.

[104] See, e.g., Dodson, supra note 11, at 130.

[105] Hubbard, supra note 11, at 62 app.

[106] For instance, where federal claims are dismissed pursuant to Rule 12(b)(6), pendent state claims may be dismissed afterwards for lack of subject matter jurisdiction. And where a court grants leave to a plaintiff to amend in light of a granted Rule 12(b)(6) motion, the failure of a plaintiff to do so (or even to respond to a Rule 12(b)(6) motion) may result in a dismissal for failure to prosecute.

[107] Gelbach, supra note 11, at 2270, 2296–97.

[108] Id. at 2331.

[109] Id. at 2296–97 (assuming that cases are disputes involving a single claim between a single plaintiff and a single defendant, that the only motion to dismiss that can be filed is a Rule 12(b)(6) motion, and that such motions are always granted with prejudice). Gelbach

motions to dismiss are filed has increased from Time *A* to Time *B*, any observed increase in rates at which motions to dismiss are granted likely underestimates the impact of the changed pleading standard.[110] Thus, to the extent that the data reported here suggest a larger impact from plausibility pleading than that observed in the FJC's study, it is likely that Gelbach's model would predict an even greater "negative" effect on plaintiffs.

III. METHODOLOGY OF CURRENT STUDY

The data presented here report results from a study designed to fill in some of the gaps left by prior research. Most important, this study aims to take advantage of the powerful data available through individual district courts' PACER websites, which maintains both published and unpublished decisions from all U.S. federal courts.[111] Based entirely on decisions—whether contained in written opinions or one-page orders[112]—available on PACER, the study examines the resolution of motions to dismiss during the years 2006 and 2010 in most of the twenty-three district courts studied by the FJC. Although the FJC included motions resolved during only the first six months of each year, this study examined all decisions and orders released during the entire calendar year. The data reported here represent a subset of data, from fifteen district courts,[113] amounting to about 5,200 decisions, including more than 4,000 counseled cases.

Decisions on motions to dismiss were identified by searching the docket activity reports generated by PACER for all civil cases in which a docket event related to an order occurred. All decisions relating to the sufficiency of the pleadings, whether directed towards counterclaims or

recognized that these assumptions are unrealistic, but he adopted them to simplify the analysis, and was confident that they did not affect the generalizability of his conclusions. Id.

[110] Id. at 2319.

[111] See Engstrom, supra note 15, at 1208–09 (contrasting impact that PACER can have on civil procedure empirical research with prior periods of empirical inquiry).

[112] See Kim et al., supra note 20, at 101 (arguing that empirical studies of district court decisions should "encompass *all* decisions—whether or not published and whether or not accompanied by written reasons").

[113] The Eastern District of Arkansas, Northern District of California, District of Colorado, District of the District of Columbia, Middle District of Florida, Northern District of Illinois, Southern District of Indiana, District of Kansas, District of Maryland, District of Massachusetts, Eastern District of New York, Southern District of Ohio, Eastern District of Pennsylvania, District of Rhode Island, and Northern District of Texas are examined in this Article.

crossclaims or through a device such as Rule 12(c) or Rule 12(e), were included in the initial coding. If no opposition was filed—an extremely rare event—the decision was excluded from any subsequent analysis. This is in contrast to the FJC's analysis, which included such cases on the assumption that a failure to oppose a motion was equivalent to a concession that a pleading was insufficient.[114]

Decisions were excluded to the extent they related to the following legal or condition-precedent determinations: exhaustion of administrative remedies; statutes of limitations; preemption; existence of a private right of action; absolute immunity; and sovereign immunity. Decisions were excluded if pleadings were challenged based on failure to conform to a heightened pleading standard, such as that provided by Rule 9(b) or the Private Securities Litigation Reform Act. If a decision was rendered in a case that involved both heightened pleading standards and Rule 8 pleading standards, only that portion of the decision related to Rule 8 standards was coded. Similarly, if a decision was rendered that implicated legal determinations such as preemption *and* a determination of the sufficiency of the pleading, coding was limited to the latter determinations. Where a decision was issued without a written opinion, the briefs were consulted in an attempt to best characterize the nature of the resolution. No prior study has endeavored to provide this level of detail when coding opinions on pleading sufficiency.

Opinions were coded for more than 35 total variables, which were used to generate an additional 40 variables for the purpose of data analysis.[115] Key variables are listed in the Appendix. The case coding differed from that conducted in prior studies in many important ways. First, as discussed above, cases were coded for the institutional status of both the claimant and the movant, using three basic categories: individual, corporate, and governmental. Second, cases were coded for whether the plaintiff was represented by counsel *at the time* the motion was briefed and decided. Third, opinions which granted a motion to dismiss as to some

[114] The FJC's proposition is doubtful, for many courts dismiss for failure to file an opposition on the grounds that it constitutes a failure to comply with a court order (in those circumstances where the court has ordered a plaintiff to file a response). Even were the proposition true in the vast majority of cases, however, the goal of this study is to evaluate how judges apply *Iqbal* and *Twombly*, not to evaluate how litigants assess their chance of success under those cases.

[115] For example, it was occasionally useful to transform a categorical variable into multiple binary variables. The code for district court, for instance, could become twelve separate variables indicating whether or not a particular opinion was issued by a particular district.

claims but not others were coded as a partial grant, a partial denial, or neither, depending on how many claims were dismissed as compared with how many claims survived. This treatment contrasts with that of the FJC, which treated mixed outcomes as a subset of granted cases. Fourth, the identity of the district court judge and some of her characteristics (the nominating president, his political party, and the race and sex of the judge) were coded.[116] Finally, cases were coded for two postdecision variables: whether an amendment was filed subsequent to the decision on the motion to dismiss; and the ultimate resolution of the motion to dismiss. Many of these coding decisions were meant to avoid the weaknesses that have been identified in prior empirical literature.[117]

Based on experience coding the cases,[118] several variables in particular stand out as requiring careful examination of the case file. First, it was often difficult to assess the type of case brought by a plaintiff. In particular, although the FJC study identified many cases falling into the category of "Financial Instruments" claims, the data reported here do not. This may be because an effort was made in the instant study to eliminate any cases in which a motion was directed at legal issues such as preemption or whether a particular statute provides a right of action, cases that may be included in the FJC sample.[119] Moreover, like the FJC study, many cases in the instant dataset were categorized as "Other." Further analysis of these cases may be necessary to fully evaluate the impact of *Iqbal* and *Twombly* on resolution of motions in this case category.

The second variable that was problematic to code was type of dismissal (that is, with or without prejudice to further amendment). In the FJC study, one critical finding was that increases in grants of motions to dismiss in 2010 appeared to be limited to cases in which leave to amend was provided as part of the grant of the motion. As this author coded for this variable, however, it became evident that district courts often did not specify whether a dismissal was with or without prejudice or whether the dismissal contemplated further amendment. In the FJC study, the researchers assumed that if a court did not specify that leave to amend

[116] Judicial ideology scores also were coded, using Christina Boyd's useful dataset. See Christina L. Boyd, Federal District Court Judge Ideology Data, http://cLboyd.net/ideology.html (last visited Oct. 12, 2015). Analysis of these data will be the subject of a future paper.

[117] See Engstrom, supra note 15, at 1221–22.

[118] All coding was performed by this author.

[119] See Cecil et al., March 2011, supra note 11, at 22–23.

was granted, the dismissal should be considered to be with prejudice. Even though this assumption is consistent with Federal Rule of Civil Procedure 41(b), it is not clear that this assumption is warranted, absent further follow up. Nonetheless, for ease of comparison with the FJC's data, the data presented here will be based on the FJC's assumption, unless otherwise specified. One additional difficulty with coding for dismissal type is that courts often dismiss some claims with prejudice and others without prejudice. I followed the FJC's practice, which was to code a dismissal as "without prejudice" if at least one claim was dismissed in this manner.[120]

Finally, as discussed above, in some cases a court granted only part of a motion to dismiss. The FJC and most other researchers treated all such decisions together, and for purposes of analysis categorized them as a subset of granted motions.[121] In this study, each such opinion was categorized as either a partial grant or a partial denial. Outright grants and outright denials were then combined with their partial relations to provide an overall grant or denial rate. Some might object that this obscures rather than clarifies any potential changes in dismissal rates between 2006 and 2010. For several reasons, however, I find this approach preferable at least for the moment. First, the vast majority of resolutions were either outright grants or outright denials, and therefore adding the partial grants or partial denials did not affect overall measures in any significant way.[122] Of the motions that were not entirely granted or denied, partial grants increased significantly in 2010 for both pro se and counseled cases.[123] In other words, failing to distinguish between partial

[120] See id. at 5. This decision obviously could underestimate the extent to which other claims within the same case are dismissed with prejudice.

[121] See Engstrom, supra note 15, at 1220–22. Scott Dodson's excellent article is the one exception to the general failure of researchers to conduct claim-based analysis of the impact of *Iqbal* and *Twombly*, although his study is Westlaw based. See Dodson, supra note 11, at 130–32. In this respect, my methodology is not quite as granular as Dodson's because I have conducted claim-level coding only where a judge grants a motion to dismiss in part. See infra notes 140–42 and accompanying text. Where a judicial decision grants or denies a motion in full, I have not coded for how many claims were the subject of the motion or whether they included all claims contained in the plaintiff's complaint.

[122] About 81% of decisions in both 2006 and 2010 were outright grants or denials. When one limits the data to counseled cases, 20.3% of decisions in 2006 were partial grants or denials, the same percentage observed in 2010.

[123] In 2006, of the opinions in counseled cases that were partial grants or denials, 25.6% were partial grants, compared to 36.2% in 2010 (p=0.001). For pro se cases, the partial grant rate increased from 42% in 2006 to 51.3% in 2010, but the results do not meet any standard of significance (p=0.423).

grants and partial denials obscures the difference in the resolution of motions in 2006 and 2010. Second, it is important to remember that some decisions that are coded as outright grants or outright denials could still relate to only a very small part of a case. Perhaps a defendant moved to dismiss only one particular claim, or perhaps only one or two claims were resolved on pleading grounds (rather than on the legal grounds mentioned above that were excluded from analysis). Given these limitations built into the data, the choice to consolidate partial grants with wholesale grants and partial denials with wholesale denials is appropriate.

Thus, in contrast to every prior study, I have attempted claim-level coding of dismissals when a court partially grants a motion to dismiss, while fully accounting for those judicial decisions that result in a complete dismissal of a plaintiff from court.[124] In this sense, this study is my attempt to account for what Engstrom refers to as the "social welfare" implications of plausibility pleading.[125] And it ultimately offers a counter to Engstrom's observation that the more rigorous studies of plausibility pleading have tended to report smaller effects than have less rigorous ones.[126]

IV. RESULTS

The following summary of results includes decisions from 15 district courts: the Eastern District of Arkansas, Northern District of California, District of Colorado, District of the District of Columbia, Middle District of Florida, Northern District of Illinois, Southern District of Indiana, District of Kansas, District of Maryland, District of Massachusetts, Eastern District of New York, Southern District of Ohio, Eastern District of Pennsylvania, District of Rhode Island, and Northern District of Texas. In total, this sample represents more than 5,300 cases. All data were analyzed using Stata 10.1 software. For all two-way tables, significance testing was conducted using Pearson's chi-square testing, providing a two-tailed *p*-value.[127] Regression analysis was conducted using the lo-

[124] In Scott Dodson's research, he conducted claim-level coding, but did not follow the cases through to determine when claimants were left with zero remaining claims. Dodson, supra note 11, at 130–31.

[125] See Engstrom, supra note 15, at 1229–30.

[126] See id. at 1231–32.

[127] There is a good argument that using two-tailed significance testing is a conservative means to assess statistical significance. One-tailed testing is likely more appropriate for as-

gistic regression command (logit) from Stata; results are discussed where applicable and provided in the Appendix. As a general matter, I report all *p*-values, whether they meet different levels of statistical significance or not. Readers can decide for themselves the acceptable level of risk that chance accounts for a result. I have highlighted in bold those results where the *p*-value is below 0.10, on the assumption that the 0.10 level of significance is the point at which a debate emerges as to acceptable standards of significance testing. As is discussed below, choosing 0.10 rather than 0.05 or 0.01 as the cutoff for significance testing may create room for debate in assessing certain relationships, but for most of the relationships I focus on, the correlation between a post-*Iqbal* decision maker and increased rates of dismissal was almost always significant at the 0.05 level and often at the 0.01 level.

A. Overall Results

Tables 1 and 2 summarize the outcome of motions to dismiss in 2006 and 2010 according to whether the plaintiff was represented by counsel.[128] Figure 1 depicts this visually for counseled cases, dividing grant rate for motions to dismiss according to month of decision. For both categories of cases, rates of dismissal increased in 2010 by at least ten percent. For pro se cases, perhaps what is most significant about this observation is that grant rates were already quite high in 2006 (three-quarters of motions to dismiss pro se claims were granted in 2006), so the increase to an almost ninety percent grant rate in 2010 nearly extinguishes any chance that a pro se complaint will survive a motion to dismiss.

Table 1: Outcome in Counseled Cases

Outcome	2006	2010	Change in Grant Rate	*p*-value
Denied	1,048 (63%)	1,048 (48%)		
Granted	624 (37%)	1,121 (52%)	+15%	<0.001
Total	1,672	2,169		

sessing the relationship herein, given that it is doubtful that plausibility pleading would operate to reduce the likelihood of dismissal.

[128] In 2006 and 2010, a small percentage of cases (approximately five percent) were neither grants nor denials, because an equal number of claims survived and were dismissed by the district court. These cases are excluded from analysis throughout.

Figure 1: Outcome in Counseled Cases, by Month

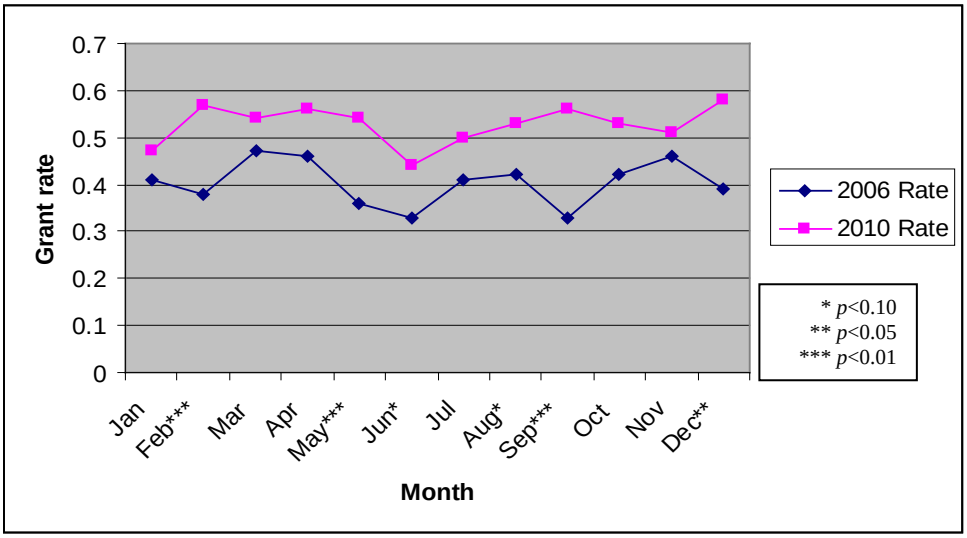

Table 2: Outcome in Pro Se Cases

Outcome	2006	2010	Change in Grant Rate	*p*-value
Denied	124 (25%)	104 (14%)		
Granted	372 (75%)	623 (86%)	+11%	<0.001
Total	496	727		

The data also offer some insight into the suggestion by some researchers that *Iqbal* and *Twombly* are less relevant to the resolution of pro se cases.[129] According to the FJC, because judges are instructed to be lenient when reviewing pro se filings, there was doubt as to whether *Iqbal*'s standard would do much work in such cases. Table 2 casts doubt on this assumption, but there is additional evidence that courts considered *Iqbal* and *Twombly* to govern the resolution of motions to dismiss directed at pro se complaints: In pro se cases, courts referenced *Iqbal* or *Twombly* in 84% of their decisions. In counseled cases, the cases were referenced in 81% of decisions. Notably, dismissal was more common when opinions in counseled cases mentioned *Iqbal* or *Twombly*, as com-

[129] Cecil et al., March 2011, supra note 11, at 6 n.10.

pared to when no citation was made to those cases, but there was no significant difference in pro se cases.[130]

Of course, as the FJC observed, it is possible that overall increases in the rate at which motions to dismiss are granted may be limited to only certain types of cases. Thus, Table 3 reports the change in grant rates in counseled cases, by type of case. Similar to the FJC study, grant rates increased for almost all case types in 2010. Moreover, although the increase in grant rate in civil rights cases in the FJC study was of borderline statistical significance, in the dataset analyzed here, the increase is both large (an eight percent increase) and it meets any reasonable definition of "statistical significance."

[130] The dismissal rate increased from 45% to 53% in counseled cases (p=0.004). For pro se cases, the dismissal rate was 90% when the cases were not cited and 85% when the cases were cited (p=0.172).

Table 3: Outcome in Counseled Cases, by Case Type

Outcome, by Case Type	2006	2010	Change in Grant Rate	*p*-value
Tort				
Denied	67 (63%)	74 (53%)		
Granted	39 (37%)	65 (47%)	+10%	0.118
Total	106	139		
Contract				
Denied	231 (69%)	282 (59%)		
Granted	103 (31%)	199 (41%)	+10%	0.002
Total	334	481		
Employment Discrim.				
Denied	142 (64%)	113 (48%)		
Granted	79 (36%)	121 (52%)	+16%	0.001
Total	221	234		
Prison				
Denied	39 (65%)	31 (54%)		
Granted	21 (35%)	26 (46%)	+11%	0.242
Total	60	57		
Antitrust				
Denied	15 (48%)	17 (47%)		
Granted	16 (52%)	19 (53%)	+1%	0.924
Total	31	36		
Civil Rights				
Denied	217 (53%)	152 (34%)		
Granted	193 (47%)	293 (66%)	+19%	<0.001
Total	410	445		
Financial Instr.				
Denied	14 (52%)	60 (30%)		
Granted	13 (48%)	138 (70%)	+22%	0.025
Total	27	198		
Other				
Denied	323 (67%)	319 (55%)		
Granted	160 (33%)	260 (45%)	+12%	<0.001
Total	483	579		

As Table 4 shows, for pro se cases, most case categories have experienced an increase in dismissal rate in 2010 that meets traditional standards of significance testing. In certain categories of cases, the sample is not large enough to adequately test any potential correlation between changed litigation outcomes and the post-*Iqbal* time frames. Moreover, most pro se cases were so unsuccessful in 2006 that finding a statistically significant increase in 2010 would likely require additional data.

Table 4: Outcome in Pro Se Cases, by Case Type

Outcome, by Case Type	2006	2010	Change in Grant Rate	*p*-value
Tort				
Denied	2 (14%)	7 (54%)		
Granted	12 (86%)	6 (46%)	-40%	0.029
Total	14	13		
Contract				
Denied	6 (50%)	7 (33%)		
Granted	6 (50%)	14 (67%)	+27%	0.346
Total	12	21		
Employment Discrim.				
Denied	25 (43%)	19 (23%)		
Granted	33 (57%)	62 (77%)	+20%	0.014
Total	58	81		
Prison				
Denied	52 (32%)	42 (17%)		
Granted	111 (68%)	202 (83%)	+15%	0.001
Total	163	244		
Civil Rights				
Denied	28 (15%)	17 (8%)		
Granted	153 (85%)	190 (92%)	+7%	0.026
Total	181	207		
Financial Instr.				
Denied	3 (23%)	5 (5%)		
Granted	10 (77%)	92 (95%)	+18%	0.019
Total	13	97		
Other				
Denied	8 (15%)	7 (11%)		
Granted	44 (85%)	57 (89%)	+4%	0.478
Total	52	64		

B. Analysis of Pro Se Outcomes

The majority of this Article will focus on outcomes in counseled cases. Before moving to that analysis, however, it is worth taking time to dig a little more deeply into the pro se outcomes. Prior research by the FJC identified the presence of a prior amendment to the complaint as a relevant variable for resolution of a motion to dismiss. The data for pro se cases are not quite consistent with the FJC's observations: As Table 5 indicates, the grant rate increased in 2010 for all pro se cases, whether or not an amendment had been made to the pleadings, but the rate was higher where there had been no prior amendment.

Table 5: Pro Se Dismissals, by Prior Amendment of Complaint

Outcome, by Prior Amendment	2006	2010	Change in Grant Rate	*p*-value
No Prior Amendment				
Denied	65 (23%)	45 (11%)		
Granted	212 (77%)	357 (89%)	+12%	<0.001
Total	277	402		
Prior Amendment				
Denied	59 (27%)	25 (18%)		
Granted	160 (73%)	266 (82%)	+9%	0.015
Total	219	291		

The variable of prior amendment appears more significant when one considers pro se cases according to type of case. The grant rate increased in civil rights cases, for example, without regard to whether an amendment had been filed, but the increase was not statistically significant in either category (Appendix Table 1).[131] Employment discrimination cases experienced an increased grant rate that was statistically significant only where no prior amendment had been made (Appendix Table 2).[132] In prison cases, by contrast, there was a statistically significant increase in

[131] See infra Appendix Table 1. Many of the tables discussed from this point forward are provided in the Appendix that follows the Conclusion.

[132] This asymmetry should be viewed with caution, because few pro se employment cases were adjudicated in 2006. See infra Appendix Table 2.

grant rate in cases in which a prior amendment had been filed *and* in cases in which there had been no amendment (Appendix Table 3).[133]

There is one other variable that, at least on the surface, appeared to play a possible role in the resolution of motions to dismiss in pro se cases: the political party of the president who nominated the district court judge issuing the relevant decision. As Tables 6 and 7 show, in prison and employment discrimination cases, the political party of the nominating president appears to correlate with increased grant rates. In employment cases, the dismissal rate increased for Republican-nominated judges, with a *p*-value that meets traditional standards of significance testing. In prison cases, the dismissal rate was significantly increased for Democrat-nominated judges.

Table 6: Pro Se Dismissals in Prison Cases, by Nominating Party of President

Outcome, by Nominating Party	2006	2010	Change in Grant Rate	*p*-value
Republican				
Denied	18 (21%)	25 (17%)		
Granted	66 (79%)	119 (83%)	+4%	0.449
Total	84	144		
Democrat				
Denied	33 (45%)	17 (19%)		
Granted	40 (55%)	74 (81%)	+26%	<0.001
Total	73	91		

[133] See infra Appendix Table 3.

Table 7: Pro Se Dismissals in Employment Discrimination Cases, by Nominating Party of President

Outcome, by Nominating Party	2006	2010	Change in Grant Rate	*p*-value
Republican				
Denied	12 (55%)	10 (24%)		
Granted	10 (45%)	32 (76%)	+31%	0.014
Total	22	42		
Democrat				
Denied	13 (36%)	9 (26%)		
Granted	23 (64%)	26 (74%)	+10%	0.344
Total	36	35		

The analysis to this point suggests that for pro se cases, the following variables may play some role in adjudications of motions to dismiss: case type (particularly employment discrimination, prison, civil rights, financial instruments, and "other"), presence of an amended complaint, political party of nominating president, and decision rendered in 2010. Accordingly, separate logistic regression analyses were conducted for prison, civil rights, financial instruments, and "other" cases, using the remaining independent variables, with outcome as the dependent variable.[134] Additional independent variables were tested (including district of origin, judicial demographics, and the like), and where relevant they were noted. The results for employment cases, prison cases, and civil rights cases are reported in Appendix Tables 4, 5, and 6, respectively.[135] For all categories of cases the plausibility pleading regime (represented by the variable "decision in 2010") was a significant and strong correlate with increased dismissal rates. Other than plausibility pleading, the only other variables that were significantly correlated with changes in dismissal rate were the presence of an amended complaint (for employment discrimination cases) and presence of the case in the District of the District of Columbia (for prison cases). For all of these case categories, de-

[134] For all regression results reported herein, regression analysis was conducted using the logistic regression command (logit) from Stata. This is an appropriate choice where the outcome under study is binary. To facilitate regression analysis, I converted all independent variables to binary ones where possible.

[135] Because there were so few pro se cases in other categories, I do not report regression results for them here.

cision in 2010 was more closely correlated with an increased chance of dismissal than any other independent variable except for variables linked to the district of decision.

In sum, there was a significant increase in the rate of dismissal of some categories of pro se cases. After controlling for independent variables, the increase in dismissal in employment discrimination, civil rights, and prison cases was correlated with the year 2010 (and implicitly the new pleading standards in operation during that time). These data suggest that, contrary to the assumptions of some prior researchers, pro se litigants are not being treated with additional solicitude in the era of plausibility pleading. They also indicate that additional research may help shed light on the extent to which judicial ideology plays a role in the adjudication of motions to dismiss in pro se cases.

C. Analysis of Counseled Cases

As described above, counseled cases, at least on the surface, revealed increases in grant rates that were statistically significant in the following categories of cases: employment discrimination, civil rights, financial instruments, and "other." Table 8 compares the results reported here for counseled cases with those reported by the FJC.

Table 8: Outcome in Counseled Cases, by Case Type, Comparison to FJC (2011)

Case Type	Change in Grant Rate (*p*-value)	FJC 2011 Change in Grant Rate (*p*-value)[136]
Tort	+10% (0.118)	+1.8% (0.866)
Contract	+10% (0.002)	+1.5% (0.758)
Employment Discrim.	+16% (0.001)	+3.2% (0.656)
Prison	+11% (0.242)	N/A[137]
Antitrust	+1% (0.924)	N/A
Civil Rights	+19% (<0.001)	+7.7% (0.084)
Financial Instr.	+22% (0.025)	+44.8% (<0.001)
Other	+12% (<0.001)	+7.5% (0.118)

[136] The FJC did not provide *p*-values, but I have calculated them using Stata 10.1.

[137] The FJC's November 2011 study provided data for prison cases, but did not disaggregate by counseled and pro se status. See Cecil et al., March 2011, supra note 11, at 41 app. c.

The data reported here are much more indicative of a *Twombly-Iqbal* "effect" than the data generated by the FJC, both in terms of absolute change in grant rate and in significance testing. There are many potential explanations for this variation. First, the methodology of this study was designed to focus solely on cases in which the sufficiency of pleadings was at stake, and not legal issues such as preemption, the existence of a cause of action, and the like. Thus, it is quite possible that a case that the FJC coded as a partial grant could be coded in multiple ways by my methodology: If the only arguments made by the movant that addressed pleading were rejected, but other arguments were accepted, then it would be coded as a wholesale denial; if the only arguments that addressed pleading were accepted, but others were rejected, it would be coded as a wholesale grant; and it could be coded as a partial grant or partial denial depending on how many pleading-based arguments were accepted and how many were rejected. Second, the FJC may have included within its cohort cases in which a district court denied a motion to dismiss as moot, because the plaintiff had filed an amended complaint after the motion to dismiss was filed. This inclusion would likely tend to overstate the number of denials of motions to dismiss in 2010, as opposed to in 2006.[138] Finally, in this study, an attempt was made to specifically code mixed decisions on motions to dismiss as either partial grants or partial denials. The FJC coded all such mixed decisions as grants. It turns out that mixed decisions from 2010 were more likely to be partial grants than in 2006 (35% of mixed decisions in 2006 were partial grants, as compared with 52% of mixed decisions in 2010).[139]

The FJC ultimately concluded that factors other than case type likely explained the variation in grant rates between 2006 and 2010. The variables that the FJC identified included district of origin and presence of an amended complaint.[140] In addition, the FJC concluded that to the extent there was an increase in dismissals in the category of civil rights cases, the increase was attributable to grants of motions to dismiss with leave to amend, and not grants with prejudice to subsequent amendment.[141]

[138] This is based on the assumption that, immediately post-*Iqbal*, many plaintiffs responded to motions to dismiss by amending the complaint to meet any objections contained in a motion to dismiss. As an anecdotal matter, I found many more such cases in 2010 than in 2006.

[139] The *p*-value for this difference was <0.001.

[140] Cecil et al., March 2011, supra note 11, at 18–19.

[141] Id. at 13–16.

With these variables in mind, it is useful to consider whether the data reported here are subject to the same caveats.

1. District of Origin

At least as an initial matter, it is not evident that there is significant variation in the rates of dismissal when considering the district of origin. First, every district except for the Eastern District of Arkansas and the Southern District of Ohio experienced an increase in dismissal rates between 2006 and 2010; the change in grant rate was statistically significant in the District of Colorado, the District of District of Columbia, the Northern District of California, the Middle District of Florida, the Northern District of Illinois, the District of Massachusetts, the Eastern District of New York, and the Eastern District of Pennsylvania.[142] The districts varied in their base dismissal rates in 2006 and 2010, but the increase in rates at which motions to dismiss were granted in 2010 ranged from 8% in the District of Maryland to 23% in the Eastern District of Pennsylvania.

One can examine variation between the districts in another way, namely, by comparing the dismissal rates in each year by district. This reveals whether there was a significant difference in dismissal rates in either 2006 or 2010 when one compares each district to all of the others combined. This analysis reveals some evidence of differences. In 2006, the District of Maryland had a higher dismissal rate (52%) as compared with all of the other districts combined (36%).[143] The Northern District of Illinois experienced a significantly lower dismissal rate in 2006 (31%) as compared to all other districts (38%), and also was significantly lower compared to other districts in 2010 (44% in the district compared to 53%

[142] The dismissal rate in the District of Colorado increased from 40% to 56% (p=0.058); from 33% to 47% in the Middle District of Florida (p=0.01); 42% to 53% in the District of Kansas (p=0.253); 52% to 60% in the District of Maryland (p=0.166); 41% to 52% in the District of the District of Columbia (p=0.08); 37% to 49% in the District of Massachusetts (p=0.074); 43% to 54% in the Eastern District of New York (p=0.057); 23% to 46% in the Eastern District of Pennsylvania (p<0.001); 41% to 54% in the Southern District of Indiana (p=0.299); 31% to 44% in the Northern District of Illinois (p=0.002); and 52% to 68% in the Northern District of California (p<0.001). In the Eastern District of Arkansas, the grant rate decreased from 45% to 36% (p=0.384). In the Southern District of Ohio, there was almost no change (51% grant rate in 2006 and 49% grant rate in 2010, p=0.783). The data collected from the District of Rhode Island were sparse—only 22 total decisions—and therefore of limited utility.

[143] p=0.001.

in all other districts).[144] And the Northern District of California had a higher dismissal rate in both 2006 and 2010, as compared with all other districts combined.[145] The Eastern District of Arkansas was unique, experiencing dismissal rates comparable to other districts in 2006, but significantly decreased dismissal rates in 2010, as compared to other jurisdictions.[146] While the evidence is mixed, taking all of these data together, it is necessary to further examine the possibility that increases in dismissal rates in 2010 are a function of the district of origin instead of case type or another variable.

2. Presence of Amended Complaint

As is the case with pro se complaints, the presence of an amended complaint appears to be relevant in certain categories of cases. In contracts, employment discrimination, and financial instruments cases, the grant rate increased between 2006 and 2010 only in cases in which the plaintiff had not amended prior to the motion to dismiss being filed (Appendix Tables 7, 8, and 9).[147] In civil rights and "other" cases, however, the rate at which claims were dismissed increased to a statistically significant degree whether a prior amendment had been filed or not (Appendix Table 10).[148] This suggests the advisability of including the presence of an amended complaint as an independent variable in logistic regression analysis.

3. Institutional Status of Parties

In this study, unlike any prior study, the institutional status of the claimant and the movant was coded for and analyzed for potential correlation with the outcomes of motions to dismiss. Appendix Table 11 shows the dismissal rate for counseled cases according to institutional status of the claimant. Notably, only individual claimants experienced an

[144] p=0.027 for the 2006 comparison; p=0.002 for the 2010 comparison.

[145] In 2006, the dismissal rate within the Northern District of California was 51%, as compared to 36% in all other districts (p<0.001). In 2010, the same rates were 67% and 49% (p<0.001).

[146] The dismissal rate in 2006 for the Eastern District of Arkansas was 45% as opposed to 37% for other districts (p=0.290). In 2010, by contrast, the same figures were 36% and 52% (p=0.025).

[147] This pattern also was observed in prison cases, but the numbers of cases were so small that they are not reported here. See infra Appendix Tables 7–9.

[148] See infra Appendix Table 10.

increase in dismissal rate between 2006 and 2010 that was statistically significant. Moreover, individual and corporate claimants experienced similar dismissal rates in 2006 (a 32% dismissal rate for corporate claimants and a 40% dismissal rate for individual claimants), but 2010 increased the gap significantly between the two categories of claimants (37% of corporate claimants who defended against a motion to dismiss had claims dismissed in 2010, barely an increase from 2006, compared to 58% for individual claimants in 2010). Thus, although one might expect individuals to fare worse than organizations as a general matter in our legal system,[149] the data also suggest that plausibility pleading has increased the extent of the inequality.

Appendix Table 12 shows the results of the correlation between institutional status of the movant and the dismissal rate. Individual, corporate, and governmental movants all experienced an increased success rate between 14 and 18% that was statistically significant.[150] Thus, taking Appendix Tables 11 and 12 together, in counseled cases, individual claimants did more poorly in 2010, and all movants did much better in 2010. When the data are broken down even further, however, it is apparent that individual claimants suffered an increased dismissal rate in 2010, no matter the institutional status of the movant.[151] When one looks at movant success rate disaggregated by the institutional status of plaintiffs, by contrast, individual movants experienced an increased success rate in 2010 only when the opposing party also was an individual.[152]

[149] See, e.g., Theodore Eisenberg & Henry S. Farber, The Litigious Plaintiff Hypothesis: Case Selection and Resolution, 28 RAND J. Econ. 92, 93 (1997) (revealing data confirming the hypothesis that individual litigants are more likely than corporations to file suit when they do not have a strong case and less likely to refrain from filing suit when they do have a strong case).

[150] These results remained even if one excluded civil rights and financial instruments cases from the analysis.

[151] When individual movants sought to dismiss claims brought by other individuals, the dismissal rate increased from 30% to 48% (p=0.050). The grant rate when corporate movants sought to dismiss individual claimants increased from 37% in 2006 to 55% in 2010 (p<0.001). And government movants seeking to dismiss individual claims were successful in 43% of 2006 motions, increasing to 64% of 2010 motions (p<0.001). Only the latter results are altered by excluding civil rights and financial instruments claims; this is to be expected, however, given that most cases in which individuals are claimants and governmental entities or agents are movants will be civil rights claims.

[152] When individual movants sought to dismiss claims brought by corporations, their success rate increased from 15% to 25%, but the result was not statistically significant (p=0.162). There was no difference in individuals' success rates when they moved to dismiss governmental claims.

To sum up so far, the data reported here suggest that the increase in dismissal rates between 2006 and 2010 cannot be explained away as an artifact of the financial crisis, as the FJC hypothesized. The dismissal rates in 2010 increased for most categories of cases, and were significantly elevated in cases involving civil rights and employment discrimination claims. Moreover, the data suggest that the pleading rules applicable in 2010 are much more favorable to corporations and governmental actors, at the expense of individual claimants. It is necessary to conclude this analysis by turning to regression analysis to test whether the relationships described above are observed even after controlling for independent variables.

4. Regression Analysis

The data described to this point suggest that some of the following variables may be correlated with an increase in dismissal rates in counseled cases: case type (particularly employment discrimination, financial instruments, or civil rights), presence of an amended complaint, district of origin, and decision rendered in 2010. In addition, the following additional independent variables were included in the analysis: political party of nominating president, nominating president, institutional status of claimant (individual, corporate, governmental, or other), and institutional status of movant (individual, corporate, governmental, or other). Accordingly, separate logistic regression analyses were conducted for each case type, using the remaining independent variables, with outcome as the dependent variable.

The results of the regression analysis for employment discrimination and civil rights cases can be found at Appendix Tables 13 and 14. They show that there is a strong (and statistically significant) relationship between dismissal in civil rights and employment discrimination cases and correlation with a decision rendered in the year 2010.[153] The only independent variable that is more closely associated with an increase in the likelihood of dismissal is the presence of the case in certain judicial districts, but even those correlations are rarely statistically significant. For civil rights cases, no other independent variable correlates more strongly than plausibility pleading with an increase in the likelihood of a grant of

[153] Consistent with the FJC study, there also is a strong correlation between dismissal of financial instruments cases and decision in 2010, but I have not provided separate regression analysis of this result.

a motion to dismiss. For employment discrimination cases, only presence in the Northern District of California is more closely correlated with a grant of a motion to dismiss than decision in the year 2010.

Regression analysis based on movant and claimant status also shows a strong correlation between an increase in dismissal rate for individual claimants (but not for corporate or governmental claimants) and decision rendered in 2010. The results for individual claimants are found in Appendix Table 15, and show that (aside from the presence of a financial instruments claim), decision in 2010 is the variable most strongly correlated with dismissal of claims brought by individual claimants. For corporate movants, success on a motion to dismiss has a healthy correlation with decision in 2010, although claimant-based variation is stronger (Appendix Table 16).[154] For governmental movants, the correlation between increased dismissal and decision in 2010 is stronger than any other variable (Appendix Table 17A).[155] For individual movants, the variable most correlated with an increase in dismissal rate other than decision in 2010 is presence in the Northern District of California (Appendix Table 17B).[156] And, consistent with the data described above, presence of a governmental or corporate plaintiff is negatively correlated with success of a motion to dismiss brought by individual movants.

The data thus suggest that overall, decision in 2010 is highly correlated with an increase in the likelihood that a case (or the majority of the claims challenged by motion) will be dismissed. The increased rate of dismissal associated with decision in 2010 is more pronounced for particular kinds of cases (employment discrimination, civil rights, and financial instruments), particular kinds of claimants (individual), and all categories of movants. While some other independent variables also are strongly correlated with an increased likelihood of dismissal (usually decision in a particular judicial district), few independent variables are as strongly correlated with dismissal as the variable that stands in for the new plausibility pleading standard.

D. Potential Caveats

There are at least three potential responses to the observations described above. First, one might wonder whether the increased rate of

[154] See infra Appendix Table 16.
[155] See infra Appendix Table 17A.
[156] See infra Appendix Table 17B.

dismissal is actually having any effect on the ultimate survival of cases or claims. That is, if claimants are able to successfully amend their pleadings after a court grants a motion to dismiss, then the effect of plausibility pleading is arguably more limited. A second response may be that plausibility pleading is a success story, because it is filtering out "meritless" cases that would otherwise occupy the time of courts, attorneys, and litigants. Third, and most difficult to account for, is the argument that focusing on the rate of dismissal is misleading because of the potential that litigant behavior changed between 2006 and 2010. As the discussion below shows, the data offer good reason to reject the first two objections. The third critique is neither confirmed nor undermined by the data, but I offer some reasons to give the concern less weight than others have.

1. The Prospect of Amendments Subsequent to Dismissal

Perhaps the most significant aspect of the FJC study's analysis was the researchers' conclusion that much of the increase in dismissal rates could be attributed to an increase in dismissals with leave to amend.[157] If this proves true, it might suggest that there is a limited harm to the increase in dismissal rates observed between 2006 and 2010, namely, the imposition on the plaintiff of the burden of filing an amended complaint.[158] If the same pattern holds true here, the observed increased rate of dismissal in 2010 may be less problematic.[159] When one examines the data in detail, however, the FJC's proffered explanation is not sufficient to minimize any concern over the increase in dismissal rates in 2010, particularly for civil rights cases.

The FJC study found that the increase in dismissal rates it observed was more prevalent in motions to dismiss without prejudice than in motions to dismiss with prejudice. The data collected here support that finding to some degree. As Table 9 shows, if one looks at the entire category of counseled cases, only dismissals without prejudice increase in 2010, not dismissals with prejudice.

[157] Cecil et al., March 2011, supra note 11, at 13–16.

[158] This burden is not minimal, but it arguably does not have the drastic effect of removing a claim or a case from a merits-based consideration.

[159] Of course, it also may make the imposition of plausibility pleading seem like a fruitless exercise, generating more work for judges and fees for lawyers but little else.

Table 9: Dismissal Type, Overall (Counseled Cases)

Dismissal Type	2006	2010	Change in Rate	*p*-value
Denied	880 (50%)	883 (38%)	-12%	
Granted without Prejudice	305 (17%)	626 (27%)	+10%	
Granted with Prejudice	590 (33%)	794 (35%)	+2%	
				<0.001
Total	1,775	2,303		

Appendix Tables 18 and 19 tell a more nuanced story, however. These demonstrate that when one looks at the rate of dismissals with or without prejudice, there is wide variation according to case type. Plaintiffs in torts, contract, and financial instruments cases experienced the greatest increase in dismissals without prejudice (Appendix Table 18).[160] Employment discrimination, civil rights, and "other" plaintiffs, by contrast, experienced an increase in dismissals with *and* without prejudice. And Appendix Table 19, which excludes partial grants and partial denials, shows that for civil rights cases the increase in dismissals with prejudice exceeds the increase in dismissals without prejudice. Thus, it is difficult to conclude from these data that there is a significant mitigating effect caused by some judges dismissing complaints post-*Iqbal* without prejudice.

Rounding out the picture, the methodology used here enables one to determine whether amendments were filed *after* a motion to dismiss was resolved. In other words, the data can test whether the denomination "without prejudice" is actually meaningful; if amendments are not being filed in such cases, then it undermines the FJC's minimization of the observed increase in dismissal rates. The data show that post-2010 plaintiffs were less likely to file an amendment to the complaint in all circumstances compared to post-2006 plaintiffs, whether the motion to dismiss was denied, granted without prejudice, or granted with prejudice.[161] In other words, although many of the dismissals in 2010 may have been without prejudice to amending the complaint, plaintiffs were

[160] See infra Appendix Table 18.

[161] See infra Appendix Table 20. Where motions to dismiss were denied, amendments were filed in 24% of post-2006 cases and 20% of post-2010 cases (p=0.055). Where motions were granted without prejudice, the amendment rate decreased from 71% in 2006 to 69% in 2010 (p=0.543). Amendments were understandably less frequent where dismissals were with prejudice: 15% of 2006 cases and 12% of 2010 cases (p=0.140). Id.

nonetheless less likely to amend after the motion was adjudicated. Appendix Table 21 shows that, in civil rights cases, only plaintiffs whose complaints were dismissed *without prejudice* in 2010 were less likely to file an amendment as compared to 2006 plaintiffs.[162]

One final way to consider the possibility that the increase in dismissal rates between 2006 and 2010 is limited to those cases in which claimants will have an opportunity to amend is to consider whether plaintiffs file amendments at all after any part of their claim has been dismissed. This is important because this study and the FJC both coded dismissals as "without prejudice" if at least one claim was dismissed with that denomination; even if the vast majority of claims were dismissed with prejudice, the case would be coded as a dismissal without prejudice. Thus, it is likely that dismissals without prejudice are overestimated in both this study and the FJC's. Table 10 provides these data for all counseled cases, and Table 11 provides data for specific categories of cases. Overall, the data indicate that there is very little difference between the rate of amendment in 2006 and 2010, among cases in which some part of the plaintiff's claim was dismissed.

Table 10: Subsequent Amendment, Overall (counseled cases; claims dismissed in whole or in part)

Subsequent Amendment	2006	2010	Change in Rate	*p*-value
No subsequent amendment	591 (66%)	893 (63%)		
Subsequent amendment	304 (34%)	527 (37%)	+3%	0.124
Total	895	1,420		

[162] See infra Appendix Table 21. Where motions to dismiss were denied in civil rights cases, amendments were filed in 23% of post-2006 cases and 30% of post-2010 cases (p=0.190). Where motions were granted without prejudice, the amendment rate decreased from 72% in 2006 to 64% in 2010 (p=0.270). Amendments were similar in both 2006 and 2010 where dismissals were with prejudice: 14% of 2006 cases and 13% of 2010 cases (p=0.817). Id.

Table 11: Subsequent Amendment, by Case Type (counseled cases; claims dismissed in whole or in part)

Subsequent Amendment	2006	2010	Change in Rate	*p*-value
Tort				
No subsequent amendment	41 (76%)	56 (68%)		
Subsequent amendment	13 (24%)	27 (33%)	+9%	0.287
Total	54	83		
Contract				
No subsequent amendment	97 (64%)	159 (61%)		
Subsequent amendment	54 (36%)	103 (39%)	+3%	0.474
Total	151	262		
Employment Discrimination				
No subsequent amendment	79 (65%)	95 (60%)		
Subsequent amendment	43 (35%)	63 (40%)	+5%	0.429
Total	122	158		
Civil Rights				
No subsequent amendment	187 (68%)	243 (70%)		
Subsequent amendment	87 (32%)	106 (30%)	-2%	0.712
Total	274	349		
Financial Instruments				
No subsequent amendment	11 (58%)	81 (49%)		
Subsequent amendment	8 (42%)	85 (51%)	+9%	0.452
Total	19	166		
Other				
No subsequent amendment	139 (62%)	215 (63%)		
Subsequent amendment	85 (38%)	124 (37%)	-1%	0.742
Total	224	339		

From these data, one can quantify an effective dismissal rate that disregards the denomination of with or without prejudice. Imagine 1,000 counseled cases in which a motion to dismiss was resolved in 2006. The data reported here suggest that the motion was denied in full in 590 cases.[163] Of the 410 cases in which some claim was dismissed, an amend-

[163] These figures are based on the fact that motions to dismiss were denied in full in 59% of all counseled cases in which motions to dismiss were decided in 2006, including cases in which there were partial grants and partial denials.

ment was filed in 34%,[164] meaning that the dismissal was effectively final in 271 cases. If we consider 1,000 motions to dismiss adjudicated in 2010, these data suggest that 540 experienced a dismissal of some claim as an initial matter.[165] Of those claims that were subjected to dismissal, an amendment was filed in 37% of the cases,[166] resulting in an effective dismissal of 340 claims. Thus, 2010 cases experienced an increase of 7% in the effective dismissal rate as compared with 2006 cases.[167] If one conducts the same analysis for counseled employment discrimination and civil rights cases, the increase in effective dismissal rate from 2006 to 2010 comes to 7% and 13%, respectively.[168]

Thus, although on the surface the data here are consistent with the FJC's observation that 2010 dismissals are more likely to be styled "without prejudice" than 2006 dismissals, a deeper consideration of the results suggests otherwise. The effective dismissal rate in 2010 has increased overall and for civil rights and employment discrimination cases in particular. Plausibility pleading is therefore associated with a decreased adjudication of the merits of these categories of cases, either through summary judgment or trial.

2. Plausibility Pleading as Filter?

A second response may be not to minimize the effect of the increased rate of dismissal associated with plausibility pleading, but rather to celebrate it. After all, one of the arguments explicitly advanced for heightened pleading standards is that it will better filter cases based on their underlying merit: On this theory, asking more of plaintiffs at the pleading stage is a defensible way to conserve scarce resources.[169] But there are many reasons to question this contention. First, the assumption that

[164] See supra Table 10.

[165] Of all counseled cases in which a motion to dismiss was decided in 2010, 46% were denied in full.

[166] See supra Table 10.

[167] As noted, this is a simplistic example. Confidence intervals would provide a better estimation of the potential differences in effective dismissal rates.

[168] Out of 1,000 employment discrimination cases subjected to a motion to dismiss in 2006, 400 would have some claim dismissed with 260 instances in which no subsequent amendment was filed. For 2010, 550 cases would have a claim dismissed with 330 never being subsequently amended. For civil rights cases, out of 1,000 cases subjected to a motion to dismiss decided in 2006, 500 would have some claims dismissed with 340 instances in which no amendment was filed. For 2010, 680 cases would have some claims dismissed with 476 being effectively terminated by the initiation of a motion to dismiss.

[169] Reinert, supra note 6, at 123–25 (summarizing argument).

more rigorous pleading standards leads to higher quality litigation has yet to be established empirically.[170] Instead, my prior work and the work of Stephen Choi suggest otherwise.[171]

Second, the data collected here present another reason to question the assumption. Follow-up of the cases that survived motions to dismiss in 2006 and 2010 does not reveal a significant difference in outcomes. As Table 12 shows, whether one measures by settlement or plaintiff's judgment, there is no obvious improvement in the success of lawsuits in 2010 as compared to 2006, in any category of case. Focusing more directly only on those cases in which the motion to dismiss was denied in its entirety (as opposed to partial denials), nearly all of the cases that are unresolved from 2010 would have to be resolved via settlement or through a plaintiff's judgment to achieve a marginally higher degree of success as compared with 2006. Table 13 combines different variables to create an overall measure of success, and it is to the same effect.[172]

[170] Id. at 132.

[171] Id. at 161; see also Stephen J. Choi, Do the Merits Matter *Less* After the Private Securities Litigation Reform Act?, 23 J.L. Econ. & Org. 598, 600–01 (2006) (concluding that despite Congress's intent the PSLRA likely deterred the filing of a substantial number of meritorious cases).

[172] In Table 13, consistent with established empirical legal method, a settlement or a judgment is deemed a success for the plaintiff. See Alexander A. Reinert, Measuring the Success of *Bivens* Litigation and Its Consequences for the Individual Liability Model, 62 Stan. L. Rev. 809, 812 n.13 (2010); Margo Schlanger, Inmate Litigation, 116 Harv. L. Rev. 1555, 1592–93 (2003); Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government As Defendant, 73 Cornell L. Rev. 719, 726–27 (1988). Everything else, except for voluntary dismissals, or unresolved or "other" outcomes, is considered unsuccessful. There is a cogent argument for treating voluntary dismissals as successes as well, see Theodore Eisenberg & Charlotte Lanvers, What Is the Settlement Rate and Why Should We Care?, 6 J. Empirical Legal Stud. 111, 115–18 (2009), but I have categorized them as "Other" in Table 13.

Table 12: Ultimate Outcome of Counseled Cases

Outcome[173]	MTD Denied		Granted All Relief		Granted Some Relief	
	2006	**2010**	**2006**	**2010**	**2006**	**2010**
Settled	63%	58%	35%	29%	60%	54%
Pl. Judgment	7%	6%	2%	2%	6%	2%
Def. Judgment	4%	2%	3%	2%	3%	3%
Vol. Dismissal	4%	4%	3%	4%	4%	2%
Dismissed (MTD)	1%	2%	33%	33%	3%	2%
Dismissed (SJ)	13%	9%	7%	4%	11%	11%
Dismissed (Other)	3%	2%	15%	13%	8%	6%
Unresolved	2%	15%	1%	11%	3%	19%
Other	4%	3%	2%	2%	3%	2%

Table 13: Outcome of Counseled Cases, Combined Success Measure, MTD denied in full

Success	2006	2010
No	20%	15%
Yes	71%	64%
Unresolved	2%	15%
Other	7%	7%

Thus, these data solidify the observation from prior research that plausibility pleading does not appear to correlate with lawsuit quality. And when the data are subdivided according to case type, the two case types with the highest increase in dismissals—civil rights and employment discrimination—experience even worse success in 2010 than in 2006. Civil rights cases were successful in 57% of cases in which a motion to dismiss was denied in 2006 and have been successful in only 53% of the cases in 2010. Employment discrimination cases have a similar profile—64% of cases in 2006 were successful after a denial of a mo-

[173] In this table, there are three categories of dismissals: (1) dismissal on a Rule 12(b)(6) motion, denoted "Dismissed (MTD)"; (2) dismissal on summary judgment, denoted "Dismissed (SJ)"; and (3) dismissal for some other reason, such as failure to prosecute, denoted "Dismissed."

tion to dismiss, and only 48% of 2010 cases have been successful.[174] Nor are 2010 cases that survive dismissal experiencing greater rates of success when divided along the lines of institutional status of claimant or movant.[175] In other words, the increased dismissal rate in 2010 has not, by any measure, resulted in increased quality of an underlying lawsuit.

There are at least three important caveats. First, many would argue that the measurement of success here is too inclusive; some settlements likely reflect true success and others may reflect only a defendant's calculation of the likely costs at risk from going forward. Accepting these criticisms as valid, however, it is very difficult to imagine any other way of calculating success other than through this admittedly imperfect method. Second, the unresolved cases have yet to be resolved, and as discussed above, they could lead to at least a marginal increase in success rate in 2010 as compared to 2006. There may be a positive correlation between the length of time a case is on the docket and likelihood of settlement, although it is unlikely to be enough to confidently predict that every currently unresolved case will ultimately be successful. Moreover, after a certain amount of time has passed—say more than a year—the prospect of settlement would appear to become less likely.[176] Third, and related, if plausibility pleading is operating in the margins, then one would not expect a significantly higher success rate in 2010 than in 2006; one would expect only a marginally higher success rate. What this adds up to is that it makes sense to await more data before concluding one way or another whether plausibility pleading has im-

[174] As with cases overall, there are many more unresolved cases from 2010 than from 2006. Again, even if all unresolved cases ultimately proved successful, there would be little difference between 2006 and 2010 success rates.

[175] In those cases in which the motion to dismiss was denied in full, claimants were much more successful in 2006 than in 2010, no matter the status of the claimant or moving party. In 2006, cases in which plaintiffs were individuals were successful 65% of the time, while these cases resulted in successful outcomes 59% of the time in 2010. Corporations were successful claimants 80% of the time in 2006 and 73% of the time in 2010. In those cases where individuals were the defending party, the claimant was successful in 80% of 2006 cases and 70% of 2010 cases. Where corporations were the defending party, 76% of 2006 claimants and 67% of 2010 claimants were successful. And where a government was defending, 55% of 2006 claims resolved favorably, compared to 46% of 2010 claims.

[176] See Benjamin Sunshine & Victor Abel Pereyra, Note, Access-to-Justice v. Efficiency: An Empirical Study of Settlement Rates After *Twombly* and *Iqbal*, 2015 U. Ill. L. Rev. 357, 393 (reporting that settlements decrease "precipitously" after a case has been pending for more than one year).

proved the quality of underlying lawsuits. There is, however, *no* empirical evidence to support the assumption that we can expect plausibility pleading to shoulder this heavy load.

3. The Potential Impact of Changed Litigant Behavior

Finally, we must return to the question of whether there is any value to a study such as this, where parties may be altering their litigation behavior in the shadow of the changed pleading rule. There are multiple ways in which parties might change their behavior as a result of the new pleading regime.[177] First, plaintiffs (at least those represented by counsel) might change their filing practices. Second, defendants might change their motion practices. Third, litigants might change their settlement behavior; plausibility pleading may operate to eliminate cases from the pool before a motion to dismiss is even filed. Jonah Gelbach has argued that, because no reasonable assumptions can be made about how this changed behavior might impact the pool of cases subject to a motion to dismiss in different pleading regimes, attempting to measure changes in grant rates from notice pleading to plausibility pleading is of dubious merit.[178]

On one hand, while Gelbach is surely right that uncertainty exists, I believe two behavioral assumptions are reasonable. First, plaintiffs' counsel, if their behavior is affected by a more demanding pleading standard,[179] will respond by not suing at all or by filing complaints with much more detail than they would have under the *Conley* standard. Second, most defendants will move to dismiss at a higher rate in a regime that demands more of plaintiffs, especially immediately after a decision like *Iqbal* or *Twombly*, either because of uncertainty as to how much the pleading standard has changed or simply because of the belief that certain cases will now be amenable to dismissal under plausibility pleading but would not have been dismissed under the notice pleading standard. There is limited empirical evidence of such behavioral effects so far.

[177] Jonah Gelbach has addressed this issue extensively. See generally Jonah B. Gelbach, Can the Dark Arts of the Dismal Science Shed Light on the Empirical Reality of Civil Procedure?, 23 Stan. J. Complex Litig. 223, 227–29 (2014) [hereinafter Gelbach, Dark Arts] (explaining how parties may change their litigation behavior in response to changes in the pleading standard); Gelbach, supra note 11.

[178] See Gelbach, Dark Arts, supra note 177, at 259–61.

[179] Anecdotally, my conversations with many plaintiffs' counsel after *Iqbal* suggest that many attorneys did not change their filing behavior at all.

Christina Boyd and her co-authors, for instance, report that plaintiffs may be pleading fewer claims per case, but their analysis did not include cases filed post-*Iqbal*.[180] Morgan Hazelton's study of linguistic changes in complaints filed in the District of Colorado suggests that there were some modest differences in the language found in complaints as one shifted from the pre-*Twombly* to the post-*Twombly* period, but that these differences did not carry over into the post-*Iqbal* period.[181] There also is some evidence that defendants are indeed filing motions to dismiss at a higher rate.[182] But there is very little evidence that plaintiffs are filing fewer cases post-*Iqbal*.[183] And there is no evidence that defendants have sought to take advantage of the plausibility pleading standard by increasingly removing cases from notice-pleading state courts to federal court.[184] Nor is there any evidence that parties changed their settlement behavior. Indeed, Kevin Clermont and Ted Eisenberg report that immediately after *Iqbal* and *Twombly*, defendants' overall win rate sharply increased, suggesting that parties have not yet adjusted to the new standard, and certainly not by the end of 2010, the critical period for this study.[185]

Whether these selection effects have emerged yet, any change in plaintiffs' filing or defendants' motion practices is most likely to underestimate the effect of plausibility pleading, making the results reported here even more worrisome. If, for instance, plaintiffs are being more careful in a postplausibility world, one would expect that dismissal rates should decrease as they adjust to the new standard and file "better" cas-

[180] See Christina L. Boyd et al., Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints, 10 J. Empirical Legal Stud. 253, 273–74, 274 fig.8 (2013) (reporting that the median number of causes of action per complaint shifted from three in the pre-*Twombly* period to two in the post-*Twombly* period). This shift was statistically significant, but did not include cases filed post-*Iqbal*.

[181] Hazelton, supra note 16, at 15–18 (reporting that post-*Twombly* complaints contained more language directed at causation and more certainty language, but that effects dissipated by the post-*Iqbal* period).

[182] Cecil et al., March 2011, supra note 11, at 9–10.

[183] See Joe Cecil, Of Waves and Water: A Response to Comments on the FJC Study Motions to Dismiss for Failure to State a Claim After *Iqbal* 42 (Mar. 19, 2012) (unpublished manuscript, available at http://ssrn.com/abstract=2026103).

[184] See Jill Curry & Matthew Ward, Are *Twombly* & *Iqbal* Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State, 45 Tex. Tech L. Rev. 827, 868–71 (2013) (reporting results of a fifty-one-state sample of removal from the period from June 2006 through May 2007 and June 2009 through March 2010).

[185] Theodore Eisenberg & Kevin M. Clermont, Plaintiphobia in the Supreme Court, 100 Cornell L. Rev. 193, 209–11 (2014) (focusing on constitutional torts).

es. And if defendants are filing more motions to dismiss, in cases that would not have been considered vulnerable to dismissal pre-*Twombly*, this too should drive the dismissal rate down, all else being equal. All told, if plaintiffs and defendants have changed their in-court behavior in the plausibility pleading regime, it most likely means that this study has underestimated plausibility pleading's impact on judicial behavior.

This leaves the potential that parties have changed their out-of-court settlement decisions between 2006 and 2010. As opposed to the first two selection effects, systematic changes in settlement decisions could impact an observed dismissal rate in multiple ways. On one hand, there is a plausible argument that, all else being equal, a perception that the risk of dismissal increased from 2006 to 2010 will increase the overall quality of cases that are present in the pool of disputes potentially subject to a motion to dismiss. One can see this by using completely arbitrary numbers. If we assume that defendants perceive all cases to be meritorious on a 0 to 1 scale, we can say for the purposes of argument that in 2006 defendants would have an incentive to make settlement offers in cases that they perceived to be 0.3 or higher on the merit scale. Cases with less than that level of merit, defendants might calculate, would have enough of a chance of being dismissed to justify the expense of moving to dismiss. Under plausibility pleading, however, defendants might reasonably believe that they have a better chance, on average, of dismissing higher quality cases. Such defendants will only make settlement offers on cases that score somewhat higher in perceived merit—say 0.4 on a scale of 0 to 1. Thus, in the *Conley* era, the pool of cases that are guaranteed to not settle prior to the defendant making a decision as to whether to move to dismiss would range from 0 to 0.3 on the merit scale, while the same pool of cases in the plausibility pleading era would range from 0 to 0.4 on the merits scale. Although these numbers are arbitrary, the basic point is simple: Assuming a similar merits distribution in both time periods, the quality of cases that will be in the pool of those potentially subject to a motion to dismiss should, on average, be higher in the plausibility pleading era from the defendant's perspective.

Of course, there are many assumptions implicit in the foregoing analysis. First, one must assume that parties can accurately calculate the merit of a given range of cases and that decisions to offer and accept a given settlement will be correlated with evaluations of merit. To the extent there is asymmetric access to information, changes in perception of the risk of dismissal will not predictably change the underlying quality

of litigation. Similarly, to the extent parties asymmetrically evaluate risks based on the *same* information, including risks inherent in particular pleading standards, the impact of legal change on lawsuit quality will be unpredictable. Finally, plaintiffs may become more risk averse in a plausibility pleading regime, thereby leading to a willingness to accept settlements in higher quality cases.[186] The bottom line is that we have little data to suggest one way or the other how plausibility pleading has affected settlement decisions, although I am conducting ongoing data collection regarding settlements in 2006 and 2010 that may shed light on this question.

To the extent that data from this study are able to shed light on the question, they suggest that there has been little if any change in party behavior as a result of plausibility pleading. If, for instance, we believe that parties have changed the way they file, move to dismiss, or settle cases post-*Iqbal*, we would expect that the rates of dismissal, all else being equal, would change as attorneys adjust to the new pleading regime. In fact, however, the data suggest that when one compares dismissal rates for cases filed in 2009 against dismissal rates filed in 2010, there is almost no significant change.[187] And even if one compares cases filed solely in the first half of 2009—when attorneys and parties had less opportunity to adjust to the plausibility pleading regime—against cases filed in 2010, no significant change in grant rate is observed.[188] Thus, the preliminary data I have collected to date suggest that the impact of plausibility pleading has not changed as cases have "aged" into the plausibility regime; that is, the grant rate for motions to dismiss does not appear to vary with the date of filing of the complaint, casting at least some doubt on the theoretical objection raised by Gelbach and others.[189]

[186] According to behavioral economic accounts, settlements should increase as at least one party becomes more risk averse. Margaret H. Lemos, Special Incentives to Sue, 95 Minn. L. Rev. 782, 799 n.68 (2011) (summarizing literature).

[187] Dismissal rates for contracts, employment discrimination, and financial instruments cases are greater for cases filed in 2010 than for those filed in 2009, while dismissal rates for civil rights and "other" cases are lower. But the only statistically significant change is for the "other" case type, in which the dismissal rate decreased from 48% to 34% between 2009 and 2010 (p=0.004), making the 2010 rate look very much like the 2006 rate for the same case type.

[188] The exception, just as for the overall comparison between 2009 and 2010, is the experience of the "other" case type.

[189] There are further empirical means of testing the behavioral change hypothesis, all of which are the subject of ongoing research and future scholarship.

To sum up, although the potential effects of changing party behavior are difficult to predict, and even more difficult to measure, there are good reasons to think that most of the potential behavioral changes should drive the dismissal rate down in the plausibility pleading era. Thus, measuring changes in dismissal rates is likely, if anything, to underestimate the extent to which plausibility pleading has increased barriers to claimants. And the results of this study suggest, even without being able to take changed party behavior into account, that application of the plausibility pleading standard has had a significant impact.

CONCLUSION

The data presented here suggest some concrete costs of a heightened pleading regime. Important categories of cases are experiencing increased dismissal rates in 2010. Individuals are faring far worse than corporate and governmental litigants. And plausibility pleading is not paying dividends; it is not resulting in higher quality lawsuits. The current pleading regime has brought increased inequality, reduced access to justice, and provided little measurable benefit.

If there is a normative justification for the imposition of plausibility pleading, empirical support for it is elusive. Instead, the data presented here suggest two normative arguments against plausibility pleading. First, for those who believe that federal courts have an important role to play in cases involving the adjudication of public law norms, the increase in effective dismissal rates of civil rights cases is troubling. And although employment discrimination cases are not technically "public" law, they share many of the characteristics of civil rights claims, including remedying inequality, achieving structural reform in large institutions, and setting norms of behavior that pervade public life. Federal courts have historically played important roles in both categories of cases; plausibility pleading may interfere.

Even for those who do not believe that federal courts have a significant role to play in particular kinds of cases, however, the increased inequality based on institutional status that is associated with plausibility pleading should be concerning. Recall that in 2006, individual and corporate claimants experienced remarkably similar dismissal rates when confronted with a motion to dismiss. In 2010, however, those rates greatly diverged, with corporate claimants basically in the same place and individual claimants much worse off. When viewed through the lens of movants, the divergence is less stark, but no less concerning. Individ-

ual movants do better in 2010 than in 2006, but their improvement is limited to those cases in which their adversary is an individual claimant. In other words, plausibility pleading is associated with decreased access to justice for individuals, often to the benefit of corporations and governmental entities. Not long before *Twombly* was announced, rulemakers openly debated reforming the notice pleading standard, but set the issue aside after determining that it was unlikely "that proposals to abandon notice pleading, or to redefine it, would survive the full course of Enabling Act scrutiny."[190] The data reported here suggest that the Court was able to accomplish through judicial fiat what corporate interests could not, despite their best efforts, obtain through the more open, transparent, and deliberative rulemaking process.[191]

Iqbal and *Twombly* are associated with a pleading regime in which plaintiffs do worse at nearly every stage. They are more likely to have their case dismissed, and less likely to proceed to discovery and adjudication of the merits of their claims. Even if they survive dismissal, the cases are less likely to be successful in 2010 than in 2006. In this light, it is difficult to see what value the new pleading standards have added to our civil justice system.

[190] See Advisory Committee on Rules of Civil Procedure – May 2006, at 37–38 (May 22–23, 2006), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-may-2006; Advisory Committee on Rules of Civil Procedure – October 2005, at 29–30 (Oct. 27–28, 2005), http://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-october-2005.

[191] See Moller, supra note 24, at 692–93.

APPENDIX

Coding Variables:

Docket Number: Docket number of case in which decision was rendered

Claimant Status: Institutional status of plaintiff or claimant (Individual, Corporation, Federal Government, State Government, Other)

Pro se: Whether plaintiff was represented by counsel at the time of decision

Opposition Filed: Indicating whether an opposition was filed to the motion to dismiss—If no opposition was filed, the decision was excluded from any subsequent analysis.[192]

Circuit: Circuit court of appeals in which district court which rendered decision sits

Year filed: Year that case was filed

AO Code: Case code used by the Administrative Office of United States Courts

Case Type: Type of claims challenged in motion to dismiss (Tort, Contract, Employment Discrimination, Prisoners' Rights, Antitrust, Civil Rights, Financial Instruments, Other)

Order Date: Date when decision was rendered

Cohort: Whether the decision was rendered in 2006 or 2010

Movant Status: Institutional status of defendant or movant (Individual, Corporation, Government, Multiple)[193]

[192] By contrast, the FJC assumed that a failure to oppose a motion was equivalent to a concession that a pleading was insufficient. The FJC's proposition is doubtful, for many courts dismiss for failure to file an opposition on the grounds that it constitutes a failure to comply with a court order (in those circumstances where the court has ordered a plaintiff to file a response). Even were the proposition true in the vast majority of cases, however, the goal of this study is to evaluate how judges apply *Iqbal* and *Twombly*, not how litigants assess their chance of success under those cases.

[193] Coding of the status of movant was also done at a more granular level, distinguishing between corporate entities and their agents, as well as between government officials sued in their personal capacity and as governmental entities.

Outcome: Outcome of motion to dismiss (Denied, Granted All Relief, Granted Some Relief, Other)

Dismissal Type: Extent to which any dismissal precluded further involvement of district court (Without Prejudice, With Prejudice, Other)

Claims Dismissed: In cases in which some relief was granted, a numerical count of the claims that were dismissed for insufficient pleading

Claims Survived: In cases in which some relief was granted, a numerical count of the claims that were specifically found to be pleaded sufficiently

Partial Grant/Denial: In cases in which some relief was granted, an assessment of whether the case should be characterized as a partial grant or a partial denial—If the Claims Dismissed variable was greater than the Claims Survived variable, it was coded as a partial denial, and vice versa. If the Claims Dismissed variable was equal to the Claims Survived variable, it was coded as "Equal."

Amended Complaint: Indicating whether a motion was directed at a pleading that has been amended in the past

Reason for Amendment: If an amended complaint had been filed, coding for the reason that the amendment was made (Unsolicited, In Response to a Motion, In Response to a Judicial Order, Other)

District Judge: The district court judge who entered the relevant order

Presidential Nomination: The President who nominated the district court judge

Magistrate Judge: The magistrate judge assigned to the case

Race: The race of the judge deciding the motion

Sex: The sex of the judge deciding the motion

Twiqbal Reference: Whether *Twombly* or *Iqbal* was referenced in the relevant judicial decision—This variable was relevant only to the 2010 cohort.

Plaintiffs Remaining: The plaintiffs remaining after resolution of the motion to dismiss (None, Some, All, Other)

Magistrate Judge Recommendation: Whether there was a report and recommendation by a magistrate judge

Magistrate Judge Objection: Whether there was an objection to a report and recommendation by a magistrate judge

NOMPARTY: Political party of the President who nominated the district court judge

Subsequent Amendment: Whether a plaintiff filed an amended complaint subsequent to the resolution of the motion to dismiss

Case Outcome: The ultimate resolution of the case, if available (Settlement, Plaintiff Judgment, Defense Judgment, Voluntary Dismissal, Dismissed on Motion to Dismiss, Dismissed on Motion for Summary Judgment, Unresolved, Other)

Appendix Table 1: Pro Se Dismissals in Civil Rights Cases, by Prior Amendment of Complaint

Outcome, by Prior Amendment	2006	2010	Change in Grant Rate	*p*-value
No Prior Amendment				
Denied	13 (13%)	8 (7%)		
Granted	85 (87%)	110 (93%)	+6%	0.109
Total	98	118		
Prior Amendment				
Denied	15 (18%)	9 (10%)		
Granted	68 (82%)	80 (90%)	+8%	0.132
Total	83	89		

Appendix Table 2: Pro Se Dismissals in Employment Discrimination Cases, by Prior Amendment of Complaint

Outcome, by Prior Amendment	2006	2010	Change in Grant Rate	*p*-value
No Prior Amendment				
Denied	12 (41%)	7 (16%)		
Granted	17 (59%)	37 (84%)	+25%	0.015
Total	29	44		
Prior Amendment				
Denied	13 (45%)	12 (32%)		
Granted	16 (55%)	25 (68%)	+13%	0.303
Total	29	37		

Appendix Table 3: Pro Se Dismissals in Prison Cases, by Prior Amendment of Complaint

Outcome, by Prior Amendment	2006	2010	Change in Grant Rate	*p*-value
No Prior Amendment				
Denied	28 (31%)	19 (15%)		
Granted	63 (69%)	108 (85%)	+16%	0.005
Total	91	127		
Prior Amendment				
Denied	24 (33%)	23 (20%)		
Granted	48 (67%)	94 (80%)	+13%	0.035
Total	72	117		

Appendix Table 4: Regression Analysis of Pro Se Employment Cases[194]

Variable	Coefficient	*p*-value
Decision in 2010	1.132	0.017
Dem. Nom.	0.393	0.389
Presence Amended	-0.757	0.092
MDFL	1.00	0.492

Appendix Table 5: Regression Analysis of Pro Se Prison Cases

Variable	Coefficient	*p*-value
Decision in 2010	0.995	<0.001
Dem. Nom.	-0.406	0.133
Presence Amended Compl.	-0.173	0.515
DDC	2.285	0.066

Appendix Table 6: Regression Analysis of Pro Se Civil Rights Cases

Variable	Coefficient	*p*-value
Decision in 2010	0.889	0.011
Dem. Nom.	0.173	0.617
Presence Amended Compl.	-0.356	0.296

[194] For all regression tables, I have reported results for select variables (generally, those that were highly correlated with change in dismissal rates or were statistically significant).

Appendix Table 7: Dismissals in Counseled Contract Cases, by Prior Amendment of Complaint

	2006 Grant Rate	2010 Grant Rate	Change in Grant Rate	*p*-value
No Prior Amendment	27%	43%	+16%	<0.001
Prior Amendment	36%	39%	+3%	0.641

Appendix Table 8: Dismissals in Counseled Employment Discrimination Cases, by Prior Amendment of Complaint

	2006 Grant Rate	2010 Grant Rate	Change in Grant Rate	*p*-value
No Prior Amendment	30%	54%	+24%	<0.001
Prior Amendment	42%	49%	+7%	0.323

Appendix Table 9: Dismissals in Counseled Financial Instruments Cases, by Prior Amendment of Complaint

	2006 Grant Rate	2010 Grant Rate	Change in Grant Rate	*p*-value
No Prior Amendment	40%	71%	+31%	0.018
Prior Amendment	58%	69%	+11%	0.475

Appendix Table 10: Dismissals in Counseled Civil Rights and Other Cases, by Prior Amendment of Complaint

	2006 Grant Rate	2010 Grant Rate	Change in Grant Rate	*p*-value
Civil Rights - No Prior Amendment	50%	64%	+14%	0.004
Civil Rights - Prior Amendment	44%	68%	+24%	<0.001
Other - No Prior Amendment	31%	45%	+14%	0.001
Other - Prior Amendment	36%	45%	+9%	0.026

Appendix Table 11: Outcome in Counseled Cases, by Plaintiff Status

Plaintiff Status	2006 Grant Rate	2010 Grant Rate	Change in Grant Rate	*p*-value
Individual	40%	58%	+18%	<0.001
Corporation	32%	37%	+5%	0.106
Government	16%	21%	+5%	0.643
Multiple/Other	49%	60%	+11%	0.270

Appendix Table 12: Outcome in Counseled Cases, by Movant Status

Movant Status	2006 Grant Rate	2010 Grant Rate	Change in Grant Rate	*p*-value
Individual	20%	34%	+14%	0.015
Corporation	35%	50%	+15%	<0.001
Government	45%	63%	+18%	<0.001
Multiple/Other	41%	53%	+12%	0.455

Appendix Table 13: Regression Analysis for Counseled Employment Discrimination Cases (with Noteworthy Coefficients and *p*-values)[195]

Variable	Coefficient	*p*-value
2010	0.765	<0.001
Dem. Nom.	-0.269	0.231
Presence Amended	0.225	0.288
NDCA	0.932	0.167
Decision January to June	-0.411	0.049

Appendix Table 14: Regression Analysis for Counseled Civil Rights Cases (with Noteworthy Coefficients and *p*-values)

Variable	Coefficient	*p*-value
2010	0.743	<0.001
Dem. Nom.	-0.011	0.945
Presence Amended	0.083	0.585
NDTX	-1.102	0.062

Appendix Table 15: Regression Analysis for Counseled Cases Brought by Individual Claimants (with Noteworthy Coefficients and *p*-values)

Variable	Coefficient	*p*-value
2010	0.678	<0.001
Dem. Nom.	-0.034	0.699
Presence Amended	0.042	0.629
DMD	0.532	0.060
NDCA	0.513	0.065
Financial Instruments	0.782	0.269
Civil Rights	0.621	0.378
Gov't Movant	0.444	0.071

[195] The District of Kansas was dropped from the regression to enable a comparison of the districts. In addition to the variables listed in the table, the following variables were used: Nominating President, Decision Between January and June, Movant Status, District of Origin, and Claimant Status.

Appendix Table 16: Regression Analysis for Motions Made by Corporate Movants in Counseled Cases (with Noteworthy Coefficients and *p*-values)

Variable	Coefficient	*p*-value
2010	0.489	<0.001
Dem. Nom.	0.051	0.583
Presence Amended	-0.026	0.773
Decision January to June	0.163	0.066
Corporate Plaintiff	0.675	0.093
Individual Plaintiff	1.111	0.005
MDFL	-0.453	0.090
NDIL	-0.551	0.043

Appendix Table 17A: Regression Analysis for Motions Made by Governmental Movants in Counseled Cases (with Noteworthy Coefficients and *p*-values)

Variable	Coefficient	*p*-value
2010	0.660	<0.001
Dem. Nom.	-0.123	0.368
Presence Amended	0.130	0.332
Civil Rights	0.565	0.312
Individual Plaintiff	0.165	0.521

Appendix Table 17B: Regression Analysis for Motions Made by Individual Movants in Counseled Cases (with Noteworthy Coefficient and *p*-values)

Variable	Coefficient	*p*-value
2010	0.903	0.013
Dem. Nom.	0.98	0.775
Presence Amended	0.410	0.216
NDCA	2.24	0.040
Individual Plaintiff	0.523	0.528
Gov't Plaintiff	-1.74	0.140
Corp. Plaintiff	-0.416	0.627

Appendix Table 18: Dismissal Type, by Case Type (Counseled Cases)[196]

Outcome, by Case Type	2006	2010	Change in Rate	*p*-value
Tort				
Denied	57 (51%)	68 (45%)	-6%	
Granted without Prejudice	10 (9%)	34 (23%)	+14%	
Granted with Prejudice	44 (40%)	49 (32%)	-8%	
Total	111	151		0.015
Contract				
Denied	204 (58%)	245 (48%)	-10%	
Granted without Prejudice	54 (15%)	135 (27%)	+12%	
Granted with Prejudice	97 (27%)	127 (25%)	-2%	
Total	355	507		<0.001
Employment Discrim.				
Denied	117 (49%)	92 (37%)	-12%	
Granted without Prejudice	43 (18%)	67 (27%)	+9%	
Granted with Prejudice	79 (33%)	90 (36%)	+3%	
Total	239	249		0.013
Civil Rights				
Denied	166 (38%)	122 (26%)	-12%	
Granted without Prejudice	85 (19%)	118 (25%)	+6%	
Granted with Prejudice	189 (43%)	231 (49%)	+6%	
Total	440	471		<0.001
Financial Instruments				
Denied	12 (39%)	46 (22%)	-17%	
Granted without Prejudice	6 (19%)	105 (50%)	+31%	
Granted with Prejudice	13 (42%)	61 (29%)	-13%	
Total	31	212		0.006
Other				
Denied	280 (56%)	274 (45%)	-11%	
Granted without Prejudice	88 (18%)	142 (23%)	+5%	
Granted with Prejudice	136 (27%)	198 (32%)	+5%	
Total	504	614		0.001

[196] Because prison and antitrust claims represented a very small portion of the sample, they are not included here.

Appendix Table 19: Dismissal Type, by Case Type, Counseled Cases and No Partial Grants/Denials

Outcome, by Case Type	2006	2010	Change in Rate	*p*-value
Tort				
Denied	57 (61%)	68 (53%)	-8%	
Granted without Prejudice	3 (3%)	24 (19%)	+16%	
Granted with Prejudice	34 (36%)	36 (28%)	-8%	
Total	94	128		0.002
Contract				
Denied	204 (70%)	245 (58%)	-12%	
Granted without Prejudice	30 (10%)	87 (21%)	+11%	
Granted with Prejudice	59 (20%)	90 (21%)	+1%	
Total	293	422		0.001
Employment Discrim.				
Denied	117 (65%)	92 (48%)	-17%	
Granted without Prejudice	24 (13%)	47 (24%)	+11%	
Granted with Prejudice	38 (21%)	54 (28%)	+7%	
Total	179	193		0.002
Civil Rights				
Denied	166 (51%)	122 (34%)	-17%	
Granted without Prejudice	54 (16%)	82 (23%)	+7%	
Granted with Prejudice	109 (33%)	155 (43%)	+10%	
Total	329	359		<0.001
Financial Instruments				
Denied	12 (52%)	46 (28%)	-24%	
Granted without Prejudice	4 (17%)	73 (45%)	+28%	
Granted with Prejudice	7 (30%)	43 (27%)	-3%	0.024
Total	23	162		
Other				
Denied	280 (67%)	274 (55%)	-12%	
Granted without Prejudice	51 (12%)	91 (18%)	+6%	
Granted with Prejudice	89 (21%)	134 (27%)	+6%	
Total	420	499		0.001

Appendix Table 20: Subsequent Amendment in Counseled Cases, by Type of Dismissal

Subsequent Amendment, by Type of Dismissal	2006	2010	Change	*p*-value
Denied				
No Subsequent Amendment	668 (76%)	703 (80%)		
Subsequent Amendment	212 (24%)	179 (20%)	-4%	0.055
Total	880	882		
Granted without Prejudice				
No Subsequent Amendment	90 (30%)	197 (32%)		
Subsequent Amendment	215 (71%)	429 (69%)	-2%	0.543
Total	305	626		
Granted with Prejudice				
No Subsequent Amendment	501 (85%)	696 (88%)		
Subsequent Amendment	89 (15%)	98 (12%)	-3%	0.140
Total	590	794		

Appendix Table 21: Subsequent Amendment in Civil Rights Counseled Cases, by Type of Dismissal

Subsequent Amendment, by Type of Dismissal	2006	2010	Change	*p*-value
Denied				
No Subsequent Amendment	128 (77%)	85 (70%)		
Subsequent Amendment	38 (23%)	36 (30%)	+7%	0.190
Total	166	121		
Granted without Prejudice				
No Subsequent Amendment	24 (28%)	42 (36%)		
Subsequent Amendment	61 (72%)	76 (64%)	-8%	0.270
Total	85	118		
Granted with Prejudice				
No Subsequent Amendment	163 (86%)	201 (87%)		
Subsequent Amendment	26 (14%)	30 (13%)	-1%	0.817
Total	189	231		