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Is Ashcroft v. Iqbal the Death (Finally) of the “Historical Test” for Interpreting the Seventh Amendment?

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Is *Ashcroft v. Iqbal* the Death (Finally) of the “Historical Test” for Interpreting the Seventh Amendment?

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I. INTRODUCTION

There is the possibility that the recent Supreme Court decision of *Ashcroft v. Iqbal*¹ finally will be the necessary impetus to revisit one of the more bizarre but enduring canards of American jurisprudence—the way we interpret the Seventh Amendment’s preservation of a right to a jury trial in federal civil litigation. The Seventh Amendment provides that “[i]n suits at common law . . . the right of trial by jury shall be preserved.”² To this day, the way we apply the Seventh Amendment—in other words, what we interpret to be the constitutional intent and mandate of our Founders—is to postulate hypothetically that a contemporary federal civil case, filed in federal district court under current-day statutes and laws, instead had been filed in England in 1792, and to ask whether then it would have been filed in the common law courts or in the equity courts.³ Time and jurisprudential evolution have exposed this approach—known as the “historical test”—as flawed from the inception. Nonetheless, largely through judicial inertia, the historical test has survived. Indeed, in the roughly 200 years since the historical test emerged, no occasion has been sufficient to cause the courts to consider whether the test is jurisprudentially supportable.

The historical test may well not survive *Ashcroft v. Iqbal*. On its face, *Iqbal* has nothing to do with the Seventh Amendment. Rather, the opinion addresses pleading standards under *Federal Rule of Civil Procedure* 8, and empowers a federal district court in the vast majority of civil cases to dismiss a lawsuit pre-answer on the basis that the allegations, while facially sufficient, are conclusory and implausible.

1. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

2. U.S. CONST. amend. VII.

3. Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1020–30 (1992) [hereinafter Klein I].

Iqbal is a none-too-subtle signal from the Court that it is interested in utilizing Rule 12(b)(6) motions as a gate-keeping device to regulate potentially frivolous litigation, and thus has re-interpreted Rule 8 to effectuate this approach.⁴ As a result, the Court all but directs district trial judges to weigh the factual heft of a complaint early, and to toss unworthy cases out of court.

In *Iqbal* there is no mention of the Seventh Amendment. But that silence can only be maintained for so long. The opinion empowers judges to invade the constitutionally protected province of the jury. Or, to put the problem in the terminology and approach of the historical test, the common law courts of eighteenth century England simply had no procedural vehicle to weigh the factual allegations of a writ and dismiss the writ, pre-trial, as implausible.

While the Court does not yet seem to see the Seventh Amendment problem with *Iqbal*, eventually it will. Then, the Court finally will have to revisit the historical test as the interpretive regimen of jury rights in federal civil litigation, if only to try to enunciate a way to navigate around it.

It is unlikely that the Court will be able to give due deference simultaneously to the history and intent of the Seventh Amendment, and yet constitutionally empower district courts to weigh evidence at the pleadings stage of civil litigation. Nonetheless, the attempt should be the necessary impetus to exposing the historical test as the flawed jurisprudence it long has been. This Article proposes an alternative and preferred understanding of the Seventh Amendment.

Part I traces the doctrinal path that leaves us today with the historical test. Part II very briefly reviews the constitutional impasse between the historical test and *Iqbal*. Part III presents the case for abandoning the historical test and proposes a new interpretive rule to replace it.

II. THE DOCTRINAL PATH TO MEASURING MODERN CIVIL JURY RIGHTS AND PROCEDURE BY 18TH CENTURY STANDARDS: AN ABRIDGED HISTORY OF THE SEVENTH AMENDMENT AND ITS INTERPRETATION

At a minimum, any interpretation of the Seventh Amendment must not blatantly contradict the original intent of the language. Also, if one argues (as this Article does) that the historical test is not consistent with the original intent, one must know that history. For this reason, the starting point of any proposal to reject the historical test must be a review of that very test's history.

4. Kenneth S. Klein, *Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) [hereinafter Klein II].

A. The History of the Drafting of the Seventh Amendment

The written record memorializing the emergence of the Seventh Amendment is scarce.⁵ But what it reflects is something that rarely is explicitly acknowledged—the Seventh Amendment is not the result of a considered philosophical approach to organizing a justice system, but rather is the result of the authors of the draft Constitution facing a political problem for which they attempted to craft a political solution. Succinctly stated, the political problem was that although eighteenth century Americans viewed civil juries as a critical check on government power, they could not agree on the details of how to define the scope of civil jury rights, and yet they were willing to refuse to ratify a draft Constitution that omitted any reference to civil juries.⁶

1. *The American Commitment to Civil Juries*

The comments of the Founders in the late eighteenth century provide repeated reference to the importance early Americans placed on the ideal of the civil jury as a critical check on the power of government. Patrick Henry, speaking in the Virginia Constitutional Convention, called civil juries the “best appendage of freedom,” one “which our ancestors secured [with] their lives and property.”⁷ Thomas Jefferson remarked, “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”⁸ Thomas Paine felt civil juries were an extension of a natural right.⁹ In his *Anti-Federalist* writings Judge Samuel Bryan found civil juries to be crucial:

Judges are likely to have “a bias towards those of their own rank and dignity; for it is not to be expected, that the *few* should be attentive to the rights of the

5. The Author has published a previous article specifically on the history of the Seventh Amendment. See Klein I, *supra* note 3. Portions of this Part of the present Article are drawn from that article. A comprehensive history of the Seventh Amendment is not necessary to understand the topics the present Article covers; however, for thorough histories, see Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966) and Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973). For a more concise, but still helpful, history of the origins of the civil jury in Western jurisprudence, see 5 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 38.02 (2d ed. 1994) and also Jack Pope, *The Jury*, 39 TEX. L. REV. 426 (1961).

6. Klein I, *supra* note 3, at 1020.

7. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 324, 544 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES I].

8. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 269 (Julian P. Boyd ed., 1958). Jefferson would later express surprise at his perception that the populace would give up the right without protest. See 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 609 (Bernard Schwartz ed., 1971).

9. THE BILL OF RIGHTS, *supra* note 8, at 316.

many. This [the civil jury trial] therefore preserves in the hands of the people, that share which they ought to have in the administration of justice, and prevents the encroachments of the more powerful and wealthy citizens."¹⁰

The Federalists opined that eliminating civil jury rights could lead to insurrection.¹¹ In sum, there was consensus on the importance of civil juries.

2. *The Drafting Dilemma at the Constitutional Convention*

At the Constitutional Convention, the devil was in the details. In Federalist Paper No. 83, which is one of the most extensive contemporaneous discussions of jury practice in civil cases, Alexander Hamilton provided a stark and detailed description of the vast variety of jury practice among the states:

The great difference between the limits of the jury trial in different States is not generally understood; . . . In this State, our judicial establishments resemble, more nearly than any other, those of Great Britain. We have courts of common law, courts of probate (analogous in certain matters to the spiritual courts in England), a court of admiralty, and a court of chancery. In the courts of common law only, the trial by jury prevails, and this with some exceptions. In all the others a single judge presides, and proceeds in general either according to the course of the canon or civil law, without the aid of a jury. In New Jersey, there is a court of chancery which proceeds like ours, but neither courts of admiralty nor of probate, in the sense in which these last are established with us. In that State, the courts of common law have the cognizance of those causes which with us are determinable in the courts of admiralty and of probate, and of course the jury trial is more extensive in New Jersey than in New York. In Pennsylvania, this is perhaps still more the case, for there is no court of chancery in that State, and its common-law courts have equity jurisdiction. It has a court of admiralty, but none of probates, at least on the plan of ours. Delaware has in these respects imitated Pennsylvania. Maryland approaches more nearly to New York, as does also Virginia, except that the latter has a plurality of chancellors. North Carolina bears most affinity to Pennsylvania; South Carolina to Virginia. I believe, however, that in some of those States which have distinct courts of admiralty, the causes depending in them are triable by juries. In Georgia, there are none but common-law courts, and an appeal of course lies from the verdict of one jury to another, which is called a special jury, and for which a particular mode of appointment is marked out. In Connecticut, they have no distinct courts either of chancery or of admiralty, and their courts of probates have no jurisdiction of causes. Their common-law courts have admiralty, and, to a certain extent, equity jurisdiction. In cases of importance, their General Assembly is the only court of chancery. In Connecticut, therefore, the trial by jury extends in *practice* fur-

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10. Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 186 (2000) (quoting Wolfram, *supra* note 5, at 695–96 (quoting Letters of Centinel, No. II, FREEMAN'S J. (Philadelphia), Oct. 24, 1787, reprinted in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 584 (John Bach McMaster & Frederick D. Stone eds., Lancaster, Historical Society of Pennsylvania 1888))).
 11. JAMES IREDELL, ANSWERS TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION, 1788, reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 362 (Paul Leicester Ford ed., 1971).

ther than in any other State yet mentioned. Rhode Island is, I believe, in this particular, pretty much in the situation of Connecticut. Massachusetts and New Hampshire, in regard to the blending of law, equity, and admiralty jurisdictions, are in a similar predicament. In the four Eastern States, the trial by jury not only stands upon a broader foundation than in the other States, but it is attended with a peculiarity unknown, in its full extent, to any of them. There is an appeal *of course* from one jury to another, til there have been two verdicts out of three on one side.¹²

Thus, the Constitutional Convention faced what today would be recognized at a glance as a classical legislative challenge—how to build a voting consensus supporting a particular version of draft legislation from a diverse group of legislators. In other words, each of the States had a different form of civil jury practice, and so to incorporate any particular extant form of civil jury practice as the model for the federal courts was to implicitly reject all others. The challenge was to choose one form without offending proponents of the others.

This was a dilemma indeed for delegates who needed the support of enough States in order to achieve adoption of the draft Constitution. The initial solution to this political dilemma was to duck.¹³ The text of the Constitution that went to the States for ratification was silent on right to trial by jury in civil cases.¹⁴

3. *The Political Deal Resulting in the Seventh Amendment*

Silence was not golden. When the Constitution was sent to the states for ratification, it was met with immediate concern that “in civil causes it did not secure the trial of facts by a jury.”¹⁵ The Anti-Federalists, who opposed ratification of the Constitution, rallied support by asserting that the Constitution would abolish civil juries altogether.¹⁶

12. THE FEDERALIST NO. 83, 501–03 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (footnote omitted).

13. Colgrove v. Battin, 413 U.S. 149, 153 n.8 (1973); see also Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 411–12 (1999) (“The Convention’s failure to create a constitutional right to civil jury trials was part of an even larger political blunder . . .”).

14. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 587–88, 628 (Max Farrand ed., 1911); see also Wolfram, *supra* note 5, at 665–66. When Charles Pinckney reported on the Federal Convention to the ratification debates in South Carolina, he explained that the Constitution was silent on civil juries because “they found it impossible to make any precise declaration upon the subject.” 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 260 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES II]. Governor Edmund Randolph took the same position in the Virginia ratification debates. ELLIOT’S DEBATES I, *supra* note 7, at 444.

15. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).

16. See Henderson, *supra* note 5, at 292; see also Parsons v. Bedford, 28 U.S. 433, 446 (1830) (“One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.”).

Professor Henderson summarizes the divisiveness created over retention of a constitutional right to jury trials:

Within a month the whole country was divided into Federalist and Anti-Federalist parties. The almost complete lack of any bill of rights was a principal part of the Anti-Federalist argument; the lack of provision for civil juries was a prominent part of this argument, and the Supreme Court's appellate jurisdiction in law and in fact was treated by the Anti-Federalists as a virtual abolition of the civil jury.¹⁷

When Hamilton reflected on the entire range of stated objections to the Constitution, he surmised that the one which met with the most success in his state, "and perhaps in several of the other States, is *that relative to the want of a constitutional provision for the trial by jury in civil cases.*"¹⁸

In exchange for a promise by the first Congress to pass a declaration of individual rights as amendments to the Constitution, the Anti-Federalists allowed nine states to approve the Constitution.¹⁹ Of the seven states that proposed amendments, six proposed language protecting civil jury rights.²⁰ The proposed amendments evolved, of course, into the Bill of Rights.²¹ The Federalists were committed to pass these amendments in the First Congress to avoid convening a second constitutional convention.²²

4. *The Drafting and Adoption of the Seventh Amendment*

The second attempt to solve the political problem was to opt, in lieu of ducking altogether, to evade through ambiguity. James Madison was the first to introduce a draft of a bill of rights.²³ One of his proposed provisions was the clear predecessor of the eventual final language of the Seventh Amendment: "In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate."²⁴

The key language in Madison's proposal is "In suits at common law." Even before the First Congress, Alexander Hamilton recognized

17. Henderson, *supra* note 5, at 295.

18. THE FEDERALIST NO. 83., *supra* note 12, at 495. At the time of the consideration of the proposed Constitution, of all of the rights later enshrined in the Bill of Rights, "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions." LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960).

19. Wolfram, *supra* note 5, at 725.

20. JAMES MADISON, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE CONSTITUTION, H.R. DOC. NO. 69-398, at 1018-19, 1024-26, 1028-29, 1034-36, 1044-46, 1052-54 (1927) (Massachusetts, New Hampshire, Virginia, New York, North Carolina, and Rhode Island, respectively) (1927).

21. Wolfram, *supra* note 5, at 725.

22. *Id.*

23. *Id.* at 726-27.

24. *Id.* at 727-28 (quoting 1 ANNALS OF CONG. 435 (Joseph Gales ed. 1834)).

the problem with language that defined the right to a jury trial by reference to "common law"—the language let each reader see the meaning they chose, because of the lack of shared definition of the phrase.²⁵ Hamilton's criticism was echoed in the First Congress. Federalist Samuel Livermore, former Chief Justice of New Hampshire, strongly opposed Madison's version of the Bill of Rights, and in particular the language used in the Seventh Amendment.²⁶ He enunciated the basic concern that not every case was best decided by a jury.²⁷ But Madison won and Livermore lost; the Seventh Amendment was adopted, stating:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.²⁸

One of the Federalists predicted what would necessarily follow: "A general declaration . . . to preserve the trial by jury in all civil cases [will] produce[] confusion, so that the courts afterwards in a thousand instances [will] not know[] how to . . . proceede[]."²⁹ Given the drafting approach of Madison, this was a serious concern. But that writer did not anticipate that the first of those potential thousand instances would fall to the legendary Justice Joseph Story.

B. The Emergence Of, And Continued Loyalty To, the "Historical Test" For Interpreting the Seventh Amendment

1. The Creation of the Historical Test for Interpreting the Seventh Amendment

Twenty-one years after the adoption of the Seventh Amendment, a case brought the issue of the scope of the amendment to the doorstep of Justice Story. In *United States v. Wonson*, Samuel Wonson was prosecuted for failing to pay penalties in accordance with the Embargo Supplementary Act of 1808.³⁰ Mr. Wonson won at the trial court level, and the Government appealed. Justice Story was asked to decide "whether the facts are again to be submitted to a jury in this court, or the appeal submits questions of law only for the considera-

25. THE FEDERALIST No. 83, *supra* note 12, at 523–28.

26. Wolfram, *supra* note 5, at 727–28 & n.259.

27. *Id.* at 728–29.

28. U.S. CONST. amend. VII.

29. IREDELL, *supra* note 11, at 361.

30. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

tion of the court."³¹ Justice Story found that the legislation creating appellate jurisdiction rejected the notion of a second jury.³²

Justice Story then turned to the constitutional clauses regarding appeals. There is at least some debate to this day about precisely what Justice Story intended when he decided this issue.³³ But taking the decision at face value, Justice Story took on a task akin to pinning a wave to the shore—he sought to read the Seventh Amendment as describing and constitutionally enshrining a black letter rule of law, even though for political reasons the intention of the language was precisely the opposite. After all, Justice Story had an actual case he had to decide.³⁴

Justice Story reasoned that the Seventh Amendment was specifically crafted to restrict the higher courts from nullifying the jury verdicts of the lower courts.³⁵ More importantly, he recognized the States' deep interest in the subject of civil jury rights at the time of the drafting of the Seventh Amendment.³⁶ He concluded that this gave insight into the "scope and object of the amendment."³⁷

Justice Story then turned to grappling in particular with the phrase "common law." Federalist No. 83, with which Justice Story was familiar,³⁸ made clear that if "common law" was read as a reference to American practice, then it provided no guideline at all. Consequently, Justice Story concluded that "common law" referred to the law of England, which he considered the only other theoretically available solution:

Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all) but it is the common law of England, the grand reservoir of all our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law.³⁹

31. *Id.* Justice Story recounts how at least some states did have the practice of second juries on appeal. *Id.* at 748.

32. *Id.* at 749–50.

33. Kraus, *supra* note 13, at 460–75.

34. Justice Story apparently never considered that he could have taken the approach that the second clause of the Seventh Amendment (addressing review of jury verdicts) was not restricted by the usage in the first clause of the phrase "common law."

35. *Wonson*, 28 F. Cas. at 750. Justice Story relied on Hamilton's *THE FEDERALIST* No. 83. *Id.*

36. *Id.*

37. *Id.*

38. He cited it within his opinion. *Id.*

39. *Id.* If Justice Story had tried to explain the basis for his assertion that "common law" referred to England, he would have found the task nearly impossible. There is no recorded legislative history suggesting that the phrase "common law" referred to the common law of England. Nor is support found in the records of the state debates, the Federalist Papers, or the writings of commentators of the time. Indeed, Hamilton's concerns seem to suggest the opposite. *THE FEDERALIST* No.

Today, at least one scholar cogently argues that Justice Story's intentions have been misunderstood.⁴⁰ Nonetheless, the conventional understanding of *Wonson*—interpreting the Seventh Amendment as a static constitutional enshrinement of English common law jury rights—has been the law for nearly two hundred years. As Professor Wolfram notes, “No federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious.”⁴¹

The *Wonson* interpretation of the Seventh Amendment became known as the “historical test.”⁴² Under the historical test, in order to determine whether a civil case carries a jury right, one must ask if the claimant would have a right to a jury trial according to English common law principles. If there was any doubt that this test incorporated the English practice of a fixed point in time, that was clarified in 1898, when the Supreme Court expressly recognized that the Sixth and Seventh Amendment's phrase “trial by jury” not only meant that a case should be compared to English practice, but also that the comparison was fixed in time to English practice in 1791.⁴³

2. *The Resilience of the Historical Test*

In the near two-hundred years since *Wonson*, a handful of scholars (including this writer) have discussed, criticized, defended, and ridiculed the historical test and the accuracy of the understanding of original intent it rests upon.⁴⁴ Nevertheless, courts have remained steadfast to the notion that the Seventh Amendment is a constitutional preservation of the civil jury as it existed at common law in England in 1791.⁴⁵

83, *supra* note 12. Justice Story's assertion had no documentable basis. See David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 448–49 (1971).

40. Kraus, *supra* note 13, at 460–75.

41. Wolfram, *supra* note 5, at 641.

42. See, e.g., *id.*, at 639–40.

43. *Thompson v. Utah*, 170 U.S. 343, 350 (1898). See also *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) (holding that courts must look to the common law at the time of the adoption of the Bill of Rights in 1791).

44. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998) [hereinafter AMAR II]; KLEIN I, *supra* note 3; Rachael E. Schwartz, “Everything Depends on How You Draw the Lines”: An Alternative Interpretation of the Seventh Amendment, 6 SETON HALL CONST. L.J. 599 (1996).

45. An excellent review of the post-*Wonson* jurisprudence and the inroads it has, and has not, made on the historical test is found in Moses, *supra* note 10, which reviews whether the *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), decision, holding that claim construction of patents is not a jury issue, forebodes the end of the historical test, and concludes it does not.

The loyalty of historical test supporters has not come easy—requiring instead increasingly abstract comparisons of modern day litigation to eighteenth century England. Recent cases are indicative of the reaches the U.S. Supreme Court has had to make to find analogs between contemporary causes of action and eighteenth century English writs. In *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, the Justices argued over whether the common law action for attorney malpractice or the equitable action for breach of fiduciary duty was a closer eighteenth century English equivalent to a modern suit by an employee for back pay arising out of a union's breach of duty of fair representation.⁴⁶ In *Feltner v. Columbia Pictures Television, Inc.*, the Court concluded there was a 1791 English common law analog to a 1976 United States statute creating a right to damages for copyright infringement.⁴⁷ In *Granfinanciera, S.A. v. Nordberg*,⁴⁸ the Court performed all sorts of jurisprudential gymnastics in order to hold that bankruptcy proceedings did not carry the right to a jury trial.⁴⁹ In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Court found that a section 1983 claim protesting a municipal exercise of eminent domain was analogous to a 1791 English common law tort action.⁵⁰ In *Markman v. Westview Instruments, Inc.*, the Court found that while a case for patent infringement did carry a jury right, the construction of claims terms in the patent did not.⁵¹

The above cases are just a handful of examples of the historical test surviving, even at the resulting cost of fantastical jurisprudence.⁵² There is sporadic academic debate over Justice Story's interpretation of the history underlying the Seventh Amendment and over whether the static historical test is even what Justice Story intended. There is no debate that it is what we now have.⁵³

Amidst the sporadic academic debate, the Court has only even slightly wavered but once. In *Ross v. Bernhard*, the Court hinted that there might be a complexity exception to the Seventh Amendment.⁵⁴ While this triggered an academic debate over the desirability of such

46. 494 U.S. 558, 567–68, 584 (1990).

47. 523 U.S. 340, 348–49 (1998).

48. 492 U.S. 33 (1989).

49. Kenneth S. Klein, *The Validity of the Public Rights Doctrine in Light of the Historical Rationale of the Seventh Amendment*, 21 HASTINGS CONST. L.Q. 1013, 1034–38 (1994).

50. 526 U.S. 687, 708–09 (1999).

51. 517 U.S. 370, 372 (1996).

52. See, e.g., Klein I, *supra* note 3; Schwartz, *supra* note 44; Ellen E. Sward, *The Seventh Amendment and the Alchemy of Law and Fact*, 33 SETON HALL L. REV. 573 (2003).

53. See Moses, *supra* note 10, at 187–88.

54. 396 U.S. 531, 538 n.10 (1970).

an exception,⁵⁵ in the end the Court hewed the line to the historical test.⁵⁶

One way to think about and appreciate the resiliency of the historical test is to note that its legal pedigree is only nine years less than that of *Marbury v. Madison*.⁵⁷ Why has the Court remained true to the historical test even in the face of the resulting convoluted jurisprudence? As then Associate Justice Rehnquist observed, while the "rigid" application of the Seventh Amendment might be "burdensome," "it is the Constitution which commands that rigidity."⁵⁸

If the Constitution does, in fact, command that rigidity, then Justice Rehnquist was correct—we must live with the increasingly burdensome historical test. But if that is a misreading of the Seventh Amendment, then one is reminded of the first law of holes: when you find yourself in a hole, stop digging.⁵⁹

III. THE IMPLICATIONS OF *ASHCROFT V. IQBAL* ON THE SEVENTH AMENDMENT

While the historical test is most often thought of as the measure of when a cause of action carries a jury trial right, it also serves as the measure of procedural reforms that arguably infringe on the role of the jury. In evaluating procedural reforms through a Seventh Amendment lens, the Court's approach has not been to look for a precise procedural equivalent in eighteenth century English common law, but rather to measure whether the reform had an analogous eighteenth century English common law procedure in effect; in other words, whether the contemporary procedure encroached on the traditional role and prerogative of a jury.⁶⁰ For example, in *Galloway v. United States* (the opinion most often cited for this approach), the Court held that a directed verdict was appropriate under the historical test be-

55. See, e.g., Morris S. Arnold, *A Modest Replication to a Lengthy Discourse*, 128 U. PA. L. REV. 986 (1980); Morris S. Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829 (1980); James S. Campbell & Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 U. PA. L. REV. 965 (1980); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43 (1980); Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581 (1984).

56. See, e.g., *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987) ("The Court has also considered the practical limitations of a jury But the Court has not used these considerations as an independent basis for extending the right to a jury trial under the Seventh Amendment."); Wolfram, *supra* note 5, at 648-49.

57. 5 U.S. 137 (1803).

58. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 346-50 (1979) (Rehnquist, J., dissenting).

59. THE PENGUIN DICTIONARY OF MODERN HUMOROUS QUOTATIONS 194 (Fred Metcalf ed., 1986) (quoting Denis Healey).

60. See, e.g., *Parklane Hosiery*, 439 U.S. at 336-37.

cause it had a procedural equivalent in eighteenth century English common law.⁶¹ *Dimick v. Schiedt* held that an appellate court conditioning reversal on a defendant's declination of an additur violated the Seventh Amendment because of the absence of an English judge having a similar right in 1791 England.⁶² *Ex Parte Peterson* approved a trial court retention of a financial auditor to report on and simplify issues for a jury, finding the auditor served a role similar to the role of pleadings in the common law in that it focused and simplified matters for the jury.⁶³ *Fidelity & Deposit Co. of Maryland v. United States* approved of summary judgment as permitted by the Seventh Amendment because it was equivalent to the common law demurrer to the evidence.⁶⁴

It is in this context that *Iqbal* collides with the Seventh Amendment. In *Iqbal*, the Court addressed pleading standards under *Federal Rule of Civil Procedure* 8.⁶⁵ There are some civil cases with special pleading rules. Rule 9 sets a special standard for pleading fraud.⁶⁶ The Private Securities Litigation Reform Act⁶⁷ sets special

61. 319 U.S. 372, 389–90 (1943). For a more detailed discussion of exactly what *Gal-loway* did and did not hold, see Klein II, *supra* note 4, at 278–83.

62. 293 U.S. at 482–87 (1935). A useful, in depth, and ultimately critical analysis of the Court's opinion in *Dimick* is Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003).

63. 253 U.S. 300, 308–10 (1920).

64. 187 U.S. 315 (1902). See also, *Colgrove v. Battin*, 413 U.S. 149, 158–60 (1973) (the Court approved of six-person jury panels because it did not implicate the power or role of the jury); *Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 594–96 (1897) (the procedure of the special verdict did not violate the Seventh Amendment "[s]o long as this substance of right is preserved the procedure by which this result shall be reached is wholly within the discretion of the legislature, and the courts may not set aside any legislative provision in this respect because the form of action—the mere manner in which questions are submitted—is different from that which obtained at the common law"). There also are cases approving procedural devices that had no eighteenth century English common law analog, but can be explained on the basis that the procedures were forms of review of juries (the second clause of the Seventh Amendment speaks to review of jury verdicts and is not textually grounded in the "common law"). Thus, in *Gasoline Products Co. v. Champlin Refining Co.*, the Court rejected a claim for retrial on both liability and damages, and instead held (even though this was not an available procedure at common law in 1791) that an appellate court could set aside a verdict in part. 283 U.S. 494, 499 (1931) (affirming the verdict on liability, but remanding for a new trial on damages due to an erroneous jury instruction on damages). The Court held the Seventh Amendment was concerned with substance, not form, and the substance preserved was the right of the jury to decide all issues of fact (and the jury had decided liability in the first verdict). *Id.* Similarly, *Capital Traction Co. v. Hof* recognized the power of the legislature to pass a statute empanelling an appellate jury to review a jury trial held before a justice of the peace, even though no such procedure existed at common law in England. 174 U.S. 1, 38–39 (1899).

65. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1953 (2009).

66. FED. R. CIV. P. 9(b).

standards for pleading securities class actions. However, the overwhelming majority of civil cases in federal court simply must meet the "short and plain statement" standard of Rule 8.⁶⁸ Under *Conley v. Gibson*,⁶⁹ this standard has long been the "no set of facts" standard, also known as "notice pleading."⁷⁰

In *Iqbal*, the Court implicitly rejected notice pleading, holding that any complaint subject to Rule 8 should have its allegations divided into those which are "conclusory" and those which are not.⁷¹ As to the former, the district court should review them under the lens of the trial judge's experience and common sense to determine if the allegations are plausible.⁷² If the court finds these allegations are not plausible, then the case should be dismissed under *Federal Rule of Civil Procedure* 12(b)(6).⁷³

The crux of this analytical approach, of course, turns on the Court's meaning of the word "conclusory." If one focuses on the facts of *Iqbal*, it seems that what is meant by "conclusory" is any complaint that does not have in hand, and plead, the equivalent of smoking gun evidence. Since virtually all civil cases depend to one degree or another on the discovery process—it is the rare plaintiff who comes to the courthouse with a lay down hand *before* suing—this subjects virtually all civil cases to a trial court's whims and instincts on plausibility, and essentially insulates that conclusion from appellate reversal.⁷⁴

The underlying logic of *Iqbal* is that it empowers a trial judge to act as an early gatekeeper to dismiss possibly frivolous litigation before too much cost is imposed by discovery.⁷⁵ The Court has identified a Rule 12(b)(6) motion as the correct tool to achieve this goal, and thus has interpreted Rule 8 in such a way as to give that tool a target rich environment.⁷⁶

But there is no way to evaluate the plausibility of factual allegations without that effort constituting a weighing of evidence.⁷⁷ And there is no way to characterize a dismissal on the basis of a weighing of the evidence as anything other than taking the prerogative of weighing controverted evidence away from the jury.⁷⁸ That is not a power that was available to an eighteenth century English Common

67. 15 U.S.C. § 78u-4(c) (2006).

68. FED. R. CIV. P. 8(a)(2).

69. 355 U.S. 41 (1957).

70. Klein II, *supra* note 4, at 267–68.

71. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

72. *Id.* at 1950.

73. *Id.*

74. Klein II, *supra* note 4, at 274.

75. *Id.*

76. *Id.*

77. *Id.* at 276.

78. *Id.*

Law judge.⁷⁹ That is why *Iqbal* inevitably clashes with the Seventh Amendment.⁸⁰

While the evolution of litigation has increasingly made the historical test anachronistic, it is rare that the Court has actually had to square up to this fact. Thus far, the historical test has never put a jurisprudential goal of the Court at unavoidable odds with eighteenth century English practice. But *Iqbal* does present that impasse. It now seems inevitable that as a result of *Iqbal*, the Court will have to address the viability of the historical test for the first time since *Wonson*.

IV. IT IS TIME TO ABANDON THE HISTORICAL TEST

When the Court revisits the historical test, it should abandon it. The test is a misreading of constitutional intent. And from that comes the question the Court never has addressed—what reading of the Seventh Amendment should replace the historical test?

A. The Historical Test Is a Misreading of Constitutional Intent

The historical test has been flawed from inception. Either Justice Story never intended to create a static interpretation of the Seventh Amendment,⁸¹ or Justice Story had a failure of imagination in prognosticating the mischief his rule would create. Put another way, one is left to wonder precisely why "later judges have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious."⁸²

Frankly, it is hard to come up with an answer beyond some combination of inertia and legend. Like the call of the mermaid, one wishes to ascribe great wisdom and lofty goals to each word in the now centuries old Constitution. And just as one may run aground on the rocks rather than see that the siren song is not coming from a mermaid, but a manatee, one may live with absurd law rather than see the Founders as political actors acting with pedestrian political motives. But what would we conclude about the Framers' intentions if we could step back, clear our minds of preconception, and simply read the Founders' contemporaneous words about what they were doing, and why they were doing it?⁸³

79. *Id.* at 283.

80. *Id.* at 287.

81. Krauss, *supra* note 13, at 460–78.

82. Wolfram, *supra* note 5, at 641. See Henderson, *supra* note 5, at 292.

83. Mark Twain once said, "It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so." BrainyQuote.com, <http://www.brainyquote.com/quotes/quotes/m/marktwain109624.html> (last visited Oct. 2, 2009).

The history of the Seventh Amendment describes a group of politicians addressing a political problem by navigating to a political solution.⁸⁴ Unburdened by preconception, contemporary political scientists would see it at a glance, just by reading the contemporaneous words of the Founders. They describe how at the Constitutional Convention, the Framers knew that the nascent nation cherished jury rights in civil trials, but they could not come to an agreement on the precise parameters of those rights.⁸⁵ They describe how they found it an impossible task to choose a precise form of jury rights to be preserved in the draft Constitution without risking alienating so many states that it imperiled adoption.⁸⁶ They describe how they decided to leave the document silent on the issue, in the hope that no one would question their intentions.⁸⁷ They describe how that hope failed, and how they then committed to address the issue in immediate amendments to the Constitution, if the Constitution was adopted.⁸⁸ And they describe how at the stage of drafting those amendments, the initial problem had not changed.⁸⁹

Through all of this the drafters of the Seventh Amendment were cobbling together a political majority—they were vote counters. It would seem inescapable, in light of this history, that the resulting language of the Seventh Amendment was a salve, but not a solution. Put another way, because it was politically necessary, the Seventh Amendment intentionally was *not* a choice of a definitive rule of law concretely defining the precise contours of the preservation of civil

84. As Professor Krauss notes, for example, “only by promising to support amendments did men like James Madison win election to the First Congress.” Krauss, *supra* note 13, at 412.

85. For example, the Federalists acknowledged that a Constitution that eliminated civil jury rights could lead to insurrection. IREDELL, *supra* note 11. During the Constitutional Convention, Mr. Gerry “urged the necessity of Juries to guard [against] corrupt Judges,” to which Colonel Mason responded, “[t]he jury cases cannot be specified.” 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1911).

86. For example, Alexander Hamilton said, “no general rule could have been fixed upon by the convention which would have corresponded with the circumstances of all the States” THE FEDERALIST NO. 83, *supra* note 12, at 525. As one of the Federalists amplified, “[a] general declaration therefore to preserve the trial by jury in all civil cases would only have produced confusion . . . because there has been no uniform custom about it. If therefore the Convention had interfered, . . . if they had pleased some States they must have displeased others.” THE BILL OF RIGHTS, *supra* note 8, at 454.

87. For example, when General Pinckney reported on the Federal Convention to the ratification debates in South Carolina, he explained that the Constitution was silent on civil juries because “they found it impossible to make any precise declaration upon the subject.” ELLIOT’S DEBATES II, *supra* note 14, at 253, 260. Mr. Randolph took the same position in the Virginia ratification debates. ELLIOT’S DEBATES I, *supra* note 7, at 463, 468.

88. Wolfram, *supra* note 5, at 725.

89. Klein I, *supra* note 3, at 1016–20.

jury rights. Unfortunately, that political solution is what has led to the contemporary problem.

B. The Historical Test Should Be Abandoned

The historical test rests on discredited approaches of constitutional interpretation. The basic interpretive approach of the historical test is that the term "common law" had a static meaning in 1791; the history of the drafting of the Seventh Amendment can tell us what that static meaning is; and therefore because of that history, we are bound to that static meaning in interpreting the Seventh Amendment today.

The contemporary Supreme Court rejects as essentially absurd an approach of constitutional interpretation binding future generations to the precise meaning of a noun as it was defined in the eighteenth century. As even the staunchest originalist, Justice Scalia, wrote for a majority of the Court recently interpreting the word "arms" in the Second Amendment:

Some have made the argument, *bordering on the frivolous*, that only those arms in existence in the 18th century are protected by the Second Amendment. *We do not interpret constitutional rights that way.* Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search, the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.⁹⁰

Similarly, the contemporary Supreme Court rejects the notion that historical intent, assuming it can ever be accurately ascertained, becomes an inflexible barrier to an evolving understanding of constitutional rights. Rather, as Justice Kennedy wrote for the majority of the Court when dealing with Texas' laws regulating homosexual relationships, history is informative, but not controlling, when interpreting the Constitution.⁹¹ There, the Court recognized that the fact that the law at issue certainly would have passed constitutional muster at the time of the founding of the Nation was insufficient to save the law from falling to evolving constitutional norms two centuries later.⁹²

With these holdings in mind all three legs supporting the stool of the historical test are now gone. The drafters did not intend the words "common law" to refer to 1791 English common law. If they had so intended, that would not bind future generations to that static in time reference. And even if the intent had been to have the reference static and binding, it would not immunize the Seventh Amendment from evolving views of the role of civil juries. Indeed, imagine the irony of the contrary conclusion: facially static terms in the Constitution—

90. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2791–92 (2008) (emphasis added) (citations omitted).

91. *Lawrence v. Texas*, 539 U.S. 558, 567–74 (2003) (citations omitted).

92. *Id.* at 568–79.

"arms," "free speech," and "search"—in fact evolve and expand with the development of society, but the term "common law," which is understood to describe either a court system or jurisprudential approach through which law develops incrementally over time, is treated as forever static and binding in its reference. There is no interpretive paradigm or principle of jurisprudence I can identify to support this oxymoron.

The increasingly uncomfortable analysis the Court has engaged in to remain true to the historical test aptly demonstrates the peril of losing sight of these lessons. The problems on the horizon as a result of *Iqbal* loom even larger.⁹³ It would seem that regardless of one's jurisprudential approach to constitutional interpretation, the historical test should have no friends. The historical test must be abandoned.

C. A Proposal for a New Interpretive Approach to the Seventh Amendment

There is scant discussion of what might be a more defensible interpretation of the Seventh Amendment. Even in academic circles, questioning Justice Story's reading of constitutional intent has been a rare exercise. The proposals in lieu of the historical test (other than this Author's own work in 1992⁹⁴) take three forms. One is reading the Seventh Amendment as enshrining an *Erie Railroad Co. v. Tompkins*-like rule, preserving jury rights in civil cases in federal court as they exist in the forum state of that court.⁹⁵ Another argues that the Seventh Amendment is a grant of power to Congress to define civil jury rights in civil cases as Congress sees fit.⁹⁶ A third approach interprets Seventh Amendment original intent as preserving jury rights except in cases in which a jury would be an "inappropriate fact-finding body."⁹⁷

None of these interpretations is satisfactory. Of the three, the *Erie* interpretation is the most attractive because it rests on a documentary record that certainly can be read as supporting this intention.⁹⁸ In essence, the argument is that the record reflects both a diversity of practice among the states and the intent that there be no encroachment on this practice, and so an *Erie*-type interpretation would

93. Klein II, *supra* note 4.

94. Klein I, *supra* note 3, at 1034–35.

95. AMAR I, *supra* note 44, at 88–93. To a Civil Procedure professor such as myself, there would be delicious irony in using an *Erie*-like approach in lieu of *Wonson*, since *Erie* itself overturned one of Justice Story's other monumental opinions—*Swift v. Tyson*, 41 U.S. 1 (1842). *Erie R. Co. v. Tompkins*, 304 U.S. 64, 71–78 (1938).

96. Krauss, *supra* note 13, at 479–83; Schwartz, *supra* note 44, at 616–22.

97. King, *supra* note 55, at 608–13.

98. AMAR I, *supra* note 44, at 89–91.

achieve this result. This interpretation nonetheless has a problem I have difficulty surmounting. As the opinion in *Wonson* reflects, Justice Story was well aware that the states had widely divergent jury practices, and that the animating concern underlying the Seventh Amendment was the preservation of jury rights. This was the conundrum he had to resolve to decide the case, and is the reason he enunciated the interpretation that the Seventh Amendment was a reference to England. Justice Story was a contemporary of the gentlemen who advocated for and wrote the Seventh Amendment. So if, as Professor Amar argues, those gentlemen had conceived of and been explicit in their intention that the Seventh Amendment directed each federal court to apply the preservation of jury rights of that court's forum state, then I have no explanation for why this was lost on Justice Story. It certainly would have been an easier solution.

The interpretation that the Seventh Amendment did not provide any legal mandate, but rather gave a jury right "whenever Congress deigned to allow them," is explicitly grounded in the premise that the Seventh Amendment reflects a purely precatory principle aimed simply at "calming" the general populace, rather than mandatory protection of a cherished right.⁹⁹ I reject the notion that directive text in the Constitution, which on its face is restrictive and mandatory, can be reduced to aspirational, non-binding, and of no legal effect.¹⁰⁰

The interpretation that the Seventh Amendment is an attempt to recognize and utilize the different skill sets of judges and juries, and apportion to each responsibility for those cases for which each is most appropriate, has a different problem.¹⁰¹ As the proponent of this approach concedes, it rests on seeing a tacit, but unspoken, assumption behind the text.¹⁰² From this assumption it is argued that the Founders foresaw the future, radical evolution of the law and intended to not tie the hands of future courts to the procedure of using juries, come what may.¹⁰³ The word "tacit" is telling. There simply is no documentary support for this interpretation.

Professor Lawrence Lessig in 1993 described a mode of constitutional interpretation which he called "translation," meaning "to change one text into another text, while preserving the original text's meaning."¹⁰⁴ Under this mode, one would seek a way to translate the Seventh Amendment reference to "common law" that serves modern forms of civil litigation while not abusing the original intent. This is a

99. Krauss, *supra* note 13, at 479–81; Schwartz, *supra* note 44, at 610–11, 616–17.

100. Klein I, *supra* note 3, at 1033.

101. An excellent discussion of the additional challenge this approach raises is found in Sward, *supra* note 52.

102. King, *supra* note 55, at 611–12.

103. *Id.*

104. Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1172–73 (1993).

particularly apt approach to the Seventh Amendment, since its history reflects an intent to craft a political solution, rather than a doctrinal rule, and so searching for an actual intended rule of law is not a productive exercise. One year before publication of Professor Lessig's work, I inadvertently applied this same basic approach to interpreting the Seventh Amendment.¹⁰⁵ At that time, I concluded that there were two possible meanings of "common law" that would be true to original intent: "common law" in juxtaposition to equity or "common law" in juxtaposition to statutory law.¹⁰⁶ I concluded that the latter interpretation was preferable, because while the former was probably more like what the Founders had in mind, it also was the interpretation the historical test rested upon, and time had demonstrated the historical test as unworkable.¹⁰⁷

Now, seventeen years later, I think my initial conclusion—that one could not simultaneously avoid the problems of the historical test and translate "common law" in juxtaposition to equity—was too hasty. There is a way. The starting point is to remind ourselves of the core, animating principle of the Seventh Amendment. The absence of a constitutional provision preserving jury rights almost kept the Constitution from being adopted at all. The original intent was clear—to preserve the role of civil juries (the embodiment of citizen democracy in the civil courtroom) as the broadly empowered institution that it was throughout all of the states.

Although I did not perceive it in 1992, there is a way to be true to the original intent, and to be true to the most prevalent eighteenth century meaning of the term "common law"—which is in juxtaposition to equity—and yet still avoid the problems of the historical test. That way is to approach the definition, for purposes of the Seventh Amendment, from the other side of the coin—to read "common law" as "not equity," or phrased slightly differently, as "not chancery courts."

At the time of the drafting and adoption of the Seventh Amendment, all civil court systems were bifurcated into common law courts and chancery courts. That division was well understood by any lawyer of the day, and so one would be describing the exact same sphere of responsibility whether using the phrasing "common law" or the phrasing "not chancery." For James Madison—even if he did consider whether to phrase the Seventh Amendment one way versus the other (there is no evidence that he did)—because the choice would not result in a difference in content, using "common law" was certainly the phrasing that was least awkward.

With the merger of law and equity, coupled with more than two centuries of evolution of legal rights, the meaning of those two phras-

105. Klein I, *supra* note 3, at 1032–35.

106. *Id.* at 1034.

107. *Id.* at 1034–35.

ings has diverged. Ironically, if one today were trying to make juries the norm rather than the exception, that intent would be better served by the phrasing "not chancery." Time has exposed the consequence of defining jury rights by reference to the old sphere of responsibility of the common law courts, rather than the chancery courts. It results in a gradual but resolute contraction of jury rights.¹⁰⁸ Thus, as a starting point, to be true to the intent of broadly giving citizens a role in the courts through the institution of civil juries, "common law" ideally would have been understood to mean anything not in the sphere of chancery court responsibility, rather than that which was within the sphere of common law court responsibility.

But which chancery court system would be the point of reference? Put another way, why was I wrong in 1992 when I wrote that this interpretation would recreate the same problem into which Justice Story fell? After all, the problem Justice Story wrestled with—that the states all drew the lines between common law and equity differently—is no less challenging if one looks at the chancery courts than if one looks at the common law courts. Justice Story simply could not see a way to solve the problem but to bluster, without support, that the reference was to England. There was, however, another choice. What is certain is that by "preserving" jury rights, the Seventh Amendment does not anticipate a scope of jury rights below a floor as defined by the most crimped range of those rights among the then-existing states. Thus, for Justice Story, he could (and should) have held that "common law" meant, at a minimum, the range of cases from the then-existing state systems that were within the scope of responsibility of the common law courts as that scope was the most narrowly defined within those state systems. Or, if one today were to interpret "common law" as "not chancery," the point of reference would be the sphere of responsibility of the chancery courts in the broadest of the then-existing state systems. This would be a translation consistent with the word "preserved" within the Seventh Amendment.

While not immediately apparent, this proposed "translation" of the Seventh Amendment—that it preserves the right to civil juries except in cases that would have been in the sphere of responsibility of the chancery courts in the broadest of the state systems as such systems existed in 1791—is not only true to original intent, but also, with a tweak, has the flexibility to respond to modern realities of litigation (the concern that animated the proposal to interpret the Seventh Amendment in a way that accommodated a complexity exception¹⁰⁹). The tweak would be that as the Court has long recognized, as new

108. *See, e.g.,* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339–50 (1979) (Rehnquist, J., dissenting); *Galloway v. United States*, 319 U.S. 372, 396–407 (1943) (Black, J., dissenting).

109. *See* King, *supra* note 55.

rights are created by Congress, Congress may append or not a right to civil jury. Here, however, rather than repeat the mistake of the historical test of looking for historical analogs, the interpretive rule would be that since the right is new (i.e., was neither a right at common law or in equity in 1791), to be true to original intent, there is a civil jury right unless Congress explicitly states there is not. Thus, the Seventh Amendment should be understood to provide that any contemporary civil case carries a jury right unless one of two situations applies: (1) it was within the scope of the chancery courts by reference to the broadest definition as such courts existed in the United States in 1791, or (2) the contemporary right sued upon is newly created by Congress and explicitly does not carry a right to trial by jury.

While my proposed interpretation of the Seventh Amendment (let us call it the "Chancery test") is grounded in an understanding of the justice system as it was in 1791, this proposal has an immediate advantage over the traditional historical test. The Chancery test avoids the mental gymnastics of trying to view modern causes of action through the lens of historical analogs. Rather, one looks at a particular Chancery court system, and says either a modern claim actually existed in that system in 1791, or it did not. Under the traditional historical test, as modern litigation strayed further and further from 1791 forms, one had to struggle for historical analogs because to do otherwise was to narrow the scope of jury rights beyond recognition. Under the Chancery test, the absence of searching for modern analogs has the opposite result—it preserves and arguably expands jury rights. That consequence is certainly more true to original intent.

I not only believe that this translation of "common law" is an acceptable alternative to my 1992 proposal, but also that it is the better of the two. My 1992 interpretation translated "common law" as any claim not created by statute. But as Alexander Hamilton described, all of the States in eighteenth century America had some equity actions that did not carry a jury right.¹¹⁰ Thus, to translate "common law" as "not statutory" creates a broader range of jury rights than one can say, with confidence, was intended.¹¹¹ Translating "common law" as "not chancery," coupled with using the floor of the State with the broadest chancery courts, avoids this dilemma.

Yet, the Chancery test is an incomplete proposal. For example, proposing an alternative interpretation to the historical test, especially one which is also an historical test, does not resolve the problem

110. THE FEDERALIST NO. 83, *supra* note 12, at 523–25.

111. In this regard, I believe Professor Krauss's critique of my 1992 approach, which raises essentially this point, is well-taken. See Krauss, *supra* note 13, at 483 n.292.

presented by *Iqbal*.¹¹² But it is a separate article in itself to provide a complete detailing of this proposal, including dealing with issues such as whether a judge should ever be able to engage in fact weighing, whether as a gate keeping function or as an element of the standard of granting directed verdict or judgment NOV. The absence of that detail here, however, is not an indictment of any alternative interpretation of the Seventh Amendment, or a basis to continue to adhere to the current historical test.

D. The Advantages of Abandoning the Historical Test

The core proposal of this Article—abandoning the historical test—has several advantages, whether my new interpretive paradigm is adopted or not.

First, the passage of time has exposed the historical test. Surely the kind of mental gymnastics we go through now in cases like *Markman*¹¹³ and *Grandfinanciera*¹¹⁴ are not serving any jurisprudential goals. There must be a better way.

Second, the very exercise of deciding how to best interpret the Seventh Amendment today will force real and thoughtful revisiting as to whether we still view juries as an important institution some two hundred and twenty years later. England itself has largely eliminated civil juries.¹¹⁵ The contemporary American conception of the importance of civil juries is largely divorced from the concerns that so animated early Americans. It would be a productive exercise to re-engage the public in an honest and introspective discussion of what functions juries can serve, and whether society deems those functions, on the whole, desirable. I do not presuppose the outcome of that process. While there is much current criticism of the jury,¹¹⁶ it is possible (perhaps even likely) that nonetheless the ultimate outcome could be the same as in the eighteenth century, when the people valued their

112. In defense of my own proposal, however, I do conclude that, even at a glance, it results in a far preferable intersection with *Iqbal* than does the current historical test. The traditional historical test results in an unpredictable "hodge podge" when trying to determine which procedures in which cases are constitutionally permissible. Klein II, *supra* note 4, at 285. But there is a far greater approximation of black letter clarity when answering the dual questions: "Did Congress explicitly say this right does not have a jury right?" and "Did this cause of action exist in the Chancery Courts of State X in 1791?" For this reason, under the Chancery test there would be little ambiguity in knowing which cases could be susceptible to a front-end plausibility review, and which ones would not. It is this lack of clarity under the traditional historical test that is, to my mind, its ultimate infirmity.

113. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

114. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989).

115. Shapiro, *supra* note 39, at 443 n.4, 450.

116. Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1328–59 (1996) [hereinafter Klein III].

own abilities over that of judges. After all, there is also much criticism of judges in contemporary America.¹¹⁷

Third, the abandonment of the historical test might remove a constitutional impediment to the valuable introspection and debate over plausibility pleading. The debate over what, as a matter of public policy, the pleading standard should be is a good and useful conversation. But it is a dramatically incomplete debate, precisely because it is the same conversation that animated the adoption of the Seventh Amendment in the first place, and yet is occurring without reference to the Seventh Amendment. A good deal of the reason eighteenth century Americans cared so deeply about civil juries was an extension of their views on the relative roles of government and citizenry to be the ultimate deciders of private affairs. The debate over heightened fact pleading standards is, in many ways, that same conversation. Eliminating the historical test, and doing so explicitly because of the consequence of *Iqbal*, forces the issue out in the open.

Finally, the Chancery test would eliminate the awkward exercise of looking for historic analogs to contemporary forms of litigation—an increasingly fictional enterprise. By changing the default position from “no jury right” to “jury right,” the need for this exercise evaporates.

E. A Response to Anticipated Criticisms of Abandoning the Historical Test

One could criticize this proposal as actually solving nothing. An *Iqbal* pleading standard may be almost inescapably contradictory to the intention of the Seventh Amendment. As reflected in the above excerpted quotes contemporaneous with the consideration, drafting, and adoption of the Seventh Amendment, one of the driving concerns was not in preserving the right of civil litigants to a jury trial, but in preserving the right of the citizenry—through the vehicle of the jury,

117. Indeed, in his dissent in *Bush v. Gore*, Justice Stevens famously asserted that the majority opinion had to be premised on an assumption of general mistrust of the competence of trial judges, which he asserted had now been endorsed by a majority of the Supreme Court. 531 U.S. 98, 128–29 (2000) (Stevens, J., dissenting) (“What must underlie petitioners’ entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.”).

as opposed to the government through the vehicle of the judge—to be the ultimate fact finder in common law civil disputes.¹¹⁸ As Professor Wolfram, a noted scholar of the Seventh Amendment, wrote: "It is familiar legend that juries in civil cases were intended to guard private litigants against the oppression of judges."¹¹⁹ In reality, the Anti-Federalists, who were the driving force behind the amendment, wished to interpose juries between judges and the general populace.¹²⁰ Yet while the memory of this rationale for the Seventh Amendment has faded, it has not been lost entirely, and is, from time to time, still reaffirmed by the Court.¹²¹

One would struggle to harmonize giving the judge the initial right to evaluate the plausibility of facts, and yet preserving the intended role of the jury as interjected in between the litigant and the government in the evaluation of the facts. Thus, under any test used to interpret the Seventh Amendment, plausibility pleading still may be

118. See, e.g., *Green v. United States*, 356 U.S. 165, 209 (1958) (Black, J., dissenting) ("Primary among the precepts underlying the Constitution was that the people of the time deeply feared and bitterly abhorred the existence of arbitrary, unchecked power in the hands of any government official. . . . A great concern for protecting individual liberty from even the possibility of irresponsible official action was one of the momentous forces which led to the Bill of Rights. And the . . . Seventh [Amendment was] directly and purposefully designed to confine the power of courts and judges . . ."); *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218, 236 (5th Cir. 1990) (Rubin, J., dissenting) ("The Seventh Amendment preserves the right of trial by jury . . . thus interposing the civil jury as an important constraint on the power of government."); *Standard Oil Co. of Cal. v. Arizona*, 738 F.2d 1021, 1029 (9th Cir. 1984) (the Seventh Amendment arose as a consequence of "concern over the broad powers of federal government under the new constitution."); *Frank Irey, Jr., Inc. v. Occupational Safety & Health Review Comm'n*, 519 F.2d 1200, 1208 (3d Cir. 1975) (Gibbons, J., dissenting) (the people insisted upon the Seventh Amendment because they were "fearful of the aggrandizement of power in the national government"); *Accord Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 434–44 (1979) (Rehnquist, J., dissenting) (citing OLIVER WENDELL HOLMES, *COLLECTED LEGAL PAPERS* 237 (1920)); 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 285 (Phillips Bradley ed., 1945) ("I do not know whether the jury is useful to those who have lawsuits, but I am sure it is highly beneficial to those who judge them."). See also Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169–72 (1995); Akhil Reed Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1187–89 (1991) [hereinafter Amar II]. See generally, Klein III, *supra* note 116, at 1336–41.

119. Wolfram, *supra* note 5, at 708.

120. *Id.* at 670–72. See also Amar II, *supra* note 118, at 1182–99 (discussing the jury in the Fifth, Sixth, and Seventh Amendments, the historical importance of the jury, the role of the jury in government, and the ability to waive a jury trial in criminal cases). Professor Amar also discusses other rationales that he believes complemented the populism rationale. *Id.* But see Robert C. Palmer, *Akhil Amar: Elitist Populist and Anti-Textual Textualist*, 16 S. ILL. U. L.J. 397, 408–14 (1992).

121. *Powers v. Ohio*, 499 U.S. 400, 406–07 (1991). *Accord* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995).

unconstitutional. This criticism does not save the historical test, but rather it just changes the terms of the debate. The conversation about the desirability of a plausibility pleading standard would have to incorporate a topic heretofore ignored in that context—the degree to which we share the view of our forbearers regarding the desirability of protecting the historic province of the jury.¹²²

Another criticism might be that the historical test has been the rule of law for roughly two hundred years, and so should be a settled matter for that reason. I will not rehash the many reasons for giving deference, but not blind unquestioning deference, to *stare decisis*. It does bear noting, however, that for decades in key Seventh Amendment decisions, dissenting Justices have questioned whether the historical test is getting increasingly more lip service than adherence.¹²³ Perhaps of equal importance, *stare decisis* simply should not trump bad law.

A related criticism might be that indeed the accusation in the dissent in *Parklane Hosiery* is correct—the Court has lately just been paying lip service to the historical test, and thus already has long ago abandoned it. Here, the response is that if this is so, then the replacement has been that the Court is now acting on intuition on a case by case basis. This defeats the time honored value of predictability in the law.

Yet another criticism could be that the Chancery test would make it very difficult to create new causes of action that did not carry a jury right. My response is simple—that is exactly the result the Seventh Amendment intended.

Finally, one might argue seeing *Iqbal* as the catalyst to jettison the historical test but without doing so in a way that solves the constitutional problems with *Iqbal* is the quintessential instance of the tail wagging the dog. To these critics, I would say that the historical test has been flawed from its inception. The correct metaphor is that one hopes it is the straw that breaks the camel's back. The Court should have abandoned it long ago. If the consequence, albeit unintended, of *Iqbal* is to force the issue, then so much the better. In other words, I do not propose that *Iqbal* forces us to a regrettable but inescapable loss of an otherwise valuable and cherished rule of law. Rather, I see this as the necessary application of the special category of appropriate, "high time."

122. For a discussion, and possible explanation, of the eroding public support of juries, see Klein III, *supra* note 116.

123. See, e.g., *Parklane Hosiery*, 439 U.S. at 339–50 (Rehnquist, J., dissenting); *Galloway v. United States*, 319 U.S. 372, 396–407 (1943) (Black, J., dissenting).

V. CONCLUSION

Time and dust should not morph myth into value. Our Founders were politicians, who sometimes cut political deals to solve political problems. That such a solution is described in the text of the Constitution should neither obscure its origins, nor impair contemporary jurisprudence. Let us now, finally, put the myth of the historical test to bed.