

Summary Judgment and the Progressive Constitution

William E. Nelson*

At the outset, let me be clear: my main argument is that America is and must be governed by a progressive Constitution that changes in response to changing societal needs, not by black-letter rules that were adopted one or two centuries ago and are anachronistically applied without regard to today's conditions. At least since the founding in 1787, Americans have always hoped that their lives and their country would get better; we have not, until recently, perhaps, been a culture that looks back to a past golden age, strives to preserve its essence, and fears that we have entered an era of decline.¹ Faith in progress—faith that we can make our world better—is part of what it has meant, and must continue to mean, to be American.² Importantly, faith in progress cannot meaningfully exist under a Constitution that is mired in the past and, therefore, makes progress impossible.

I was eager to participate in this panel on summary judgment, and I will discuss it and the Supreme Court's recent procedural innovation in *Bell Atlantic*

* Weinfeld Professor of Law, New York University.

1. Declension was, however, a main theme of earlier Puritan thinkers, see PERRY MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY 463–75* (1939), and a main theme in the conflict leading up to the American Revolution was reliance on a customary constitution, which the king and Parliament were thought to be threatening. See JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 5–8, 19–20, 39–41* (abr. ed. 1995).

2. Consider, for example, the following presidential speeches: Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), in *PRESIDENTIAL DOCUMENTS: THE SPEECHES, PROCLAMATIONS, AND POLICIES THAT HAVE SHAPED THE NATION FROM WASHINGTON TO CLINTON* 134, 135 (J.F. Watts & Fred L. Israel eds., 2000) [hereinafter *PRESIDENTIAL DOCUMENTS*] (promising “that this nation, under God, shall have a new birth of freedom”); Ronald Reagan, Speech Denouncing the Soviet Union as an “Evil Empire” (Mar. 8, 1983), in *PRESIDENTIAL DOCUMENTS, supra*, at 365, 365–66 (stating that the “glory of this land has been its capacity for transcending the moral evils of our past,” and that “any objective observer must hold a positive view of American history, a history that has been the story of hopes fulfilled and dreams made into reality”); Franklin D. Roosevelt, “Four Freedoms” Speech (Jan. 6, 1941), in *2 DOCUMENTS OF AMERICAN HISTORY* 446, 449 (Henry Steele Commager & Milton Cantor eds., 10th ed. 1988) (observing that “[s]ince the beginning of our American history we have been engaged in change—in a perpetual peaceful revolution,” and promising “a world order” involving “the cooperation of free countries, working together in a friendly, civilized society”); Woodrow Wilson, “Fourteen Points” Plan for Ending the War (Jan. 8, 1918), in *PRESIDENTIAL DOCUMENTS, supra*, at 236, 239 (promising to make the world “fit and safe to live in” and “safe for every peace-loving nation which, like our own, wishes to live its own life, determine its own institutions, [and] be assured of justice and fair dealing”).

*Corp. v. Twombly*³—both of which narrow the role of the jury—because summary judgment and *Twombly* illuminate why a progressive Constitution is so vital.

My main argument in favor of a progressive Constitution is not new. Distinguished jurists and scholars have made it in the past.⁴ So have I.⁵ In particular, I have analogized law and society to a train, in which law can be either the engine or the caboose. As I have explained:

On the one hand, a judge might see herself as an agent of society who is under a duty to make law conform to the wishes of society. If such a judge thinks of society as a train, law will appear as the caboose at the end of the train, and the judge's job will be to keep the caboose on the same track as the train. On the other hand, a judge might see himself as society's commander. Looking upon society as a train, law will emerge as the engine, and the judge as the engineer who must determine the direction that the train ultimately will take.⁶

Of course, if the engine is not connected to the train, the train will not progress at all; similarly, if the Constitution is fixed in one originalist location, it cannot pull society in new directions or, indeed, permit it to be pulled in any direction at all. Iraq provides a telling contemporary example of a society that is in violent stasis because no engine is capable of pulling the train. Additionally, if the caboose becomes disconnected because someone thinks it must remain in a fixed location, no one will be watching to ensure that the train as a whole remains intact. As a result, the train may come apart and a train wreck may result. That, I suggest, is what would happen if summary judgment were held unconstitutional.

Constitutional law can serve either as a societal engine or as a caboose. Difficult issues arise if we think of constitutional law as an engine that

3. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). The Court's *Twombly* decision arguably heightened the standard that a plaintiff must meet in order to overcome a defendant's 12(b)(6) motion to dismiss. *See generally id.* at 1974–89 (Stevens, J., dissenting).

4. *See, e.g.*, BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–33 (1991); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66–67, 71–72, 88–90, 98–102, 135–37 (1921); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–38 (1996); Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1, 59–65 (1955); William J. Brennan, Jr., *Speech at the Georgetown University Text and Teaching Symposium* (Oct. 12, 1985), *in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11, 17 (Paul G. Cassell ed., 1986); Edward S. Corwin, *Social Planning Under the Constitution—A Study in Perspectives*, 26 *AM. POL. SCI. REV.* 1, 17–19 (1932).

5. *See* William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 *ST. LOUIS U. L.J.* 795, 800 (2004) [hereinafter Nelson, *Legal Realism*] (lamenting recent conservative courts' move away from a progressive Constitution); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 *VA. L. REV.* 1237, 1295 (1986) [hereinafter Nelson, *History and Neutrality*].

6. Nelson, *Legal Realism*, *supra* note 5, at 799.

determines society's direction. What business, it is often asked, do appointed Justices with life tenure have in deciding where society should go? And how can we determine whether judges are leading the societal train in a good, rather than bad, direction?

I hope to avoid these hard questions by arguing in favor of the law serving as society's caboose, with the conductors in the caboose (i.e., the judges) ensuring only that the train remains coupled together and proceeding down the track that society has chosen. Here, the main question is whether it is possible for judges to determine objectively the direction that society is taking. The answer, as I have argued in the past,⁷ is that most of the time they can. A subsidiary question is whether judges, from their vantage point in the caboose, should warn society if it takes a wrong turn. Finally, if society does not heed these warnings, should judges then put themselves in the position of engineer and stop the train?

In the remainder of this Article, I will test my argument in favor of a progressive Constitution in the context of the right to trial by jury in civil cases—the right protected by the Seventh Amendment and arguably undermined by summary judgment and the Supreme Court's *Twombly* decision.

The history of the jury's role in the decades surrounding the adoption of the Seventh Amendment has become quite clear. Although many legal historians doubted my claim when, some thirty years ago, I became the first scholar to announce that civil juries in Revolutionary-era Massachusetts decided law as well as fact,⁸ my position has now been generally accepted, both for Massachusetts and for a number of other states.⁹ Scholars of the history of

7. See Nelson, *History and Neutrality*, *supra* note 5, at 1262–86.

8. I first articulated this claim in William E. Nelson, *The Legal Restraint of Power in Pre-Revolutionary America: Massachusetts as a Case Study, 1760–1775*, 18 AM. J. LEGAL HIST. 1, 23–26 (1974), and repeated it in WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 20–35 (1975). For a published expression of doubts, see generally Hiller B. Zobel, *Some Agonies and Misuses of Legal History*, 50 NEW ENG. Q. 138 (1977) (reviewing NELSON, *supra*). Barbara Black, then a colleague who studied the role of the jury in an earlier period of Massachusetts history, was another skeptic. I sensed from our conversations that she could not believe that central authorities could leave local juries uncontrolled. Accordingly, she urged me to search for an appellate mechanism capable of controlling them.

9. See, e.g., Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. PA. L. REV. 829, 833–34 (1980); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377 *passim*; William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 904–24 (1978) [hereinafter Nelson, *Eighteenth-Century Background*]. But see William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 SMU L. REV. 3, 17–26 (2006) [hereinafter Nelson, *Government by Judiciary*] (discussing how juries in pre-Revolutionary Pennsylvania lacked law-finding power). I am currently examining archival material for North and South Carolina, and my preliminary conclusion is that colonial South Carolina juries also did not possess law-finding power. Nonetheless, there is no doubt that the power of juries to find law, which was understood as an

the jury also agree that the jury's power to determine both law and fact was of constitutional significance;¹⁰ it ensured that central authorities in a state, provincial, or national capital could not impose their will on local communities. No case made this point more powerfully than the 1761 case of *Erving v. Cradock*, where a jury in a Massachusetts county ignored the instructions of the province's superior court and returned a verdict of £499 against a customs collector who had condemned a local vessel for smuggling.¹¹ Neither the superior court, the governor, nor the Privy Council could do anything about it.¹² *Erving v. Cradock* thus left little doubt that the ultimate source of law was the local jury—not Parliament, not the Privy Council, not the provincial legislature, and surely not the judiciary.

Not surprisingly, the Antifederalists—proponents as they were of local self-rule—were strong supporters of jury power. One of their most frequent objections to the proposed federal constitution was that federal judges would have the power to set aside, control, or otherwise ignore jury findings and thereby impose centralized national law on local communities.¹³ The Seventh Amendment—which preserves the right to trial by jury by providing that “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”¹⁴—was adopted in response to these Antifederalist concerns.¹⁵

The Seventh Amendment is about as clear as a constitutional provision ever gets. Of course, there is some ambiguity, particularly in the text's reference to the “rules of the common law.” The common law of England differed from that of the American states, and each state, in turn, had common-law rules that differed at least slightly from those of others states.¹⁶ The Amendment does not specify to which common law it is referring, nor does it indicate whether, as the common law evolves, a court applying the

obstacle to centralized despotism, enjoyed widespread support in Revolutionary-era America. See Nelson, *Government by Judiciary*, *supra*, at 52–53.

10. See SAUL CORNELL, *THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828*, at 31–33, 59–68, 87–92, 125–36 (1999); THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800*, at 331–36 (1985).

11. *Erving v. Cradock* (Mass. 1761), in Josiah Quincy Jr., *REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1773*, at 553, 556 (Samuel M. Quincy ed., 1865).

12. See NELSON, *supra* note 8, at 31.

13. See CORNELL, *supra* note 10, at 31–33, 59–68, 87–92, 125–36 (describing the Antifederalists' fear of a large, centralized judiciary that could undermine a jury's findings).

14. U.S. CONST. amend. VII.

15. See CORNELL, *supra* note 10, at 31–33 (discussing Antifederalists' concerns about the proposed Constitution, including their desire for a provision for the right of trial by jury).

16. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 11–16 (1977); Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 508–21 (1996). See generally JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* (2006).

Seventh Amendment should refer to the common law of 1791 or to the common law at the time the case is being decided.¹⁷ Arguably, this ambiguity in the term “common law” prevents judges today from knowing how those who drafted and ratified the Amendment intended it to be applied. Nevertheless, the general purpose of the Amendment—to preserve juries as obstacles to the central government’s imposition of law that local communities deem unjust—is evident.

Moreover, the common law of 1791, especially in the states of the new United States, gave juries vast power. The courts almost never used procedures analogous to summary judgment or the newly broadened *Twombly* motion to dismiss. 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. In some jurisdictions, notably England, lawyers and judges had a variety of devices to limit jury power, such as special pleading, the demurrer to the evidence, and the motion to set aside a verdict as contrary to the evidence or instructions and award a new trial; in most American states, however, judges did not possess even the limited power to grant a new trial.¹⁸

17. While it is true that the Supreme Court in the 1930s repeatedly declared that the term “common law” as used in the Seventh Amendment refers to English common law as of 1791, *see* *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), it is important to note that the Court never examined evidence of the actual purposes or intentions of the drafters or ratifiers of the Seventh Amendment; its history was, as is often the case, inaccurate, law-office history. In fact, the Court’s rulings were probably inconsistent with the views of most Antifederalist proponents of the Amendment, who tended to be hostile to imported English law. *See* CORNELL, *supra* note 10, at 133–34, 263–64.

18. *See* OLDHAM, *supra* note 16, at 32–39. On the American states during the Revolutionary era, *see* Nelson, *Eighteenth-Century Background*, *supra* note 9, at 904–17. Edward Brunet concludes that the demurrer to the evidence was analogous to summary judgment, *see* Edward Brunet, *Summary Judgment Is Constitutional*, 93 IOWA L. REV. 1625, 1642–48 (2008), while Suja Thomas concludes that it was not. *See* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 150–54 (2007). It was, of course, similar in that it tested whether the evidence presented by the non-moving party, assuming it to be true, could as a matter of law support a jury verdict in that party’s favor. At the same time, it was different in that (1) the moving party could not introduce evidence in support of its demurrer; (2) the moving party lost the case if the demurrer was overruled; and (3) the demurrer was offered at, rather than before, trial. Lawyers argue all the time whether two similar phenomena are analogous or distinguishable, and no way exists to resolve those arguments other than recourse to intuitive policy judgments or to the directives of some dispositive lawmaker. In this case, the dispositive lawmakers—the authors and ratifiers of the Seventh Amendment—have given no directives, since summary judgment was a concept that never entered their minds.

The interposition of a special plea often gave defendants power to remove a case from jury consideration, although plaintiffs in some cases could file replications that would leave narrow issues for a jury. In contrast, no special plea existed by which plaintiffs could remove a case from jury consideration once a defendant pleaded the general issue. Professors Brunet and Thomas do not discuss special pleading in their articles for this Symposium.

Professor Brunet, however, does argue that trial by inspection was an available device by which litigants could limit jury discretion. Brunet, *supra*, at 1630–41. In my research of colonial

The result was that the people of a locality could immunize themselves from metropolitan law that was inimical to their interests. For example, a creditor from a metropolitan center, such as London, could not prevent his debtor from presenting his case to a jury, obtaining the delay that assembling a jury entailed, and ultimately falling on the jury's mercy, even if the debtor had no bona fide legal defense. All the debtor needed to do was to plead the general issue, and a jury trial that might excuse him from paying his debt inexorably followed.¹⁹ Thus, it is not surprising that back-country Antifederalists seized on the jury as an instrument for preventing oppression by metropolitan creditors and other metropolitan interests.

It follows 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. There are two problems, however, with such a simplistic solution. The main problem is that freezing the law in 1791 makes no sense: the Constitution created a society and economy that has catapulted forward since that date, and to separate the law from that society and economy—to have the law function at cross purposes—risks wreckage. Imagine a train that has proceeded slowly and cautiously along a secondary track up to its intersection with the main line, where it can speed up; would it make sense at that point to uncouple either its engine or its caboose? The second problem is the fact that the Seventh Amendment contains a key ambiguity: by referring to the common law ambiguously as something that might change over time, the drafters opened up the possibility that interpretation of the Amendment also should change over time to keep in tune with changes in society and the economy.

In fact, the common law did change dramatically, beginning only a few years after the Seventh Amendment's ratification, when a loosely knit group of Federalist judges—including John Marshall, the Chief Justice of the U.S. Supreme Court, James Kent of New York, Theodore Sedgwick of Massachusetts, and Jeremiah Smith of New Hampshire—initiated a plan to seize control of the law from juries and the lay public and place it in the hands of judges and legal professionals.²⁰ Their goal was to create a body of uniform,

judicial records, which remains far from complete, I have found no case in which trial by inspection was used in an adversary proceeding. Virginia did have a procedure by which a master could obtain an ex parte judicial determination of a servant's age, see 8 NORTHAMPTON COUNTY, VIRGINIA RECORD BOOK: COURT CASES 299 (Howard Mackey & Marlene A. Groves eds., 2002) (describing a 1663 case in which a court, on request of a master, judged an Indian boy to be six years old), but I am inclined to agree with Professor Thomas that this procedure was a distinctive quasi-administrative one, rather than a device for controlling the discretion of a common-law jury.

19. It is worth noting that summary judgment originated as a device that permitted a creditor to recover his debts without a jury trial, unless the defendant submitted, along with a plea of the general issue, an affidavit swearing to the existence of facts in support of a legal defense to the debt sufficient to warrant a trial. See WILLIAM E. NELSON, *THE LEGALIST REFORMATION: LAW, POLITICS, AND IDEOLOGY IN NEW YORK, 1920–1980*, at 33–34 (2001).

20. See *infra* note 21 and accompanying text.

stable, and predictable law on which entrepreneurs seeking to develop the national economy could rely. I and others have written at some length about how these Federalists, usually with support from at least some of their Jeffersonian political opponents, carried out their plan—which involved setting aside jury verdicts, limiting the evidence and legal argument that could be presented to juries, restricting judicial dissent, publishing judicial opinions, and educating and professionalizing the bar—from state to state as well as within the federal judiciary in the early nineteenth century.²¹ Despite the opposition of radical Jeffersonians, who were dedicated to the preservation of local autonomy, the Federalists and their moderate Jeffersonian allies and successors ultimately carried out their program everywhere; the underlying goal of creating uniform, stable, and predictable law on which entrepreneurs could rely was simply too popular to be resisted. Indeed, efforts to achieve the goal of uniformity have persisted to this day: witness Justice Joseph Story in *Swift v. Tyson*,²² the American Law Institute's *Restatements of Law*, and various uniform acts of the Uniform Law Commissioners.²³

How should a judge charged with determining the constitutionality of summary judgment, or a scholar charged with determining the legitimacy of the Supreme Court's recent *Twombly* decision, approach this history? Should she rely on the law as it was known in 1789 through 1791 by the Framers and ratifiers of the Seventh Amendment? Or should subsequent changes in the common law, which have taken place on both the state and the federal level, provide the raw material with which to explicate the Amendment's commands? Should we understand our Constitution to be merely a parchment written in 1787 through 1791 and 1866 through 1868, with occasional other amendments? Or should we understand it to reflect a likeness of how the United States is in reality constituted today—a product of over two centuries of common-law adjudication and public acquiescence in progressive change that have made our polity more democratic, equal, just, and efficient than the antiquated structure that was created in 1789?

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

21. See HORWITZ, *supra* note 16, at 141–45, 228; NELSON, *supra* note 8, at 165–71; William E. Nelson, *The Province of the Judiciary*, 37 J. MARSHALL L. REV. 325, 333–49 (2004); Jonathan Lahn, *The Demise of the Law-Finding Jury in America and the Birth of American Legal Science: History and Its Challenge for Contemporary Society* 30–35 (Nov. 7, 2007) (unpublished manuscript, on file with the Iowa Law Review), available at <http://ssrn.com/abstract=1030827>.

22. *Swift v. Tyson*, 41 U.S. 1, 18–19, 16 Pet. 1, 12–13 (1842) (holding that federal courts exercising diversity jurisdiction are not bound by state courts on questions of state law), *overruled by* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79–80 (1937). See generally TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981) (discussing the *Swift* and *Erie* cases and their relationship to the applicability of the common law).

23. See generally Joseph B. Kelly, *The Codification of Contract Law in the Twentieth Century*, 88 DICK. L. REV. 289 (1984) (discussing the efforts of the *Restatements of Contracts* and the *Uniform Commercial Code* to organize and clarify contract law).

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.

Consider the connection between jury power and economic growth and stability. The entire world assumes that the rule of law—i.e., known, stable, and predictable legal doctrine that is neutrally and objectively applied—is a prerequisite to the commitment of the money and energy essential to economic activity. Entrepreneurs need 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 assurance 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, thereby facilitating its flow.²⁴

Juries, however, are not tightly bound to the rule of law. Juries instead brandish the values of the local communities from which they are drawn. Especially as they functioned in 1791 and as the Antifederalist proponents of the Seventh Amendment intended them to function, juries are expected to interpose local values in order to prevent the enforcement of metropolitan norms deemed unjust by local communities.

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.²⁵ By preserving powerful juries that determined both law and fact, the Seventh Amendment protected local communities from the metropole.

America today is not, however, the America of 1791. We live in a nationally integrated society and economy in which we depend almost entirely on people distant from our own communities for nearly all of our needs. Think of how well we would eat if we had to produce our own food; of how warm we would be if we had to chop our own wood; of how pleasant it would be to assemble together, as we do at this conference, if we had to sew our own clothes, make our own soap, and draw our own bathwater from the local well. Think of how few of us would even be alive if we had to produce our own medicines. The American economy on which we rely could not function if today's juries possessed the broad powers of classic, eighteenth-century juries and the accompanying capacity to hamper investment and trade.

24. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 46–62 (2000).

25. See CORNELL, *supra* note 10, at 61–68, 80, 114–20.

The Federalists and their moderate Jeffersonian supporters and successors simply recognized that Americans would live richer and more fulfilling lives in an integrated, national economy than in local, self-sufficient ones. They were right. They set about using and changing the law in order to facilitate the growth of that national economy. They were prepared to reject rules, such as those empowering local juries to reject metropolitan norms, that posed obstacles to national economic growth.

More fundamentally, we need to understand the parchment document of 1787 through 1791 not merely as the end, but rather as the beginning of the constitutional process. The framing and ratification of the Constitution and the Bill of Rights were, especially for their time, democratic acts by which the people set out permanent rules for their self-government. At the same time, however, they also created a new entity—the government of the United States of America—with a goal of transforming the societal order of North America and creating opportunities for its people that had never before existed. The Constitution, in its own language, sought “to form a more perfect Union, establish Justice, . . . [and] promote the general Welfare,”²⁶ not merely to preserve what already existed. The Framers understood that the Articles of Confederation were far from perfect, that liberty and justice did not extend to all, and that government needed to act to make Americans better off. The Framers were optimistic progressives who envisioned a bright future, not anachronistic conservatives with their heads buried in the sands of the past.

Once the new government came into existence, the American people consistently used it to expand and take advantage of their new opportunities and to improve their lives. As they went along, they inevitably changed the world around them: they established political parties, democratized elections, invented judicial review, abolished slavery, granted legal equality and the vote to women, and proclaimed all individuals to be equal under the law. These are just a few of time’s constitutional innovations, and they are all part of today’s Constitution, regardless of whether they were formally adopted as amendments. The American people of today are constituted differently than were the American people of 1791. America is not now governed by the Constitution of 1787 through 1791, nor could it go back to that Constitution if it wanted to, and, in any event, it does not want to go back.

But the reality of our contemporary Constitution does not mean that we should completely ignore the permanent rules of governance that the Framers set out. After all, the Constitution was drafted both to enable the Framers to institute a new process of government and to guarantee that the rights of posterity would be protected. The hard question is how to balance the reality of our contemporary, progressive Constitution with the enduring values enshrined in the text of the old one.

26. U.S. CONST. pmb1.

The key to ascertaining the proper balance, I suggest, is to calculate the importance of these allegedly enduring values. It is necessary to determine what values actually have endured. Consider, for example, the obligation of contracts, which the Constitution protects against state impairment.²⁷ Compare it with the equal protection of the laws, which the Fourteenth Amendment ensures.²⁸ Despite the accurate assertion by Justice George Sutherland that the Contracts Clause “was meant to foreclose state action impairing the obligation of contracts primarily and especially in respect of such action aimed at giving relief to debtors in time of emergency,”²⁹ the Supreme Court has consistently held, at least since *Home Building & Loan Ass’n v. Blaisdell*, that the Clause imposes, at most, minor restrictions on the power of government to protect its citizens from the harsh economic consequences of burdensome contracts.³⁰ The Contracts Clause is largely a dead letter. In contrast, the Equal Protection Clause remains the fount of much of the Court’s most important jurisprudence. Even after nearly three decades of conservative political dominance, Americans regard equality, whatever one interprets it to mean, as a vastly more important constitutional value than freedom of contract.

The job of the conductor in a caboose, like that of a judge striving to keep law in tune with socio-economic realities, is to keep the train on the right track and stop it if it enters onto a wrong track. It is a truism that equality is one of the main lines of American—indeed, world—constitutionalism; freedom of contract is, at best, a siding. When the map of the Constitution’s text directs a judge to keep the law on the main line, the judge, like the conductor, should conclude that the map has enduring value and should follow it. When, however, the map directs the judge to turn the train onto what has plainly become a siding, the judge must recognize that the map is out of date and that following it might lead to a train wreck.

Jury trial has become, especially in civil cases, a legal siding. Relatively few jury trials occur. Although jury duty could serve as an important device for citizens to participate in government, citizens do not value it for that reason; few Americans are eager to perform jury duty when called, and most try very hard to avoid it. The main function that the jury can serve is to give local communities a mechanism for obstructing and even nullifying the enforcement of metropolitan law—to protect the periphery from the center. But few Americans really care about preserving local power. Watching current political debates, one can sense widespread voter concern about religious and family values, foreign and tax policy, racial and gender equality, poverty,

27. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

28. *Id.* amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

29. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 465 (1934) (Sutherland, J., dissenting) (emphasis omitted).

30. See *id.* at 444–48 (majority opinion).

economic opportunity, and wealth distribution. States' rights and the rights of localities, on the other hand, come into play not as values in themselves, but only as means to some other end. Most major issues today are debated and resolved on the national level; whichever side loses turns to states and localities not because of any genuine commitment to their power, but because they provide a place to continue the fight. Consider, for example, the advice of Justice William Brennan: he urged a "rebirth of interest in state constitutional law," as he saw the Supreme Court becoming "involved in a new curtailment of the Fourteenth Amendment's scope."³¹ And, if the tide turns and national losers become national winners, their commitment to state and local power vanishes. Thus, a Republican Congress under the leadership of a Republican President adopted the No Child Left Behind Act of 2001, which significantly impacts the primary- and secondary-school curriculum,³² even though Republican Supreme Court Justices had a few years earlier identified "education [a]s a traditional concern of the States"³³ and, thus, not a matter appropriate for federal regulation.

The train has traveled far since the framing and ratification, when the United States consisted of a group of discrete and insular communities that were markedly different from each other and did not want a national culture to absorb them. Urbane Cambridge, Massachusetts at that time was not bustling New York City, and both differed from rural, slaveholding South Carolina and Virginia. Many Americans of the early national period would have found establishing residence in a new state more difficult than today's Americans find moving to a foreign country³⁴: the law, for example, barred black citizens of free states from entering South Carolina,³⁵ while southern planters could not resettle with their slaves in several northern states or in the Northwest Territory.³⁶ Today, in contrast, many Americans pursue jobs in a national market; consume the same nationally and globally made products wherever they reside; watch the same television, read the same printed matter, and access the same Internet without regard to location; and, in general, cross interstate boundaries frequently without even being aware that they have done so. Most

31. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546, 550 (1986).

32. See generally Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 784–97 (2006) (discussing the history, requirements, and implementation of No Child Left Behind).

33. *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, J., concurring).

34. Of course, movement to certain foreign nations, such as those with whom the United States lacks diplomatic relations or where anti-American violence is rife, constitutes an exception.

35. See DONALD G. MORGAN, *JUSTICE WILLIAM JOHNSON, THE FIRST DISSENTER: THE CAREER AND CONSTITUTIONAL PHILOSOPHY OF A JEFFERSONIAN JUDGE 192–93* (1954).

36. Massachusetts, for example, abolished slavery by judicial decision in the 1770s and 1780s, see NELSON, *supra* note 8, at 102, and the Northwest Ordinance of 1787 prohibited slavery in the territory to which it applied. See Northwest Ordinance of 1787, art. 6, *reprinted in 1 DOCUMENTS OF AMERICAN HISTORY*, *supra* note 2, at 128, 132.

of us have no unique local culture to preserve, and even when we do (think, for example, of New Yorkers wishing to preserve their theater district or residents of Dallas committed to their megachurch), it does not occur to us that the jury is the appropriate instrument for preserving it.

Thus, I conclude that no constitutional policy traceable to the Seventh Amendment's Framers supports a broad construction of the Amendment that would justify treating summary judgment or the recent *Twombly* decision as unconstitutional or otherwise inconsistent with the Amendment's purposes. It may be that access to the jury favors plaintiffs in tort cases or defendants who are seeking to avoid arbitration in contract cases. Also, lawyers may earn higher fees if they can try their cases before juries. A goal of protecting certain interest groups in the national economy—lawyers and people who do not own shares of corporate equity—might generate a populist argument in support of preserving capacious jury power, but that argument is not the same as the Antifederalist arguments in favor of local self-rule that ultimately led to the Seventh Amendment's inclusion in the Bill of Rights.

To invalidate summary judgment or overrule *Twombly* is, therefore, not to follow the main line of American constitutional development, but to take the constitutional train onto a siding that leads nowhere and may quickly end in a train wreck—or onto a track that judges will newly construct in unpredictable directions. Perhaps judges should use dissenting opinions and certain doctrines, such as narrowly construing statutes to avoid constitutional issues, to remind people that venerable constitutional principles are being abandoned. But to actually use the Constitution to stop the train and enforce outworn values would transform judges into social engineers rather than conductors who simply make sure that the legal caboose remains attached to the societal train.

My argument, in conclusion, is that judges should serve as conductors in a caboose, ensuring that the societal train stays on the main line—a line that is traceable back to the constitutional text and that goes forward pursuant to policies endorsed by the people. From the vantage of the caboose, summary judgment and *Twombly* are constitutionally impregnable. Those who continue to hope for a liberal, activist Supreme Court undoubtedly will find this troublesome. They also may be troubled that other important Supreme Court precedents, such as *Engel v. Vitale*³⁷ and *Roe v. Wade*,³⁸ seem problematic when viewed from the caboose: they are not obviously supported either by the

37. *Engel v. Vitale*, 370 U.S. 421, 425 (1962) (striking down, as a violation of the Establishment Clause, a program of school prayer).

38. *Roe v. Wade*, 410 U.S. 113, 162–65 (1973) (holding unconstitutional an abortion ban that applied before viability of the fetus). Some years ago, I argued that *Roe* itself could have been decided on the basis of ongoing, shared societal values. See Nelson, *History and Neutrality*, *supra* note 5, at 1273–74. At the same time, however, I noted that “no neutral resolution of the underlying question” of “a woman’s right to terminate her pregnancy . . . could have occurred in *Roe*.” *Id.* at 1274.

Constitution's text or by policies that can be traced back to the text or to the broad endorsement of the American people. Although there are many precedents, ranging from *Brown v. Board of Education*³⁹ to *Lawrence v. Texas*,⁴⁰ with which progressives who wish to ride the caboose can be comfortable—because they are grounded in the textual requirement of equal protection of the laws and in shared egalitarian values traceable to the Fourteenth Amendment,⁴¹ and have been instantiated in Supreme Court decisions as long ago as *Yick Wo v. Hopkins*⁴² and as recently as *Parents Involved in Community Schools v. Seattle School District No. 1*⁴³—nothing can entirely assuage progressive concerns.

Dissatisfaction with results should not, however, lead us to want judges to stop the train whenever they wish or jump into the engine and drive the train in whatever directions or onto whatever sidings they think appropriate. For me, judicial engineering might be acceptable as long as I were the Chief Justice and could appoint eight trustworthy friends as my associates; perhaps I could satisfy myself that, as an unelected judge, I should have a right to impose my values on others. But when Presidents make Supreme Court appointments to pay off their political bases, I worry about where the train may go if the Justices are free to stop it or drive it when and where they will.

Above all, we must not disconnect the legal caboose from the societal train and leave the law mired in the mud of the past, enforcing language and policies that made sense long ago, but that have no societal traction today. In that case, *Plessy v. Ferguson*⁴⁴ might still be the law,⁴⁵ and if it were, its persistence would have either made law irrelevant or produced a catastrophic wreck. Indeed, it would require a baffling act of imagination to contemplate how a Supreme Court bench—with a seat for Justice Clarence Thomas, the Court's most vociferous originalist—would have to be physically configured in the aftermath of such a wreck. Perhaps eight Justices would sit together at one

39. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “separate but equal” public schools violate equal protection).

40. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding unconstitutional a Texas anti-sodomy statute).

41. See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 13–21 (1988) (tracing the development of the idea of equality in early America and concluding that “no one could be driven away by an argument for equality, since everyone believed in it”).

42. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) (holding unconstitutional a San Francisco law that was facially neutral but that was administered so as to disproportionately impact Chinese-run laundries).

43. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007) (holding unconstitutional two school districts' plans for racial integration).

44. *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (holding that “separate but equal” public facilities do not violate equal protection), *overruled by Brown*, 347 U.S. at 494–95.

45. Although I have argued that the Fourteenth Amendment did not, as a matter of original intent, clearly authorize segregation, see NELSON, *supra* note 41, at 133–36, the predominant view probably remains to the contrary. See generally Bickel, *supra* note 4.

bench, while Justice Thomas sat separately but equally to the right. An act of similar imaginative power would be required to envision how the judiciary could survive the onslaught of cases—and the economy, the ever increasing fees of lawyers and inconsistency of jury decisions—if courts were denied the means to process cases expeditiously and in accordance with the rule-of-law values that the national and global economies require.