

Why Summary Judgment Is Still Unconstitutional: A Reply to Professors Brunet and Nelson

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ABSTRACT: As I have stated, summary judgment is unconstitutional. Professors Edward Brunet's and William Nelson's Symposium responses to my article Why Summary Judgment Is Unconstitutional, previously published in the Virginia Law Review, confirm that summary judgment is unconstitutional. No procedure analogous to summary judgment existed under the English common law in 1791, the common law that governs the constitutionality of modern procedures that affect the civil jury trial right. Misreading and ignoring the governing common law, Professor Brunet offers a different type of trial under the common law, a non-jury trial—the trial by inspection—as the common law analogy to summary judgment. A look at this trial shows that, if analogous to anything in modern litigation, this trial has similarity to judicial notice, a far cry from summary judgment. Professor Brunet also incorrectly attempts to compare summary judgment to the common law demurrer to the evidence, again ignoring the governing case law. Noted legal historian William Nelson agrees with my analysis that no common law analogy to summary judgment exists. Professor Nelson, however, rejects the Supreme Court's own test that the English common law governs the constitutionality of modern procedures that affect the jury trial right. I conclude that the substance of the common law should continue to govern the constitutionality question. The Constitution explicitly imposes this "common law" check on the power of the judiciary over the power of the jury. Under the substance of this governing common law, summary judgment is unconstitutional.

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INTRODUCTION

As I have stated, summary judgment is unconstitutional. Professors Brunet's¹ and Nelson's² responses to my article *Why Summary Judgment Is Unconstitutional*³ confirm my finding that summary judgment is unconstitutional. Here I address their responses and offer where I think this discussion should go.

In my article, I followed the approach adopted by the Supreme Court for the assessment of the constitutionality of a modern procedure that affects the jury trial right under the Seventh Amendment.⁴ A modern procedure is constitutional if the substance of the English common law jury trial in 1791 is satisfied.⁵ In other words, the constitutionality test is flexible, not requiring rigid adherence to the particular procedures in effect in 1791, while requiring that the substance of the common law jury trial be preserved.⁶ Accordingly, in my article, I examined the English common law procedures that affected the jury trial right, including the demurrer to the pleadings, the demurrer to the evidence, the nonsuit, the special case, and the new trial.⁷ In addition to showing that each of those procedures contrasted with summary judgment, I also derived the substance or core principles of those common law procedures and demonstrated that summary judgment did not satisfy the substance or core principles of the common law.⁸

Both Professors Brunet and Nelson agree that the common law in 1791 governs the analysis of the constitutionality of summary judgment.⁹ Professor Nelson also agrees with me that "a modern judge who is committed to interpreting the Seventh Amendment as its drafters and ratifiers would have applied it should deem summary judgment and the *Twombly* motion to dismiss unconstitutional."¹⁰ Professor Nelson himself has shown that juries in Massachusetts in the Revolutionary Era decided law and fact and that juries in several other states also decided both law and fact.¹¹

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1. Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625 (2008).
 2. William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653 (2008).
 3. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139 (2007).
 4. *Id.* at 146–47.
 5. *Id.*
 6. *Id.*
 7. *Id.* at 148–58.
 8. Thomas, *supra* note 3, at 158–60.
 9. Brunet, *supra* note 1, at 1627–30; Nelson, *supra* note 2, at 1656 ("The Seventh Amendment is about as clear as a constitutional provision ever gets.").
 10. Nelson, *supra* note 2, at 1658.
 11. *Id.* at 1655–56.

Moreover, juries had much power under the common law in England.¹² Despite this research, Professor Nelson seems to argue that the Seventh Amendment is irrelevant today.¹³ In Professor Nelson's view, at most, the Seventh Amendment should evolve to meet modern-day needs, and summary judgment must be constitutional by this necessity.¹⁴

Professor Brunet attempts to show that, in my analysis of the common law, I (and now presumably also Professor Nelson) have missed the relevance of something that existed under the common law—an English non-jury trial referred to as the trial by inspection or trial by examination. He argues that this trial has similarity to summary judgment such that summary judgment is constitutional.¹⁵ When the trial by inspection is described, one sees quickly, however, that if there is any modern analogy to trial by inspection, the obvious analogy would be judicial notice, a procedure that we all well know is not comparable to summary judgment. Professor Brunet also argues that the demurrer to the evidence has similarity to summary judgment such that summary judgment is constitutional.¹⁶ In his discussion of the demurrer to the evidence, he fails to address my treatment of the demurrer to the evidence in *Why Summary Judgment Is Unconstitutional*, including my discussion of the definitive eighteenth century case on the demurrer to the evidence, *Gibson v. Hunter*. In that case, the House of Lords stated that the demurrer to the evidence was rare because the demurring party accepted as true all of the other party's evidence, including that which was implausible, and the court decided whether a claim existed under those implausible and plausible facts.¹⁷ This is not summary judgment. Under summary judgment, a court instead looks at both parties' evidence and decides whether a reasonable jury could find for the nonmoving party, examining only inferences that a judge deems reasonable.¹⁸ Finally, Professor Brunet attempts to show that the goals of the English courts included efficiency and competition and as a result it follows that summary judgment is constitutional.¹⁹ Professor Brunet's basis for these general propositions ignores the substance of the common law jury trial, which sharply conflicts with modern summary judgment.²⁰ Instead, the substance of the common law jury trial demonstrates that any such efficiency and

12. *Id.* at 1657; see JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 9–16, 25–44 (2006) (discussing the types of cases tried by juries in eighteenth-century England and the jury's power to decide questions of law).

13. Nelson, *supra* note 2.

14. *Id.*

15. Brunet, *supra* note 1, at 1630–41.

16. *Id.* at 1642–48.

17. *Id.*; *Gibson v. Hunter*, (1793) 126 Eng. Rep. 499, 509–10 (H.L.).

18. Thomas, *supra* note 3, at 145–46.

19. Brunet, *supra* note 1, at 1648–50.

20. *Id.*

competition at the time of the founding did not compromise on jury power.²¹

Indeed, the jury is a separate constitutional actor, the importance of which the Founders recognized by the adoption of the Seventh Amendment in 1791. The Seventh Amendment explicitly limited the cases that the judiciary could hear and the manner in which the judiciary could be involved in the cases preserved for juries. A flexible common law, the law which Professors Brunet, Nelson, and I agree governs the jury trial right embodied in the Seventh Amendment, must preserve the jury trial right, not permit the judiciary or other constitutional actors to eliminate the power of the jury, a constitutional actor that cannot preserve its own power.

I. SUMMARY JUDGMENT IS UNCONSTITUTIONAL

In my initial contribution to this Symposium, *The Unconstitutionality of Summary Judgment: A Status Report*,²² and in *Why Summary Judgment Is Unconstitutional*,²³ I have extensively discussed my argument that summary judgment is unconstitutional. In brief, the text of the Seventh Amendment states that “[i]n Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”²⁴ I argued that summary judgment is unconstitutional for two reasons. There was no procedure analogous to summary judgment.²⁵ In addition, the substance of the common law jury trial procedures contrasts with summary judgment.

First . . . under the common law, the jury or the parties determined the facts. One party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without a determination of the facts by the parties or the jury, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. Where the court decided that the evidence was insufficient to support the verdict, the court would order a new trial. Another jury would determine

21. Thomas, *supra* note 3, at 145–60.

22. Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (2008).

23. Thomas, *supra* note 3.

24. U.S. CONST. amend. VII.

25. Thomas, *supra* note 3, at 145–58; see also Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687, 704–48 (2004) (discussing common law procedures).

the facts and decide which party won. The court itself would never determine who should win if it believed the evidence was insufficient. Third, a jury would decide a case with any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.²⁶

Summary judgment contrasts with the substance of the common law because under summary judgment, contrary to the common law, a court examines the evidence of both parties and decides whether a reasonable jury could find for the nonmoving party.²⁷ Under the common law, to avoid a jury trial, a party was required to accept the allegations or conclusions of the opposing party's evidence, including the implausible allegations or conclusions, and the court must find no claim under those allegations or conclusions.²⁸ A court could decide the sufficiency of the evidence, considering both parties' evidence, only after a jury trial, and even then if the court decided that the evidence was insufficient, the court could order only a new trial, *not judgment*.²⁹

II. REPLY TO PROFESSOR BRUNET

First, I address Professor Brunet's response to my argument that summary judgment is unconstitutional. Professor Brunet begins with the admission that "the common law lacked a transsubstantive procedure exactly like summary judgment."³⁰ After this admission, Professor Brunet attempts to transform the trial by inspection into such a transsubstantive rule of the common law.³¹ To allow him to do this would be to ignore the English common law, which, indeed, as I have stated—and as noted legal historians Professors Nelson and Oldham acknowledge—finds no analogy to summary judgment.³²

I applaud Professor Brunet, a noted scholar on the civil procedure aspects of summary judgment,³³ for entering this important discussion on the constitutionality of summary judgment. Over the past several years, I

26. Thomas, *supra* note 3, at 147–48, 158–60; Thomas, *supra* note 25, at 748–54.

27. Thomas, *supra* note 3, at 158–60.

28. *Id.*

29. *Id.*

30. Brunet, *supra* note 1, at 1630.

31. *Id.* at 1630–41.

32. Thomas, *supra* note 3, at 145–60; Nelson, *supra* note 2, at 1657; *cf.* OLDHAM, *supra* note 12, at 10 (“[A]lmost all cases in the common-law courts were tried before juries.”); *id.* at 15 (“The Seventh Amendment historical test has become an American legal fiction in application, since many more things were lodged with juries in England in 1791 than modern American courts, including the Supreme Court, are prepared to acknowledge.”).

33. EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE (3d ed. 2006).

have studied the English common law procedures that affected the jury trial in 1791.³⁴ It is a worthwhile endeavor to research these issues. However, Professor Brunet misreads the history.

So let's take a look at the "trial by inspection," which Professor Brunet argues "bears a remarkably close resemblance to summary judgment . . . [which] justifies the conclusion that a summary-judgment procedure existed historically in or around 1791."³⁵ "Trial by inspection," as indicated by its name, was one of seven types of "trial" in civil cases.³⁶ The "trial by jury" was another.³⁷ In other words, some cases did not go to jury trials, and trial by inspection was a type of trial by which there was no jury.³⁸

With this distinction between trial by inspection and trial by *jury* understood, under the trial by inspection, judges would "upon the testimony of their own senses" through "ocular demonstration or other irrefragable proof" determine certain "obvious" facts for purposes of efficiency.³⁹ Where a court would decide an issue upon its senses, "the law depart[ed] from it's [sic] usual resort, the verdict of twelve men."⁴⁰ If the senses alone were incapable of reaching a definite conclusion, the court would empanel a jury to determine such "dubious facts."⁴¹ Trial by inspection was thus used in the following narrow subset of circumstances, which were obvious upon the testimony of judges' own senses.⁴²

First, trial by inspection occurred when the question was whether a person was of sufficient age, "[a]s in [the] case of a suit to reverse a fine for non-age of the cognizor,"⁴³ or to set aside a statute⁴⁴ or recognizance⁴⁵

34. Thomas, *supra* note 3 (analyzing the English common law procedural devices); Thomas, *supra* note 25 (same); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) [hereinafter Thomas, *Remittitur*] (same); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) [hereinafter Thomas, *Motion to Dismiss*] (same).

35. Brunet, *supra* note 1, at 1630–31.

36. 3 WILLIAM BLACKSTONE, COMMENTARIES *330.

37. *Id.* The seven species of trial were trial by jury, trial by inspection, trial by record, trial by certificate, trial by witness, trial by wager of battle, and trial by wager of law. *Id.*

38. *Id.*

39. *Id.* at *331.

40. *Id.* at *331–32.

41. 3 BLACKSTONE, *supra* note 36, at *331.

42. *See id.* at *331–33 (listing these circumstances); 7 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 524–25 (Anthony Hammond & Thomas Day eds., 5th ed. 1826) (discussing when the trial by inspection should and should not be used); *see also* 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2555 (3d ed. 1940) (stating that "the instances given being non-age of an infant, life and identity of a party alleged to be dead, idiocy on appeal to the chancellor, mayhem [e.g. whether the person is maimed], and a date as appearing in the almanac").

43. OXFORD ENGLISH DICTIONARY 283 (2d ed. 1989) ("The cognizor is the party who levies a fine of land.").

44. *Id.* at 1891 ("The creditor could hold land in case of default.").

entered into by an infant.”⁴⁶ In this circumstance, the sheriff would bring the person in to the court to determine “by the view of his body by the king’s justices, whether he be of full age or not.”⁴⁷ If this was not satisfactory to answer the question, other proof on the issue could be taken, including the person’s testimony and relatives’ testimony.⁴⁸

Second, trial by inspection could occur to determine questions of death such as when “a defendant pleads in abatement of the suit that the plaintiff is *dead*, and one appears and calls himself the plaintiff, which defendant denies.”⁴⁹

Third, trial by inspection could occur for determinations of idiocy.⁵⁰ In the past, all determinations of idiocy had been referred by the King to committees.⁵¹ This was changed because the King benefited from that determination by being able to use the land of the person who was deemed an idiot until that person died.⁵² Thus, the rule became instead that the chancellor in the high court of chancery would determine whether a man was an idiot.⁵³ However, if a writ *de idiota inquirendo* was issued, a jury would try the question of whether a person was an idiot.⁵⁴ Moreover, if a person was deemed an idiot, by a jury or otherwise, he could come to the chancery to have a previous determination deemed void.⁵⁵ By use of its senses, a court could determine whether a person was not an idiot “if he hath any

45. *Id.* at 1527 (“A bond or obligation entered into before court or magistrate by which person agrees to perform some act or observe some condition.”).

46. 3 BLACKSTONE, *supra* note 36, at *332; *see also* *Hearle v. Greenbank*, (1749) 27 Eng. Rep. 1043, 1043–44 (Ch.) (giving an example of a court determining the age of an infant); *In re Abbot of Strata Mercella*, 9 Co. Rep. 24, 30 (explaining that “there the Age shall be tried by the . . . Inspection of the Justices . . .”); 1 Br. & Gold 150; *Wilkinson v. Bolton*, 1 Keb. 891; 27 Eng. Rep. 1043 (1 Vesey Senior 298).

47. 3 BLACKSTONE, *supra* note 36, at *332.

48. *Id.*; *Ex parte Roberts*, (1743) 26 Eng. Rep. 806, 806–07 (Ch.).

49. 3 BLACKSTONE, *supra* note 36, at *332; *The Case of Abbot of Strata Mercella*, (1591) 9 Co. Rep. *24a, *30b, 77 Eng. Rep. 765, 776 (K.B.) (“[I]f the . . . defendant pleads that the husband is living, the trial shall not be by jury, but by the Justices, upon proofs made before them . . .”).

50. 3 BLACKSTONE, *supra* note 36, at *332; *Abbot of Strata Mercella*, 9 Co. Rep. at *31a, 77 Eng. Rep. at 777 (“[H]e may be examined, if he be ideot or not . . .”). The chancellor, the judge who presided in the high court of chancery, was the guardian of idiots, lunatics, and infants. 3 BLACKSTONE, *supra* note 36, at *47. The chancery had two courts, the court of common law and the court of equity. *Id.* “[O]riginal writs that pass[ed] under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like, . . . issue[ed]” out of the common-law court. *Id.* at *48–49.

51. 3 BLACKSTONE, *supra* note 36, at *427.

52. *Id.*

53. *Id.*

54. 1 *id.* at *293.

55. 3 *id.* at *332.

glimmering of reason, so that he can tell his parents, his age, or the like common matters.”⁵⁶ A court could thus decide this obvious question.

Fourth, trial by inspection could occur on appeals of mayhem where the court was asked to determine whether there was “mayhem or no mayhem,” and this could be done with the assistance of doctors.⁵⁷ Blackstone defines mayhem as “depriving another of the use of a member proper for his defense in fight.”⁵⁸ He further defines when mayhem occurs and when it does not.⁵⁹ The defensive members include “not only arms and legs, but a finger, any eye, and a fore-tooth, and also some others. But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law as they can be of no use in fighting.”⁶⁰ In other words, a jury could make a determination that mayhem had occurred, but because mayhem was so specifically defined by these obvious determinations, on appeal a court could also determine if there had been mayhem or not.

Fifth, trial by inspection could occur

in an action of trespass for maihem, [in which] the court, (upon view of such maihem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may increase damages upon their own discretion.⁶¹

Here, the jury tried the issue and the court could increase the damages found by the jury.⁶² This was a very special circumstance in which there was a supported finding of mayhem—that a person could not defend himself—and judges were permitted to *increase* the damages.⁶³ It should be noted that despite this fact of the existence of additur—increasing a jury verdict—the Supreme Court has stated that additur is unconstitutional and that remittitur—the reduction of a jury verdict, which did not exist at common law—is constitutional.⁶⁴

Sixth, trial by inspection could also occur in actions for atrocious battery, in which the judges, inspecting the injury, could also use judicial discretion to increase the damages.⁶⁵ Similar reasoning applies to mayhem

56. 1 BLACKSTONE, *supra* note 36, at *293.

57. 3 *id.* at *332–33; 2 Roll. Abr. 578 (Blackstone states that appeals of mayhem were abolished by statute at the time he wrote his commentaries, citing 59 Geo. III, ch. 46).

58. 3 BLACKSTONE, *supra* note 36, at *121.

59. *Id.*

60. *Id.*

61. *Id.* at *333 (citing *Angell v. Shatterton*, (1663) 1 Sid. 108).

62. *Id.* at *333.

63. 3 BLACKSTONE, *supra* note 36, at *121, *333.

64. Thomas, *Remittitur*, *supra* note 34, at 747–50, 764–84.

65. 3 BLACKSTONE, *supra* note 36, at *333; *Austin v. Hilliers*, (1660) 145 Eng. Rep. 521, 521 (Court of Exchequer) (stating that mayhem must be alleged in the declaration for the court to increase the damages and the court can then increase the damages “upon view of the mayhem”

and atrocious battery; these were very special circumstances regarding the physical impairment of a person, something that was considered very important at the time, and judges could *increase* damages upon their view of the injury.⁶⁶

Seventh, trial by “inspection of the almanac” could occur to “ascertain any circumstances relative to a particular day past,” such as examining an almanac to determine the obvious fact that a particular day fell on a Sunday and, as a result, a judgment was incorrectly given on a Sunday.⁶⁷

Thus, these were trials by which judges would decide these matters “upon the evidence of their senses” to avoid unnecessary jury determinations of these obvious questions of the senses.⁶⁸ Even with respect to this limited set of determinations, Blackstone made clear that “the judges, if they conceive a doubt, may order it to be tried by jury.”⁶⁹ Trial by inspection disappeared with the abolition of real actions, the actions regarding real property where many of these matters of obviousness had occurred.⁷⁰ Indeed, real actions had “pretty generally [been] laid aside in practice” by the mid-to-late eighteenth century,⁷¹ which further shows the limited use of trial by inspection at the time when the Seventh Amendment was adopted.

A judge does not use his senses to decide summary judgment motions. In making a decision upon a motion for summary judgment, a judge examines depositions, documents, and other forms of evidence regarding past events to determine the sufficiency of the evidence.⁷² In these decisions, the judge determines the strengths and weaknesses of inferences—determinations that are not made through the testimony of the judge’s senses because such inferences are not objects of sense. Thus, contrast trial by inspection, under which a court decides a specific obvious fact by using a judge’s senses (e.g., in looking at a person or an almanac), with summary judgment, under which a judge does not rely on his senses to determine the weaknesses or strengths of inferences (e.g., in determining whether there is sufficient evidence of discrimination).

If there is any appropriate modern analogy to trial by inspection, it would be judicial notice, where an adjudicative fact given to a jury under

and further stating that if battery is alleged in the declaration, the court also can increase damages); *see also* FRANCIS BULLER, AN INTRODUCTION TO THE LAW OF TRIALS AT NISI PRIUS 21 (London, A. Strahan & W. Woodfall for R. Pheney 5th ed. 1788) (citing *Burton v. Baynes*, 94 Eng. Rep. 852, 852 (Court of Common Pleas), where the judge increased damages upon inspection from eleven pounds, fourteen schillings to fifty pounds).

66. 3 BLACKSTONE, *supra* note 36, at *120–21.

67. *Id.* at *332–33; *Page v. Faucet*, (1591) 78 Eng. Rep. 482, 482 (K.B.) (reversing the judgment because of the date “found by the examination of the almanacks”).

68. ALEXANDER MARTIN, CIVIL PROCEDURE AT COMMON LAW 302 (1905).

69. 3 BLACKSTONE, *supra* note 36, at *333.

70. MARTIN, *supra* note 68, at 302.

71. 3 BLACKSTONE, *supra* note 36, at *117–18, *200.

72. Thomas, *supra* note 3, at 145–46.

normal circumstances is instead decided by a judge because of its obviousness. Judicial notice, like the trial by inspection, is for purposes of efficiency.⁷³ Under judicial notice, “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”⁷⁴ Under judicial notice, like trial by inspection, courts take judicial notice of “obvious . . . facts,” such as the capitals of states and the fact that Father’s Day occurred . . . on June 17, 1979.⁷⁵ Thus, *judicial notice* would be the closest analogy to trial by inspection. Indeed, taking Professor Brunet’s attempted comparison of summary judgment and trial by inspection to its logical conclusion would result in the unimaginable attempted comparison of judicial notice to summary judgment.

Additionally, one could easily argue that determinations of non-age, idiocy, and death—many of the categories of trial by inspection—are now matters of public record and, therefore, of no need for a jury determination.

I note that Professor Brunet briefly also mentions the demurrer to the evidence, one of the procedures that I analyzed thoroughly in my articles *Why Summary Judgment Is Unconstitutional*⁷⁶ and *The Seventh Amendment, Modern Procedure, and the English Common Law*.⁷⁷ He incorrectly describes the demurrer to the evidence as a procedure whereby a court could dismiss a case for insufficiency of evidence.⁷⁸ His support is previous Supreme Court jurisprudence,⁷⁹ which I previously showed does not accurately describe the

73. GLEN WEISSEBERGER & JAMES J. DUANE, WEISSEBERGER’S FEDERAL EVIDENCE § 201.1 (5th ed. 2006).

74. FED. R. EVID. 201(b).

75. See, e.g., *Lennon v. Metro. Life Ins. Co.*, 504 F.3d 617, 623 (6th Cir. 2007) (taking judicial notice that one is more likely to be involved in a fatal automobile crash as blood-alcohol levels rise); *United States v. Howard*, 381 F.3d 873, 880 n.7 (9th Cir. 2004) (taking judicial notice of the effects of certain prescription drugs); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991) (stating that it is appropriate to take judicial notice of the content of documents filed with the SEC); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (taking judicial notice of a prior guilty plea); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1140 (7th Cir. 1987) (stating that the fairness of media coverage was “not the kind of undisputed ‘fact[.]’ that is proper for judicial notice”); *O’Neill v. U.S. Dep’t of Justice*, No. 06C0671, 2007 U.S. Dist. LEXIS 37807, at *5 (E.D. Wis. May 22, 2007) (refusing to take judicial notice of evidence that was authenticated by the plaintiff, rather than an obvious fact or publicly available document); *Mefer S.A.R.L. of Paris, Fr. v. Naviagro Mar. Corp.*, 533 F. Supp. 337, 346 (S.D.N.Y. 1982) (taking judicial notice of the fact that “high tides occur twice every day”); *Allen v. Allen*, 518 F. Supp. 1234, 1235 n.2 (E.D. Pa. 1981) (taking judicial notice of a date from an almanac).

76. Thomas, *supra* note 3, at 150–54

77. Thomas, *supra* note 25, at 709–22.

78. Brunet, *supra* note 1, at 1643.

79. See *id.* at 1642–48.

demurrer to the evidence.⁸⁰ It is noteworthy that Professor Brunet fails to address any English common law cases on the subject, including the definitive case on the subject, *Gibson v. Hunter*, which I highlighted in my articles.⁸¹ *Gibson*, in unequivocal words, stated that under the demurrer to the evidence, the facts and conclusions—even the improbable facts and conclusions—were to be admitted and the other party's evidence could not be considered.⁸² Clearly, this procedure is not analogous to summary judgment.⁸³

Finally, Professor Brunet appears to argue that some overriding purpose of efficiency and competition under the common law requires the constitutionality of summary judgment.⁸⁴ It is true that some procedures under the common law were for purposes of efficiency and some were not.⁸⁵ Also, in some circumstances, courts did compete for cases. Regardless, by an examination of the common law procedures that affected the jury trial, it is obvious that the judiciary was permitted to decide only certain issues, regardless of efficiency and competition, and none of those procedures resembled summary judgment in any way.⁸⁶

Unfortunately, Professor Brunet has attempted to improperly analogize the trial by inspection and the demurrer to the evidence to summary judgment. The common law is clear. The only procedure that had any resemblance to summary judgment was the new trial that occurred after a jury trial.⁸⁷ A new jury trial was ordered if the court found the evidence insufficient.⁸⁸ Summary judgment did not exist under the common law and it indeed conflicts with the common law.⁸⁹

III. REPLY TO PROFESSOR NELSON

Let me now turn to Professor Nelson's arguments. He argues that the purpose of the Seventh Amendment supports the constitutionality of summary judgment.⁹⁰ Professor Nelson acknowledges that the common law has no analogy to summary judgment, nor to the motion to dismiss (under

80. Thomas, *supra* note 25, at 715–22.

81. Thomas, *supra* note 3, at 151; Thomas, *supra* note 25, at 710–12.

82. See Thomas, *supra* note 3, at 151 (quoting *Gibson*); Thomas, *supra* note 25, at 710–12 (same).

83. See Thomas, *supra* note 3, at 150–54 (discussing how the demurrer differs from summary judgment).

84. Brunet, *supra* note 1, at 1648–50.

85. 3 BLACKSTONE, *supra* note 36 (describing some procedures that were helpful to efficiency but also describing many others, the goal of which had nothing to do with efficiency).

86. See Thomas, *supra* note 3, at 148–60.

87. See *id.* at 157–58 (describing the new trial).

88. *Id.*

89. Thomas, *supra* note 3.

90. He also states that the text supports this result but does not explain how the text actually supports his reading.

the new standards in *Twombly*).⁹¹ He argues, however, that the common law in 1791 should not govern whether summary judgment or the motion to dismiss is unconstitutional.⁹² Professor Nelson compares the Seventh Amendment to the Contracts Clause in Article I, Section 10, which he states has appropriately become “largely a dead letter.”⁹³ Professor Nelson points out that the Seventh Amendment was adopted due to antifederalist concerns that federal judges might ignore jury findings.⁹⁴ Because he believes that the policy behind the Seventh Amendment—that of protecting “local self-rule”—no longer exists,⁹⁵ the jury trial is “a legal siding”⁹⁶ that should not be permitted to cause the “wreck” that would result from eliminating summary judgment and the new motion to dismiss.⁹⁷ Professor Nelson discusses the need for

[e]ntrepreneurs . . . to know the background norms against which they are being asked to invest resources; otherwise, they cannot negotiate the terms of investment and will refuse to invest. Investors also need assurances that the rule of law will preclude discrimination against them on account of their being outsiders. Finally, cross-jurisdictional uniformity of rules is useful in reducing the transaction costs of investment and thereby facilitating its flow.⁹⁸

He concludes this line of thought to state that “juries . . . are not tightly bound to the rule of law” and therefore will not be good for entrepreneurs and investors.⁹⁹ Professor Nelson thus argues that the reason for the Seventh Amendment—the protection of local self-rule—no longer exists, and the jury cannot adequately protect corporate interests. For these reasons, the common law in 1791 should not govern what procedures are constitutional under the Seventh Amendment, and accordingly, summary judgment under an evolving common law is constitutional.¹⁰⁰

91. Nelson, *supra* note 2, at 1657.

92. Nelson, *supra* note 2.

93. *Id.* at 1662.

94. *Id.* at 1656.

95. *Id.* at 1664.

96. *Id.* at 1662.

97. Nelson, *supra* note 2, at 1662.

98. *Id.* at 1660.

99. *Id.*

100. Professor Nelson analogizes that law for judges is either the caboose or engine of a train. If law is the caboose, judges play the role “to keep the caboose on the same track as the train.” Nelson, *supra* note 2, at 1654. If law is the engine, judges play the role to “determine the direction that the train ultimately will take.” *Id.* In applying this paradigm, Professor Nelson argues that judges should decide which cases should be tried to juries, which “are not tightly bound to the rule of law.” *Id.* at 1660. Without agreeing with Professor Nelson’s characterization of juries, Professor Nelson fails to recognize that judges in fact act as social

Professor Wolfram performed an extensive study of the history behind the ratification of the Seventh Amendment.¹⁰¹ Professor Wolfram's conclusions regarding the reasons for the adoption of the Seventh Amendment conflict with Professor Nelson's view of the Seventh Amendment. Professor Wolfram goes beyond the protection of local self-rule as the reason for the Seventh Amendment.¹⁰² He gives the reasons as follows: "the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and oppressive judges."¹⁰³ The "weighty premise" behind each of these arguments "was to achieve results from jury-tried cases that would not be forthcoming from trials conducted by judges alone."¹⁰⁴ Moreover, Congress could not or would not protect the jury trial and as a result the jury trial right must be constitutionalized.¹⁰⁵

Professor Nelson should recognize these other purposes for the Seventh Amendment, including the protection generally against judges, discussed more below, and Congress.¹⁰⁶ Also, it is certainly subject to much debate whether Professor Nelson is correct that protecting local self-rule is no longer an important policy. Certainly, as recognized by Professor Nelson (and as seen in election results in different states), people, including as constituted in juries, "brandish the values of the local communities from which they are drawn."¹⁰⁷ Regardless, courts' and academics' opinions of whether a constitutional provision is irrelevant should be viewed with extreme skepticism. There is a process by which the Constitution can be amended.¹⁰⁸ If it is not amended, the constitutional provision stays in force.

Moreover, Professor Nelson's and indeed the Court's concerns about corporate interests should not govern the interpretation of the Seventh Amendment. In the recent cases of *Bell Atlantic Corp. v. Twombly*¹⁰⁹ and

engineers when under summary judgment they decide to take cases away from juries and decide the cases themselves.

101. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973) (examining the history of the Seventh Amendment and discussing the purposes behind it).

102. *See id.* at 670–71.

103. *Id.*; *see also id.* at 673–710 (discussing these reasons in depth).

104. *Id.* at 671.

105. *Id.* at 664–65, 671.

106. *See* Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767 (2005).

107. Nelson, *supra* note 2, at 1660.

108. U.S. CONST. art. V.

109. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966–67, 1971 n.12 (2007); *see also* Thomas, *Motion to Dismiss, supra* note 34 (discussing *Twombly*).

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,¹¹⁰ the Court, like Professor Nelson, focused on the interests of corporations, particularly the cost of discovery, and did not embrace originalism to decide the proper scope of the power of the judiciary over the jury.

My argument against this type of reading of the Constitution is based on an examination of the Constitution as a whole. In *Judicial Modesty and the Jury*, I argued that there are three inherent structures of the Constitution.¹¹¹ The first structure is the separation of powers between the judiciary, the legislature, and the executive.¹¹² The second structure is federalism, the division of powers between the federal government and the states.¹¹³ One wonders: what is the third? This is the problem. The third structure inherent to the Constitution is the division of power between the judiciary and the jury.¹¹⁴ Because this division of power between the judiciary and jury has not been recognized like the divisions of power between the branches and between the federal government and the states, this division of power has not been protected as it should be. So, the jury has never been recognized formally as a constitutional actor, like the judiciary, the legislature, the executive, and the states.¹¹⁵

The Founders, however, recognized the importance of this division of power. John Adams stated:

As the Constitution requires that the popular branch of the legislature should have an absolute check, so as to put a peremptory negative upon every act of the government, it requires that the common people, should have as complete a control, as decisive a negative, in every judgment of a court of judicature.¹¹⁶

In the *Federalist Papers*, Alexander Hamilton discussed the role of the jury. He argued that the civil jury could be stated to be “a security against corruption” of judges.¹¹⁷ He stated that the judiciary and the civil jury were called “a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions.”¹¹⁸

110. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007); see also Thomas, *Motion to Dismiss*, *supra* note 34 (discussing *Tellabs*).

111. Thomas, *supra* note 106, at 770–82.

112. *Id.* at 772–75.

113. *Id.* at 775–79.

114. *Id.* at 779–82.

115. *Id.*

116. Thomas, *supra* note 106, at 780 (quoting 2 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 253 (Charles Francis Adams ed., Boston, Little, Brown & Co. 1850)).

117. *Id.* (quoting THE FEDERALIST NO. 83, at 434 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001)).

118. *Id.* (quoting THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 117, at 434).

Despite the Founders' recognition of the jury as a separate, important constitutional actor, the Court has not similarly recognized the jury. This lack of formal recognition by the Court of the division of power between the jury and the judiciary has resulted in the grant of power to the more powerful of these two actors, the judiciary, through procedures unknown under the English common law.¹¹⁹ These procedures include summary judgment and the new motion to dismiss.

Indeed, the division of power between the judiciary and the jury has an odd dynamic. The jury itself has no ability to protect its power, unlike, for example, the executive, the legislature, and the states.¹²⁰ Despite court rulings, the executive, the legislature, and the states can continue to do business.¹²¹ The jury, on the other hand, cannot do business if the judiciary takes away its power.¹²²

I argued that the judiciary should act modestly in its exercise of its power over the jury because of this dynamic.¹²³ This dynamic is such that:

[A]ny review of the power of the jury involves the review of the judiciary of its own power in comparison to the jury. As such, the judicial review of the power of other constitutional actors is unlike the judicial review of the power of the jury. If the jury is interpreted to have power under the Constitution, the judiciary generally has less power. Also, while the judiciary's review of the power of other constitutional actors often takes place after the branch or the states act in the first instance, the judiciary can prevent the jury from acting at all. Moreover, the jury, unlike other constitutional actors, does not have any power to counter impingement by the judiciary upon its authority and other constitutional actors also do not have power to counter fully any impingement on the jury's power.¹²⁴

As a result, I have argued that the judiciary should act modestly with respect to its interpretation of the power of the jury.¹²⁵ I then state that the judiciary has not done so with respect to the civil jury.¹²⁶

Acting modestly would entail

a narrow construction of the judiciary's power in relationship to the other constitutional actor. Such an interpretation of the judiciary's power as a narrow construction of its own power in

119. *Id.* at 781–82.

120. *Id.*

121. Thomas, *supra* note 106, at 790–94.

122. *Id.*

123. *Id.*

124. *Id.* at 790–91.

125. *Id.* at 790–811.

126. Thomas, *supra* note 106, at 790–804.

relationship to the other constitutional actor would, I argue, involve an examination of the text of the Constitution. Wherever the scope of the judiciary's constitutional power is possibly ambiguous, the judiciary would narrowly construe its own power in favor of power to the other actor.¹²⁷

In the context of the Seventh Amendment, this would mean that the English common law at a set point in time—in 1791 when the Seventh Amendment was adopted—would apply. If the common law evolved—in other words, could be different than what it was in 1791—judges could opt to give themselves more power, effectively rendering the Seventh Amendment a nullity.¹²⁸

In contrast to the Seventh Amendment, in the context of the Sixth Amendment, the judiciary has acted modestly where the judiciary in a series of cases has given the jury the power to decide facts that determine sentencing.¹²⁹ The powers of a criminal jury include deciding elements of a crime and deciding fact and law (without judicial review).¹³⁰ Also, in a criminal case, “a judge may not direct a verdict for the government nor . . . overturn an acquittal nor . . . require a special verdict.”¹³¹ Professor Barkow noted that “the Supreme Court has not allowed the kinds of limits on the criminal jury that it has condoned in the civil context.”¹³² In protecting the power of the criminal jury, the Court has strongly invoked the English common law from the late eighteenth century.¹³³ This is the case even though the Sixth Amendment by its text, unlike the Seventh Amendment, does not require the application of the common law.¹³⁴

Like it has in the context of the Sixth Amendment, the Court should embrace originalism to interpret the Seventh Amendment. The Constitution commands this interpretation and there is no other actor that can protect the constitutional power of the jury. Moreover, the Court itself is deciding the power it has versus the power that a competing constitutional actor

127. *Id.* at 793.

128. *See* OLDHAM, *supra* note 12, at 5–6.

129. Thomas, *supra* note 106, at 794–97.

130. *Id.* at 796.

131. *Id.*

132. *Id.* at 795 (quoting Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 69 (2003)).

133. Thomas, *supra* note 3.

134. U.S. CONST. amends. VI, VII. So why has the power granted to the criminal jury contrasted so much with the power granted to the civil jury? It is difficult to decipher. The difference between the Court's treatment of the Sixth and Seventh Amendments may have something to do with the fact that the Sixth Amendment concerns liberty and the Seventh Amendment concerns property. *Id.* The Court has been more comfortable with a jury, rather than a judge, taking the liberty of a person.

possesses, and this act of modesty is necessary to the proper balance of power in the Seventh Amendment and the Constitution generally.

Thus, Professor Nelson's argument for an evolving common law in the context of the Seventh Amendment fails as a matter of the textual interpretation of the Constitution. Professor Nelson also attempts to compare the constitutional issue of summary judgment and the motion to dismiss to constitutional issues like abortion and school integration.¹³⁵ Professor Nelson fails again to acknowledge that the constitutional provisions involved with those issues do not in the first instance require the application of the "common law" like the Seventh Amendment.¹³⁶ The Court itself has acknowledged the Seventh Amendment's unique posture as to originalism.¹³⁷ Additionally, other constitutional actors themselves can act to affect the issues of abortion and school integration under the Constitution.¹³⁸ The courts, on the other hand, often act as the only decision-maker in matters regarding the jury trial right.¹³⁹

As for the parade of horrors that could happen to corporations if summary judgment is eliminated, summary judgment is not used in most cases. Summary judgment is generally used in a limited set of cases—civil rights and antitrust cases—and as a result most types of cases would not be affected.¹⁴⁰ Moreover, as stated in my article, litigants would want to settle in most circumstances, which will eliminate most outrageous outlier verdicts that could result from trials.¹⁴¹

CONCLUSION

At various points in history, different groups have not liked the jury. In one of the most famous Seventh Amendment cases, *Curtis v. Loether*,¹⁴² the defendant in a housing discrimination suit wanted a jury and the plaintiff did not.¹⁴³ Now, plaintiffs in discrimination cases favor juries and defendant

135. Nelson, *supra* note 2, at 1664–66.

136. *See generally* U.S. CONST.

137. *See, e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435–36 & n.20 (1996); *Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996); *Galloway v. United States*, 319 U.S. 372, 388–92 (1943); *Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Dimick v. Schiedt*, 293 U.S. 474, 476–77 (1935); *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 497–98 (1931); *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 377 (1913).

138. Thomas, *supra* note 106, at 790–94.

139. *Id.*

140. Thomas, *supra* note 3, at 141 & n.5. Joe Cecil of the Federal Judicial Center stated that "civil rights cases . . . have historically been especially susceptible to resolution by summary judgment." Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 864 (2007). But there was early opposition to the use of summary judgment with the explicit and underlying concerns about the right to a jury trial. *Id.*

141. Thomas, *supra* note 3, at 177–79.

142. *Curtis v. Loether*, 415 U.S. 189 (1974).

143. *Id.* at 190–91.

corporations do not. Regardless of societal leanings, the Seventh Amendment grants the right to a jury trial, which should not be ignored.

The Seventh Amendment protects the jury trial right and courts should follow its mandate by limiting their involvement to the common law dictates. My article showed that summary judgment contrasts with the procedures and substance of the common law, and therefore summary judgment is unconstitutional.¹⁴⁴ Professor Brunet has argued that a non-jury trial, the trial by inspection, is sufficiently analogous to summary judgment such that summary judgment is constitutional. However hard Professor Brunet attempts to stretch the common law, Blackstone's *Commentaries* clearly show that this trial is most analogous to judicial notice and bears no resemblance to summary judgment. Also, Professor Brunet ineffectively argues that the demurrer to the evidence is analogous to summary judgment, ignoring the governing English common law case of *Gibson v. Hunter*, described in my article *Why Summary Judgment Is Unconstitutional*. Professor Nelson has argued that the Seventh Amendment no longer serves any purpose except to the extent that other constitutional actors decide a jury trial is desirable. I have shown to the contrary that the Seventh Amendment continues to serve important purposes. Moreover, Professors Brunet's and Nelson's articles confirm my finding that summary judgment is unconstitutional under established Supreme Court case law. Legal historian Professor Nelson himself agrees with my reading of the history. Nonetheless, I hope that readers of the responses of Professors Brunet and Nelson do not ignore the common law by taking the common law out of the context in which it was written as Professors Brunet and Nelson have. The Seventh Amendment requires an application of the common law in 1791 by its own terms and this common law demonstrates that summary judgment is indeed unconstitutional.

144. Thomas, *supra* note 3.