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Federal Pleading Standards in State Court

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FEDERAL PLEADING STANDARDS IN STATE COURT

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Most state courts cannot follow both their state constitutions and federal pleading standards. Even if they could, policy considerations unique to states compel state courts to reject federal pleading standards. This is because federal courts have changed pleading standards to allow judges to make factual determinations on a motion to dismiss and to require more factual detail in complaints. While scholars have vigorously debated whether these changes are wise, just, and permissible under the federal rules and the Constitution, they have ignored the even more important questions of whether state courts can and should adopt those pleading standards. The oversight is particularly worrisome because so many state courts are currently struggling with those questions while hearing fifty times as many cases a year as federal courts do. Indeed, questions about pleading standards that deserve the most scholarly attention have received the least. This Article answers these questions with a definitive "no."

First, federal pleading standards violate the "inviolate" right to a jury trial contained in most state constitutions. This Article describes states as generally falling into one of four categories as it relates to the scope of their jury trial rights: (1) those following English common law practice from when the United States became an independent nation, (2) those whose constitutions enshrine distinctively American attitudes toward juries prevalent during the eighteenth century, (3) those who codified the right to a jury trial at the same time they wrote the first civil procedure codes in the nineteenth century, and (4) hybrids. It demonstrates that in all four cases, federal pleading standards are unconstitutional because they allow judges to decide factual questions that must be left to a jury. In some cases, the requirement to provide heightened factual detail is a constitutionally impermissible procedural barrier between a litigant and a jury.

Furthermore, this Article makes the original claim that states should reject federal pleading standards for different reasons than those typically invoked by critics of changes in federal pleading standards. Instead of treating state courts

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as satellites revolving around federal courts, this Article puts state courts at the center of the debate. It explains that states must consider different policy concerns than federal courts do when formulating pleading standards. First, states generally guarantee litigants the right to a remedy and that their courts will be open to all who wish to remediate an injury. Second, states claim to make it easier than it is in federal courts for litigants to get a jury trial and are supposed to and do hear the vast majority of cases in this country. Third, states elect judges, which necessitates juries serving as a check on politicized decisionmaking. Fourth, states should not consider pleading standards in a vacuum. They should consider their own pleading standards in light of how federal pleading standards threaten to close the courthouse door on many vulnerable litigants. If state courts use the same pleading standards as federal courts now do, those litigants will have nowhere to go and will be shut out of court entirely. These policy concerns do not just justify states using different pleading standards than federal courts do; they require states to do so.

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INTRODUCTION

Every civil case begins with a complaint. That complaint is the most important document in the case. If the judge dismisses the complaint, the plaintiff loses the case without discovery and without the chance to tell their story to a jury. If the judge sustains the complaint, the parties will begin an expensive and time-consuming litigation process. The decision on a motion to dismiss has enormous stakes, making the vigorous debate over pleading standards unsurprising.

The debate has raged for decades, as courts wrestle with how literally to apply Rule 8, which requires only "a short and plain statement of the claim showing that the pleader is entitled to relief."[1] The Supreme Court's 1957 decision in *Conley v. Gibson* expansively interpreted Rule 8 to prohibit a complaint's dismissal "unless it appears beyond doubt that the plaintiff can prove

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

no set of facts in support of his claim which would entitle him to relief."[2] *Conley* notwithstanding, lower courts began to narrowly construe Rule 8. In an antitrust case, the Seventh Circuit even claimed that *Conley* "ha[d] never been interpreted literally."[3] Instead, the court found that, at least in antitrust cases, plaintiffs needed to plead facts and avoid legal conclusions.[4]

The debate intensified when Congress passed the Private Securities Litigation Reform Act (PSLRA), which requires plaintiffs to plead detailed facts showing that a defendant knew or should have known its representations about securities were false and prevented plaintiffs from taking any discovery while a motion to dismiss was pending.[5] The Supreme Court later waded into the debate with its decisions in *Bell Atlantic Corp. v. Twombly*[6] and *Ashcroft v. Iqbal*.[7] In those cases, the Supreme Court explicitly adopted a new plausibility standard. Plaintiffs would have to allege enough facts to nudge their claims across the line from "conceivable" to "plausible."[8] Now, federal pleading standards require more factual detail than they used to and allow judges to make factual determinations they were previously admonished to avoid. Scholars have argued over whether today's federal pleading standards fairly construe Rule 8, whether they are justifiable, and even whether they violate the Seventh Amendment.

At the same time, scholars have largely ignored a lively parallel discussion among state courts about whether to adopt federal pleading standards. And they have completely ignored the two most important questions state courts must ask when deciding what to do. First, can they, consistent with their state constitutions, adopt federal pleading standards? And second, should state courts adopt federal pleading standards as a matter of policy? These questions are arguably more important than the debate over federal pleading standards. State courts hear about fifty times as many cases a year as federal courts do.[9] What state courts do with regard to pleading standards will affect the vast majority of litigants in a way that federal pleading standards do not. It is therefore incumbent on scholars to offer state courts guidance about whether states can and should adopt federal pleading standards.

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2. 355 U.S. 41, 45–46 (1957).

3. Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984).

4. *Id.*

5. 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).

6. 550 U.S. 544, 562 (2007).

7. 556 U.S. 662, 678–79 (2009).

8. *Iqbal*, 556 U.S. at 680.

9. CT. STAT. PROJECT, STATE COURT CASELOAD DIGEST: 2017 DATA 2 (2019), https://www.courtstatistics.org/__data/assets/pdf_file/0021/29820/2017-Digest-print-view.pdf [perma.cc/S9HZ-XFHH]; ADMIN. OFF. OF THE U.S. CTS., FEDERAL JUDICIAL CASELOAD STATISTICS 2017, TABLE C: CIVIL CASES FILED, TERMINATED, AND PENDING (2017) [hereinafter FEDERAL CASELOAD STATISTICS], https://www.uscourts.gov/file/22629/download [perma.cc/8LBJ-8ARS].

This Article takes the task on. In doing so, it advances two claims. First, modern federal pleading standards will often violate state constitutional jury trial guarantees unless they survive heightened scrutiny.[10] Second, state courts should not adopt federal pleading standards because of policy concerns uniquely applicable to states.

The Article proceeds in four parts. Part I traces the change in federal pleading standards from the old lenient standard to the rigorous modern one. It then describes the heated scholarly reaction the new federal pleading standards have provoked, including a thoughtful argument over whether they infringe on the Seventh Amendment. Part II explains how state courts have reacted to the change in federal pleading standards. As it turns out, they have had a robust debate over whether to adopt those standards that has received little scholarly attention.[11] Part II further explains how the roiling state court debate has failed to consider an important question: can state courts follow federal pleading standards and remain true to their state constitutions? This omission is even more disappointing because, since the Supreme Court refused to consider whether the Constitution authorized it to change pleading standards, the only way to have a conversation about how the Constitution interacts with pleading standards is for state courts to lead it.

Part III takes up the constitutional question. To do so is not without challenge. States wrote constitutions at different times, and those who drafted them evinced a variety of attitudes about juries, with them accepting to greater and lesser degrees background assumptions from traditional English common law. To bring coherence to the constitutional discussion, this Article puts states into one of four different categories when it comes to their jury trial guarantees. The first is states that adopted the English common law view of juries in place when America became independent. The second is states that historically gave juries broader powers than they enjoyed under English common law and that consider or should consider that history to understand how the right to a jury trial applies today. The third is states that drafted constitutions in the nineteenth century, around the same time that they adopted versions of the Field Code that abandoned common law pleading rules and

10. Colorado, Louisiana, and Wyoming unquestionably have constitutional authority to adopt federal pleading standards because there is no right to a civil jury trial in their constitutions. COLO. CONST. art. 2, § 23 ("The right of trial by jury shall remain inviolate in criminal cases; but a jury in civil cases in all courts, or in criminal cases in courts not of record, may consist of less than twelve persons, as may be prescribed by law."); LA. CONST. art. 1, § 17 ("A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict."); WY. CONST. art. 1, § 9 ("The right of trial by jury shall remain inviolate in criminal cases. A jury in civil cases and in criminal cases where the charge is a misdemeanor may consist of less than twelve (12) persons but not less than six (6), as may be prescribed by law.").

11. As an exception to this trend, see Zachary D. Clopton, *Procedural Retrenchment and the States*, 106 CALIF. L. REV. 411 (2018).

instituted code pleading. The fourth is hybrids that adopted multiple constitutions over the years and do not consider any one historical period as dispositive when construing their jury trial guarantees.

Despite all these specific differences, the states generally have one thing in common.[12] Modern federal pleading standards are incompatible with state constitutions' right to a jury trial unless federal pleading standards survive heightened scrutiny necessary to overcome individual rights. This is for two reasons. First, federal pleading standards now allow judges to decide factual questions that belong to juries as a constitutional matter. Second, since only procedural impediments to a jury trial similar to those in place when states ratified their constitutions are permissible, the new federal requirement for rigorous factual detail is unconstitutional in states that did not impose such a requirement at the time of ratification. I should add a caveat here. I do not argue that all pretrial dispositions raise the grave constitutional question that modern federal pleading standards do because not all pretrial dispositions infringe on the jury's role in the same way. Indeed, since the case against federal pleading standards largely hinges on the historical inquiry state courts have undertaken to interpret their jury trial guarantees, it is relevant that there is historical precedent for at least some pretrial dispositions.

Part IV steps back from constitutional concerns to take up the important question of what states should do policy-wise. Its contribution to this debate is to consider what state courts should do in light of their unique mission in America's governmental structure. Specifically, Part IV argues that state courts should not adopt federal pleading standards because (1) states not only claim to make it easier for litigants to access jury trials than the federal government does, they even guarantee a right to a remedy and a right to open courts that federal pleading standards could undermine, (2) juries are necessary to check judges in a way that they may not be at the federal level because state court judges are elected instead of appointed and might favor campaign contributors or disfavor politically unpopular litigants, which counsels in favor of a pleading standard that lets juries hear more instead of fewer cases, and (3) state courts should adopt a more lenient pleading standard that opens the state courthouse door to compensate for federal courts using more stringent standards to shut the federal courthouse door on many Americans.

At least three groups of people should care deeply about this scholarly endeavor. The first is access to justice advocates. Many have worried that today's federal pleading standards will prevent plaintiffs—especially vulnerable ones—from redressing their injuries because their complaints can no longer survive a motion to dismiss.[13] Whether state courts can constitutionally apply

12. *Cf. supra* note 10.

13. *See, e.g.*, Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 49, 71 (2010) ("The Court's establishment of plausibility pleading, with its emphasis on the need for factual allegations, has a direct impact on the accessibility of the federal courts to the citizenry in all categories of cases. To a degree not yet determined, it will chill a potential plaintiff's or lawyer's willingness to institute an action. And even if one is started, it will result in some possibly meritorious cases being terminated under

those pleading standards and whether they should matter enormously to plaintiffs. Since federal courts do not appear likely to retreat from heightened pleading standards any time soon, the battle for pleading standards that facilitate access to justice must move to the states. The second is those who care about federalism. In recent decades, state courts have often lived in the shadow of federal courts, and federal courts have been seen as the most important guarantor of rights. That need not be so. This Article welcomes states into the dialogue over pleading standards on equal footing with federal courts by asking them to consider the unique text and history of their jury trial provisions.[14] Finally, this topic should appeal to originalists at the state level by inviting them to engage with the history of their states' jury trial guarantees and to consider whether they are consistent with modern federal pleading standards.

I. THE DEVELOPMENT OF CURRENT FEDERAL PLEADING STANDARDS

In this Part, I provide background on the traditional approach to pleading standards at the federal level and how those pleading standards have changed, as well as discuss the scholarly reaction to the current federal pleading standards.

A. *Traditional Federal Pleading Standards*

The Federal Rules of Civil Procedure innovated by decreasing the level of detail required of complaints. While code pleading regimes of the era required plaintiffs to provide considerable factual support for their complaints,[15] Rule 8 only required, "a short and plain statement of the claim showing that the pleader is entitled to relief."[16] Where decisions about complaints' sufficiency in code pleading jurisdictions often turned on arcane and perhaps illusory distinctions between material, evidentiary, and ultimate facts,[17] Rule 8 "created a system that relied on plain language and minimized procedural traps, with trial by jury as the gold standard for determining a case's merits."[18]

For many years, *Conley v. Gibson* provided the standard courts used to apply Rule 8.[19] *Conley* involved a discrimination suit where Black railroad workers alleged that their collective bargaining agent was not fairly representing them in violation of the Railroad Labor Act.[20] In deciding that the complaint complied with Rule 8, *Conley* applied "the accepted rule that a

Rule 12(b)(6), thereby reducing citizens' ability to employ the nation's courts in a meaningful fashion."); A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 479 (2008).

14. *See* JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 177 (2018).
15. *See* Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 261 (1926).
16. FED. R. CIV. P. 8(a)(2).
17. Clark, *supra* note 15, at 260–64.
18. Miller, *supra* note 13, at 4–5.
19. 355 U.S. 41 (1957); *see also* Miller, *supra* note 13, at 7.
20. *Conley*, 355 U.S. at 42.

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."[21] It then rejected the argument that the complaint was insufficient because the plaintiffs had not provided enough factual detail since "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."[22] Civil procedure scholars often say that pleading has historically served one of four functions: (1) giving notice of the claim's nature, (2) stating facts, (3) narrowing issues for litigation, and (4) eliminating frivolous claims.[23] *Conley*, however, explained that the complaint's primary purpose was not to narrow issues or state facts, as had been the case under code pleading, but to provide notice to the defendant.[24] *Conley* held that the federal rules relied on discovery to help narrow the issues and provide factual support for the claims.[25]

Federal courts largely understood *Conley* to impose a lenient standard on complaints. As Judge Easterbrook observed in *Doe v. Smith*,[26] "[p]laintiffs need not plead facts; they need not plead law; they plead claims for relief. Usually they need do no more than narrate a grievance simply and directly, so that the defendant knows what he has been accused of."[27] In *Doe*, the Seventh Circuit sustained a complaint where the plaintiff did not plead facts corresponding to each of the required elements to prove a federal Wiretap Act claim at trial.[28] This was because "complaints initiate the litigation but need not cover everything necessary for the plaintiff to win; factual details and legal arguments come later."[29]

B. *Raising Federal Pleading Standards*

1. Courts Question *Conley*

Pleading standards have been on an upward trajectory for decades. Well before *Twombly* and *Iqbal*, some courts balked at applying *Conley*'s lenient pleading standard.[30] In *Car Carriers, Inc. v. Ford Motor Co.*, the Seventh Circuit claimed, "*Conley* has never been interpreted literally."[31] In the context of an antitrust case, notwithstanding *Conley*'s explicit language suggesting that a

21. *Id.* at 45–46.

22. *Id.* at 47.

23. *E.g.*, 5 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & A. BENJAMIN SPENCER, FEDERAL PRACTICE AND PROCEDURE § 1202 (4th ed. 2021).

24. *Conley*, 355 U.S. at 47–48.

25. *Id.*

26. 429 F.3d 706 (7th Cir. 2005).

27. *Doe*, 429 F.3d at 708.

28. *Id.* at 707–08.

29. *Id.* at 708.

30. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562 (2007).

31. 745 F.2d 1101, 1106 (7th Cir. 1984).

complaint's primary purpose was providing notice, *Car Carriers* observed that the "costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint."[32] That is, *Car Carriers* believed that a complaint's primary purposes were to help courts eliminate frivolous cases and to establish facts.[33]

Courts had also begun requiring more of civil rights plaintiffs. One lower court acknowledged that, for some time, courts had found Civil Rights Act claims stood outside of the normal notice pleading framework.[34] The reason was that there "ha[d] been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety."[35] The primary consideration in such cases had to be "weed[ing] out the frivolous and insubstantial cases at an early stage in the litigation."[36]

2. The Private Securities Litigation Reform Act (PSLRA)

Congress raised the pleading standard for securities actions in the PSLRA in 1995.[37] Congress had become concerned that unscrupulous plaintiffs were frequently suing for securities fraud even when they had little or no evidence in order to extract settlements with the threat of expensive discovery and litigation.[38] It believed that such plaintiffs would wait for stock prices to drop, then race to the courthouse without conducting a reasonable inquiry into their cases—sometimes even copying and pasting from prior complaints—and then use the threat of exorbitant discovery costs to coerce defendants into settling.[39]

To curb this behavior, the PSLRA enacted two important reforms (as relevant here). First, it required plaintiffs to plead scienter—the idea that the defendants knew or should have known that representations made about securities were false—with particularity.[40] In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, shareholders alleged a scheme to deceive the public about the

32. *Car Carriers*, 745 F.2d at 1106.

33. *See id.*; *see also* Valley v. Maule, 297 F. Supp. 958, 960 (D. Conn. 1968) (noting such purposes in the context of Civil Rights Act litigation).

34. *Valley*, 297 F. Supp. at 960.

35. *Id.*

36. *Id.*

37. Richard M. Phillips & Gilbert C. Miller, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1015 (1996).

38. *Id.* at 1009–10.

39. *Id.* at 1009–13.

40. *Id.* at 1015.

value of Tellabs shares.[41] In interpreting the PSLRA's particularity requirement,[42] the Court held that a scienter allegation must be "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[43]

Second, although discovery had typically continued while courts decided motions to dismiss, the PSLRA imposed a stay on discovery with only limited exceptions to preserve evidence and prevent undue prejudice.[44] These reforms led some trial attorneys to observe that it was harder to survive a motion to dismiss on securities fraud claims than it was to prevail on them at trial.[45] In fact, some lower courts have dismissed such claims while acknowledging that information asymmetries prevent plaintiffs from uncovering enough facts without discovery to survive a motion to dismiss.[46]

3. *Twombly* and *Iqbal*

The Supreme Court extended the movement for heightened pleading standards to Rule 8 in 2007. In *Bell Atlantic Corp. v. Twombly*,[47] the plaintiffs contended that the defendants violated the Sherman Act because they restrained trade.[48] The complaint asserted that the defendants' parallel conduct was grounds to infer a conspiracy.[49] The Court found that the complaint failed to meet Rule 8's standard because, "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."[50] Although it might have been possible that the defendants conspired, the Court held that "without some further factual enhancement [, the allegation] stops short of the line between possibility and plausibility."[51]

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41. 551 U.S. 308, 314–15 (2007).

42. *Tellabs*, 551 U.S. at 314.

43. *Id.*

44. Phillips & Miller, *supra* note 37, at 1016.

45. Richard Casey & Jared Fields, *Piggybacking Through the Pleading Standards: Reliance on Third-Party Investigative Materials to Satisfy Particularity Requirements in Securities Class Actions*, SEC. LITIG. REP., June 2010, at 11, 13.

46. *E.g.*, Hockey v. Medhekar, No. C-96-0815, 1997 WL 203704, at *8 (N.D. Cal. Apr. 15, 1997).

47. 550 U.S. 544 (2007).

48. *Twombly*, 550 U.S. at 550.

49. *Id.* at 550–51 ("The complaint couches its ultimate allegations this way: 'In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.' ").

50. *Id.* at 552–53, 556–57, 570.

51. *Id.* at 557.

Twombly's approach conflicted with *Conley*'s admonition that courts should only dismiss complaints if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[52] But the Court argued it was the latest in a long line of courts since the 1970s that had "balked at taking the literal terms of the *Conley* passage as a pleading standard."[53] *Twombly* characterized the relevant language from *Conley* as "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[54] Justice Stevens's dissent faulted *Twombly* for not explaining how the new plausibility standard was consistent with Rule 8's requirement that a complaint provide only "a short and plain statement of the claim showing that the pleader is entitled to relief."[55]

A policy concern best explains the departure: discovery costs too much to allow so many cases to flood into federal court.[56] The concern was particularly heightened in antitrust cases.[57] The Court worried that defendants in antitrust cases would suffer under a lenient pleading standard because "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[58]

Ashcroft v. Iqbal clarified that plausibility pleading applied outside the antitrust context.[59] Government officials had arrested a Pakistani Muslim named Javaid Iqbal after the September 11 attacks.[60] Since he was of "high interest" to the investigators of the attacks, the government held him in restrictive conditions. As a result, Iqbal filed a *Bivens* action.[61] He alleged that federal officials labeled him a "high interest" target of investigation and detained him under harsh conditions because of his race, religion, and national origin.[62] As evi-

52. *Id.* at 561 (quoting Conley v. Gibson, 355 U.S. 41, 45–46 (1957)). The Court observed, "[o]n such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." *Id.*

53. *Id.* at 562.

54. *Id.* at 563.

55. *Id.* at 573 (Stevens, J., dissenting) ("Rule 8(a)(2) of the Federal Rules requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' The Rule did not come about by happenstance, and its language is not inadvertent.").

56. *Id.* at 558–59 (majority opinion).

57. *Id.* at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)).

58. *Id.* at 559.

59. 556 U.S. 662 (2009).

60. *Iqbal*, 556 U.S. at 666.

61. *Id.* at 668.

62. *Id.* at 668–69.

dence, he cited the fact that those whom officials thought to be Arab Muslims[63] were disproportionately designated high interest and kept in such harsh conditions.[64] The Court found that although the complaint's facts made Iqbal's claims "conceivable," they were insufficient to make the claims plausible because the facts did not establish that a discriminatory purpose was a better explanation for Ashcroft's and Mueller's actions than alternatives.[65] Instead, there was an obvious explanation for why Muslims disproportionately found themselves caught up in the government's investigation. Arab Muslim Al-Qaeda members attacked on September 11, so one would expect those investigated for links to the attackers to also be Arab Muslims.[66]

As in *Twombly*, the Court again emphasized discovery's burdens.[67] Though litigation might be "necessary to ensure that officials comply with the law," it "exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government."[68] There is evidence that *Twombly* and *Iqbal* have had the biggest impact on pro se and civil rights plaintiffs, arguably two groups who most need access to courts.[69]

C. *Scholarly Reaction*

Scholars agree that *Twombly* and *Iqbal* have raised pleading standards higher than they were under *Conley*.[70] Moreover, the decisions have received criticism for, among other things, requiring plaintiffs to plead facts to survive

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63. I use the term "Arab Muslim" throughout this Article to most precisely reflect *Iqbal*'s language. However, it should be noted that the Court inappropriately (and inaccurately) conflated distinct groups. Javaid Iqbal—and a substantial percentage of other 9/11 detainees—did not come from Arab countries. Shirin Sinnar, *The Lost Story of Iqbal,* 105 GEO. L.J. 379, 416–19 (2017).

64. *Iqbal*, 556 U.S. at 669.

65. *Id.* at 680–81 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.").

66. *Id.* at 682.

67. *Id.* at 685 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.' " (quoting *Siegert v. Gilley,* 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment))).

68. *Id.*

69. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 AM. U. L. REV. 553, 615, 624 (2010).

70. Ramzi Kassem, *Implausible Realities:* Iqbal*'s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN ST. L. REV. 1443, 1444, 1446 (2010); Benjamin P. Cooper, Iqbal*'s Retro Revolution*, 46 WAKE FOREST L. REV. 937, 937–38 (2011); Spencer, *supra* note 13, at 431–32 ("Notice pleading is dead. Say hello to plausibility pleading. In a startling move by the U.S. Supreme Court, the seventy-year-old liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2) has been decidedly tightened (if not discarded) in favor of a stricter standard requiring the pleading of facts painting a 'plausible' picture of liability." (footnote omitted)).

a motion to dismiss that they need discovery to uncover, especially in antitrust, discrimination, and conspiracy claims,[71] departing from the text of Rule 8,[72] conflating the motion to dismiss with the motion for summary judgment,[73] and permitting judges to take on the jury's factfinding role.[74] Of course, other scholars defended the decisions.[75]

Suja Thomas has concluded that the concern about judges invading the jury's factfinding role makes the plausibility pleading standard unconstitutional.[76] Thomas first faulted the Supreme Court for failing to consider whether its new plausibility standard was consistent with the Seventh Amendment's jury trial guarantee in *Tellabs* and *Twombly*.[77] Recognizing that the Supreme Court has held the Seventh Amendment protects the right to a jury trial to the same extent English common law did in 1791,[78] Thomas argued that no common law mechanisms from the era resembling the modern Rule 12(b)(6) motion allowed judges to decide factual disputes without juries.[79] Since the plausibility standard allowed judges to dismiss cases where they felt the facts would not allow a litigant to prevail at trial, and since there was no analogous procedure for judges to do so at common law, the new plausibility standard was unconstitutional.[80] Thomas's article received much scholarly attention,[81] but federal courts have yet to take up this important issue.

II. THE REACTION OF STATE COURTS

State courts have often lockstepped behind federal pleading standards, starting with adopting versions of Rule 8 in their civil procedure codes. At one time or another, Alabama, Alaska, Arizona, Colorado, the District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington State, West Virginia, and Wyoming adopted

71. Miller, *supra* note 13, at 42.

72. *Id.* at 52.

73. *Id.*

74. *Id.* at 30.

75. *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 (2007).

76. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008).

77. *Id.* at 1854–55.

78. *Id.* at 1857 & n.34 (collecting cases).

79. *Id.* at 1881.

80. *Id.* at 1882.

81. *E.g.*, Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1235 (2008).

Rule 8 wholesale.[82] Courts in these states have held that their versions of Rule 8 imposed a different pleading standard than had prevailed previously.[83]

In many cases, states have followed along as federal courts raised pleading standards. Some have adopted versions of the PSLRA.[84] Others have cited federal case law applying the PSLRA in assessing securities fraud complaints.[85]

After *Twombly* and *Iqbal*, states debated whether to adopt the new pleading standard. Some have not taken a position, and others have explicitly adopted the new standard. Alabama, Colorado, Connecticut, the District of Columbia, Kentucky, Massachusetts, Nebraska, Ohio, Pennsylvania, South Dakota, Texas, and Wisconsin have applied *Iqbal* or *Twombly* when interpreting their own civil procedure codes.[86]

Courts in Delaware, Iowa, Kansas, Minnesota, Montana, New Mexico, New York, North Carolina, Oklahoma, Tennessee, Washington State, and West Virginia have disapproved of *Twombly* and/or *Iqbal*.[87] They have typically done so within the parameters of the debates scholars have held over

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82. *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1377 (1986).

83. *See, e.g.*, 21 STEPHEN E. ARTHUR, INDIANA PRACTICE SERIES: CIVIL TRIAL PRACTICE § 13.1, at 619 (2d ed. 2007) ("Notice pleading in Indiana has been adopted, in part, to avoid the battle of the forms which plagued pre-1971 pleading practice and to prevent parties from having to litigate matters because of mistakes made in the drafting of pleadings.").

84. *E.g.*, Richard M. Weinroth, Pamela H. Gulsvig & Michael L. Kaplan, *Reformation of the Arizona Securities Act – A Brief Summary*, ARIZ. ATT'Y, Aug.–Sept. 1996, at 25, 27 (discussing Arizona's adoption of the PSLRA).

85. *E.g.*, Reinglass v. Morgan Stanley Dean Witter, Inc., No. 86407, 2006 WL 802751, at *3 n.1 (Ohio Ct. App. Mar. 30, 2006) ("[A] plaintiff must allege, in connection with the purchase or sale of securities, the misstatement or omission of a material fact, made with scienter, upon which the plaintiff justifiably relied and which proximately caused the plaintiff's injury." (quoting Hoffman v. Comshare, Inc. (*In re* Comshare Inc. Sec. Litig.), 183 F.3d 542, 548 (6th Cir. 1999))).

86. *E.g.*, Am. Suzuki Motor Corp. v. Burns, 81 So. 3d 320, 324 (Ala. 2011); Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016); Bridgeport Harbour Place I, LLC v. Ganim, 32 A.3d 296, 301–02 (Conn. 2011); Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531, 543–45 (D.C. 2011); Williams v. City of Glasgow, No. 2017-CA-001246-MR, 2018 WL 3794739, at *3 & n.6 (Ky. Ct. App. Aug. 10, 2018); Edwards v. Commonwealth, 76 N.E.3d 248, 254 (Mass. 2017); Doe v. Bd. of Regents of the Univ. of Neb., 788 N.W.2d 264, 274, 278 (Neb. 2010); Snowville Subdivision Joint Venture Phase I v. Homes Sav. & Loan of Youngstown, No. 96675, 2012 WL 1067748, at *2 (Ohio Ct. App. Mar. 29, 2012); Briggs v. Sw. Energy Prod. Co., 224 A.3d 334, 351 (Pa. 2020); Sisney v. Best Inc., 754 N.W.2d 804, 808–09 (S.D. 2008); GoDaddy.com, LLC v. Toups, 429 S.W.3d 752, 754 (Tex. Ct. App. 2014); Data Key Partners v. Permira Advisers LLC, 849 N.W.2d 693, 699–701 (Wis. 2014). *But see* Brown v. Carlton Harley-Davidson, Inc., No. 99761, 2013 WL 5310216, at *3 (Ohio Ct. App. Sept. 19, 2013) (applying "no set of facts" standard from *Conley v. Gibson*).

87. *E.g.*, Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC, 27 A.3d 531, 537 (Del. 2011); Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 607–08 (Iowa 2012); Smith v. State, No. 104,775, 2012 WL 1072756, at *6 (Kan. Ct. App. Mar. 23, 2012) (per curiam); Walsh v. U.S. Bank, N.A., 851 N.W.2d 598, 603 (Minn. 2014); Brilz v. Metro. Gen. Ins. Co., 285 P.3d 494, 500 (Mont. 2012); Madrid v. Vill. of Chama, 283 P.3d 871, 876 (N.M. Ct. App. 2012); Krause v. Lancer & Loader Grp., LLC, 965 N.Y.S.2d 312, 319 n.3 (N.Y. Sup. Ct. 2013); Holleman v. Aiken, 668 S.E.2d 579, 584–85 (N.C. Ct. App. 2008); Edelen v. Bd. of

whether *Twombly* and *Iqbal* properly interpreted Rule 8. The Minnesota Supreme Court, for example, rejected *Twombly* and *Iqbal* because the text of Minnesota's counterpart to Rule 8 did not mention "plausibility" or provide any support for reading in such a term.[88] The Iowa Supreme Court asserted that the need to control discovery abuse, which informed *Iqbal* and *Twombly*, did not justify adopting a different pleading standard in Iowa.[89] Scholars have argued that the U.S. Supreme Court misinterpreted Rule 8 and that it did not have to adopt the plausibility standard to prevent discovery abuses.[90] The Tennessee Supreme Court faulted *Iqbal* and *Twombly* for allowing judges to make factual determinations, which are typically the province of juries.[91] It is also the only state court I have found that suggested the plausibility standard might violate its state constitutional jury trial guarantee because, to "dismiss the case at the pleading stage if it determines, in light of its 'judicial experience and common sense,' that the claim is not plausible, raises potential concerns implicating the Tennessee constitutional mandate that 'the right of trial by jury shall remain inviolate.' "[92]

On both sides of the debate about whether to adopt federal pleading standards, state courts have made two important oversights. First, they have almost entirely neglected to consider whether their state constitutions allow federal pleading standards.[93] As I will show, the new federal pleading standards generally violate state constitutions' jury trial guarantees. Second, in conducting the debate on the same terms that the debate about heightened pleading standards has proceeded at the federal level, states have missed an opportunity to think more broadly about the role of state courts in our coun-

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Comm'rs, 266 P.3d 660, 663 (Okla. Ct. App. 2011); Webb v. Nashville Area Habitat for Human., Inc., 346 S.W.3d 422, 430 (Tenn. 2011); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 863–64 (Wash. 2010); Roth v. DeFeliceCare, Inc., 700 S.E.2d 183, 189 n.4 (W. Va. 2010).

88. *Walsh*, 851 N.W.2d at 603–04.

89. *See Hawkeye Foodservice*, 812 N.W.2d at 608.

90. *E.g.*, Miller, *supra* note 13, at 17, 36–37.

91. *Webb*, 346 S.W.3d at 432.

92. *Id.* (citation omitted) (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) and TENN. CONST. art. I, § 6).

93. Given that some states have rejected *Iqbal* and *Twombly*'s reading of Rule 8 and declined to apply that reading to corresponding state versions of Rule 8, one might wonder why we should consider the constitutional issue at all. If we think those decisions are harmful and that states should not follow them, why doesn't it suffice for state courts to interpret their versions of Rule 8 differently? There is both a normative and a practical answer. As for the normative reason, I believe pleading standards implicate important systemic issues about which kinds of litigants get access to court and who we believe should decide cases—judges or juries. Wading into the constitutional issues at play here ensures that courts consider these important systemic issues. As for the practical answer, Rule 8's meaning has proven quite malleable, the best evidence being that the Supreme Court saw fit to imply the term "plausible" even though that term is not present in the text. Rejecting federal pleading standards based on a constitutional analysis would make it more difficult for state court judges to change pleading standards down the road if they turn out to embrace the Supreme Court's policy concerns.

try and how that role should inform pleading standards. For their part, scholars who have studied state court responses to federal pleading standards have focused almost entirely on how the differing pleading standards affect litigants' behavior[94] or how individual state court systems should respond.[95] This Article steps into the breach.

III. CAN STATES CONSTITUTIONALLY FOLLOW FEDERAL PLEADING STANDARDS?

In this Part, I consider whether state courts can adopt federal pleading standards while complying with their state constitutions' jury trial guarantees. To do so, I have classified state jury trial guarantees as falling into one of four categories and have chosen one state for each category to serve as a case study to explore in depth how states falling into each respective category should think about federal pleading standards. The first category is states that consider their jury trial guarantees in light of English common law practice when America became independent. The second category is states that gave juries broader authority than they enjoyed under English common law during the Founding era. The third category is states that adopted jury trial guarantees around the time they adopted versions of the Field Code that established fact pleading. The fourth is hybrids that adopted multiple constitutions over the years and do not consider any one historical period as dispositive when construing their jury trial guarantees.

A. *The Constitutional Objection*

Federal pleading standards raise grave questions under state constitutions for three reasons. First, they invade the jury's historic factfinding role. Juries, not judges, are supposed to decide the factual disputes between parties. Yet, federal pleading standards now allow a judge to decide that a plaintiff loses a case because, in light of their "experience and common sense," there is an "obvious alternative" that is a more likely explanation for the defendant's behavior than the complaint's allegations.[96] Although courts claim that they are

94. *E.g.*, Jill Curry & Matthew Ward, *Are* Twombly *&* Iqbal *Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827 (2013).

95. *E.g.*, Devon J. Stewart, Note, *Take Me Home to* Conley v. Gibson*, Country Roads: An Analysis of the Effect of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal *on West Virginia's Pleading Doctrine*, 113 W. VA. L. REV. 167 (2010).

96. Ashcroft v. Iqbal, 556 U.S. 662, 679, 682 (2009). At first glance, one might think that leave to amend mitigates the constitutional concerns raised. The idea would be that so long as plaintiffs get a chance to amend their complaint and plead facts that satisfy a judge that the case deserves to proceed past a motion to dismiss, there is no infringement of the right to a jury trial. However, in many instances, judges dismiss cases with prejudice after a plaintiff has amended the complaint. *E.g.*, Innova Inv. Grp., LLC v. Vill. of Key Biscayne, No. 19-cv-22540, 2021 WL 1723678, at *4 (S.D. Fla. Apr. 30, 2021). This means that in the end, the judge is still deciding who wins the case based on a factual determination.

deciding questions of law when assessing Rule 12(b)(6) motions,[97] what I care about here is not what they say but what they do. *Iqbal* dismissed the complaint because it thought discrimination probably did not explain why Ashcroft and Mueller adopted the policies they did.[98] It is untenable to say that *Iqbal* resolved a legal question when it decided that the complaint was factually implausible. Juries are the party in the legal system who are supposed to draw on their experience and common sense to decide cases coming down to disputed factual issues. Second, and on a related note, there is no historical precedent for modern federal pleading standards in most states. Instead, states generally tether their jury trial guarantees to historical practice when their constitutions were adopted. That means that modern federal pleading standards are constitutionally permissible only if they are similar to procedural devices that allowed judges to decide cases without juries historically (as I will show, they are not). Third, by often requiring plaintiffs to supply detailed facts in their complaints, federal pleading standards impose a procedural barrier between litigants and a jury that did not exist when most states adopted their constitutions.[99] In the eighteenth and for much of the nineteenth century, plaintiffs did not have complaints dismissed because the judge believed they provided too little factual support. One or more of these constitutional objections have purchase in just about every state that has a jury trial guarantee.

B. *English Common Law and Jury Trial Rights*

Courts in Delaware, Georgia, Illinois, Maine, Maryland, Missouri, New Hampshire, New Jersey, Tennessee, and Vermont have used Founding-era English common law to inform how they apply their jury trial guarantees.[100] To explain why federal pleading standards are likely unconstitutional in these states, I have chosen to use Maryland as a case study because its constitution explicitly requires Maryland courts to use English common law from 1776 in interpreting its jury trial guarantee. Maryland followed English common law practice from its founding in the 1630s.[101] It also used juries extensively to

97. 5B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (3d ed. 2004).

98. *Iqbal*, 556 U.S. at 681–82.

99. One possible solution to this problem is for states to allow presuit discovery, which some state civil procedure rules allow. *E.g.*, N.C. R. CIV. P. 27(a).

100. *E.g.*, Claudio v. State, 585 A.2d 1278, 1290 (Del. 1991); Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 691 S.E.2d 218, 221 (Ga. 2010); People *ex rel.* Daley v. Joyce, 533 N.E.2d 873, 877–79 (Ill. 1988); State v. Means, 50 A. 30, 31 (Me. 1901); Davis v. Slater, 861 A.2d 78, 83 (Md. 2004); Watts *ex rel.* Watts v. Lester E. Cox Med. Ctrs., 376 S.W.3d 633, 636 (Mo. 2012); King v. Hopkins, 57 N.H. 334, 335–37 (1876); Wood v. N.J. Mfrs. Ins. Co., 21 A.3d 1131, 1138 (N.J. 2011); Patten v. State, 426 S.W.2d 503, 506 (Tenn. 1968); Dempsey v. Hollis, 75 A.2d 662, 663 (Vt. 1950).

101. 3 WILLIAM E. NELSON, THE COMMON LAW IN COLONIAL AMERICA 11 (2016).

decide cases.[102] Maryland's constitution continues these two traditions. Article 5(a)(1) of the Declaration of Rights declares,

> That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law, and to the benefit of such of the English statutes as existed on the Fourth day of July, seventeen hundred and seventy-six; and which, by experience, have been found applicable to their local and other circumstances, and have been introduced, used and practiced by the Courts of Law or Equity . . . .[103]

The text requires a historical inquiry to determine the scope of the jury trial right. If a Maryland resident would have had the right to a jury trial on a claim in 1776, they have such a right today. The text makes three other considerations apparent. First, this provision precludes resort to living constitutionalism or an interpretive methodology based on something other than history; 1776 English common law is frozen in time. Second, the text does not allow loose analogies to 1776 English common law. In debates about the Seventh Amendment's meaning, some scholars have suggested that a new procedure is acceptable as long as it loosely resembles an older English procedure.[104] Instead, in Maryland, a modern procedure interfering with the right to a jury trial must closely resemble an older English procedure that did so. Finally, to the extent any English procedures did keep litigants from receiving a jury trial in 1776 and could serve as ancestors of modern procedures, Maryland courts in 1776 must actually have used the English procedures. Significantly, Maryland courts have held that Article 5 freezes the jury trial right in 1776.[105] To be sure, several scholars have questioned the wisdom of freezing jury trial rights in the eighteenth century.[106] Discovery's time and expense, for instance, was

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102. *Id.* at 16.

103. MD. CONST. declaration of rights, art. 5(a)(1).

104. *E.g.*, Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1630 (2008) (observing in an exchange of articles arguing about whether summary judgment violated the Seventh Amendment: "I read the case law landscape as properly evolving into a modern interpretation of 'preserved,' which will uphold any new procedure that has a reasonable historical antecedent; exact mirror images between old and new procedures are unnecessary and not required in this more pragmatic, constitutional interpretation").

105. *Davis*, 861 A.2d at 86 ("We have invariably held that the provision concerning the jury trial denotes 'the historical trial by jury, as it existed when the constitution of the state was first adopted.'" (quoting Bryan v. State Rds. Comm'n of the State Highway Admin., 736 A.2d 1057, 1060 (Md. 1999))).

106. *E.g.*, William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1659–60 (2008) ("Analysis of summary judgment and *Twombly* make it plain, in my view, that we must understand our Constitution as a reflection of how our society has progressed and is now constituted. Law, at the very least, must follow society's direction, if not lead it. We will end up in a train wreck if the engine and caboose are not properly coupled to the train; at best, law will become irrelevant, while, at worst, it will drag society and the economy into an abyss.").

not a major concern in the eighteenth century, but it is now.[107] However, a historical approach's merits or demerits are beside the point; Article 5's text requires it.

There are two ways federal pleading standards could violate Article 5. First, they could allow a judge to make factual determinations that an English jury in 1776 would have made. Second, in requiring considerable factual detail, they could impose a barrier between litigants and the jury that did not exist in 1776.

1. English Common Law's Normative Priors

Everyone comes to debates about the jury's proper role with normative priors. Many scholars have questioned whether juries are still necessary or even desirable, and their skepticism informs attitudes about whether mechanisms like summary judgment or motions to dismiss are permissible.[108] Judges have raised similar questions.[109] Delegates to state constitutional conventions over the years have weighed in. When one delegate to Utah's constitutional convention was accused of desiring to "do away with . . . juries," he "answer[ed] frankly, that if this young State which is coming in, was financially rich and could afford to pay one gentleman as chief justice, schooled in his profession, and two associate justices worthy to sit with him, [he] would prefer it to all the juries in the world."[110] Judges, he reasoned, would be less corrupt than juries.[111]

But Maryland courts cannot approach this debate with skepticism toward juries. They must approach it with the high view that 1776 English common law had. Perhaps the best evidence that English common law valued juries in a way the legal profession does not today comes from William Blackstone's *Commentaries on the Laws of England*, first published between 1765 and 1770.

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107. *See* James Oldham, *The Seventh Amendment Right to a Jury Trial: Late-Eighteenth-Century Practice Reconsidered*, *in* HUMAN RIGHTS AND LEGAL HISTORY 225, 246–47 (Katherine O'Donovan & Gerry R. Rubin eds., 2000).

108. *E.g.*, Alfred C. Coxe, *The Trials of Jury Trials*, 1 COLUM. L. REV. 286, 290–91 (1901) ("[The jury] is an exceedingly cumbersome and inefficient method of reaching a result. Causes involving commercial transactions, expert knowledge, careful mathematical calculations, or the consideration of long and intricate accounts . . . would much better be decided by a trained legal mind than by a jury.").

109. *E.g.*, Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (striking a jury trial demand in a case with more than 100 witnesses and more than a thousand exhibits because they and other things "render[ed] it as a whole beyond the ability and competence of any jury to understand and decide with rationality" (emphasis omitted)); *In re* Boise Cascade Sec. Litig., 420 F. Supp. 99, 104 (W.D. Wash. 1976) (striking a jury trial demand because it "must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner").

110. 1 OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION ASSEMBLED AT SALT LAKE CITY ON THE FOURTH DAY OF MARCH, 1895, TO ADOPT A CONSTITUTION FOR THE STATE OF UTAH 294 (Salt Lake City, Star Printing Co. 1898).

111. *Id.*

Blackstone referred to the jury as the "glory of the English law."[112] It was "the most transcendent privilege which any subject can enjoy . . . that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals."[113]

Beyond this general praise were a number of specific claims. First, Blackstone believed that juries brought unique capabilities to the adjudicative process and that they might be free of bias influencing judges. He observed,

> But in settling and adjusting a question of fact, when intrusted [sic] 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 more artfully by 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. For the most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens. Every new tribunal, erected for the decision of facts, without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, judges of a court of conscience, or any other standing magistrates) is a step towards establishing aristocracy, the most oppressive of absolute governments.[114]

Notably, Hamilton and other Founding Fathers agreed that juries were a check on corruption.[115] Moreover, Blackstone believed jury trials had advantages over deciding cases on the papers, which is what happens when a case is decided on a motion to dismiss. Juries in a live hearing could give witnesses a chance to expound on their answers, and he explicitly envisioned trials where juries could ask questions of witnesses, thus giving them a greater chance to discern the truth.[116] Finally, he thought witnesses would be more

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112. 3 WILLIAM BLACKSTONE, COMMENTARIES *379.

113. *Id.*

114. *Id.* at *380.

115. THE FEDERALIST NO. 83, at 422 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("The strongest argument in its favor is, that it is a security against corruption. As there is always more time and better opportunity to tamper with a standing body of magistrates than with a jury summoned for the occasion, there is room to suppose that a corrupt influence would more easily find its way to the former than to the latter.").

116. 3 BLACKSTONE, *supra* note 112, at *373 ("This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never

likely to tell the truth in a public jury trial than they might in a private deposition.[117]

Maryland constitutionalized this high view of juries explicitly. Article 20 declares, "That the trial of facts, where they arise, is one of the greatest securities of the lives, liberties and estate of the People."[118]

2. Common Law Procedural Mechanisms to Decide Cases without Juries

To decide whether federal pleading standards violate Maryland's constitution, we have to decide whether they are consistent with English common law devices allowing judges to take cases from juries in 1776. That, in turn, requires us to explore a pleading system very unlike our own.

Overall, pleading's goal in English common law was to reduce a dispute to a single issue.[119] The plaintiff began with a declaration asserting a claim for something like trespass or trover.[120] The defendant could respond with a demurrer to the pleadings, which admitted the facts alleged in the pleadings, but raised a question of law, and asserted that the complaint was legally deficient.[121] Blackstone envisioned that juries would decide factual questions and that judges would resolve legal ones.[122] A defendant who lost on demurrer lost the case since they had admitted the complaint's facts.[123] The defendant could respond with a confession and avoidance, which admitted the facts alleged but argued that other facts not in the complaint relieved them of liability.[124] Later, defendants could plead the general issue, which meant both that they disputed the plaintiff's facts and wanted the court to decide a legal question.[125] Pleading was highly technical under the English common law, and litigants could lose cases for not complying with arcane requirements.[126] Assuming the litigants

meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial." (footnote omitted)).

117. *Id.*

118. MD. CONST. declaration of rights, art. 20.

119. Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. 347, 350 (2003).

120. *Id.*

121. *Id.*

122. 3 BLACKSTONE, *supra* note 112, at *315 ("And this issue, of fact, must generally speaking be determined, not by the judges of the court, but by some other method; the principal of which methods is that by the country, *per pais*, (in Latin, *per patriam*) that is, by jury."). Earlier on, he asserted that juries were not competent judges of the law. *Id.* at *309.

123. Sward, *supra* note 119, at 350.

124. *Id.* at 351.

125. *Id.*

126. *Id.*

made it through the pleading phase, they proceeded to a jury trial, which substituted for more primitive forms of dispute resolution, such as trial by combat or dueling.[127] There was also potentially the directed verdict and the compulsory nonsuit, though scholars dispute whether and to what extent those avenues were available.[128]

At trial, litigants might use various devices to have the judge decide the case.[129] One was a demurrer to the evidence. The defendant would admit the plaintiff's facts and inferences but argue that the plaintiff could not win as a matter of law.[130] The defendant had to forgo putting on their own evidence if they chose this path.[131]

For this era's plausibility pleading standard to be consistent with Article 5, it must take on the function of a common law device in use in 1776. And it must be consistent with standards courts applied when using those devices.

a. Demurrer to the Pleadings

Both in terms of litigation stage and function, the demurrer to the pleadings most closely resembles the modern Rule 12(b)(6) motion.[132] Both admitted the facts alleged as true and argued that the other party could not win as a matter of law.[133] As an example of when a demurrer to the pleadings would be appropriate, Blackstone described a case where a defendant admitted that he had trespassed on a plaintiff's land but argued that such trespass was not legally actionable when someone was hunting.[134] By contrast, issues of fact, such as whether the defendant had actually come onto the plaintiff's land, would be decided by the jury.[135] This differs from what the modern motion to dismiss has evolved into at the federal level.

In determining whether the plaintiffs had adequately pleaded scienter under the PSLRA in *Tellabs*, the Supreme Court found it necessary to weigh competing inferences that could come from the facts alleged.[136] It had to ask whether "a reasonable person [would] deem the inference of scienter at least as strong as any opposing inference."[137] Whether a reasonable person would believe that it was as likely that the defendant intended to deceive a plaintiff

127. *Id.* at 353.

128. *See infra* notes 157–176 and accompanying text.

129. Such devices were apparently actually in use in Maryland. 3 NELSON, *supra* note 101, at 18.

130. Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 477 (2004).

131. *Id.*

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

133. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

134. 3 BLACKSTONE, *supra* note 112, at *323–24.

135. *Id.* at *315.

136. Tellabs, Inc. v. Makor Issues & Rts., Ltd., 551 U.S. 308, 323 (2007).

137. *Id.* at 326.

as it was that they had not is much more like the question of whether the defendant was trespassing on the plaintiff's land and unlike the question of whether trespassing while hunting is legally actionable. Maryland courts should hesitate to rely on *Tellabs* because, while it briefly considered whether its pleading standard violated the Seventh Amendment,[138] it did not consider English common law sources from 1776 that must inform an Article 5 analysis.

As support for his claim that the government discriminated against him, Iqbal cited the fact that the government's investigation after September 11 disproportionately targeted Arab Muslim men.[139] The Supreme Court found that this evidentiary support made Iqbal's allegation of racial and religious discrimination possible but not plausible.[140] Instead, the Court decided that there was an obvious alternative explanation. Since Al Qaeda had carried out an attack on September 11 and since its membership was disproportionately Arab Muslim, those investigated for participating in the attacks and subjected to the clear and hold program would be disproportionately Arab Muslim too.[141] That is, any disparity could have resulted not from purposeful discrimination but from statistical accident.[142] This determination is unlike what Blackstone described as the determination a court would make in a demurrer to the pleadings. How likely it was that the defendants had racially discriminated against Iqbal on purpose is much closer to a factual issue that Blackstone would have expected a jury to resolve. A legal issue might have been something like whether a government official could violate the Constitution by arresting a foreign national (which Iqbal was[143]). Unlike *Tellabs*, *Iqbal* did not even consider whether its pleading standard violated the Seventh Amendment and did not consider whether what it had transformed the motion to dismiss into was consistent with a demurrer to the pleadings under English common law in 1776. Those facts should make Maryland courts hesitate to adopt *Iqbal*.

A different strategic calculus applied too. While a modern defendant making a Rule 12(b)(6) motion has little to lose—if they win the motion, they get the case dismissed, but if they lose, the case just proceeds to discovery—a defendant demurring to the pleadings lost the case if they lost the demurrer.[144] Probably for this reason, demurrers to the pleadings were rare at common law.[145] Suffice it to say, many defendants would be less likely to file Rule 12(b)(6) motions if they would lose the case by losing the motion.

Finally, federal pleading standards now require litigants to plead more factual detail than they had to under 1776 English common law. One district

138. *Id.* at 326–29.

139. Ashcroft v. Iqbal, 556 U.S. 662, 681–82 (2009).

140. *Id.*

141. *Id.* at 682.

142. *See id.*

143. *Id.* at 666.

144. 3 BLACKSTONE, *supra* note 112, at *324.

145. JAMES OLDHAM, TRIAL BY JURY 10 (2006).

court, for example, dismissed a conspiracy claim because, while the plaintiff had described the conspiracy's objectives, it did not describe each defendant's role in the conspiracy.[146] Ironically, though faulting the plaintiff for this deficiency may have been consistent with English common law in the Middle Ages, it was no longer by 1776. Blackstone asserted that at one time, long prior to when he wrote *Commentaries on the Laws of England*, defendants did not have to even answer complaints until the plaintiff stated a "probable case" in their complaint and provided witness testimony to support their claims.[147] But by the time he wrote his treatise, inclusion of such evidence supporting the claims had become "antiquated."[148]

The demurrer to the pleadings as understood in 1776 is different enough from a Rule 12(b)(6) motion under modern federal pleading standards that we cannot say they perform similar functions. Simply put, Maryland courts cannot attempt to analogize the modern Rule 12(b)(6) motion under federal standards to the demurrer to the pleadings in an attempt to confer constitutional legitimacy on the former.

b. Demurrer to the Evidence

After a party presented evidence at trial, the other party could demur to the evidence. That device required a party to admit the truth of the other side's evidence and the facts alleged.[149] The party would then argue that the evidence was insufficient to allow the other side to prevail as a matter of law. The question raised was a legal one and allowed a judge instead of a jury to decide it.[150] If the demurrer was successful, the party won. If it was unsuccessful, the party lost because it had admitted the truth of the other side's facts and evidence.[151] By the time Blackstone wrote his *Commentaries on the Laws of England* (only a few years before Maryland had adopted its constitution), demurrers to the evidence were only infrequently used.[152]

The demurrer to the evidence differs from the modern motion to dismiss under federal practice in two respects. First, the strategic calculations are different. Defendants filing a demurrer would have been very cautious before doing so because losing the demurrer would have meant losing the case. By contrast, defendants today can file a Rule 12(b)(6) motion with no downsides. If they win, the case is dismissed, and they prevail. If they lose, they proceed to discovery and get another chance to win at summary judgment and then at

146. A-Valey Eng'rs, Inc. v. Bd. of Chosen Freeholders of Camden, 106 F. Supp. 2d 711, 718 (D.N.J. 2000).

147. 3 BLACKSTONE, *supra* note 112, at *295.

148. *Id.*

149. *Id.* at *373.

150. *Id.*

151. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 151 (2007).

152. *Id.*; *see also* 3 BLACKSTONE, *supra* note 112, at *373.

trial. Defendants today would probably be far less likely to file Rule 12(b)(6) motions if they knew they would lose the case if the decision went against them. Second, the standard likely used in 1776 is incompatible with the new plausibility standard. An important case on point is *Cocksedge v. Fanshaw*, decided shortly after Maryland adopted its constitution.[153] There, on a demurrer to the evidence, the defendant raised the question of whether London residents were exempt from paying duties on corn because there was a custom of exempting them from paying the duties.[154] The court found this to be a jury question because there was a chance the custom had a legal origin. Wherever "there [wa]s an immemorial usage, the Court must presume every thing [sic] possible, which could give it a legal origin."[155] Whether it was probable that the custom had a legal origin was "for a jury to decide."[156] It would therefore seem that English common law from 1776 would expect the jury to determine whether alternatives better explained the defendant's behavior than the plaintiff's allegations.

c. Nonsuit

Plaintiffs could be nonsuited during trial. Technically, this meant the court could not submit a case for a verdict because the plaintiff had not appeared.[157] A nonsuit ended the action and allowed the defendant to prevail.[158] It was "usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to call the plaintiff; and if neither he, nor any body for him, appears, he is nonsuited."[159] In 1794, William Tidd insisted, "[t]he plaintiff in no case is compellable to be nonsuited; and therefore, if he insist[s] upon the matter being left to the jury, they must give in their verdict."[160]

There is some evidence that compulsory nonsuits did rarely happen. But such nonsuits happened when the plaintiff failed to meet a requirement to move their case forward, not because the judge ruled against them on the facts. For example, in *Abbot v. Plume*, the plaintiff failed to call a witness who had subscribed the defendant's signature on a bond, which he was required to do in such cases.[161] He was then subject to a compulsory nonsuit. By contrast, in *Company of Carpenters v. Hayward*, decided in 1780, the defendant sought a

153. Cocksedge v. Fanshaw (1779) 99 Eng. Rep. 80; 1 Dougl. 119.

154. *Id.* at 80–81, 1 Dougl. at 119.

155. *Id.* at 88, 1 Dougl. at 132.

156. *Id.*

157. 3 BLACKSTONE, supra note 112, at *376.

158. *Id.*

159. *Id.* (emphasis omitted).

160. 2 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS 588 (London, A. Strahan and W. Woodfall 1794) (emphasis omitted).

161. Abbot v. Plumbe (1779) 99 Eng. Rep. 141, 141; 1 Dougl. 216, 216.

compulsory nonsuit because the plaintiff had not presented enough evidence to prove that a company existed.[162] Lord Mansfield denied the motion because it was "a mere question of fact" whether the company existed.[163] Justice Buller added that the relevant question for the judge was whether there was *any* evidence.[164] Once there was any evidence, it was a jury's call whether it was convincing enough to show that a company did in fact exist.[165]

A nonsuit is unlike the motion to dismiss under federal practice. Most of the time, it could happen only with a plaintiff's consent, which makes it more like a Rule 41 voluntary dismissal.[166] Suffice it to say, plaintiffs are not consenting to dismissal when judges decide their claims are implausible. In compulsory nonsuits, judges were not assessing whether they found the plaintiff's claims plausible. They did not decide whether an alternative explained what happened better than the plaintiff's allegations did, which is what *Twombly* and *Iqbal* did. The nonsuit under English common law was not sufficiently analogous to the plausibility standard to support that standard's constitutionality.

d. Directed Verdict

A directed verdict allowed a judge to instruct the jury to return a particular verdict. The judge might comment on the strength of the parties' evidence or why the facts supported one side or the other.[167] Scholars have debated whether directed verdicts actually bound juries. In her heavily cited history of the Seventh Amendment in the *Harvard Law Review*, Edith Henderson argued the "weight of authority" required juries to obey directed verdicts.[168] If a directed verdict did bind juries, we might say that it allowed a judge to make a factual determination if the directed verdict was based on the view that the facts overwhelmingly favored one party. But the case she cited to show the "weight of authority," *Macbeath v. Haldimand*, does not support the claim.[169] There, the plaintiff had supplied goods and labor to the governor of Quebec. When he did not receive full payment, he argued the governor was personally liable for the promise to pay, and sued.[170] As evidence, he introduced bills of

162. Co. of Carpenters v. Hayward (1780) 99 Eng. Rep. 241; 1 Dougl. 374.

163. *Id.* at 241, 1 Dougl. at 375.

164. *Id.* at 242, 1 Dougl. at 375.

165. *Id.*

166. *See* FED. R. CIV. P. 41(a)(1)(A) ("[A] plaintiff may dismiss an action without a court order by filing: (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.").

167. Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 457–58 (2013).

168. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 302 (1966).

169. Macbeath v. Haldimand (1786) 99 Eng. Rep. 1036; 1 T.R. 172.

170. *Id.* at 1036–38, 1 T.R. at 172–75.

exchange and correspondence purporting to show that the governor had personally guaranteed payment and had not merely acted on the government's behalf.[171]

The case does not support the notion that directed verdicts were compulsory for three reasons. First, Justice Buller initially suggested that he thought a nonsuit was appropriate.[172] But after hearing the plaintiff's lawyer argue that the jury should decide whether the evidence presented showed the governor was personally liable, Justice Buller decided to leave the question to the jury, though he did tell them they should find for the defendant.[173] If Justice Buller had really intended to ensure the defendant won, why would he change his mind about nonsuiting the plaintiff and then send the case to the jury? As noted above, a compulsory nonsuit, though rare, could have allowed him to keep the jury out of the case entirely. The fact that he decided to let it take the case suggests a belief that it should make its own independent judgment. Second, Justice Willes's remarks suggest that Justice Buller had given an opinion instead of a command. He emphasized that Justice Buller had a "right to give his opinion" about whether the letters offered as evidence supported the plaintiff's contentions.[174] That phrasing is telling; it suggests Justice Buller could give an opinion, and the jury could reject it. Finally, Justice Buller, who heard the case himself, never characterized his instruction as binding. Now, perhaps one might infer that he considered his instruction binding because he characterized the dispute as a matter of law instead of a matter of fact. But overall, there are too many conflicting signals to say that *Macbeath* indicates a clear tradition that directed verdicts were binding on juries. Moreover, other scholars have concluded that eighteenth-century English juries were not bound by judges' directed verdicts.[175] It is untenable to say that the directed verdict of 1776 English common law is equivalent to a judge's plausibility finding under the modern motion to dismiss.

The best modern analog to a directed verdict is judgment as a matter of law.[176] That comparison raises another objection to adopting federal pleading standards in Maryland. Under a motion for judgment as a matter of law, the parties have had an opportunity to engage in discovery and to present all evidence they have uncovered. But requiring extra factual detail and allowing judges to then dismiss complaints they find implausible amounts to letting judges make a factual determination before the plaintiff has had a chance to present all of their evidence.

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171. *Id.* at 1038, 1 T.R. at 175–76.

172. *Id.*

173. *Id.*

174. *Id.* at 1041, 1 T.R. at 181.

175. *E.g.*, Oldham, *supra* note 107, at 235–36.

176. *See* FED. R. CIV. P. 50(a)(1)(A) ("If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . resolve the issue against the party . . . .").

e. New Trial

English judges in 1776 could order a new trial under certain conditions. Overall, these grounds were "wholly extrinsic, arising from matter[s] foreign to or dehors the record."[177] Blackstone identified the specific conditions as: one party tampering with the jury, juror misconduct, a jury verdict or damages award unsupported by the evidence, or erroneous jury instructions.[178] Judges could therefore decide that a jury's verdict was unreasonable, which is a sort of factual determination. But there are two important differences between a motion for a new trial and modern federal pleading standards. First, as with directed verdicts and demurrers to the evidence, the party had a full opportunity to present all its evidence and fully investigate its claims. Second, a decision to grant a new trial sent the case to a new court and possibly a new jury. In that sense, it might only postpone factual determinations on the merits until a new jury hears the case.

f. Trial by Inspection

Blackstone did describe one method by which judges definitely could make factual determinations in place of a jury: trial by inspection. He explained that

> Trial by inspection, or examination, is when for the greater expedition of a cause, in some point or issue being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For, where the affirmative or negative of a question is a matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of dubious facts: and therefore when the fact, from it's [sic] nature, must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from it's [sic] usual resort, the verdict of twelve men, and relies on the judgment of the court alone.[179]

According to Blackstone, trial by inspection was only acceptable when a judge could make a factual determination by sight. His first examples of trial by inspection were when a youth sought to recover a fine he was too young to pay and when a youth sought to set aside a contract he was too young to enter.[180] Theoretically, the judge would be able to figure out whether the person was actually a youth on sight. Similarly, trial by inspection would be appropriate when the defendant denied that the person coming into court was the actual plaintiff; the judge could examine the plaintiff to verify his identity.[181] Trial by

177. 3 BLACKSTONE, *supra* note 112, at *387 (emphasis omitted).

178. *Id.*

179. *Id.* at *331–32 (emphasis omitted).

180. *Id.* at *332.

181. *Id.*

inspection was the common law's version of Justice Stewart's "I know it when I see it" test.[182]

It therefore contrasts with the factual determination of whether a government official acted with a particular state of mind that one could not make just by looking at the defendant. It will not support applying the federal plausibility standard in Maryland.

English common law in 1776 had nothing reasonably similar to today's federal pleading standards. As the Maryland Constitution guarantees Marylanders that only procedural mechanisms taking cases from juries that 1776 English common law allowed can be used against them, federal pleading standards are now impermissible unless they survive heightened scrutiny. The other states that claim to follow Founding-era English common law should also reject federal pleading standards.

C. *States Where Juries Had More Expansive Powers Than They Did under English Common Law*

Massachusetts, Pennsylvania, New York, Connecticut, and Virginia allowed juries to interpret the law in some or all circumstances at the Founding and are arguably bound to consider that history in construing their jury trial guarantees.[183] I have chosen Massachusetts as a case study for these states because it allowed juries to interpret the law at the time it adopted its constitution and because its constitution explicitly codified historical practice. Massachusetts adopted its constitution in 1780.

Article XV of its Declaration of Rights says,

> In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used

182. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

183. *See* William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003 (2010). Although Pennsylvania and Virginia most recently adopted constitutions well after juries lost the ability to interpret the law in 1968 and 1902, respectively, courts in both states have held that their jury trial guarantees still apply to the same extent as they did in their first constitutions in 1776. Mishoe v. Erie Ins. Co., 824 A.2d 1153, 1160 n.10 (Pa. 2003); Bethel Inv. Co. v. City of Hampton, 636 S.E.2d 466, 469 n.2 (Va. 2006) (suggesting, however, that juries only decided facts in 1776). However, Professor Nelson has argued that Virginia juries could interpret the law as well in 1776. Nelson, *supra*, at 1008. Whereas in Pennsylvania, Professor Nelson found that legal elites opposed allowing juries to interpret the law prior to independence and that the issue was heavily contested. However, he also found that, "when, as a consequence of the Revolution, the Quaker elite lost its power and radical democrats assumed control in the new Commonwealth, juries may have received the right to determine law as well as fact." *Id.* at 1015. Although Professor Nelson did not fully research Connecticut, there is authority suggesting that juries there could decide legal questions. Witter v. Brewster, 1 Kirby 422, 423 (Conn. 1788) ("As to the other exception—that the jury have found contrary to law and evidence—It doth not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both . . . ."). Finally, I should note here too that even if one rejected the idea that these states should consider federal pleading standards in light of the fact that juries could interpret the law at the Founding, they would still find those standards inconsistent with traditional English common law.

> and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it.[184]

By its terms, this is a historical test. It protects a litigant's right to a jury trial in all cases where they would have had one in 1780 and allows denial of a jury trial only in cases where a litigant would not have received one in 1780 or in cases involving mariners' wages.[185] By tying its jury trial guarantee to historical practice, it precludes resort to living constitutionalism as an interpretive methodology. Massachusetts courts have adopted federal pleading standards without considering whether they are consistent with Article XV.[186]

1. Normative Priors

As with Maryland, Massachusetts comes to any debate over its jury trial guarantee with a high view of juries. First, Massachusetts citizens believed that juries were essential to their liberty. A Middlesex convention in 1774, for example, declared that "no state can long exist free and happy . . . when trials by juries . . . are destroyed or weakened."[187] Although delegates to state constitutional conventions in the nineteenth century began to express more negative views toward juries, and the legal profession has come to adopt a lower view, those interpreting Massachusetts's jury trial guarantee must approach it with the respect Massachusetts citizens gave juries in 1780. Second, while juries decide few cases today,[188] they decided almost all cases in colonial Massachusetts. In fact, "[t]he right to trial by jury . . . was never questioned during the prerevolutionary period, and few . . . cases went to trial without a jury."[189] William Nelson, perhaps the foremost authority on colonial legal systems, has found that "[t]he courts almost never used procedures analogous to summary judgment or the newly broadened *Twombly* motion to dismiss."[190] In Massachusetts, English common law devices to take cases from juries (described

184. MASS. CONST. declaration of rights, art. XV.

185. Dep't of Revenue v. Jarvenpaa, 534 N.E.2d 286, 291 (Mass. 1989) ("Article 15 . . . preserves 'the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted' in 1780." (quoting *In re* Op. of the Justs., 130 N.E. 685, 687 (Mass. 1921))).

186. Iannachinno v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) ("We agree with the Supreme Court's analysis of the *Conley* language [in *Twombly*] . . . and we follow the Court's lead in retiring its use. The clarified standard for rule 12(b)(6) motions adopted here will apply to any amended complaint that the plaintiffs may file."); *see also* Edwards v. Commonwealth, 76 N.E.3d 248, 254 (Mass. 2017) (applying federal pleading standards).

187. WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 21 (Univ. of Ga. Press 1994) (1975).

188. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 74 (2006).

189. NELSON, *supra* note 187, at 21.

190. Nelson, *supra* note 106, at 1657.

above) were either not used or used very rarely.[191] Simply put, juries in 1780 Massachusetts had much more power than juries today.[192]

Case law from Massachusetts courts confirms Nelson's observations, even well after 1780. In *Dole v. Weeks*, a defendant demurred in a case over promissory notes because the declaration did not allege privity between the parties or demonstrate consideration for the transfer of notes; the defendant even claimed it was essential for the plaintiff to have done so.[193] The lower court denied the demurrer, and the Massachusetts Supreme Judicial Court affirmed. It acknowledged that the declaration fell short of common practice and that it failed to specify important elements of the claim but found the declaration sufficient anyway.[194] It had to presume "the plaintiff to be the lawful bearer of the note" on demurrer.[195] Instead of looking to see whether every element of the claim had been pled or how likely it found the plaintiff's story to be, it held that "[w]hen there is sufficient matter substantially alleged to entitle the plaintiff to his action, the declaration will be good on a general demurrer."[196]

2. The Fact–Law Distinction and Massachusetts Juries

Courts today treat decisions about whether a complaint has stated a plausible claim as a legal question reserved for judges.[197] But even if a complaint's sufficiency really raises a legal question instead of a factual one, a jury in 1780 Massachusetts would have had authority to consider it. The proper interpretation of Massachusetts's constitution may have special relevance for other states that also once gave juries much more power than we do today.[198]

While we take for granted that juries only resolve factual disputes today, juries then could also decide legal questions.[199] John Adams, who wrote the Massachusetts Constitution, acknowledged that juries could decide legal questions and believed that they were generally capable of doing so. In a diary entry, he wrote:

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191. NELSON, *supra* note 187, at 3, 21.

192. *Id.* at 3 ("It is difficult to comprehend how greatly the legal system of prevolutionary [sic] Massachusetts differed from that of modern America. The most important difference was that Massachusetts juries during the fifteen years preceding the War of Independence possessed far greater power than juries do now.").

193. 4 Mass. (4 Tyng) 451, 451–52 (1808).

194. *Dole*, 4 Mass. (4 Tyng) at 451–52.

195. *Id.*

196. *Id.*

197. *See, e.g.*, Tanksley v. Daniels, 902 F.3d 165, 175 (3d Cir. 2018).

198. *E.g.*, Witter v. Brewster, 1 Kirby 422, 423 (Conn. 1788) ("As to the other exception—that the jury have found contrary to law and evidence—It doth not vitiate a verdict, that the jury have mistaken the law or the evidence; for by the practice of this state, they are judges of both.").

199. NELSON, *supra* note 187, at 3 ("But whereas modern juries must follow the law as stated to them by the court, juries in prerevolutionary Massachusetts could ignore judges' instructions on the law and decide the law by themselves in both civil and criminal cases.").

> It has already been admitted to be most advisable for the jury to find a special verdict, where they are in doubt of the law. But this is not often the case; a thousand cases occur in which the jury would have no doubt of the law, to one in which they would be at a loss. The general rules of law and common regulations of society, under which ordinary transactions arrange themselves, are well enough known to ordinary jurors. The great principles of the constitution are intimately known; they are sensibly felt by every Briton; it is scarcely extravagant to say they are drawn in and imbibed with the nurse's milk and first air.[200]

Adams was so convinced that juries should have the final say on legal questions that he asked, "is it not an absurdity to suppose that the law would oblige them to find a verdict according to the direction of the court, against their own opinion, judgment, and conscience?"[201] After 1780, Massachusetts courts confirmed that juries could decide legal questions.[202] In fact, the Massachusetts Supreme Judicial Court affirmed the practice as late as 1808,[203] almost thirty years after the Massachusetts Constitution was written.

Subsequently, Massachusetts courts retreated. In 1836, the Massachusetts Supreme Judicial Court suggested in dicta that when

> the law has been clearly and explicitly stated to the jury, and they decide against the law, it imposes upon the court the duty of interfering, because it must be apparent, that the jury have either unintentionally erred, by mistaking the terms of their instructions, or misapprehended the weight of the evidence, or that they have mistaken their duty or abused their trust.[204]

In 1845, the Massachusetts Supreme Judicial Court acknowledged that lawyers could address juries on matters of law, but insisted that

> it is the duty of the court to instruct the jury on all questions of law which appear to arise in the cause . . . . And it is the duty of the jury to receive the

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200. Diary of John Adams (Feb. 12, 1771), *in* 2 THE WORKS OF JOHN ADAMS 252, 254 (Charles Francis Adams ed., Boston, Charles C. Little & James Brown 1850).

201. *Id.*

202. *E.g.*, Coffin v. Coffin, 4 Mass. (4 Tyng) 1, 25 (1808) ("The question of law therefore arises on the second issue. Both parties had submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and the fact. To enable them to settle the fact, they were to weigh the testimony: that they might truly decide the law, they were entitled to the assistance of the judge.").

203. *Id.*

204. Cunningham v. Magoun, 35 Mass. (18 Pick.) 13, 15 (1836). *Cunningham* still suggests that Massachusetts courts in 1836 would have looked askance at the plausibility standard. The court admonished,

> But where the question is purely matter of fact, where there is evidence for the minds of the jury actually and fairly to weigh and balance, where presumptions are to be raised and inferences drawn, and the jury may be presumed fairly to have exercised their judgment, a court will not feel at liberty to set a verdict aside, although upon the same evidence they would have decided the other way.

Id.

> law from the court, and to conform their judgment and decision to such instructions, as far as they understand them, in applying the law to the facts to be found by them; and it is not within the legitimate province of the jury to revise, reconsider, or decide contrary to such opinion or direction of the court in matter of law.[205]

But the terms of Massachusetts's jury trial guarantee lock in the practice of 1780, and decisions denying juries' right to decide legal questions came too late to give us insight into that practice. Instead, the historical record makes clear that the legal profession could not wave the term "legal question" around to ward off a jury in the same way that someone might wave garlic around to ward off a vampire; juries could decide both fact and law. We might today think it unwise to give juries this right, and we might have different views of juror capabilities and the nature of law itself than John Adams did when he wrote the Massachusetts Constitution. But by freezing the jury trial right in 1780, the constitution froze this older conception of the jury in place. If we think of motions to dismiss as raising a legal question, Massachusetts courts must proceed on the assumption that a jury can and should consider it.

One possible rejoinder to this is that common law pleading in Massachusetts was complicated in a way that often interfered with the right to a jury trial.[206] For example, pleadings had to precisely identify parties to the litigation; courts dismissed lawsuits where the pleading failed to state the defendant's full name or where it misspelled the defendant's name.[207] Moreover, courts dismissed lawsuits where the plaintiff failed to identify the defendant's occupation.[208] These and other highly technical pleading requirements sometimes combined to " 'throw an honest man out of three quarters of his property' if he put his case to law."[209] Reformers believed " 'juries [were] hindered from coming to a speedy decision of a cause, by the labouring pleadings' of the common law."[210] If common law pleading requirements sometimes prevented plaintiffs from getting jury trials in 1780 and were constitutional, how can modern federal pleading standards that have the same effect be unconstitutional today?

That is the wrong question. Instead, we have to ask *why* common law pleading requirements prevented plaintiffs from getting jury trials. And that is not because judges decided that their claims were factually implausible or that they failed to plead detailed facts supporting every element of a claim as they do in federal court today but because the pleadings did not comply with a technical requirement—regardless of how ridiculous. Once a plaintiff followed all formal pleading requirements, the case proceeded to a jury trial

205. Commonwealth v. Porter, 51 Mass. (10 Met.) 263, 286 (1845).

206. *See* William E. Nelson, *The Reform of Common Law Pleading in Massachusetts 1760–1830: Adjudication as a Prelude to Legislation*, 122 U. PA. L. REV. 97, 98–110 (1973).

207. *Id.* at 106–07.

208. *Id.* at 108.

209. *Id.* at 110–11.

210. *Id.* at 111.

where a jury could determine both fact and law.[211] That suggests that today, if a Massachusetts plaintiff complied with all formatting and timing requirements in their complaint, they are entitled to a jury trial.

D. *Field Codes and Juries*

In the mid-to-late nineteenth century, Arkansas, Iowa, Minnesota, Colorado, Wyoming, Nevada, Kansas, Indiana, Washington State, Oregon, Idaho, Oklahoma, North Carolina, and South Carolina adopted versions of the Field Code around the time they drafted their constitutions.[212] I have chosen Kansas to serve as a case study for these states. Kansas adopted a version of the Field Code in 1859, the same year it adopted its constitution.[213] Defendants in Kansas have also urged courts to adopt federal pleading standards, and the Kansas Supreme Court has declined to take a definitive position.[214]

In 1859, Kansas adopted its bill of rights, which provides that "[t]he right of trial by jury shall be inviolate."[215] Kansas courts have taken a historical approach to interpreting Bill of Rights section 5.[216] Specifically, in deciding whether a litigant has a right to a jury trial today, they consider whether a jury would have decided the case when Kansas was a territory.[217] There is evidence that residents of territorial Kansas placed an extremely high value on juries and did not desire procedural barriers to interfere with the right to a jury trial. An 1854 settlers' meeting proposed requiring the chief justice to "upon the demand of either party . . . summon a jury of six persons to try *all* disputes or

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211. Nelson, *supra* note 106, at 1657 ("As long as a plaintiff filed a writ in proper form and a defendant responded with a plea of the general issue, a case would go to trial before a jury that would have broad power to find facts and make law.").

212. *See* ARK. CIV. CODE §§ 105–108 (1869); IOWA CODE §§ 1714–1760 (1851); MINN. TERR. STAT. ch. 70, §§ 56–58 (1851); COLO. CODE CIV. PROC. § 49 (1877); Act of Mar. 10, 1886, ch. 60, § 110, 1886 Wyo. Sess. Laws 128, 147; Act of Nov. 29, 1861, ch. 103, §§ 36–38, 1861 Nev. Stat. 314, 320; Act of Feb. 11, 1859, tit. 7, 1859 Kan. Sess. Laws 82, 95–103; IND. REV. STAT. pt. 2, ch. 1, §§ 46–48 (1852); WASH. CODE CIV. PROC. §§ 73–74 (1881); Act of Jan. 7, 1854, ch. 1, §§ 37–38, 1854 Or. Laws 64, 71; Anderson v. War Eagle Consol. Mining Co., 72 P. 671, 675 (Idaho 1903) (explaining that Idaho statutorily ended the practice of technical common law pleading in 1887); Paula M. Williams, Note, *Please Plead Me:* Ashcroft v. Iqbal *and Implications for Oklahoma Pleading*, 63 OKLA. L. REV. 865, 869 (2011) (noting that the Oklahoma legislature first adopted code pleading in 1893); N.C. CODE CIV. PROC. §§ 91–107 (1868); 4 CHARLES E. BAKER, SOUTH CAROLINA JURISPRUDENCE § 2 n.2 (2022).

213. *Wyandotte Constitution*, BRITANNICA, https://www.britannica.com/event/Wyandotte-Constitution [perma.cc/CLW5-99WP] (noting that Kansas adopted its constitution in 1859).

214. Williams v. C-U-Out Bail Bonds, LLC, 450 P.3d 330, 338 (Kan. 2019).

215. KAN. CONST. bill of rights § 5.

216. Hillburn v. Enerpipe Ltd., 442 P.3d 509, 514–15 (Kan. 2019) ("Section 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence.").

217. State v. Robison, 469 P.3d 83, 88–89 (Kan. Ct. App. 2020) ("Consequently, Section 5 of the Kansas Constitution only applies if it can be shown that territorial juries would have decided the issue of restitution in 1859.").

violations of law."[218] In 1856, a squatter association seeking a way to orderly resolve disputes adopted a resolution requiring it to "elect by ballot nine jurymen, whose duty it shall be to try impartially *every case* where the parties cannot agree among themselves."[219] Such settlers' associations were responsible for much civil litigation in territorial Kansas.[220] Informality characterized the territorial court system when it was established. One scholar has described litigation in territorial Kansas as "simple, if not crude, and in most places a comprehensive knowledge of the law or special technical training in legal skills was not required and was likely to be of little use to the average lawyer."[221] Lawyers and judges, in fact, were frequently uncertain about what the law actually was.[222] If this was the case in the territorial court system, it is hard to imagine neighborhood associations that insisted on juries trying all legal disputes to have had litigants arguing over whether *Cocksedge v. Fanshaw* supported granting a demurrer to the evidence.[223]

To understand whether modern federal pleading standards violate Kansas's constitution, we can also consider its 1859 civil procedure code. That code expressly abrogated common law pleading to the extent it was ever practiced in Kansas territory.[224] The code did not allow for compulsory nonsuits or trial by inspection. Its streamlined provisions did allow for demurrers to complaints, which would be analogs to a modern Rule 12(b)(6) motion. A complaint needed "[a] statement of the facts constituting the cause of action, in ordinary and concise [language], and without repetition."[225] A defendant could demur on the grounds that "the petition d[id] not state facts sufficient to constitute a cause of action."[226] Kansas had become the latest jurisdiction to adopt code pleading.

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218. A.T. ANDREAS, HISTORY OF THE STATE OF KANSAS 309 (Chicago, A.T. Andreas 1883) (emphasis added).

219. Daniel Vancil & Thomas B. Wolverton, *Squatter Rules and Regulations*, KAN. HERALD FREEDOM, Jan. 12, 1856, at 4 (emphasis added and omitted).

220. Robert W. Parnacott, *To the Stars: Where the Journey of Law in Kansas Began*, J. KAN. BAR. ASS'N, July/Aug. 2018, at 44, 46.

221. M.H. Hoeflich, *In Judge Lecompte's Court*, 62 U. KAN. L. REV. 1169, 1175 (2014).

222. *See id.* at 1174 ("[T]he applicable law in the territory would have been either difficult to discover because of the lack of law books or unclear because of the unique situation in the new territory.").

223. Cocksedge v. Fanshaw (1779) 99 Eng. Rep. 80; 1 Dougl. 119; *see supra* notes 149–156 and accompanying text.

224. Act of Feb. 11, 1859, tit. 7, ch. 1, § 92, 1859 Kan. Sess. Laws 82, 95 ("The rules of pleading, heretofore existing in civil actions are abolished; and hereafter, the forms of pleading, in civil actions . . . are those prescribed by this code.").

225. *Id.* ch. 2, § 94.

226. *Id.* ch. 3, § 96.

Code pleading started with New York's 1848 Field Code.[227] It was the first time a common law state had adopted a civil procedure code.[228] The Field Code merged law and equity and ended separate forms of action for things like trespass and trover that had been present in the common law.[229] The code was motivated at least in part by disenchantment with how cumbersome and technical common law pleading had become.[230] In fact, a prominent nineteenth-century commentator described code pleading as "often antagonistic to common law pleading."[231] The Field Code—or variations of it—eventually spread to at least twenty-seven other states.[232] Although there were variations, the codes shared general characteristics: they required single pleading for all causes of action and called for complaints to allege facts to support their claims.[233]

If we take Kansas's civil procedure code as a baseline, determining the constitutionality of federal pleading standards requires us to answer two questions. First, how much detail did a plaintiff need to plead to survive a demurrer? Second, could judges make factual determinations at the pleading stage? Kansas courts did not impose onerous fact-pleading requirements. *Crowther v. Elliott*, decided twelve years after ratification, involved a contract for the plaintiff to sell the defendant his interest in a newspaper stock for $100 and for the plaintiff to manage the newspaper for $25 a week.[234] The plaintiff did not allege that he had actually turned over his shares in the newspaper to the defendant in the complaint or that he continued managing the newspaper.[235] There was only a general allegation that "he duly performed all the conditions of said contract on his part."[236] The defendant demurred, claiming the complaint had not pled facts sufficient to state a claim, and the trial court sustained the demurrer.[237] The Kansas Supreme Court reversed. It held that a court should not find a complaint defective so long as "from the whole petition the nature of the charge can be ascertained."[238] That is, the basic purpose of pleadings was to put the defendant on notice, not to state facts, narrow the issues,

227. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 3–4 (1989).

228. *Id.* at 9–10.

229. *Id.* at 10.

230. *Id.* at 11.

231. CHARLES M. HEPBURN, THE HISTORICAL DEVELOPMENT OF CODE PLEADING IN AMERICA AND ENGLAND 13 (Cincinnati, W.H. Anderson & Co. 1897).

232. *Id.* at 14–15.

233. *Id.* at 12.

234. 7 Kan. 235, 235 (1871).

235. *Crowther*, 7 Kan. at 236–37.

236. *Id.* at 237.

237. *Id.* at 236–37.

238. *Id.* at 238.

or eliminate frivolous cases,[239] which are the usual reasons given for requiring more factual detail in complaints.

Moreover, juries, not judges, were supposed to decide what the best explanation for a defendant's behavior was. The code defined an issue of fact as, chiefly, "a material allegation in the petition, controverted by the answer."[240] That is, once the parties disputed whether a material allegation was true, it became a factual issue instead of a legal one. Kansas's 1859 civil procedure code required that "[i]ssues of fact arising in [an] action, for the recovery of money, or of specific, real or personal property, shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as hereinafter provided."[241] I can find no case law from the decade after the Kansas Constitution's ratification suggesting that courts decided whose version of the facts to believe on demurrer.

Eventually, code pleading became as hung up on technicalities as common law pleading. Courts struggled to distinguish between "dry naked actual facts," ultimate facts, and evidentiary facts.[242] One court found a demurrer appropriate because an allegation that the defendants had agreed to sell property to the plaintiff, had delivered a deed, and had not actually turned over possession was merely evidentiary, and because the complaint had failed to allege the ultimate fact that the plaintiff had a right to ownership.[243] But courts applying Kansas's civil procedure code in the years immediately after the constitution's ratification did not draw such hypertechnical distinctions. Three years after ratification, the Kansas Supreme Court decided *Munn v. Taulman*.[244] The plaintiff demurred to the defendant's answer because the answer stated, "*he says* that he denies," instead of "he denies."[245] He claimed that one goal of the civil procedure code was to verify pleadings and that the phrasing "*he says* that he denies" would not have subjected the defendant to perjury penalties if his answer was false, thus defeating the code's goals.[246] The court refused to make the answer's sufficiency turn on such a minute difference in phrasing. Instead, it observed that "[t]he object of an answer is to apprise the plaintiff what defense is intended to be set up in bar of his claim," and found that the answer had done so.[247] Under Kansas's 1859 civil procedure code, so long as a pleading properly provided notice, it should survive a demurrer, and

239. JOSEPH W. GLANNON, ANDREW M. PERLMAN & PETER RAVEN-HANSEN, CIVIL PROCEDURE 422 (4th ed. 2021).

240. Act of Feb. 11, 1859, tit. 9, ch. 1, § 271, 1859 Kan. Sess. Laws 82, 123.

241. *Id.* ch. 2, art. 1, § 274.

242. Clark, *supra* note 15, at 261–63.

243. McCaughey v. Schuette, 46 P. 666 (Cal. 1896).

244. 1 Kan. 254 (1862).

245. *Munn*, 1 Kan. at 258.

246. *Id.*

247. *Id.*

a jury should decide disputed facts. Whatever the flaws of *Twombly*'s and *Iqbal*'s complaints, surely they at least provided the defendants notice of the claims against them.

Kansas courts cannot constitutionally adopt federal pleading standards unless those standards survive heightened scrutiny.

E. *Hybrids*

Some states do not fall into the first three categories because their jury trial rights' precise scopes are hard to determine. Ohio[248] and California fall into this category. I have chosen California to serve as a case study for these states because it is unclear which time period governs a historical inquiry. California adopted constitutions in 1849 and 1879. In each iteration, its jury trial provisions were similar. The 1849 version read, "[t]he right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law."[249] The 1879 version read,

> The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, not amounting to felony, by the consent of both parties, expressed in open Court, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law.[250]

At times, California courts have found that the jury trial right is preserved to the same extent as in English common law in 1849.[251] At others, it has looked to the common law of 1879.[252]

There is some evidence the drafters of California's 1849 constitution meant to incorporate English common law into the jury trial guarantee from the 1849 convention. For example, one delegate stated that

> It has been the object of the great common law of England to separate these two subjects [law vs. facts], so divisible in their nature, and turn them over to the consideration of two distinct and separate tribunals—if I may say so—the judge to decide the law, and twelve unlawyered men to decide the facts; and the opinion of the common law is, that the jury are better judges of the

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248. There is some authority that Ohio courts should consider their jury trial practice based on whether the common law provided a right to a jury trial in 1802. Ratcliff v. Darby, No. 02CA2832, 2002 WL 31721942, at *5 n.9 (Ohio Ct. App. Dec. 2, 2002). However, Ohio adopted constitutions in 1802, 1851, and 1912, and it had similarly worded jury trial guarantees in each version, and courts have not always indicated the time period considered to determine whether there is a right to a jury trial. *See, e.g.*, Zoppo v. Homestead Ins. Co., 644 N.E.2d 397, 401 (Ohio 1994).

249. CAL. CONST. of 1849, art. I, § 3.

250. CAL. CONST. of 1879, art. I, § 7.

251. People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 835 (Cal. 1951) (per curiam).

252. Mitchell v. Superior Ct., 783 P.2d 731, 738 (Cal. 1989) ("The scope and content of the current state constitutional jury trial provision were debated extensively at the 1879 California Constitutional Convention.").

> facts than he who sits upon the bench; that twelve men are more competent to judges of the facts than any one man can be . . . .[253]

No one challenged this view of English common law or argued for abandoning it.

1. Views of Juries in California

If California courts engage in a historical inquiry to understand their jury trial guarantees, then they must adopt a higher view of juries than now prevails in the legal profession—at least if they use 1849 as a frame of reference. California adopted a provision declaring that "[j]udges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law."[254] There was considerable debate about how effective the provision would be at keeping judges from presenting juries with biased summaries, but none disputed that the provision meant to keep judges from taking factual disputes from juries. Mr. Hastings was emphatic: "The judge has nothing to do with the facts or the testimony; it is the business of the jury to take them into consideration."[255] He insisted that the judge "should never be permitted to interfere with the facts."[256] No one challenged this view, and no one disputed the view, expressed by Mr. Botts, "that the jury are better judges of the facts than he who sits upon the bench; that twelve men are more competent to judge of the facts than any one man can be."[257]

However, by 1879, a more jaundiced view was taking shape. One delegate expressed open contempt for juries, saying that

> public opinion is undergoing a change in regard to the jury system . . . . Forty years ago the popular idea [about the jury] with Americans was [that it is] the palladium of our liberties. To-day, the popular idea, even among the legal profession, is that the jury system is the bulwark of thieves.[258]

Another delegate argued that, in part because of the risk of parties manipulating juries, "if the intent is to arrive at the facts and a just conclusion, it is the judgment of bench and bar generally that this can be better accomplished before a court than before a jury."[259] He went on to worry that trial by jury caused "a special oppression in cases where suits are brought by the poor, who are worried out by the expense of litigation."[260] There was dissent on the jury's

253. J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 236 (Washington, John T. Towers 1850).

254. CAL. CONST. of 1849, art. VI, § 17.

255. BROWNE, *supra* note 253, at 237.

256. *Id.*

257. *Id.* at 236.

258. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 258 (E.B. Willis & P.K. Stockton eds., Sacramento, J.D. Young 1880).

259. *Id.* at 297.

260. *Id.*

utility as an institution. A delegate claimed that juries were "believed, under our system, to be better judges of the facts than the Court" and that it was, therefore, its "special province to pass upon the facts."[261] On the whole, though, the drafters of California's 1879 guarantee held a lower view of juries than the drafters of California's 1849 guarantee did. It is worth noting, however, that whatever reservations delegates had about juries in 1879, they still adopted a jury trial guarantee similar to the 1849 version.

2. English Common Law and Juries

Since California courts have sometimes suggested looking to English common law to understand section 16,[262] we must inquire into whether and how English common law changed between 1776, when Maryland adopted its constitution, and 1849, and ultimately, 1879.

a. Required Factual Detail in Complaints

In 1849, English courts had modest expectations for how much detail a complaint needed to contain in the types of cases federal pleading standards have most affected. Joseph Chitty's 1844 version of his treatise on pleadings illustrates this. In fact, "general words are sufficient, where it is to be presumed that the party pleading is not acquainted with the minute circumstances."[263] Not being acquainted "with the minute circumstances" when one is drafting a complaint would describe many discrimination, fraud, and complex cases where the plaintiff lacks access to evidence probative of the defendant's intent that will almost always be in the defendant's possession. As an example, the treatise described a case where a plaintiff's house was burned and insisted that the plaintiff would be able to use "general words" to describe his injury and not to precisely identify which specific goods were burned because "he is not presumed to be able to set forth with certainty the good destroyed."[264] Chitty's treatise further observed that "[i]t is also a rule of pleading, that where a subject comprehends multiplicity of matter, and a great variety of facts, there in order to avoid prolixity, the law allows general pleading."[265] English common law in 1849 gave plaintiffs latitude in crafting their pleadings that federal pleading standards no longer allow in many cases.

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261. *Id.* at 337.

262. *See, e.g.*, People v. One 1941 Chevrolet Coupe, 231 P.2d 832, 838 (Cal. 1951) (per curiam); Crouchman v. Superior Ct., 755 P.2d 1075, 1078 (Cal. 1988); *In re* Javier A., 206 Cal. Rptr. 386, 396–97 (Ct. App. 1984).

263. JOSEPH CHITTY, A TREATISE ON PLEADING AND PARTIES TO ACTIONS 234–35 (H. Greening ed., 9th Am. ed. Springfield, Mass., G. & C. Merriam 1844).

264. *Id.* at 235.

265. *Id.*

b. English Common Law Views of Juries

English common law in 1849 insisted that juries were the sole judges of factual disputes. The case of *Dearden vs. Evans* illustrates that the plausibility pleading standard is inconsistent with the era's common law.[266] In *Dearden*, the plaintiff filed a trover action for stones in 1839.[267] The allegation was that the defendant removed stones.[268] The defendant argued that the stones were chattels that he would have been entitled to remove without the plaintiff's permission. The judge found that if they were chattels, the defendant would have had to show evidence of when they came to the land, but the defendant submitted no evidence.[269] The judge himself even believed that the stones were part of the plaintiff's property and had not come from somewhere else. Despite finding the defendant's argument implausible, he submitted the issue to the jury.[270] None of the judges on appeal faulted leaving the issue to the jury.

Furthermore, in 1849, England had not developed subsequent methods of letting judges decide cases without juries that might support modern federal pleading standards. The Bills of Exchange Act of 1855 was a forerunner to summary judgment,[271] though it was far narrower, applying in only limited types of cases,[272] and only plaintiffs could invoke it.[273] The act required plaintiffs to obtain a specially endorsed writ warning the defendant that default judgment would be entered against them unless they obtained leave to appear within twelve days of service after the writ.[274] The defendant could obtain leave to appear by paying into court the amount the plaintiff demanded as a security or by providing an affidavit setting forth a defense.[275]At that point, a trial would take place, making the act more of an expedited default process than a modern summary judgment statute. The act is interesting for two reasons. First, it suggests that Parliament thought that the common law as it stood before 1850 was too likely to send cases to juries instead of judges, or else it would not have bothered passing the statute. Second, this is still very limited compared to our modern Rule 12(b)(6) motion. It was available only to plaintiffs and in very limited kinds of cases (bills of exchange). This suggests a fundamental conservatism about having judges decide factual disputes in 1855.

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266. Dearden v. Evans (1839) 151 Eng. Rep. 5; 5 M. & W. 11.

267. *Id.* at 5, 5 M. & W. at 11.

268. *Id.* at 6, 5 M. & W. at 11–12.

269. *Id.*

270. *Id.*

271. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 76 (1990).

272. *Id.*

273. Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J.L. & LIBERTY 173, 178 (2010).

274. John A. Bauman, *The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating's Act*, 31 IND. L.J. 329, 338–39 (1956).

275. *Id.* at 339.

In fact, England had rejected Lord Brougham's 1828 proposal to adopt a Scottish procedure allowing a plaintiff creditor to get judgment without a trial.[276] The House of Lords finally approved it in 1853, but it died in the House of Commons. Furthermore, it was not until 1854 that the Common Law Practice Act allowed litigants to consent to the judge trying factual disputes without a jury.[277]

The 1873 Judicature Act expanded summary judgment to cases involving the recovery of debts,[278] but only plaintiffs could use it.[279] Plaintiffs would file affidavits making factual allegations, and a judge decided the case without a jury or a formal trial.[280] The Judicature Act's summary judgment is very different from modern summary judgment and even more different from the modern Rule 12(b)(6) motion.

Interestingly, other methods of deciding cases without juries fell into disuse.[281] The demurrer to the evidence became rare after *Gibson v. Hunter*, decided in 1793.[282] In that case, Lord Justice Eyre predicted, "I have very confident expectations that a demurrer like the present will never hereafter find its way into this House."[283] He was right. When the House of Lords heard an appeal of a jury verdict in 1858, Lord Wensleydale observed that the demurrer to the evidence had become "little used."[284]

3. California Practice

To the extent California courts engage in a historical inquiry, they would be remiss if they did not consider historical practice in the state around the time the constitution was ratified. In 1851, California adopted a civil procedure code, the Practice Act, modeled after the Field Code.[285] The code required a complaint to "contain . . . [a] statement of the facts constituting a cause of action, in ordinary and concise language."[286] A defendant could demur if "the complaint does not state facts sufficient to constitute a cause of

276. *Id.* at 334–38.

277. Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 77–78 (1980).

278. Haramati, *supra* note 273, at 178.

279. *Id.*

280. *Id.* at 178–79.

281. For example, California courts did claim the power to issue compulsory nonsuits around 1850, but the standard to do so was demanding. *See* Mateer v. Brown, 1 Cal. 221, 222 (1850) ("The general rule by which Courts should be guided in determining whether a nonsuit, when applied for, should be ordered, is, that if the evidence given by the plaintiff would not authorize a jury to find a verdict for him, or, if the Court would set it aside, if so found, as contrary to evidence, in such case it is the duty of the Court to nonsuit the plaintiff.").

282. Henderson, *supra* note 168, at 304–05.

283. Gibson v. Hunter (1793) 126 Eng. Rep. 499, 510; 2 H. Bl. 187, 209.

284. Cooper v. Slade (1858) 10 Eng. Rep. 1488, 1506; 6 H.L.C. 746, 792.

285. California Practice Act § 40, 1851 Cal. Stat. 51, 54.

286. *Id.* § 39, 1851 Cal. Stat. at 52.

action."[287] At first, California courts treated the Practice Act as tracking the common law.[288] The California Supreme Court found sufficient an allegation that the plaintiff was "lawfully entitled to possession of the premises sued for" over the defendant's objection.[289] Though *Twombly* and *Iqbal* would call this a conclusory allegation and disregard it, the California Supreme Court found that the complaint did not need to provide evidence to support the allegation. Indeed, the court found that it "would have been unnecessary and superfluous for the plaintiffs below to have encumbered the record by setting out in his declaration the evidence of his right."[290] At the same time, California courts reserved vast authority to juries. In 1850, the California Supreme Court expressed doubt about whether trial courts could even order new trials.[291] It reversed a trial court's decision to order a new one where it found a jury verdict excessive and observed that "however just it may have appeared to the Court below to set aside this verdict, great abuse, if not the destruction of this right [to a jury trial], would ensue" if it affirmed the new trial order.[292] In 1858, in an ejectment case, the California Supreme Court found clear error where a trial court instructed a jury "to find for the defendant, as the plaintiff had failed to prove a redemption."[293] The court found the instruction erroneous and reversed, writing, "[t]he question of redemption was the main point in issue between the parties. It was a question of fact for the jury, and as the evidence was conflicting, the instruction amounted to a charge on the weight of evidence."[294] This suggests California courts found it inappropriate for judges to weigh inferences that arise from the evidence as *Iqbal* and *Twombly* allow.

By 1859, though, the California Supreme Court began to look at the Practice Act as breaking from common law pleading. In *Jerome v. Stebbins*, the court approvingly cited a New York opinion holding that

> Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has the right to controvert in the answer, must be distinctly averred, and every such averment must be understood as meaning what it says, and, consequently, is only to be sustained by evidence which corresponds with its meaning.[295]

By 1864, the California Supreme Court found that the Practice Act abolished common law pleading standards and imposed new requirements on

287. *Id.* § 40, 1851 Cal. Stat. at 54.

288. Godwin v. Stebbins, 2 Cal. 103, 105 (1852).

289. *Id.* at 105.

290. *Id.*

291. Payne v. Pac. Mail S.S. Co., 1 Cal. 33, 36 (1850) ("It seems to be extremely questionable whether Courts of First Instance possess the power of granting new trials, as practiced in Courts of common law.").

292. *Id.* at 37.

293. Battersby v. Abbott, 9 Cal. 565, 568 (1858).

294. *Id.*

295. 14 Cal. 457, 459 (1859).

complaints.[296] In a breach of contract claim, the court expressly indicated that the complaint's general allegation of a breach would have been acceptable under the common law but that under the Practice Act, the complaint needed to specifically refer to the provisions of the contract that had been breached.[297] If the proper year to understand California's jury trial guarantee is 1879 and not 1849, then evolving interpretations of the Practice Act might allow California courts to adopt federal pleading standards to the extent they require a high level of factual detail.

Still, controlling authorities from the era—1849 or 1879—suggest that judges could not make factual determinations when assessing complaints.

F. *Would Federal Pleading Standards Survive Heightened Scrutiny?*

Although constitutional rights guarantees are usually framed in absolute terms, courts in Maryland, Massachusetts, Kansas, and California have invoked a strict scrutiny analysis to consider permissible limits on said rights.[298] For fundamental rights, it is necessary to show both that there is a compelling government interest and that the method of accomplishing that interest is narrowly tailored before the rights yield.[299] Courts in Maryland, Massachusetts, Kansas, and California have found that the right to a jury trial is fundamental.[300] So have courts in other states.[301]

If we assume that predictability and efficiency qualify as compelling interests, we should consider whether they justify adopting federal pleading standards.[302] As to the first, Nelson has demonstrated that judges and lawyers early in American history wanted to develop the law so as to bolster the economy by making the law more predictable for citizens and commercial entities.[303] Nelson argued this line of thinking led to judges limiting juries' power by more frequently granting new trials, preventing them from deciding legal

296. O'Connor v. Dingley, 26 Cal. 11, 22 (1864).

297. *Id.*

298. State v. Sheldon, 629 A.2d 753, 763 (Md. 1993); Finch v. Commonwealth Health Ins. Connector Auth., 959 N.E.2d 970, 974 (Mass. 2012); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 495 (Kan. 2019) (per curiam); Connerly v. State Personnel Bd., 112 Cal. Rptr. 2d 5, 25 (Ct. App. 2001).

299. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273 (2007).

300. Rankin v. Brinton Woods of Frankford, LLC, 211 A.3d 645, 657 (Md. Ct. Spec. App. 2019); Bank of Am., N.A. v. Diamond Fin., LLC, 42 N.E.3d 1151, 1154 (Mass. App. Ct. 2015); Miller v. Johnson, 289 P.3d 1098, 1108 (Kan. 2012); Blanton v. Womancare Inc., 696 P.2d 645, 655 (Cal. 1985) (Bird, C.J., concurring).

301. *E.g.*, Sullivan v. Lazzari, 43 A.3d 750, 754 (Conn. App. Ct. 2012).

302. I do not wish to definitively weigh in on what does constitute a compelling interest and what doesn't in this Article. Scholars have recognized disagreement on the subject. *See, e.g.*, Fallon, *supra* note 299, at 1322–23. In this debate, at least the Kansas Supreme Court has questioned whether efficiency can override the right to a jury trial. *See infra* note 314 and accompanying text.

303. Nelson, *supra* note 106, at 1658–59.

questions, and limiting evidence they could consider.[304] If concerns about how the law affected the economy were an important question at the end of the eighteenth century, it is a critical one today.[305] In theory, federal pleading standards promote consistency in the law by having judges with legal training decide more cases and juries decide fewer. This prevents juries from nullifying the law or misapplying it.

But do federal pleading standards make the legal system more predictable in practice? Maybe not. As it happens, judges are not uniform in their decisionmaking. Race, gender, and partisan affiliation may all play a role in how they decide cases.[306] One study found that plaintiffs alleging racial harassment win far more often with Black judges than they do with judges of other races.[307] That study further indicated that partisan affiliation predicted how white judges adjudicated racial harassment claims, with white Democrats much more likely than white Republican judges to rule for plaintiffs.[308] Other research has shown that, controlling for party and region of the country, women judges vote differently on certain issues than men.[309] How much more predictable do federal pleading standards make the legal system if decisions on motions to dismiss turn on the judge's race, gender, or partisan affiliation? Indeed, federal pleading standards may make decisions on motions to dismiss *less* uniform. Whereas *Conley* provided a clear rule—do not dismiss complaints unless there is no chance for the plaintiff to prevail—*Iqbal* and *Twombly* provided a hazy standard that allows and perhaps even calls for more subjectivity in decisionmaking.

The second purported interest would be efficiency. State courts hear far more cases than federal courts do,[310] and efficiency is arguably even more important for them. Indeed, some of the states mentioned above are straining under large caseloads. Plaintiffs filed 16,676 cases in Massachusetts during the

304. *Id.*

305. *Id.* at 1660 ("Government by juries of this sort made sense in 1791. Antifederalist strongholds consisted mainly of planters, farmers, and artisans capable of providing for most of their basic needs and otherwise striving for self-sufficiency. These communities governed themselves by their own values. They neither needed nor wanted outsiders to come in and compel them to follow an outside, metropolitan-imposed rule of law. By preserving powerful juries that determined both law and fact, the Seventh Amendment protected local communities from the metropole.").

306. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Study of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117, 1121 (2009).

307. *Id.* at 1156.

308. *Id.* at 1149.

309. Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 31 SOC. SCI. Q. 750 (2000).

310. CT. STAT. PROJECT, *supra* note 9, at 2; FEDERAL CASELOAD STATISTICS, *supra* note 9.

2019 fiscal year,[311] and there were just 82 full-time judges to hear them;[312] that works out to about 203 cases per judge, an untenable caseload. In Kansas, dismissals of some kind terminate over 35 percent of cases, while jury verdicts terminate only 0.36 percent.[313] Before considering whether federal pleading standards would make state legal systems more efficient, we have to consider the threshold question of whether efficiency is really compelling enough to overcome the jury trial right. Answering that question depends on why we have juries. The Kansas Supreme Court has suggested that "the constitutional provision for trial by jury is not directed at trial efficiency, but to protect the individual from oppression."[314] Other state courts have also suggested that efficiency gain is not a good enough reason to override the right to a jury trial.[315] If we have juries to serve as a check on judges and legislatures, as Blackstone and delegates to many a state constitutional convention have suggested, then the jury system's inefficiency might be the point. That aside, for every case that federal pleading standards eliminate, they might prolong another one. In many instances, federal courts have dismissed complaints for failure to meet the plausibility standard but then given the plaintiff leave to amend and ultimately found the amended complaint plausible.[316] In such cases, federal pleading standards would cause courts to spend *more* time on a case and not less.

Even if federal pleading standards did make state legal systems more efficient, there remains the question of narrow tailoring. That requires us to consider whether there are alternatives to federal pleading standards, such as mediation, that could keep caseloads manageable. No broad judgment is possible here. But it is worth noting that some state courts have indicated they do not need federal pleading standards to keep caseloads from overwhelming

311. Ralph D. Gants, Mark V. Green, Paula M. Carey & Jonathan S. Williams, COMMONWEALTH OF MASS. CT. SYS., ANNUAL REPORT ON THE STATE OF THE MASSACHUSETTS COURT SYSTEM 49 (2019), https://www.mass.gov/doc/fy-2019-annual-report-for-the-court-system/download [perma.cc/HEG2-MSDV].

312. *Superior Court*, MASS.GOV, https://www.mass.gov/orgs/superior-court [perma.cc/9PNB-DWZ3].

313. ANNUAL REPORT OF THE COURTS OF KANSAS (2019), https://www.kscourts.org/KSCourts/media/KsCourts/Case%20Statistics/Annual%20Reports/2019/19-T-OF-C-for-web.pdf [perma.cc/76D3-VB5S].

314. Bourne v. Atchison, Topeka & Santa Fe Ry., 497 P.2d 110, 114 (Kan. 1972).

315. *E.g.*,Vassalluzzo v. Ernst & Young, LLP, 22 Mass. L. Rptr. 654, 657 (Super. Ct. 2007) ("This Court well understands the desire of overburdened courts to resolve related disputes in a single forum, especially when that forum will be arbitration, but courts cannot succumb to the temptation of denying a plaintiff his right to a jury trial and to the various safeguards provided by our trial courts (including the right to an appeal on the merits) in its case against one party simply because the plaintiff has agreed to arbitration with another party.").

316. *See, e.g.*, Estate of Faull v. McAfee, 727 F. App'x. 548, 551 (11th Cir. 2018) (reversing the district court's decision denying leave to amend a complaint and holding that a third amended complaint was plausible).

them.[317] That suggests that alternatives besides federal pleading standards could work.

IV. WHY STATE COURTS SHOULD NOT ADOPT FEDERAL PLEADING STANDARDS AS A MATTER OF POLICY

Even aside from whether state courts can constitutionally apply federal pleading standards, there remains the question of whether they *should* apply federal pleading standards. I advance two arguments for why they should not. The first is about why state courts have a different orientation towards civil cases than federal courts do and how that difference dictates different pleading standards. The second is about how states should compensate for federal courts increasingly shutting their courthouse doors by opening theirs.

Before going further, I wish to briefly discuss why it is appropriate for states to go their own way on pleading standards, even if their versions of Rule 8 read the same as the federal rule does. Under our system of dual sovereignty, states have the final say over how to interpret state law.[318] Indeed, they are supposed to be laboratories of democracy that have the opportunity to try different policies. Instead of blindly following federal law, they should consciously consider whether they should. Given that states will have different policy concerns and needs than the federal government, it only makes sense that they will apply different pleading standards than federal courts do.

A. *State Courts Have a Different Orientation from Federal Courts*

State courts come to the debate over pleading standards with a different mission than federal courts. After all, "[i]t is a principle of first importance that the federal courts are tribunals of limited subject matter jurisdiction" while "state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary."[319] The Founding Fathers envisioned that federal courts would play a more modest role. Alexander Hamilton, foremost among federalists who desired a strong central government, observed:

> [I]t is equally true, that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the same situation in which it is placed by the State constitutions, and will be in no degree altered or influenced by the adoption of the plan under consideration. The foundation of this assertion is, that the national judiciary will have no cognizance of them, and of course they will

317. *E.g.*, Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp., 812 N.W.2d 600, 608 (Iowa 2012) ("[The defendants] have not presented this court with any evidence that our state court system is facing the sort of systemic pressures that contributed to the Supreme Court's decisions in *Twombly* and *Iqbal.*").

318. Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016).

319. 13 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & RICHARD D. FREER, FEDERAL PRACTICE AND PROCEDURE § 3522 (3d ed. 2008).

> remain determinable as heretofore by the State courts only, and in the manner which the State constitutions and laws prescribe.[320]

Twombly, *Iqbal*, and the PSLRA might make sense as filtering mechanisms in a legal system whose designers intended courts not to hear most disputes but not in a legal system whose designers expected them *to* hear most disputes. In the latter, one would not expect courts to strive so hard to filter out cases.

In line with this distinction, most states have much less onerous restrictions on the right to a jury trial than the federal court system has. While a litigant cannot even get into federal court on a state law claim worth less than $75,000.01,[321] no state requires anything approaching that amount to get a jury trial. Litigants in Virginia and West Virginia can get jury trials on claims of just $21.[322] Even states like Florida, which requires significantly more than West Virginia and Virginia, allow litigants to receive a jury trial for significantly smaller state law claims than they could receive in federal courts.[323] Simply put, state court systems are more accessible to the average litigant than federal courts.

In addition, they guarantee a right to a remedy. Forty state constitutions,[324] but not the federal Constitution, provide some version of the following: "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."[325] Although state courts have taken a bewildering array of approaches to the provisions, those provisions still give state courts a different mission than federal courts have. State courts are supposed to be the one place where an injured person can expect a right to redress. Federal pleading standards now undermine that goal. Take the example of a Black woman who was fired solely because of her race and gender but whose presuit investigation does not reveal detailed evidence of her employer's state of mind or the mountain of facts needed to use a burden-shifting framework. The plausibility pleading standard will often require dismissing her complaint even if it turns out that she experienced race and gender discrimination. At the very least, states that provide a right to a remedy should be hesitant to deny

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320. THE FEDERALIST NO. 83, *supra* note 115, at 421 (Alexander Hamilton).

321. 28 U.S.C. § 1332.

322. *Small Claims Court Procedures*, VA.'S JUD. SYS. (Oct. 2020), https://www.vacourts.gov/resources/small_claims_court_procedures.pdf [perma.cc/5VMQ-PDUM]; W.VA. CODE ANN. § 50-5-8 (LexisNexis 2016).

323. Jury trials take place in Florida circuit courts, which—until January 2023—exercised jurisdiction over claims with amounts in controversy exceeding $30,000. *See* FLA. STAT. § 34.01 (2021); *Trial Courts - Circuit*, FLA. CTS. (Dec. 8, 2020), https://www.flcourts.org/Florida-Courts/Trial-Courts-Circuit [perma.cc/XM5K-Z947]. Although the amount-in-controversy requirement increased to $50,000 in 2023, *see* § 34.01(1)(c)(3), it remains well below the federal limit.

324. Thomas R. Phillips, Speech, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1310 (2003).

325. IND. CONST. art. 1, § 12.

plaintiffs the right even to discovery that will help them prove meritorious claims.

Simply put, state courts have a different overall orientation than federal courts. That difference justifies if not requires different pleading standards.

B. *Juries Serve Different Purposes in State Courts*

State courts select judges differently than federal courts do, and that difference should mean a different role for juries. Judges in federal courts have life tenure and face removal only through an arduous impeachment process.[326] With a few exceptions,[327] states use some form of election to pick judges.[328] Some use partisan elections where a Democrat runs against a Republican, while others use a merit selection plan where the governor appoints a judge forwarded by a nonpartisan merit panel who must eventually stand for a retention election to remain on the bench.[329] Previous scholarship has documented how political pressures affect judicial decisionmaking. Elected state court judges must raise money to fund their campaigns. One recent study in the *N.Y.U. Law Review* found "a significant relationship between direct campaign contributions from business groups and elected judges' voting."[330] State court judges themselves have acknowledged the problem. Justice Paul Pfeiffer of the Ohio Supreme Court lamented that he "never felt so much like a hooker down by the bus station in any race [he had] ever been in as [he] did in a judicial race" and observed that contributors "mean to be buying a vote"[331] They have succeeded. One study found that Ohio judges rule for their contributors 70 percent of the time and that even more worryingly, during a twelve-year period, they recused themselves in only nine cases out of 215 when a contributor was a party.[332] Even if thorough campaign finance reform took place—hard to believe—there would remain an incentive for popularly elected judges to decide civil cases in popular ways. It is harder still to imagine states abandoning judicial elections wholesale in the near future.

Pleading standards can play a key role in enabling or constraining biased decisionmaking. Under federal pleading standards, a judge can dismiss cases

326. *See* U.S. CONST. art. III, § 1.

327. In New Jersey for example, with the legislature's consent, the governor appoints judges to an initial seven-year term. Once judges are reappointed, they receive tenure until the mandatory retirement age of seventy. STUART RABNER, GLENN A. GRANT & PETER MCALEER, THE NEW JERSEY COURTS 9 (2019), https://njcourts.gov/forms/12246_guide_judicial_process.pdf [perma.cc/JK5D-KQ9K].

328. Marcus Alexander Gadson, *State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound*, 93 ST. JOHN'S L. REV. 1, 14–15 (2019).

329. *Id.*

330. Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions,* 86 N.Y.U. L. REV. 69, 100 (2011).

331. Gadson, *supra* note 328, at 20.

332. *Id.*

against contributors to their campaign or contributors they would like to attract and receive little public outcry. They could also dismiss cases against politically disfavored groups and use that record to win reelection. On the other hand, relaxed pleading standards could let more juries decide cases. As I have argued elsewhere, juries bring unique advantages to the adjudicative process over judges.[333] That aside, they can check judges. Unlike judges, they face few, if any, political pressures to decide cases a particular way. No one will run negative ads or threaten to withhold campaign funding unless they render a certain verdict. Though it is less common to think of juries as another check in our government, many of the Founding Fathers expected them to serve that function.[334]

If we believe that juries are important to check politicized judicial decisionmaking, then it follows that states should adopt pleading standards that allow juries to decide more cases, not fewer.

C. *The Structural Case for Rejecting Federal Pleading Standards*

This Article has so far tried to put states at the center of the debate over pleading standards by focusing on their unique constitutional provisions and highlighting why federal pleading standards should not inform how states approach their own.

But one can also argue that state courts should compensate for federal courts raising pleading standards by lowering them. This view, most famously espoused by Justice Brennan, envisions state courts as a backstop for federal courts when those federal courts decide to less aggressively enforce rights guarantees. In his 1977 *Harvard Law Review* article, Justice Brennan lamented recent Supreme Court decisions he saw as undermining constitutional rights.[335] These decisions, he said, "constitute[d] a clear call to state courts to step into the breach."[336] Drawing on Justice Brennan's framework, we might think of access to justice as a seesaw. If it goes down on the federal end, the state end should rise up in response.

In fact, it might be even more important for state courts to open their doors to litigants. That is because they hear the overwhelming majority of cases. In 2017, Americans filed about 16 million civil cases in state court,[337] but just 292,000 cases were filed in federal court.[338] If we accept, as many commentators do, that federal pleading standards have negative consequences on access to justice in federal courts, they would have catastrophic consequences if applied at the state level.

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333. *Id.* at 31–35.

334. *Id.* at 26.

335. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

336. *Id.* at 503.

337. CT. STAT. PROJECT, *supra* note 9, at 2.

338. *See* FEDERAL CASELOAD STATISTICS, *supra* note 9.

If state courts should broaden court access when federal courts narrow it, state courts should decline to apply federal pleading standards.

D. *A Note of Caution?*

We must acknowledge that applying a more lenient pleading standard comes with a potential downside from an access to justice standpoint: flooding the legal system with cases of questionable merit. What would be worrisome is if more of these cases survive a motion to dismiss and consume valuable time and resources, which would take away from the attention meritorious cases receive. While I take this concern seriously, I do not believe it supports states embracing federal plausibility pleading for three reasons. First, civil procedure has other ways besides pleading standards to filter out meritless claims. Many states, for example, have versions of Rule 11,[339] which allows courts to sanction lawyers for frivolous court filings.[340] Second, plausibility pleading might consume just as many resources as a lenient pleading standard does.[341] Finally, as noted before, some state courts have indicated that they didn't need to adopt *Twombly*/*Iqbal* because prevailing (more lenient) pleading standards hadn't led to an unreasonable influx of cases.

CONCLUSION

For too long, the debate about proper pleading standards has ignored states. This oversight is particularly problematic for two reasons. First, while there is no sign that federal courts will retreat from recent pleading decisions, whether states should adopt them is a live issue state courts have confronted with insufficient scholarly guidance. Second, state courts hear many more cases each year than federal courts do, which means that many more litigants will be affected by how states choose to weigh in on this debate.

For many states, their jury trial guarantees compel them to reject federal pleading standards. As Maryland, Massachusetts, Kansas, and California demonstrate, states that word their jury trial guarantees differently and have very different histories generally share one thing in common: federal pleading standards are unconstitutional.

That aside, there remains an equally compelling reason for states not to adopt federal pleading standards: their unique role in America's constitutional system. States by and large guarantee litigants a right to a remedy and open courts, make juries more accessible than they are at the federal level, and select their judges in such a way that having juries hear more cases rather than fewer is necessary to serve as an adequate check on judges. With federal pleading standards risking court access for so many litigants, states adopting those

339. *See, e.g.*, N.C. GEN. STAT. § 1A-1, r. 11 (2021).

340. Danielle Kie Hart, *Still Chilling After All These Years: Rule 11 of the Federal Rules of Civil Procedure and Its Impact on Federal Civil Rights Plaintiffs after the 1993 Amendments*, 37 VAL. U. L. REV. 1, 9 (2002).

341. *See supra* Section III.F.

standards could completely shut the courthouse door for too many Americans. These considerations might individually justify states rejecting federal pleading standards. Cumulatively, they require it.