The Seventh Amendment and the Alchemy of Fact and Law

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I. INTRODUCTION

The Seventh Amendment to the United States Constitution guarantees a right to jury trial in most civil cases in federal courts. It provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[1]

This language—the use of the word "preserved" and the reference to the common law—invokes history, but the precise role of history has been the subject of considerable controversy and inconsistency over the last two centuries. Interpreting the Seventh Amendment, the courts have made two important distinctions: that between law and equity on the one hand, and that between law and fact on the other. The historical right to a civil jury in England existed for cases brought in common law courts, as opposed to courts of equity, and the right extended to questions of fact, not questions of law.[2]

The Court has been most consistent in honoring historical forms when distinguishing between law and equity, though it has not been entirely faithful to history even there. But when it comes to distinguishing between law and fact, the record is much more

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[1] U.S. CONST. amend. VII.

[2] I have written extensively on these historical distinctions in ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY, ch. 2 (2001).

difficult to interpret. This distinction has long been a difficult one,[3] possibly because the kinds of questions that come up in trials do not divide neatly into two categories. There are pure questions of law, pure questions of fact, mixed questions of law and fact, ultimate facts, and perhaps others.[4] It has been suggested that the law/fact distinction is nothing but a mask for a policy decision about which questions should be given to the judge and which to the jury.[5] This distinction, however, does have Constitutional significance. It deserves another look, at least in part, because the Supreme Court has recently invoked it in a context that raises questions about the entire history of that distinction in Seventh Amendment jurisprudence.

In 1996, the Court decided *Markman v. Westview Instruments, Inc.*,[6] a patent case in which the issue was how one should interpret a patent claim.[7] The Court noted that previous decisions had relied on distinctions between law and fact or between substance and procedure to determine what issues go to the jury,[8] but asserted that the "sounder course" was to use the "historical method."[9] Looking to eighteenth century English cases, the Court found that, while the cases were ambiguous, judges rather than juries generally interpreted patent specifications—the rough equivalent of the modern claim—and that, in any event, there was an established rule that judges, not

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[3] Much has been written on the law/fact distinction. *See, e.g.*, WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 216-48 (Lawbook Exchange, Ltd. 1994) (1875); LEON GREEN, JUDGE AND JURY 268-79 (1930); FRANCIS HILLIARD, THE LAW OF NEW TRIALS (1866); JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRIES BY A JURY (1873); SIR JOHN SALMOND, JURISPRUDENCE 15-18 (1920); JAMES B. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 183-262 (Rothman Reprints, Inc. 1969) (1898); Francis H. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924); Frederick J. de Slovere, *The Functions of Judge and Jury in the Interpretation of Statutes*, 46 HARV. L. REV. 1086 (1933); Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545 (1899); Frederick Green, *Mixed Questions of Law and Fact*, 15 HARV. L. REV. 271 (1901); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922); Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949); J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483 (1985); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1 (1991); Stephen A. Weiner, *The Civil Jury and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966); Adrian A.S. Zuckerman, *Law, Fact, or Justice?*, 66 B.U. L. REV. 487 (1986).

[4] For a discussion of some of these categories, see SWARD, *supra* note 2, at 272-73.

[5] *See* Fox, *supra* note 3, at 551; *see also* Isaacs, *supra* note 3, at 4; Weiner, *supra* note 3, at 1868.

[6] 517 U.S. 370 (1996).

[7] *See id.* at 373-74. A claim is the part of the patent that describes the invention.

[8] *See id.* at 378.

[9] *Id.*

juries, interpreted written documents.[10] Further, finding no reason in "existing precedent," in "the relative interpretive skills of judges and juries," or in the "statutory policies that ought to be furthered by the allocation,"[11] the Court held that there is no right to have a jury interpret the claim in a patent.[12]

This case could be confined to its facts, of course, and apply only to the interpretation of claims in patents, but its language was broader than that. If we are now to look to history in defining fact and law, it is worth examining how that history might affect current practices. That examination, it turns out, is quite telling. Over the nation's history, the Court has approved a variety of tests and procedural devices that, collectively, have changed our definition of fact and law. Specifically, some issues that quite clearly would have been classified as "fact" and given to juries in eighteenth century England are now classified as "law" and given to the judge to decide. In this article, I will trace that transformation. The earliest and most important development was the rejection of the so-called "scintilla" test for determining the sufficiency of the evidence in favor of the "reasonable jury" test. The cases show that what is "reasonable" is often in the eyes of the beholder, meaning that the new test gives judges more power. Court approval of three new procedural devices whose contours were refined in the twentieth century—summary judgment, directed verdict, and judgment notwithstanding the verdict—also gave judges more power. The latter two are now collectively called judgment as a matter of law,[13] but I will use the older terms in this article to emphasize their separate development.

In Part II of this article I will present a brief description of the history and structure of the Seventh Amendment, which guarantees the right to a jury trial in certain civil cases. Part III then discusses how law and fact have been defined in English and American legal history, using the development of the reasonable jury test, directed verdict, judgment notwithstanding the verdict, and summary judgment as anchors. This discussion shows that, for the most part, courts have moved toward defining as "law" some matters that would have been called "fact" at the time the Seventh Amendment was

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[10] *See id.* at 380-82.

[11] *Id.* at 384.

[12] 517 U.S. at 391.

[13] *See* FED. R. CIV. P. 50 advisory committee's note to 1993 amendment. The purpose of this change in terminology was to underline the fact that a directed verdict and judgment notwithstanding the verdict were judged by the same test as summary judgment. *Id.* The summary judgment rule also uses the term "judgment as a matter of law." *See* FED. R. CIV. P. 56(c).

ratified. The effect of this is that judges now decide some issues that juries would have decided at the time of the Seventh Amendment's ratification. In Part IV, I complete the historical development by discussing *Markman* in more detail and speculating on its import. I conclude that if the Court is serious about using history to define law and fact, it will have to revisit the constitutionality of the reasonable jury test, the directed verdict, the judgment notwithstanding the verdict, and the summary judgment.

II. THE SEVENTH AMENDMENT AND THE USES OF HISTORY

Before we can understand the effect *Markman* might have on the law/fact distinction, it is important to understand how history has been used in Seventh Amendment jurisprudence. In this section I will first describe briefly the English and American origins of the Seventh Amendment. I then turn to a brief description of how history has been used in the analysis of the two distinctions that the Seventh Amendment draws: that between law and equity, and that between law and fact.

A. Origins

1. The English Origins

The civil jury is an English institution, imported to the American colonies by English immigrants.[14] The English jury dates to shortly after the Norman Conquest of 1066, and is generally thought to be a Norman import.[15] Originally, the jury was an inquisitorial device, whereby citizens from the neighborhood where the dispute arose were summoned to tell the court what happened.[16] If the summoned jurors did not know what had happened they were required to make inquiries and then swear in court as to the facts.[17] Over several centuries, the jury evolved to its present form, in which jurors are expected to know nothing about the matter except what they hear in

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[14] A more detailed history of the civil jury appears in SWARD, *supra* note 2, at ch. 2. Perhaps the best general history of the jury is found in THAYER, *supra* note 3. For additional sources, see LORD PATRICK DEVLIN, TRIAL BY JURY (1956); FORSYTH, *supra* note 3; 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 135-46 (1903); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 106-38 (1956); 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 138-46 (1898).

[15] *See* JOHN P. DAWSON, A HISTORY OF LAY JUDGES 119-20 (1960); *see also* FORSYTH, *supra* note 3, at 45-77; PLUCKNETT, *supra* note 14, at 107-09; R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 73-79 (1988).

[16] *See* THAYER, *supra* note 3, at 54

[17] *See id.*

court.[18] Trials in substantially modern form apparently occurred by the end of the fifteenth century,[19] but jurors were permitted to base their decisions on personal knowledge as late as 1670.[20] By the middle of the eighteenth century, however, jurors were forbidden to base their decisions on personal knowledge.[21]

At the time of the American Revolution, there were two significant limits on the scope of the English civil jury's authority. First, the jury was confined to the common law courts and did not operate at all in courts of equity. Courts of equity developed because the rigid rules and procedures of the common law courts sometimes prevented those courts from doing justice.[22] While the jurisdiction of courts of equity was limited by the doctrine that equity could act only if the remedy in the common law courts was inadequate,[23] the courts of equity still had substantial authority, including the power to enjoin common law proceedings under some circumstances.[24] The primary remedy in common law courts was money damages.[25] Courts of equity handled nearly everything else, including injunctions,

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[18] *See generally* John Marshall Mitnick, *From Neighbor-Witness to Judges of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201 (1988).

[19] *See* PLUCKNETT, *supra* note 14, at 129-30.

[20] *See* Bushell's Case, Vaughan 135, 124 Eng. Rep. 1006 (1670); *see also* Mitnick, *supra* note 18, at 203-07. Most of the English cases cited in this article were reported initially by individual reporters and collected in reports bearing their names. These so-called nominal reports were collected in the English Reports. I give both citations in this article, but I have consulted only the English Reports.

[21] *See* Mitnick, *supra* note 18, at 207 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 374-75 (1768)). The case that established this was apparently *Dormer v. Parkhurst*, Andr. 315, 95 Eng. Rep. 414 (K.B. 1738). *See* Mitnick, *supra* note 18, at 226.

[22] *See* HAROLD GREVILLE HANBURY, MODERN EQUITY 1-28 (2d ed. 1937); *see also* 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 16-23 (Spencer W. Symons ed., 5th ed. 1941). The jury also did not operate in admiralty courts.

[23] *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION § 2.1(1) (2d ed. 1993).

[24] A court of equity could enjoin a common law proceeding if the court of equity already had jurisdiction over the matter. *See* SWARD, *supra* note 2, at 159. This prevented multiple suits on the same matter. *See id.* A court of equity could also enjoin a person from instituting multiple common law proceedings on the same matter, or from threatening to do so. *See id.* A court of equity acted to prevent irreparable harm, and it was thought that having to litigate multiple suits arising out of the same matter would cause irreparable harm. *See id.* at 159-60.

[25] *See* JOHN E. CRIBBET, JUDICIAL REMEDIES 36 (Erwin N. Griswold ed., 1954). Common law courts could also order the recovery of real and personal property through such claims as ejectment and replevin. *See* 1 POMEROY, *supra* note 22, at §109. They also handled a variety of extraordinary writs, such as the writ of habeas corpus. For discussions of the common law extraordinary writs, see 2 CHESTER J. ANTIEAU, THE PRACTICE OF EXTRAORDINARY REMEDIES (1987); FORREST G. FERRIS & FORREST G. FERRIS, JR., THE LAW OF EXTRAORDINARY LEGAL REMEDIES (1926).

accountings, trusts, reformation of contracts, and some forms of restitution.[26]

The second major limitation on English civil juries was that they could decide questions of fact, but not questions of law. This limitation was apparently well-established by the seventeenth century, when Lord Coke said unequivocally that judges are to decide questions of law, and juries are to decide questions of fact.[27] There were problems with this neat maxim, however. First, some forms of pleading allowed juries to make *de facto* determinations of law. For example, while English common law pleading rules historically required the parties to continue pleading until they had reduced the matter to a single issue of fact or law,[28] the general issue plea allowed a party to contest the entire opposing pleading without specifying the part of the pleading with which she took issue.[29] This sometimes meant that a jury could not help but make a determination of law.

Second, it was not always easy to distinguish fact from law.[30] This difficulty manifested itself in several ways. Judges and juries often seemed to share decision-making on some issues, with juries deciding what the facts were and judges then applying the law to those facts.[31] For example, in a common law libel action, the jury would decide whether the alleged libel had been published and the import of the words used, but the judge would make a determination of law as to whether the jury's fact-finding warranted a judgment of libel.[32] Disputes sometimes arose between judge and jury when the jury's fact-finding conflicted with the judge's views, but English judges could guide the jury by instructing it as to the law and by

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[26] Pomeroy's treatise is five volumes, which attests to the scope and complexity that equity eventually acquired. *See supra* note 22.

[27] *See* 1 HOLDSWORTH, *supra* note 14, at 135 n.7; *see also* THAYER, *supra* note 3, at 185, 187. *See generally* BARBARA J. SHAPIRO, A CULTURE OF FACT: ENGLAND 1550-1720 (2000) (describing how the concept of "fact" arose out of developments in English law); Morris S. Arnold, *Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind*, 18 AM. J. LEGAL HIST. 267 (1974) (discussing the role of the special verdict in the development of the law/fact distinction); S.F.C. Milsom, *Law and Fact in Legal Development*, 17 U. TORONTO L.J. 1 (1967) (describing the effect of distinguishing between law and fact on the development of legal principles).

[28] *See* THAYER, *supra* note 3; MORRIS S. ARNOLD, *Introduction* to 1 SELECT CASES OF TRESPASS FROM THE KING'S COURTS, 1307-99, at x-xx (Selden Society vol. 100, 1985).

[29] *See* J.H. BAKER, INTRODUCTION TO ENGLISH LEGAL HISTORY 84 (3d ed. 1990); *see also* David Millon, *Positivism in the Historiography of the Common Law*, 1989 WIS. L. REV. 669 (1989).

[30] *See supra* note 3.

[31] *See, e.g.*, Gibson v. Hunter, 2 H. Bl. 187, 205-06, 126 Eng. Rep. 499, 508-09 (N.P. 1793); FORSYTH, *supra* note 3, at 221, 223-35; THAYER, *supra* note 3, at 185-88.

[32] *See* FORSYTH, *supra* note 3, at 223-35.

commenting on the evidence.[33] Although juries could defy the judge's guidance and find the facts differently from the judge's suggestions, the trial judge had the power to order a new trial if he thought the verdict was against the weight of the evidence.[34] A further complication is that juries were usually asked to apply the law to the facts even though that was not their job.[35] A party could remove the law-applying task from the jury through procedural devices such as the demurrer to the evidence.[36]

Another manifestation of the difficulty in classifying issues as fact or law is reflected in some rather arbitrary historical characterizations of adjudicatory tasks.[37] For example, the interpretation of written documents was characterized as a question of law for the judge, apparently on the theory that the words on a page have immutable legal meaning.[38] In modern practice, we look to the intent of the parties behind the writing's language and consider intent a question

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[33] *See id.* at 224-25.

[34] *See id.* at 157-58. Many English common law trials were actually held before more than one judge. *See* DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND, 1727-1875, at 7-8, 23 (1982); *see also* S. F. C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 72 (2d ed. 1981); *Gibson*, 126 Eng. Rep. at 508; Steel v. Houghton, 1 H. Bl. 52, 52-63, 126 Eng. Rep. 32, 33-39 (C.P. 1788); Harris v. Porter, Car. 1, 1-2, 124 Eng. Rep. 788, 788-89 (C.P. 1688). For discussion of how English courts were organized, see RONALD WALKER & RICHARD WARD, WALKER & WALKER'S ENGLISH LEGAL SYSTEM 131-39 (7th ed. 1994). While the trial court could order a new trial for alleged factual error, the appellate courts had no such power. *See* ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 57 (1941). Appellate courts could order a new trial only for legal error. *See id.* There was no provision for either trial or appellate courts to enter judgments contrary to the jury's fact-finding. There is some authority stating that appellate courts could "recall" judgments for factual errors, but such factual errors are narrowly defined and must appear on the face of the record. *See id.* Factual errors subject to this procedure include such matters as the plaintiff's being underage, the plaintiff's being a married woman, or the death of the plaintiff prior to the verdict. *See* 2 MATTHEW BACON, NEW ABRIDGMENT OF THE LAW 217 (1736). Appellate courts could not recall verdicts that the jury returned on disputed questions of fact. *See id.*

[35] *See Gibson*, 126 Eng. Rep. at 509. *See generally* Green, *supra* note 3 (describing the difficulty of separating questions of law from questions of fact).

[36] *See Gibson*, 126 Eng. Rep. at 509; *see also* Van Stone v. Stillwell & Bierce Mfg. Co., 142 U.S. 128, 134 (1891) (discussing English practice); Hopkins v. Nashville, C & St. L. Ry., 34 S.W. 1029 (Tenn. 1896) (same). A demurrer to the evidence is similar to the modern directed verdict.

[37] There are many examples of apparently arbitrary classifications of issues of fact or law. *See* Isaacs, *supra* note 3, at 4-5. Isaacs was looking primarily at American cases around the turn of the twentieth century. *See id.*

[38] *See, e.g.*, Macbeath v. Haldimand, 1 T.R. 173, 180-82, 99 Eng. Rep. 1036, 1040-41 (K.B. 1786); Clench v. Tomley, Cary 23, 21 Eng. Rep. 13 (1603); Vicary v. Farthing, Cro. Eliz. 411, 78 Eng. Rep. 653 (1595); THAYER, *supra* note 3, at 205-06. One reason for this rule is that many jurors could not read. *See* Macferson v. Thoytes, Peake 29, 170 Eng. Rep. 67 (N.P. 1790).

of fact, perhaps reflecting less confidence in the determinacy of words.[39] Mixed questions of law and fact also made the law/fact distinction difficult because there were only two ways to allocate authority: to the judge or to the jury.[40] Mixed questions often appear to be questions of fact, but have some legal content. For example, the question whether an alleged tortfeasor's conduct was reasonable under the circumstances is generally considered to be a question of fact for the jury.[41] The decision, however, can help define the contours of reasonableness, and thus provide guidance to others. This gives the determination the look of law.[42]

At common law there were a number of procedural devices used to police the judge/jury allocation and these devices are important for the analysis that follows.[43] The two most important are demurrer to the evidence and case reserved. Demurrer to the evidence allowed a party to obtain a decision on the law of the case by admitting the facts and inferences shown by her opponent's evidence.[44] It required the party to forego presenting any evidence of her own, so that if she lost the demurrer to the evidence, she lost the case.[45] Case reserved allowed the court to give the case to the jury while reserving a decision on a question of law that arose during the trial. It was possible for the court to decide the question of law in a way that conflicted with the jury's decision, but the legal decision prevailed.[46]

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[39] *See, e.g.*, Rankin v. Fid. Trust & Safe Deposit Co., 189 U.S. 242, 252-54 (1903); Dobson v. Masonite Corp., 359 F.2d 921, 923-24 (5th Cir. 1966); 5 MARGARET N. KNIFFEN, CORBIN ON CONTRACTS § 24.30 (Joseph M. Perillo ed., rev. ed. 1998). On the indeterminacy of words, see generally LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans. 1958); GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 238-39 (1995); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2514-18 (1992).

[40] *See* FORSYTH, *supra* note 3, at 8-10; *see also* Bohlen, *supra* note 3; Green, *supra* note 3.

[41] *See, e.g.*, Lewis v. Knowlton, 688 A.2d 912, 914 (Me. 1997); Johnson v. A.M.C., 225 N.W.2d 57, 65 (N.D. 1974); J. Weingarten, Inc. v. Brockman, 135 S.W.2d 698, 699 (Tex. 1940); Bohlen, *supra* note 3, at 115.

[42] *See generally* Bohlen, *supra* note 3 (discussing mixed questions of law and fact); Green, *supra* note 3 (same).

[43] For discussions of these various devices, see Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289 (1966); ROBERT WYNESS MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 297-309 (1952).

[44] *See* Henderson, *supra* note 43, at 304-05; *see also* Galloway v. United States, 319 U.S. 372, 399-400 (1943) (Black, J., dissenting).

[45] For discussions of the demurrer to the evidence, see THAYER, *supra* note 3, at 234-39; Henderson, *supra* note 43, at 304-05.

[46] For discussions of the case reserved, see Henderson, *supra* note 43, at 305-07.

Other devices, bearing modern names but differing substantially from the modern form, were directed verdict and judgment notwithstanding the verdict.[47] The directed verdict was simply an instruction to the jury, which the jury could ignore. The judgment notwithstanding the verdict was a device used by the *plaintiff* to challenge the sufficiency of the defendant's pleading after the verdict.[48]

By 1791, when the Seventh Amendment to the United States Constitution was ratified, the rules governing the allocation of decision-making authority between judges and juries in England had grown quite complex. On the surface, two primary allocational rules were still in place—juries functioned only in common law courts and they decided only questions of fact, while judges decided everything else. The difficulty of fitting complicated, multi-faceted questions into just two categories, fact and law, gave rise to some strange and over-lapping rules. We still struggle with this problem of allocation today, and English history continues to inform the resolution of this problem.

2. American Origins

The American colonies adapted many English practices when they set up their governments, including the practice of using juries in both civil and criminal cases. This does not mean that jury practice in the various colonies was identical to that of England; nor does it mean that such practice was uniform among the colonies. There were many variations in jury practice, both large and small.[49] One important difference between English and colonial juries was that, in many of the colonies, juries had the power to decide law as well as fact.[50] On the other hand, the colonies generally maintained the distinction between law and equity, though many maintained the

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[47] *See* Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 44 MINN. L. REV. 903, 910 (1971); *see also* Henderson, *supra* note 43, at 302-04.

[48] *See* MILLAR, *supra* note 43, at 324. The judgment notwithstanding the verdict was the reverse of the motion in arrest of judgment, whereby the *defendant* could challenge a pleading error by the plaintiff after the verdict. *See id.*; *see also* HERBERT BROOM, COMMENTARIES ON THE COMMON LAW 208 (4th ed. 1873).

[49] *See generally* Henderson, *supra* note 43, at 289 (discussing a variation in jury practice).

[50] *See* WILLIAM E. NELSON, THE AMERICANIZATION OF THE COMMON LAW 3-29 (1975); Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993); *see also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 705-06 n.183 (1973); Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 103-06; Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 172 (1964).

distinction through separate procedures rather than separate courts.[51] In addition, limitations on appellate review of jury verdicts were at least as strong in the colonies as in England.[52]

Colonial practices reflect the fact that the jury was one of the most important institutions in the struggle for independence.[53] Colonial juries regularly refused to enforce British laws that the colonists viewed as oppressive, whether the laws were civil or criminal.[54] Indeed, the British tried vigorously to evade colonial juries by providing that sensitive matters be tried in courts of equity or admiralty, where the jury did not operate.[55] Depriving the colonists of trial by jury was one of the grievances set forth against the king in the Declaration of Independence.[56]

Nevertheless, in 1787, when the Constitutional Convention proposed a new Constitution to the American people to replace the dysfunctional Articles of Confederation,[57] the proposed Constitution contained no reference to civil juries, though it did provide for a right to jury trial in criminal cases.[58] Furthermore, Article III of the Constitution provided that the Supreme Court had appellate jurisdiction "both as to Law and Fact,"[59] a power that could effectively nullify a jury verdict. Some people interpreted these provisions as meaning that the civil jury was abolished, and used that alleged

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[51] *See* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, 8 n.14, 493 (Paul A. Freund ed., 1971). The colonies had trouble deciding how to incorporate equitable principles, and so took many approaches, including separate courts, separate procedures, and legislative determinations of claims in equity. *See* Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 U. KAN. L. REV. (forthcoming 2003).

[52] *See id.* at 19-35.

[53] *See* NELSON, *supra* note 50; Wolfram, *supra* note 50, at 653-56.

[54] *See, e.g.*, VINCENT BURANELLI, THE TRIAL OF PETER ZENGER (1957) (discussing criminal libel trial of newspaper editor); NELSON, *supra* note 50, at 31 (discussing nullification of the Navigation Act); Wolfram, *supra* note 50, at 703-08.

[55] *See* GOEBEL, *supra* note 51, at 85-87.

[56] *See* DECLARATION OF INDEPENDENCE, *reprinted in* 43 GREAT BOOKS OF THE WESTERN WORLD 1 (American State Papers 1952) (1776).

[57] For general histories of the Constitutional Convention and the origins of the Constitution, see THE DEBATES IN THE FEDERAL CONVENTION OF 1787, WHICH FRAME THE CONSTITUTION OF THE UNITED STATES OF AMERICA, REPORTED BY JAMES MADISON, A DELEGATE FROM THE STATE OF VIRGINIA (Gaillard Hunt & James Brown Scott eds., 1920); MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES (1913); CLINTON LAWRENCE ROSSITER, 1787: THE GRAND CONVENTION (1966).

[58] *See* U.S. CONST. art. III, §2, cl. 3 (providing for a right to jury trial in criminal cases).

[59] *See* U.S. CONST. art. III, §2, cl. 2 (describing the jurisdiction of the Supreme Court). For a discussion of the powers of courts in England to alter jury verdicts, see *supra* notes 43-47 and accompanying text.

abolition to rouse opposition to the Constitution.[60] When the Constitution was ratified in 1789, it was understood that the First Congress would propose a Bill of Rights in the form of amendments to the Constitution, and Congress wasted no time in doing so.[61] The Seventh Amendment contains the guarantee of a right to a civil jury.[62]

The Seventh Amendment was problematic for the drafters of the Bill of Rights because of the considerable variation in jury practices that existed among the states. The Amendment's language is intentionally vague, but it invokes both the law/equity distinction and the law/fact distinction. It specifically refers to the common law (not equity) and to the jury's fact-finding powers.[63] It also invokes history in its provision that the right to jury trial is "preserved."[64] The Seventh Amendment does not, however, protect juries' law-deciding authority; it only protects the jury's fact-finding authority from review by the courts. The next section briefly describes the interpretive problems that have faced the courts since the Seventh Amendment's ratification in 1791.

B. Interpretation

1. Language

The courts have faced a number of questions regarding the Seventh Amendment over the course of the country's history. What, for example, is meant by "suits at common law"? Does the phrase encompass statutory actions? Courts have also asked what is meant by

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[60] *See* Wolfram, *supra* note 50, at 657-61. Proponents of the new Constitution defended the omission of a right to a civil jury, arguing, among other things, that the omission did not abolish the right to a civil jury, but only left it in the capable hands of Congress. *See* THE FEDERALIST, No. 83 (Isaac Kramnick ed., Penguin Books 1987) (1788). This was too-small comfort for proponents of the civil jury.

[61] Bill of Rights, 1 Stat. 97 (1789).

[62] U.S. CONST. amend. VII.

[63] The federal courts that were established under the Judiciary Act of 1789 were unitary—they they handled both legal and equitable matters, though they used different procedures for the two kinds of matters. *See* SWARD, *supra* note 2, at 103. Until promulgation of the Federal Rules of Civil Procedure in 1938, federal courts were required to use the procedures of the state in which they were sitting in all common law matters. *See* Practice Conformity Act, ch. 225, 17 Stat. 197 (1872). *See generally* ROBERT C. CASAD ET AL., CIVIL PROCEDURE 428-29 (2d ed. 1989) (discussing the Conformity Act). The practice originated with the First Congress. *See* Process Act of 1789, ch. 21, § 2, 1 Stat. 93 (1789). When federal courts heard equitable matters, they followed the Federal Equity Rules, first promulgated in 1822. *See* Rules of Practice for the Courts of Equity of the United States, 20 U.S. (7 Wheat.) v (1822); s*ee also* Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (1792) (granting the Supreme Court authority to promulgate rules for equity practice).

[64] U.S. CONST. amend. VII.

"preserving" the right to jury trial. Are we bound strictly to the historical right, or can changes in the common law result in changes in the Seventh Amendment right to a jury trial?[65] What exactly is the nature of the right that is preserved? Does the reference to the fact-finding authority of the jury in the Amendment's second clause help define that fundamental right?

In approaching these questions it is helpful to break the Amendment into its constituent parts—something that the courts have done implicitly almost since the Amendment's adoption. The most reasonable parsing of the Amendment, and the one most consistent with judicial practice, is as follows:

> [A] In Suits at common law, where the value in controversy shall exceed twenty dollars, [1] the right of trial by jury shall be preserved, and [2] 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.[66]

This gives the Amendment an introductory clause that limits the right defined in the Amendment to "Suits at common law." It then continues with two separate clauses. The first "preserve[s]" the right to jury trial, and I shall refer to it as the Preservation Clause. The second, commonly referred to as the Re-Examination Clause, bars courts from re-examining jury verdicts except in accordance with common law rules. The Amendment as a whole is a response to the complaints raised during the ratification debates that the Constitution lacked protection for the civil jury.[67] The Re-Examination Clause responds to the specific fear that the Supreme Court's appellate power "both as to Law and Fact" would negate any jury right that the Amendment otherwise provided.[68]

One of the earliest expositors of the Seventh Amendment was Justice Story. To this day courts frequently cite to his opinion in the 1830 case *Parsons v. Bedford*.[69] In *Parsons*, Justice Story noted that the Seventh Amendment "requires that the right of trial by jury shall be preserved in suits at common law."[70] However, he also stated

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[65] For discussions of static versus dynamic interpretations of the Seventh Amendment, see Wolfram, *supra* note 50, at 731-47; Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 504-17 (1998).

[66] U.S. CONST. amend. VII.

[67] *See supra* notes 57-62 and accompanying text.

[68] *See supra* notes 59-60 and accompanying text.

[69] 28 U.S. (3 Pet.) 433 (1830).

[70] *See Parsons*, 28 U.S. at 446-47. Justice Story's statement is a juxtaposition of phrases. In the Seventh Amendment, the language "in Suits at common law" comes before the language saying that the right to trial by jury is to be preserved. *See* U.S.

unequivocally that the Re-Examination Clause, which was at issue in *Parsons*, was the more important clause of the Seventh Amendment.[71] He described it as "a substantial and independent clause."[72] Nevertheless, the decision in *Parsons* turned more on the law/equity distinction than on the precise meaning of the Re-Examination Clause and the case is cited most often for its interpretation of the phrase "Suits at common law."[73]

The question in *Parsons* was whether the trial court had erred in refusing to allow evidence to be recorded at the trial as permitted under Louisiana procedural rules, which were applicable in the federal courts under the Conformity Act.[74] The only purpose for such recording was to allow the appellate court to review the jury's fact-finding.[75] The argument in favor of recording was that the matter was not a common law matter because it was a diversity case that arose in Louisiana, which used a variant of civil law, not common law.[76] The Court rejected this argument, holding that the phrase "common law" in the Seventh Amendment was meant to distinguish equity, admiralty, and maritime law.[77] In other words, anything that was not equity, admiralty, or maritime law was common law within the meaning of the Seventh Amendment. The Court said,

> By *common law*, [the framers] meant what the constitution denominated in the third article "law;" not merely suits, which the *common* law recognized among its old and settled proceedings, but suits in which *legal* rights were asserted to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same

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CONST. amend. VII.

[71] *See Parsons*, 28 U.S. at 447.

[72] *Id.* Indeed, in *United States v. Wonson*, Justice Story misquoted the Amendment, putting a period after "preserved" and capitalizing "and," thus emphasizing the independence of the clauses. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750). Justice Story also misquoted the Amendment in *Parsons v. Bedford*, quoting the Re-Examination Clause as stating that "no fact *once* tried by jury shall be otherwise *re-examinable* in any court of the United States, than according to the rules of the common law." 28 U.S. (3 Pet.) 433, 446 (1830) (emphasis added).

[73] *See, e.g.*, City of Monterey v. Del Monte Dunes at Monterey, Ltd. 526 U.S. 687, 726 n.1 (1999) (Scalia, J., concurring); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347-48 (1998).

[74] *See Parsons*, 28 U.S. at 435-36. For a discussion of the Conformity Act, see *supra* note 63.

[75] *See Parsons*, 28 U.S. at 435-36.

[76] *See id. at* 436.

[77] *See id.* at 446.

suit.[78]

The matter at issue in *Parsons* did not involve equity, admiralty, or maritime law, and it therefore fell within the Seventh Amendment's definition of "common law." As the Seventh Amendment permitted no appellate review of the jury's fact-finding in "[s]uits at common law," the trial judge had not erred in refusing to permit recording of the evidence.[79]

An equally important statement of the Seventh Amendment's meaning came from Justice Story while he was sitting as a circuit justice.[80] In *Wonson v. United States*,[81] the losing party in a federal district court sought to have his case retried in a circuit court by another jury.[82] The matter was partly one of statutory construction, as Congress had enacted a series of somewhat confusing and inconsistent statutes governing the appellate jurisdiction of various courts.[83] Consistent with now-familiar rules of construction, Justice Story interpreted the statutes to make them consistent with the Constitution. Citing the common law of England, the Justice noted that facts found by a jury could never be re-examined at common law "unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded."[84] He noted further that a writ of error allows examination of "general errors of law only," and the appeals court "never can re-try the issues already settled by a jury, where the judgment of the inferior court is affirmed."[85] In other words, trial judges could order a new trial for good cause, but

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[78] *Id.* (emphasis in original).

[79] *Id.* at 455.

[80] The first judiciary act set up two kinds of lower federal courts, denominated district courts and circuit courts. *See* Judiciary Act of 1789, 1 Stat. 73 (1789). The two kinds of courts, however, bore little resemblance to the modern courts bearing those names. Both courts could hold trials, though their jurisdiction was somewhat different. Circuit courts, however, could also function as courts of appeals from district court decisions. For appellate matters, circuit courts were staffed by two justices of the Supreme Court sitting as circuit justices, and by a judge from the district court, probably the same judge who had decided the case initially. For discussions of this early history, see RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 28-31 (4th ed. 1996); ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS (1987).

[81] 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

[82] *Id.* at 750.

[83] *Wonson*, 28 F. Cas. at 745-47.

[84] *Id.* at 750.

[85] *Id.*

appellate courts could only deal with alleged errors of law.[86] This is the virtually contemporaneous understanding of the meaning of the Re-Examination Clause.

While Justice Story's exposition has served as the foundation on which Seventh Amendment analysis has been built, courts and commentators have paid much more attention to the Amendment's first clause than the second clause. Despite Justice Story's insistence that the two clauses are independent, there appear to be substantial connections between them. One is the common law. The introductory clause of the Amendment ties the two together by limiting application of both clauses of the Amendment to "Suits at common law." Another linkage between the two clauses is also apparent. The Preservation Clause preserves the right to jury trial, but does not define that right.[87] The Re-Examination Clause helps to define the jury trial right, by protecting the jury's fact-finding authority. Indeed, defining the right to jury trial as the right to have the jury find facts constitutes one of the Supreme Court's principle definitions of this preserved fundamental right.[88]

Defining the right in this manner is consistent with English practice, where the law/fact distinction was the principle means of allocating decision-making authority between judge and jury. Justice Story, in describing the Re-Examination Clause as the more important of the Seventh Amendment's two clauses, recognized the significance of the jury's fact-finding authority. I have already demonstrated that the law/fact distinction is not an easy one to articulate or to use, but it is at least a start. A brief look at how the Court has handled the law/equity and law/fact distinctions in Seventh Amendment jurisprudence reveals that the Court has been much more protective of the law/equity distinction than of the law/fact distinction.

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[86] Trial courts could order a new trial if the verdict was against the weight of the evidence. *See, e.g.*, Bright v. Eynon, 1 Burr. 390, 97 Eng. Rep. 365 (1757); Wood v. Gunston, Style 466, 82 Eng. Rep. 867 (1655). Henderson, however, says that the practice was not firmly established until 1836. *See* Henderson, *supra* note 43, at 311. This is another example of the difficulty of determining what the rules were in England in 1791.

[87] U.S. CONST. amend. VII.

[88] *See, e.g.*, Gasoline Prods. Co., Inc. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); *Ex parte* Peterson, 253 U.S. 300, 310 (1920); Walker v. N.W. & S. Pac. R.R. Co., 165 U.S. 593, 596-97 (1897). *See also* Margaret L. Moses, *What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 200-07 (2000).

2. Common Law and Equity

In *United States v. Wonson*, Justice Story said that the Seventh Amendment's reliance on the common law of England to define a suit at common law was "obvious to every person acquainted with the history of the law."[89] Justice Story thought it unnecessary to expound on the reasons for this reliance.[90] But the distinction between law and equity was not as clear in the new federal courts, or in many of the states, as it was in England. Congress created lower federal courts in 1789, but it did not create separate courts of law and equity.[91] Litigants, however, still filed cases in either law or equity. Although different procedural rules applied to legal and equitable cases,[92] the same judges heard both, sitting in either law or equity as each case demanded. As long as this clear separation was maintained, there were few conflicts over the right to jury trial in the federal courts. Those that did arise, as in *Wonson* and *Parsons*, tended to concern not the initial assignment of the matter to law or equity, but questions about the courts' power to review jury verdicts.

The matter became more complicated as law and equity merged beginning with the state courts in the mid-nineteenth century. The Conformity Act required that federal courts follow state procedures in common law actions,[93] but as states eliminated the distinction between law and equity, it became more difficult for federal judges to determine what procedures to apply—state procedures or federal equity rules.[94] While it was implicit in Justice Story's opinions in *Wonson* and *Parsons*, it was not until the 1935 cases of *Dimick v.*

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[89] *Wonson*, 28 F. Cas. at 750.

[90] One commentator has suggested that the reliance on English common law was a twentieth century development, and that nineteenth century Supreme Court cases tended to look to both English and American precedent, especially when analyzing the Preservation Clause. *See* Moses, *supra* note 88, at 187-92. The reference to "Suits at common law" in the Seventh Amendment is logically read as referring to both clauses, and it follows that the test for determining whether the matter is a suit at common law should be the same for both clauses.

[91] *See* Judiciary Act of 1789, 1 Stat. 73, §§ 2-4 (1789).

[92] *See supra* note 63.

[93] *See id.*.

[94] *See, e.g.*, Gudger v. W. N.C.R. Co., 21 F. 81 (C.C.W.D.N.C. 1884) (refusing to allow a single cause of action blending legal and equitable claims despite a state code that merged law and equity); Montejo v. Owen, 17 F. Cas. 610 (C.C.S.D.N.Y. 1877) (No. 9,722) (applying federal equity rules to an equitable defense despite the New York state rule that merged law and equity and allowed an equitable defense to be asserted to a common law claim); Beardsley v. Littell, 2 F. Cas. 1178 (C.C.S.D.N.Y. 1877) (No. 1,185) (refusing to allow pre-trial examination of witnesses in a legal action despite a state code that merged law and equity and would have allowed it).

Scheidt[95] and *Baltimore & Carolina Line, Inc. v. Redman*[96] that the Court stated explicitly that courts should look to the English common law in 1791—the year of the Amendment's ratification—to define the distinction between law and equity.

Three years later, in 1938, the Federal Rules of Civil Procedure took effect, merging law and equity under a single set of procedures in the federal courts.[97] Although the issue then became more acute for the courts, the Supreme Court's first significant statement about the effect of the merger on the definition of law and equity did not come until 1959. In *Beacon Theatres, Inc. v. Westover*,[98] the Court held that when legal and equitable matters are presented in the same case, there is a right to trial by jury as to all facts that are common to the legal and equitable issues, as well as facts that are particular to the legal issues.[99] This outcome resulted from changes in procedural rules, which eliminated the grounds for equitable action in many cases.[100] Thus, procedural changes could result in apparent expansion of the right to jury trial.

In 1974, the Court started down a path that brought history even more squarely into the Seventh Amendment analysis of the distinction between law and equity. In *Curtis v. Loether*,[101] the Court held that the Seventh Amendment applies to "actions enforcing *statutory* rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."[102] While this is certainly reminiscent of *Parsons v. Bedford*, which held that the statute-based civil law of Louisiana was "common law" for purposes of the Seventh Amendment,[103] *Curtis* opened the door to an explicit historical test to distinguish law and equity. The test, which was implicit in *Curtis* but

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[95] 295 U.S. 654 (1935).

[96] 293 U.S. 474 (1935).

[97] *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2nd §§ 1041-45 (1987).

[98] 359 U.S. 500 (1959).

[99] *See id.* at 510-11. For a more detailed discussion of *Beacon Theatres*, see SWARD, *supra* note 2, at 162-65.

[100] *See Beacon Theatres*, 359 U.S. at 506-10; s*ee also* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) (holding that a jury trial was required in an action seeking injunctive relief and equitable accounting because the underlying relief requested was legal and the Federal Rules' provision for masters eliminates the need for equity to act); Ross v. Bernhard, 396 U.S. 531 (1970) (holding that a jury was required for a shareholders' derivative suit because the underlying claim was legal). For a more detailed discussion of these cases, see SWARD, *supra* note 2, at 166-68.

[101] 415 U.S. 189 (1974).

[102] *Id.* at 194 (emphasis added).

[103] *See supra* notes 77-80 and accompanying text.

became explicit thirteen years later in *Tull v. United States*,[104] has two steps: first, the Court must find an English claim that existed at the time of the Seventh Amendment's ratification and is analogous to the statutory claim at issue; second, the Court must examine the remedy to determine if it is legal or equitable.[105] The Court has continued to apply this test despite some misgivings among various justices.[106] Indeed, the Court applies this test not only to statutory actions, but to common law actions as well, though common law actions are often easier to characterize.[107]

In short, history is at least nominally quite important in the Seventh Amendment analysis of the distinction between law and equity. A purely historical analysis, however, would hold that the right to jury trial prevails only in those precise cases where a jury would have been available in 1791 England.[108] The current test

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[104] 481 U.S. 412, 417-18 (1987).

[105] *See id.*

[106] *See* Chauffeurs, Teamsters and Helpers Local 391 v. Terry, 494 U.S. 558 (1990). *Terry* generated spirited disagreement about whether this historical approach is appropriate. *See id.* at 574-81 (Brennan, J., concurring) (arguing that the first step should be eliminated and courts should rely solely on the historical remedy); *see also id.* at 581-84 (Stevens, J., concurring) (arguing that precise analogies are unnecessary, but that the Court should decide based on whether the matter is similar to one that common law courts would have handled in England in 1791); *id.* at 584-95 (Kennedy, J., dissenting) (arguing that the first step should determine the matter). All of these opinions, however, look to history to some degree. The Court still refers to the two-part test in determining whether the matter is legal or equitable. *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).

[107] *See, e.g.*, Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42-49 (1989) (applying the test to common law fraudulent conveyance actions in bankruptcy court). The test will be easy to apply if the cause of action existed in England in 1791, but there are circumstances where the analysis could be complicated even for common law actions. The first circumstance is when an action did not exist at common law, but has evolved in the United States since 1791. An example is dram shop liability, which holds a barkeeper liable for injuries caused by an intoxicated person who drank at his bar. *Compare* Cruse v. Aden, 20 N.E. 73, 74 (Ill. 1889) (saying that it was not a tort at common law to supply alcoholic beverages to a "strong and able-bodied man"), *with* Schelin v. Goldberg, 146 A.2d 648, 652-53 (Pa. 1958) (recognizing liability of bar owner for injuries to patron when bar owner served patron knowing that he was already intoxicated). For a history of social host and dramshop liability, see Robert G. Franks, Note, *Common Law Liability of Liquor Vendors*, 31 MONT. L. REV. 241, 242-48 (1970). Another circumstance is where the action existed in England in 1791, but there was a choice of remedy. An example is breach of contract, which in 1791 England, could be heard in a court of law if money damages were sought, or in a court of equity if various equitable remedies, such as rescission, reformation, or specific performance, were sought. In the latter instance, the nature of the remedy, the second step in the two-step analysis, would be the determining factor.

[108] Some commentators have suggested such an analysis. *See, e.g.*, Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decisionmaking*, 70 NW. U. L. REV. 486 (1975).

requires jury trials in some actions that would have been equitable in eighteenth century England, and it requires jury trials in some actions that did not exist in eighteenth century England.[109] History, therefore, comes into play in analogizing modern actions to actions that existed in England in 1791.

3. Law and Fact

In *Beacon Theatres*, the Court allowed a procedural change, the merger of law and equity, to affect the right to a jury trial. The change resulted in more cases being tried to a jury than would have been tried to a jury in England in 1791. By contrast, a number of other procedural changes have affected analysis of the law/fact distinction, and the Court has been less protective of the jury in the face of those changes. The Court has repeatedly made it clear that courts are not tied to the precise procedures available in 1791 English courts, and therefore, that procedural changes can affect the jury's domain as long as they do not undercut the "fundamental" right to a jury trial.[110] The Court has not clearly defined the "fundamental" right, but has suggested that the jury's fact-finding role is fundamental.[111]

Indeed, some recent cases have suggested that the Court is growing more concerned about protecting the jury's fact-finding authority. For example, in *Reeves v. Sanderson Plumbing Products, Inc.*,[112] the Court overturned a judgment as a matter of law on the grounds that the lower court, in granting the judgment, had ignored evidence in favor of the non-moving party and had failed to draw all reasonable inferences in favor of the non-moving party.[113] In fact, there is some evidence that the Supreme Court is somewhat more protective than lower courts of the jury's fact-finding role.[114] But if the Supreme Court is concerned about preserving the jury's fact-finding role, it might have to reconsider 130 years of history. Over the course of that history questions of fact have been transformed

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[109] My own view is that the right to jury trial is sufficiently important that this expansion is quite proper. *See generally* SWARD, *supra* note 2, at ch. 2 (describing the value of the civil jury).

[110] *See* Galloway v. United States, 319 U.S. 372, 388-92 (1943).

[111] *See, e.g.*, cases cited *supra* note 88.

[112] 530 U.S. 133 (2000).

[113] *See id.* at 152-54.

[114] *See, e.g.*, Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 205-18 (2000) (discussing recent Supreme Court cases on summary judgment); Eric Schnapper, *Judges Against Juries – Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 298-313 (discussing lower court and Supreme Court rulings on judgment notwithstanding the verdict).

into questions of law, with the result that judges decide matters today that would have been decided by juries in England in 1791. The next section details that development.

III. HOW FACT BECAME LAW: TRACING THE ORIGINS OF DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING THE VERDICT, AND SUMMARY JUDGMENT

The transformation of fact into law is best demonstrated by starting with the most significant case in this development and tracing the doctrine back through the cases it cites. This analysis starts with an important doctrinal change that preceded all procedural developments: the adoption of the "reasonable jury" test. It then examines the directed verdict and *Galloway v. United States*,[115] which held that the directed verdict procedure did not violate the Seventh Amendment. It then examines judgment notwithstanding the verdict, focusing on the most significant case, *Baltimore & Carolina Line, Inc. v. Redman*.[116] Finally, the inquiry shifts to an evaluation of summary judgment. This is a more difficult analysis because the Supreme Court has not explicitly considered whether the current summary judgment procedure is constitutional. An early Supreme Court opinion and several lower court decisions shed light on the constitutionality of summary judgement, however, and serve as a starting point. Three 1986 cases, widely thought to have changed summary judgment practice, are also relevant. Finally, this section traces the transformation of fact into law and thereby illustrates this article's thesis: judges now decide matters that would have been decided by juries at common law.

A. The Unifying Test: The Reasonable Jury

The most significant shift in the law relating to the law-fact distinction was the recognition of the "reasonable jury" standard. Under this standard a judge can take a case from the jury by a variety of devices if there is no substantial evidence upon which a reasonable jury could reach a verdict in favor of one party; in other words, if there is only one reasonable outcome.[117] The key word is "reasonable" because the cases suggest that what is "reasonable" is often in the eyes of the beholder. Indeed, many of the cases

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[115] 319 U.S. 372 (1943).

[116] 295 U.S. 654 (1935).

[117] *See* Anderson v. Liberty Lobby, 477 U.S. 242 (1986). The test is often referred to as the "substantial evidence" test. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 564-66 (3d ed. 1999).

discussed in this section demonstrate that reasonable people can disagree about what is reasonable. This section explores the origins of the shift to the reasonable jury standard.[118]

The shift began in the United States with the Supreme Court's 1871 decision in *Improvement Company v. Munson*.[119] It appears from the complicated facts that the plaintiffs and defendants had conflicting claims for land in Pennsylvania.[120] Surveys taken at the times of the initial land grants put the respective parcels some miles apart from one another.[121] A later survey produced the conflict.[122] The lower court instructed the jury to find for the plaintiffs on the ground that there was no evidence of authorization for the later survey and subsequent surveys done without authorization were invalid.[123] That being the case, the court held that there was no conflict in the ownership.[124]

The Supreme Court affirmed, applying the settled rule that a case should not be submitted to the jury where there is no evidence on the subject, but the court thought it was adopting a new rule for determining whether there was any evidence in the record.[125] The Court said:

> Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.[126]

The Court then found that the defendants were asking, in effect, that the court apply a presumption: that the presence of a second survey is

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[118] It is reasonable to ask, if we are examining a shift, what came before the "reasonable jury" standard. The answer is not entirely clear, though the former test has often been referred to as the "scintilla" test—as long as there was a scintilla of evidence for the non-moving party, the case had to go to the jury. *See, e.g.*, Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871). It is clear, however, that the reasonable jury standard made it easier to take cases away from the jury.

[119] 81 U.S. (14 Wall.) 442 (1871).

[120] *Id.* at 442-46.

[121] *Id.* at 444-45.

[122] *See generally id.* at 443-46.

[123] *See id.* at 446.

[124] *Id.*

[125] *Munson*, 81 U.S. at 448.

[126] *Id.* (emphasis in original).

presumptive evidence of that survey's proper authorization.[127] The Court refused to apply this presumption, and thus, the absence of any evidence establishing authorization was determinative.[128] In other words, the Court in *Munson* refused to allow the jury to infer authorization from the existence of the second survey because such an inference would undermine its ruling on an evidentiary presumption. A decision not to employ a presumption is more a question of law than of fact.[129] Under this reading, *Munson* has come to stand for more than its facts would seem to warrant because there was, literally, no evidence of a critical fact: authorization for the second survey.

The "recent decisions of high authority" [130] that the Court referred to were mostly English cases. The earliest of these was *Jewell v. Parr*,[131] decided in 1853, and it is apparently the first case to hold that a court can take a case from the jury even when there is some evidence on both sides.[132] *Jewell* was a suit by an indorsee on a bill of exchange against an acceptor for recovery of the value of the bill.[133] The acceptor claimed that he had accepted the bill without consideration solely to accommodate the drawer, and that the drawer had paid the bill when it became due.[134] Apparently, however, the drawer had thereafter used the fully-paid bill as payment for another debt, and the creditor presented it to the acceptor for payment.[135] There was no direct evidence as to payment by the drawer, who was dead, but there were some indeterminate notations on the bill, including a due date that was earlier than the creditor's acquisition of the bill.[136] The only clear evidence of payment was the acceptor's testimony.[137] The jury returned a verdict for the acceptor, and the indorsee was given leave to move for judgment.[138]

The court then ordered judgment for the indorsee on the ground that there was no evidence to show that the bill had been

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[127] *See id.* at 451.
[128] *Id.* at 451-52.
[129] *See* THAYER, *supra* note 3, at 212-13.
[130] *Munson*, 81 U.S. at 448.
[131] 13. C.B. 909, 138 Eng. Rep. 1460 (1853).
[132] *Jewell*, 138 Eng. Rep. at 1464-65.
[133] *Id.* at 1460-61.
[134] *Id.* at 1461.
[135] *See id.* The plaintiff was the indorsee of the person who had obtained the allegedly fully paid bill. *Id.*
[136] *Id.*
[137] *Id.* at 1460-61.
[138] *Jewell*, 138 Eng. Rep. at 1461.

paid and re-issued, as the acceptor claimed.[139] Justice Maule said,

> Perhaps it cannot with strict propriety be said . . . that there is no evidence to go to the jury. . . . [W]hen we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established.[140]

The issue was not strictly factual, however: there was a hint of a legal issue in the case as well. The chief justice noted that the acceptor, not the drawer, is the person primarily responsible for paying the bill. If the drawer had in fact paid it, the acceptor's recourse was against the drawer.[141] Thus, if the court had allowed the jury's verdict to stand, the rule that the acceptor was chiefly responsible for paying the bill would have been undermined, as any acceptor could claim payment by the drawer and put the credibility issue to the jury. The issue in *Jewell* can be characterized, therefore, as a mixed question of law and fact.

This case does indicate a shift in English practice toward awarding judgments inconsistent with the jury's verdict when there is evidence going both ways, but there are factors that should have limited its reach in American jurisprudence. First, as noted, the decision was necessary in order to preserve a rule of law concerning who had primary responsibility for paying a bill. Second, the case, decided in 1853, is not part of the background of the Seventh Amendment, which was adopted in 1791. Furthermore, the fact that *Jewell* cited no authority for the proposition that a court could take a case from the jury if there was no evidence upon which a reasonable jury could find for one of the parties suggests that this notion originated with the *Jewell* court, more than 60 years after the Seventh Amendment's ratification.

Munson next cited *Ryder v. Wombwell*,[142] decided in 1868. There, the question was whether a minor could be held to his debt on the ground that the debt was for "necessaries," goods that were necessary

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[139] *Id.* at 1463-65.

[140] *Id.* at 1463. Indeed the court suggested that the evidence on that question allowed no firm conclusion for either party, which meant that the party with the burden of proof—the defendant on his defense of payment—could not prevail. *See id.* The defense of payment would now be deemed an affirmative defense in federal practice. *See* FED. R. CIV. P. 8(c). In common law parlance, it was called an avoidance. The court in *Jewell* did not use the term "avoidance," but it is clear that the court viewed the matter as imposing a burden of proof on the defendant, which could only be the case if the defense were an avoidance.

[141] *See id.* at 1463.

[142] L.R., 4 Ex. 32 (1868).

to his station in life.[143] The minor, a younger son of a deceased baronet, had purchased an antique silver goblet and a pair of jeweled solitaires.[144] The jury found that the goods were necessaries, but the court believed that there was no evidence that the goods were necessary to the defendant's station in life.[145] The court applied the reasonable jury test announced in *Jewell v. Parr*,[146] but it avoided deciding the question of fact by holding, in accordance with cited authority, that the goods were not *prima facie* necessary,[147] and that it was incumbent upon the plaintiff to offer evidence that they were necessary.[148] The court ordered a nonsuit[149] because the plaintiff did not provide such evidence.[150] Again, there are significant differences between this case and modern American practice. First, a nonsuit is not the same as entering a judgment for the defendant. A nonsuit gives the plaintiff the opportunity to try again with better evidence. Second, *Ryder* is really a decision that the plaintiff simply lacked necessary evidence under the substantive rule that the court was to apply. It did not involve weighing evidence, though it would have if the plaintiff and defendant had each presented evidence on whether the goods were necessaries. Thus, there was literally *no* evidence to support the plaintiff's claim.

The Court in *Munson* also cited two other English cases and one earlier decision of its own. The two English cases had been cited in *Ryder*, and both were decided in 1857—four years after *Jewell*. The first of these was *Toomey v. London, Brighton, and South Coast Railway Co.*[151] The plaintiff in *Toomey* was an illiterate man who asked a fellow passenger for directions to the rest room at the railroad station.[152] When he followed those directions, he found two doors and mistakenly chose the one leading to a basement.[153] He fell down the stairs and was injured.[154] The court, affirming that more than a scintilla was required to send the case to the jury, found for the

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[143] *See id.* at 38.

[144] *See id.* at 33.

[145] *See id.* at 37.

[146] *See id.* at 39.

[147] *See id.* at 40-41.

[148] *Id.*

[149] A nonsuit allowed the court to dismiss the case without prejudice to the plaintiff. It was generally done when the plaintiff had failed to produce evidence on an essential element, and it allowed the plaintiff to start over.

[150] *See id.* at 42.

[151] 3 C.B. (N.S.) 146, 140 Eng. Rep. 694 (1857).

[152] *Id.* at 694-95.

[153] *Id.*

[154] *Id.*

defendant railroad on the question whether the railroad company was negligent.[155] The court seemed to blame the plaintiff for his own carelessness, but also noted that the stairs presented no more than the normal danger.[156] It suggested that if there had been evidence that the stairs were more than ordinarily dangerous, the plaintiff might have been successful.[157] A nonsuit against the plaintiff was, therefore, affirmed.[158]

In the second case cited by the *Munson* Court, *Wheelton v. Hardisty*,[159] the plaintiffs were beneficiaries under a life insurance policy.[160] The plaintiffs had loaned the insured a large sum of money with the insured's reversionary interest in his father's estate as security.[161] If the insured did not survive his father, however, the security would be worthless; hence, the need for the life insurance.[162] Upon the death of the insured, the insurance company refused to pay on the ground that the insured had given false statements about his health.[163] The false statements were given to the plaintiffs, however, and not to the insurance company.[164] Believing the statements to be true, the plaintiffs had transmitted the allegedly false medical information to the insurance company in their application for insurance.[165] The jury found no fraud on the part of the plaintiffs, and the court entered judgment for the plaintiffs on three counts.[166] However, the court entered judgment for the defendants on a claim that plaintiffs had warranted the truth of the statements made in their application.[167] The issues in the reported case were whether the insured's fraud should be imputed to the plaintiffs and whether the record contained any evidence of warranty.[168] The court held that the insured's fraud should not be imputed to the plaintiffs, who were also

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[155] *Id.* at 695-96.

[156] *Id.* at 696.

[157] *Toomey*, 140 Eng. Rep. at 696.

[158] *See id.* at 695, 696. Recall that a nonsuit allowed the plaintiff to try again. Thus, if the plaintiff could amass additional evidence of extraordinary dangerousness, he might ultimately succeed.

[159] 8 El. & Bl. 232, 120 Eng. Rep. 86 (1857).

[160] *Id.* at 86-87.

[161] *Id.*

[162] *See id.* at 89.

[163] *Id.* at 86-87.

[164] *Id.* at 92.

[165] *See Wheelton*, 120 Eng. Rep. at 92.

[166] *Id.*

[167] *See id.*

[168] *Id.*

victims of the insured's false statements.[169] But the court, emphasizing that the "scintilla" rule had been abandoned in favor of the reasonable jury standard,[170] held that there was "no such proof in this case as would justify the jury in finding the issue [of warranty] for the plaintiffs."[171] The court found that the evidence was inconclusive as to whether the plaintiffs were induced to enter into the contract of insurance by a prospectus from the defendants in which the defendants said that their insurance would be unquestionable except in case of fraud.[172] As the plaintiffs had the burden of proof on this issue, they could not prevail.[173] The court also said, however, that it would be inclined to treat the insured's fraud as negating the policy under the terms of the prospectus.[174]

Both *Toomey* and *Wheelton* reaffirm the decision in *Jewell* to abandon the scintilla test in favor of a reasonable jury test. In both cases, however, there was no disputed fact for the jury to decide. In *Toomey*, there was no dispute about the circumstances under which the man fell down the stairs. The only question regarded the fall's legal significance. Similarly, in *Wheelton*, everyone agreed that the plaintiffs were as unaware of the insured's fraud as the defendants were. The issue was the effect of that fraud on the insurance policy that the plaintiffs had purchased.[175] Again, the question was more law than fact. These cases can be read as applications of the English rule that juries decide disputed questions of fact, but judges decide the application of law to those facts.[176]

The last case cited by *Munson* was a Supreme Court case, *Schuchardt v. Allens*.[177] In *Schuchardt* the plaintiffs claimed breach of warranty in connection with their purchase of material used in dyeing.[178] The plaintiffs had purchased the material based on a single bottle, despite the fact that they had not been permitted to open the bottle to inspect its contents. The defendant asked the court to instruct the jury that there was no warranty, or that if there was, it was an implied warranty such that plaintiffs would have to establish

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[169] *See id.* at 97.
[170] *See id.* at 98.
[171] *Wheelton*, 120 Eng. Rep. at 98.
[172] *See id.*
[173] *Id.*
[174] *See id.* at 99.
[175] *Id.*
[176] *See* Gibson v. Hunter, 2 H. Bl. 187, 205-06, 126 Eng. Rep. 499, 508-09 (N.P. 1793). For a discussion of this rule, see *supra* notes 30-35 and accompanying text.
[177] 68 U.S. (1 Wall.) 359 (1863).
[178] *Id.* at 359-60.

fraud.[179] The court refused, and the jury returned a verdict for the plaintiffs.[180] The Court found that the proposed instructions sought to take the case away from the jury[181] and noted that instructions that seek to bind the jury's fact-finding are proper because they are equivalent to a demurrer to the evidence.[182] However, the Court found that the jury was justified in inferring a warranty. In other words, the Court held that the lower court properly allowed the jury to decide whether the facts supported an inference of a warranty.[183] Thus, *Munson* cited *Schuchardt* primarily for its language suggesting that a case could be taken from the jury on a demurrer to the evidence.

In short, neither *Munson* nor the cases it relies on support a radical transformation of the law/fact distinction whereby judges can take pure questions of fact away from the jury. At best, these cases suggest that courts can take such matters from the jury when allowing the jury to decide the matter could undermine a rule of law. They might also reinforce the English rule that judges decide the application of law to undisputed facts. They might even be characterized as mixed questions of law and fact. However, in no way can these cases be construed as allowing judges to take cases away from the jury when there are disputes of pure questions of fact, unmixed with law.

B. Directed Verdict: Galloway v. United States

The first case to explicitly approve the directed verdict procedure provided for in the Federal Rules of Civil Procedure was *Galloway v. United States*.[184] In *Galloway*, the Court tied the directed verdict to the common law demurrer to the evidence, which gave it a grounding in common law procedure, but *Galloway* also held that courts were not bound to the precise contours of common law procedural devices. Therefore, the fact that the directed verdict operated differently from the demurrer to the evidence did not render the directed verdict unconstitutional.[185] This notion was not new; *Galloway* cited several earlier U.S. Supreme Court cases in support of the proposition that the Seventh Amendment did not

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[179] *Id.* at 393.
[180] *Id.* at 363.
[181] *Id.* at 390-91.
[182] *Id.* at 370.
[183] *Id.*
[184] 319 U.S. 372 (1943).
[185] *Id.* at 392.

demand fidelity to common law procedures.[186] Each of these cases, however, involved procedural changes that nevertheless left the fact-finding in the jury's hands. One case allowed courts to order new trials limited to damages.[187] Another approved the appointment of auditors to conduct accountings, with the final decision as to the accounting left with the jury.[188] A third approved a procedure where a jury trial could be held before a justice of the peace, with an appeal permitted to the ordinary trial court, which would then conduct a second jury trial.[189]

Galloway is inconsistent with the precedent it cited in two ways. First, unlike the cases discussed earlier, *Galloway* approved a procedure that took a disputed question of fact out of the hands of the jury. In that sense, it went beyond being a mere procedural change. Second, the kinds of questions that the old demurrer to the evidence took from the jury were really questions of law. *Galloway*, by contrast, involved a disputed question of fact.[190] In other words, while earlier cases distinguished fairly effectively between both substance and procedure and law and fact, *Galloway* muddied both distinctions. In the remainder of this section, I will concentrate on the law/fact distinction. To see the difference between *Galloway* and the cases it relied on, I will present a detailed exposition of all of these cases. I start with *Galloway* itself.

Galloway concerned an insurance claim by an Army veteran, under a military insurance policy that paid benefits for permanent and total disability.[191] The policy expired on May 31, 1919, so Galloway had to prove that he was permanently and totally disabled as of that date.[192] This is quite clearly a question of fact, though it can be a complicated one. The suit was brought in 1938, by which time everyone involved agreed that Galloway had been permanently and

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[186] *See id.*(citing Gasoline Prods. Co., Inc. v. Champlin Ref. Co., 283 U.S. 494 (1931); *Ex Parte* Peterson, 253 U.S. 300 (1920); Capital Traction Co. v. Hof, 174 U.S. 1 (1899); Walker v. N.W. & S. Pac. R.R. Co., 165 U.S. 593 (1897)).

[187] *See Gasoline Prods.*, 283 U.S. at 500.

[188] *See Peterson*, 253 U.S. at 306-11.

[189] *See Capital Traction*, 174 U.S. at 45. The Court avoided the strictures of the Seventh Amendment's Reexamination Clause by holding that a jury trial before a justice of the peace is not a jury trial within the meaning of the Seventh Amendment. *Id.* A fourth case cited by *Galloway* approved the special verdict, with the jury finding facts and the judge applying the law to those facts. *See Walker*, 165 U.S. at 598. The Court in *Walker* noted, however, that this procedure was consistent with the common law. *See id.* at 596-97.

[190] *Galloway*, 319 U.S. at 372.

[191] *Id.* at 373-75.

[192] *Id.*

totally disabled by reason of mental illness for at least six years.[193] Galloway's evidence consisted of testimony from a boyhood friend who described Galloway's mental condition before and after Galloway served in France during World War I; the testimony of two fellow soldiers from the war; the testimony of two superior officers from two tours of duty after the war; and the testimony of a chaplain who thought he had seen Galloway in a mental hospital in 1920.[194] The trial court discounted the chaplain's testimony, however, because it was inconsistent with records showing that Galloway was serving in the Navy at that time.[195] The rest of the evidence tended to show mental instability during and after the war. This evidence showed Galloway to be mentally unstable from about 1918 to the early- to mid-1920s, and possibly as late as 1925;[196] however, there was no evidence for the period between 1925 and 1930.[197] The most crucial evidence in favor of Galloway's claim was the testimony of an expert witness, a medical doctor who examined Galloway shortly before the trial and testified that some people are born with an inherent instability that can be triggered by traumatic experiences, such as Galloway's service in the war.[198] The doctor expressed the opinion that Galloway had become insane during the war and had continued in that state ever since, though the nature of his illness meant that he could have periods of relative stability.[199]

The trial court directed a verdict for the government, and the court of appeals affirmed.[200] The Supreme Court by a vote of six to three agreed, holding that no reasonable jury could find for the plaintiff when there was so large and so unexplained a gap in the evidence.[201] The Court found that the plaintiff should have been able to produce evidence as to his condition between 1925 and 1930, and his failure to do so could lead only to the conclusion that he was sane during those years.[202] Galloway's attorney had attempted to explain

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[193] A guardian was appointed in February 1932. *Id.* at 374. However, there was also evidence that Galloway had sought treatment for mental illness as early as 1930. *Id.* at 383 n.10.

[194] *Id.*

[195] *Galloway*, 319 U.S. at 379-80. The Supreme Court stated that "[t]he chaplain's testimony . . . should have been stricken had the case gone to the jury . . . ." *Id.* at 384-85 n.11.

[196] *Id.* at 381-82.

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] Galloway v. United States, 130 F.2d 467 (1942).

[201] *Galloway*, 319 U.S. at 396.

[202] *Id.* at 384-87.

the absence of evidence by noting that Galloway was a deserter from the Army and sought to avoid people he knew in order to escape detection and punishment.[203] The Court rejected this explanation on the ground that, among other things, Galloway married during the period and his wife, who was his legal guardian, could have testified.[204]

The Supreme Court also rejected Galloway's argument that the directed verdict violated the Seventh Amendment, reasoning that the practice was too well-established in the United States to question it at that late date.[205] The Court held that the Seventh Amendment did not bind courts to the exact procedural devices that existed in England in 1791, but allowed for some development in procedures while preserving "the basic institution of jury trial in only its most fundamental elements."[206] The Court emphasized that jury practice was evolving even when the Seventh Amendment was ratified, and was, therefore, not "crystallized in a fixed and immutable system."[207] The Supreme Court finally held that changes in the standards of proof for submitting the case to the jury were irrelevant because no formulation of those standards allowed the jury to engage in speculation, which the record in *Galloway* would have required.[208]

Three justices dissented, primarily on Seventh Amendment grounds, though they also disagreed with the majority's conclusion that no reasonable jury could find for Galloway.[209] The dissenters thought that the demurrer to the evidence, from which the directed verdict descended,[210] was too different from the modern directed

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[203] *Id.* at 385 n.13.

[204] *Id.* The marriage took place on February 14, 1929. *See Galloway*, 130 F.2d at 470. The Court also noted that Galloway continued to be a deserter in 1930 when doctors examined him for mental illness, and that his ability to successfully hide himself for eight years suggested some mental agility. *Galloway*, 319 U.S. at 385 n.13.

[205] *See Galloway*, 319 U.S. at 389. For a discussion as to whether post-1791 precedent can solidify a diminution of Seventh Amendment rights, see *infra* notes 496-498 and accompanying text.

[206] *Id.* at 392.

[207] *Id.* at 390-92, 391 n.23.

[208] *See id.* at 395.

[209] *See id.* at 396-411 (Black, J., dissenting).

[210] Everyone seems to agree that the directed verdict descended from the demurrer to the evidence, and that assumption is quite reasonable. *See infra* notes 216-302 and accompanying text. It is likely, however, that the nonsuit is also in the family tree, and the nonsuit did not require entry of judgment, but allowed the plaintiff to try again with more evidence. *See* Hopkins v. Nashville, C. & St. L. Ry., 34 S.W. 1029 (Tenn. 1896) (comparing demurrer to the evidence, involuntary nonsuit, and directed verdict).

verdict to withstand a Seventh Amendment challenge.[211] In particular, the dissenters noted that the demurrer to the evidence was quite risky because it required the demurring party to give up his right to present evidence: once he had admitted the truth of the opposing party's evidence, as well as all reasonable inferences from that evidence, he could not challenge the evidence or the inferences.[212] The directed verdict has no such rule and, therefore, makes it likely that more cases will be withdrawn from the jury. The dissenters also complained that the evolution of the substantial evidence or reasonable jury standard meant that courts took cases from the jury under directed verdict practice that would have gone to the jury under demurrer to the evidence practice.[213] Thus, the dissenters saw the decision in *Galloway* as part of a pattern of decisions that undermined the Seventh Amendment.[214]

In contrast, the majority in *Galloway* saw their decision as the logical and reasonable extension of a long line of previous cases. An examination of authorities relied on by the Court suggests that the dissenters were closer to the mark. The reason is not so much the change in procedure—the directed verdict does seem to be a reasonable development from its common law sources—but a change in how the Court viewed questions of law and fact. The issue in *Galloway* could not be classified as anything other than a question of fact: was Galloway permanently and totally disabled by reason of mental illness as of May 31, 1919, or not? Yet the Court treated it as a question of law, holding that there was only one "reasonable" inference from the facts, and therefore that Galloway had failed to establish his case *as a matter of law*.[215] After *Galloway*, fact has become law. How did the Court get there?

The Court in *Galloway* cited several cases where courts had directed verdicts due to insufficiency of the evidence. Only one of these cases predated *Munson*, which had adopted the "reasonable jury" test for federal courts. The early case, *Parks v. Ross*,[216] is credited as the first Supreme Court case involving a directed verdict. Decided in 1850, *Parks* involved the westward migration of the Cherokee Nation at the instigation of the United States in the late 1830s. Ross, a Cherokee chief, was responsible for contracting with persons who

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[211] *See Galloway*, 319 U.S. at 399-404.
[212] *Id.* at 402-03.
[213] *See id.* at 403.
[214] *See id.* at 405-06.
[215] *Id.* at 396.
[216] 52 U.S. 362 (1850).

were helping with the migration.[217] Among the items budgeted for was the cost of returning wagons used in the migration.[218] Plaintiff's intestate had owned four of the wagons, but he was a Cherokee and did not intend to return.[219] Thus, he had settled his account in full with Ross, who was acting on behalf of the Cherokee Nation.[220] Nevertheless, plaintiff Parks, on behalf of the decedent's estate, sued Ross *personally* seeking recovery of the cost of returning the wagons.[221] Following presentation of Parks's case, Ross asked the court to instruct the jury that if it believed the evidence, Parks was not entitled to recover.[222] This the court did, and the jury held for Ross.[223]

On appeal, the Supreme Court held that seeking the instruction was similar to demurring to the evidence and, therefore, would be tested by the same standard, which the Court described as whether there was "some evidence legally sufficient to establish [the fact]."[224] The question, then, was whether Parks had produced legally sufficient evidence that he was entitled to personally recover from Ross the cost of returning the wagons. Unlike *Galloway*, this was a case in which there was *no* evidence supporting plaintiff's position. The Court noted that Ross was a public official acting on behalf of the Cherokee Nation, and that such officials are not personally liable absent "satisfactory evidence of an absolute and unqualified engagement to be personally liable."[225] However, there was "no evidence whatever tending to show a special contract by John Ross personally to pay for the teams and wagons, either for going or returning."[226] Indeed, the plaintiff's intestate himself had never made a claim for the return.[227] Arguably, the budget presented some evidence that wagon owners would be paid for the return, but that did not mean that Ross was personally liable.[228] Thus, there was no evidence to weigh. Furthermore, because the case turned in part on Ross's status as an agent for the Cherokee Nation,[229] this can be viewed as a mixed question of law and fact.

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[217] *See id.* at 373-74.
[218] *See id.* at 364.
[219] *See id.* at 374.
[220] *See id.* at 365.
[221] *Id.* at 365-66, 374.
[222] *Id.* at 368.
[223] *Parks*, 52 U.S. at 365.
[224] *Id.* at 373.
[225] *Parks*, 52 U.S. at 374.
[226] *Id.*
[227] *See id.*
[228] *Id.*
[229] *Id.* at 362.

In addition to *Parks*, the other cases cited by *Galloway* are similarly inapposite. For example, the decision in *Munson*, as I have demonstrated, was primarily a ruling on evidence: whether the court should allow the jury to infer a fact when to do so would be inconsistent with the court's ruling on an evidentiary presumption.[230] The existence of a presumption has always been a legal matter to be decided by the judge.[231] Thus, the issue in *Munson* was quite different from the issue in *Galloway*.

In another case cited by *Galloway*, *Pleasants v. Fant*,[232] the question was whether the defendant Fant was a partner in a firm, a status that would make him liable for the firm's debts.[233] The evidence showed that Fant had assisted the firm in securing a loan for the purchase of cotton, and that the firm had voluntarily promised to give him a part of any profits, though no sum was agreed upon.[234] The trial court instructed the jury that there was no evidence of partnership, and entered judgment for Fant.[235] The Supreme Court agreed, finding that because Fant could not have demanded an accounting in a court of equity, he could not be considered a partner.[236] The Court conceded that the case might nonetheless have gone to the jury under earlier case law but, citing *Parks v. Ross* and *Improvement Co. v. Munson*, applied the reasonable jury standard.[237]

Fant also differs from *Galloway* because there was no dispute about what happened, at least on the record before the Court.[238] The outcome seemed to result from an application of what the Court called "one of the most approved criteria of the existence of the partnership,"[239] the ability of the alleged partner to seek an accounting. Fant, who had only a voluntary promise that the firm would pay him an unknown sum of money, had no power to seek an accounting.[240] Thus, the Court's decision can be viewed as applying

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[230] *Id.* at 448-51.

[231] *See* THAYER, *supra* note 3 at 318-19. *See generally id.* at ch. VIII.

[232] 89 U.S. 116 (1874).

[233] *Id.* at 116.

[234] *Id.* at 117.

[235] *Id.* at 116.

[236] *Id.* at 120.

[237] *Id.* at 120-21.

[238] The plaintiff creditor offered testimony that a member of the debtor company had told the creditor that Fant was a partner in the company, but the trial court excluded the evidence, possibly on hearsay grounds. *See Pleasants*, 89 U.S. at 117. Decisions about the admission or exclusion of evidence were questions of law for the judge at common law. *See* FORSYTH, *supra* note 3, at 235-36.

[239] *See Pleasants*, 89 U.S. at 120.

[240] *Id.* at 119-20.

established law to established facts, a proper role for the judge under eighteenth-century English law.

Next, the *Galloway* Court cited *Commissioners of Marion County v. Clark*,[241] which addressed whether a plaintiff bank was a *bona fide* purchaser for value of bonds that had been issued based on fraudulent misrepresentations to the County.[242] The lower court instructed the jury that there was no evidence that the bank had any notice of the fraud, and the jury returned a verdict in favor of the bank, consistent with that instruction.[243] The County objected to the instruction, but the Court, citing *Munson* and other U.S. and English cases employing the reasonable jury rule, found that the instruction was proper.[244] There is little in the reported case, however, revealing whether there was evidence establishing the bank's *bona fide* purchaser status. The case report states that the County alleged in its answer that the bank was not a *bona fide* purchaser, and that the bank denied that allegation.[245] The report's description of the evidence is minimal, but it appears that the Court applied the legal rule that a bondholder who takes from a *bona fide* purchaser takes a valid title even if the bondholder knew of the fraud at the time he acquired the bonds.[246] Thus, this case appears to involve an application of law to settled facts, and not a dispute of fact.

In *Galloway*, the Court also cited *Ewing v. Goode*,[247] a lower court opinion involving a medical malpractice action in which the plaintiff developed glaucoma following cataract surgery.[248] The plaintiff claimed that the doctor had failed to monitor and treat her condition properly, resulting in the loss of one eye and impaired vision in the other.[249] Expert testimony established that glaucoma occasionally follows cataract surgery, and that if it does, little can be done to treat

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[241] 94 U.S. 278 (1876).

[242] *Id.*at 282-84.

[243] *See id.* at 281-83.

[244] *See id.* at 284-85. In addition to *Munson*, the Court cited *Pleasants v. Fant*, *Parks v. Ross*, *Merchants' Bank v. State Bank*, 77 U.S. 604 (1870); *Hickman v. Jones*, 76 U.S. 197 (1869); *Jewell v. Parr*, 13 C.B. 909, 138 Eng. Rep. 1460 (1853); *Toomey v. London, Brighton, and South Coast Ry. Co.*, 3 C.B. (N.S.) 146, 140 Eng. Rep. 694 (1857); *Wheelton v. Hardisty*, 8 El. & Bl. 232, 120 Eng. Rep. 86 (1857); *Schuchardt v. Allen*, 68 U.S. 359 (1863); and *Grand Chute v. Winegar*, 82 U.S. 355 (1872). Most of these cases are discussed elsewhere in this article.

[245] *See Commissioners*, 94 U.S. at 282.

[246] *See id.* at 284-86.

[247] 78 F. 442 (S.D. Ohio 1897).

[248] *Id.*

[249] *Id.* at 443.

it.[250] The expert witness also found nothing improper in the way the defendant operated on the plaintiff or in his follow-up care.[251] Although there was some dispute over whether the defendant adequately provided for the plaintiff's care while the defendant was out of town, the court found that there was no more than a scintilla of evidence in support of the plaintiff's claims because the defendant was already treating her for glaucoma during that period despite scant evidence of the disease.[252] Thus, the court, relying heavily on the expert testimony, directed a verdict for the defendant.[253]

Ewing is different from the earlier cases and provides some support for *Galloway* because the issue presented appears to be one of fact: did the defendant doctor give the plaintiff proper care in treating her eye? Two aspects of *Ewing*, however, tie it to the earlier cases: first, the issue of negligence has some legal content; and second, the facts on which the court based its opinion—especially the fact that the doctor was already treating the plaintiff for glaucoma when he went away—were undisputed. Although the evidence for the plaintiff was scant, this case shows movement in the lower courts toward more judicial decisions on issues of fact.[254]

The *Galloway* Court also cited *Southern Railway Co. v. Walters*[255] and *Gunning v. Cooley*.[256] In *Walters*, the plaintiff, a child who had been hit by a train and severely injured, sued the railway company alleging that it negligently failed to stop the train and flag the crossing as required by an order of the Illinois Commerce Commission.[257] While this case concerned a fact dispute—whether the train had stopped—it also posed an evidentiary question: whether the court could justify excluding certain questionable testimony. Witnesses disagreed over whether the train had stopped. Five

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[250] *See id.* at 446.

[251] *See id.* at 448.

[252] *See id.* at 448-50.

[253] 78 F. at 450.

[254] Recent studies suggest that the lower courts are more eager to take cases away from juries than is the Supreme Court. *See, e.g.*, Mollica, *supra* note 114; Schnapper, *supra* note 114. This conclusion seems inconsistent with numerous studies suggesting that judges generally think that juries do a good job. *See, e.g.*, Prentice H. Marshall, *A View from the Bench: Practical Perspectives on Juries*, 1990 U. CHI. LEGAL F. 147 (1990); Valerie P. Hans, *Attitudes Toward the Civil Jury: Crisis of Confidence?*, *in* VERDICT: ASSESSING THE CIVIL JUSTICE SYSTEM 248 (Robert E. Litan ed., 1993); Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Power*, 56 TEX. L. REV. 47 (1977); Mark Curriden, *Putting the Squeeze on Juries*, 86 A.B.A. J. 52, 56 (2000).

[255] 284 U.S. 190 (1931).

[256] 281 U.S. 90 (1930).

[257] *Gunning*, 284 U.S. at 191-92.

witnesses testified that it had stopped,[258] while two witnesses testified that the train did not stop. The Court found, however, that the latter witnesses were not in a position to see whether the train had stopped.[259] Ultimately, the Court found that the plaintiff's evidence "was so insubstantial and insufficient that it did not justify a submission of that issue to the jury."[260] In fact, the Court said that "[t]here is no proof whatever that the alleged failure to stop before entering the crossing was the proximate cause of the plaintiff's injury."[261]

Finally, the *Galloway* Court cited *Gunning v. Cooley*,[262] a medical malpractice case upholding a lower court's refusal to direct a verdict for the defendant. In *Gunning*, the plaintiff claimed that the doctor had put acid in her ears, causing severe pain and loss of hearing.[263] The defendant testified to the contrary, and physical evidence suggested that it was unlikely that acid had been applied to the plaintiff's ears.[264] Nevertheless, the court viewed the issue as turning on the credibility of the witnesses, and held that that was a question for the jury.[265] In the course of reaching that conclusion, the Court repeated the rules governing when a case can be taken from a jury, including the rule requiring more than a scintilla of evidence before a case may go to the jury.[266] That language probably explains why the Court in *Galloway* cited *Gunning*. Galloway had relied on *Gunning* in arguing his cause to the Court, and his reliance was certainly reasonable. If Galloway's expert witness had been believed, there would have been evidence of mental illness dating to Galloway's service in the war. However, the Court never gave a jury an opportunity to consider the credibility of that expert.

Galloway also relied on two other decisions, each coming within two years of the decision in his case and squarely on point. In both cases, the Court found the evidence sufficient to go to the jury on the question whether the claimant had been permanently and totally disabled as of the date when his War Risk Insurance had expired. In the earlier of the two, *Berry v. United States*,[267] the plaintiff lost a leg

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[258] *See Walters*, 284 U.S. at 194.
[259] *See id.* at 193-94.
[260] *Id.* at 194.
[261] *Id.*
[262] 281 U.S. 90 (1930).
[263] *See id.* at 95-97.
[264] *See id.* at 97.
[265] *See id.* at 97-98.
[266] *Id.* at 94.
[267] 312 U.S. 450 (1941).

during World War I and subsequently failed at numerous attempts to hold gainful employment upon his return to the United States. The Court found that the jury could have returned a verdict either way, such that the trial judge had properly denied the Government's motion for directed verdict.[268] Additionally, the Court stated that Federal Rule of Civil Procedure 50(b), which governs directed verdicts, "has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."[269]

Galloway also relied on *Halliday v. United States*,[270] another case involving a claim under a War Risk Insurance policy. Halliday's disability, like Galloway's, was mental.[271] Halliday had refused to seek hospitalization, but he presented evidence of mental incapacity beginning during the life of his policy and continuing for fifteen years.[272] Although there was no gap in the evidence, the evidence in *Halliday* was otherwise similar to that offered by Galloway. The gap in *Galloway*, therefore, was clearly determinative.

In *Galloway*, the Court cited no authority on the demurrer to the evidence that predated *Munson* other than *Parks v. Ross*.[273] The Court noted, however, that practice relating to the common law devices of demurrer to the evidence and nonsuit was changing at the time of the Seventh Amendment's ratification.[274] Evidently the Court thought that this meant that the practice was not so hardened as to be an immutable part of the Seventh Amendment, but the cases the Court cites as examples of that changing practice are revealing. As for demurrer to the evidence, the Court cited two English cases and invited a comparison between the two. The earlier of the two, *Cocksedge v. Fanshaw*,[275] addressed whether certain tradesmen were exempt from taxes on goods sold in London through third parties. The evidence showed that these tradesmen had been treated as exempt for a long period of time, but the exemption required a legal act, such as an Act of Parliament, in order to be given legal effect, and there was no evidence of such an Act.[276] The court noted that on

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[268] *See id.* at 453-56.
[269] *Id.* at 453.
[270] 315 U.S. 94 (1942).
[271] *Id.* at 96-99.
[272] *See id.*
[273] *See Galloway*, 319 U.S. 372 (1943).
[274] *See id.* at 391 & n.23.
[275] 1 Doug. 118, 99 Eng. Rep. 80 (1779).
[276] *Id.*at 84.

a demurrer to the evidence, "the defendant admits every fact which the jury could have found upon the evidence."[277] The court found that the jury could have inferred that the practice of exempting the tradesmen, which concededly dated to "time immemorial," had been supported initially by an Act of Parliament or other legal act that is no longer part of the record.[278]

The Court in *Galloway* invited a comparison between *Cocksedge* and a later English case, *Gibson v. Hunter*,[279] decided in 1793, and therefore roughly contemporaneous with the ratification of the Seventh Amendment. In *Gibson*, which concerned an allegedly fraudulent bill of exchange, there was some dispute over whether the acceptor knew of the fraud. The court required the party demurring to his opponent's evidence to admit on the record the truth of the evidence, which the demurring party had not done.[280] The court also found that the evidence was so uncertain that no judgment could be given, and ordered a new trial.[281] As *Galloway* noted, comparison of *Cocksedge* and *Gibson* suggests a change in the practice governing demurrer to the evidence, but the change seems to make demurrer to the evidence more difficult to sustain. *Cocksedge*, the earlier case, allowed courts to draw all inferences that the jury could have drawn from the evidence, but *Gibson* required the demurring party to admit everything, including inferences, on the record before his demurrer could be sustained. One commentator noted that this made the device "cumbersome" so that "it fell into disuse soon after this decision."[282] Thus, the nature of the shift in demurrer to the evidence does not sustain *Galloway*'s apparent conclusion that changes in the demurrer to the evidence in late eighteenth century England should make it easier for judges to take cases from the jury.

The Court in *Galloway* also sought to illustrate the changing state of the law by citing three state cases decided in the late 1700s and early 1800s. None of these cases required the party demurring to admit all the facts on the record; rather they allowed the judge to draw inferences that the jury could have drawn against the demurring party. In *Patrick v. Hallett*,[283] a New York case, the question was whether a ship that had suddenly sprung a leak and sunk was

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[277] *Id.* at 88.
[278] *Id.* at 86-89.
[279] 2 H. Bl. 187, 126 Eng. Rep. 499 (1793).
[280] *Id.* at 510.
[281] *Id.*
[282] Henderson, *supra* note 43, at 289, 304-05.
[283] 1 Johns. Rep. 241 (N.Y. 1806).

seaworthy. If it was not, the insurers were relieved of liability.[284] The court held that if the evidence allowed any inference that the ship was seaworthy, that inference was considered admitted by the demurrer.[285] The court stated that this rule prevented judges from becoming triers of fact.[286] The court then held that the sudden springing of a leak alone is not evidence of unseaworthiness, and thus the shipowner prevailed.[287] The dissent, by contrast, would have applied a presumption that the sudden springing of a leak is prima facie evidence of unseaworthiness.[288] The difference of opinion between the majority and the dissent in *Patrick* concerned whether an evidentiary presumption of unseaworthiness should apply based on the sudden springing of a leak. The existence of a presumption, like other evidentiary rulings, is a question of law for the judge.[289]

The second state court case cited by *Galloway* that suggested a change in demurrer to the evidence law was *Stephens v. White*,[290] a legal malpractice action. The question in *Stephens* was whether the defendant was an attorney of record when the alleged malpractice occurred.[291] The case contains the language that a demurrer to the evidence "admits the truth of all facts which can be *fairly*, and *consequently* inferred from the evidence, yet that inference must grow necessarily out of the evidence."[292] However, that language only appears in the report of the parties' arguments, not in the court's opinion. The court found no issue as to when the defendant attorney was employed.[293] According to the court, the only indication in the record that he was part of the proceedings occurred in 1784, more than five years after the action originally commenced and long after the alleged malpractice.[294] Thus, this might be seen as a case where there was no evidence in support of the plaintiff's position.

In *Whittington v. Christian*,[295] the court noted a change in the practice of demurrer to the evidence in Virginia. While Virginia had at one time followed the English practice of requiring the party

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[284] *Id.* at 241-45.
[285] *Id.* at 245.
[286] *Id.*
[287] *Id.* at 246-47.
[288] *See id.* at 247-49.
[289] *See* THAYER, *supra* note 3, at 212.
[290] 2 Wash. 203, 1-2 Va. Rep. Ann. 709 (1796).
[291] *Id.* at 203-09.
[292] 2 Wash. at 207.
[293] *Id.* at 208.
[294] *See id.* at 203-04, 208, 212-13.
[295] 2 Rand. 353, 23 Va. 353 (1824).

demurring to admit all facts that the opposing party's evidence "conduced to prove,"[296] the rule was now

> to consider the demurrer, as if the demurrant had admitted all that could reasonably be inferred by a jury, from the evidence given by the other party, and waived all the evidence on his part, which contradicts that offered by the other party, or the credit of which is impeached; and all inferences from his own evidence, which do not necessarily flow from it.[297]

Thus, *Whittington* certainly supports *Galloway*'s statement that the law was in flux early in the country's history, but in no way suggests that courts can weigh evidence as to disputed questions of fact. Instead, the court is to put all the weight on the non-moving party's side. Even if *Whittington* suggested that the judge could weigh evidence, it would have no bearing on the Seventh Amendment, which applies in federal courts but not in state courts.[298]

It is also interesting to consider a case that the Court in *Galloway* did not cite, *Pawling v. United States*.[299] The demurrer to the evidence was in use early in the country's history, but its use was quite different from *Galloway* in the way it defined questions of fact and questions of law. In *Pawling*, the issue was whether a bond had been delivered as an escrow conditioned on others becoming sureties on the bond.[300] There was nothing on the face of the bond suggesting it was delivered as an escrow.[301] The Court found the evidence sufficient for a jury to find for either party, but on the demurrer to the evidence the judgment had to be for the party opposing the demurrer—in this case, the defendants.[302] The Court stated the rule as

> [t]he party demurring admits the truth of the testimony to which he demurs, and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw.[303]

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[296] 2 Rand. at 357. This is the rule stated in *Gibson v. Hunter*, 2 H. Bl. 187, 126 Eng. Rep. 499 (1793). *See supra* notes 280-282 and accompanying text.

[297] *Whittington*, 2 Rand. at 357-58.

[298] *See, e.g.*, Minneapolis & St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 216-18 (1916); Chesapeake & Ohio Ry. Co. v. Carnahan, 86 S.E. 863, 864-66 (Va. 1915); Austin W. Scott, *Trial By Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 670-71 (1918).

[299] 8 U.S. (4 Cranch) 219 (1808).

[300] *Id.*

[301] *Id.* at 222.

[302] *See id.* at 223-24.

[303] *Id.* at 221-22.

This language suggests that the court can assess the reasonableness of a decision for the demurring party, but also makes it plain that the court must construe the evidence strongly against the demurring party. This is, perhaps, the most significant shift between the demurrer to the evidence as seen in *Pawling* and the directed verdict as interpreted by *Galloway*, and it depends heavily on the *Munson* decision's adoption of the reasonable jury standard.

This review of the cases cited in *Galloway* suggests that *Galloway* misapplied the precedent it purportedly relied on. Drawing on *Munson*'s reasonable jury standard, itself of questionable lineage, the Court in *Galloway* permitted a directed verdict to be entered on a disputed question of pure fact, when none of the authority it cited had gone so far.

C. Judgment Notwithstanding the Verdict: Baltimore & Carolina Line, Inc. v. Redman

Baltimore & Carolina Line, Inc. v. Redman[304] predated the Federal Rules of Civil Procedure by three years, and, therefore, did not use the term "judgment notwithstanding the verdict," but the Federal Rules codified the approach adopted in *Redman*. The appellate court in *Redman* found that the evidence supporting the jury's verdict for the plaintiff was insufficient, and ordered a new trial, believing that it could not order judgment for the defendant because of the Court's decision in *Slocum v. New York Life Insurance Company*. In *Slocum*, the Court held that a court could not enter a judgment inconsistent with the jury's verdict because to do so would violate the Reexamination Clause of the Seventh Amendment.[305] Thus, the Court was limited to ordering a new trial, which was the practice at common law. By constrast, the Supreme Court in *Redman* noted that the trial judge in that case, unlike the trial judge in *Slocum*, had explicitly reserved judgment on the sufficiency of the evidence.[306] This, the Court found, was consistent with a well-established eighteenth century practice of taking a jury's verdict subject to the court's opinion on a reserved question of law.[307] The Federal Rules of Civil Procedure still follow the practice of reserving decisions on the sufficiency of evidence, and its constitutionality is considered settled.[308]

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[304] 295 U.S. 654 (1935).

[305] Slocum v. New York Life Ins. Co., 228 U.S. 364, 423-24 (1913).

[306] *Redman*, 295 U.S. at 656.

[307] *Id.* at 656-57.

[308] *See* FED. R. CIV. P. 50(b) (providing that when a judge denies a motion for judgment as a matter of law before the case is submitted to the jury, "the court is considered to have submitted the action to the jury subject to the court's later

Once again, however, the cases cited in *Redman* fail to support its decision. The Supreme Court in *Redman* did not describe the facts of the case at all.[309] Indeed, the Court granted certiorari only on the question whether the court of appeals correctly held that it could not order a judgment to be entered for the defendant; it denied certiorari on the question whether the evidence in support of the plaintiff's verdict was sufficient.[310] The court of appeals set out the facts of the case in detail, however, and they tell a story considerably more complicated than the Supreme Court's decision suggests.[311]

The plaintiff was a ship's cook who suffered gangrene in his left foot, which required amputation of the lower third of his leg.[312] He testified that he stepped on a box slat that had a nail in it while on his way to work in the galley at 5:00 a.m. He stated that there was no light on the deck, which was littered with debris. He washed the foot with hot water, and went to work, but the next day, the foot was swollen and painful. The plaintiff testified that he told the chief steward about the injury. The plaintiff then went ashore, procured some medication for the foot, spent the night ashore, and missed the ship's sailing the next day. The foot continued to get worse until, almost two weeks after the initial injury, he was taken to the hospital by ambulance, where he was diagnosed with gangrene. Doctors amputated the leg nearly two months later. Plaintiff claimed that gangrene resulted from the initial injury.[313]

The court of appeals, however, recited a litany of evidence that contradicted the plaintiff's story. The chief steward denied that the plaintiff told him about the injury. Doctors who treated the plaintiff at the hospital testified that he did not tell them about the injury from the nail.[314] The plaintiff also did not tell a medical examiner for his employer, who determined that he was fit to sail with the ship.[315] The plaintiff filed a claim with his company, but the written statement, taken down by an agent, was inconsistent with his testimony, and never mentioned the nail.[316] The hospital doctors

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deciding the legal questions raised by the motion"). It is well established that one cannot move for judgment as a matter of law after the verdict if one has failed to move for judgment as a matter of law before the case was submitted to the jury. *See* MILLAR, *supra* note 43, at 330-35.

[309] *See Redman*, 295 U.S. at 656.

[310] *See id.*

[311] *See* Redman v. Baltimore & Carolina Line, Inc., 70 F.2d 635 (2d Cir. 1934).

[312] *Id.* at 636-37.

[313] *Id.* at 636.

[314] *Id.*

[315] *Id.* at 637.

[316] *Redman*, 70 F.2d at 637.

testified that the plaintiff suffered from "dry" gangrene, which could not result from an injury such as he described.[317] One doctor testified that gangrene could result from an injury like the one alleged by plaintiff, but that doctor did not take account of the diagnosis of "dry" gangrene.[318]

A dissent in the case, however, gives a somewhat different view of the facts. The dissent noted that the plaintiff's testimony about stepping on the nail was uncontradicted and that the chief steward, who denied having been told about it, had apparently offered his testimony to the highest bidder.[319] The dissent also noted that the plaintiff might not have mentioned the foot to the ship's doctor because that doctor was on board to check for venereal disease.[320] Furthermore, the doctor who first examined the plaintiff at the hospital did not speak English well, and resented any questions about his professional ability.[321] The dissent suggested that the plaintiff's subsequent failure to inform other doctors about the nail could be attributed to the initial doctor's dismissal of the information. The dissent also found conflicting medical testimony about whether a wound such as the plaintiff reported could cause "dry" gangrene.[322] In addition, the dissent noted that the doctors who testified that the plaintiff had not suffered an infection in his foot had not seen the plaintiff until after gangrene had set in.[323]

The defendant moved for a directed verdict and for a dismissal of the complaint, claiming that the evidence was insufficient to support a verdict for the plaintiff.[324] The judge reserved his decision on the two motions, and sent the case to the jury.[325] Based on the evidence presented in court, the jury found for the plaintiff and awarded him $5000.[326] The trial judge, ruling on the reserved motions, then decided that the evidence was sufficient to support the verdict and entered judgment for the plaintiff.[327] The defendant appealed the case to the United States Court of Appeals for the

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[317] *Id.* at 638.

[318] *Id.* The court of appeals also noted at the outset of the opinion that the plaintiff was "a colored seaman." *Id.* at 636. One wonders whether this influenced the court, as it discounted most of what the plaintiff said.

[319] *Id.* at 638-39.

[320] *Id.*

[321] *Redman*, 70 F.2d at 638-39.

[322] *Id.*

[323] *Id.* at 638.

[324] Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 656 (1935).

[325] *Id.*

[326] *See Redman*, 70 F.2d at 637.

[327] *Redman*, 295 U.S. at 656.

Second Circuit, which, in a two to one decision, produced the two very different views of the evidence described above.[328] Thus, by the time the case got to the Supreme Court, four judges had considered the sufficiency of the evidence, with two believing that the evidence was sufficient, and two believing that it was not. In spite of this conflict, the Supreme Court denied certiorari on this issue.[329]

The state of the "facts" in *Redman* is particularly telling in light of the authority cited for the Court's position that the trial judge can enter judgment for the verdict loser if he has explicitly reserved decision on the sufficiency of the evidence. In support of this position, the Court first noted that the Seventh Amendment preserves the right to a jury trial, "which existed under English common law when the amendment was adopted."[330] The Court later said that "[a]t common law there was a well-established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved."[331]

There certainly was such a common law practice, commonly called the "case reserved," but the cases that the *Redman* Court cited suggest that the Court misused the "case reserved" concept.[332] For example, the Court cited *Carleton v. Griffin*,[333] an English case from 1758 in which a testator had written a will without the required formalities. The testator subsequently added a codicil, which conformed to the requirements and acknowledged that the original informal will was his.[334] The plaintiff, the testator's heir at law, claimed certain properties the testator left to his wife and daughter under the informal will.[335] The jury returned a verdict for the plaintiff, but two questions were "reserved for the opinion of [the] Court":[336] first, whether the republication of the first will by means of the codicil constituted a republication under the Statute of Frauds; and, second, whether the first will had left a freehold interest to either the daughter or her mother.[337] The court answered both questions in favor of the daughter.[338] The justices interpreted the first

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[328] *Redman*, 70 F.2d at 637.
[329] *Redman*, 295 U.S. at 656.
[330] *Id.* at 657.
[331] *Id.* at 659.
[332] *See* Henderson, *supra* note 43, at 305-07.
[333] 97 Eng. Rep. 443 (1758).
[334] *Id.*
[335] *Id.*at 443-44.
[336] *Id.* at 443.
[337] *Id.* at 443-44.
[338] *Id.* at 445-47.

will and the codicil as a single instrument, and then held that the will clearly devised the property to the daughter.[339] Therefore, the court granted judgment for the daughter even though she had lost the jury verdict.

In contrast to *Redman*, there was no dispute about the facts in *Carleton* because they were written plainly in the will. The only question was the effect given to those facts. Thus, the case is consistent with two rules followed by English courts at the time. The first is that juries are to decide only disputed facts, and if the facts are not disputed, the court decides the application of law to the facts.[340] The second is that judges, not juries, interpret written documents.[341] Unlike the wills in *Carleton*, the evidence in *Redman* consisted largely of testimony—testimony that was quite inconsistent. In other words, it is much easier to classify the questions at issue in *Carleton* as questions of law than the questions at issue in *Redman*.

The other cases cited by the Court in *Redman*, which all concerned reserved questions of law, are similar to *Carleton*. *Coppendale v. Bridgen*[342] involved an action against a sheriff for a false return on an execution. The facts were clear.[343] A man named Debonaire was arrested for a debt and remained in prison for over two months. He was released pursuant to his adjudication as a bankrupt. While the return on the execution was due during Debonaire's two months in prison, the sheriff did not actually return it until four months after Debonaire's release. At that time, the sheriff returned it "*nulla bona*." But the question was whether the sheriff, who had levied on Debonaire's small amount of property, should have turned it over to the plaintiff, who had sought the execution. Plaintiff alleged that on the due date, the sheriff could not have known that Debonaire would be adjudged a bankrupt because that adjudication was based on his being imprisoned for two months, which had not yet elapsed.[344] By the time the sheriff actually returned the writ, Debonaire was clearly bankrupt. The court noted that the statute provides that a debtor who is imprisoned for two months is presumed to have been bankrupt upon his incarceration. Thus, the sheriff's return was proper. Debonaire was, in fact, bankrupt on the original return date because of this relation back

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[339] *Id.* at 445-47. All three justices expressed opinions, but they were unanimous.

[340] *See* FORSYTH, *supra* note 3, at 240.

[341] *See* THAYER, *supra* note 3, at 203-06; *see also* supra note 38.

[342] 2 Burr. 814, 97 Eng. Rep. 576 (1759).

[343] The facts are set out at *Coppendale*, 97 Eng. Rep.at 576-77.

[344] *Id.* at 577-79.

provision.[345] Indeed, the plaintiff would have gained nothing had the sheriff returned the writ on the due date, because the plaintiff would have been required to turn the goods over to the debtor's assignees.[346] This case, like *Carleton*, seems to be a clear question of law as it concerns the interpretation of a statute and its application to undisputed facts.

The *Redman* Court next cited *Bird v. Randall*,[347] a case in which the plaintiff obtained a verdict subject to the opinion of the court on a reserved question of law. The question was whether a plaintiff who had recovered damages for breach of contract could also recover damages against the person who had allegedly induced the breach.[348] The plaintiff filed the second suit after he obtained a judgment in the first, but before recovering that judgment.[349] The court noted that the plaintiff could not maintain a suit against the person who had induced the breach if the first judgment was paid before the second suit commenced.[350] The court held that the result should be the same where the plaintiff has recovered from the first defendant before the second suit is tried.[351] There is nothing in this case that looks remotely like a question of fact.

The Court next cited *Price v. Neal*.[352] In *Price*, the question reserved was whether a person who paid forged notes could recover the value from the innocent person to whom they had been paid.[353] Plaintiff's counsel noted that it would be impossible to recover from the drawer because no drawer existed, nor from the forger, because he had been hanged for forgery.[354] Although the jury found for the plaintiff, the court held that because the defendant had given value for the payments in good faith, with no suspicion of forgery, he was not required to pay the plaintiff.[355] In other words, the plaintiff had the burden of ascertaining the genuineness of the notes. Once again, there was no question about the facts; the only question was the clearly legal question about the rights of a bona fide purchaser for value.

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[345] *Id.* at 478.
[346] *Id.* at 579.
[347] 97 Eng. Rep. 866 (1762).
[348] *Id.* at 867.
[349] *Id.*
[350] *Id.* at 869-70.
[351] *Id.* at 870-71.
[352] 97 Eng. Rep. 871 (1762).
[353] *Id.*
[354] *Id.*
[355] *Id.* at 872.

The *Redman* Court next cited *Basset v. Thomas*,[356] in which the reserved question was whether a lease was valid. The court held that the lease was valid, in large part based on the meaning of words used in the document.[357] In this respect, *Basset* is consistent with the rule that documents are interpreted by the judge, not the jury. In addition, none of the evidence in *Basset* was in dispute,[358] so the court's holding is consistent with the rule that the judge can decide the legal effect of undisputed facts.

The last eighteenth-century English case that the *Redman* Court relied on was *Timmons v. Rowlinson*.[359] The reserved issue was whether the plaintiff was liable for double rent for a half year after he had given notice of his intent to vacate the premises, but had failed to leave.[360] The lease and the notice of intent to vacate were both oral. Accordingly, the questions were, first, whether a statute that allowed double rent for holding over after giving notice governed oral leases, and, second, whether the statute governed leases for a period as short as a year.[361] These are clearly questions of statutory construction—questions of law—and the court decided them, finding the statute applicable.[362]

In short, the *Redman* Court relied on eighteenth century English cases where the questions reserved significantly differed from the question at issue in *Redman*. The earlier cases involved applications of law to fact, interpretations of the legal language used in documents, and constructions of statutes. In *Redman*, by contrast, there was conflicting evidence on whether the defendant's negligence caused the plaintiff's injury.[363] The *Redman* Court, however, ignored that conflicting evidence and chose not to reconsider the lower court's two to one decision that the evidence was so one-sided as to render the factual dispute a question of law.[364]

In addition to these cases, *Redman* also cited a number of treatises. While most merely mention the rule governing the case reserved,[365] Thayer's evidence treatise is more illuminating. Thayer

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[356] 97 Eng. Rep. 916 (1763).

[357] *Id.* at 919.

[358] *Id.* at 916-20.

[359] 97 Eng. Rep. 1003 (1765).

[360] *Id.* at 1003-04.

[361] *Id.* at 1004-05.

[362] *Id.* at 1005-07.

[363] *See Redman*, 70 F.2d 635 (2d Cir. 1934).

[364] *See Redman*, 295 U.S. 654 (1935).

[365] *See, e.g.*, 1 JOHN FREDERICK ARCHBOLD, THE PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS AND EJECTMENT 188, 192 (1823); THOMAS STARKIE, A

says little about the practice of reserving questions on his own account,[366] but he does report at length on what Lord Blackburn said about the practice in the late 1800s.[367] This report is not particularly relevant to English practice in the late 1700s, as the law can change dramatically in a hundred years. If the Court, however, had reviewed *Dublin, Wicklow, and Wexford Railway Co. v. Slattery*,[368] the case cited in Thayer's treatise, it would have found that Lord Blackburn was a dissenter in that case, and that the majority made it clear that when evidence is in dispute, the question is for the jury.[369] The *Dublin* case concerned a railroad accident in which a train hit and killed a man while he was crossing the tracks at a station.[370] The plaintiff alleged that the railroad's engineer negligently failed to blow the train's whistle.[371] The defendant claimed that the decedent was contributorily negligent in failing to take adequate precautions when crossing the track.[372] A jury found for the plaintiff, who was the widow of the deceased, but the railroad contended that there was no evidence of its own negligence but ample evidence showing that the deceased was contributorily negligent.[373] Finding that evidence existed in plaintiff's favor on both counts, the majority allowed the verdict to stand even though the evidence was weak.[374] In particular, there was some question about whether the train's engineer had actually blown the whistle.[375] More importantly, while there was evidence suggesting that the deceased might have seen the train coming if he had exercised care, crossing the tracks was necessary in order to buy a ticket, and the deceased crossed at a spot that had

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PRACTICAL TREATISE OF THE LAW OF EVIDENCE 808-09 (10th Am. ed. 1876); WILLIAM TIDD, THE NEW PRACTICE OF THE COURTS OF KING'S BENCH, COMMON PLEAS, AND EXCHEQUER OF PLEAS IN PERSONAL ACTIONS AND EJECTMENT 539 (1837). The Court also cited WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS AND EJECTMENT 900 (4th Am. ed. 1856). The Third American Edition of that treatise contains the same reference to the case reserved at page 900, without elaboration but with a number of citations. 2 WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS AND EJECTMENT (Robert H. Small ed., 3d Am. ed. 1840).

[366] *See* THAYER, *supra* note 3, at 241 & n.1.

[367] *See id.* at n.1.

[368] 3 App. Cas. 1155 (1878).

[369] *See id.* Thayer referred to Lord Blackburn's remarks in another case as well, but cites only the *London Times*. *See* THAYER, *supra* note 3, at 241 n.1.

[370] *See Dublin*, 3 App. Cas. at 1155.

[371] *Id.* at 1155-56.

[372] *Id.*

[373] *Id.* at 1155, 1159.

[374] *Id.*

[375] *See Dublin*, 3 App. Cas. at 1158-59.

become customary for making the crossing.[376] In light of this uncertainty as to the facts, the case stands for the traditional rule in England that the jury decides any factual disputes.[377]

The *Redman* Court also referred to three later English cases in support of the practice of reserving questions of law. The first, *Treacher v. Hinton*,[378] did not involve the case reserved, but rather a procedure more akin to a directed verdict. In *Treacher*, the acceptor of a bill of exchange was sued by the plaintiff-indorsee after the bank refused payment.[379] The plaintiff failed to prove that he had given notice of non-payment to the defendant acceptor. The court nonsuited the plaintiff, with leave for the plaintiff to seek a judgment based on a question of law.[380] The question of law was whether the acceptance had the legal effect of requiring the acceptor to pay regardless of whether he was given notice of the bank's non-payment.[381] The court answered this legal question in the affirmative and ordered judgment for the plaintiff.[382] Interestingly, two of the judges, in answering the question whether the court could enter judgment for the plaintiff, as opposed to nonsuiting him, employed a legal fiction: because the trial judge had nonsuited the plaintiff and given him leave to move for a judgment in the hearing of the jury, the jury was presumed to have consented to the judgment.[383] More to the point, there was no dispute about what happened in the case; the only existing dispute was the legal effect of the facts.

The Court also cited *Jewell v. Parr*[384] and *Ryder v. Wombwell*,[385] both of which had been relied on in *Improvement Co. v. Munson*[386] in support of the reasonable jury standard.[387] Neither of those cases, however, supports the outcome in *Redman*. As I have noted, *Jewell* concerned the question whether an acceptor of a bill of exchange

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[376] *See id.* at 1157.

[377] The question in *Dublin* might also be viewed as a mixed question of fact and law, though one where the jury was allowed to decide the matter. The question of the duty of the railroad to passengers who had to make a dangerous crossing certainly has an element of law in it.

[378] 106 Eng. Rep. 988 (1821).

[379] *Id.*

[380] *See Treacher*, 106 Eng. Rep. at 988.

[381] *Id.* at 989-90.

[382] *Id.*

[383] *Id.*

[384] 138 Eng. Rep. 1460 (1853).

[385] 4 L.R. Ex. 32 (1868).

[386] 81 U.S. (14 Wall.) 442 (1871).

[387] *See id.* at 448; *see also* the cases discussed *supra* notes 119-184 and accompanying text.

could escape liability by testifying that the bill had been paid by the drawer.[388] The court, relying largely on the rule that an acceptor in such circumstances is generally liable to the holder but has recourse against the drawer, did not allow the jury verdict in favor of the acceptor to stand, even though the jury could have believed the acceptor's testimony.[389] Thus, the *Jewell* ruling was more legal than factual.

Similarly, the court in *Ryder* relied largely on a legal rule: one who seeks to establish that jewels and other luxury items are "necessaries" so as to overcome the defense of minority in a breach of contract action must produce an affirmative evidence showing that the goods are necessary to the person's station in life.[390] Thus, *Ryder* was a case where there was *no* evidence for the plaintiff on the disputed question. Neither case is anything like *Redman*, where there was a substantial dispute as to a pure question of fact.

The Court in *Redman* noted that some of its own earlier cases had approved of the case reserved. The earliest was the 1809 case, *Brent v. Chapman*,[391] which addressed whether ownership of a slave had passed from the estate of the father to his son.[392] Creditors of both the father and the son claimed the slave.[393] The jury returned a verdict for the plaintiff, a creditor of the son, subject to the opinion of the court on an agreed set of facts.[394] The Court found that, while not formally administered, the father's estate provided for transfer of the slave to the son because of the assent of an executor who was competent to assent to the division of property.[395] Thus, the court held that the slave was the property of the son.[396] The legal effect of an executor's assent seems primarily a question of law. Thus, this case is consistent with the early English cases in that the facts are undisputed, and only their legal effect was at issue, and the case differs from *Redman*.

Another case relied on by *Redman*, *Chinoweth v. Haskell*,[397] also presented a distinct question of law. This case was an ejectment

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[388] *Id.* at 1462.

[389] *Jewell*, 138 Eng. Rep. at 1463.

[390] *Ryder*, 4 L.R. Ex. at 38.

[391] 9 U.S. (5 Cranch) 358 (1809).

[392] *Id.*

[393] *Id.* at 358-60.

[394] *Id.* at 361.

[395] *Id.* The opinion, by Chief Justice Marshall, was only two paragraphs long and cited no authority. *See id.*

[396] *Id.*

[397] 28 U.S. (3 Pet.) 92 (1830).

action in which a land grant was inconsistent with a survey.[398] The plaintiff's survey encompassed land that the defendants occupied, but the defendants argued that the grant did not include this land.[399] The defendants demurred to the evidence, and the jury returned a verdict for the plaintiff subject to a ruling on the demurrer.[400] The Court found that the grant prevailed largely because the sloppily performed survey[401] conformed neither to the courses and distances in the grant, nor to the general description of the property in the grant.[402] On its face, this appears to be a case where evidence was in dispute and the Court decided it inconsistently with the jury verdict. It can also be read, however, as turning largely on the Court's interpretation of documents, which in eighteenth century England, was a job for the judge. Indeed, the Court notes that "neither the grant nor the face of the plat furnishes any information by which the corner called for in the grant can be controlled."[403] In other words, the plaintiff presented no evidence to support his position that the survey should prevail over the grant.

Finally, the *Redman* Court cited *Suydam v. Williamson*,[404] an ejectment action that turned entirely on the procedural niceties of the method of appeal. The Court in *Suydam* mentioned the practice of the case reserved,[405] but found that the lower court had not taken proper steps to reserve questions of law.[406] Indeed, the Court found that that the trial court had used no recognized method of questioning the judgment and it affirmed judgment for the plaintiffs.[407] Thus, while the Supreme Court acknowledged the case reserved procedure during the early to mid-nineteenth century, its practice was generally consistent with English practice.

This survey of cases reveals that *Redman*, like *Munson*, read far too much into the cases upon which it relied. While English

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[398] *Id.*

[399] *Id.* at 92-95.

[400] *Id.* at 96.

[401] *See id.* at 94-96. The surveyor made the original disputed line in his office, and did not have an axeman to mark trees or a chain to measure distances when he went to the land. The markers he was looking for were trees, and they were largely indistinguishable from other trees in the area. In addition, the surveyor was looking for a corner of property previously surveyed, but the the grant did not describe the corner with reference to previous surveys.

[402] *See id.* at 96-98.

[403] *Chinoweth*, 28 U.S. (3. Pet.) at 98.

[404] 61 U.S. (20 How.) 427 (1857).

[405] *See id.* at 434.

[406] *Id.* at 434-35.

[407] *Id.* at 431-42.

common law practice had a procedure whereby jury verdicts could be taken subject to later decisions by the court on questions of law, the reserved questions in the English cases really were questions of law. Eighteenth century English judges surely would be surprised to see *Redman* decided by the court as if no dispute of fact existed. By incorporating the reasonable jury standard enunciated in *Munson*, the *Redman* Court treated disputed facts as law. Under this approach, judges can decide matters that juries would have decided in 1791.

D. Summary Judgment: The Trilogy

The summary judgment has much more recent origins than either the directed verdict or the judgment notwithstanding the verdict.[408] In both England and the United States, summary proceedings were unknown until the middle of the nineteenth century.[409] Even then, they were restricted to specific kinds of proceedings, and generally favored plaintiffs.[410] Specifically, summary proceedings were designed to help commercial plaintiffs get quick relief against defaulting debtors.[411] Nevertheless, the theory behind summary judgment is similar to the rationale for various procedures and doctrines that were well-established in the common law at the time of the Seventh Amendment's ratification.

For example, the theory behind the demurrer to the evidence, as stated in *Gibson v. Hunter*,[412] was that while the jury decides the facts and the judge decides the law, the usual practice was for the judge to instruct the jury and then for the jury to "compound their verdict of the law and fact."[413] The demurrer to the evidence was a way for a party to withdraw the decision *as to the law* from the jury.[414] Summary judgment, which allows the judge to apply the law to undisputed facts, similarly withdraws the legal aspects of the case from the jury.

In 1902, the Supreme Court approved an early form of summary judgment in *Fidelity and Deposit Company of Maryland v. United States*.[415] Indeed, this is the only Supreme Court case that has considered the constitutionality of any form of summary judgment.[416] At issue in

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[408] *See* SWARD, *supra* note 2, at 275-87.

[409] *See id.* at 277-78.

[410] *See id.* at 275; *see also* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 3d, § 2711 (1998).

[411] *See* WRIGHT ET AL., *supra* note 410.

[412] 126 Eng. Rep. 499 (1793).

[413] *Id.* at 508-09.

[414] *Id.* at 509.

[415] 187 U.S. 315 (1902).

[416] *See* 10A WRIGHT ET AL., *supra* note 410, at § 2714 (discussing whether summary

Fidelity was a court rule providing that in contract actions, a plaintiff could file an affidavit along with his complaint, setting out his case and arguing that he would be entitled to judgment unless the defendant filed his own affidavit setting out his case and showing a proper defense to the action.[417] The defendant in *Fidelity*, an alleged surety on several contracts, filed an affidavit denying knowledge of the contracts it was supposed to have secured and demanded a trial by jury.[418] Apparently believing that the affidavit was insufficient to state a defense, the Court entered judgment for the plaintiff, the United States.[419] The Supreme Court held that this rule did not deprive the defendant of his right to jury trial, as it provided a means by which the defendant could raise an issue triable to a jury.[420] As the defendant had failed to state facts that could defeat the plaintiff's claim, the Court upheld the judgment against the defendant.[421] Modern summary judgment procedure is similar, in that it allows the party opposing summary judgment to raise issues of fact, thus requiring a trial by jury if properly demanded.[422]

Modern summary judgment procedure began with the enactment of Rule 56 of the Federal Rules of Civil Procedure. It allows the court to grant summary judgment for either the plaintiff or the defendant if she establishes that "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law."[423] To raise a genuine issue of material fact, the party opposing summary judgment "may not rest upon the mere allegations or denials of the . . . party's pleading, but the . . . party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."[424] This means that the party must produce evidence that would be admissible at trial.[425]

When hearing motions for summary judgment, courts traditionally have been protective of the right to a jury trial, taking care to give the case to the jury when issues of fact, including issues of

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judgment violates the Seventh Amendment).

[417] *Fidelity*, 187 U.S. at 316.

[418] *Id.* at 317-18.

[419] *Id.* at 322-23.

[420] *Id.* at 320.

[421] *Id.* at 321-22.

[422] *See* FED. R. CIV. P. 56(e).

[423] FED. R. CIV. P. 56(c).

[424] FED. R. CIV. P. 56(e).

[425] *See* WRIGHT ET AL., *supra* note 410, at § 2721.

credibility, are raised.[426] But in 1986, the Supreme Court decided three cases, commonly referred to as "the trilogy," that made it easier for courts to grant motions for summary judgment.[427] In *Celotex Corp. v. Catrett*,[428] the Court held that summary judgment would be proper where the moving party shows that the non-moving party has no evidence on an essential element of her claim or defense and the non-moving party has the burden of proof on that issue.[429] It is not necessary for the moving party to produce affirmative evidence that there is no factual support for her opponent's claim.[430] While this was not a significant departure from the general practice at that time, the Court in *Celotex* encouraged lower courts to make greater use of summary judgment, noting that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[431] In other words, courts should not be reluctant to use the device.

The Court made it easier for the lower courts to grant summary judgment in two other cases decided that same term. In *Anderson v. Liberty Lobby*,[432] the Court first made it clear that in evaluating motions for summary judgment, courts should apply the reasonable jury standard.[433] The Court then said that courts should take account of heightened standards of proof when deciding summary judgment motions.[434] Specifically, when the standard of proof on an issue is "clear and convincing evidence" rather than "a preponderance of the evidence," the question that the court must answer is whether a reasonable jury could find that there was clear and convincing

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[426] *See id.* § 2714.

[427] For critiques of the trilogy, see Robert J. Gregory, *One Too Many Rivers to Cross: Rule 50 Practice in the Modern Era of Summary Judgment*, 23 FLA. ST. U. L. REV. 689 (1996); D. Michael Risinger, *Another Step in the Counter-Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35 (1988); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

[428] 477 U.S. 317 (1986).

[429] *Id.* at 317-18.

[430] *See id.* at 323.

[431] *Id.* at 327 (quoting FED. R. CIV. P. 1.)

[432] 477 U.S. 242 (1986).

[433] *See Anderson*, 477 U.S. at 250-51. The Court also said this in *Matsushita*, which was decided the same day. *See* Matsushita v. Zenith Radio Corp., 475 U.S. 574, 588 (1986). The Court had, however, used the reasonable jury standard for summary judgment decisions in earlier cases. *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 767-68 (1984).

[434] *Anderson*, 477 U.S. at 257.

evidence for the non-moving party's claim or defense.[435] In other words, *Anderson* mandates that judges do some initial weighing of evidence in deciding summary judgment motions; it allows judges to put their thumbs on the scale. This decision provoked a strong dissent from Justice Brennan who could not "square the direction that the judge 'is not himself to weigh the evidence' with the direction that the judge also bear in mind the 'quantum' of proof required and consider whether the evidence is of sufficient 'caliber or quantity' to meet that 'quantum.'"[436]

Finally, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[437] the Court held that summary judgment was proper in an antitrust case where the alleged motive to engage in a predatory pricing conspiracy was unreasonable. The alleged conspiracy was to maintain artificially high prices in Japan for various consumer electronic products, while maintaining artificially low prices in the United States for the purpose of driving American manufacturers out of the market.[438] At the time of the Court's decision, the conspiracy allegedly had been going on for as long as thirty years.[439] The Court found that evidence of high prices in Japan was irrelevant to the alleged conspiracy to charge artificially low prices in the United States, even though that mechanism allegedly allowed the conspiracy to continue.[440] The Court reasoned that "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."[441] The Court found that the Japanese manufacturers had no rational motive to engage in a predatory pricing conspiracy because: (1) the American manufacturers were larger and better established; (2) the alleged conspiracy had been going on for at least twenty years with no appreciable effect; and (3) there is no guarantee

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[435] *See id.* The issue in *Anderson* was whether an allegedly libelous article was produced with "actual malice." Actual malice must be shown by clear and convincing evidence when the plaintiff in a libel action is a public figure, according to *New York Times v. Sullivan*, 376 U.S. 254, 279-80, 285-86 (1964).

[436] *Anderson*, 477 U.S. at 266 (Brennan, J., dissenting).

[437] 475 U.S. 574 (1986). *Matsushita* was the first of the three cases in this line of cases, decided three months before *Celotex* and *Anderson*.

[438] *Id.* at 578.

[439] *See id.* at 578, 591 n.13. The Supreme Court's decision was in 1986. The suit was commenced in 1974, *see id.* at 577, and the conspiracy allegedly began as early as 1953, though it could have been as late as 1960. *See id.* at 591 n.13.

[440] *See id.* at 595-96.

[441] *Matsushita*, at 596-97.

that the alleged conspirators could recoup the losses they suffered while maintaining artificially low prices in the American market.[442] In the absence of a rational motive, the Court found the evidence insufficient to permit a jury to infer a predatory pricing conspiracy.[443]

To some extent, *Matsushita* may be an artifact of antitrust law, which does not permit the jury to infer conspiracies if the evidence is equally capable of supporting legal competitive behavior.[444] In other words, there is a heightened standard of proof in antitrust cases.[445] That rule in itself, however, is arguably inconsistent with the historical allocation of fact-finding—including the drawing of inferences—to the jury.[446] The Court has held that the Seventh Amendment fully applies to statutory actions,[447] including antitrust actions.

Indeed, four justices dissented in *Matsushita*, and accused the majority of mandating that a judge considering a summary judgment motion in an antitrust case "should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff."[448] The dissent accused the majority of ignoring a substantial and significant report of an expert witness, and of preferring "its own economic theorizing to [the expert's]."[449] The expert witness's report, if believed, supported not only the existence of the alleged conspiracy, but also a reasonable motive for it.[450]

The three cases in the "trilogy"—*Celotex*, *Anderson*, and *Matsushita*—permit judges to take cases away from juries under

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[442] *See id.* at 597.

[443] *Id.* at 574-75.

[444] *See* Monsanto Co., 465 U.S. at 759-60 n.6, 763-64 (1984).

[445] *See* Mollica, *supra* note 114, at 154 and n.81 (citing cases).

[446] *See* Galloway v. United States, 319 U.S. 372, 406-11 (1943) (Black, J., dissenting); *see also* Brockbank v. Anderson, 135 Eng. Rep. 124, 131 (1844); Wright v. Pindar, 82 Eng. Rep. 892 (1681); FORSYTH, *supra* note 3, at 222; THAYER, *supra* note 3, at 194.

[447] *See* Curtis v. Loether, 415 U.S. 189, 194 (1974); *see also* Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959); Standard Oil Co. of Cal. v. Arizona, 738 F.2d 1021, 1024-31 (9th Cir. 1973). It could be argued that Congress can change the law by imposing a heightened standard of proof, especially for causes of action that it creates. *Cf., e.g.*, Grogan v. Garner, 498 U.S. 279, 287-90 (1990) (finding that Congress had lowered the standard of proof for exceptions to discharge in bankruptcy).

[448] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 600 (1986) (White, J., dissenting). Justice White was joined by Justices Brennan, Blackmun, and Stevens. *See id.*

[449] *Id.* at 603.

[450] *See id.* at 601-03, 606.

conditions unlike anything seen in eighteenth century England. While judges in eighteenth century England could decide the application of law to fact—the theory behind summary judgment—they did so only when the facts were undisputed. Current summary judgment jurisprudence allows judges to make dispositive determinations of fact under the guise of the reasonable jury standard. Moreover, there is considerable evidence that judges have used the Supreme Court's permission from the trilogy to do just that.

A recent study that compared appellate cases decided in 1973 with cases decided in 1997-98 found that "certain inquiries deemed factual in 1973—especially indeterminate legal standards such as state of mind or reasonableness—transmuted into questions of law by the end of the study period."[451] That study found that judges "demanded more rigorous proof to rebut a Rule 56 [summary judgment] motion" in the later years.[452] Other studies have found an increase in the number of summary judgments granted since the trilogy, especially for defendants.[453] An examination of these studies' data and the cases analyzed in these studies reveal judges deciding disputed questions of fact—something judges were less willing to do prior to the trilogy.[454]

E. The Linkage of Directed Verdict, Judgment Notwithstanding the Verdict, and Summary Judgment

Directed verdict, judgment notwithstanding the verdict, and summary judgment all trace their origins to a hodgepodge of common law procedures that were designed, in part, to police the law/fact distinction. Thus, demurrer to the evidence, precursor to the directed verdict, amounted to an argument that the opposing party had failed to produce evidence on a critical element of her claim. Judgment notwithstanding the verdict traces to the case reserved, by which the judges allowed the jury to proceed to a verdict while reserving a question of law for later decision. Summary judgment has no clear procedural ancestor, but the general common law rule that judges could decide the application of law to undisputed

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[451] Mollica, *supra* note 114, at 142.

[452] *Id.*

[453] *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 91-93 (1990); *see also* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 208 (1993).

[454] *See* Issacharoff & Loewenstein, *supra* note 453, at 91; *see also* International Union v. Johnson Controls, 886 F.2d 871, 918-19 (7th Cir. 1989) (Easterbrook, J., dissenting) (arguing that the majority decided questions of fact).

facts reflects the same principle.[455]

From these distinct but related beginnings, the three procedures are now clearly linked under the Federal Rules of Civil Procedure. The Supreme Court itself has linked summary judgment and directed verdict in its holding that the directed verdict standard (the reasonable jury standard) applies to summary judgment.[456] If summary judgment traces to the common law rule that judges could decide the application of law to undisputed facts, this linkage effects an expansion of summary judgment: the reasonable jury standard allows judges to make some determinations of *disputed* facts on the theory that a reasonable jury could resolve the dispute only one way.

In 1991, changes in the Federal Rules of Civil Procedure completed the linkage by eliminating the terms "directed verdict" and "judgment notwithstanding the verdict" and substituting "judgment as a matter of law" for both. The Advisory Committee's notes to the 1991 amendment to Rule 50 describe the rationale for the change:

> The term "judgment as a matter of law" is . . . [a] familiar term and appears in the text of Rule 56 [governing summary judgment]; its use in Rule 50 [governing what used to be termed directed verdicts and judgments notwithstanding the verdict] calls attention to the relationship between the two rules. Finally, the change enables the rule to refer to preverdict and post-verdict motions with a terminology that does not conceal the common identity of two motions made at different times in the proceeding.[457]

Thus, the three motions are described as identical but for the timing. And if they are identical, the same standard—the reasonable jury standard—must apply to all of them. If this was not clear to everyone before the 1991 amendments, it surely must be after.

The reasonable jury standard is critical to this linkage. Under the Seventh Amendment's Reexamination Clause no fact found by a jury can be reexamined other than according to the rules of the common law.[458] With the development of the reasonable jury standard, judges became more willing to take cases away from the jury prior to the verdict by means of a directed verdict. Judges

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[455] *See supra* notes 408-22 and accompanying text. There were numerous now-extinct common-law procedures that reflected this principle. *See* Henderson, *supra* note 43, at 300-16 (discussing case reserved, demurrer to the evidence, and the old j.n.o.v.).

[456] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

[457] FED. R. CIV. P. 50 adv. comm. notes (1991 amendment).

[458] U.S. CONST. amend. VII.

remained reluctant, however, to apply the reasonable jury standard to post-verdict motions because of the Reexamination Clause. *Redman* resolved their doubts by allowing a post-verdict judgment notwithstanding the verdict if the judge had reserved decision on a motion for directed verdict.[459] Eventually, Rule 50 provided that a judge who denied a motion for directed verdict was *deemed* to have reserved the question until after the verdict.[460] This fiction continues to this day, as Rule 50 still permits a post-verdict motion for judgment as a matter of law (to use modern terminology) only if such a motion is made prior to a verdict.[461]

On the one hand, the Rule 50 fiction seems unnecessary. As I have shown, the development of the reasonable jury standard has transformed what were once questions of fact for the jury into questions of law for the judge. If the court rules that no reasonable jury could have found for the verdict winner *as a matter of law*, then the court is not reexamining facts found by the jury. On the other hand, courts remain uncomfortable with this approach, clinging to the fiction that they are not reexamining facts, but delaying a decision on a pre-verdict motion. Framing judges' role this way links the procedure to the common law, even if the substance reflected in those common law procedures differs vastly from the substance reflected in their modern counterparts. This procedural scheme, however, clearly allows—and even encourages—judges to tread heavily on the jury's territory, while hiding behind legal fiction.

This examination of the cases that the Court has relied on in orchestrating the transformation of fact into law reveals several things. First, the reasonable jury standard on which the entire symphony depends was not developed in England until the middle of the nineteenth century, sixty years after ratification of the Seventh Amendment—and did not make its way into Supreme Court jurisprudence until nearly twenty years after that. Second, demurrers to the evidence, which challenged the sufficiency of the evidence, were generally directed at a complete lack of evidence, at inadmissible evidence, or—and this was a later development—at evidence relating to mixed questions of law and fact. Third, eighteenth century English cases employing the "case reserved," which is the basis for the judgment notwithstanding the verdict, quite

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[459] *Redman*, 295 U.S. 654 (1935).

[460] FED. R. CIV. P. 50(b).

[461] *Id.* ("If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion.").

clearly involved reserved questions of law, or at most mixed questions of law and fact. Finally, in eighteenth century England, disputed questions of fact went to the jury. None of these eighteenth century procedures support the proposition that courts can decide disputed questions of fact simply because the evidence is extremely one-sided.

Recent Supreme Court cases suggest some retrenchment in the approach to defining matters as fact or law. As one commentator has detailed, the Court overturned judgments as a matter of law several times in the late twentieth century, insisting that the matter was for the jury to decide.[462] These cases include *Reeves v. Sanderson Plumbing Products, Inc.*,[463] where the Court held that the question whether the plaintiff's dismissal from his job was due to age discrimination was a question for the jury;[464] *Hunt v. Cromartie*,[465] where the Court held that summary judgment was not an appropriate vehicle for determining a state legislature's motivation in creating congressional districts;[466] and *Bragdon v. Abbott*,[467] where the Court held that the question whether a person's HIV-positive status posed a direct threat to a dentist who had refused to treat her was a question for the jury.[468] Whether such decisions restrain the lower courts in their rush to judgments as a matter of law remains to be seen.[469] However, this examination of the case law reveals that the problem dates back much farther than we have been willing to acknowledge.

IV. *MARKMAN* AND HISTORY: WHERE DO WE GO FROM HERE?

Having reviewed the history of the law/fact distinction, it is appropriate to consider how *Markman* might affect the jurisprudence of the law/fact distinction. While *Markman* may be limited to its context of patent claim interpretation, the language is broader than that. This section describes the *Markman* opinion in more detail and then analyzes how it might affect the jurisprudence of the law/fact distinction.

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[462] *See* Mollica, *supra* note 114, at 205-18.

[463] 530 U.S. 133 (2000).

[464] *Id.* at 146-48.

[465] 526 U.S. 541 (1999).

[466] *Id.* at 553.

[467] 524 U.S. 624 (1998).

[468] *Id.* at 652-55.

[469] One commentator has argued that the lower courts have shown considerably more enthusiasm for taking cases away from the jury than the Supreme Court in recent decades. *See* Schnapper, *supra* note 114. The Supreme Court cannot police all of the cases where matters are taken out of the hands of the jury, even if it thinks the lower courts are going too far.

A. The Markman *Decision*

A claim is the part of a patent that describes the unique features of the invention.[470] The patent at issue in *Markman* was for an inventory tracking system for dry cleaning establishments.[471] The question was whether a system that tracked accounts receivable but not articles of clothing infringed Markman's patent for a system that tracked both.[472] The jury found an infringement, but the district court granted the defendant's deferred motion for judgment as a matter of law.[473] The court's decision turned on its interpretation of the claim in Markman's patent, which the court construed as encompassing both cash inventory and inventory of clothing.[474] The question on appeal was whether the district court had properly taken this decision out of the hands of the jury.[475] The court of appeals affirmed, holding that construction of a claim in a patent is "the exclusive province of the court"[476] and the Supreme Court agreed.

The Court, in a unanimous opinion written by Justice Souter, described its task in terms of both the law/equity and law/fact distinctions.[477] As for the law/equity distinction, the Court noted the historical test and determined quickly and easily that juries were a feature of patent infringement litigation in England in 1791.[478] The Court then said that the next question was "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[479] The Court noted

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[470] *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, 373-74 (1996).

[471] *Id.* at 374.

[472] *Id.* at 374-75.

[473] *Id.* at 375.

[474] *See id.*

[475] *Id.* at 371.

[476] *Markman*, 517 U.S. at 376.

[477] *Id.* at 372-73.

[478] *Id.* at 377. The Court did not spend much time on this issue, perhaps because it was obvious. Patent infringement cases tended to be brought as actions on the case, a common law action. *See, e.g.*, Turner v. Winter, 99 Eng. Rep. 1274 (1787). The usual test for determining whether a case is subject to the Seventh Amendment has two parts, with the first being whether the matter would have been tried in a court of law in England in 1791or whether it was analogous to a legal cause of action. *See, e.g.*, Chauffeurs, Teamsters, and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564-65 (1990); Tull v. United States, 481 U.S. 412, 417 (1987). The second part of the test is whether the remedy is legal or equitable, which the Court has characterized as the more important of the two inquiries. *See Terry*, 494 U.S. at 565; *see also Tull*, 481 U.S. at 417-18, 420-21. The Court in *Markman* never discussed the remedy, perhaps because the first part of the test provided such a clear answer. The Court in both *Terry* and *Tull* determined that the first part of the test did not definitively resolve the question, so it had to turn to the second prong of the analysis.

[479] *Markman*, 517 U.S. at 376.

that this question had been answered in the past by referring to the distinction between substance and procedure or between fact and law, but reasoned that "the sounder course, when available, is to classify a mongrel practice . . . by using the historical method, much as we do in characterizing the suits and actions in which they arise."[480] The Court went on to say that "where there is no exact antecedent, the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know."[481] In other words, the court finds an analogous issue, and decides whether the analogous issue was normally decided by the judge or the jury in England in 1791.

The Court then examined eighteenth century English patent cases, analogizing the modern patent claim to the eighteenth century "specification."[482] The Court noted that there were few reported cases dealing with the interpretation of disputed terms in a specification, but that "none demonstrates that the definition of such a term was determined by the jury."[483] The cases reveal that juries regularly decided whether the patent covered a new invention (novelty) and whether the invention could be built from the specification in the patent (enablement).[484] Markman had argued that in deciding such matters, juries must have decided the meaning of disputed terms in the specification.[485] The Court, however, apparently believed that courts could, and did, tell the jurors what the disputed terms meant before sending them off to decide novelty or enablement.[486]

In reaching this conclusion, the Court relied partly on the lack of a clear statement in the cases that juries were to interpret terms in the specification, but also on the general rule that judges, and not juries, interpreted written documents in eighteenth century England.[487] The Court found nothing to suggest that this rule was not followed in patent cases.[488] The Court also rejected Markman's claim that juries regularly interpreted terms of art in written documents,

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[480] *Id.* at 378.

[481] *Id.*

[482] *See id.* at 379-80.

[483] *Id.* at 380. In one of the cases cited, however, the judge, Lord Kenyon, told the jury that the invention was not new, and that they should find for the defendant, but the report notes that "[t]he jury found a verdict for the plaintiff, and the verdict was not afterwards disturbed." Bramah v. Hardcastle, 1 Carp. Pat. Cas. 168, 171-72 (K.B. 1789).

[484] *See Markman*, 517 U.S. at 379-83.

[485] *Id.* at 381.

[486] *See id.* at 382.

[487] *Id.* at 381-82.

[488] *Id.* at 381-83.

finding no evidence from late eighteenth century England suggesting that juries interpreted terms of art in patent cases.[489]

Finding no evidence that juries interpreted patent specifications at common law, the Court then determined that it must "look elsewhere to characterize this determination of meaning in order to allocate it as between court or jury."[490] The Court noted that it should "accordingly consult existing precedent and consider both the relative interpretive skills of judges and juries and the statutory policies that ought to be furthered by the allocation."[491] In other words, the Court looked to both U.S. precedent and policy to determine if the eighteenth century rule should be altered so as to allow a jury to interpret patent claims. This suggests that the Court was willing to permit a jury to interpret patent claims based on precedent or policy. However, the Court ultimately found that neither factor supported that result.[492]

Whether or not the Court had taken this historical approach before,[493] it is a new way of describing how courts draw what is commonly called the law/fact distinction. Indeed, the Court seemed to treat the law/fact distinction as simply one way of defining the

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[489] *Id.* at 383-84.

[490] *Markman*, 517 U.S. at 384.

[491] *Id.* at 384.

[492] The Court found that the precedent distinguished between the written patent and the actual invention, and gave to the jury questions about the "'character of the thing invented.'" *Id.* at 386 (quoting Bischoff v. Wethered, 76 U.S. (9 Wall.) 812, 816 (1869)). The Court also found that nineteenth century commentators generally noted that claim construction was for the court. *Id.* at 387-88. Finally, as to matters of policy, the Court found that both the judges' "special training in exegesis," *id.* at 388, and the need for uniformity in patent construction meant that claim construction should be given to the judge. *Markman*, 517 U.S. at 388-91.

[493] In *Tull v. United States*, 481 U.S. 412 (1987), the Court first determined that the claim for a civil penalty under the Clean Water Act was analogous to a legal action, and so required a jury, *see id.* at 417-25, and then turned to the question whether a jury was required to assess the amount of a civil penalty. *See id.* at 425-27. In answering the second question, the Court noted that Congress could itself determine the amount of a civil penalty, and described a similar power in Parliament during the eighteenth century. *Id.* (citing Atcheson v. Everitt, 98 Eng. Rep. 1142, 1147-49 (K.B. 1775)); *see also id.* at 426. Because the amount of the civil penalty could be determined by the legislature, the Court concluded, the "substance of a common-law right to a trial by jury" does not include the determination of the amount of a civil penalty. *Id.* Thus, as in *Markman*, the Court in *Tull* attempted to define the "substance of a common-law right" to a jury trial by looking at history, though the examination of history in *Tull* was not as sweeping as it was in *Markman*. This would not be the first time that the Court hinted at an approach in one case and made the approach more explicit in a later case. For example, the Court's two-step approach to defining the distinction between law and equity for purposes of the Seventh Amendment was hinted at in *Curtis v. Loether*, 415 U.S. 189 (1974), but did not become explicit until thirteen years later with the decision in *Tull*.

substance of the common law right to a jury trial. The Court reasoned that the best way to define the substance of the right is through history. That analysis raises interesting questions about the use of the reasonable jury standard, directed verdict, judgment notwithstanding the verdict, and summary judgment.

B. The Future of the Law/Fact Distinction

Markman calls into question all of the development described in this article. If we are to look to history to define the contours of the right that is preserved by the Seventh Amendment we will surely have to backtrack from the conclusions of *Munson*, *Galloway*, *Redman*, and the trilogy. It is insufficient to quote empty words, or to cite unexamined cases, as the Court repeatedly did in sanctioning the expansion of judicial power reflected by these cases. Rather, if we are to understand the history that the Court now seems prepared to invoke, we must look at the circumstances behind the words of the eighteenth century English and early American cases relied on by the Court. Those circumstances belie the conclusions that the Court has drawn in *Munson*, *Galloway*, *Redman*, and the trilogy. There was no reasonable jury standard in eighteenth century English cases. The demurrer to the evidence was not used to resolve disputed questions of pure fact, and neither was the case reserved. Judges applied law to undisputed facts, but if facts were disputed, they sent cases to the jury. Finally, although early U.S. cases said that courts were not bound by eighteenth century English procedures, the procedural changes that the Court had approved prior to *Munson* and *Galloway* left fact-finding in the jury's hands.

Of course, this too may paint too simplistic a picture. The law/fact distinction had its bumps and detours in eighteenth century England as well. It has never been the case that juries always found all of the facts; some kinds of facts had to be determined by the judge.[494] An example given by a number of writers is that judges, not juries, determined whether probable cause for prosecution existed in a suit for malicious prosecution.[495] Of course, one can see some legal content to such a question, so it might more accurately be deemed a mixed question of law and fact: probable cause for a criminal prosecution is tied up with policy decisions that protect both the

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[494] *See* THAYER, *supra* note 3, at 184-85. For discussions of the law/fact distinction, including the somewhat arbitrary classifications of law and fact employed in eighteenth century England, see the materials cited *supra* note 3.

[495] *See* FORSYTH, *supra* note 3; *see also* THAYER, *supra* note 3, at 221-22, 252; GREEN, *supra* note 3, at 280.

accused and the accuser.

Another example of arbitrariness in defining law and fact is the distinction at issue in *Markman*: judges, not juries, decided the meaning of written documents in eighteenth century England, even if such inquires look like questions of fact. There were complications to this common law doctrine, however. First, courts sometimes called upon juries to interpret terms of art in written documents on the theory that jurors, who were themselves steeped in the useful arts, would have a better understanding of what those terms meant than the more removed judges.[496] The Court in *Markman* considered this complication, but decided that it did not apply in that case because the earliest patent case cited for the proposition was decided in 1841, well after the ratification of the Seventh Amendment.[497]

Of course, if it was illegitimate to cite an 1841 case to define the Seventh Amendment in *Markman*, it was also illegitimate to cite an 1853 case, *Jewell v. Parr*, for a similar purpose in *Munson*. Moreover, *Munson*, with its reliance on *Jewell*, is the basis for the decisions in *Galloway*, *Redman*, and the trilogy. If *Markman* was serious about relying on history to define the contours of the Seventh Amendment right to jury trial, then the entire structure must collapse. Even if the structure still stands, however, my examination of the facts of the cases that the Court has relied on to define the law/fact distinction reveals that the structure has serious flaws. The cases simply do not support the conclusions that the Court reaches.

It might be argued that whatever the legitimacy of relying on an 1853 English case in the first place, the doctrine borrowed from that case is now too well established to deny. *Markman* itself suggested that post-1791 U.S. precedent could affect the right to a jury trial.[498] But, *Markman* would have used such precedent to allow a jury trial where history did not demand one. It is quite another matter to allow such precedent to have continuing force when it becomes clear that it has failed the Seventh Amendment mandate to "preserve" the right to a jury trial.

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[496] *See Markman*, 517 U.S. at 384. *Markman* noted that there is some evidence that this doctrine was in its early development in the late 1700s. *See id.* at 383-84, n.9 (citing 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2461, at 195 (James H. Chadbourn rev. 1981)).

[497] The Court cited *Wigmore on Evidence* for the proposition that the allocation to juries of the interpretation of terms of art in documents generally was not well established at the time the Seventh Amendment was ratified, but considered it irrelevant anyway given that *Markman* was a patent case. *Markman*, 517 U.S. at 383-84 (citing 9 WIGMORE, EVIDENCE § 2461, at 195).

[498] *See Markman*, 517 U.S. at 388-91.

The historical approach, however, is not without difficulty. In fact, the history is sometimes quite murky, as *Markman* itself illustrates. Relying on that history would require litigants and judges to search through old English cases in hopes of gleaning the English classification of a particular issue. Such research could be difficult to do, both because those cases are not going to be readily accessible to many lawyers and judges, and because the cases themselves are difficult to interpret. Many are written in archaic legal language and employ archaic common law procedural devices that are not well known to modern lawyers. Furthermore, the case reports vary considerably in clarity and completeness. Some are just two or three sentences, while others go on for pages. The Court and commentators have criticized the historical approach to the law/equity distinction,[499] and if anything, the difficulties of doing historical research would be greater in dealing with the law/fact distinction. There are also instances where modern juries decide issues that historically were given to judges in eighteenth century England, and some question about how to handle such matters would arise. Again, *Markman* provides an example. Eighteenth century English judges interpreted written documents, largely on the theory that words had immutable legal meanings. We no longer have such confidence in the clarity of words, and courts instead look to the intent of the parties as reflected in the document. For the most part, we leave questions of such intent to juries.[500] In theory, *Markman* could return document interpretation to the judge, though that is one area where post-1791 U.S. precedent might supersede history.

V. CONCLUSION

For well over one hundred years, courts have found procedural excuses for taking questions of fact away from juries. The courts have relied on eighteenth century English practice to justify their action, arguing that modern procedures are mere variations on the English themes. This whole symphony, however, is built on a theme that does not exist: the reasonable jury standard was not announced in England until 1853, well after the relevant date for determining what the Seventh Amendment preserves. Moreover, a comparison of the kinds of issues taken from juries in eighteenth century England with

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[499] *See, e.g.*, *Terry*, 494 U.S. at 574-81 (1990) (Brennan, J., concurring). *See also* Redish, *supra* note 108 (criticizing the historical approach).

[500] *See, e.g.*, Dobson v. Masonite Corp., 359 F.2d 921, 923-24 (5th Cir. 1966); *cf.* FED. R. CIV. P. 52(a) (classifying the interpretation of documents as fact-finding for purposes of establishing the appellate standard of review of fact-finding by judges).

those taken from the juries under modern American procedures for defining judgments "as a matter of law" show that they are quite different. Fact has become law, and as it becomes law, it is withdrawn from the jury.

Markman suggests that the Supreme Court might be returning to a more historical view of the Seventh Amendment. Indeed, *Markman* explicitly stated that the best method for determining what are the fundamental elements of the right to jury trial—the elements that are preserved by the Seventh Amendment—is the historical method.[501] If the Court is serious about defining the right to jury trial historically, it ought to take a close look at *Munson* and all the cases that rely upon it.

[501] *See Markman*, 517 U.S. at 376.