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Article

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Before the end of the 2006 Supreme Court Term, defendants rarely moved to dismiss cases upon a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)[1] and courts rarely granted such motions.[2] This will change soon, however, as courts begin to employ the new standard for the motion to dismiss that the Supreme Court formulated in *Bell Atlantic Corp. v. Twombly*[3] and *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*[4]

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1. FED. R. CIV. P. 12(b)(6) ("[A] party may assert the following defense[] by motion: . . . failure to state a claim upon which relief can be granted . . . .").

2. *See* 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 557 (3d ed. 2004) ("For many years after the promulgation of the Federal Rules of Civil Procedure the motion to dismiss for failure to state a claim was viewed with disfavor and was rarely granted; in many cases and in many courts, that restrained approach to the use of the motion continues to be the norm.").

3. 127 S. Ct. 1955 (2007); *see, e.g.*, Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (discussing *Twombly*'s new standard); Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007) (same); *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 439–60 (2008) (same); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135 (2007), http://virginialawreview.org/inbrief/2007/07/09/dodson.pdf (same).

4. 127 S. Ct. 2499 (2007); *see also* Geoffrey P. Miller, *Pleading After* Tellabs (NYU Law and Econ. Research Paper No. 08-16, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121396.

In *Twombly*, the Court "retire[d]" the fifty-year-old standard to dismiss a claim under Rule 12(b)(6),[5] which was established in *Conley v. Gibson*.[6] In *Tellabs*, the Court again took a significant turn from *Conley*.[7] Under the old *Conley* standard, a court accepted the alleged facts as true and could dismiss a case only where there was no claim under those facts.[8] A court determined that the plaintiff could prove "no set of facts" in support of his claim.[9] In *Twombly* and *Tellabs*, while the Court continued to state that the court should accept the alleged facts as true,[10] the Court superimposed additional requirements for plaintiffs to meet to survive a motion to dismiss, requirements which in essence eliminated the standard to take the alleged facts as true and explicitly eliminated the "no set of facts" language.

In *Twombly*, the Court decided that for a typical claim with no special pleading requirements, a court should engage in a determination of whether the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face."[11] In *Tellabs*, the Court stated that for a claim created by Congress for which Congress has imposed additional pleading requirements, such special pleading could require courts to examine both inferences from the facts that favor the plaintiff and inferences from the facts that favor the defendant.[12] In both cases, the Court emphasized the cost that companies face with unwarranted discovery and the settlement of unmeritorious cases.[13]

In *Twombly*, the Court justified its departure from the rule in *Conley* by its insistence that the language in *Conley* had been taken out of context for years and that the Court's present interpretation was the correct interpretation of Rule 12(b)(6), although the *Conley* rule had stood for fifty years.[14] In *Tellabs*,

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5. *See Twombly*, 127 S. Ct. at 1965–66, 1969.

6. 355 U.S. 41, 45–46 (1957). The *Conley* standard was that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

7. *See Tellabs*, 127 S. Ct. at 2509–10.

8. *See Conley*, 355 U.S. at 45–46.

9. *Id.*

10. *See Tellabs*, 127 S. Ct. at 2509; *Twombly*, 127 S. Ct. at 1965.

11. *Twombly*, 127 S. Ct. at 1974.

12. *See Tellabs*, 127 S. Ct. at 2509–10.

13. *See id.* at 2504; *Twombly*, 127 S. Ct. at 1966–67, 1971 n.12.

14. *See Twombly*, 127 S. Ct. at 1968–69.

the Court emphasized the power of Congress to formulate the standards for pleading causes of action that Congress creates.[15]

These decisions have significantly changed the pleading stage of a case.[16] Now, courts can more easily dismiss any case upon a motion to dismiss. Additionally, the Court gave Congress and rulemakers the explicit authority to enact heightened pleading rules for any cause of action that Congress has created.[17]

The problem, however, is that the Supreme Court failed to follow its long-standing common law jurisprudence on the Seventh Amendment. The Court did not consider the constitutionality issue at all in *Twombly* and gave a conclusory analysis of the issue in *Tellabs*. The many scholars who have examined one or both cases also have not focused on the constitutional implications.[18]

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15. *See Tellabs*, 127 S. Ct. at 2512.

16. *Cf.* Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW, Aug. 13, 2007, http://writ.lp.findlaw.com/dorf/20070813.html (stating that, in less than three months since the decision, courts had cited *Twombly* "a whopping 457 times").

17. *See Tellabs*, 127 S. Ct. at 2512 n.9; *Twombly*, 127 S. Ct. at 1973 n.14.

18. *See, e.g.*, Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61 (2008); Brian Thomas Fitzsimmons, *The Injustice of Notice & Heightened Pleading Standards for Antitrust Conspiracy Claims: It Is Time to Balance the Scale for Plaintiffs, Defendants, and Society*, 39 RUTGERS L.J. (forthcoming 2008); Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091246; Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627 (2008); 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); David M. Levy & Sandra J. Peart, *Adam Smith, Collusion and "Right" at the Supreme Court*, 16 SUP. CT. ECON. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022829; Spencer, *supra* note 3; Joshua D. Wright, *The Roberts Court and the Chicago School of Antitrust: The 2006 Term and Beyond*, COMPETITION POL'Y INT'L, Autumn 2007, at 25; Amanda Sue Nichols, Note, *Alien Tort Statute Accomplice Liability Cases: Should Courts Apply the Plausibility Standard of* Bell Atlantic v. Twombly*?*, 76 FORDHAM L. REV. 2177 (2008); Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards* (Boston Univ. Sch. of Law Working Paper Series, Law & Econ. Working Paper No. 06-06, 2007), *available at* http://ssrn.com/abstract_id=897486; Randal C. Picker, 'Twombly', 'Leegin' *and the Reshaping of Antitrust* (Univ. of Chi. Law & Econ., Olin Working Paper No. 389, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1091498; Dodson, *supra* note 3; Audio recording: Richard A. Nagareda, Professor, Vanderbilt Univ. Law Sch., Commentary on *Bell Atlantic v.*

The Seventh Amendment provides that "[i]n Suits at common law, . . . 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."[19] Thus, the Seventh Amendment governs the question of when a case may be dismissed without a jury trial. As a preliminary matter, the Supreme Court has stated that "common law" in the Seventh Amendment is the English common law in 1791, when the Seventh Amendment was adopted.[20] Under the English common law in 1791, a jury trial right existed in cases in which legal, rather than equitable, remedies were available.[21] As a result, the Court has held that a jury trial right exists in cases in which legal remedies exist, regardless of whether the cause of action existed under the common law.[22] The Supreme Court has further stated that, where a constitutional right to a jury trial exists, a new procedure that affects the jury trial right (including taking the right away) is constitutional if the procedure satisfies the substance of the English common law jury trial in 1791.[23]

In both *Twombly* and *Tellabs*, a right to a jury trial existed because legal remedies were available respectively for the alleged antitrust and securities fraud claims.[24] The constitutional issue, then, is whether the new motion to dismiss standard established by these cases, which eliminates this jury trial right,

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Twombly, broadcast on Federalist Society's SCOTUScast (May 25, 2007), http://www.fed-soc.org/publications/pubID.320/pub_detail.asp; *cf.* Allan Horwich & Sean Siekkinen, *Pleading Reform or Unconstitutional Encroachment? An Analysis of the Seventh Amendment Implications of the Private Securities Litigation Reform Act*, 35 SEC. REG. L.J. 4 (2007) (discussing the Private Securities Litigation Reform Act (PSLRA) issue before *Tellabs* was decided). For discussions of pleading standards prior to *Twombly* and *Tellabs*, see generally Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998), and Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433 (1986).

19. U.S. CONST. amend. VII.

20. *See, e.g.*, Galloway v. United States, 319 U.S. 372, 388–92 (1943).

21. *See, e.g.*, Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446–47 (1830) (defining the right).

22. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 192–94 (1974) (finding a right to a jury trial in a Title VIII case); Ross v. Bernhard, 396 U.S. 531, 542 (1970) (finding a right to a jury trial in a shareholder derivative suit).

23. *See, e.g.*, *Galloway*, 319 U.S. at 390–92.

24. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct., 2499, 2505–06 (2007) (alleging securities fraud violations); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1962 (2007) (alleging antitrust violations); *cf., e.g.*, *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 419–31, 423 n.38 (9th Cir. 1979) (finding a Seventh Amendment right to a jury trial in securities litigation).

comports with the substance of the common law. In *Twombly*, the Court implicitly assumed that there was no constitutional problem with the new standard. In *Tellabs*, the Court stated that, for a claim created by Congress for which Congress has imposed additional pleading requirements, there was no constitutional issue because Congress, as the creator of the cause of action, possessed the power to impose these requirements.[25] In both cases, the Court disregarded established jurisprudence and did not examine the common law to determine the correct constitutional standard to dismiss a claim.

Part I of this Article sets forth the Supreme Court's long-established common law theory of the Seventh Amendment. This Part then discusses the Court's decisions in *Twombly* and *Tellabs* in which the Court failed to recognize the common law limits on courts' and Congress's power over the jury. Part II argues that the Court should have applied its common law jurisprudence instead of deciding *Twombly* and *Tellabs* in favor of court, congressional, and rule-making power. Here, it is shown that the new motion to dismiss standards do not comport with the common law requirements and therefore violate the Seventh Amendment. The standards involve improper steps by which the courts will first assess the plausibility of the allegations pled by the plaintiffs rather than simply accepting them as true, and second weigh those inferences against inferences that favor defendants rather than simply accepting the facts pled as true. The Article also argues that the Supreme Court was wrong to state that Congress and rulemakers could impose essentially limitless requirements upon plaintiffs at the pleading stage for causes of action that Congress created. Part III addresses the anticipated responses to the Article's argument that the motion to dismiss is now unconstitutional. The Article concludes that the Court's decisions, while rendered only in antitrust and securities litigation cases thus far, have possible far-ranging ramifications to the impingement of the jury trial right in other types of cases, including employment discrimination and other civil rights cases.

25. *See Tellabs*, 127 S. Ct. at 2512.

I. THE SUPREME COURT'S RECENT JURISPRUDENCE ON THE MOTION TO DISMISS: IGNORING THE ENGLISH COMMON LAW

The Court's decisions in *Twombly* and *Tellabs* will spark a renewed interest in the dormant motion to dismiss. The rarely moved for and rarely granted motion to dismiss[26] has contrasted with the often moved for and granted summary judgment motion.[27] Upon a motion for summary judgment, a court examines the evidence presented by the litigants and decides whether "a reasonable jury could return a verdict for the nonmoving party."[28] After the trilogy of Supreme Court cases in 1986, in which the Court established this standard,[29] it has been said that the courts exponentially increased their use of summary judgment to dismiss cases.[30] The dramatic use of summary judgment has been found particularly in certain categories of cases including civil rights and antitrust cases.[31]

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26. *See* 5B WRIGHT & MILLER, *supra* note 2, § 1357, at 557.

27. *See* EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 2 (3d ed. 2006); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1332–35 (2005) (discussing empirical evidence showing a decrease in trials and an increase in summary judgment awards); *see also* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 141 & n.5 (2007) (citing scholars' discussion of the overuse of summary judgment in civil rights cases). While courts, using Federal Rules of Civil Procedure 12(b) and 15(a), may at times dismiss a claim with leave to file an amended claim, the dismissal to which this Article refers is a final dismissal of the claim with prejudice. *See* FED. R. CIV. P. 41(b) (discussing involuntary dismissal).

28. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322–25 (1986) (discussing the standard for summary judgment); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–88 (1986) (same); *cf.* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1073–74 (2003) (discussing the effect of this trilogy on the motion to dismiss).

29. *See Celotex*, 477 U.S. at 322–25; *Anderson*, 477 U.S. at 248; *Matsushita*, 475 U.S. at 585–88.

30. *See, e.g.*, Redish, *supra* note 27, at 1330. *But see* Thomas, *supra* note 27, at 140 n.3 (citing Professor Burbank and Joe Cecil's views doubting the effect of the trilogy on summary judgment).

31. *See* Thomas, *supra* note 27, at 141 & n.5 (citing scholarship on this issue); *cf.* Adam Liptak, *Cases Keep Flowing in, but the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, at A14 (discussing Thomas, *Why Summary Judgment Is Unconstitutional*, *supra* note 27, and other matters related to the decline in the civil jury trial).

Moreover, summary judgment became the subject of significant academic commentary.[32]

In *Twombly* and *Tellabs*, the Court established standards for dismissal at the motion to dismiss stage that are similar to the standard for summary judgment. Now, the motion to dismiss, with this easier standard, will be used more frequently, particularly in civil rights and antitrust cases, like summary judgment, and will be the subject of much scholarship, like summary judgment.

A. THE SUPREME COURT'S SEVENTH AMENDMENT JURISPRUDENCE PRIOR TO *TWOMBLY* AND *TELLABS*

Prior to the 2006 Term, the Court's jurisprudence on the Seventh Amendment was well defined as governed by the English common law in 1791. The Seventh Amendment provides that "[i]n Suits at *common law*, . . . 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*."[33] The Seventh Amendment is the only provision in the Constitution to use the words "common law." The Court has interpreted the meaning of "common law" in the first and second clauses of the Amendment to be the English common law in 1791,[34] and has further

32. *See* Thomas, *supra* note 27, at 140–41 & nn.3–6 (citing law review articles discussing summary judgment); *see also* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007) (discussing the costs of summary judgment to the justice system).

33. U.S. CONST. amend. VII (emphasis added).

34. The Amendment was adopted in 1791. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435–36 & n.20 (1996); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996); Galloway v. United States, 319 U.S. 372, 388–92 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476–77 (1935); Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494, 497–98 (1931); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377 (1913); Thompson v. Utah, 170 U.S. 343, 350 (1898) (stating that common law refers to English common law in 1791); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (referring to the English common law as "the grand reservoir of all our jurisprudence"). *See generally* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD (2004) (discussing the role of juries in various types of civil actions); 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY (1992) (noting the use and role of juries); JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 127–52 (2006) [hereinafter OLDHAM, TRIAL BY JURY] (describing the origin of special juries in England); Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 595–600 (2006) (discussing originalism in the Seventh Amendment); James Oldham, *The Se-*

held that the "substance" and not the "form" of the English common law must be satisfied.[35]

With respect to the first clause, the Court has held that a jury trial right exists for claims for which a legal remedy exists even though the explicit claim might not have existed under the common law. The well-settled holding from the early nineteenth-century case *Parsons v. Bedford* is:

> By *common law*, they meant what the constitution denominated in the third article "law;" not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.[36]

Thus, this early interpretation of the Amendment described that a jury trial right exists for cases in which legal rights, in contrast to equitable right or rights under admiralty law, are at issue.

In *Parsons*, Justice Joseph Story also discussed the second clause of the Amendment, which he called "more important" than the first clause and which he referred to as "a substantial and independent clause."[37] The key question in the case was whether the Court had appellate jurisdiction.[38] The Court opined that Congress had not created this jurisdiction in the

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venth Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered, in HUMAN RIGHTS AND LEGAL HISTORY 225 (Katherine O'Donovan & Gerry R. Rubin eds., 2000).

35. *See Slocum*, 228 U.S. at 378 ("'[The Seventh Amendment's] aim is not to preserve mere matters of form and procedure but substance of right.'" (quoting Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897))); *see also,* Colgrove v. Battin, 413 U.S. 149, 157–60 (1973) (deciding the minimum number of jurors acceptable under the right); *Galloway*, 319 U.S. at 392 ("[T]he Amendment was designed to preserve the basic institution of a jury trial, . . . not the great mass of procedural forms and details . . . .").

36. 28 U.S. (3 Pet.) 433, 447 (1830).

37. *Id.*

38. *See id.* at 445.

Act of 1824, including the appellate power to grant a new trial by reexamining facts tried by a jury.[39] Such appellate power would be unconstitutional because under the English common law, the court that tried the case was generally the only court that could order a new trial.[40] The Court also emphasized that if Congress had attempted to alter the power of the courts to in fact give this power to the courts, this would be a violation of the Seventh Amendment: "If, indeed, the construction contended for at the bar were to be given to the act of congress, we entertain the most serious doubts whether it would not be unconstitutional."[41] In subsequent cases, the Supreme Court further discussed this second clause of the Amendment and the requirement that the English common law in 1791 govern the constitutionality of modern procedures that affect the jury trial right.[42]

Although *Parsons* discussed the right to a jury trial for causes of action that did not exist under the common law, in *Curtis v. Loether*, the Supreme Court explicitly considered the issue of whether a right to a jury trial existed for a Title VIII violation, a cause of action that did not exist under the English common law in 1791.[43] The Court stated,

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.[44]

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39. *See id.* at 448.

40. *See id.* at 448–49; Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 453–54 & n.3 (1996) (Scalia, J., dissenting) (citing *Parsons* and stating that an appellate court does not have the power to review the denial of a motion for a new trial).

41. *Parsons*, 28 U.S. at 448.

42. *See, e.g.*, Galloway v. United States, 319 U.S. 372, 388–95 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 656–57 (1935); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 376–80 (1913).

43. 415 U.S. 189, 190 (1974).

44. *Id.* at 194. The Court also has set forth a test to determine when a jury trial right exists in a case with both equitable and legal claims: "The Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." Ross v. Bernhard, 396 U.S. 531, 538 (1970). The Court continued,

> [T]he "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.

Id. at 538 n.10. In *Ross*, the Court also discussed the availability of a jury trial

The Court further stated that

> [a] damages action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law. . . . More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law.[45]

Petitioner plaintiff argued that there should be no jury trial for statutory causes of action.[46] The Court recognized the importance of her policy arguments, which underlie the Fair Housing Act and which were derived from the Thirteenth and Fourteenth Amendments.[47] These concerns included that jury trials might delay the case and might result in prejudice by the jury.[48] The Court specifically held, however, that Congress lacked the power to alter this constitutional right even though the right to a jury trial derived from a congressional statute.[49]

Thus, the Supreme Court jurisprudence on the Seventh Amendment prior to *Twombly* and *Tellabs* was quite clear. The English common law in 1791 governed whether a jury trial right existed and the circumstances under which courts and Congress could interfere with that right. The Court has also been quite clear that Congress could not alter this right to a jury trial.

B. THE SUPREME COURT'S RECENT JURISPRUDENCE ON THE MOTION TO DISMISS

In *Twombly* and *Tellabs*, the Court ignored the well-established case law described above under which the English common law in 1791 governs the constitutionality of procedures that affect the jury trial right.

1. *Bell Atlantic Corp. v. Twombly*

As a preliminary matter, one might argue that the Court's decision in *Bell Atlantic Corp. v. Twombly* is not relevant to a discussion of the Court's decisions on the motion to dismiss and

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despite the class action nature of a derivative suit. *Id.* at 540–42.

45. *Curtis*, 415 U.S. at 195–96 (citations omitted); *see also* OLDHAM, TRIAL BY JURY, *supra* note 34, at 5–16, 45–79 (discussing the scope of the jury trial right under the Seventh Amendment).

46. *See Curtis*, 415 U.S. at 193.

47. *See id.* at 198 & n.15.

48. *See id.* at 198.

49. *See id.*

the Seventh Amendment. After all, the parties, the lower courts, and the Supreme Court did not raise the Seventh Amendment issue.[50] For several reasons, however, this Article includes *Twombly* as an important part of the analysis of the Court's jurisprudence on the motion to dismiss and the Seventh Amendment. In the first instance, the Court chose to address the issue of the proper motion to dismiss standard by its grant of certiorari in *Twombly*. Second, the Court chose to significantly change the motion to dismiss standard, and the Court could have considered the constitutional question but did not. Finally, while *Tellabs* does not cite *Twombly*, *Tellabs* is consistent with the holding of *Twombly* and itself considered the Seventh Amendment issue.

In *Twombly*, the plaintiffs alleged that the defendant companies, also known as the Incumbent Local Exchange Carriers (ILECs), conspired to restrain the entry of other telephone companies, also known as the Competitive Local Exchange Carriers (CLECs), into their respective markets, and also conspired to agree not to compete with each other.[51] The Court considered the issue of the proper standard to dismiss a complaint for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).[52] The Court also interpreted Rule 8(a)(2), which requires "only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"[53] The Court decided that while the allegations pled must be accepted as true, they must demonstrate that the claim is plausible.[54] "[T]he line between possibility and plausibility of 'entitle[ment] to relief'" must be crossed.[55] The Court held that the line had not been crossed, because independent parallel conduct by the companies alone, without more, did not make the conspiracy claim plausible.[56] While the Court did not explicitly

50. *Cf.* Gonzalez v. Carhart, 127 S. Ct. 1610, 1640 (2007) (Thomas, J., concurring) (noting that questions not raised or briefed in lower courts are not properly before the Court on appellate review); Cutter v. Wilkinson, 544 U.S. 709, 727 n.2 (2005) (Thomas, J., concurring) (stating that the Court correctly declines to consider issues that were not addressed by lower courts).

51. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1962 (2007).

52. *See id.* at 1964–65.

53. *Id.* at 1964 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

54. *See id.* at 1965.

55. *Id.* at 1966 (alteration in original) (quoting FED. R. CIV. P. 8(a)(2)).

56. *See id.* at 1971–73.

state that courts should examine both inferences that favor the plaintiff and inferences that favor the defendant, it appears that the plausibility standard permits a court to examine inferences that favor both parties in the court's decision whether to dismiss a complaint.[57]

In this decision that made complaints easier to dismiss, the Court emphasized the cost to the parties of discovery and forced settlement, as well as the cost to the federal courts.[58] The Court specifically "retire[d]" the standard that was established fifty years earlier in *Conley v. Gibson*.[59] Under this standard, "a complaint [c]ould not be dismissed for failure to state a claim unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim which would entitle him to relief."[60] In *Twombly*, the Court decided that this standard went too far by permitting possible and not just plausible claims to go forward.[61] The Court explained that allegations must "plausibly suggest[]" the claim, "not merely [be] consistent with" the claim.[62] The Court also stated that this standard did not involve any heightened pleading requirements and noted that only the rulemakers could establish heightened pleading requirements.[63]

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57. *Cf. id.* at 1972–73; *id.* at 1986 n.11 (Stevens, J., dissenting) (discussing the Court's decision to draw factual inferences in favor of the defendant).

58. *Id.* at 1966–67, 1971 n.12 (majority opinion). Justice Stevens stated that cost should not influence the Court's analysis of the issue. *See id.* at 1989 (Stevens, J., dissenting).

59. *See id.* at 1969 (majority opinion) (referencing Conley v. Gibson, 355 U.S. 41, 45–46 (1957)).

60. *Conley*, 355 U.S. at 45–46.

61. *See Twombly*, 127 S. Ct. at 1968–69.

62. *Id.* at 1966. *See generally* Spencer, *supra* note 3, at 439–60 (describing the pleading standard after *Twombly*); Dodson, *supra* note 3, at 136–38 (same); Audio recording: Richard A. Nagareda, *supra* note 18 (describing the *Twombly* case). In *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), also decided in the 2006 Term, the Court considered the district court's dismissal of a pro se plaintiff's complaint that alleged an Eighth Amendment violation for the failure of the prison to treat the plaintiff's hepatitis C condition. The Tenth Circuit affirmed the district court's dismissal, finding the plaintiff's allegations "conclusory." *Id.* at 2199. The Court reversed the Tenth Circuit's affirmance of the district court's dismissal, and, citing *Twombly*, emphasized that facts pled should be taken as true. *Id.* at 2200. The case possibly suggests that *Twombly* will be limited to antitrust cases. However, the Court's emphasis that courts should apply a less difficult standard to pro se plaintiff's complaints, and that the court could still dismiss the complaint here, shows that *Twombly* is probably not so limited. *See id.* at 2200; *see also* Spencer, *supra* note 3, at 455–57 (discussing *Erickson* and its application of the *Twombly* standard).

63. *Twombly*, 127 S. Ct. at 1973 n.14.

Justice John Paul Stevens, joined by Justice Ruth Bader Ginsburg, dissented.[64] Justice Stevens asserted that a court should not dismiss a claim on the basis that the claim is not plausible.[65] Plausibility should not be assessed at the motion to dismiss stage of a case.[66] Instead, Justice Stevens asserted that the correct standard was the fifty-year-old *Conley* standard.[67]

2. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*

The *Tellabs* decision followed the *Twombly* decision. In *Tellabs*, the investors alleged that Richard Notebaert, the Chief Executive Officer of Tellabs, made several statements that were intended to mislead them as to the value of Tellabs's stock.[68] The Supreme Court considered the issue of the proper standard to dismiss a complaint for securities fraud under the Private Securities Litigation Reform Act (PSLRA).[69] The PSLRA required, among other things,[70] that the plaintiff plead

64. *See id.* at 1974 (Stevens, J., dissenting).

65. *See id.* Justice Stevens also stated that even if the standard was plausibility, plausibility would be met here. *Id.* at 1985.

66. *See id.* at 1983.

67. *See id.* at 1977–84.

68. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2505–06 (2007).

69. *See id.* 2507–09; *see also* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.). In enacting the PSLRA, Congress sought "to curtail the filing of meritless" class action securities fraud cases due to the concern that companies were being forced to settle such cases to avoid the high costs of litigating them. H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 740; *see also, e.g.*, Hillary A. Sale, *Heightened Pleading and Discovery Stays: An Analysis of the Effect of the PSLRA's Internal-Information Standard on '33 and '34 Act Claims*, 76 WASH. U. L.Q. 537, 540 (1998) ("The primary concern [behind enacting the PSLRA] was that plaintiffs' attorneys were filing frivolous class-action suits which, given the extensive and expensive discovery available, forced companies to settle meritless claims."); *id.* at 552–61 (discussing reform efforts and legislative history).

70. In addition to the scienter requirement, 15 U.S.C. § 78u-4(b)(2) (2000), Congress imposed a number of other requirements to discourage frivolous claims. Under the PSLRA, a complaint also must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Id.* § 78u-4(b)(1). Professor Sale criticized the new standards in the Reform Act, which contrast with the pre-Reform Act standards to dismiss a complaint: "The Reform Act, aimed at abusive securities litigation, both prohibits . . . discovery [of internal company information] and heightens the pleading standard necessary to survive a motion to dismiss. By combining these reforms, the Reform Act implements a standard that is outcome determinative and, if strictly applied, virtually impossible to meet."

with particularity facts showing a "strong inference" of scienter.[71] Citing Seventh Amendment concerns, without any specific analysis, the Seventh Circuit had stated that the facts were pled sufficiently if "a reasonable person could infer that the defendant acted with the required intent."[72] The Seventh Circuit had not adopted the Sixth Circuit standard that required courts to review inferences from the facts pled in the complaint that favored the defendant, along with those that favored the plaintiff, and determine which of the inferences were most plausible.[73]

In its decision, the Supreme Court emphasized the cost of meritless securities fraud cases[74] and decided that the appropriate standard to determine the "sufficiency"[75] of the allegations in a complaint upon a motion to dismiss for failure to plead a strong inference of scienter was as follows: "When the allegations are accepted as true and taken collectively, would a reasonable person deem the inference of scienter at least as

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Sale, *supra* note 69, at 538; *see also id.* at 579–83 (advocating, among other things, that Congress repeal stay-of-discovery provisions and that the courts could permit limited discovery); Elliott J. Weiss & Janet E. Moser, *Enter Yossarian: How to Resolve the Procedural Catch-22 That the Private Securities Litigation Reform Act Creates*, 76 WASH. U. L.Q. 457, 458–60 (1998) (describing provisions that make it more difficult for the plaintiff to proceed with a securities fraud claim, including heightened pleading requirements and discovery-stay provisions).

71. 15 U.S.C. § 78u-4(b)(2). Courts had proposed several different standards to satisfy the requirement that a complainant must plead "a strong inference" of scienter. Makor Issues & Rights, Ltd. v. Tellabs, Inc., 437 F.3d 588, 601 (7th Cir. 2006) (explaining the approaches of the various circuits), *rev'd*, 127 S. Ct. 2499 (2007); *In re* Credit Suisse First Boston Corp., 431 F.3d 36, 49 (1st Cir. 2005); Ottmann v. Hanger Orthopedic Group, Inc., 353 F.3d 338, 348–49 (4th Cir. 2003); Pirraglia v. Novell, Inc., 339 F.3d 1182, 1188–89 (10th Cir. 2003); *In re* Rockefeller Ctr. Props., Inc. Sec. Litig., 311 F.3d 198, 224 (3d Cir. 2002); Gompper v. VISX, Inc., 298 F.3d 893, 897 (9th Cir. 2002); Fla State Bd. of Admin. v. Green Tree Fin. Corp., 270 F.3d 645, 660 (8th Cir. 2001); Helwig v. Vencor, Inc., 251 F.3d 540, 553 (6th Cir. 2001).

72. *Tellabs*, 437 F.3d at 602.

73. *See id.* at 601–02 (discussing Fidel v. Farley, 392 F.3d 220, 227 (6th Cir. 2004)). The Sixth Circuit stated that, in deciding this question of whether a strong inference has been pled, "'plaintiffs are entitled only to the most plausible of competing inferences'" from the facts that have been pled, but the inferences need not be "'irrefutable.'" *Fidel*, 392 F.3d at 227 (quoting *Helwig*, 251 F.3d at 553). The Sixth Circuit recognized a possible Seventh Amendment problem with the standard that it proposed. *See* City of Monroe Employees Ret. Sys. v. Bridgestone Corp., 399 F.3d 651, 682 n.25 (6th Cir. 2005).

74. *Tellabs*, 127 S. Ct. at 2504.

75. *Id.* at 2504.

strong as any opposing inference?"[76] Thus, it was permissible to consider inferences that favored the plaintiff and those that favored the defendant in a court's decision whether to dismiss a complaint, and despite the concerns of the Seventh Circuit, the Court held that the Seventh Amendment was not violated by this standard.[77]

The Court's constitutional analysis was short and emphasized the power of Congress to regulate pleading, as the creator of the claim:

> Congress, as creator of federal statutory claims, has power to prescribe what must be pleaded to state the claim, just as it has power to determine what must be proved to prevail on the merits. It is the federal lawmaker's prerogative, therefore, to allow, disallow, or shape the contours of—including the pleading and proof requirements for—§ 10(b) private actions. No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims.[78]

In a footnote, the Court added that the Court had previously held that other judicial gatekeeping was not problematic under the Seventh Amendment.[79] The Court also emphasized that under the standard that it adopted—whether the inferences that show the defendant acted with scienter are as likely as the inferences that show the defendant did not act with scienter—the plaintiff was not required "to plead more than she [was] required to prove at trial"—whether it was more likely than not that the defendant acted with scienter.[80]

The Court discussed *Fidelity & Deposit Co. of Maryland v. United States*[81] in support of its decision that this standard did not violate the Seventh Amendment.[82] The rule at issue in that case required the defendant to file an affidavit "'specifically stating . . . , in precise and distinct terms, the grounds of his defen[s]e.'"[83] In *Tellabs*, the Court stated that the rule in *Fidelity* did not violate the Seventh Amendment because "the heigh-

76. *Id.* at 2511.

77. *See id.* at 2511–13.

78. *Id.* at 2512; *see also* Jones v. Bock, 127 S. Ct. 910, 926 (2007) (explaining that the legislature, and not the courts, should "adopt[] different and more onerous pleading rules").

79. *Tellabs*, 127 S. Ct. at 2512 n.8; *see also infra* note 104 (analyzing cases cited by Court).

80. *See Tellabs*, 127 S. Ct. at 2513.

81. 187 U.S. 315 (1902).

82. *See Tellabs*, 127 S. Ct. at 2512–13.

83. *Id.* at 2512 (alteration in original) (quoting *Fidelity*, 187 U.S. at 318).

tened pleading rule simply 'prescribes the means of making an issue,' and that, when '[t]he issue [was] made as prescribed, the right of trial by jury accrues.'"[84]

The Court criticized the concurrences of Justices Antonin Scalia and Samuel Alito,[85] in which those Justices advocated dismissal unless "the inference of scienter (if any) is *more plausible* than the inference of innocence."[86] Justice Alito had stated that the adoption of this standard, as opposed to the creation of a brand new standard as the Court claimed, was the most likely intention of Congress.[87] Justice Scalia and Justice Alito both had acknowledged, however, that the results under their standard or the Court's standard would be similar.[88] Addressing Justice Scalia and Justice Alito's standard, the Court stated that if Congress had intended to adopt this summary judgment-like standard, Congress would have more explicitly adopted the standard—especially when a complaint would, at this stage, be dismissed without any discovery.[89] The Court vacated and remanded the case.[90]

In his dissent, Justice Stevens appeared to agree with the Court's Seventh Amendment analysis, but disagreed with the Court's interpretation of "strong inference."[91] Justice Stevens asserted that the meaning of "strong inference" was similar to "probable cause"[92] and therefore to decide whether a "strong inference" of scienter has been pled, one should determine whether there is "probable cause to believe [the defendants]

84. *Id.* at 2512 (alteration in original) (quoting *Fidelity*, 187 U.S. at 320).

85. *See id.* at 2510 n.5.

86. *Id.* at 2513, 2514 (Scalia, J., concurring) (arguing that his interpretation does not rely on legislative history, like the Court's does, but instead relies on text, and arguing that Congress has extended "the ordinary rule under which a tie goes to the defendant" "to the pleading stage of a case").

87. *See id.* at 2516 (Alito, J., concurring).

88. *See id.* at 2514 (Scalia, J., concurring); *id.* at 2516 (Alito, J., concurring).

89. *See id.* at 2510 n.5 (majority opinion). Interestingly, in *Twombly* the Court made a comparison to the summary judgment standard in its decision that the plaintiffs had not pled enough. "[A]t the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1964 (2007) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986)).

90. *See Tellabs*, 127 S. Ct. at 2513. The Seventh Circuit subsequently remanded the case to the district court. Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 712 (7th Cir. 2008).

91. *See Tellabs*, 127 S. Ct. at 2516–17 (Stevens, J., dissenting).

92. *Id.* at 2517.

guilty of misconduct."[93] Justice Stevens stated that his standard was "both easier to apply and more consistent with the statute."[94] Using this standard, Justice Stevens concluded that the plaintiffs' claims should not be dismissed.[95]

3. The Problem with the Supreme Court's Recent Jurisprudence on the Motion to Dismiss

Whether the Supreme Court realizes it or not, it is on the road to the creation of a new theory on the interpretation of the Seventh Amendment—one that eliminates the common law analysis, thus disregarding the constitutional limit on courts' and Congress's power over the jury. In *Twombly*, the Supreme Court stated that claims must be plausible to proceed beyond the pleadings stage. Courts must assess the facts alleged by the plaintiff to determine the plausibility of the claim.[96] The Court also stated that the rulemakers could adopt heightened pleading standards.[97] In *Tellabs*, the Supreme Court stated that Congress could establish the standards for dismissal of causes of action that Congress created.[98] There, Congress had created a cause of action for securities fraud.[99] The Court decided that Congress could determine the standard to dismiss this claim, including requiring the plaintiff to plead a strong inference of scienter. This was appropriate as long as the standard to survive a motion to dismiss was not higher than the standard to win the claim upon a determination by a jury.[100] The Court noted the power of Congress and rulemakers to adopt special pleading requirements without any infringement of the Seventh Amendment.[101]

If a court determines that a plaintiff has not satisfied the standards from these cases—the plausibility requirements or

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93. *Id.*

94. *Id.*

95. *See id.* at 2517–18. Blackstone stated that formerly a plaintiff had to show probable cause for his charge before a defendant was required to answer, but that this requirement was eliminated. WILLIAM BLACKSTONE, 3 COMMENTARIES *295 (Univ. Chi. Press 1979) (1768).

96. *See supra* text accompanying notes 54–62.

97. *See supra* text accompanying note 63.

98. *See supra* text accompanying note 78.

99. *See Tellabs*, 127 S. Ct. at 2504, 2512.

100. *See supra* text accompanying note 80. The Court missed that the jury decides certain questions. The standard that the jury applies is irrelevant to the proper standard for the court to apply. *See infra* Part II.A.

101. *See Tellabs*, 127 S. Ct. at 2512 n.9.

the heightened pleading requirements[102]—the case is dismissed at the pleading stage, which eliminates the plaintiff's jury trial right. The Court's reasoning that Congress and the rulemakers should be able to establish such pleading standards for causes of action created by Congress appears logical in the first instance. It seems reasonable that if Congress has created a cause of action, Congress and the rulemakers should be able to decide when a court can eliminate that cause of action, and thus, when the jury trial right is extinguished.

This would require, however, that the Supreme Court change its Seventh Amendment jurisprudence. After all, under the Court's jurisprudence, the jury trial right exists when there are legal rights and remedies, that is, where a jury trial existed under the English common law in 1791.[103] Any alteration of that right is governed by the common law as well. In the *Twombly* and *Tellabs* decisions, the Court did not state that it had changed its Seventh Amendment jurisprudence, did not justify a change to its jurisprudence, and even cited previous cases to show its allegiance to its prior case law.[104] With that

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102. Such heightened pleading has not been adopted for antitrust cases thus far though. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (requiring antitrust plaintiffs to plead "only enough facts to state a claim to relief that is plausible on its face").

103. *See supra* text accompanying notes 44–45.

104. In a *Tellabs* footnote, without further explanation, the Court cited previous jurisprudence in which judicial control had been upheld: "In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment without violating the Seventh Amendment." *Tellabs*, 127 S. Ct. at 2512 n.8. The Court cited three cases as examples. *Id.*

In the first case, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), the Court set forth the test that governed the admissibility of scientific expert evidence under Federal Rule of Evidence 702. It is somewhat puzzling why the Court cited *Daubert*. *Daubert* was a purely rule-based decision without any mention or analysis of its compatibility with the Constitution, including the Seventh Amendment and the common law. Also, the possible exclusion of evidence for the consideration of the jury, the issue in *Daubert*, contrasts with the complete elimination of the jury trial in *Tellabs*. In the next case cited by the Court, *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 321–22 (1967), the Court decided that an appellate court can order dismissal of a case after it has reversed the trial court's denial of judgment notwithstanding the verdict. The Court cited its previous decision that judgment notwithstanding the verdict does not violate the Seventh Amendment. *See id.* at 321 (citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940)). I have previously made distinctions between a court's involvement after a jury has tried a case under judgment notwithstanding the verdict and a court's elimination of the jury trial completely under summary judgment. *See* Thomas, *supra* note 27, at 166–77. A similar argument applies to the motion to dismiss. I have also stated that the Court's jurisprudence on judgment as a matter of law

stated, the Court failed to apply its prior Seventh Amendment case law, which required an analysis of the new standards in comparison to the common law procedures.

The Court also failed to examine the text of the Seventh Amendment. The first clause refers to the preservation of the jury trial with no exception that permits that right from being interfered with, including by Congress and the courts.[105] Instead, the common law explicitly governs when there is a jury trial. Under the second clause, the common law also governs when facts can be re-examined after a jury has tried them.[106] Although the jury trial right might result from congressional action that establishes a particular cause of action with a legal remedy, once that right exists under the Seventh Amendment, the right is governed by the Amendment. Once a legal right and remedy exist, Congress and the courts cannot change the power granted to juries in the Amendment.[107]

The jury is a constitutional actor, as are Congress and the courts, with specific power given to it under the Constitution.[108]

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and the directed verdict incorrectly analyzed the common law. *See id.* In the final case cited by the Court, *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273, 278 (1917), which the Court stated stood for the constitutionality of summary judgment, the Court decided that "[t]he constitutional right of trial by jury presents no obstacle to this method of proceeding, since by becoming a surety the party submits himself 'to be governed by the fixed rules which regulate the practice of the court,'" *id.* (quoting Hiriart v. Ballon, 34 U.S. (9 Pet.) 156, 167 (1835)). The Court in *Tellabs* stated that *Pease* stood for the constitutionality of summary judgment. *Tellabs*, 127 S. Ct. 2512 n.8. However, the facts at hand in *Pease* are irrelevant to the facts in *Tellabs*. Moreover, I have previously shown the constitutional infirmity of summary judgment under the governing common law. *See* Thomas, *supra* note 27.

The Court also cited cases that do not discuss the Seventh Amendment at all to attempt to support its Seventh Amendment theory that Congress can "establish[] whatever pleading requirements it finds appropriate for federal statutory claims." *Tellabs*, 127 S. Ct. at 2512. Additionally, the Court cites *Walker v. New Mexico & Southern Pacific Railroad Co.*, 165 U.S. 593 (1897), for the proposition that the "Seventh Amendment 'does not attempt to regulate matters of pleading,'" *id.* at 2512–13 (quoting *Walker*, 165 U.S. at 596). The Court, however, does not quote the adjacent words in the decision that require the "substance" of the "common law" right to be preserved. *See Walker*, 165 U.S. at 596.

105. *See* U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

106. *See id.* ("[N]o 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.").

107. *See supra* text accompanying notes 36–49.

108. Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV.

The Seventh Amendment does not grant Congress or the courts the power to interfere with the power of the jury except as permitted by the common law, and the Court itself has stated that Congress cannot alter the courts' power under the Seventh Amendment.[109]

Indeed, this reading of the Amendment is the most sensible reading to continue to give the jury any significant power to hear cases pursuant to the Amendment. If the Supreme Court's new decisions are further developed, there would be no need to analyze any modern procedure that affects the jury trial in any case in which a jury trial right exists due to congressional action. Thus, the right to a jury trial in a case (for example, employment discrimination) that is dismissed for example, upon summary judgment or a directed verdict, would not be governed by the common law but instead only by whether the dismissal standard was the same or easier to meet than the standard employed by the jury. Prior to *Twombly* and *Tellabs*, the Court itself had established that the common law does govern these stages of a litigation, regardless of whether Congress created the cause of action.[110]

Another problem with the Court's new decisions is illustrated by an examination of the Court's jurisprudence on the Sixth Amendment. The Court has been careful to analyze the English common law to decide when the right to a jury trial exists in criminal cases although, unlike the Seventh Amendment, the Sixth Amendment by its terms does not require the application of the common law.[111] Thus, the Court's new deci-

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767 (2005).

109. *Id.* For discussions of jury decision making, see generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002) (exploring the question of why juries make certain decisions in punitive damages cases); Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325 (1995) (analyzing the history of jury power and authority in the United States); Deborah R. Hensler, *Jurors in the Material World: Putting Tort Verdicts in Their Social Context*, 13 ROGER WILLIAMS U. L. REV. (forthcoming 2008) (discussing the possible influence of "social inflation" on jury verdicts); Catherine M. Sharkey, *Punitive Damages: Should Juries Decide?*, 82 TEX. L. REV. 381 (2003) (reviewing SUNSTEIN ET AL., *supra*); Neil Vidmar, *Experimental Simulations and Tort Reform: Avoidance, Error and Overreaching in Sunstein et al.'s* Punitive Damages, 53 EMORY L.J. 1359 (2004) (same).

110. *See supra* text accompanying notes 34–49.

111. *See* Cunningham v. California, 127 S. Ct. 856, 863–64 (2007) (mentioning common law roots of Sixth Amendment jurisprudence); Jones v. United States, 526 U.S. 227, 244–48 (1999) (discussing common law bases of criminal jury trials and the roles of judge and jury as respectively law and fact

sions conflict with its interpretation of the Sixth Amendment, which requires application of the English common law.

If the Court had applied the long-established common law jurisprudence on the Seventh Amendment, it would have found the Seventh Amendment right to a jury trial existed because of the legal rights and remedies available in *Twombly* and *Tellabs*. This jury trial right could be altered only by adherence to the limitations of the substance of the common law jury trial. The Court failed, however, to analyze the common law in its decisions. The constitutional analysis that *Twombly* and *Tellabs* lack is performed in the next Part.

II. THE ENGLISH COMMON LAW THEORY OF THE SEVENTH AMENDMENT REVISITED: WHY THE MOTION TO DISMISS IS NOW UNCONSTITUTIONAL

In my Article, *Why Summary Judgment Is Unconstitutional*, I opined in a footnote that the motion to dismiss was constitutional.[112] This view was based on the well-developed case law by the Supreme Court under *Conley*, which accepted the facts pled as true and under which a case was rarely dismissed upon a motion to dismiss.[113] While the Court has asserted that its standards for dismissal in *Twombly* and *Tellabs* continue to accept the facts pled as true, the standards depart substantially from the common law and therefore violate the Seventh Amendment.

The Supreme Court's decision one century ago in *Fidelity & Deposit Co. v. United States* is the closest that the Supreme Court has come to a decision on the question of the constitutionality of the modern motion to dismiss.[114] While the Court cited *Fidelity* in support of its decision in *Tellabs*, *Fidelity* does not support the Court's holding but rather confirms the constitu-

finders); Thomas, *supra* note 27, at 169 (citing other Supreme Court cases); *cf.* Thomas, *supra* note 108, at 794–97 (arguing that the Court has granted more power under the Sixth Amendment to juries in criminal cases than it has under the Seventh Amendment to juries in civil cases). The Court stated that the issue in England in the late eighteenth century was not if the jury was the fact finder, but rather if the jury should also have played the role of the law finder. *See Jones*, 526 U.S. at 246–47 & n.8.

112. *See* Thomas, *supra* note 27, at 150 n.39.

113. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

114. 187 U.S. 315 (1902). While often cited for the proposition that summary judgment is constitutional under the Seventh Amendment, *Fidelity* best supports the constitutionality of the old motion to dismiss under *Conley*. *See* Thomas, *supra* note 27, at 164–66.

tional problem posed by the Court's new standards for the motion to dismiss.

Fidelity involved a contract dispute between the plaintiff and the defendant.[115] Under a rule available to the plaintiff in that case, the plaintiff could receive judgment if the plaintiff filed an affidavit along with his declaration that stated both the cause of action and the amount owed, and the defendant did not respond with a plea and an affidavit that denied the claim and stated a defense to it.[116] The plaintiff followed the rule and filed along with his declaration an affidavit in which he alleged the existence of the contract and the amount owed by the defendant.[117] The defendant responded with a plea and an affidavit in which it asserted a lack of adequate knowledge as to the alleged contracts and debt.[118] The trial court granted judgment to the plaintiff, the court of appeals affirmed the judgment, and the Supreme Court eventually affirmed the judgment in favor of the plaintiff.[119] In its opinion deciding that the rule did not violate the right of the defendant to a jury trial, the Court described that under the rule, "the facts stated in the affidavit of defense [were to] be accepted as true."[120] Here, the defendant had raised no defense at all.[121]

The rule employed in *Fidelity* uses the same standard as the motion to dismiss under *Conley*—the facts alleged in the complaint are taken as true. The rule in *Fidelity* contrasts, however, with the new motion to dismiss standard established by *Twombly* and *Tellabs*. In *Fidelity*, there was no plausibility analysis or comparison of inferences, as occurs under the *Twombly/Tellabs* standard. Thus, *Fidelity* fails to support the Court's position that the new standard is constitutional.

In *Fidelity*, in its decision that the rule at issue did not violate the Seventh Amendment, the Court did not analyze the rule in comparison to the common law procedures. This analysis of the new motion to dismiss is performed below.

115. *Fidelity*, 187 U.S. at 316.
116. *Id.* at 318–19.
117. *See id.* at 316–17.
118. *See id.* at 317.
119. *See id.* at 318, 322.
120. *Id.* at 320.
121. *See id.* at 317–18, 322.

A. THE STANDARD FOR ASSESSING THE CONSTITUTIONALITY OF PROCEDURES THAT AFFECT THE JURY TRIAL RIGHT

The issue of the constitutionality of procedures that affect the jury trial right may be governed by either the first or second clause of the Seventh Amendment. If a court employs a procedure that affects the jury trial right prior to a jury trying the facts, the first clause would govern the constitutionality of that procedure.[122] Likewise, if a court employs a procedure that affects the jury trial right after a jury has tried the facts, the second clause would govern the constitutionality of that procedure.[123] A motion to dismiss, similar to a motion for summary judgment, occurs prior to the jury trying the facts. One could argue that once a jury trial right exists under the first clause, a court cannot interfere with that right until a jury tries the facts, and then, only according to the rules of the common law as set forth in the second clause. Under such a reading of the Seventh Amendment, the motion to dismiss and the motion for summary judgment would be unconstitutional, without further analysis. The Supreme Court has not adopted this approach but rather has examined whether a modern procedure that affects the jury trial right, before or after a jury has tried facts, comports with the substance of the English common law jury trial in 1791.[124]

Prior to *Twombly* and *Tellabs*, the Court had emphasized that the substance of the common law jury trial in 1791 must be satisfied.[125] The Court had not set forth this substance but rather had examined individual modern procedures and compared those procedures to common law procedures.[126] In previous scholarship, I examined the English common law in 1791 to identify the core principles or substance of the common law jury trial in 1791. Under the common law,

> [o]ne party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without a determination of the facts by the parties or the jury, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. Where the court decided that the evidence was insuffi-

122. *See Thomas*, *supra* note 27, at 147–48.
123. *Id.*
124. *See supra* note 35 and accompanying text.
125. Thomas, *supra* note 27, at 147–48.
126. *Id.* at 147.

> cient to support the verdict, the court would order a new trial. Another jury would determine the facts and decide which party won. The court itself would never determine who should win if it believed the evidence was insufficient. Third, a jury would decide a case with any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.[127]

As discussed below, the standards for the dismissal of a complaint set forth by the Court in *Twombly* and *Tellabs* are not similar to any common law procedures and do not comport with the substance of the common law. As a result, these standards violate the Seventh Amendment right to a jury trial.

B. DEBUNKING THE COURT'S CASES ON THE MOTION TO DISMISS: THE CONSTITUTIONAL INFIRMITY OF THE NEW STANDARDS TO DISMISS A CASE

As stated above, until the *Twombly* and *Tellabs* decisions in the 2006 Term, the Supreme Court's decision in *Conley* governed when a complaint could be dismissed for failure to state a claim.[128] The court accepted plaintiff's facts as true,[129] and a complaint could not be dismissed "unless it appear[ed] beyond doubt that the plaintiff [could] prove no set of facts in support of his claim which would entitle him to relief."[130] Again, as stated above, in *Twombly* and *Tellabs*, while the Court stated that the defendant must accept the facts pled as true, the Court decided that for the plaintiff to survive a motion to dismiss, the claim must be plausible.[131] The Court also decided that at least in some circumstances it is appropriate for a court to assess both the inferences that favor the plaintiff and the inferences that favor the defendant to decide whether the inferences that favor the plaintiff are as strong as those that favor the defendant.[132]

This Section sets forth the English common law procedures of the demurrer to the pleadings and the demurrer to the evi-

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127. *Id.* at 148.

128. Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

129. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1 (2002); Davis v. Monroe County Bd. of Educ., 526 U.S. 629, 633 (1999) (citing Summitt Health, Ltd. v. Pinhas, 500 U.S. 322, 325 (1991)).

130. *Conley*, 355 U.S. at 45–46; *see also* Hishon v. King & Spalding, 467 U.S. 69, 73 (1984) ("A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.").

131. *See* note 54–55 and accompanying text.

132. *See supra* notes 57, 77 and accompanying text.

dence, the two procedures under the common law that best can be compared to the motion to dismiss. It shows that while the old motion to dismiss under *Conley* shares significant characteristics with both the demurrer to the pleadings and with the demurrer to the evidence, the additional requirements that have been imposed by *Twombly* and *Tellabs* for a plaintiff to survive a motion to dismiss and thus to present his case before a jury are constitutionally infirm. Those requirements permit a court to assess critically the facts alleged by the plaintiff, including determining the inferences that favor the defendant instead of accepting as true all facts and corresponding inferences propounded by the plaintiff, as required by the English common law. It also shows that the new motion to dismiss fails to comport with the core principles or substance of the common law jury trial.

1. A Comparison of the Common Law Demurrer to the Pleadings and the New Motion to Dismiss

The common law demurrer to the pleadings has much similarity to the motion to dismiss under the standard in *Conley*.[133] Like the old motion to dismiss, if one of the parties (the demurring party) admitted the truth of the plea or declaration of the opposing party, and the demurring party was entitled to judgment under the law, the court would enter judgment for that party.[134] Unlike the motion to dismiss, however, if the demurring party was incorrect, then the other party received judgment because that party had admitted the facts alleged by the opposing party.[135] Blackstone gives examples of where a declaration or plea might be "insufficient in law."[136] A defendant

133. *Conley*, 355 U.S. at 45–46.

134. *See* 3 BLACKSTONE, *supra* note 95, at *314. If there was a jury verdict, the defendant might attempt to move for an arrest of judgment, stating that a demurrer would have been successful because of a problem with the declaration. Even if a demurrer would have overturned the action, the verdict could possibly cure the "inaccuracies and omissions" of the declaration. *See* Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 738–40 & n.317 (2004). This is another illustration of the importance of the jury at common law.

135. *See* 3 BLACKSTONE, *supra* note 95, at *314; *see also* Thomas, *supra* note 134, at 706–07 (describing this procedure). The Advisory Committee's Notes to the Federal Rules of Civil Procedure state, "Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action." FED. R. CIV. P. 12(b)(6) advisory committee's notes to the 1948 amendments.

136. 3 BLACKSTONE, *supra* note 95, at *314.

might demur to the declaration if the plaintiff had "not assign[ed] sufficient trespass" or a plaintiff might demur to the plea if the defendant "plead[ed] that he committed the trespass by authority from a stranger, without making out the stranger's right."[137] Blackstone gives as another example that in a trespass action, the defendant, in his plea, admits that he trespassed and states that he was hunting. The plaintiff may demur to the plea by admitting the plea's truth and stating that hunting is not a legal justification for trespass.[138] The court would decide this issue of law.[139]

While the motion to dismiss under *Conley* and the demurrer to the pleadings share significant characteristics, this analysis changes when a comparison is made between the new motion to dismiss standard under *Twombly* and *Tellabs* and the demurrer to the pleadings. The new motion to dismiss adds the requirement that the plaintiff must plead a plausible claim. The court must decide this question based on an evaluation of the facts and in some circumstances a court will also examine inferences that favor the plaintiff *and the defendant*.[140]

Under these standards, the court does not simply accept the facts and corresponding inferences alleged by the plaintiff as true, as was required under the common law demurrer to the pleading. Instead, the court examines the facts and decides the plausibility of the inferences that favor the plaintiff and in some circumstances the plausibility of the inferences that favor the defendant. Neither analysis was permitted under the common law. A court simply accepted the facts pled by the plaintiff and any inference in support of the plaintiff's claim was accepted, however improbable any such inferences might be. The court then decided whether a claim existed under these facts. Thus, the common law demurrer to the pleadings and the new motion to dismiss standards are inapposite.

2. A Comparison of the Common Law Demurrer to the Evidence and the New Motion to Dismiss

An examination of the common law demurrer to the evidence further demonstrates that the new standard to dismiss a claim violates the right of the plaintiff to a jury trial. The common law demurrer to the evidence permitted the demurring

137. *Id.*
138. *Id.* at *323–24.
139. *See id.*
140. *See supra* notes 57, 77 and accompanying text.

party to admit the truth and conclusions of the opposing party's evidence at the trial and to request judgment on that evidence.[141] Any fact or conclusion to be drawn from the opposing party's evidence was accepted as true, whether those facts and conclusions were probable or not.[142] "Whether probable or not, [was] for a jury to decide."[143] Judgment would be entered for the demurring party if no claim or defense existed under the admitted facts and conclusions.[144] If a claim or defense existed, the court would enter judgment for the opposing party because the demurring party had admitted the facts and conclusions.[145] Because the demurring party was required to admit the facts and conclusions of the evidence of the opposing party,[146] the common law demurrer to the evidence was rarely used.[147]

While the procedures occur at different times during the case, the demurrer to the evidence has significant similarities to the standard for the motion to dismiss under *Conley*.[148] Under both, the court accepts as true the allegations or facts and conclusions of the party opposing the motion and grants judgment to the moving party if there is no claim or defense on those allegations or facts and conclusions under the law.[149]

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141. *See* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT *NISI PRIUS* 307 (London, W. Strahan & M. Woodfall 1772).

142. *See* Cocksedge v. Fanshaw, (1779) 99 Eng. Rep. 80, 88 (K.B.); *see also* Gibson v. Hunter, (1793) 126 Eng. Rep. 499, 510 (H.L.) (stating that the defendant must admit "every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove").

143. *Cocksedge*, 99 Eng. Rep. at 88.

144. *See* BULLER, *supra* note 141.

145. *See Cocksedge*, 99 Eng. Rep. at 88.

146. *See Gibson*, 126 Eng. Rep. at 510.

147. *Cf. id.* Lord Chief Justice Eyre, writing for the Lords, concluded that "after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House." *Id.* "[The] proceeding, which is called a demurrer to evidence, and which though not familiar in practice, is a proceeding well known to the law." *Id.* at 508. For a more extensive description of this procedure, including case descriptions, see Thomas, *supra* note 134, at 709–15. Professor Baker describes the demurrer to the evidence as "in effect that the parties agreed on the facts as disclosed by the evidence at the trial, and had them entered on the record in Latin, discharging the jury and leaving the decision to the court." J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 83 (4th ed. 2002).

148. *See* Conley v. Gibson, 355 U.S. 41, 45–46 (1957).

149. In contrast to the motion to dismiss, however, under the common law demurrer, the demurring party could lose, as once it had admitted the facts and conclusions of the evidence and there was a claim or defense under those

Again, however, the new requirements imposed by the Court violate the Seventh Amendment. Under those standards, a court does not simply accept the facts and corresponding inferences alleged by the plaintiff as true as required upon a demurrer to the evidence. Instead, the court examines the facts and decides the plausibility of the inferences that favor the plaintiff and in some circumstances the plausibility of the inferences that favor the defendant.[150] This was not permitted under the common law. Any inferences for the opposing party, however improbable, were accepted. Whether an inference was probable or not was for a jury to decide.[151]

As stated here, the new motion to dismiss differs significantly from the common law procedures of the demurrer to the pleadings and the demurrer to the evidence. Under the new motion to dismiss, the facts and inferences pled by the plaintiff are not accepted as true, as the common law required, but rather the court engages in a determination of the plausibility of the claim and weighs the inferences that favor the plaintiff, including at times against the inferences that favor the defendant. This was expressly prohibited by the common law.[152] While a comparison of the common law procedures to modern procedure is helpful to see differences and similarities between the procedures, modern procedures need not be the same as the common law procedures. Under the Supreme Court jurisprudence on the Seventh Amendment prior to *Twombly* and *Tellabs*, a modern procedure must comport only with the substance of the common law jury trial.[153]

3. The Inconsistency of the New Motion to Dismiss with the Core Principles or Substance of the Common Law

As stated above, I have previously set forth the core principles or substance of the common law jury trial procedures.[154] An examination of these core principles in comparison to the new motion to dismiss shows the constitutional infirmity of the new motion to dismiss. Under a motion to dismiss, the court

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facts and conclusions, the other party was entitled to judgment. *See supra* text accompanying note 145.

150. *See supra* notes 55, 77 and accompanying text.

151. *See supra* text accompanying notes 142–43.

152. *See supra* notes 134–39, 141–45 and accompanying text.

153. *See supra* Part I.A.

154. *See* Thomas, *supra* note 27, at 147–48; *see also supra* text accompanying note 127.

examines the facts and decides the plausibility of the inferences that favor the plaintiff and at times the plausibility of the inferences that favor the defendant.[155] Neither determination was permitted at common law.[156] A court would not decide a case unless the facts and conclusions of the opposing party, including the improbable and probable facts and conclusions, had been admitted by the demurring party. In fact, a court would not engage in any determination of the sufficiency of the evidence unless a jury had heard the case, and even then, the court could send the case only to another jury.[157] Thus, the new motion to dismiss does not comport with the core principles or substance of the common law.

Using the Supreme Court standard for the constitutionality of modern procedures under the Seventh Amendment, I have described how the new standards for the motion to dismiss a claim violate the core principles or the substance of the common law and are therefore unconstitutional. An examination of how a common law court would treat the complaints in *Twombly* and *Tellabs* follows.

C. *TWOMBLY*, *TELLABS*, AND THE COMMON LAW

As I previously stated, in *Twombly*, the Court did not analyze the new motion to dismiss standard under the Seventh Amendment and in *Tellabs*, the analysis was short and incomplete. Indeed, a common law court would not have dismissed the complaints in *Twombly* and *Tellabs*. In *Twombly*, a legal right and remedy were involved and thus the complaint would be subject to a jury trial under the common law.[158] Moreover, evidence that the ILECs engaged in the same behavior against the CLECs, and also the same behavior of not competing with one another could demonstrate to a jury that the ILECs agreed

155. *See supra* Parts I.B.1–2.

156. *See supra* Parts II.B.1–2.

157. In the present day, there may be an attempt to characterize a court's decision on the motion to dismiss as a legal question. This is a simplistic characterization that has no significance under the common law. Reference to the common law as described here is the appropriate inquiry, and again that "common law" in the Seventh Amendment refers to the English common law in 1791, not the common law at any of the various points in the nineteenth or twentieth centuries. *See supra* note 34 and accompanying text; *see also* Thomas, *supra* note 27, at 146 & n.25, 147, 160–63.

158. *See supra* notes 36–49 and accompanying text. Moreover, statutory antitrust claims can be compared to common claims of contracts restraining competition. *See, e.g.*, United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

to engage in this behavior. While the Court stated that "the complaint does not set forth a single fact in a context that suggests an agreement,"[159] this parallel behavior could show agreement. Indeed, the Court actually recognized that agreement was one explanation. The Court stated that "the ambiguity of the behavior [was] consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market."[160] The Court also stated the "obvious alternative explanation" for the behavior of the ILECs was they liked the monopoly world in which they lived and they hoped the other ILECs would remain content as well staying in their areas.[161] Under the common law, a court would accept the allegations of parallel behavior as true, and because this behavior could demonstrate a conspiracy to a jury, a court could not dismiss the complaint. The requirement set forth by the Court in *Twombly*, that a court decide whether a claim was plausible, did not exist under the common law.[162] Moreover, the line that the Court stated must be crossed between possibility and plausibility did not exist under the common law.[163]

In *Tellabs*, a legal right and remedy were also involved and thus the claim would be subject to a jury trial under the common law.[164] Evidence that the company made several misstatements about its products and revenues could demonstrate to a jury that the company committed fraud and that the scienter requirement was met. Under the common law, a court would accept the allegations pled as true,[165] and because a jury could find fraud based on this behavior, a court could not dismiss the complaint. In *Tellabs*, the Court placed great weight on the power of Congress and rulemakers to adopt pleading standards but the Court did not tie these pleading standards in

159. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1968–69 (2007).

160. *Id.* at 1964.

161. *See id.* at 1972. Moreover, even without discovery, what the CEO meant in his statements could have been established through cross-examination of the CEO. *Id.* at 1986–87 (Stevens, J., dissenting).

162. *See supra* Part II.B.1–2.

163. *See supra* Part II.B.1–2. Additionally, although the Court states that the test it established did not require probability, *Twombly*, 127 S. Ct. at 1965, there was no such difference between plausibility and probability under the common law. *See supra* Part II.B.2.

164. *See supra* notes 36–49 and accompanying text. Moreover, the statutory claim here can be compared to common law fraud. *See infra* note 176 and accompanying text.

165. *See supra* Part II.B.1.

any manner to the common law. Indeed, an examination of the common law shows that common law courts explicitly rejected the requirement set forth in *Tellabs* that a court examine opposing inferences to decide whether to dismiss a case.[166]

The case of *Gibson v. Hunter*, decided by the House of Lords, the supreme judicial body in England, in 1793,[167] provides guidance on the rare circumstances when a case that alleged fraud could be dismissed under the common law.[168] In that case, the plaintiff alleged that the defendants engaged in fraud in the creation of a bill of exchange.[169] The bill of exchange was signed by an allegedly nonexistent party.[170] In order for the court to consider whether the case could be dismissed, the defendant was required to admit the facts and conclusions of the opposing party's evidence that were presented at the trial, including those facts and conclusions that were improbable.[171] The plaintiff presented evidence of fraud including the testimony of witnesses.[172] For the defendant to have the opportunity to dismiss the case, the defendant was required to admit the evidence of the plaintiff, including the testimony of the witnesses regarding the fraud.[173] The defendant had not done this and would not do this.[174] The court discussed that it would be rare that such an attempt to dismiss a case would occur again.[175] Thus, this case demonstrates that for a court to dismiss a fraud case under the common law, all of the circumstantial evidence of the plaintiff must have been admitted, even that which was not probable.[176]

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166. *See supra* Part II.A–B.

167. Gibson v. Hunter, (1793) 126 Eng. Rep. 499 (H.L.).

168. *See* Thomas, *supra* note 134, at 710–12 (discussing *Gibson*, 126 Eng. Rep. at 499–506).

169. *See Gibson*, 126 Eng. Rep. at 499.

170. *See id.*

171. *See id.* at 509–10.

172. *See id.* at 499–506.

173. *See id.* at 509–10.

174. *See id.* at 510.

175. *See id.*

176. *See id.*; Thomas, *supra* note 134, at 712. The procedure of the demurrer to the evidence that the defendant attempted to employ is discussed above. *See supra* Part II.B.2.

One could argue that if there were special requirements—as under the PSLRA—to litigate fraud cases under the English common law, then the requirements imposed by Congress and the courts might be constitutionally permissible. I have found no indication that eighteenth-century English courts required a plaintiff to plead fraud or scienter with particularity, or required a special level of proof of scienter (e.g., a strong inference). To the contrary, as

Where the Court first strays from the requirements of the Seventh Amendment in *Twombly* and *Tellabs* is where it permits courts to consider only *plausible* inferences from the facts that favor the plaintiff. This determination necessarily permits a court to assess the plausibility of the inferences that arise from the facts alleged by the plaintiff. This was not permitted under the common law.[177] Next, the Court also strays from the Seventh Amendment's command when it has told the courts to also review plausible inferences that favor the defendant and weigh those against plausible inferences that favor the plaintiff. These were all decisions that were reserved for the jury at common law.[178]

D. THE PROPER CONSTITUTIONAL STANDARD TO DISMISS A CLAIM UPON A MOTION TO DISMISS

As stated above, the new standards adopted by the Court are unconstitutional under the Seventh Amendment.[179] This Section proposes a standard that the Court could adopt that comports with the Seventh Amendment. It proposes that in re-

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indicated by the *Gibson* case, it was very difficult for a case to be dismissed prior to a jury trial, including a case alleging fraud. The notes of the Advisory Committee on the Federal Rules of Civil Procedure cite the English rules. FED. R. CIV. P. 9(b) advisory committee's note ("See English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, R. 22."). Under this English practice, it was "sufficient to allege the [claim] as a fact without setting out the circumstances from which the same is to be inferred." RULES OF THE SUPREME COURT, 1883 O. 19, R. 22, *reprinted in* THE ANNUAL PRACTICE 1937, at 1, 369 (W. Valentine Ball et al. eds., 57th ed. 1937); *see also* Christopher M. Fairman, *An Invitation to the Rulemakers—Strike Rule 9(b)*, 38 U.C. DAVIS L. REV. 281, 283–87 (2004) (discussing nineteenth century treatises and stating that "[w]hen these treatises consider fraud pleading in the legal context, as opposed to the equitable context, there is no mention of the particularity requirement").

In England, "the essence of a cause of action for fraud was . . . that a seller had knowingly made a false affirmation at the time of sale." WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 195 n.68 (1975) (citing a nineteenth century treatise).

177. *See supra* Part II.A–B.

178. *See supra* Part II.A–B. Apart from the argument that a jury would decide these types of claims is the argument that a complexity exception to the Seventh Amendment exists. *See, e.g.*, OLDHAM, TRIAL BY JURY, *supra* note 34, at 17–24; Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1013666 (citing scholarship on the complexity exception issue and also arguing that a national jury for national cases is constitutional under the Seventh Amendment).

179. *See supra* Part II.B.

viewing a complaint upon a motion to dismiss, a court should accept as true all of the facts that the plaintiff has pled and should draw all inferences, whether probable or not, in favor of the plaintiff. If those facts and resulting inferences do not give rise to a cause of action, then the court should dismiss the complaint. If those facts and resulting inferences, on the other hand, give rise to a cause of action, then the complaint should not be dismissed.[180]

This proposal takes into account the Seventh Amendment's requirement that the court should not assess the facts alleged by the plaintiff. The court should not decide which inferences from the facts are plausible, and should not weigh inferences that favor the plaintiffs against the inferences that favor the defendant. In *Gibson*, the House of Lords had stated that where a "matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved by presumptions or probabilities," the demurring party cannot receive judgment "unless he will confess the matter of fact to be true."[181] In other words, a court cannot dismiss a complaint unless the defendant admits all facts and conclusions, even those that are improbable. An English common law court compared this procedure of the demurrer to the evidence to the special verdict; the facts were stated and the court applied the law to those facts.[182]

One might respond that the standard proposed here eliminates the PSLRA requirements and heightened pleading requirements in any case. Indeed, it might. To the extent that Congress has sought to have courts decide what facts and inferences are plausible at the motion to dismiss stage when a jury trial right exists, this is constitutionally impermissible. On the other hand, one could look at the PSLRA and other heightened pleading as consistent with the motion to dismiss under 12(b)(6). For example, through such heightened pleading in the PSLRA, Congress established only that specific facts that show scienter must be pled to set forth a claim.[183] As long as the

180. Seeing virtue in only the substance of the common law and not the form of the common law, I do not propose that to be constitutional a case should be dismissed in favor of the nonmoving party when the moving party loses the motion to dismiss.

181. Gibson v. Hunter, (1793) 126 Eng. Rep. 499, 510 (H.L.).

182. *See* Thomas, *supra* note 134, at 712–15 (discussing Cocksedge v. Fanshaw, (1779) 99 Eng. Rep. 80, 88 (K.B.)).

183. *See* 15 U.S.C. § 78u-4(b)(2) (requiring a "strong inference" of scienter); *see also supra* note 71 and accompanying text.

courts do not engage in an assessment of the plausibility of the plaintiff's facts and inferences, both the "strong inference" and "particularity" requirements may be constitutionally sound. However, as previously stated, there is no known eighteenth-century common law requirement to plead fraud or scienter with particularity.[184] As a result, any attempt to add special requirements to dismiss cases that would otherwise not be dismissed under the common law is constitutionally suspect.[185]

III. RESPONSES TO WHY THE MOTION TO DISMISS IS NOW UNCONSTITUTIONAL

There are a number of anticipated responses to this argument that the motion to dismiss is now unconstitutional. This Section briefly addresses these responses.

Some may argue that the English common law pleading system, by which cases would be eliminated because of problems with the pleading (for example, that the improper writ had been filed) is sufficiently similar to the results under the modern motion to dismiss, such that the motion to dismiss is constitutional. There are several problems with this argument. First, there is no evidence that the pleading system was established for purposes of efficiency. The evidence is quite the opposite. The pleading system was leftover from a time period in which form was valued over substance for no reasons other than those particular forms had been required for many years.[186] Indeed, it was believed that the system stood in the way of the service of justice with cases being eliminated that should not have been eliminated.[187] This inequity led to the

184. *See supra* note 176.

185. *See supra* Parts I.A, II.C (discussing the constitutional test for adding requirements to the Seventh Amendment right). Rule 9(b) also could be constitutionally problematic under this analysis. Furthermore, this analysis would dictate that, under the Seventh Amendment, Congress cannot properly add pleading requirements to its statutes for cases in which a legal right and remedy are available.

186. Professor Baker states that the "difference of form [of writs] seems to represent no more than an accident of history." BAKER, *supra* note 147, at 63; *see also Progress of Law Reform*, WESTMINSTER REV., July–Oct. 1833, at 42, 66 (describing lawyers as "mere technical hacks").

187. Professor Baker states that "[t]he expression 'special pleading' eventually passed into the layman's vocabulary as a synonym for the deployment of technicalities to perplex an adversary." BAKER, *supra* note 147, at 89. Professor Sunderland referred to the "technical refinements which obstructed justice." Edson R. Sunderland, *The English Struggle for Procedural Reform*, 39 HARV. L. REV. 725, 728 (1926).

elimination of this pleading system.[188] Second, the old pleading system concerned the form of an action that wholly contrasts with the new motion to dismiss standard, which involves a substantive plausibility analysis.[189] Third, both plaintiffs and defendants made errors that caused the elimination of their cases.[190] Thus, an attempt to equate this system with the motion to dismiss fails to appreciate that the system eliminated not just plaintiffs' claims but also defendants' defenses. Finally, any attempt to replace the old pleading system with the motion to dismiss does not take into account the requirement that modern procedures must comport with the substance of the common law. The common law limited the control of courts over the power of the jury to hear cases. Under the old pleading system, if certain technical requirements were not met over which the court exercised little interpretive judgment, the court could eliminate the case.[191] In contrast, under the new motion to dismiss standard, the court makes a substantive interpretive judgment as to how much evidence is sufficient evidence, a judgment far from the writ system. Accordingly, the motion to dismiss does not satisfy the substance of the common law represented by the old pleading system.

A second response to the argument that the motion to dismiss is now unconstitutional might emphasize that Congress created many of the causes of action under which the jury trial exists, and therefore Congress should be able to determine when these causes of action are dismissed or, in other words, when a jury does not hear the case. This argument ignores the

188. "The striking characteristic of the British revolt against the apotheosis of legal formalism was its popular origin and support." Sunderland, *supra* note 187, at 729; *see also Law Abuses—Pleading, Practice—*, WESTMINSTER REV., May–July 1826, at 39, 39–40 (describing lawyers on both sides as simply seeking fees).

189. The defendant could enter a plea referred to as a dilatory plea, under which the defendant stated the writ was defective. 3 BLACKSTONE, *supra* note 95, at *301–02. However, the defendant was required to tell the plaintiff how to correct the defect. *Id.* at *302. Blackstone wrote that "[s]ometimes demurrers are merely for want of sufficient form in the writ or declaration" and there, the demurring party must "set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist." *Id.* at *315; *see also Law Abuses—Pleading, Practice—*, *supra* note 188, at 46–48 (stating that demurrers were mostly for want of form).

190. For an illustration, see GEORGE HAYES, CROGATE'S CASE: A DIALOGUE IN YE SHADES ON SPECIAL PLEADING REFORM (1853), *reprinted in* 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW app. 1, at 417 (Methuen 1926) (1903).

191. *See* 3 BLACKSTONE, *supra* note 95, at *270–313.

Supreme Court jurisprudence that has held that the constitutional jury trial right attaches if a legal right and remedy are involved because a jury trial existed when such circumstances existed under the English common law in 1791.[192] The jury trial right was not associated with particular common law causes of action but rather a jury trial right attached when a legal right and remedy were involved, regardless of whether Congress created the cause of action.[193]

A third response to the argument that the motion to dismiss is now unconstitutional might contend that a case should

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192. *See supra* notes 36–49 and accompanying text. In the Introduction to the reprint of *3 Blackstone's Commentaries*, John Langbein, citing the Seventh Amendment, remarked that "in the United States, where the Bill of Rights has constitutionalized the English law/equity division of the late eighteenth century, Blackstone's taxonomy of departed courts and procedures still has an eerie relevance." John H. Langbein, *Introduction to Book III* of 3 BLACKSTONE, *supra* note 95, at iv. Langbein also wrote that "[i]n Blackstone's day trial by jury was still the typical means of resolving disputed issues of fact in civil litigation." *Id.* at vii. "[H]e cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." 3 BLACKSTONE, *supra* note 95, at *379.

193. *See supra* note 36–49; *see also* Tull v. United States, 481 U.S. 412, 417–25 (1987) (reviewing the English common law regarding the legal right and remedy involved in the case based on a congressional statute and holding a right to a jury trial attached as to liability). *But see* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (citing *Tull* regarding the requirement of a jury finding of liability and questioning the finding in *Tull* that the jury need not determine the civil penalty); OLDHAM, TRIAL BY JURY, *supra* note 34, at 66–73 (describing the inconsistency of *Tull* with other Supreme Court cases and the English common law).

There are other examples in which a greater power of a constitutional actor was determined to be constitutional while a lesser power was unconstitutional. *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) ("'[G]reater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance.'" (quoting Renne v. Geary, 501 U.S. 312, 249 (1991))).

There is also the possible argument that "common law" in the first clause of the Seventh Amendment does not include statutory actions despite the Supreme Court case law. Colleen Murphy proposed that to make the jurisprudence consistent and workable, the Supreme Court should change its jurisprudence to require a jury trial in statutory rights cases only where a "statutory action merely codifies a constitutional or state law right . . . . known at common law . . . ." *See* Colleen P. Murphy, Note, *Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions*, 95 YALE L.J. 1459, 1473 (1986) (footnote omitted). *But see* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1112–13 (1999) ("[I]f the framers saw the right to a jury trial as an independent check on Congress's powers, as I have suggested, they could hardly have approved of Congress's creating new rights and depriving citizens of the right to jury trial as to those rights.").

be dismissed without discovery when such a case appears to have little evidence to support the asserted claims. While this may be a tempting argument, particularly to corporations that may spend significant sums of money on discovery, efficiency and cost considerations cannot eliminate the Seventh Amendment right to a jury trial. There is no such constitutional basis to consider efficiency and cost in this context. Indeed, this is a sensible interpretation of this constitutional right. The Amendment gives power to the jury that cannot be eliminated by Congress or the courts for reasons that include efficiency and cost. Moreover, if facts are pled for which there is no legal claim, the claim will be dismissed. A sufficiency determination, however, is not a decision that a judge can make except upon a motion for a new trial after a jury has tried a case.

A final response to the argument that the motion to dismiss is now unconstitutional might contend that the Supreme Court established the incorrect standard for the interpretation of the Seventh Amendment, and thus, the English common law in 1791 should not govern the constitutionality analysis. Presently, though the Court uses the English common law to inform its analysis of many constitutional provisions, in addition to the Seventh Amendment.[194] To eliminate the English common law from the governance of the Seventh Amendment, the only provision of the Constitution to specifically include the language "common law," would be to eliminate the English common law from the governance of other constitutional provisions as well. However, the Court most recently affirmed its reliance on the English common law in its continuing jurisprudence on the Sixth Amendment which, like the other constitutional provisions except the Seventh Amendment, does not include the words "common law."[195]

Importantly, the requirement that the common law in 1791 governs the constitutionality analysis continues to limit the

194. *See, e.g.*, Hudson v. Michigan, 126 S. Ct. 2159, 2162 (2006) (Fourth Amendment); Deck v. Missouri, 544 U.S. 622, 626–28 (2005) (due process); Roper v. Simmons, 543 U.S. 551, 626 (2005) (O'Connor, J., dissenting) ("It is of course true that we share a common history with the United Kingdom, and that we often consult English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought."); U.S. v. Booker, 543 U.S. 220, 238–39 (2005) (Sixth Amendment); Rasul v. Bush, 542 U.S. 466, 473–74, 481–82 & nn.12–14 (2004) (habeas corpus).

195. *See* Thomas, *supra* note 27, at 180 n.169 (citing Sixth Amendment cases).

control of judges over the power of the jury. To eliminate this requirement and to permit instead an evolving common law to govern the constitutionality analysis would permit courts to restrict the power of the jury according to the will of the courts. This would eliminate the reason for the Seventh Amendment, the division of power between the courts and the jury, and the restriction of the courts' power over the power of the jury.[196] One might respond that Congress instead of the courts could determine the power of the jury. There is no indication, however, that Congress was to be involved in the determination of the power of the jury. The indication is the opposite. The Seventh Amendment gives certain power to the jury and the court is the only constitutional actor that can restrict this power, and then only according to the common law.[197]

CONCLUSION

The Supreme Court's decisions regarding the motion to dismiss have significant consequences beyond the antitrust and securities litigation claims in *Twombly* and *Tellabs*.[198] First,

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196. *See* Thomas, *supra* note 108, at 804–10. Blackstone wrote of the importance of the jury:

> [I]f [the impartial administration of justice] be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity: it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*.

3 BLACKSTONE, *supra* note 95, at *379. He wrote that

> the principles and axioms of law . . . not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees . . . in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen; chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice. . . . Every new tribunal, erected for the decision of facts, without the intervention of a jury . . . is a step towards establishing aristocracy, the most oppressive of absolute governments.

Id. at *379–80.

197. *See generally* Thomas, *supra* note 108.

198. *See, e.g.*, Spencer, *supra* note 3, at 457–60 (discussing implications beyond antitrust cases).

the difficult standards to survive a motion to dismiss, which require plausibility and the assessment of inferences that favor the plaintiff and even sometimes the defendant, will cause courts to dismiss claims in other types of cases. Second, Congress and the rulemakers may decide to adopt stringent pleading standards for other types of claims.[199] An example of types of cases in which this might occur is employment discrimination,[200] an area that occupies large portions of the federal docket.[201] Already there is evidence that suggests that employment discrimination cases are dismissed upon summary judgment more than most other types of cases before trial.[202]

While this may be desirable to some, there are constitutionally violative steps in the standards adopted by the Court. First, under the common law, courts would not decide what inferences were plausible. The facts and corresponding inferences alleged by the plaintiff were taken as true. Second, under the

199. However, under *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167–68 (1993), courts could not impose their own such heightened standards of pleading. *See also* Hill v. McDonough, 126 S. Ct. 2096, 2103 (2006) ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, case-by-case determinations of the federal courts."); Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002) (stating that no heightened pleading is required for employment discrimination claims); Miller, *supra* note 28, at 1003–16 (discussing trends in civil procedure imposing additional requirements for a case to reach trial). Special pleading has been argued to already apply in other types of cases. *See, e.g.*, Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551 (2002); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003) (discussing that particularized fact pleading is required in many areas of the law).

200. *See, e.g.*, EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 784 (7th Cir. 2007) (Flaum, J., concurring) (arguing that under *Twombly* a plaintiff in an employment discrimination case must "plead enough facts to demonstrate a plausible claim"); *cf.* Iqbal v. Hasty, 490 F.3d 143, 155 (2d Cir. 2007).

201. Noyer v. Viacom, Inc., 22 F. Supp. 2d 301, 302 (S.D.N.Y. 1998) ("Employment discrimination cases now compose a material portion of the federal docket."); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) ("Employment discrimination cases constitute an increasing fraction of the federal civil docket, now reigning as the largest single category of cases at nearly 10 percent.").

202. *See, e.g.*, Thomas, *supra* note 27, at 141 n.5; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation* (Brooklyn Law School Legal Studies, Research Paper No. 71, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=968834; *cf.* Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 554 (2003) ("The critical point here is that the data show defendants succeeding more than plaintiffs on appeal, and much more so in employment discrimination cases.").

common law, courts would not weigh plausible inferences that favored the plaintiff against those that favored the defendant. Again, the facts and corresponding inferences alleged by the plaintiff were taken as true. Finally, courts would not determine whether the plaintiff's inferences were as plausible as the defendant's inferences. Only the facts and corresponding inferences alleged by the plaintiff would be reviewed and then only accepted as true. Under the common law, the only time when a court determined the sufficiency of the evidence was upon a motion for a new trial following a jury verdict, and then, only a new trial would be ordered. With that said, a complaint may be dismissed without a violation of the Seventh Amendment, but the court must accept as true the facts and corresponding inferences pled by the complainant, however probable or not.

The motion to dismiss is fast becoming the new summary judgment motion and with this movement, the civil jury trial continues to disappear.[203] The Supreme Court's decision in *Twombly* and *Tellabs* should open up a new constitutional discussion of the proper role of the courts and Congress in relationship to the power of the jury.

203. *Cf.* Thomas, *supra* note 27, at 141 n.4 (discussing the disappearing jury trial).