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Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores

Kenneth S. Klein
California Western School of Law, kklein@cwsl.edu

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* Assistant Professor of Law, California Western School of Law. I am incapable of writing an Article without the assistance and support of many others. I particularly thank my personal editor, spouse, and best friend, Professor Lisa Black. I greatly appreciate the research support of the Library staff at California Western School of Law, and the exceptionally valuable comments and input of my professional colleagues, Professors Mark Weinstein, Larry Benner, and Robert Bohrer of California Western School of Law, and Professor Walter Heiser of the University of San Diego School of Law. Catherine Pugh put in the tough duty of the initial *Bluebook* cite checking of this Article for me, for which I am very grateful. A special thanks is due to Jared Hestetune, my research assistant on a different article, who nonetheless in support of this Article found Dahlia Lithwick's colorful comments regarding *Twombly*, Civil Procedure professors, and live ferrets. The staff of the NEBRASKA LAW REVIEW deserves credit for their professionalism and quality work—they made this Article better. Finally, I dedicate this Article to the memory of my mother-in-law, Marian Black, who passed in her sleep during the writing of this Article. Ms. Black expected, inspired, and required me to think more clearly every day.

I. INTRODUCTION

Since the early nineteenth century, the interpretation of the Seventh Amendment preservation of the right to a civil trial by jury has remained static and become increasingly anachronistic. Over the same period of time, the evolution of modern civil procedure pleading standards has been on a collision course with that interpretation. The penultimate 2007 Supreme Court opinion in this field, *Bell Atlantic Corp. v. Twombly*,[1] raised the specter of an impending impasse between pleading standards and the Seventh Amendment. The 2009 opinion in *Ashcroft v. Iqbal*[2] is the point of impact. While the *Iqbal* opinion fails to even acknowledge a potential conflict with the Seventh Amendment, the decision inescapably interprets *Federal Rule of Civil Procedure* 8 in a manner that is unconstitutional when measured against the traditional (and continuing) interpretation of the Seventh Amendment—the so-called "historical test."

The collision between *Iqbal* and the Seventh Amendment, simply stated, is that under the historical test it is unconstitutional to give a judge the power to weigh the factual heft of a complaint at the outset of a civil case and to dismiss it as insufficient. Yet, that power is precisely what the *Iqbal* Court held was a permissible mechanism for controlling frivolous litigation.

The Seventh Amendment provides that "in suits at common law . . . the right to trial by jury shall be preserved."[3] In the early nineteenth century, the courts held that the Seventh Amendment preservation of a right to trial by jury in civil cases was measured by a static, or fixed in time, reference to common law in England in 1791.[4] In other words, a federal claim or procedure in a civil case falls within the scope of the Seventh Amendment if it existed, or had an analog, in the common law courts of 1791 England. This became known as the "historical test."[5] It remains today the operative interpretation of the Seventh Amendment.[6]

1. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
2. Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009).
3. U.S. CONST. amend. VII.
4. 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].
5. *Id.* at 1023.
6. *See, e.g.*, City of Monterey v. Del Monte, 526 U.S. 687, 708–09 (1999); Feltner v. Columbia Pictures, 523 U.S. 340, 348–49 (1998); Chauffers v. Terry, 494 U.S. 558, 566–68, 584 (1990).

As pleading standards have evolved in American courts, the standards have crept closer and closer to the edges of what would not satisfy the historical test. The common law in England in 1791 did not have pre-trial attacks on the pleadings for insufficient or implausible facts.[7] Eighteenth century civil pleadings were form writs. Pleading challenges tested compliance with the form. But as the American courts moved from form pleading to the Field Codes to *Federal Rule of Civil Procedure* 8, complaints moved from forms, to narratives, to notice pleading, and so motions to dismiss moved from attacks on compliance with a form to attacks on the factual sufficiency of a story, to attacks on the sufficiency of notice to a defendant about what a suit concerns. This inevitably challenged the dividing line between the respective roles of judge and jury.

The Supreme Court presaged the crossing of that line in *Twombly*.[8] *Twombly* involved a consumer class action challenge to local telecommunications companies on the basis that the parallel pricing of internet services could be explained only by as yet undiscovered conduct by the telecommunications companies in violation of antitrust laws.[9] The Court found that given the expense of discovery in antitrust cases, among other reasons, a trial court could dismiss this complaint on the basis that its facts were not "plausible."[10]

Twombly left open many questions. One prominent question was noted by the circuit court in *Iqbal* itself—whether the *Twombly* opinion really intended to change pleading standards at all.[11] Even assuming *Twombly* did create a new, plausibility pleading standard, the question remained whether *Twombly* applied to all civil litigation, or whether *Twombly* was narrow in application (perhaps either to antitrust contexts or to high-expense litigation contexts).

The Court answered both questions in *Iqbal*, a *Bivens* action brought by a post-9/11 detainee against numerous federal officials, including both the Director of the Federal Bureau of Investigation and the Attorney General of the United States.[12] In *Iqbal*, the Court held that a trial court, if ruling on a Rule 12 motion to dismiss, should not simply accept all of the factual allegations of a complaint as true, but rather should "draw on its judicial experience and common sense" to

7. William E. Nelson, *Summary Judgment and the Progressive Constitution,* 93 IOWA L. REV. 1653, 1657 (2008).
8. Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).
9. *Id.* at 550–55.
10. *Id.* at 555–63.
11. *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007), *cert. granted sub nom.* Ashcroft v. Iqbal, 128 S. Ct. 2931 (June 16, 2008) (No. 07-1015) ("Considerable uncertainty concerning the standard for assessing the adequacy of pleadings has recently been created by the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*.").
12. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1943–45 (2009).

determine "whether a complaint states a plausible claim for relief."[13] The Court rejected the notion of restricting its interpretation of Rule 8 to the narrow context of *Twombly*, rather holding that "[o]ur decision in *Twombly* expounded the pleading standard for 'all civil actions.'"[14]

The opinion in *Twombly* suggested the Court was amenable to using the Rule 12(b)(6) motion to dismiss as a screening device to identify and quickly dispose of perceived frivolous litigation, and so triggered a vigorous, and important, debate about the desirability of imposing a system-wide, heightened Rule 8 fact pleading requirement for civil cases in federal court.[15] *Iqbal* confirmed the Court's intentions as foreshadowed in *Twombly* and certainly will only increase the vigor of the colloquy. Almost entirely missing from that largely academic debate, however, is any recognition that given the current state of Seventh Amendment law, it should be *purely* an academic debate.[16] Nowhere in *Twombly* or *Iqbal* is there any recognition that in the common law courts of 1791 England, a trial court could not dismiss a pleading because the factual allegations were implausible.[17]

Part I of this Article traces the development of the pleading standards from writs to Rule 8 to *Iqbal*. Part II demonstrates that under

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13. *Id.* at 1950.

14. *Id.* at 1953.

15. A small sampling of the academic discussion of *Twombly* is: DAVID CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE 301–08 (5th ed., LexisNexis 2008); RICHARD D. FREER & WENDY COLLINS PERDUE, CIVIL PROCEDURE CASES, MATERIALS, AND QUESTIONS 298–310 (5th ed., LexisNexis 2008); JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE CASES AND MATERIALS 526–37 (2008 rev. ed., Thomson West); RICHARD L. MARCUS, MARTIN H. REDISH & EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 1205–24 (Updated 4th ed., Thomson West 2008); STEPHEN C. YEAZELL, CIVIL PROCEDURE 359–64 (7th ed., Aspen 2008); Keith Bradley, *Pleading Standards Should Not Change After* Bell Atlantic v. Twombly, 102 NW. U. L. REV. COLLOQUY 117 (2007), http://www.law.northwestern.edu/lawreview/colloquy/2007/31/LRColl2007n31Bradley.pdf; Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic v. Twombly, 9 NEV. L. J. 1 (2008); M. Norman Goldberger, Colleen F. Coonelly & Justine M. Kasznica, *Courts Begin To Apply* Twombly, NAT'L L.J., Oct. 15, 2007, at S-1; Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice,* 243 F.R.D. 604 (2007); Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 548–51 (2008); Benjamin Spencer, *Plausibility Pleading,* 49 B.C. L. REV. 431 (2008); Saritha Komatireddy Tice, *A "Plausible" Explanation of Pleading Standards:* Bell Atlantic Corp. v. Twombly, *127 S. Ct. 1955* (2007), 31 HARV. J.L. & PUB. POL'Y 827 (2007); Note, *Pleading Standards*, 121 HARV. L. REV. 305 (2007).

16. So far, only one scholar or commentator has written about the possible conflict between *Twombly* and the Constitution. Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional,* 92 MINN. L. REV 1851 (2008) [hereinafter Thomas I]. As of the time of this writing, none have written about *Iqbal.*

17. Nelson, *supra* note 7, at 1657.

the historical test, *Iqbal*'s interpretation of Rule 8 is unconstitutional—at least in cases to which the Seventh Amendment applies.

II. THE EVOLUTION OF CONTEMPORARY (HEIGHTENED) PLEADING STANDARDS

Under current Seventh Amendment jurisprudence, the constitutionality of any particular procedural practice requires more than a comparison of the practice to constitutional text; it requires an inquiry as to whether the procedure existed or had an analog in eighteenth century English common law practice. And, of course, because of the potential impact of precedent, one should also consider any constitutional evaluations that were made regarding the interim, evolutionary iterations of the procedure. Thus, to evaluate the constitutionality of a current procedural approach, one needs to know not just where we are, but where we began and how we traveled from one point to the other.

A. The Eighteenth Century English System of Form Pleading

The common law in England in 1791 was not structured in a way that anticipated a pre-trial attack on the pleadings for insufficient or implausible facts.[18] The role of pleadings was to frame a case within a particular form of code pleading, or writ, and to notify the defendant of what form had been asserted. It was not to notify the defendant of the specific facts giving rise to a dispute.[19] Stated in only slightly overgeneralized terms, English common law pleading in 1791 entailed asserting through a declaration an entitlement by a recognized writ sufficient to notify the defendant of which form of action was claimed.[20]

English common law in 1791 provided few mechanisms for a judge, rather than the jury, to decide a case. There was no "procedure (other than demurrer [to the pleadings]) that would allow a judge to determine before trial that a case presented no issue to be decided by a jury, or that an issue in a case should be withheld from the jury."[21] A demurrer to the pleadings allowed a trial court to enter judgment as a matter of law if the parties conceded that they had no factual dispute

18. *Id.*
19. *See* BENJAMIN J. SHIPMAN, HAND-BOOK OF COMMON-LAW PLEADING 423–26 (2d ed., West 1895).
20. *See id.* at 417–18.
21. Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 149 (2007) (quoting James Oldham, *The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered, in* Human Rights and Legal History: Essays in Honour of Brian Simpson 225, 231 (Katherine O'Donovan & Gerry R. Rubin eds., 2000)) [hereinafter Thomas II].

with each other.[22] Even at the trial stage, under English common law, a judge could never decide a case without a jury or the parties determining the facts, however improbable the evidence might be.[23]

If the judge considered a factual matter to be of such common sense that it was not necessary to summon a jury to decide it, the court had a pre-trial procedure available called "trial by inspection."[24] Contemporary scholars disagree over whether the proper modern analogy to trial by inspection is the contemporary device of judicial notice, or the procedure of summary judgment.[25] Under either construct, it depended upon a fact being either undisputed or undisputable.[26]

If the plaintiff failed to appear at trial, the judge could order a nonsuit.[27] This resulted in the equivalent of a dismissal without prejudice.[28]

After the close of evidence, but before verdict, an English common law judge in 1791 could take a matter away from the jury through a demurrer to the evidence.[29] This was a mechanism available at the end of trial which admitted all facts shown by the plaintiff as well as all inferences and asked for a ruling by the court on the "law of the case."[30] The federal court procedure of directed verdict "superseded the ancient practice of a demurrer to evidence."[31]

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22. *Id.* at 148–49 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *314–15). *See also* HENRY WINTHROP BALLANTINE, HAND-BOOK OF COMMON-LAW PLEADING BY BENJAMIN J. SHIPMAN 277–79 (Third ed., West 1923).

23. Thomas II, *supra* note 21, at 143, 147–58.

24. Edward Brunet, *Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625, 1631–32 (2008) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *331–32).

25. *Id.* at 1636–41; Suja A. Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667, 1676–77 (2008) [hereinafter Thomas III].

26. Brunet, *supra* note 24, at 1631–40.

27. Thomas II, *supra* note 21, at 154 (citing 2 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH, IN PERSONAL ACTIONS 586–87 (London, A. Strahan & W. Woodfall 1794)).

28. *Id.* at 154 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *376–77).

29. *Id.* at 150–51 (citing FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 307 (London, W. Starhan & M. Woodfall 1772)). This practice fell into disuse in England in 1793 and in the United States federal courts in 1826. Galloway v. United States, 319 U.S. 372, 399–400 (1943) (Black, J. dissenting) (citing Gibson v. Hunter, 2 H.Bl. 187, (1793) 126 Eng. Rep 499, 510, and Fowle v. Alexandria, 24 U.S. 320 (1826)).

30. *Galloway*, 319 U.S. at 399–400 (Black, J., dissenting) (citing Wright v. Pindar (1647) Alleyn 18 and Pawling v. United States, 8 U.S. 219 (1808)). *See also* Parks v. Ross, 52 U.S. 362, 373 (1850) ("A demurrer to evidence admit[ed] (sic) not only the facts stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom."); Gibson v. Hunter, 2 H.Bl. 187, (1793) 126 Eng. Rep 499, 510.

31. *Parks*, 52 U.S. at 373.

After verdict, a 1791 English common law judge could order the re-examination of the facts by granting a motion for new trial.[32] English common law in 1791 also had the procedure of "special case," or "case stated," through which a judge decided purely legal issues after trial, but it is of limited pertinence to this Article because when it involved a jury the procedure in no way allowed the judge to question, supplant, or revisit the jury's factual determinations.[33] The judge further could order a compulsory non-suit.[34] This was the equivalent to finding as a matter of law that a party had failed to meet the burden of producing evidence on an element.[35]

In summary, in English common law in 1791, pleadings were form driven, not fact driven. The weighing of facts was not a matter of concern at the pleading stage and ultimately, regardless of the procedural juncture, the jury had the sole right to weigh the evidence.

B. The American Evolution from Form Pleading to Fact Pleading to Notice Pleading

Because eighteenth century English common law practice was one of form pleading, some focus should be placed on how American courts moved from form pleading to fact pleading while staying within the contours of the Seventh Amendment. Justice Stevens' dissent in *Twombly* provides a concise summary of the history of the development of contemporary American federal court pleading standards for civil cases in the period from the break with England to the decision in *Twombly*:

> The English experience with Byzantine special pleading rules—illustrated by the hypertechnical Hilary rules of 1834—made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." . . . .
>
> A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. . . . Rule 8 was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." . . . .
>
> Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropri-

32. Parsons v. Bedford, 28 U.S. 433, 448 (1830).
33. Thomas II, *supra* note 21, at 156–57.
34. *Id.* at 155 (citing Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 301 (1966)).
35. *Id.* (citing Co. of Carpenters v. Hayward, (1780) 99 Eng. Rep. 241 and Pleasant v. Benson, (1811) 104 Eng. Rep. 590, 591).

> ate, through the crucible of trial. See *Swierkiewicz*, 534 U.S. at 514, 122 S.Ct. 992 ("The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim").[36]

As this summary highlights, the only significant change in pleading standards in the United States before *Twombly* was the move from form pleading to fact pleading to notice pleading. Fact pleading first arose as part of the Field Codes and, as a result of the difficulties in defining the sufficiency of facts, eventually evolved into notice pleading, which became codified in Federal Rule of Civil Procedure 8(a)(2) and (d)(1).[37]

For the fifty years immediately preceding *Twombly*, the pleading standard necessary to satisfy Rule 8 came from *Conley v. Gibson*,[38] holding that a claim should give a "short and plain statement" of the facts and claims sufficient to give the defendant fair notice of what a lawsuit concerned, with the details left to be developed during discovery.[39] As the majority in *Twombly* discussed, over time this holding was understood to mean that a complaint was sufficient unless there was "no set of facts" under which the complaint could succeed.[40]

C. Notice Pleading and the Seventh Amendment

While the move from form pleading to notice pleading by definition meant that a motion to dismiss moved from an attack on the form to an attack on the sufficiency of notice afforded by a bare-bones complaint, United States courts apparently did not consider that the Field Codes, Rule 8, or *Conley* might be inroads on the province of the jury as it existed in 1791 English common law. During the entirety of the two-hundred year evolution from common law code pleading, to the Field Codes, to Rule 8, to *Conley,* to *Twombly*, there simply is no introspection or lengthy discussion in the case law, or in scholarship, about the intersection of the Seventh Amendment and pleading standards.

There is guidance, however, as to what the courts might have concluded had the courts considered the matter, by looking at the parallel procedural evolution of the "modicum of facts" necessary for a civil case to reach a jury. In that context, courts did recognize and resolve any issues with the Seventh Amendment. Thus, as the courts evolved

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36. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 573–75 (2007) (citations omitted) (citing 9 W. HOLSWORTH, HISTORY OF ENGLISH LAW 324–327 (1926) (regarding the Hilary rules of 1834)).

37. "A pleading . . . must contain . . . a short and plain statement of the claim . . . . Each allegation must be simple, concise, and direct." FED. R. CIV. P. 8(a)(2), (d)(1).

38. Conley v. Gibson, 355 U.S. 41 (1957).

39. *Id.* at 47.

40. *Twombly*, 550 U.S. at 561.

from the jargon of a "scintilla" of evidence to some "proper" evidence,[41] the courts justified the change by noting its equivalency to the English common law procedure of a demurrer to the evidence, which permitted a judge to find that the evidence was insufficient to reach the jury.[42] This suggests the "no set of facts" standard similarly would have fared well under scrutiny, as it too looked much like the 1791 English common law demurrer to the evidence. In turn, this might explain why early American courts, even as they moved to fact pleading (and later to notice pleading), never perceived that they were wavering from the 1791 English common law view that weighing evidence was the exclusive province of the jury, and thus did not perceive a Seventh Amendment issue.[43]

D. From "No Set of Facts" to "Plausible Facts"

The confidence that notice pleading did not present Seventh Amendment issues should have been shaken by *Twombly*, for it foreshadowed a potential sea change in the general pleading standard. One says "potentially" because there was never one-hundred percent coherency in pleading standards before *Twombly*, and there certainly was not one-hundred percent coherency after *Twombly*.[44]

The case arose out of the breakup of the national monopoly of American Telephone & Telegraph Company into a number of regional entities, so-called Baby Bells, and the subsequent breakup of those regional monopolies.[45] William Twombly and Lawrence Marcus, as putative representatives of the class of subscribers of high-speed internet services, brought an action against several of the Baby Bells for Sherman Act violations.[46] In particular, the plaintiffs alleged the Baby Bells inflated charges for local telephone and high-speed internet services by "engag[ing] in parallel conduct" in their respective service areas to inhibit the growth of upstart competitors, and made agreements "to refrain from competing against one another."[47] As the Court recounted,

> The complaint couches its ultimate allegations this way:
>
> "In the absence of any meaningful competition between the [Baby Bells] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [competitors] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the Baby Bells] have entered into a contract,

41. Improvement Co. v. Munson, 81 U.S. 442, 448 (1871).
42. *Id.* at 448 n.8.
43. Greenleaf v. Birth, 34 U.S. 292, 299 (1835).
44. Ides, *supra* note 15.
45. *Twombly*, 550 U.S. at 549.
46. *Id.* at 550.
47. *Id.* at 550–51.

> combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another."[48]

In other words, the plaintiffs saw and alleged parallel pricing and on that basis suspected and alleged an illegal pricing agreement. While the Court in *Twombly* purported still to be applying the *Conley* standard,[49] in reviewing the adequacy of these allegations the Court affirmed a dismissal of the complaint on a Rule 12 motion for failure to plead a "plausible" set of facts.[50]

The *Twombly* Court was not entirely clear what it meant by the term "plausible." The Court appeared to say that it was clarifying and applying, not abandoning, *Conley*.[51] Yet the Court justified dismissal of the complaint, in large part, because the cost of discovery in antitrust litigation was too much to impose if the plaintiffs did not already have in hand, at the time of the filing of the complaint, at least some facts of conspiracy beyond parallel conduct.[52] In essence, the Court suggested that it suspected Twombly's counsel of being a predatory plaintiffs' attorney suing purely based on suggestive but legal parallel conduct, and with a hope that either discovery would uncover more or that the sheer cost of discovery would extort a lucrative settlement. Simply put, the Court smelled a rat. Given this context—as well as the Court's self-touted continued adherence to *Conley*—it was hard to know from the opinion which of many more familiar legal standards the Court meant by "plausible." The choices included: "possible" (the *Conley* standard), "probable" (a burden of proof standard), "believable" (a weight of the evidence standard), or "sufficient" (a Rule 8(a) standard). It also was hard to know how broadly or narrowly *Twombly* applied.

For this reason, among others, the precise meaning of *Twombly* was ambiguous. The jargon of "plausibility" was new to the arena of pleading standards and it was not certain that the Court really was presaging a retreat from notice pleading back to fact pleading. These factors, combined with reliance on the particular context of antitrust litigation, made the consequence of *Twombly* a debatable matter. The ambiguity was compounded just two weeks after the Court published its opinion in *Twombly*, when the Court published its opinion in *Erickson v. Pardus*, which seemed to reaffirm the *Conley* notice pleading standard.[53]

48. *Id.* at 551.
49. *Id.* at 561–62.
50. *Id.* at 564–70.
51. *Id.* at 560–63.
52. *Id.* at 555–61.
53. Erickson v. Pardus, 551 U.S. 89 (2007).

Yet *Twombly* did not go unnoticed. As legal journalist Dahlia Lithwick reported at the time, "to America's civil-procedure professors, the effect of *Twombly* was akin to releasing a live ferret amid the Federal Rules of Civil Procedure."[54]

Then, the Court decided *Iqbal*. Javiad Iqbal is a citizen of Pakistan and a Muslim.[55] Following the September 11, 2001 attacks, he was arrested in the United States on immigration charges and was deemed to be of "high interest" to the investigation of "the attacks in particular or to terrorism in general."[56] Iqbal pleaded guilty to the immigration charges, served a term of imprisonment, and was removed to Pakistan.[57] He then brought a *Bivens* action concerning his treatment in confinement pending his trial.[58] Iqbal sued, among others, John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation.[59] Ashcroft and Mueller moved to dismiss the complaint.[60] The district court denied their motion (pre-*Twombly*), citing the "no set of facts" standard of *Conley*.[61] The court of appeals (post-*Twombly*) found that while *Twombly* retired the "no set of facts" standard, Iqbal's complaint was not one that necessitated further factual amplification.[62] The Supreme Court reversed.[63]

The Court held that under *Twombly*, Rule 8 "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation," "'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'"[64] A complaint must have "facial plausibility," meaning "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[65] The

54. Dahlia Lithwick, *Supreme Court Dispatches: The Attorney General Is a Very Busy Man, The Supreme Court Seems to Think That also Makes Him Immune from Litigation*, SLATE, http://www.slate.com/id/2206441/.

55. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1942 (2009).

56. *Id.* at 1943.

57. *Id.*

58. *Id.*

59. *Id.* at 1942.

60. *Id.* at 1944.

61. *Id.*

62. *Id.*

63. *Id.* at 1945.

64. *Id.* at 1949. The Court did not address the view, expressed by Professor Wright (and cited by the dissent in *Twombly*), that in Rule 8 the "substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions'." 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 207 (3d ed. 2004).

65. *Iqbal*, 129 S. Ct. at 1949.

Court held that a trial court was not required to accept such allegations as true for purposes of a Rule 12(b)(6) motion.[66]

Rather, as the Court put it, a trial court should engage in a "two-pronged approach."[67] A "court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth."[68] As to these "conclusory" allegations, the trial court could "draw on its judicial experience and common sense" to evaluate whether the allegations "nudged" "across the line from conceivable to plausible."[69] The Court explicitly held that this was the pleading standard for "all civil actions" pleaded under Rule 8.[70]

While *Twombly* may have left ambiguity about whether trial judges could weigh the facts in deciding a motion to dismiss, the way the *Iqbal* Court used the words "conclusory" and "plausible" removed any doubt on the matter. In *Iqbal*, the petitioners, Messrs. Ashcroft and Mueller, were alleged to have supervisory liability for confinement policies based solely on a detainee's race, religion, or national origin and for no legitimate penological interest. The petitioners conceded that they would be liable under *Bivens* if they had actual knowledge of discrimination by their subordinates and exhibited deliberate indifference to that discrimination.[71] The complaint alleged that following the September 11 attacks, the FBI arrested and detained thousands of Arab Muslim men; that many of these detainees were designated by high-ranking FBI officials as being of "high interest"; that in many cases, including Iqbal's, this designation was made without any supporting evidence and purely on the basis of race, religion, or national origin, and for no legitimate penological interest; that Ash-

66. *Id.* at 1949–50.

67. *Id.* at 1950.

68. *Id.*

69. *Id.* at 1950–51. One suspects that all of the form complaints in the Appendix Of Forms to the Federal Rules of Civil Procedure inescapably would fall within this category.

70. *Id.* at 1953. One of the interesting aspects of the *Iqbal* opinion is that following its analysis and resolution of the issues, the opinion identifies and responds to three arguments that could be raised against itself. *Id.* at 1953–54. The second of these is that a better resolution of the case would have been to adopt careful case management and thus limited discovery. *Id.* at 1953–54. In rejecting this argument, the Court emphasized that it was an inadequate solution in a case involving implausible allegations against high government officials. *Id.* This language might suggest a narrow reading of *Iqbal*, limiting its import to lawsuits brought against high government officials. *Id.* But for opponents of the *Iqbal* opinion, this almost certainly is Pollyannaish thinking. Immediately preceding the Court's discussion of lawsuits against high government officials is the Court's retort to the argument that *Twombly* was only requiring plausible fact averments in expensive antitrust litigation. It is in the course of rejecting this argument that the Court holds that *Twombly* and *Iqbal* apply to "all civil actions." *Id.*

71. *Id.* at 1956 (Souter, J., dissenting).

croft was the principal author of these policies; that Mueller was instrumental in the adoption, promulgation, and implementation of these policies; that both Ashcroft and Mueller knew of, condoned, and agreed to the conditions of confinement based solely on race, religion, or national origin; and that, as to the policies regarding conditions of confinement, Ashcroft wrote them and Mueller implemented them.[72] The Court, however, rejected the petitioners' concession on the standard for pleading supervisor liability in a *Bivens* action, holding instead that "to state a claim . . . respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin."[73] The Court then measured the factual allegations against this newly enunciated formulation of the element and concluded the complaint was simply "bare assertions" amounting to "nothing more than a 'formulaic recitation of the elements'" of the claim.[74] In other words, the Court retreated (without acknowledging such) from notice pleading back to fact pleading, and then set a threshold for adequacy of facts that, in essence, held that if the plaintiffs did not come into the case with a smoking-gun level of evidence in hand, then the allegations were sufficiently "conclusory" to allow a trial court power to engage in a "plausibility" review.

The Court said "plausibility" was something more than "possibility" but something less than "probability."[75] Where "plausibility" falls on that spectrum is made more clear by Justice Souter's dissent. Justice Souter was the author of the Court's majority opinion in *Twombly*. Justice Souter's *Iqbal* dissent chided the *Iqbal* majority as being too aggressive in its standard for plausibility, arguing that the majority was allowing a trial court to conclude a complaint was facially implausible based on a standard that would not have been permitted by what he meant when he used the word "plausible" in *Twombly*. The dissent argues that all *Twombly* held was that a trial court did not have to accept as true allegations "that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel."[76]

But where did *Twombly* draw the line on plausibility? In *Twombly*, Justice Souter's opinion found implausible the allegation that local telephone companies might engage in price fixing as a means of suppressing nascent potentially national competitors. Thus, taking the *Iqbal* majority and dissent together, the standard for plau-

72. *Id.* at 1944, 1951, 1958–60, 1961 (Souter, J., dissenting).
73. *Id.* at 1948–49.
74. *Id.* at 1951.
75. *Id.* at 1949.
76. *Id.* at 1959 (Souter, J., dissenting).

sibility in *Iqbal* falls somewhere below "probability" but somewhere above the likelihood, whatever that is, that local telephone companies might agree to price fixing as a means of suppressing potentially common national competitors. And, perhaps more to the point, even in the milieu of what is publicly known as of May 2009 concerning the Bush Administration and its reaction to the September 11 attacks, the Court still held under this standard that the allegations made by Iqbal were facially implausible.[77]

Given these holdings, it is inescapable that *Iqbal* invests trial judges with the power to weigh evidence. Applying the *Iqbal* meaning of "conclusory," in any case where discovery would be needed to garner the evidence to succeed at trial, it would appear that a trial court could confidently characterize the complaint as sufficiently "conclusory" to support a plausibility review. Applying the *Iqbal* meaning of "plausible," it would appear that in any such case a trial judge then could confidently characterize the case as implausible and dismiss it. And it is virtually certain that this will result in the dismissal of cases that otherwise, following discovery, would have emerged as meritorious cases properly resulting in a plaintiff's verdict at trial.[78]

If the level of discourse prompted by *Twombly* was akin to the activity of a live ferret, then the mind boggles at what will happen in the wake of the *Iqbal*. But as an initial matter, it is nigh impossible to characterize *Iqbal* as anything other than vesting a trial judge with early power to weigh and decide the factual heft of a lawsuit, even at the price of erroneously dismissing at least a handful of cases that, given the fullness of discovery, would have developed factually sufficient (indeed, meritorious) theories of recovery.

III. UNDER *IQBAL*, RULE 8 IS UNCONSTITUTIONAL (SOMETIMES)

A. The Historical Test Leaves No Wiggle Room for *Iqbal*

The Seventh Amendment states, "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 a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[79] Twenty-one years after the adoption of the Seventh Amendment, this language was interpreted by the leg-

77. *See, e.g.*, Peter Spiegel & Jonathan Weisman, *Conflicting Views on Terror Fight Get Capitol Airing*, WALL ST. J., May 22, 2009, at A2.

78. For precisely this reason, in the immediate wake of *Iqbal*, Senator Arlen Spector introduced a bill in the United States Senate attempting to reverse the decision. David Ingram, *Specter Proposes Return to Prior Pleading Standard*, THE NAT'L L.J., July 24, 2009, http://www.law.com/jsp/article.jsp?id=1202432493166.

79. U.S. CONST. amend. VII.

endary Justice Story. In *United States v. Wonson*,[80] the defendant was prosecuted for failing to pay penalties in accordance with the Embargo Supplementary Act of 1808.[81] The defendant 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 consideration of the court."[82] In resolving this issue, Justice Story held that within the text of the Seventh Amendment the phrase "common law" referred to the law of England:

> 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.[83]

There has been sporadic criticism of the historical test.[84] In defense of the test, one scholar cogently argues that Justice Story's intentions have been misunderstood.[85] Yet the conventional understanding of *Wonson*, interpreting the Seventh Amendment as a static constitutional enshrinement of English common law jury rights, is what we have and it has been the law for nearly two-hundred years.[86] In sum, "[n]o federal case decided after *Wonson* seems to have challenged this sweeping proclamation; perhaps later judges

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

81. *Id.* at 750.

82. *Id.* at 745. Story recounts how at least some states did have the practice of second juries on appeal. *Id.* at 748.

83. *Id.* at 750. 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. 83, 523–25 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888). 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).

84. *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 88–93 (Yale Univ. Press 1998); Douglas King, *Complex Civil Litigation and the Seventh Amendment Right to a Jury Trial*, 51 U. CHI. L. REV. 581, 608–13 (1984); Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1034–35 (1992); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 479–83 (1999); 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, 616–22 (1996).

85. Krauss, supra note 84, at 460–75.

86. *See* AMAR, *supra* note 84, at 89; King, *supra* note 84, at 611–12; Klein, *supra* note 84, at 1006; Krauss, *supra* note 84, at 445–79; Schwartz, *supra* note 84, at 611–15.

have hesitated to appear to be the kind of intractable person that would require Mr. Justice Story to elaborate on the obvious."[87]

The *Wonson* interpretation of the Seventh Amendment became known as the "historical test."[88] 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 eighteenth century common law principles.[89] If there was any doubt that this was a test incorporating English practice as of a fixed point in time, that was clarified in 1898 when the Supreme Court expressly recognized that the Sixth and Seventh Amendments' 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.[90]

B. The Supreme Court's Application of the Historical Test to Pre-Trial Civil Procedure

Given the holdings of *Twombly* and *Iqbal*, it would be natural to assume that, somewhere in the course of the opinions, at least lip service was paid to the Seventh Amendment. Better still would be a thoughtful discussion. After all, it is hard to conceive of the Supreme Court considering increasing the fact weighing role of a judge without being cognizant that this could result in a corresponding retraction of the fact weighing role of the jury, which in turn might implicate constitutional provisions concerning the role of the jury. That would be wishful thinking.[91]

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87. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 641 (1973).

88. *See, e.g.*, Wolfram, *supra* note 87, at 639.

89. Klein, *supra* note 84, at 1023–30.

90. Thompson v. Utah, 170 U.S. 343, 350 (1898). *See also* Dimick v. Schiedt, 293 U.S. 474, 476 (1935) (recognizing that interpretation of the Seventh Amendment requires an evaluation of the common law at the time of adoption in 1791). While there is some jurisprudence rejecting a static interpretation of the Seventh Amendment, it arises in reference to its second clause; i.e., that at the pre-verdict trial level the role of the jury cannot be narrowed from its role in 1791 England, but that this stricture does not bind what a trial or appellate court can do under the re-examination clause of the Seventh Amendment post-verdict. Thomas IV, *infra* note 123, at 747–62; *see also* Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 261–71 (2002) (identifying the Court's different treatment of the Seventh Amendment right to a jury trial pre- and post-verdict and arguing that the distinction devalues the right to a jury). *Accord* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO WASH. L. REV. 183 (2000).

91. I personally find this rather astonishing. I teach Civil Procedure. I happened to be lecturing on the topic of pleading standards the day after the Court released its opinion in *Iqbal*. I was less than half an hour into that class session when a

None of the players in *Twombly*, judges or attorneys, seem to have had any cognizance of a potential Seventh Amendment issue. In *Twombly*, the words "Seventh Amendment" do not appear. The issue does not come up in the majority opinion,[92] the dissent,[93] the parties' briefing,[94] or the oral argument.[95]

Nor did the Seventh Amendment come up in *Iqbal*. The Seventh Amendment is not mentioned in the underlying Second Circuit opinion,[96] in the briefing to the Second Circuit,[97] in the parties' briefing to the Supreme Court,[98] or in the oral argument before the Supreme Court.[99] It was not mentioned in the majority opinion, or in either dissent. Indeed, the Seventh Amendment is not even mentioned in the *amici curiae* filed by "a group of law professors who teach and write in the areas of Civil Procedure and Federal Practice."[100]

We should not be overly harsh toward the Justices or attorneys on this issue. Over sixty years before *Twombly*, the Court seemed to have held that the historical test did not address pleading rules. In *Galloway v. United States*, the Court stated in dicta, "[t]he [Seventh] Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791,

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student asked how the Court could reach its holding without infringing on the constitutionally protected right to trial by jury.

92. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547–70 (2007).

93. *Id.* at 572–97 (Stevens, J., dissenting).

94. Brief for Petitioners, *Twombly*, 550 U.S. 544 (No. 05-1126), 2006 WL 2474079; Brief for Respondents, *Twombly*, 550 U.S. 544 (No. 05-1126), 2006 WL 3089915; Reply Brief for Petitioners, *Twombly*, 550 U.S. 544 (No. 05-1126), 2006 WL 3265610.

95. Transcript of Oral Argument, *Twombly*, 550 U.S. 544 (No. 05-1126), 2006 WL 3422211.

96. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007).

97. Brief for Defendants-Appellants Michael Rolince and Kenneth Maxwell, *Iqbal*, 490 F.3d 143 (No. 05-5768-CV (L)), 2006 WL 5234421; Brief for Plaintiff-Appellee Javaid Iqbal, *Iqbal*, 490 F.3d 143 (No. 05-5768-CV (L)), 2006 WL 5234423; Brief of Appellants Kathleen Hawk Sawyer, Michael Cooksey, David Rardin, *Iqbal*, 490 F.3d 143 (No. 05-5768-CV (L)), 2006 WL 5516202; Reply Brief of Appellant Dennis Hasty, *Iqbal*, 490 F.3d 143 (No. 05-5768-CV (L)), 2006 WL 5234426; Reply Brief of Appellant Michael Cooksey, *Iqbal*, 490 F.3d 143 (No. 05-5768-CV (L)), 2006 WL 5234425.

98. Brief for Respondent Javaid Iqbal, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4734962; Brief for the Petitioners, Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4063957; Reply Brief for Petitioners, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5009266.

99. Transcript of Oral Argument, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 5168391.

100. Brief of Professors of Civil Procedure and Federal Practice as Amici Curiae in Support of Respondents, *Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015), 2008 WL 4792462.

any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing."[101]

In light of this language from *Galloway*, one should proceed with both caution and humility in reaching the conclusion that the Seventh Amendment prohibits the federal courts from heightening pleading standards. But, using the National Football League phrase "upon further review," if either in *Twombly* or in *Iqbal* the Court *sub silentio* had *Galloway* in mind, then upon further review this was a misguided reliance on *Galloway*.

Joseph Galloway was a veteran of World War I.[102] While there is ambiguity about his precise experiences in wartime France, it was apparent that he came back a changed and troubled man.[103] One of the military benefits Congress provided in those times was the War Risk Insurance Act, which allowed soldiers to purchase insurance for total disability resulting from "any impairment of mind or body."[104] Galloway had such insurance until he let it lapse as of May 31, 1919.[105] Over the next roughly twenty years, Galloway had a difficult and checkered life, including stints in both the Army and the Navy.[106] Then, in 1938, Galloway sued the United States, claiming benefits for total and permanent disability by reason of insanity that existed before May 31, 1919.[107] At the close of evidence at trial, the district court granted the government's motion for a directed verdict, holding the evidence legally insufficient to support a verdict for Galloway; the appellate court affirmed.[108] The Supreme Court accepted review to address whether Galloway was deprived of trial by jury, contrary to the Seventh Amendment.[109]

While the majority opinion in *Galloway* does address the constitutionality under the Seventh Amendment of the procedure of directed verdict, the case did not actually frame that issue. Galloway did not challenge the power of a federal court to withhold or withdraw a case from the jury on the basis of insufficient evidence, but rather asserted that his evidence was sufficient (the Court disagreed).[110] Further, according to the Court, Galloway *wrongly* asserted that his action implicated the Seventh Amendment; rather, his action did not carry a jury

101. Galloway v. United States, 319 U.S. 372, 390 (1943).
102. Brief for the United States at 8–9, *Galloway*, 319 U.S. 372 (No. 533), 1943 WL 71847.
103. *Id.* at 8–12.
104. *Galloway*, 319 U.S. at 372 n.1.
105. *Id.* at 372.
106. Brief for the United States, *supra* note 102, at 12–25.
107. *Galloway*, 319 U.S. at 372–73.
108. *Id.* at 373.
109. *Id.*
110. *Id.* at 373, 388.

right in 1791 England.[111] Nonetheless, the Court, through a majority opinion and a spirited dissent, waded into an extended discussion of whether the Seventh Amendment prohibited the procedure of directed verdict.[112]

The Court began its analysis by reviewing one-hundred years of precedent approving the power of federal courts to direct a verdict for insufficiency of evidence.[113] None of the cases the Court cited addressed the Seventh Amendment.[114] The Court next, without citation, noted that the rules of common law in 1791 did allow a trial court to remove a case from the jury either through the procedures of demurrer to the evidence, which if granted ended the litigation, or motion for new trial, which if granted essentially created the opportunity for a do-over.[115] But did the Seventh Amendment exclude any device to take a case from the jury by any process "to which one or the other of these consequences [did] not attach?"[116] It was in answering this question that the Court stated that the Seventh Amendment "did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing."[117]

None of the cases cited by the Court for this finding[118]—which are many of the same cases often discussed today in scholarship on the scope of the Seventh Amendment—actually had any discussion at all of whether the Seventh Amendment bound federal courts to the common law system of pleading prevailing in 1791. *Ex Parte Peterson* approved of the trial court retention of a financial auditor to report on and simplify issues for a jury, finding the Seventh Amendment did not categorically prohibit the introduction of new procedures, and indeed 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.[119] In *Gasoline Products Co. v. Champlin Refining Co.*, the Court rejected a claim for retrial on both liability and damages, and instead held that an appellate court could set aside a verdict in part (in this instance, affirming the verdict on liability but remanding for a new trial on

111. *Id.* at 388.
112. *Id.* at 388–407.
113. *Id.* at 389 n.19.
114. *See* S. Ry. Co. v. Walters, 284 U.S. 190 (1931); Gunning v. Cooley, 281 U.S. 90 (1930); Comm'rs of Marion County v. Clark, 94 U.S. 278 (1876); Pleasants v. Fant, 89 U.S. 116 (1874); Improvement Co. v. Munson, 81 U.S. 442 (1871); Parks v. Ross, 52 U.S. 362 (1850); Ewing v. Goode, 78 F. 442 (C.C.S.D. Ohio 1897).
115. *Galloway*, 319 U.S. at 390.
116. *Id.*
117. *Id.*
118. *Id.* at 390 n.22.
119. In re Peterson, 253 U.S. 300, 308–09 (1920).

damages due to an erroneous jury instruction on damages) even though this was not an available procedure at common law in 1791. 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).[120] *Walker v. New Mexico & Southern Pacific R.R.* held (without citation) that the procedure of the special verdict did not violate the Seventh Amendment because the amendment

> does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common-law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. So 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.[121]

Capital Traction Co. v. Hof recognized the power of the legislature to pass a statute empanelling an appellate jury to review a jury trial by a justice of the peace, even though no such procedure existed at common law in England.[122] *Dimick v. Schiedt* held that an appellate court conditioning reversal on a defendant's declination of an additur *did* violate the Seventh Amendment because of the absence of an English judge having a similar right in 1791 England:

> [H]ere we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution.[123]

And as the Court itself described in *Galloway*, *Funk v. United States*[124] held that the Seventh Amendment did not impair the ability to expand rules of admissibility of evidence.[125]

In the end, the *Galloway* Court approved of directed verdict as a mechanism for trial management when the evidence was insufficient to reach a jury. But *Galloway* did not view "sufficiency" to be a weight of the evidence issue; rather, the issue was about the existence of proper evidence at all—the Court in *Galloway* emphasized that in the

120. Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 499 (1931).

121. Walker v. New Mexico, 165 U.S. 593, 596 (1897).

122. Capital Traction v. Hof, 174 U.S. 1, 39 (1899).

123. Dimick v. Schiedt, 293 U.S. 474, 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) [hereinafter Thomas IV].

124. Funk v. United States, 290 U.S. 371 (1933).

125. Galloway v. United States, 319 U.S. 372, 390 n.22 (1943).

end "the essential requirement is that mere speculation be not allowed to do duty for probative facts."[126]

As this dissection of *Galloway* reflects, the Court never intended to hold or to even suggest that the Seventh Amendment would permit the federal courts to change pleading standards (or any other rules) in a way that decreased the fact evaluation role of the jury.[127] In *Galloway*, the precise issue was the sufficiency of the evidence of each element of plaintiff's case to get to the jury. The Court affirmed the ruling of the trial and appellate courts that, as a matter of law, the evidence was insufficient to support a verdict for the plaintiff. A secondary issue in *Galloway* was whether the procedure of directed verdict implicated the Seventh Amendment. The Court held that it did not because the action was not one to which the Seventh Amendment right attached. The tertiary issue was the broader jurisprudential question of whether the Seventh Amendment reserved for the jury the determination of the legal sufficiency of evidence. The Court found that directed verdict was allowed under the Seventh Amendment because it did not narrow the role of the jury as it existed in 1791, citing cases holding the Seventh Amendment constitutionally enshrined "the rules of common law in respect of trial by jury as these rules existed in 1791," as well as cases holding that the Seventh Amendment "does not attempt to regulate matters of pleading and practice" so long as the "prerogative" of the jury is not lessened.[128] The Court implicitly found

126. *Id.* at 395.

127. Indeed, in his dissent in *Galloway*, one of Justice Black's criticisms of the majority opinion is that nonetheless "[t]oday the Court comes dangerously close to weighing the credibility of a witness and rejecting his testimony because the majority do not believe it." *Id.* at 405 (Black, J., dissenting). Plainly Justice Black made this comment based on the assumption that not even the majority would contend this was proper. Yet, it is this same prerogative that the majority both in *Twombly* and in *Iqbal*, without introspection, seems to assume that judges do have.

128. *Dimick*, 293 U.S. at 487–88. There is conflict between the holdings of these cases regarding whether the Seventh Amendment preserves only the substance of 1791 common law jury rights, or rather preserves the precise procedural forms of those rights as well. While in *Galloway* the Court did not explicitly acknowledge this conflict, the Court did adopt the view that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." *Galloway*, 319 U.S. at 392. The Court reached this conclusion by noting the "widely divergent common-law rules on procedural matters among the states, and between them and England" in 1791, and thus concluded that the Seventh Amendment could not have been intended to adopt any single set of rules. *Id.* at 391–92. In this regard, the Court was coming to the exact opposite analytical conclusion that Justice Story came to in *United States v. Wonson*, 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750), looking at the same divergence of 1791 common law jury practice. There is no discussion of *Wonson* in *Galloway*. The Court apparently was unaware of this implicit rejection of *Wonson*. The Court employed similar reasoning in *Celotex Corp. v. Catrett*,

that under either construction the common law in 1791 permitted courts to find that if, accepting all of a party's evidence as true, there was a failure of proof on an element, then there was insufficient proper evidence for the jury to weigh.[129] But here is the critical point—nothing in *Galloway*, or in any case cited in *Galloway*, or in any other pre-*Twombly* decision, held or even suggested a court could take a case away from the jury because while the evidence, accepted as true, would be sufficient, the court simply found it implausible.[130]

While there is no post-*Galloway* Supreme Court jurisprudence on pleading standards and the Seventh Amendment, this reading of *Galloway* is consistent with the post-*Galloway* Supreme Court Seventh Amendment jurisprudence on the broader topic of procedural reform. Thus, in *Parklane Hosiery Co. v. Shore*—a case holding that offensive collateral estoppel did not violate the Seventh Amendment—the Court cited *Galloway* among three examples of "procedural devices developed since 1791 that have diminished the civil jury's historic domain" and yet "found not to be inconsistent with the Seventh Amendment."[131] Similarly, in *Colgrove v. Battin*, the Court cited *Galloway* as authority for holding that six-member juries did not present Seventh Amendment issues.[132] Finally, in *Markman v. Westview Instruments, Inc.*, the Court found the historical evidence equivocal, and so for reasons of "the relative interpretive skills of judges and juries," held that patent claim construction was the province of the judge.[133]

In summary, this single phrase within a single sentence of the opinion in *Galloway*—that the Seventh Amendment does not bind contemporary courts to eighteenth Century pleadings standards—is the entirety of the Court's twentieth century jurisprudence on the issue to date, and it is insufficient to insulate *Iqbal* from constitutional scru-

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477 U.S. 317, 322–23 (1986), holding that summary judgment did not implicate the Seventh Amendment

129. The Court in *Galloway* back-stopped this analysis by emphasizing that a directed verdict did not infringe on a litigant's right to trial by jury. *Galloway*, 319 U.S. at 392–93. The Court gave no acknowledgement to, or discussion of, the intention of the Seventh Amendment to preserve the rights and power of the jury.

130. Indeed, one of the central points of then-Associate Justice Rehnquist's dissent in *Parklane Hosiery Co. v. Shore* is essentially this point—that whether the Seventh Amendment preserved just the substance, or also the form, of 1791 common law jury practice (the dissent reviews many of the Court's prior opinions on both sides of this proposition), no case approved of substantive encroachment of jury rights by masking the encroachment as a mere procedural change. Parklane Hoisery Co. v. Shore, 439 U.S. 322, 344–50 (1979).

131. *Id.* at 336. *See also* Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 497–97 (1931) (finding retrial of damages only, without the use of a jury, acceptable under the Seventh Amendment); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319–21 (1902) (holding that summary judgment does not violate the Seventh Amendment).

132. Colgrove v. Battin, 413 U.S. 149, 156 (1973).

133. Markman v. Westview Instruments Inc., 517 U.S. 370, 376–84, 388–91 (1996).

tiny under the Seventh Amendment. And, to repeat the point, because an eighteenth century English common law judge could not subject a writ to a plausibility review and on that basis dismiss a case, the weighing of evidence was the responsibility of a common law jury.

C. The Academic Debate over the Constitutionality of Pre-Trial Civil Procedure

The inattention of the courts to the Seventh Amendment implications for procedural reform largely has been mirrored by the level of attention, or inattention, to the same issues by scholars. There is not much academic work addressing the Seventh Amendment implications for contemporary civil procedure. The majority of the work has been by Professor Suja Thomas. The focus of her writing has been a vigorous, provocative, and often lonely argument that, because of the Seventh Amendment, summary judgment is unconstitutional.[134] Her core argument is that under the historical test there is no 1791 English common law analog to summary judgment because there was no device in 1791 English common law through which a judge could make a pre-trial ruling that, based on the undisputed evidence, the case failed as a matter of law.[135] Thus, accepting the historical test as the law of the land (which she does), Professor Thomas concludes that summary judgment is unconstitutional.[136]

There is not universal acceptance of Professor Thomas' argument. Some concede the lack of a 1791 English common law analog, but challenge the correctness of blindly hewing to the historical test, believing it to be a misreading of the text of the Seventh Amendment.[137] Others concede the applicability of the historical test, but dispute the lack of a 1791 English common law analog, asserting that both trial by inspection and demurrer to the evidence were appropriate 1791 English common law procedures for entry of judgment before trial if there was no dispute as to the facts.[138]

Professor Thomas has replied to both positions. To the former, she says that the argument fails as a matter of the textual interpretation of the Constitution.[139] To the latter, she says that trial by inspection was more analogous to judicial notice, because a common law judge would never evaluate the strengths and weaknesses of inferences,

134. Thomas II, *supra* note 21; Thomas III, *supra* note 25; Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (2008).

135. Thomas II, *supra* note 21.

136. *Id.*

137. Nelson, *supra* note 7, at 1653.

138. Brunet, *supra* note 24.

139. Thomas III, *supra* note 25, at 1678–84.

while a modern judge does precisely this in determining whether to grant summary judgment.[140]

D. The Constitutionality of the Motion To Dismiss—A Thought Experiment

While Professor Thomas' focus has been summary judgment under Rule 56, in the immediate aftermath of *Twombly* she asserted that, like summary judgment, motions to dismiss, at least if attacking the factual specificity of a pleading, had no counterpart to eighteenth century English common law.[141] She concluded that, as a result of *Twombly*, Rule 12 now was, in all civil cases, unconstitutional.[142]

The comparison of summary judgment to pleadings standards and motions to dismiss is an imperfect one. Rule 56 requires that *"there is no genuine issue as to any material fact."*[143] If courts hew honestly to this language there is no constitutional problem, as the common law did have an analog to summary judgment.[144] There is no analogous textual trap door in Rule 8 or Rule 12 to escape the historical test.

There is, however, a more critical point of divergence between the Seventh Amendment analysis of Rule 56 on the one hand, and Rules 8 and 12 on the other hand. Conceptually, summary judgment is grounded in taking cases away from the jury. Per force, summary judgment arises only in cases that otherwise would have a jury trial. There is no reason to bring a Rule 56 motion in a bench trail. That is not the case with the motion to dismiss. Thus, while the Seventh Amendment applies with equal vigor (or not) to all cases involving Rule 56, that is not so as to cases involving Rules 8 and 12.[145]

To illustrate this problem, try this two-step thought experiment:

First, divide civil filings into five categories. Category A are those cases for which it has been determined that there is a right to jury trial under the Seventh Amendment. There are three types of these cases: those with claims that the Court has held were cognizable under 1791 English common law, those with claims that the Court has recognized to have an analog under 1791 English common law, and those that are statutory rights with a statutory entitlement to jury, as the Court has held that Seventh Amendment rights extend to statuto-

140. *Id.* at 1667.

141. Thomas I, *supra* note 16, at 1871–72.

142. *Id.* at 1873–84.

143. FED. R. CIV. P. 56(c).

144. Brunet, *supra* note 24.

145. Professor Thomas is inescapably plain in her view, however, that the historical test would require this standard to apply to *all* civil cases. Thomas I, *supra* note 16, at 1883–84.

rily created rights "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[146]

Category B are the cases that the Court has held do not have a jury right under the Seventh Amendment. Typically this would be a newly recognized right either developed in the courts or created by statute, for which the Court has concluded there is no 1791 English common law analog, statutory rights with non-Article III adjudicatory forums,[147] statutorily created "public rights" claims,[148] and (for the purposes of this thought experiment) claims where there might be a jury right, but for which the Court nonetheless has expressly approved a heightened pleading standard.[149]

Category C are the cases where it has not yet been decided by the Court whether the Seventh Amendment would attach, but where whatever the answer is, it will be the same across all claims in the action. This is its own category because whether any particular case within this category would ultimately be found to have a jury right is surprisingly and disturbingly unpredictable; rather, as one treatise summarizes how the courts have solved the problem of how to apply the historical test in the wake of the merger of law and equity:

> The problem is unsolvable. The courts for the most part "solved" it piecemeal through rules of thumb purporting to be deduced from the historical test. The commentators have struggled to formulate more generalized resolutions, with only limited success.[150]

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146. Curtis v. Loether, 415 U.S. 189, 194 (1974). *See also* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990) (holding that a Labor Management Relations Act action for breach of a union's duty of fair representation carried a right to trial by jury); Tull v. United States, 481 U.S. 412 (1987) (holding that the actions asserted under the Clean Water Act carry a right to trial by jury).

147. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (no jury right for labor disputes within the jurisdiction of the NLRB).

148. *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989) (only certain rights created under the Bankruptcy Act are private rights and thus implicate the Seventh Amendment). For a more detailed discussion of the import and problems with the public rights exception, see 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 (1994).

149. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2512 (2007) (holding the heightened pleading standards of the Private Securities Litigation Reform Act did not entail a Seventh Amendment issue because "Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim.").

150. FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE 508 (5th ed., Foundation Press 2001) (citations omitted). *See also* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making,* 70 NW. U. L. REV. 486, 530–31 (1975) (discussing the unpredictability of the application of the historical test to contemporary civil litigation).

Category D are the hybrid cases. In other words, this category has the cases where some claims have a jury right and others do not (so-called cases with both legal and equitable claims).[151]

Category E are the ambiguous mixed cases. These are actions where there is clarity as to the jury right (or lack thereof) as to some claims, and a lack clarity as to others.

Second, assume a Rule 12(b)(6) motion (brought on the basis of *Iqbal* implausibility) across these categories. There would be quite the muddle: The Seventh Amendment would make the motion unconstitutional in Category A cases. There would be no constitutional impediment to the motion attack in Category B cases. In Category C cases, the trial court would have to hold a pre-discovery hearing to determine whether there were jury rights, which in turn would drive whether constitutionally the trial court could consider the motion (this would certainly generate significant appellate litigation in some portion of these actions, and thus would seem to obviate the Court's stated goal in *Twombly* of controlling the cost of litigation).

What about Category D? The Court has held that for actions presenting some claims with a jury right and others without a jury right, the claims with a jury right should be tried first.[152] In *Beacon Theatres, Inc. v. Westover*, the Court, recognizing that the disposition of an equitable claim first could have the effect of disposing of legal claims and thus involuntarily eliminating a jury right, held:

> If there should be cases where the availability of declaratory judgment or joinder in one suit of legal and equitable causes would not in all respects protect the plaintiff seeking equitable relief from irreparable harm while affording a jury trial in the legal cause, the trial court will necessarily have to use its discretion in deciding whether the legal or equitable cause should be tried first. Since the right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial. . . . [O]nly under the most imperative circumstances . . . can the right to a jury trial of legal issues be lost through prior determination of equitable claims.[153]

In *Dairy Queen, Inc. v. Wood*, the Court held that a legal claim which was only "incidental" to an equitable claim, and which indeed could not even exist independent of the equitable claim, not only still carried a jury right, but under *Beacon Theatres* still had to be tried first.[154] Yet, because the Seventh Amendment would be a constitutional impediment to a motion to dismiss challenging the plausibility of legal claims, if interpreted under the historical test, but not of equitable claims, a motion to dismiss in a Category D case involving mixed

151. *See, e.g.*, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

152. *Dairy Queen*, 369 U.S. at 470–73; *Beacon Theatres*, 359 U.S. at 510–511.

153. *Beacon Theatres*, 359 U.S. at 510–511 (citations and footnotes omitted).

154. *Dairy Queen*, 369 U.S. at 470–73.

claims in equity and in law would reverse the order of disposition mandated in *Beacon Theatres* and *Dairy Queen*.

Of course, the problem gets yet messier in the Category E case—actions where there is clarity as to the jury right (or lack thereof) as to some claims, and a lack clarity as to others. There, at minimum, cases would encounter the Category C-like additional layer of pre-trial evaluation, and perhaps a lengthy appeal to determine the scope of ambiguously applicable Seventh Amendment rights, only to lead in many cases to a Category D-like *Beacon Theatres/Dairy Queen* sequencing issue.

What this thought experiment exposes is the messy answer to the question: "If the historical test is correct, then are motions to dismiss unconstitutional?" One cannot give a blanket "Yes" or "No" answer. Rather, the answer is: "Sometimes yes, sometimes no, sometimes in part both yes and no, and sometimes we do not know."

But what is inescapable is that *Iqbal* defines an interpretation of Rule 8 that in many, many cases cannot be squared with the Seventh Amendment as interpreted under the historical test (and that it will be a difficult, and likely undesirable, to engage in the process of sorting out which cases are which). There can be no debate whatsoever that an eighteenth century English common law judge could not do what the Supreme Court in *Iqbal* now empowers twenty- first century federal district judges to do.[155] There can be no debate that this is not a mere incident of technical procedure—this is a weighing of evidence, pre-discovery, with the potential consequence of dismissal of potentially meritorious litigation. *Twombly* took Rule 8 on a path that could not be squared with the Seventh Amendment, as interpreted under the historical test. And to paraphrase a Jewish prayer from a wildly different context, in *Twombly* it was written, in *Iqbal* it was sealed.

IV. CONCLUSION

Aldous Huxley wrote, "[f]acts do not cease to exist because they are ignored."[156] The constitutional protection of right to trial by jury in a civil case is, in the contemporary environment of a perceived explosion of frivolous litigation, an inconvenient legal doctrine. That is not a justification, however, for ignoring it. In a future article, I will argue for an alternative and preferred interpretation of the Seventh Amendment. But under the way the Amendment has been understood for roughly 200 years, under *Iqbal*, Rule 8 is unconstitutional (sometimes).

155. Brunet, *supra* note 24, at 1631–40 .

156. ALDOUS HUXLEY, PROPER STUDIES 205 (Chatto & Windus 1949), *available at* http://quod.lib.umich.edu/cgi/t/text/pageviewer-idx?c=genpub;cc=genpub;rgn=full%20text;idno=AJE0708.0020.001;view=image;seq=00000229.