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The Seventh Amendment, Modern Procedure, and the English Common Law

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THE SEVENTH AMENDMENT, MODERN PROCEDURE, AND THE ENGLISH COMMON LAW

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INTRODUCTION

> "[The right of trial by jury] . . . is perpetually spoken of as the *palladium* of our public rights and liberties; and in all the various fluctuations of public opinion, it has remained untouched and unsuspected."[1]

From the time of the founding of the United States, the jury trial was recognized as an important part of the governmental structure.[2] The Seventh Amendment, adopted in 1791, established the right to a jury trial in civil cases in federal court.[3] Since 1791, however, many new procedures that effectively eliminate the civil jury trial have been created.[4] Under these procedures, a judge possesses substantial power to affect a civil jury trial by her authority to dismiss a case before trial, during the trial, or after a jury renders a verdict. Before trial, a judge can grant a motion to dismiss or a motion for summary judgment. Once a trial begins and after the

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1. John C. Hogan, *Joseph Story on Juries*, 37 OR. L. REV. 234, 249 (1958) (quoting Justice Story's article "Jury" published in 1831).

2. *See, e.g.*, LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 29 (Walter Hartwell Bennett ed., 1978) (letters first printed in 1787 and 1788) ("It is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department.").

3. *See* U.S. CONST. amend. VII.

4. Federal district court judge William G. Young issued an open letter to his colleagues that called the "'withering away' of the nation's jury system . . . the 'most profound change in our jurisprudence in the history of the Republic.'" Maggie Mulvihill, *A Top Judge Fears Juries Are on Wane*, BOSTON HERALD, Aug. 5, 2003 at 1, *available at* 2003 WL 3033416. Judge Young advocated for changes because "[w]ithout juries, the pursuit of justice becomes increasingly archaic . . . juries are the great leveling and democratizing element in the law." *Id*. The new procedures discussed in this Article have contributed to the decrease in the number of jury and bench trials in federal courts which was only 1.8 percent of all dispositions of civil cases in federal court in 2002. *See* Adam Liptak, *U.S. Suits Multiply, But Fewer Ever Get to Trial, Study Say*s, N.Y. TIMES, Dec. 14, 2003, at A1.

plaintiff has presented his evidence, or at the close of all of the evidence, a judge can grant a directed verdict or judgment as a matter of law for the defendant.[5] After a jury has found for one party, a judge may grant judgment as a matter of law to the other party or may grant a new trial on one of several grounds. After a jury has found damages, a judge can reduce the verdict either because she found the damages excessive[6] or because Congress enacted a statute that limits damages under the cause of action.[7]

Judges increasingly have used such devices, particularly summary judgment, to dismiss cases.[8] For example, courts frequently dismiss employment discrimination cases upon summary judgment,[9] and courts increasingly have used summary judgment to dismiss other types of cases, including antitrust cases.[10] The propriety of summary judgment has

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5. Although a judge could conceivably grant a directed verdict for the plaintiff at the close of the evidence, this occurs rarely. *See* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2535 (2d ed. 1995).

6. Here, the judge offers a new trial as an alternative to the reduced verdict.

7. The Senate and the House regularly consider tort reform to control the awards rendered by juries. *See, e.g.*, Sheryl Gay Stolberg, *Short of Votes, Senate G.O.P. Still Pushes Malpractice Issue*, N.Y. TIMES, July 6, 2003, at A1 (discussing bill that would limit pain and suffering damages in medical malpractice cases to $250,000). A few articles have analyzed the constitutionality of statutory caps under the Seventh Amendment. *See, e.g.*, Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345 (1995) (arguing that statutory caps are unconstitutional under the Seventh Amendment); Michael S. Kang, Comment, *Don't Tell Juries About Statutory Damage Caps: The Merits of Nondisclosure*, 66 U. CHI. L. REV. 469 (1999) (stating that the Supreme Court has not decided the issue and discussing the arguments for and against constitutionality).

Appellate judges also possess significant power to affect a jury trial. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002). This modern appellate power will not be studied in detail in this Article.

8. *See, e.g.*, EDWARD J. BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 1 (2d ed. 2000) (summary judgment is "probably the single most important pretrial device used today").

9. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (arguing federal courts are improperly granting summary judgment in Title VII hostile environment cases); JOE S. CECIL, DEAN P. MILITECH & GEORGE CORT, DIVISION OF RESEARCH, FEDERAL JUDICIAL CENTER, TRENDS IN SUMMARY JUDGMENT PRACTICE: A PRELIMINARY ANALYSIS 5 (Nov. 2001) ("notably higher rates" of summary judgment in civil rights cases); Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 101–02 (1999) (discussing judges' improper use of summary judgment in ADA cases, including the refusal of judges to send "'normative' factual questions" to juries and a "high threshold for defending summary judgment"); 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, 206–07 (1993) (increased use of summary judgment in federal employment discrimination cases); *see also* Hillary Richards, *Summary Judgment in Sexual Harassment Cases: An Overview of Recent Trends*, 693 PRAC. L. INST./LITIG. 275 (2003) ("There can be no question that defendants in employment cases have used summary judgment more frequently in recent years.").

10. *See* Peter D. Ehrenhaft, *Is Interface of Antidumping and Antitrust Laws Possible?*, 34 GEO.

become an increasingly controversial subject in scholarly debate. Some scholars have argued that courts overuse the device,[11] while others have asserted that the procedure serves a particularly desirable role in the litigation system.[12]

These same scholars have differed in their views of the constitutionality of the procedure, some assuming summary judgment is constitutional[13] and others expressing concern regarding the constitutionality issue.[14] The question of the constitutionality of summary

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WASH. INT'L L. REV. 363, 390 (2002); *see also* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (generally discussing increased use of summary judgment in civil cases); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141 (2000) ("emergence of summary judgment as the new fulcrum of federal civil dispute resolution"); 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, 107–08 (1988) (increased grant of summary judgment); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897–98 (1998) (increased use of summary judgment has affected all areas of civil litigation).

Professor Ellen Sward has written that the use of another modern procedure, judgment as a matter of law, has expanded. *See* ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY 298 (2001). On the other hand, the procedural device of the new trial appears to be used less often by judges. *Id*.

11. In an article published recently, Professor Arthur Miller argued that the procedural device of summary judgment is overused by judges because of judges' desire to efficiently dispose of cases and their concerns regarding the ability of juries. *See* Miller, *supra* note 10, at 1016, 1104. Professor Miller feared that an unnecessary "judicial intrusion into the factfinder's realm" will inevitably occur should summary judgment expand. *Id.* at 1068; *see, e.g.*, Beiner, *supra* note 9, at 71; Colker, *supra* note 9, at 101–02; McGinley, *supra* note 9, at 206–07.

12. In an article published recently, Professor Jonathan Molot argued that summary judgment, as opposed to a settlement conference, is a particularly desirable device in the court system because the parties and the judge play traditional roles such that parties frame the issues and judges decide legal questions. *See* Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27 (2003). Molot contrasted the controversial use of settlement conferences with what he viewed as the generally uncontroversial pretrial management procedure of summary judgment. *Id.* at 43–46. He stated that summary judgment allowed the parties to frame the issues and the judge to decide the legal issues. *Id.* at 44–45. While Molot recognized that there is some criticism of what he termed the aggressive use of summary judgment, he discounts the importance of this issue to advocate that summary judgment is preferable to preserve tradition, as opposed to settlement conferences. *Id.* at 88. Molot stated that summary judgment is more traditional but more costly and settlement conferences are not traditional but tend to relieve the judicial system of the many burdens of litigation. *Id.* at 45–46. Molot was concerned that in settlement conferences there is no review of the judge's behavior. *Id.* at 44, 89. He argued that judges should be required to write significant decisions if they are to deny summary judgment, and also that in addition to strengthening summary judgment standards, judges should be encouraged to apply the standards uniformly. *Id.* at 88. Molot stated that "the summary judgment mechanism offers a less dangerous (though more burdensome) substitute for the settlement conference." *Id.* at 91. In another recent article, the authors argue that judges should decide whether summary judgment should be granted before they will enforce settlement agreements. *See* David Rosenberg & Randy Kozel, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, (Harvard Public Law Working Paper No. 90, 2004, *at* http://ssrn.com/abstract=485242).

13. *See* Molot, *supra* note 12, at 44.

14. "Overly enthusiastic use of summary judgment means that trialworthy cases will be

judgment and other procedural devices fundamentally influences how courts should use the procedures. If a procedure is constitutionally firm, then the courts should be encouraged to use the device to the extent the procedure comports with and aids other goals of the federal litigation system. If, on the other hand, the procedure is problematic constitutionally, the courts should reassess its use in the litigation system.

The Supreme Court has evaluated the constitutionality of modern procedures that affect the jury trial under the Seventh Amendment.[15] The Amendment provides that "[i]n Suits at common law . . ., the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[16] The Supreme Court has repeatedly stated that "the common law" in the Seventh Amendment refers to "the common law of England,"[17] which Justice Joseph Story stated was "the grand reservoir of all our jurisprudence."[18] As a result, in its constitutionality analyses, the Court has compared modern procedures that affect the jury trial right to procedures under the English common law in 1791, when the Seventh Amendment was adopted.[19] While none of the modern procedures, except the new trial,[20] existed under the English common law in 1791, the Court

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determined pretrial on motion papers, possibly compromising the litigants' constitutional rights to a day in court and jury trial." Miller, *supra* note 10, at 1071. Miller's concern is the constitutional guarantee of a jury trial; however, he asserted that if no "'genuine issue of material fact' exists and the movant is entitled to judgment 'as a matter of law,' pretrial disposition does not raise questions of constitutional dimensions." *Id.* at 1075. Other scholars have recognized that "[s]ummary judgment rests on a potentially tenuous constitutional foundation." BRUNET, *supra* note 8, at 13. For example Brunet has stated:

> [W]hen all or part of the issue to be resolved on the summary judgment motion concerns whether there exists sufficient evidence to allow the case to go to a jury, then it would be quite incorrect to suggest that judicial resolution of that 'legal' issue could not conceivably threaten the jury's historic and constitutionally based fact-finding province.

Id. at 17.

15. *See infra* notes 20–24 and accompanying text.

16. U.S. CONST. amend. VII.

17. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.); *see, e.g.*, Markman v. Westview Instruments, 517 U.S. 370, 376 (1996) (citing *Redman*); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right of trial by jury . . . is the right which existed under the English common law when the Amendment was adopted."); Slocum v. New York Life Ins. Co., 228 U.S. 364, 377 (1913) (citing *Wonson*); *see also* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640 (1973).

18. *Wonson*, 28 F. Cas. at 750 (stating also that "[i]t cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law").

19. The modern procedures to which this Article refers are briefly described above. This Article does not examine details of the jury trial right such as the number of jurors who try a case.

20. As described below, however, the modern new trial does differ in significant ways from the new trial under the common law. *See supra* text accompanying notes 368–72.

has determined that all of the new devices by which a court may reduce, completely preclude, or eliminate a jury verdict are constitutional.[21] In many of these decisions, the Court interpreted the Constitution to require that the "substance" of the jury trial right must be satisfied[22] and decided that the procedures did not violate the substance of the right.[23] The Court has only once found a new device that affected the jury trial right unconstitutional and only then when a judge enhanced a jury verdict.[24]

In its constitutionality analyses, the Court could be said to have taken certain missteps. English common law devices such as the demurrer to the evidence and the special case could have been described more completely.[25] Moreover, some of the comparisons between the English devices and modern procedures could be said to be oversimplified. For example, the common law demurrer to the evidence and the special case are compared to the modern judgment as a matter of law, although nothing similar to judgment as a matter of law existed under the English common law.[26] Also the devices under the English common law are labeled as inconsistent, although this is not a necessary conclusion.[27] This approach by the Court to the evaluation of the English common law can be said to have led to the lack of a significant standard by which to analyze the constitutionality of modern procedures. The current test is unrelated to any specific characteristics of the English common law and examines the "substance" not the "form" of the jury trial right.[28] While this anti-formalistic approach to the constitutionality analysis may seem reasonable, there has not been an appropriate recognition of the fundamental elements of the right embodied in the common law. The substance of the right has been defined only as: judges should decide law and juries should decide facts.[29] Leading scholars have closely followed the jurisprudence of the

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21. *See, e.g.*, Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902) (summary judgment); *see also infra* text accompanying notes 54–103.

22. *See infra* text accompanying notes 68–103.

23. *See infra* text accompanying notes 68–103.

24. *See* Dimick v. Schiedt, 293 U.S. 474, 487–88 (1935) (finding additur, the increase of a jury verdict, unconstitutional under the Seventh Amendment). In *Slocum*, the Court had found unconstitutional the modern procedure of judgment notwithstanding the verdict. *See Redman*, 295 U.S. at 660–61. *Redman* essentially overruled *Slocum*, however. *See id*.

25. *See infra* text accompanying notes 122–99, 287–300; *see also* Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) (arguing the Supreme Court did not accurately describe remittitur under the English common law and that remittitur is unconstitutional).

26. *See infra* text accompanying notes 122–99, 287–300.

27. *See infra* text accompanying notes 122–99, 287–300.

28. *See infra* text accompanying notes 68–103.

29. *See infra* text accompanying notes 68–103.

Court and, like the Court, have adopted a test unconnected to principles of the English common law.[30] As demonstrated in this Article, however, fundamental elements of the common law further differentiate between the roles that the jury and the judge should play in a case.

This Article assumes the validity of the English common law historical test to the constitutionality analysis.[31] It argues, however, that the underlying test, unconnected to actual principles of the common law devices, has caused the invariable constitutionalization of procedures that are increasingly used by the federal courts.[32] This Article develops principles derived from the English common law by which modern procedures that affect the jury trial right can be reassessed. These proposed principles include that procedures permitted under the English common law should be constitutional, and that procedures proscribed under the English common law should be unconstitutional. Also, if a procedure was not proscribed under the common law, the procedure may be constitutional if the procedure comports with the other principles of the common law. Moreover, under the proposed principles, modern procedures that relate to problems with pleadings may be constitutional. Additionally, except on a motion for a new trial, a court should not consider the evidence of the moving party, and the party seeking to remove a case from a jury should admit the truth of the evidence of the non-moving party. Importantly, in this decision, a court should not analyze the sufficiency of the evidence of what the jury should find or should have found. Also, the moving party loses if the admitted facts present a legal claim. Moreover, the emphasis should be on the right of the parties for a jury to hear and decide a case.[33]

Part I begins with an examination of the modern procedural devices and an overview of the Supreme Court jurisprudence regarding the constitutionality of the new procedures under the Seventh Amendment. Scholarship regarding the "rules of the common law" is then examined. Part II analyzes the late eighteenth-century English procedural devices used to dismiss a case before a jury heard the case. The devices in place during the trial are then explored, followed by an analysis of the

30. *See* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 336 (1966).

31. *See infra* note 108.

32. *See infra* text accompanying notes 54–103; *supra* notes 8–10.

33. This Article sets forth principles to apply in the analyses of the constitutionality of modern procedures. It is beyond the scope of this Article to reconsider the constitutionality of each of the specific devices. Stare decisis also may play a role in the future constitutionality analyses because of the dependency of the present judicial system on modern procedures. For an example of an article reconsidering one modern procedure, see Thomas, *supra* note 25 (considering remittitur).

procedures that surrounded the verdict. Additionally, this Part describes the procedures used after a jury rendered a verdict. Each subpart on the English procedures compares the English procedures to modern procedures and critiques the Supreme Court's analysis of the common law devices. Finally, Part III sets forth principles derived from the English common law by which the constitutionality of modern procedures may begin to be reassessed.

I. CURRENT JURISPRUDENCE ON THE CONSTITUTIONALITY OF MODERN PROCEDURAL DEVICES THAT AFFECT THE RIGHT TO A JURY TRIAL

A. Modern Procedural Devices that Affect the Jury Trial Right

In federal court, in a case in which a jury trial right exists, a judge may dismiss the case before a jury trial or otherwise affect the verdict of a jury using procedures at many different junctures of the litigation. Consider how a judge could affect a case under the procedures in federal court. The defendant may move the court under Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint for "failure to state a claim upon which relief can be granted."[34] In other words, the defendant may request the court to dismiss the case because no legal claim rests on the facts that the plaintiff alleged.[35] The plaintiff similarly may move the court for judgment on the pleadings.[36] If the judge does not dismiss the case upon the motion to dismiss or judgment on the pleadings, the case typically proceeds to discovery.

After discovery, the parties each have another opportunity before the trial to request that the court grant judgment for them on part or all of the case. Under Federal Rule of Civil Procedure 56(c), the judge may grant judgment to the moving party if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[37] Here, the judge determines whether any important fact is at issue, and if not, whether under the facts and the law, the moving party is entitled to judgment. Courts have explained the summary judgment standard as requiring that no "reasonable jury" could find for the non-moving party under the facts of the case.[38] If the judge does not grant summary

34. FED. R. CIV. P. 12(b)(6); *see also* 5A WRIGHT, *supra* note 5, § 1356, at 294–99.

35. *See, e.g.*, UniCredito Italiano SPA v. JPMorgan Chase Bank, 288 F. Supp. 2d 485, 497 (S.D.N.Y. 2003).

36. *See* FED. R. CIV. P. 12(c); *see also* 5A WRIGHT, *supra* note 5, § 1367, at 509–17.

37. *See* FED. R. CIV. P. 56(c); *see also* 10A WRIGHT, *supra* note 5, § 2725, at 401–40.

38. *See, e.g.*, Gourlay v. Forest Lake Estates Civic Ass'n of Port Richey, Inc., 276 F. Supp. 2d

judgment, the case proceeds to a jury trial unless the parties have waived their rights to a jury trial.

At the trial, after the plaintiff presents his case, the defendant again has the opportunity to obtain judgment before a verdict. Under Federal Rule of Civil Procedure 50(a), the defendant may move the judge for a directed verdict or for judgment as a matter of law.[39] The court may direct a verdict for the defendant if, under the facts established during the case of the plaintiff, the defendant is entitled to judgment under the law.[40] The directed verdict standard is the same as the standard for summary judgment—no "reasonable jury" could find for the plaintiff under the facts.[41] If the judge does not dismiss the case, the defendant proceeds to introduce evidence. After the parties have presented all of the evidence in the case, either party may move for judgment as a matter of law.[42] The judge may grant judgment to the moving party if, under the facts, the moving party is entitled to judgment as a matter of law.[43] As with summary judgment and the directed verdict, the standard here has been interpreted to mean no "reasonable jury" could find for the non-moving party.[44] The court often reserves this decision until after the jury renders a verdict.[45]

At this time, after all of the evidence has been presented, one or more of the parties may request that the jury render a special verdict. Under the special verdict, the jury decides the answers to questions posed by the judge and upon review of those answers, the judge decides whether the plaintiff or the defendant receives judgment.[46] A court instead could require a jury to answer interrogatories and find a general verdict.[47] If the answers are inconsistent with the verdict, the judge may enter judgment

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1222, 1228 (M.D. Fla. 2003); *see also* 10A WRIGHT, *supra* note 5, § 2725, at 433–37.

39. *See* FED. R. CIV. P. 50(a). While the rulemakers in 1990 changed the terminology from directed verdict to judgment as a matter of law, the former phrase will be used in this Article because judges often still distinguish the procedures using this phrase and the Supreme Court has used the phrase directed verdict in past decisions.

40. *See* FED. R. CIV. P. 50(a).

41. *See, e.g.*, Pannu v. Iolab Corp., 96 F. Supp. 2d 1359, 1361–62 (S.D. Fla. 2000); *see also* 9A WRIGHT, *supra* note 5, § 2524, at 261–66.

42. *See* FED. R. CIV. P. 50(a).

43. *See id*.

44. *See, e.g.*, Isco Int'l, Inc. v. Conductus, Inc., 279 F. Supp. 2d 489, 493–94 (D. Del. 2003) (granting judgment where "substantial evidence" does not support jury's findings); *see also* 9A WRIGHT, *supra* note 5, § 2524, at 261–66.

45. *See* FED. R. CIV. P. 50(b).

46. *See* FED. R. CIV. P. 49(a); *see also* 9A WRIGHT, *supra* note 5, § 2505, at 161.

47. *See* FED. R. CIV. P. 49(b); *see, e.g.*, Austin v. Paramount Parks, Inc., 195 F.3d 715, 723 (4th Cir. 1999); *see also* 9A WRIGHT, *supra* note 5, § 2511, at 217–18.

for the party for whom the jury did not find, return the issue to the jury, or order a new trial.[48] If the judge does not give a special verdict or general verdict with interrogatories to the jury, the jury will render a general verdict for one of the parties.

After the trial, the losing party may renew a motion for judgment as a matter of law.[49] Alternatively, either party may move for a new trial. Under Federal Rule of Civil Procedure 59, the judge may order a new trial for several reasons, including that insufficient evidence exists upon which a jury could find for the winning party.[50] This motion may be granted if the verdict is against the weight of the evidence.[51] The evidence need not be examined in the light most favorable to the non-moving party who won, and the motion may be granted where "substantial evidence" supports the jury verdict.[52] Additionally, if the jury rendered excessive damages, the defendant may request that the judge reduce the damages to the maximum verdict that a reasonable jury could find or in the alternative may request the judge to order a new trial.[53]

As set forth here, a court can affect the rights of the parties to a jury trial both before, during, and after trial using a number of procedures which may prevent a jury trial, limit the fact-finding of a jury, or eliminate the verdict of a jury. The next section describes the jurisprudence of the Supreme Court under which such procedures have been found constitutional under the Seventh Amendment.

B. Supreme Court Case Law Regarding Modern Procedural Devices that Affect the Jury Trial Right

In the twentieth century the Supreme Court assessed the constitutionality of several modern procedural devices under the Seventh

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48. *See* FED. R. CIV. P. 49(b).

49. *See* FED. R. CIV. P. 50(b).

50. *See* FED. R. CIV. P. 59(a).

51. *See, e.g.*, Egebergh v. Village of Mount Prospect, No. 96-C-5863, 2004 WL 856437, at *1 (N.D. Ill. Apr. 20, 2004); *see also* 11 WRIGHT, *supra* note 5, § 2806, at 63–78.

52. *See* Pappas v. New Haven Police Dep't, 278 F. Supp. 2d 296, 301 (D. Conn. 2003); 11 WRIGHT, *supra* note 5, § 2806, at 63–78.

53. *See* 11 WRIGHT, *supra* note 5, § 2807, at 78–86; *see also* Thomas, *supra* note 25, at 738 & n.31. Upon a dismissal of a case for failure to state a claim, upon summary judgment, or for judgment as a matter of law, the appellate court will decide de novo whether the judge was correct to dismiss the case. *See, e.g.*, Chute v. Walker, 281 F.3d 314, 318 (1st Cir. 2002) (discussing Rule 12(b)(6)); Marshall v. Columbia Lea Regional Hosp., 345 F.3d 1157 (10th Cir. 2003) (discussing Rule 56); Brown v. Bryan County, Okla., 219 F.3d 450 (5th Cir. 2000) (discussing Rule 50(b)). Upon the grant of a new trial, the appellate court decides whether it was an abuse of discretion to order a new trial. *See, e.g.*, Synder v. City of Moab, 354 F.3d 1179, 1188 (10th Cir. 2003).

Amendment. By the end of that century, all but one of the procedures had been found constitutional.[54] The Supreme Court has held that the constitutionality of the procedures should be evaluated against the "rules of the common law," which the Court has held means the rules of the English common law in 1791.[55] In its analyses of the procedures, the Court began with a test where a procedure was unconstitutional if it did not exist under the English common law in 1791.[56] The Court then moved to a test under which a device was constitutional if the substance of the jury trial right under the English common law in 1791, as opposed to the specific form of the common law procedure, was preserved.[57] Later decisions have also emphasized fairness and the abilities of judges versus juries.[58]

The Court has found modern procedural devices unconstitutional only in cases in which the Court employed the test that a procedure was unconstitutional if it did not exist under the English common law in 1791. *Slocum v. New York Life Insurance Co*.[59] is arguably the first significant Supreme Court case regarding the constitutionality of procedural devices that affect the jury trial right.[60] In *Slocum*, the Court found unconstitutional the procedure of judgment notwithstanding the verdict, the procedure by which a court orders judgment to the party who loses the jury verdict.[61] The Court stated that under the Seventh Amendment, when a court re-examines a fact tried by a jury, the re-examination must be only "'according to the rules of the common law of England.'"[62] Under the English common law, upon a re-examination of facts tried by a jury, the court could not grant judgment to the verdict loser; it could order only a new trial.[63]

Similar to the analysis in *Slocum*, in *Dimick v. Schiedt*,[64] the Court found unconstitutional a procedure that did not exist under the English common law in 1791. Additur, the option to the defendant to accept, instead of a new trial for inadequate damages, a judge-proposed increase

54. *See infra* text accompanying notes 55–103.
55. U.S. CONST. amend. VII; *see infra* text accompanying notes 56–103.
56. *See infra* text accompanying notes 59–67.
57. *See infra* text accompanying notes 68–103.
58. *See infra* text accompanying notes 89–103.
59. 228 U.S. 364 (1913).
60. *See* 9A WRIGHT, *supra* note 5, § 2522, at 244.
61. *See Slocum*, 228 U.S. at 364.
62. *Id*. at 379 (quoting Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899)); *see also id.* at 399.
63. *See id*. at 399. The dissent argued to the contrary for the constitutionality of judgment notwithstanding the verdict. *See id*. at 400–28 (Hughes, J., dissenting). According to the dissent, the procedure did not violate the Seventh Amendment. There had been no facts for the jury to try and the defendant was entitled to judgment under the established facts and the law. *Id*. at 401.
64. 293 U.S. 474 (1935).

in the jury verdict, did not exist under the English common law in 1791.[65] In dicta, the Court stated that remittitur, the option to the plaintiff to accept, instead of a new trial for excessive damages, a judge-proposed reduction in the jury verdict, was constitutional.[66] Unlike additur, according to the Court, evidence of remittitur existed at common law.[67]

In these early decisions the Court had strictly adhered to the English common law in 1791, finding a procedure was unconstitutional if it did not exist under the common law. In this time period, and thereafter, the Court also employed another analysis regarding whether a procedure was constitutional. This test emphasized the substance of the 1791 English common law procedure over its form.[68] Under the application of this test, many procedures which did not exist under the common law were found constitutional. This included the two procedures previously determined to be unconstitutional under the first test.

In *Gasoline Products Co. v. Champlin Refining Co.*,[69] the Supreme Court considered the constitutionality of a modern procedure that did not exist under the English common law. Under the common law, a court ordered a new trial on all issues, not just some of the issues.[70] In deciding that a partial new trial was constitutional, the Court stated that "we are not now concerned with the form of the ancient rule. It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance."[71] According to the Court, the Seventh

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65. *See id*. at 476–88. In particular circumstances significantly prior to 1791, such as in cases of mayhem, English common law courts increased jury verdicts. *See id*. at 476–82; James Oldham, Determining Damages: The Seventh Amendment, the Writ of Inquiry, and Punitive Damages 27–35 (Jan. 2003) (unpublished manuscript, on file with The Washington University Law Quarterly).

66. *Dimick*, 293 U.S. at 482–87.

67. *See id*. This Article analyzes neither remittitur nor additur under the English common law. Remittitur as practiced in the federal courts did not exist under the English common law. *See* Thomas, *supra* note 25, at 763–82. Additur also did not exist. *See id*. at 733.

The dissent, citing *Gasoline Products v. Champlin Retaining Co.*, 283 U.S. 494 (1931), among other cases, disagreed with the majority that the precise procedures in existence in 1791 should limit the review of a court of the decision of a jury. *See Dimick*, 293 U.S. at 488–97 (Stone, J., dissenting). Instead, in order for a review procedure to be constitutional, it should "preserve the essentials of the jury as it was known to the common law before the adoption." *Id*. at 490. A court through its power under the common law could grant or deny a motion for a new trial for inadequate damages and thus could implicitly "determine, as a matter of law, the upper and lower limits" of the permissible damages. *See id*. at 488. As a result, the alternative for the defendant to pay a larger verdict within these legal limits which the judge determined, without giving the plaintiff the option for a new trial, was constitutional. *See id*. at 495–98.

68. *See, e.g.*, *infra* text accompanying note 71.

69. 283 U.S. 494 (1931).

70. *See id* at 497.

71. *Id*. at 498.

Amendment required issues of fact to be submitted to the jury.[72] Here, such issues had been submitted and determined by a jury.[73] As a result the Seventh Amendment required no more.[74]

In *Baltimore & Carolina Line, Inc. v. Redman*,[75] a case decided a few years after *Gasoline Products*, the Court considered the constitutionality of judgment notwithstanding the verdict, a procedure that did not exist under the English common law and one that the Court had found unconstitutional in *Slocum*. This time the Court found the procedure constitutional.[76] Here, unlike in *Slocum*, the judge had reserved the question of the sufficiency of the evidence.[77] The Court reiterated what it had said for many years; the English common law in 1791 governed the Seventh Amendment analysis.[78] However, similar to the analysis in *Gasoline Products*, the Court emphasized "substance" over "form" and stated the line should be drawn such that legal issues went to the court and factual issues went to the jury.[79] The Court noted that at common law questions of law could be reserved for a later ruling by the court and the result could be judgment for one party when the jury had found for the other party.[80] Here, the sufficiency of the evidence was a question of law.[81] As a result, judgment for the defendant, rather than a new trial, was appropriate where the Court had determined that the evidence was insufficient.[82]

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72. *Id.*

73. *Id* at 498–99.

74. *Id*. Although the Court decided a partial new trial could be constitutional, the Court reversed the decision of the court of appeals which had ordered a partial new trial because "the question of damages on the counterclaim [was] so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id*. at 500.

75. 295 U.S. 654 (1935).

76. *See id.* at 661.

77. *Id*. at 656.

78. *Id*. at 657.

79. *Id.*

80. *Id*. at 659–60.

81. *Id*. at 659.

82. *Id.* at 661. The Court stated:

> The aim of the Amendment . . . [was] to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure, and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law [were] to be resolved by the court and issues of fact [were] to be determined by the jury under appropriate instructions by the court.

Id. at 657.

A few years later, in *Galloway v. United States*,[83] the Court continued the jurisprudence begun in *Gasoline Products* and also set forth in *Redman*. The Court found constitutional another modern procedure that did not exist under the English common law.[84] Under the directed verdict, the judge orders judgment for one party before the jury renders a verdict.[85] In *Galloway*, it had been argued that the directed verdict and other modern procedural devices that did not exist at English common law could not be constitutional because of the "incidental or collateral effects" of the modern procedures such as "allegedly higher standards of proof" and because "different consequences follow[ed] as to further maintenance of the litigation."[86] The Court disagreed and found the directed verdict constitutional. In language similar to that found in *Gasoline Products* and *Redman*, the Court stated that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements."[87] The Court stated that the "essential requirement [to submit a case to a jury] is that mere speculation be not allowed to do duty for probative facts, after

83. 319 U.S. 372 (1943).

84. *Id*.

85. *See id*.

86. *See id*. at 390.

87. *See id*. at 392. A number of years later the Court cited this language in its decision that found another modern procedural device constitutional. Parklane Hosiery Co., Inc., v. Shore, 439 U.S. 322 (1979). In *Parklane Hosiery*, the Supreme Court decided that issue preclusion absent mutuality of the parties, which did not exist under the English common law, was constitutional under the Seventh Amendment. *Id.* at 333–38. Citing the general "most fundamental elements" language in *Galloway*, the Court stated that it had previously deemed constitutional a number of procedures that had not existed under the English common law. *See Parklane Hosiery*, 439 U.S. at 336 (citing Galloway v. United States, 319 U.S. 372, 388–93 (1943); *Gasoline Prods.*, 283 U.S. 494, 497–98 (1935); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319–21 (1902)). While the English common law required the mutuality of parties, under the English common law, like under this procedure, a party did not have the right to have an issue decided by a jury that previously had been decided in an equity court. *See Parklane Hosiery*, 439 U.S. at 333. The Court discounted the relevance of *Dimick* in which the Court found unconstitutional a procedure that did not exist at English common law. *Id.* at 336 n.23. While *Dimick* concerned the second clause of the Amendment, collateral estoppel involved the first clause; there was no further factfinding under collateral estoppel because the factfinding was accomplished in the first case. *See id*. In his dissent, Justice Rehnquist objected to the denial of a jury trial on the issue that had been previously litigated. *See id.* at 337–50 (Rehnquist, J., dissenting). Justice Rehnquist emphasized the importance of the English common law to the interpretation of the Seventh Amendment and stated that because issue preclusion absent mutuality of the parties did not exist under the common law, the Seventh Amendment required a jury trial in this case. *See id*. While the ultimate conclusion of the majority appears reasonable, assuming that under the common law there is support for a party not having a second chance to litigate an issue before a jury after an equity court had decided the issue, the reliance of the majority here, and in the other cases, on the amorphous "fundamental elements" standard for the constitutionality of modern procedures is discussed in this Article.

making due allowance for all reasonably possible inferences favoring the party whose case is attacked."[88]

In *Gasoline Products*, *Redman,* and *Galloway*, the Court had departed from its analyses in *Slocum* and *Dimick*, under which it had stated a procedure was unconstitutional if it did not exist under the common law. Under the new analysis, the Seventh Amendment required only the preservation of the substance of the English common law jury trial in 1791. The Court characterized the substance of the right as the jury serving the role of the fact-finder in a case and the judge serving the role of the determiner of the law. This revised test resulted in the constitutionalization of all modern procedures evaluated by the Court.

In the most recent decisions of the Court, the English common law has become even less relevant to the Seventh Amendment analysis. In *Gasperini v. Center for Humanities, Inc.*,[89] the Supreme Court found constitutional the appellate review of a denial of a motion for a new trial for excessiveness, another device that did not exist under the English common law.[90] Like judgment notwithstanding the verdict, the Court had previously deemed the procedure unconstitutional under the original test that a procedure was unconstitutional if the procedure did not exist under the English common law.[91] In *Gasperini*, for the first time the Court did not compare the modern procedure to the English common law. The Court

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88. 319 U.S. at 395. The Court specifically stated that a formula that requires "'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa" was not helpful to the determination of whether a device was constitutional. *Id*. In *Improvement Co. v. Munson*, 81 U.S. 442 (1871), the Court discussed how formerly only "a *scintilla* of evidence" was required to leave a matter to the jury and that interpretation had been rejected in favor of "a more reasonable rule" which required not only some evidence but "any upon which a jury [could] properly proceed to find a verdict." *Improvement Co.*, 81 U.S. at 448. In *Galloway*, the Court stated:

> The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791 . . . . [n]or were 'the rules of the common law' then prevalent, . . . crystallized in a fixed and immutable system. . . . [T]hey were constantly changing and developing during the late eighteenth and early nineteenth centuries.

Galloway, 319 U.S. at 390–91; *see also* BRUNET, *supra* note 8, at 15 ("collateral effects doctrine makes eminent constitutional sense"). The dissent quoted the Seventh Amendment and stated:

> The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty. For this reason, among others, they adopted Article III, §2 of the Constitution, and the Sixth and Seventh Amendments. Today's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.

Galloway, 319 U.S. at 397 (Black, J., dissenting).

89. 518 U.S. 415 (1996).

90. *See id*.

91. *See id*. at 434–36.

justified its decision that the procedure was constitutional on the basis that at some point a jury verdict was so excessive so as to become a question of law that was reviewable "as a control necessary and proper to the fair administration of justice."[92] In his dissent, Justice Scalia stated that because such appellate review of a denial of a new trial motion for excessive damages did not exist at English common law in 1791, the procedure must be unconstitutional under the Seventh Amendment.[93]

The same year that the Court decided *Gasperini* the Court decided another case that involved the constitutionality of a procedure that affected the jury trial right under the Seventh Amendment. In this latest case, *Markman v. Westview Instruments*,[94] the Court considered whether in a patent infringement case the Seventh Amendment requires the jury to decide the scope of the rights of a patent holder, also referred to as the claim.[95] In the past, the Court had "repeatedly" stated that whether the issue was one for the jury depended on whether a jury determination of the issue was required to preserve the "'substance of the [English] common-law right of trial by jury.'"[96] A unanimous Court recognized that the phrase "'substance of the common-law right' [was], however, a pretty blunt instrument for drawing distinctions."[97] The Court had "tried to sharpen it, to be sure, by reference to the distinction between substance and procedure."[98] Moreover, the Court spoke of "the line as one between issues of fact and law."[99] However, the Court stated that "[w]here 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, seeking the best analogy we can draw between an old and the new."[100] Finding an absence of common law precedent that the jury decided this issue, the Court examined the question of whether it would be preferable for the

92. *Id*. at 435.

93. *Id*. at 448–61 (Scalia, J., dissenting). While Justice Scalia acknowledged that an appellate court could review issues of law, he argued that a damages determination by a jury did not involve such a legal issue. *See id*. at 453–54.

94. 517 U.S. 370 (1996).

95. *See id*. at 372.

96. *Id*. at 377 (quoting Tull v. United States, 481 U.S. 412, 426 (1987), which quotes Colgrove v. Battin, 413 U.S. 149, 156 (1973)). In dicta, Justice Souter had raised—but did not resolve—an issue that had not been addressed previously. He stated "the historical test do[es] not deal with the possibility of conflict between actual English common law practice and American assumptions about what the practice was, or between English and American practices at the relevant time. No such complications arise in this case." *Id.* at 376 n.3.

97. *Id*. at 378.

98. *Id*.

99. *Id*.

100. *Id*. (citations omitted).

judge or the jury to interpret the claim.[101] Citing existing Supreme Court precedent from the mid-nineteenth century, the Court stated that the judge should interpret the claim.[102] The Court further stated that even if history and precedent did not answer the question, judges were better able than juries to interpret documents and thus to interpret the claim.[103]

In all of its decisions, the Court has recognized the English common law as somehow influential to the analysis of the constitutionality of procedures that affect the jury trial right. The specific role of the common law has not remained constant, however. In the first cases a procedure was unconstitutional if it did not exist under the English common law in 1791. Under this test, some new procedures were found unconstitutional. In other decisions, the Seventh Amendment was interpreted to require that the substance of the jury trial right under the 1791 English common law, not its form, be preserved. The substance of the right was loosely defined only in terms of facts decided by juries and the law by judges. All procedures considered under this test have been deemed constitutional including two procedures previously deemed unconstitutional under the original test. Most recently, the Court has decided that certain issues which were previously factual and for juries under the common law are now legal questions for judges. Additionally, in its analysis finding a procedure constitutional, the Court has sometimes examined whether judges perform certain functions better than juries.

Some scholars have advanced an approach similar to that adopted by the Supreme Court. In her well known article, Edith Henderson argued

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101. *See id*. at 384.

102. *See id*. at 384–85.

103. *Id*. at 388. A recognized authority on the English common law has disagreed with the Supreme Court's assessment in *Markman* of the role of the jury at common law and the decision that it was appropriate to take this matter away from the jury. *See* James Oldham, *The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered*, *in* HUMAN RIGHTS AND LEGAL HISTORY: ESSAYS IN HONOUR OF BRIAN SIMPSON 235–36 (Katherine O'Donovan & Gary R. Rubin eds., 2000) [hereinafter Oldham, *Seventh Amendment Right*]. Professor Oldham stated that the jury would be given the patent interpretation question possibly with non-binding instructions from the judge that the jury should decide for one party. *Id*. at 236. This Article does not further explore this question. Oldham stated that there was different reasoning under which it might be argued that the question was one for the judge. *See infra* note 164.

For other decisions finding procedural devices constitutional: see Weisgram v. Marley Co., 528 U.S. 440 (2000) (finding constitutional the appellate decision to give judgment to the verdict loser when trial court denied judgment notwithstanding the verdict based on the alleged improper admission of evidence); Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967) (finding constitutional the appellate decision to give judgment to the verdict loser when the trial court denied judgment notwithstanding the verdict based on the alleged insufficiency of the evidence); *cf*. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (finding that punitive damages are not facts tried by a jury, without considering the English common law).

that the test for the constitutionality of a procedure involved "preserving the substance of the common law trial by jury and particularly the jury's power to decide serious questions of fact, while allowing rational modifications of procedures in the interests of efficiency."[104]

In an earlier influential article, Austin Wakeman Scott had also adopted a standard unrelated to any particular practices of the English common law. He stated:

> The question of the constitutionality of any particular modification of the law as to trial by jury resolves itself into a question of what requirements are fundamental and what are unessential . . . . [I]t . . . should be approached in a spirit of open-mindedness . . . . [I]t is a question of substance, not of form.[105]

Similar to the Court and Henderson, Scott concluded that the issue of whether there was a right to a jury trial rested on whether there was a disputable fact to be tried by a jury.[106]

Assuming the validity of the English common law historical test,[107] Part II explores this constitutionality standard unconnected to principles derived from the English common law which the Supreme Court and scholars have adopted. While this anti-formalistic approach to the constitutionality analysis appears reasonable, whether the substance of the common law right has been adequately examined has remained unclear. The current Seventh Amendment standard curiously, it seems, has led to the constitutionalization of virtually every modern procedural device that affects the jury trial right.

The question is whether this current approach adequately accounts for principles embodied in the English common law—the common law which the Supreme Court has stated constitutes the "rules of the common law"

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104. *See* Henderson, *supra* note 30, at 336; *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339 n.2 (1979) (Rehnquist, J., dissenting) (citing Henderson).

105. *See* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918).

106. *Id*. at 690–91. Scott stated:

> The old methods of enforcing the division [of the functions of the court and the jury] which were in use before our constitutions were adopted are clearly not unconstitutional. Nor does it violate our constitutions to supplement or supersede those methods by other methods more readily calculated to effect the division of functions without undue formality or delay. The constitutional guaranty does not stand in the way of the accomplishment of the result, much to be desired, that there shall be no trial by jury when there is no disputable question of fact to be tried, and no new trial when there is no disputable question of fact left undetermined.

Id.

107. *See infra* text accompanying note 108.

under the Seventh Amendment. Can additional principles beyond a distinction between fact and law be derived from the English common law?[108] Part II examines the English common law and the Supreme Court jurisprudence that discusses specific English common law devices. As shown below, the English common law devices could have been described more completely and comparisons to modern procedures could be said to be oversimplified. Moreover, the procedures have been labeled as inconsistent, although this is not a necessary conclusion. Part II begins to develop principles from the common law beyond the law/fact distinction. Part III further describes the principles and suggests a path that the Supreme Court could take in the future analyses of the constitutionality of procedures that affect the jury trial right.

II. THE RULES OF THE COMMON LAW AND MODERN PROCEDURE

In the period surrounding the adoption of the Seventh Amendment in 1791, many English common law procedures affected the jury trial right. Authoritative treatises, Supreme Court commentary, and scholarship recognize the procedures of demurrer to the pleadings, demurrer to the evidence, and the nonsuit as the primary methods by which a case that a jury would ordinarily hear was removed from the consideration of a jury. Additionally, under the common law procedure of the direction of a verdict, a judge would attempt to influence the verdict of the jury. Finally, in a case decided by a jury, the special case, the special verdict, arrest of judgment, and the new trial were methods under the common law by

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108. This Article assumes that the English common law in 1791 provides the appropriate "rules of the common law." Because the Supreme Court has for many years interpreted the rules of the common law as those of the English common law in 1791, this Article seeks only to evaluate whether more specific principles than simply a distinction between law and fact may be derived from the English common law. *But see* Thomas, *supra* note 25, at 761–62 & n.143 (discussing other interpretations of common law).

While this Article does not seek to analyze the propriety of the Court's specific use of the English common law, the language of the Seventh Amendment with its reference to "rules" and "common law" does appear to dictate some structured approach to the constitutionality analysis under the Amendment. *See* U.S. CONST. amend. VII. Additionally, the Seventh Amendment itself limits the power of the judiciary by the grant of certain cases to only juries and the re-examination by the judiciary of facts tried by juries only according to certain rules. As a result, the judiciary should arguably act with restraint with respect to the exercise of its power over the jury's power. *See* Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. (forthcoming 2005).

The Supreme Court has relied on the English common law in the interpretation of other parts of the Constitution that do not explicitly refer to "the common law," including the Sixth Amendment. *See, e.g.*, Crawford v. Washington, 124 S. Ct. 1354, 1359–67 (2004) (relying on the English common law in 1791, in deciding the requirements of the Confrontation Clause).

which the court could analyze the case for errors or could decide a legal issue.[109]

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109. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 377–78, 387–95 (Oxford, 2d ed. Clarendon Press 1768); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 307–09, 314, 319–22 (London, printed by W. Strahan and M. Woodfall, for C. Bathurst, 1772); 2 WILLIAM TIDD, THE PRACTICE OF THE COURT OF KING'S BENCH, IN PERSONAL ACTIONS 595–620 (London, Butterworth 1794).

Blackstone is recognized as having a significant influence upon the law in colonial America. It has been stated, "'There is no doubt that for many early American lawyers, Blackstone was the common law, because, for one thing, they often had no other book.'" Hogan, *supra* note 1, at 234 (quoting RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 287 (1936)); *see* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976). The influence of Blackstone was widespread across England, in the courts, Parliament and otherwise. *See* JAMES OLDHAM, 1 THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 60 (1992) [hereinafter OLDHAM, THE MANSFIELD MANUSCRIPTS] (The English Judge Mansfield "admired the *Commentaries*." He contributed to and edited them.).

In its analysis of the constitutionality of modern procedural devices, the Supreme Court has discussed the English common law procedures of the demurrer to the evidence, the nonsuit, the direction of a verdict, the special verdict, the special case, arrest of judgment (and judgment *non obstante verdicto*), and the new trial. *See infra* notes 168–99, 232–49, 269–73, 282–86, 294–300, 329–37, 374–82 and accompanying text.

See also Henderson, *supra* note 30, at 300–17 (discussing demurrer to the pleadings, nonsuit, "directed verdict," demurrer to the evidence, the case reserved (special case), the special verdict, the new trial, and judgment *non obstante verdicto* (arrest of judgment)); Scott, *supra* note 105, at 678–90 discussing demurrer to the pleadings, special pleading, demurrer to evidence, instructions to the jury, the special verdict, the special case (and reserved point), direction of verdict, compulsory nonsuit, attaint and the motion for a new trial; Oldham, *Seventh Amendment Right*, *supra* note 103, at 230–35 (discussing demurrer, non-suit, special verdict, case stated, new trial, and arrest of judgment). Additionally, the *Complete Juryman* published in 1752 discusses new trials and the arrest of judgment as the only methods by which the verdict of a jury does not survive. *See* ANON., THE COMPLETE JURYMAN: OR, A COMPENDIUM OF THE LAWS RELATING TO JURORS 262–77 (1752).

This Article does not attempt to examine every detail of common law pretrial and trial procedure. For example, in the eighteenth century, there was no discovery except as to which the parties consented. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 231 n.32. A jury could render a verdict for the plaintiff without hearing evidence from the defendant. *See* OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* at 139. Jurors could be witnesses. *See* 3 BLACKSTONE, *supra* at 375. The losing party in a case was required to pay some amount. *See id*. at 376. A conditional verdict occurred where after a verdict some type of valuation of the damages would occur. *See* OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* at 151. There were also differences between judges at the time and now. Judges received payment based on the number of cases that they heard. *Id*. at 119. Judges also served in a legislative capacity. *See id*. at 65.

Additionally, judges instructed juries as to the law and had more extensive contact with jurors. *See* Renée Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 204–11 (2000–2001) [hereinafter Lerner, *Transformation of Civil Trial*]; c*f.* Renée B. Lettow, *New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America*, 71 NOTRE DAME L. REV. 505, 514 (1996) [hereinafter Lettow, *New Trial*] (English "[j]udges had and regularly used power to examine witnesses, sum up evidence, instruct in the law, recommend (and sometimes even direct) verdicts, postpone verdicts, informally question jurors before and after verdicts as to their reasoning, and send the jury back to redeliberate."). This aspect of the effect on the jury is not examined here except in the description of the direction of a verdict. *See infra* text accompanying notes 250–66 & n.266. Wigmore argued that the elimination of advice by the judge to the jury made the jury trial less efficient and impeded justice. *See* Lerner, *Transformation of Civil*

This Part describes each English common law procedure and compares each such procedure to modern procedures. Additionally, the Supreme Court jurisprudence that discusses the common law and modern procedure is set forth. This discussion demonstrates that significant differences exist between the modern and common law procedure and that the common law procedures could have been described more completely. Moreover, differences between the common law and modern procedures have not been recognized or have been downplayed; the most significant differences have involved the movement of decision-making from juries, under the common law, to judges under modern procedure. Examination of the English common law reveals consistent principles within the common law which thus far have been undiscovered. This Article argues that these principles are fundamental to the common law right and should be applied in the future assessment of the constitutionality of modern procedures.

A. Procedure Before Trial

1. Demurrer to the Pleadings

Under the English common law, a case could be dismissed before trial upon a demurrer to the pleadings.[110] Under this procedure, the plaintiff or the defendant admitted the truth of the plea or the declaration, respectively, and argued that he was entitled to judgment under the law.[111]

Trial, *supra*, at 199 (citing 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2551, at 557 (2d ed. 1923)). It might be argued that modern procedure that arguably permits judges to exercise more control over jury verdicts may counter the lessening of direct judicial influence on jury decision-making that had occurred under the common law. While as explained here this Article does not examine these differences in the common law and modern procedure regarding direct judicial influence, such influence on the jury under the common law could be perceived as very different than eliminating jury decision-making under modern procedure. *See infra* text accompanying notes 116–21, 162–99, 230–49, 267–73, 281–86, 293–300, 325–37, 368–82 (explaining differences between common law and modern procedure); *see also infra* note 266.

110. 3 BLACKSTONE, *supra* note 109, at 314–15.

111. *See id*. "[I]n the late eighteenth century, the demurrer was virtually the only pre-trial method in the common law courts to take a case forward for decision without calling a jury. In other words, almost all cases in the common law courts were tried before juries. . . . [There was no] procedure (other than the demurrer) that would allow a judge to determine before trial that a case presented no issue to be decided by a jury, or that an issue in a case should be withheld from the jury." *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 231. In an original study of the plea rolls, Professor James Oldham found that demurrer was "quite rare." *See id.* at 230–31 (one case on demurrer and 181 cases sent to jury in Trinity Term 1770 and four cases on demurrer and 197 sent to the jury in Trinity Term 1774). Juries tried most cases. *Id*. Oldham is unsure as to whether the rolls refer to demurrer to the pleadings or demurrer to the evidence. *See id*.

If the demurring party was correct, he received judgment. If he was not, the court entered judgment for the other party. As an example, Blackstone cited a case in which the plaintiff declared that the defendant had trespassed upon his property.[112] The defendant pled that he had so trespassed but justified the trespass on the basis that he was hunting.[113] The plaintiff demurred to the plea, admitting the facts stated by the defendant, but stated that he, the plaintiff, was entitled to judgment under the law because hunting was not a defense to trespass.[114] If the en banc court decided that hunting was not a defense, the court gave judgment to the plaintiff; if the court decided that hunting was a defense, the court gave judgment to the defendant.[115]

2. A Comparison of Modern Procedures to the Common Law Procedure of Demurrer to the Pleadings

Under modern practice, the motion for judgment on the pleadings and summary judgment are two procedures whereby a case may be dismissed before trial. The procedure most similar to the common law demurrer to the pleadings is the motion for judgment on the pleadings. Under the motion for judgment on the pleadings, like the demurrer to the pleadings, the truth of the non-moving party's pleadings is admitted.[116] However, unlike the demurrer, under the motion for judgment on the pleadings, the moving party does not give up his right to have his case heard by a jury if the motion is denied.[117]

The modern procedure of summary judgment does not share any significant characteristics with the common law procedure of the demurrer to the pleadings. Under summary judgment, the judge considers the

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112. *See* 3 BLACKSTONE, *supra* note 109, at 323–24.

113. *Id* at 324.

114. *Id*.

115. *Id*; *see also id.* at 315, 317, 323; Duherley v. Page, 100 Eng. Rep. 211, 211 n.(a), 213 (1788) (awarding costs to the plaintiff after the court granted judgment upon the demurrer to the plaintiff). The en banc court was the full court at Westminster. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 82–85, 138–39 (4th ed. 2002). Under the common law, either the plaintiff or the defendant could also assert that there was only an issue of fact in the case. 3 BLACKSTONE, *supra* note 109, at 315. That is, either party could admit the law was not disputed. *Id*. Upon joinder by the other party, the case would be decided upon this fact and a jury generally, not the court, would decide the fact. *Id*.

116. *See supra* text accompanying notes 34–36.

117. *See supra* text accompanying notes 110–15. Additionally, under the modern procedure, a single judge decides whether to dismiss the complaint, whereas under the common law, the en banc court would decide whether to grant the demurrer. *See supra* text accompanying notes 34–36; *supra* text accompanying notes 110–15.

evidence of both the plaintiff and the defendant to determine whether a reasonable jury could find for the non-moving party.[118] If the judge thinks a reasonable jury could not find for that party, the judge grants judgment for the moving party.[119] Under the common law, there was no procedure before trial under which a case could be dismissed by the court unless the facts alleged were admitted.[120] In other words, cases could not be dismissed before trial on the ground that the evidence was insufficient. Also, unlike summary judgment, under the common law the facts alleged by the demurring party could not be considered by the court, and the non-demurring party won if the demurring party was not entitled to judgment under the admitted facts.[121]

Because the English common law of 1791 governs the constitutionality analysis of modern procedures that affect the jury trial right, consistent principles derived from this common law should constitute the fundamental elements by which the Supreme Court should assess the constitutionality of these procedures. Under the common law, a party moving for judgment must have admitted the facts alleged by the non-moving party and could not have proffered any facts itself. The

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118. *See supra* text accompanying notes 37–38.

119. *See supra* text accompanying notes 37–38.

120. Summary judgment was established in England only in the mid-nineteenth century. *See, e.g.*, Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1928–1929); SWARD, *supra* note 10, at 275.

121. Moreover, under the common law, only the en banc court, not a single judge, could dismiss a case prior to trial.

In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Supreme Court cited *Fidelity & Deposit Co. v. United States*, 187 U.S. 315 (1902), in support of the proposition that summary judgment was constitutional under the Seventh Amendment. *Parklane,* 439 U.S. at 336 (citing *Fidelity*, 187 U.S. at 319–21); *see also* BRUNET, *supra* note 8, at 17 (arguing that the Supreme Court found summary judgment constitutional in *Fidelity*). In *Fidelity*, the Supreme Court did not compare any English common law procedure to the procedure in question—a court rule regarding contract actions. Under the rule, the court granted judgment to the plaintiff if the plaintiff filed an affidavit with the reason for the action and the amount that was due, and the defendant did not, by affidavit, deny the claim of the plaintiff or did not specifically state a defense that if true, the defendant would prevail. *Fidelity,* 187 U.S. at 318–19. The Supreme Court decided that the rule generally did not deprive the defendant of the right to a jury trial because a jury trial would ensue in cases in which the defendant raised an issue to be tried by the jury. *Id*. at 319–20. The Court decided that there was no such issue. The plaintiff Smoot had contracted with Vinson whose contracts the defendant Fidelity & Deposit Co. guaranteed. *Id*. at 316. Vinson allegedly did not pay and the plaintiff sued the defendant to recover the alleged amount owed. *Id*. at 316–17. Pursuant to the rule, Smoot filed an affidavit that alleged the existence of the contracts and the amounts due to Smoot. *Id*. In an affidavit in response, the defendant admitted that the contracts had been executed but asserted that it lacked sufficient knowledge of the debt claimed by Smoot. *Id*. at 317. Because the defendant had not raised any defense to the suit, the Court decided that there was no issue to be tried by the jury and that the plaintiff was entitled to judgment. *Id*. at 317–22. The court rule in *Fidelity* appears to be similar to the modern motion to dismiss, not the procedure of summary judgment, and consequently has similarities as noted above to the common law demurrer to the pleadings.

determination here was purely a legal question, not a question of the sufficiency of the evidence. The result was the moving party lost if the facts admitted presented a legal claim.

B. Procedures During Trial

1. Demurrer to the Evidence

Under the procedure of demurrer to the evidence, the party admitted the truth of the opposing party's evidence.[122] If no cause of action or defense existed under the law under the facts admitted by the demurrant, the en banc court would grant judgment for the demurrant.[123] If, on the other hand, a cause of action or defense existed under the admitted facts, because the demurrant admitted these facts and had not presented evidence, the court granted judgment to the non-demurring party.[124] Where the evidence was circumstantial, the party could demur successfully only if that party admitted all facts offered to be proved by the opposing party even when "offered to be proved only by presumptions and probabilities."[125] If the demurring party did not admit the facts but the opposing party agreed to the demurrer, the court would send the matter for a new jury trial because only the jury could determine the facts.[126] As stated below, the demurrer to the evidence was rare.[127]

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122. BULLER, *supra* note 109, at 307. The dissent in *Galloway v. United States* stated that "[t]he principal method by which judges prevented cases from going to the jury in the Seventeenth and Eighteenth Centuries was by the demurrer to the evidence." *Galloway*, 319 U.S. 372, 399 (1943) (Black, J., dissenting).

123. *See* BULLER, *supra* note 109, at 307.

124. *See, e.g.*, BULLER, *supra* note 109, at 307–08; Scott, *supra* note 105, at 683 (stating under demurrer to evidence, judgment for non demurring party when jury could have found but not necessarily would have found for non-demurring party); William Wirt Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 561–62 (1950) (describing demurrer to evidence).

125. In 1772, in his treatise, Justice Buller explained the demurrer to the evidence:

> He that demurs to Evidence admits it to be true, and if the Matter of Fact be uncertainly alledged [sic], or it be doubtful whether it be true or not, because offered to be proved only by Presumptions and Probabilities, and the other Party will demur thereupon, so that the Truth of the Fact as well as the Validity of Evidence be referred to the Court, he that alledges [sic] this Matter cannot join in Demurrer, but ought to pray Judgment of the Court that his Adversary may not be admitted to his Demurrer, unless he will confess the Matter of Fact to be true; and if he do not so do, but join in Demurrer, he has likewise misbehaved, and the Court cannot proceed to Judgment, but a *Venire de Novo* shall go.

BULLER, *supra* note 109, at 307.

126. In 1768, Blackstone described the demurrer to the evidence as occurring:

> [W]here a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may if he pleases demur

The leading English case on demurrer to the evidence is the post-Seventh Amendment case of *Gibson v. Hunter*,[128] which, as discussed below, was consistent with the pre-Seventh Amendment jurisprudence on demurrer.[129] In this case, the House of Lords, the supreme judicial body of England, set forth the high standard for the grant of a demurrer to the evidence. The plaintiff had alleged that the defendants defrauded him of money on a bill of exchange signed by an allegedly non-existent party.[130] Because the plaintiff's action alleged matters involving the context of the bill of exchange, specifically that the signature on the bill belonged to no real person and that the defendants had committed this fraud, the plaintiff introduced not only the bill itself, the writing, into evidence, but also testimony of two clerks involved in the bill's creation.[131]

The defendants demurred to the plaintiff's evidence,[132] and the King's Bench granted judgment for the plaintiff.[133] On appeal, the issue was how to construe the evidence produced by the plaintiff.[134] The Lords emphasized that the procedure of demurrer to the evidence was not common. "The questions referred to by your Lordships to the Judges, arise upon a proceeding, which is called a demurrer to evidence, and which *though not familiar in practice*, is a proceeding well known to the law."[135]

The Lords explained that the standard governing the *uncommon* demurrer to the evidence had been confused:

> My Lords, in the nature of the thing, the question of law to arise out of the fact cannot arise till the fact is ascertained. It is the province

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> to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue: which draws the question of law from the cognizance of the jury, to be decided (as it ought) by the court.

3 BLACKSTONE, *supra* note 109, at 372–73.

127. *See infra* text accompanying note 135.

128. 126 Eng. Rep. 499 (1793).

129. *Id.*

130. *Id* at 499.

131. *Id*. at 499–506.

132. *Id*. at 506.

133. Although the demurrer was to be argued before the King's Bench, "it being the understanding of both parties that a writ of error was to be brought, the Court gave judgment for the Defendant in error, without argument." *Id.* at 506.

134. *Id*.

135. *Id.* at 508. (emphasis added). In his treatise published in 1768, Blackstone stated:

> [D]emurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*.

3 BLACKSTONE, *supra* note 109, at 372.

> of a jury to ascertain the fact, under the direction and assistance of the judge; the process is simple and distinct, though in our books there is a good deal of confusion with respect to a demurrer upon evidence.[136]

The issue in the case was what were the facts to which the court applied the law upon the demurrer to the evidence. The Lords established the difference between the presentation of written evidence and "circumstantial" evidence upon a demurrer. A party offering written evidence must join a demurrer because "'there cannot be any variance of matter in writing.'"[137] A party also was required to join in a demurrer upon his presentation of circumstantial evidence if, analogous to a writing, the facts were not disputed or in other words the circumstantial evidence was admitted:

> *[I]f the matter of fact be uncertainly* alleged, or that it be doubtful whether it be true or no, because offered to be *proved by presumptions or probabilities*, and the other party demurs thereupon, he that alleges this matter, cannot join in demurrer with him, but ought to pray the judgment of the court, that he may not be admitted to his demurrer, unless he will confess the matter of fact to be true.[138]

Thus, for example, if the defendant admits as true the testimony of witnesses offered by the plaintiff, the plaintiff must join in the demurrer of the defendant.[139]

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136. *Gibson*, 126 Eng. Rep. at 508. If a party demurred to the evidence, the facts must "be first ascertained," so that the judge could apply the law to the facts. *Id.* at 509. The standard for demurrer had been confused with the standard for the bill of exceptions. *Id*. at 508; *see also* 3 BLACKSTONE, *supra* note 109, at 372 (stating that unlike the demurrer to the evidence, a bill of exceptions is decided by the appellate court, not in the court out of which the case arose). A bill of exceptions would be pled to preserve for appeal a judge's legal decision at trial, on for example the admissibility of evidence. *See Gibson*, 126 Eng. Rep. at 508. The bill of exceptions did not, however, remove the ultimate issue from the jury: "The admissibility of the evidence being established [by the Judge], the question *how far* it conduces to the proof of the fact which is to be ascertained, is not for the Judge to decide, but for the Jury exclusively." *Id*. (emphasis added).

137. *Gibson*, 126 Eng. Rep. at 509 (quoting *Baker's Case*, Cro. Eliz. pt. 2 753); s*ee also* 3 BLACKSTONE, *supra* note 109, at 368 (written evidence includes "1. Records, and 2. Ancient deeds of thirty years standing, which prove themselves; but 3. Modern deeds, and 4. Other writings, must be attested and verified by *parol* evidence of witnesses").

138. *Gibson*, 126 Eng. Rep. at 510 (quoting Wright v. Pyndar, 82 Eng. Rep. 499 (1647) (emphasis added)).

139. *See id*. at 509; *see also* 2 TIDD, *supra* note 109, at 584 ("[W]here a demurrer to evidence is admitted, it is usual for the court or judge, to give orders to the associate, to take a note of the testimony; which is signed by the counsel on both sides").

In *Gibson*, the Lords found that the demurrer failed.[140] The allegation by the plaintiff of fraud involved predominately circumstantial evidence.[141] On demurrer, the defendant was required to admit the factual conclusions of the plaintiff.[142] Therefore, for the defendant to demur and request that the court find in its favor would be for the defendant to admit the fraud. The defendant had not done so. Because "there [was] no manner of certainty in the state of facts upon which any judgment [could] be founded," no judgment could be given.[143] Instead a new trial was awarded.[144]

Lord Chief Justice Eyre, writing for the Lords, concluded "after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House."[145] It was improper to discharge the jury without a verdict when the defendant did not admit "'every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove.'"[146] As this opinion makes clear, it would be extremely rare for a court to grant a demurrer to the evidence because a court could not grant judgment to the defendant unless the defendant admitted every possible fact and conclusion that the evidence of the plaintiff was offered to prove.

Cocksedge v. Fanshaw,[147] decided before *Gibson*, in the immediate time period before the adoption of the Seventh Amendment, further demonstrates under what circumstances demurrer to the evidence was appropriate under the English common law in 1791. The issue was whether freemen of London were exempted from paying a duty on corn, whether the corn had been consigned to them as factors,[148] or was their own corn.[149] The plaintiff corn merchant argued that he had a right to have the duty returned regardless of whether it was owned or consigned to him, and the defendant toll collector argued that the merchant was exempt from the duty only if he owned the corn.[150] Two issues were presented: what was the usage and custom regarding the toll, and was this usage and

140. *Gibson*, 126 Eng. Rep. at 510.
141. *See id*.
142. *See id*.
143. *Id*.
144. *Id*.
145. *Id*.
146. *Id*.
147. 99 Eng. Rep. 80 (1779).
148. A person who sells goods on commission.
149. *See Cocksedge*, 99 Eng. Rep. at 85.
150. *Id*. at 81; *see also* OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 109, at 691–95.

custom the result of fraud.[151] After two previous jury verdicts against the defendant, upon the third action, the defendant demurred to the evidence, arguing against the existence of immemorial custom and usage and that any such custom and usage was the result of fraud.[152]

Justice Mansfield's opinion is significant and consistent with the subsequent House of Lord's decision in *Gibson*. He emphasized that if it were at all possible, not probable, that the custom and usage had legal, non-fraudulent origins, then the court must find in the plaintiff's favor on the demurrer to the evidence:

> If, by no possibility, such a privilege could have a legal commencement, then, to be sure, the fact of its existence does not decide the question; because in point of law, that does not establish the right; but the rule of law is, that wherever there is an immemorial usage, the Court must presume every thing possible, which could give it a legal origin. *Whether probable or not, is for a jury to decide*.[153]

Justice Buller noted that the legal standard for the demurrer to the evidence and the special verdict was the same:

> Now, if this cause had been put into the shape of a special verdict, what must have been stated on the record? The jury could not find all the evidence set forth in the demurrer, but must have pronounced upon the fact, whether or not such an immemorial custom had existed, and then it would have been for the Court to decide, whether such a custom was good in law.[154]

Justice Buller also had stated:

> It is the province of a jury, alone, to judge of the truth of facts, and the credibility of witnesses; and the party cannot, by a demurrer to evidence, or any other means, take that province from them, and draw such questions ad aliud examen. I think the plain and certain rule is this: the demurrer admits the truth of all facts, which, upon

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151. *See Cocksedge*, 99 Eng. Rep. 80; OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 109, at 691–95.

152. *Cocksedge*, 99 Eng. Rep. at 86; *see also* OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 109, at 691–95.

153. *Cocksedge*, 99 Eng. Rep. at 88 (emphasis added).

154. *Id*. at 89.

> the evidence stated, might be found by the jury in favour of the party offering the evidence.[155]

The Court gave judgment to the plaintiff, denying the demurrer, because the usage and custom could have a legal origin.[156] For example, the city could have created it to facilitate the corn trade.[157]

English courts had infrequently granted demurrers because the standard was difficult to meet, and after the Lords in *Gibson* further clarified the standard, courts granted demurrers even less frequently.[158] As Thayer stated:

> And so, when once the demurring party was driven from his vague expectations of getting something out of a court, in the considering of his evidence, which he might not get from a jury; when once it was forced clearly upon his attention, that, not only did a demurrer upon evidence commit him irrevocably to all those inferences from the evidence which were most unfavorable to him, but that he must set these conclusions all down in writing beforehand, then this ancient instrument of justice fell wholly into disuse in England.[159]

The demurrer was intended only as a procedure by which a party could avoid the risk of a decision from a jury that did not apply the law. For example:

> If a judge allow the matter to be evidence, but not conclusive, and so refer it to the jury, no bill of exceptions will lie; as if a man produce the probate of a will, to prove the devise of a term for years, and the judge leave it to the jury; because though the evidence be conclusive, yet the jury may hazard an *attaint*, if they

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155. *Id*. at 88–89.

156. *See Cocksedge*, 99 Eng. Rep. at 88–89; OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 109, at 694.

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

158. *See* 2 WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH, AND COMMON PLEAS, IN PERSONAL ACTIONS, AND EJECTMENT: TO WHICH ARE ADDED, THE LAW AND PRACTICE OF EXTENTS; AND THE RULES OF THE COURT, AND MODERN DECISIONS, IN THE EXCHEQUER OF PLEAS 866 (R.H. Small ed., 3d. Am. ed. 1840) (discussing *Gibson v. Hunter*); Lettow, *New Trial*, *supra* note 109, at 521 n.102; William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 905–13 (1978); Henderson, *supra* note 30, at 305. James Bradley Thayer stated that "[n]ear the end of the last century demurrers upon evidence got their death blow in England, by the decision in the case of *Gibson v. Hunter*, carrying down with it also the great case of *Lickbarrow v. Mason*." JAMES BRADLEY THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 235 (1898). Thayer stated that demurrer was not necessary where new trials could be ordered. *Id*. at 238.

159. THAYER, *supra* note 158, at 236–37.

> please, and the proper way had been, to have demurred to the evidence.[160]

Under the demurrer to the evidence the court accepted as true any possible fact or conclusion to be drawn by the jury of the evidence of the non-moving party. In other words, a court could not grant judgment for the defendant even if the court believed the facts or conclusions of the plaintiff were not "probable" or "reasonable" under the evidence presented by the plaintiff. The only justification at common law for the removal of issues of fact from a determination by the jury was that there was *no* issue of fact for the jury to determine. Moreover, this was not merely because the court reasoned that it was so, but because both parties either agreed or were required to agree (with evidence of record or writing) as to the facts.

2. A Comparison of Modern Procedures to the Common Law Procedure of Demurrer to the Evidence

The 1791 English common law procedure and the modern procedure during a trial are significantly different. While both the common law procedure of demurrer to the evidence and the modern directed verdict occur during the trial, the demurrer to the evidence is not similar to the directed verdict. The procedure of the directed verdict is the method in federal court today by which a case may be removed from a jury during the trial. Under the directed verdict, the defendant may request that the trial judge dismiss the case after the plaintiff has presented his case, or either party may request judgment at the close of all of the evidence before the jury decides the case.[161] Similar to the standard for summary judgment, under the directed verdict, the judge considers whether a reasonable jury could find for the non-moving party.[162] In contrast to the directed verdict under which a court may consider the evidence of both the plaintiff and the defendant, under the demurrer to the evidence the en banc court considered the evidence of only the non-demurring party.[163] Additionally, unlike the directed verdict in which the judge decides whether a reasonable jury could find for the non-moving party, under the demurrer, the court did not engage in such an analysis of the facts.[164] Only the jury

160. 2 TIDD, *supra* note 109, at 578.
161. *See supra* text accompanying notes 39–41.
162. *See supra* text accompanying notes 39–41.
163. *See supra* text accompanying notes 122–23.
164. Professor Oldham touched on the subject of whether at English common law, judges decided certain issues upon which a reasonable jury could not disagree. *See* Oldham, *Seventh Amendment*

could determine the facts. Whether the evidence was probable or not was for the determination of the jury.[165] The demurrer was similar to a special verdict such that all of the facts were set forth. The parties agreed to the facts and the judge applied the law to the facts, or the parties were required to agree because of the existence of a writing upon which the court could make a legal determination as to its meaning.[166] Finally, under the demurrer to evidence, if the court determined that the non-demurring party had a claim or a defense, the demurring party automatically lost because he had admitted the facts and conclusions of the opposing party and had not put forth any evidence himself.[167] Under the modern directed verdict, on the other hand, the moving party will be permitted to continue his case even if he loses his motion.

Right, *supra* note 103, at 235–38 (citing Stephen Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867 (1966)). He stated that in the English case of *Tindal v. Brown*, 99 Eng. Rep. 1033 (1786), it was established that what notice was reasonable in commercial cases was a legal issue. Oldham, *Seventh Amendment Right*, *supra* note 103, at 235–38. As a result he stated that it could be legitimately argued that certain issues could become legal if reasonable minds could not disagree and thus it would be constitutional under the Seventh Amendment for a judge to decide those issues. *Id*. In *Tindal*, while the court did state that what notice was reasonable was a legal issue, the court left the case to the jury to decide, granting a new trial. *Tindal*, 99 Eng. Rep. 1033; *see also* Appleton v. Sweetapple, 99 Eng. Rep. 579 (1782); Medcalf v. Hall, 99 Eng. Rep. 566 (1782). Additionally, the court noted that "when . . . facts are established, it then it becomes a question of law on those facts, what notice shall be reasonable." *Tindal*, 99 Eng. Rep. at 1035. So the facts, it seems, must be undisputed before the question becomes a legal one. In *Tindal*, after a second jury verdict for the plaintiffs and the grant of a new trial motion, the third jury found a special verdict and the judge granted the defendant judgment upon the facts found by the jury. *See Tindal*, 99 Eng. Rep. at 1036 & n.(a). Upon the first motion for a new trial, the judges had stated that this was a legal question for the sake of "diligence and certainty." *Id*. at 1034. The judges did not assert that reasonable minds could not disagree. The courts before and after this time period surrounding the Seventh Amendment took a different view than the court in *Tindal*, finding the question of what notice is reasonable for the jury. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 235–38; *see, e.g.*, Muilman v. D'Eguino, 126 Eng. Rep. 705 (1795). In the context of negligence and malicious prosecution cases, Weiner discussed the constitutional question of whether certain questions became legal if a reasonable jury could not disagree. Weiner stated that because of lack of affirmative authority under the English common law in 1791 that juries should decide whether ordinary care had been exercised in negligence cases the constitution did not require that the jury decide this question. *See* Weiner, *supra*, at 1891–92. Weiner acknowledges that in the late eighteenth century the common law action of trespass on the case, upon which there would be a jury trial, could be analogized to negligence. *See id.* at 1890–91. Also less than fifty years later, English courts recognized the issue of ordinary care as one for the jury. *Id.* at 1891. Weiner's conclusion was that the question for judges is at minimum subject to disagreement and more study. Weiner also stated that in cases of malicious prosecution, the judge may decide the legal question of whether probable cause has occurred but only upon established facts or facts presumed true. *See id.* at 1916; *see also* Joshua Getzler, *The Fate of the Civil Jury in Late Victorian England: Malicious Prosecution as a Test Case*, *in* "THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND": THE JURY IN THE HISTORY OF THE COMMON LAW 226–34 (John W. Cairns & Grant McLeod eds., 2002).

165. *See supra* text accompanying note 153.

166. *See supra* text accompanying notes 137–39.

167. *See supra* text accompany note 124.

Although these differences between the common law procedures and modern procedures are stark, several Supreme Court justices have compared the modern directed verdict to the demurrer to the evidence.[168] This started with the description by the dissent in *Slocum v. New York Life Insurance Co*.[169] Justice Hughes stated that the modern directed verdict was similar to the demurrer to the evidence.[170] Demurrer to the evidence was characterized as a procedure under which the court could decide the legal sufficiency of the evidence.[171] The dissent asserted that under the demurrer to the evidence, the court could dismiss a case upon a determination that there was no evidence of the fact at issue.[172] There, where the issue was the existence of a contract at the time of the plaintiff's husband's death, and there was no evidence of the existence of a contract at the time of the plaintiff's husband's death, only a question of law for the court remained.[173]

The demurrer to the evidence was not described completely by the dissent. Under that device, whether there was any evidence of the fact at issue must have been agreed upon by the parties, or the parties could not in essence disagree because the only facts were a writing upon which the court would make a legal determination as to its meaning. The existence of the contract, on the other hand, was a question of fact for the determination of the jury.

In *Galloway v. United States*,[174] the Supreme Court again examined, among other common law devices, the demurrer to the evidence.[175] In this

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168. Scholars previously have criticized the Supreme Court's comparison of 1791 procedures to present day procedures. *See* BRUNET, *supra* note 8, at 15 n.13; ELLEN E. SWARD, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573 (2003).

169. 228 U.S. 364 (1913) (Hughes, J., dissenting). The dissent's description is particularly relevant because the conclusion of the dissent essentially represents the current jurisprudence of the Court on judgment notwithstanding the verdict. *See supra* text accompanying notes 75–82.

170. *See Slocum*, 228 U.S. at 408–09. The majority had cited *Gibson*, *Wright v. Pynder*, 82 Eng. Rep. 499 (1647), and *Middleton v. Baker*, 78 Eng. Rep. 983 (1600), in its decision that distinguished the demurrer to the evidence from modern procedure. *See Slocum*, 228 U.S. at 388, 391–92. Although the dissent also cited and discussed those cases, *see id*. at 409–12, these cases do not support the dissent. In *Wright*, where the issue was whether there was a writ, the court decided that a demurrer upon the evidence was inappropriate because there was no writing entered into the pleading upon which the court could determine the ownership of the property. *See Wright*, 82 Eng. Rep. 499 (1647). The issue here was not the legal implication of the writing, rather whether there was a writing, a matter improper for a demurrer to the evidence. *See id*. In *Middleton,* the court stated that a party could not be compelled to join a demurrer upon evidence where evidence is given by a witness. *See Middleton*, 78 Eng. Rep. 983, 983 (1600).

171. *Slocum*, 228 U.S. at 408–09.

172. *Id*. at 409.

173. *Id*. at 401–02.

174. 319 U.S. 372 (1943).

175. *Id*. at 391 n.23. The discussion of the Supreme Court regarding the nonsuit is found *infra* text

case, the Court held that the modern directed verdict was constitutional. Here, the Court, unlike the dissent in *Slocum*, recognized differences between the common law procedures and modern procedures.[176] However, the Court found these differences irrelevant.[177] The Court stated that the common law was continually changing and as a result the specific procedures of the common law in 1791 did not bind the federal courts.[178] The Court stated that demurrer to the evidence was one such procedure that had changed under the common law.[179] The Court did not describe the change, however.[180] The Court also criticized some of the characteristics of the demurrer to the evidence. Demurrer to the evidence was described as essentially depriving the challenger of his right to a jury trial because a party was required to give up his own case to challenge the sufficiency of the other's case.[181]

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accompanying notes 232–49.

176. *See Galloway*, 319 U.S. at 389–92.

177. *See id*. at 394.

178. *See id*. at 391–92.

179. *Id*. at 391 n.23

180. *See id*. With respect to the demurrer to the evidence, the Court cited the following English authorities: 3 BLACKSTONE'S COMMENTARIES, 2 TIDD'S PRACTICE, *Cocksedge v. Fanshaw*, and *Gibson v. Hunter*, all of which are analyzed *supra*. *Id*. The Supreme Court cited *Cocksedge* and *Gibson* to argue the change and thus inconsistency of the common law. *Id*. No significant difference between the cases exists, however. While *Gibson* appears to require the facts admitted to be recorded and *Cocksedge* appears not to, see SWARD, *supra* note 168, at 610, the substance of the description of the demurrer to the evidence is the same in both cases. Under both cases, the facts were required to be admitted and probabilities and possibilities could not be weighed, except by a jury. *See supra* text accompanying notes 128–57. Moreover, Professor Sward commented that the apparent change to require recording made it only more difficult to obtain a demurrer and does not support the conclusion in *Galloway* that the change supported making it easier to take cases from juries. *See* Sward, *supra* note 168, at 610. The Court also cited the Supreme Court case of *Pawling v. United States*, 8 U.S. (4 Cranch) 219 (1808). In *Pawling*, the Court discussed the demurrer to the evidence and described that the court should draw only "such conclusions as a jury might justifiably draw," an incorrect characterization of the demurrer to the evidence. *Pawling*, 8 U.S. (4 Cranch) at 221; *Galloway*, 319 U.S. 372, 395 n.32 (1943).

181. *Galloway*, 319 U.S. at 392. In the case, the plaintiff had sought coverage under an insurance policy for his disability of insanity. *Id*. at 372. The insurance company denied coverage because it stated that the plaintiff was not disabled when the policy lapsed. *See id*. at 372–74. The plaintiff introduced evidence of his insanity during the time shortly before the policy ended and thereafter. *Id*. at 383. The plaintiff did not introduce evidence of insanity for all periods of time up until the time that there was no dispute that he was insane. *See id*. at 383, 386. Also, the defendant presented testimony that contradicted that the plaintiff was insane. *See id*. at 385. After all of the evidence was presented, the Court granted the motion of the defendant for a directed verdict finding that the evidence was not sufficient to show the insanity of plaintiff and thus the jury should not decide the case. *See id*. at 387–88. The Court stated:

> The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons. The argument concedes they weighed the evidence, not only piecemeal but in toto for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial. The objection is not

Justice Black's dissent, on the other hand, emphasized that the demurrer to the evidence was the main method under the common law by which an issue could be kept from a jury.[182] The dissent criticized the majority's supposition that there were only minor differences between the demurrer to the evidence and the modern directed verdict.[183] Under the modern directed verdict, the movant no longer faced the risk of losing his case, and the standard changed from what the dissent characterized as the "'admission of all facts and reasonable inferences'" under the demurrer to the evidence to the "'substantial evidence' rule" under the directed verdict.[184] The dissent asserted that a court should grant a directed verdict only where "there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy."[185]

The demurrer to the evidence was not described completely by the majority nor by the dissent in *Galloway*. Both characterized the demurrer to the evidence as a procedure whereby the court decided whether there was any reasonably possible inference of the facts at issue. Under the demurrer, facts were not weighed in this manner by the court. Instead, the court decided a demurrer only if there were no issues of fact, not because the court determined this but rather because the parties agreed to, or were required to, agree to the facts.

The argument of the majority that the demurrer changed, and as a result the characteristics of the procedure are not important to the analysis under the Seventh Amendment, also is subject to critique. In the time

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> therefore to the basic thing, which is the power of the court to withhold cases from the jury or set aside the verdict for insufficiency of the evidence.

Id. at 390 (citing 3 GILBERT, THE LAW OF EVIDENCE 1181–85 (1792); Rex v. Paine, 87 Eng. Rep. 584 (1696); Folkes v. Chadd, 99 Eng. Rep. 589 (1782)). *Rex v. Paine* and *Folkes v. Chadd* support only that the jury decided the facts and that the judge or court makes legal determinations, including regarding the admissibility of evidence. In *Rex v. Paine*, the jury rendered a special verdict and the court considered whether under the facts found by the jury and under the law, the defendant was guilty of libel. *See Paine*, 87 Eng. Rep. at 585–87. In *Folkes v. Chadd*, the court decided that the trial judge had improperly excluded evidence and ordered a new trial. *See Folkes*, 99 Eng. Rep. at 590–91.

182. *Galloway*, 319 U.S. at 399–400 (Black, J., dissenting). The dissent cited the English cases of *Wright v. Pyndar* and *Gibson v. Hunter*, both of which are analyzed *supra*.

183. *See id*. at 401–04.

184. *Id*. at 403 (internal quotes in decision without citation).

185. *Id.* at 407. The dissent discussed *Greenleaf v. Birth*, 34 U.S. (9 Pet.) 292 (1835), in which the Supreme Court stated that while a court can instruct the jury that there is no evidence regarding a particular fact, a court cannot give an instruction that takes away the power of the jury to decide the facts. *See Galloway*, 319 U.S. at 402. The dissent pointed out that in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1850), the Court departed from *Greenleaf* and approved the directed verdict for the first time in cases in which "there was 'no evidence whatever' on the critical issue in the case." *Galloway*, 319 U.S. at 402. In that case it was argued that the directed verdict accomplished the same goal as the demurrer to the evidence. *See id.* at 401–02.

surrounding the adoption of the Seventh Amendment, the demurrer to the evidence was a specific procedure under which a court could dismiss a case if there were no facts to be determined by the jury.[186] This occurred only infrequently because a case must have involved the legal meaning of a writing or a party would be required to admit the conclusions of the evidence of the opposing party. A party demurred only to avoid a decision by the jury that did not follow the law.

Earlier, in *Slocum v. New York Life Insurance Co.*,[187] the majority of the Supreme Court described the demurrer to the evidence more completely. In that case, the Court considered the constitutionality of judgment notwithstanding the verdict.[188] In its decision that the circuit court should not have granted judgment to the defendant, the Supreme Court compared the common law procedure of the demurrer to the evidence, among other common law procedures, to judgment notwithstanding the verdict.[189] The Court concluded that the demurrer to the evidence was unlike judgment notwithstanding the verdict. Under the demurrer to the evidence the facts must be admitted in order for the court to apply the law.[190] The Court decided that, here, under judgment notwithstanding the verdict, where the verdict of the jury had been set aside, there were no such facts on which the court could make a legal determination.[191] As a result, a new trial was necessary.[192] Although the Court in *Slocum* correctly described the demurrer to the evidence, this analysis essentially became irrelevant after the decision of the Court in *Baltimore & Carolina Line, Inc. v. Redman* that constitutionalized judgment notwithstanding the verdict.[193]

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186. *See supra* text accompanying notes 122–27.

187. 228 U.S. 364 (1913).

188. In *Slocum*, the plaintiff, the wife of the deceased holder of life insurance, brought an action to recover under the insurance policy. *See id*. at 366–68. After the parties presented all of the evidence in the case, the defendant requested that the court direct or instruct the jury to find a verdict for the defendant and the court did not do so. The jury found that the plaintiff should recover under the life insurance plan. *Id.* at 368. The defendant then unsuccessfully moved for judgment notwithstanding the verdict. *Id*. at 369. The circuit court of appeals reversed the trial court's decision and gave judgment to the defendant. *Id.* There was insufficient evidence of a contract of insurance at the time that the plaintiff's husband died. *Id*.

189. *See id.* at 388. The discussion of the Supreme Court regarding the other common law procedures is found *infra*.

190. *See id*. at 388–91. The Court cited *Fowle v. Alexandria*, 24 U.S. (11 Wheat) 320 (1826), in which the Supreme Court compared the demurrer to the evidence to the special verdict stating that the demurrer is "in many respects, like a special verdict." *See Slocum*, 228 U.S. at 389.

191. *See Slocum*, 228 U.S. at 392.

192. *Id*. The Court cited *Middleton v. Baker*, 78 Eng. Rep. 983 (1600), *Wright v. Pyndar*, 82 Eng. Rep. 499 (1647), and *Gibson v. Hunter*, 126 Eng. Rep. 499 (1793), which are analyzed *supra*.

193. *See supra* text accompanying notes 75–82.

More recently, in his dissent in *Parklane Hosiery Co. v. Shore*,[194] Justice Rehnquist attempted to favorably compare the demurrer to the evidence to another modern procedure, summary judgment.[195] This has continued the jurisprudence of the Court by which the English common law has not been described completely. Justice Rehnquist stated that "in 1791 a demurrer to the evidence, a procedural device substantially similar to summary judgment, was a common practice."[196] He also asserted that "[t]he procedural device[] of summary judgment . . . [was a] direct descendant[] of [its] common-law antecedent[]. [It] accomplish[ed] nothing more than could have been done at common law, albeit by a more cumbersome procedure."[197] Both of these points are subject to significant criticism. The demurrer to the evidence is wholly dissimilar to summary judgment. Under the demurrer, the demurring party admitted the facts and conclusions of the non-demurring party. Additionally, the evidence of the demurring party was not considered in the decision as to whether there was a claim under the law. In contrast, under summary judgment, the question is not whether there is a claim under the alleged facts but whether a reasonable jury could find for the nonmoving party upon the consideration of the evidence presented by both parties.[198] Moreover, the House of Lords clearly expressed the opinion, opposite to that of Justice Rehnquist, that the demurrer to the evidence was uncommon.[199] A party would not agree to the conclusion of the evidence of the opposing party unless the law upon these facts indisputably led to judgment for the party.

Over time, the common law procedure of the demurrer to the evidence has been incompletely described by the Court. This description has contributed to the lack of rigor in the analysis of the constitutionality of

194. 439 U.S. 322 (1979).

195. *See id*.

196. *See id*. at 349.

197. *Id*. at 350.

198. Justice Rehnquist incorrectly cited *Pawling v. United States*, 8 U.S. (4 Cranch) 219 (1808), for the proposition that summary judgment is constitutional. *See Parklane Hosiery*, 439 U.S. at 349. *Pawling* concerned only an apparent application of the common law procedure of demurrer to the evidence. In *Pawling*, the Court inaccurately described the demurrer to the evidence. The Court stated that "[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. . . . such conclusions as a jury might justifiably draw, the court ought to draw." *Pawling*, 8 U.S. (4 Cranch) at 221–22. Professor Molot incorrectly discussed the common law device of demurrer in his recent article. Molot, *supra* note 12, at 80. According to Molot, the only difference between the motion for demurrer and the modern motion for a directed verdict is that under the motion for a directed verdict the defendant need not give up his right to a jury trial as was required under the demurrer. *Id.* at 80. Professor Sward has also discussed the development of the standard of the reasonable jury. *See* Sward, *supra* note 168, at 592–99.

199. *See supra* text accompanying notes 128–36.

modern procedures such as the directed verdict and summary judgment. Although the Court has held that the English common law in 1791 governs the constitutionality question, the Court has not recognized principles that can be derived from the English common law procedure of demurrer to the evidence which are consistent with the principles underlying the common law procedure of the demurrer to the pleadings. Such consistent principles should govern the constitutionality issue. Under the demurrer to the evidence, similar to under the demurrer to the pleadings, the moving party admitted the facts and conclusions of the evidence of the non-moving party and could not proffer any evidence itself. The determination here again was purely a legal question, not a sufficiency of the evidence question. The result was the moving party lost if the facts and the conclusions admitted presented a legal claim.

3. Nonsuit

Another common law procedure which affected whether a jury decided a case after a trial began was the nonsuit. A plaintiff could be nonsuited if he did not answer after his name was called in court.[200] The plaintiff would not answer if the plaintiff believed his evidence was insufficient or it appeared to him that he had no case under the law.[201] The plaintiff could then file another writ and try the case again. Blackstone wrote:

> [I]t is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself: whereupon the crier is ordered to *call the plaintiff*; and if neither he, nor any body for him, appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that a nonsuit is more eligible for the plaintiff, than a verdict against him: for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is for ever barred, from attacking the defendant upon the same ground of complaint.[202]

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200. 2 TIDD, *supra* note 109, at 586–87.

201. *See id.* at 586 (legal problem includes the case being tried in the wrong place).

202. 3 BLACKSTONE, *supra* note 109, at 376–77; *see also* BULLER, *supra* note 109, at 330–31 (listing cases involving costs where nonsuits were ordered); 2 TIDD, *supra* note 109, at 587 (stating that the plaintiff must pay costs but may bring another case on the same issue).

The nonsuit traced back to the time when a plaintiff was required to appear in court in order for the jury to render its verdict.[203] The plaintiff was required to come before the court because if the jury found for the defendant, the plaintiff was liable for amercement.[204] Amercement was a fine imposed by the king for bringing a false claim.[205] Although at the time that Blackstone wrote courts did not impose amercement, the plaintiff continued to be able to withdraw his case through the procedure of nonsuit.[206]

Blackstone had stated that nonsuit was voluntary.[207] Tidd also wrote, "The plaintiff in no case is compellable to be nonsuited; and therefore, if he insist upon the matter being left to the jury, they must give in their *verdict*."[208] In *Watkins v. Towers*,[209] after a verdict for the plaintiff, the defendant argued that by bringing the case in the wrong place the plaintiff had consented to be nonsuited.[210] Although he did not need to address this point, Justice Grose stated "we could not order a nonsuit to be entered against the consent of the plaintiff but we might have ordered a new trial on terms."[211]

In certain cases in which nonsuit occurred, however, it is not clear whether the plaintiff consented. In what has been referred to as a "compulsory nonsuit," the defendant successfully moved the court en banc for a nonsuit after a jury verdict for the plaintiff.[212] It appears that the court

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203. *See* 3 BLACKSTONE, *supra* note 109, at 376.

204. *See id*.

205. *See id*.

206. *See id*. The plaintiff lost the benefit of the writ when he was nonsuited. *See* 3 BLACKSTONE, *supra* note 109, at 316. Nonsuit appears to be of relatively "frequent" occurrence. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 231 (studying notes of Lord Mansfield).

207. *See* 3 BLACKSTONE, *supra* note 109, at 376; *see also* Henderson, *supra* note 30, at 300–01; Scott, *supra* note 105, at 687; Macbeath v. Haldimand, 99 Eng. Rep. 1036, 1038 (1786) ("Buller, Justice . . . said, that he had been of opinion at the trial, that . . . the plaintiff ought to be nonsuited . . . . But the plaintiff's counsel appearing for their client when he was called, he left the question to the jury.").

208. 2 TIDD, *supra* note 109, at 588. Also, according to Tidd, only the defendant could force the plaintiff to make the choice. "A nonsuit can only be at the instance of the defendant . . . for nobody has a right to demand the plaintiff, but the defendant, and the defendant not demanding him, the judge could not order him to be called." *Id*. at 587. In 1828, in *Doe v. Grymes*, the Supreme Court decided that a plaintiff could not be nonsuited involuntarily. *Grymes*, 26 U.S. (1 Pet.) 469, 471–72 (1828). The dissent had argued that although the English rule on nonsuit appeared to require the consent of the plaintiff, there was good reason to depart from that rule, particularly given the unavailability of the former English practice of amercement—the requirement that the plaintiff pay a fine if he lost. *Id.* at 473–75 (Johnson, J., dissenting).

209. 100 Eng. Rep. 150 (1788).

210. *Id*.

211. *Id*. at 153.

212. *See* Henderson, *supra* note 30, at 300–01 (citing, among other cases, *Abbot v. Plumbe*, analyzed *infra*). Professor Oldham believes that compulsory nonsuits were rare. *See* Oldham, *Seventh*

would grant such a motion only if the verdict for the plaintiff was unsupported as a matter of law.[213] Such a matter of law involved, for example, the lack of certain specific required evidence. A general assertion that the weight of the evidence did not support the claim was not such a matter of law. The case of *Abbot v. Plumbe*[214] demonstrates that courts at times granted "nonsuits" without the consent of the plaintiff when such a legal issue was involved. In an action in trover, associated with a bankruptcy, the plaintiff won a verdict against the defendant, the obligor to a bond.[215] At the trial, the plaintiff had relied on the admission of the defendant to authenticate the signature of the witness to the bond who had subscribed his signature on the bond.[216] The defendant moved for nonsuit because the subscribing witness had not testified.[217] Lord Mansfield opined that, the error, although a mere technicality, was fatal. "To be sure this is a captious objection; but it is a technical rule that the subscribing witness must be produced, and it cannot be dispensed with."[218] Justices Ashhurst and Buller agreed.[219] Professor Oldham stated that this case essentially involved a case stated such that a question of law—in this case, regarding the rule that a particular witness be present—was reserved for the court.[220] According to Oldham's study of the notes of Lord Mansfield, this use of the nonsuit was unusual.[221] Nonsuit generally appears to be a procedure used before a verdict, after the plaintiff presented his case and with the consent of the plaintiff.[222]

Where the issue did not involve the law but rather a factual issue, the jury decided the issue. For example in *Company of Carpenters v. Hayward*,[223] the issue raised by the defendant after a verdict for the plaintiff was whether the plaintiff had proved the existence of a particular

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Amendment Right, *supra* note 103, at 231 n.35.

213. *See* Company of Carpenters v. Hayward, 99 Eng. Rep. 241 (1780); *see also* Pleasant v. Benson, 104 Eng. Rep. 590 (1811).

214. 99 Eng. Rep. 141 (1779).

215. *See id*.

216. *See id*.

217. *See id*.

218. *Id*.

219. *Id*. at 141–42.

220. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 232–33 (a judge may at times nonsuit a plaintiff if "as a matter of law, the plaintiff had no case" but this appears to be with the consent of the plaintiff).

221. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 232.

222. *See id*. at 232–33.

223. 99 Eng. Rep. 241 (1780).

company.[224] Lord Mansfield denied the motion of the defendant to nonsuit the plaintiff:

> It was properly left to the jury to consider, whether the evidence produced was sufficient to shew, that there was such a company; for that was a mere question of fact; and they were to decide on its existence, and whether it was originally created by a charter from the Crown, or was only a voluntary society. There was evidence of its existence as a corporation.[225]

Justice Buller agreed: "Whether there be any evidence, is a question for the Judge. Whether sufficient evidence, is for the jury."[226]

Under the nonsuit, the plaintiff would voluntarily withdraw his case when he believed that he had insufficient evidence. The plaintiff could bring another action without prejudice.[227] A rare species of nonsuit existed upon which a court could order a nonsuit after a jury verdict for the plaintiff if a particular legal requirement was not met.[228] A court could not order a nonsuit upon any belief of the court that the plaintiff had not presented sufficient evidence.[229]

4. A Comparison of Modern Procedures to the Common Law Procedure of the Nonsuit

The modern directed verdict, like the common law nonsuit, occurs during the trial. The directed verdict is not, however, similar to the nonsuit. Unlike the directed verdict, under the nonsuit, the judge or the en banc court did not decide whether the case was dismissed; the plaintiff would decide whether to withdraw from the case. Also unlike the directed verdict, under the nonsuit, the plaintiff could bring the same claim again.[230] The common law compulsory nonsuit, under which the court

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224. *See id*. at 241.
225. *Id*.
226. *Id.* at 242; *see also* Oldham, *Seventh Amendment Right*, *supra* note 103, at 233 (describing example of order of nonsuit by judge and denial of new trial motion by the court where the case should have been given to the jury (the question being "'of intention arising out of the circumstances'") but in light of the fact that "strong directions to find for the defendant" should have been given the jury and "the small amount [demanded] involved," the court denied the new trial); Scott, *supra* note 105, at 687 (in the states, under compulsory nonsuit, a new action could be brought).
227. *See supra* text accompanying notes 200–02.
228. *See supra* text accompanying notes 212–22.
229. *See supra* text accompanying notes 223–26.
230. *See supra* text accompanying note 202.

would give judgment to the party who lost the jury verdict, was rare. Also, unlike the modern directed verdict, under the compulsory nonsuit, the facts were specifically determined by the parties and the court made a legal decision, not a sufficiency determination, upon those facts.[231]

Again, despite these differences between the common law and modern procedure, the constitutionalization of the modern directed verdict has been justified in part on a comparison of the nonsuit to the modern directed verdict.[232] In *Galloway v. United States*, the Supreme Court found constitutional the modern directed verdict. The Court stated that because the common law constantly changed, the courts were not bound by the English common law procedures.[233] The Court described the nonsuit as changing from a procedure whereby the plaintiff voluntarily withdrew his case to a procedure whereby the defendant challenged the sufficiency of the evidence of the plaintiff.[234] Accordingly, the directed verdict differed from the nonsuit in this way only as to "form."[235] The Court did recognize that the nonsuit, unlike the directed verdict, permitted the plaintiff to try the case again.[236]

The Court had criticized some of the characteristics of the nonsuit and the demurrer to the evidence.[237] The Court asserted that the Seventh Amendment did not guarantee the plaintiff endless opportunities to try his case as was possible under the nonsuit.[238] Also, the inconsistency between the demurrer to the evidence, whereby a party was required to give up his case to challenge the other's case, and the nonsuit, whereby the plaintiff had the opportunity to retry his case, demonstrated that the Amendment was not intended to preserve particular rules.[239] "Alternatives so contradictory give room, not for the inference that one or the other is required, but rather for the view that neither is essential."[240]

The majority had stated that the procedures of the demurrer to the evidence and the nonsuit were inconsistent and as a result the characteristics of neither procedure were important to the analysis under

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231. *See supra* text accompanying notes 212–22.
232. *See* Galloway v. United States, 319 U.S. 372 (1943).
233. *See id*.
234. *Id.* at 390–92. The Court cited only Blackstone and Tidd from the English common law. *Id*. at 391 n.23. As stated *supra*, neither treatise supports the Court's interpretation. *See supra* text accompanying notes 200–08.
235. *Galloway*, 319 U.S. at 391 n.23.
236. *See id*.
237. The demurrer to the evidence is described *supra* text accompanying notes 122–60.
238. *Galloway*, 319 U.S. at 392–94.
239. *See id*. at 393.
240. *Id*. at 394.

the Seventh Amendment.[241] The procedures do not appear inconsistent. Although the demurrer to the evidence required the demurring party to give up his claim if he was wrong and the nonsuit permitted the party who withdrew his claim to retry his claim, under both procedures, the determination of the jury of the facts was most important. Under the demurrer, a case was not dismissed unless there were no facts for the jury to determine because the facts and conclusions of the nondemurring party had been admitted. Under the nonsuit, the case could be retried before a jury because there could have been facts for the jury to determine if the case had not been withdrawn or in the future there could be facts for the jury to determine when another writ was filed.

The majority also had commented that the nonsuit had changed and as a result, the characteristics of the procedure were not important to the analysis under the Seventh Amendment. As to any supposed change in the nonsuit whereby the defendant could challenge the sufficiency of the evidence, the Court admitted that this alleged change was tempered by the continued requirement that the plaintiff could retry the case.[242] Also, the Court's assertion that a nonsuit could be ordered upon a determination that the evidence was insufficient appears to be unsupported. The common law rule permitted a court to order a nonsuit only if a specific legal question could be determined upon established facts.

In an earlier case, *Slocum v. New York Life Insurance Co.*, the Court had more completely described the nonsuit.[243] In its analysis that the modern judgment notwithstanding the verdict was different from the nonsuit, the Supreme Court emphasized the common law characteristic of the nonsuit by which the plaintiff could opt for a jury verdict and the plaintiff could be dismissed without prejudice to the same case brought again by the plaintiff.[244] In *Slocum*, the circuit court had failed to direct the jury that the plaintiff had not made her case.[245] If the circuit court had indicated that it would so direct the jury, the plaintiff could have taken a nonsuit and tried the case again.[246] As a result, judgment could not be granted to the defendant and a new trial was required.[247] This analysis of the nonsuit in *Slocum* essentially became irrelevant after the decision in

241. *Id.*
242. *Id.* at 391 n.23.
243. Slocum v. New York Life Ins. Co., 228 U.S. 364 (1912).
244. *See Slocum*, 228 U.S. at 392, 394. The Court cited among other treatises, 2 TIDD, *supra* note 109, which is analyzed *supra*.
245. *Slocum*, 228 U.S. at 398–99.
246. *Id.*
247. *Id.*

Redman in which judgment notwithstanding the verdict was held constitutional.[248]

The cases demonstrate that similar to the Court's analysis of the demurrer to the evidence, in its analysis of the nonsuit, the characteristics of the nonsuit have not been adequately taken into account in the Court's evaluation of the constitutionality of modern procedures. Under the nonsuit the plaintiff decided whether to withdraw the case and could bring the case again.[249] Moreover, in the rare circumstance that a court would require a nonsuit, it was only with respect to a specific legal issue and not a question of the sufficiency of the evidence.

Although the Court has held that the English common law in 1791 governs the analysis, the principles that can be derived from the English common law procedure of the nonsuit, which are consistent with the principles underlying the common law demurrer to the pleadings and the demurrer to the evidence, have not been used to assess the constitutionality of modern procedures. Under all of the procedures the parties agreed upon the facts or the jury determined the facts. The en banc court did not engage in a determination of the sufficiency of the evidence. Rather the court (on the rare occasion it became involved under the nonsuit) decided a pure legal question based on the agreed upon or jury determined facts.

C. Procedures Surrounding the Verdict

1. Direction of a Verdict

The direction of a verdict was a procedure concerning the verdict under the common law. It differed significantly, however, from the modern directed verdict. Under the common law, the judge could direct the jury to find for the plaintiff or for the defendant.[250] The judge had discretion to comment, in effect, on the strength of the evidence presented by the parties.[251] Although Henderson wrote that the direction of the judge was binding upon the jury,[252] Professor Oldham, in his study of the trial notes of Lord Mansfield, concluded to the contrary that the jury was not bound by the direction of the judge.[253]

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248. *See supra* text accompanying notes 75–82.
249. *See supra* text accompanying note 202.
250. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 233–35.
251. *See id*.
252. *See* Henderson, *supra* note 30, at 302.
253. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 233–34; *cf*. John H. Langbein,

An examination of the cases cited by Henderson demonstrates that Oldham is correct that Henderson's conclusion that juries were required to follow the direction of the judge is faulty.[254] For example, Henderson cites *Macbeath v. Haldimand*,[255] in support of the proposition that juries must follow the direction of the judge. While the case states that in the first trial, "a verdict was found for the defendant by the direction of the Judge,"[256] the issue at the King's Bench was not whether the jury was required to obey Justice Buller's direction.[257] Rather, the issue was whether, upon a motion for a new trial, there was an issue of fact for the jury to determine.[258] Justices Mansfield and Buller opined that the writings admitted into evidence were unambiguous such that there was no need for substantive interpretation of the writings by a jury.[259] Justice Willes stated to the contrary that the jury could have rendered an interpretation of the writings in the case which was different from the direction of Buller at the trial.[260] Henderson weakly argued that because Willes's opinion was the only opinion that she could find that directly stated that the jury could disregard a judge's direction, "the weight of authority apparently was that [the jury] was bound to obey [the judge's directions]."[261] In this case Justices Buller and Mansfield determined that there was a legal issue that the court could decide and as a result no new trial was required.[262] Oldham concluded that this case did not support the proposition that the jury was required to follow the direction of the judge to find for a particular party, and that on the contrary the notes of Justice Mansfield demonstrated that the jury need not follow the direction of the judge.[263]

Historical Foundations of the Law of Evidence: A View From the Ryder Sources, 96 COLUM. L. REV. 1168, 1190–93 (1996) (discussing the notes of Chief Justice Ryder of the King's Bench regarding his directions to the jury). In an earlier article, Frank Warren Hackett incorrectly concluded that "there was no such practice known [under the English common law in the 1790s] as directing a verdict." Frank Warren Hackett, *Has a Trial Judge of a United States Court the Right to Direct a Verdict*, 24 YALE L.J. 127, 136 (1914). "The 'directed verdict' of [the 1700] period was instruction on the law, advice on the facts, or a mixture of the two." Blume, *supra* note 124, at 567. While the traditional directed verdict is that as described in the text, Oldham found that a directed verdict could also occur when counsel gave up the case and the judge directed a verdict for the other side. *See* JAMES OLDHAM, ENGLISH COMMON LAW IN THE AGE OF MANSFIELD 68 (2004).

254. *See* Henderson, *supra* note 30, at 302–03.
255. 99 Eng. Rep. 1036 (1786).
256. *Id*. at 1036.
257. *See id*. at 1040–41.
258. *See id*.
259. *Id*.
260. *See id*.
261. *See* Henderson, *supra* note 30, at 302–03.
262. *Macbeath*, 99 Eng. Rep. at 1040–41.
263. *See* Oldham, *Seventh Amendment Right, supra* note 103, at 233–34 & 229; *see also* OLDHAM,

Cases do show that the court might order a new trial if the jury did not follow the direction of the judge.[264] However, in at least some cases where the jury did not follow his direction, Lord Mansfield would not invite or entertain a motion for a new trial.[265] The fact that under the common law the judge requested the jury to find a certain way and did not decide the case before the case went to a jury also suggests, as a logical matter, that the jury was not required to find what the judge had ordered.[266]

THE MANSFIELD MANUSCRIPTS, *supra* note 109, at 150. Henderson also cited the argument of counsel in *Hankey v. Wilson*, 96 Eng. Rep. 860 (1755), to attempt to further support her argument that the direction of the judge bound the jury. *See* Henderson, *supra* note 30, at 303. This case concerned whether the jury should determine whether a party had endorsed a bill. *Hankey*, 96 Eng. Rep. at 860. Contrary to Henderson's premise, on the motion for a new trial, "[t]he question was, whether upon this evidence the matter ought to have been left to the jury? *It was holden that it ought.*" *Id.* at 860 (emphasis added); *see also* Rex v. Shipley, 99 Eng. Rep. 774, 826 (1784) (in a criminal libel case, Justice Buller "assured the Court, that he did not tell the jury 'they had no right to find a verdict of not guilty'"). Henderson also wrote without adequate support that judges commonly directed verdicts. *See* Henderson, *supra* note 30, at 302. For example, in *Beauchamp v. Borret*, 170 Eng. Rep. 110 (1792), the issue was whether the plaintiff should receive back all of the money that he had paid for an annuity that had been rescinded. The case stated, "Lord Kenyon was of opinion that both under the agreement and according to the justice of the case, the plaintiff was entitled to recover the whole £600 and interest, from the time the annuity ceased, and the jury gave damages accordingly." *Id*. at 110. As stated here, again it appears that the judge may have told the jury his opinion and the jury agreed. This does not show the commonality of the procedure nor that the plaintiff was required to follow the judge's opinion. Also, in *Coupey v. Henley Whale & Webster*, 170 Eng. Rep. 448 (1797), cited by Henderson, an action for false imprisonment, the plaintiff sued a constable for taking him into custody for an assault alleged against him but not witnessed by the constable. Justice Eyre found that a warrantless arrest should not have been made because the constable did not believe that the plaintiff would commit a felony and then stated that "[t]he plaintiff must have a verdict." *Coupey*, 170 Eng. Rep. at 449. Again, these words do not show that the jury was required to find for the plaintiff nor that it was a common instruction. Henderson also stated that in most cases where the judge directed the verdict, he did so for the plaintiffs. *See* Henderson *supra* note 30, at 302.

264. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 234; Henderson, *supra* note 30, at 302.

265. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 234–35.

266. Under the common law, judges made evidentiary rulings that included, for example, excluding witnesses based on competency and admitting expert testimony. There is some commentary that because the modern rules of evidence do not exist in the same state as the rules were in England in 1791, that this supports other developments in procedural devices that affect jury fact-finding that did not exist in England in 1791. Scholars widely agree, however, that modern evidentiary rules are more exclusionary than the English rules at common law in 1791. For example, John Langbein studied the historical origins of the modern rules of evidence and concluded that the modern rules developed from the late eighteenth century into the nineteenth century. *See* Langbein, *supra* note 253; *see also* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 595 (1990); James Oldham, *Truth-Telling in the Eighteenth Century English Courtroom*, 12 LAW & HIST. REV. 95, 96, 103–04 (1994) (stating evidence system was "incoherent" with respect to "truth-telling" and the hearsay rule was not followed closely). Langbein stated that "it is hard to believe that the courts of the mid-eighteenth century enforced the hearsay rule or any of the other modern exclusionary rules that balance the potential prejudiciality of witness testimony against the supposed probative value." *See* Langbein, *supra* note 253, at 1189; *cf*. Landsman, *supra*, at 564–72 (describing the development of hearsay rule in criminal cases in the eighteenth century). Langbein found that under the common law, an English judge exercised much power to influence a jury by

2. A Comparison of Modern Procedures to the Common Law Procedure of the Direction of a Verdict

The modern directed verdict is very different than the common law procedure of the same name. Under the modern procedure, the judge can find for one party after deciding that no reasonable jury could find for the other party.[267] Under the common law, a judge would direct a verdict such that he would request the jury to find for one party, but the judge could not require the jury to find for that party.[268]

In examining the common law procedure of the direction of the verdict, the Supreme Court has not described the device completely and has oversimplified comparisons. In his dissent in *Parklane Hosiery Co. v. Shore*,[269] Justice Rehnquist compared the modern directed verdict to the common law direction of a verdict. He stated, "[I]t is clear that a similar form of directed verdict existed at common law in 1791."[270] "The procedural device[] of . . . directed verdict . . . accomplish[ed] nothing more than could have been done at common law, albeit by a more cumbersome procedure."[271] Moreover, in *Galloway*, the Court also attempted to compare the modern directed verdict to the common law direction of a verdict. In support of its decision that the modern directed verdict was constitutional, the Supreme Court cited cases to support the proposition that a modern directed verdict-type device existed under the common law.[272] Those cases, *Wilkinson v. Kitchin* and *Syderbottom v.*

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comments regarding the evidence and instructions to the jury. *See* Langbein, *supra* note 253, at 1190–93; Kenneth A. Krasity, *The Role of the Judge in Jury Trials: The Elimination of Judicial Evaluation of Fact in American State Courts from 1795 to 1913*, 62 U. DET. L. REV. 595, 595 (1985); Lerner, *Transformation of Civil Trial*, *supra* note 109, at 204–11. "As a practical matter, it allowed the trial judge to dominate civil jury trial virtually as he wished." *See* Langbein, *supra* note 253, at 1195. As judges exercised less direct influence over the jury from the mid eighteenth century for the next hundred years, judicial controls like evidentiary controls and jury instructions further developed. *See id*. at 1196; *see also supra* note 109 (describing aspects of the common law and modern procedure). Langbein's conclusion regarding the origin of modern evidence law contrasted with that of Wigmore who traced the origin of modern evidence law to the sixteenth and seventeenth centuries. *See* Langbein, *supra* note 253, at 1170–71.

267. *See supra* text accompanying note 39–41.

268. *See supra* text accompanying notes 250–66.

269. 439 U.S. 322 (1979).

270. *Id.* at 349 & n.15 (citing Henderson, *supra* note 30 and Scott, *supra* note 105). Justice Rehnquist cited *Beauchamp* and *Coupey*, analyzed *supra* note 263, for the proposition that a procedure similar to the modern directed verdict existed at common law in 1791. *Parklane Hosiery Co.*, 439 U.S. at 349. Justice Rehnquist also cited Henderson, *supra* note 263, for her argument that to direct a verdict was common. *Parklane Hosiery Co.*, 439 U.S. at 349 n.15.

271. *Parklane Hosiery Co.*, 439 U.S. at 350.

272. Galloway v. United States, 319 U.S. 372, 391 n.23 (1943).

Smith, simply referred to the request of the judge for the jury to find for one party.[273]

Again, in these cases finding modern procedural devices constitutional, the English common law, which the Court explicitly has held governs the analysis, has not been described completely and comparisons have been oversimplified. The modern directed verdict, under which a court can give a party judgment, is very different from the procedure under the common law whereby the judge could request that the jury find for one party. By not distinguishing between the procedures, an important characteristic of the common law present in the common law direction of a verdict has not been recognized. Consistent with the common law devices of the demurrer to the pleadings, the demurrer to the evidence, and the nonsuit, by the direction of a verdict a judge could give his opinion of the evidence to the jury, but only the jury could find the facts. At most, a new jury trial would result if the jury did not follow the direction of the judge.

3. Special Verdict

Another procedural device surrounding the verdict under the common law was the special verdict. In a special verdict, the jury would set forth the facts and a conclusion conditional upon the opinion of the en banc court on the law.[274] Blackstone wrote:

> Sometimes, if there arises in the case any difficult matter of law, the jury for the sake of better information, and to avoid the danger of having their verdict attainted, will find a *special* verdict; which is grounded on the statute Westm. 2. 13 Edw. I. c.30. § 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court shall be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court at Westminster, from whence the issue came to be tried.[275]

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273. *See* Syderbottom v. Smith, 93 Eng. Rep. 759 (1725); Wilkinson v. Kitchin, 91 Eng. Rep. 956 (1696).

274. 3 BLACKSTONE, *supra* note 109, at 377–78; *see* 2 TIDD, *supra* note 109, at 595.

275. 3 BLACKSTONE, *supra* note 109, at 377–78. An attaint "is a process commenced against a former jury, for bringing in a false verdict." *Id*. at 351; *see* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 166 (Charles M. Gray ed., Univ. of Chicago Press 1971) (1739); 2 TIDD, *supra* note 109, at 595; Scott, *supra* note 105, at 684. Hale lived from 1609 through 1676 and served

A jury could choose, however, to render a general verdict instead of a special verdict:

> [T]he jury may, if they think proper, take upon themselves [sic] to determine at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.[276]

In a case decided in 1779, Justice Buller implicitly so stated when he declared that the jury "may, if they please, refuse to find a special verdict, and then the facts never appear on the record."[277] The special verdict would be settled and signed by counsel for the parties, the proceedings recorded, and copies of the special verdict sent to the judges for a decision.[278] However, if the court had insufficient facts on which to base a verdict, the court could order a new trial:[279]

> And if in this, or any other particular, the verdict be defective, so that the court [sic] are not able to give judgment thereon, they will amend it, if possible, by the notes of counsel, or even by an affidavit of what was proved upon the trial; or otherwise, they will supply the defect, by awarding a *venire de novo*.[280]

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as a judge for approximately twenty years. *See* HALE, *supra*, at xiii. In the eighteenth century, with the rise in the use of the motion for a new trial for verdicts contrary to the evidence, attaint was no longer in use. Juries continued, however, to render special verdicts if they so chose. *See* 3 BLACKSTONE, *supra* note 109, at 389.

276. 3 BLACKSTONE, *supra* note 109, at 378; *cf.* Hogan, *supra* note 1, at 243 (reprinting Justice Story's article *Jury*, in which Story described that a jury need not find a special verdict and instead may render a general verdict).

277. Cocksedge v. Fanshaw, 99 Eng. Rep. 80, 89 (1779); Kinloch v. Craig, 2 Eng. Rep. 32 (1790) (requesting jury to find special verdict for plaintiff, jury refusing to find special verdict and finding for defendant and then jury finding special verdict for plaintiff with minimal damages after judge requested such again); Duke of Pugh v. Leeds, 98 Eng. Rep. 1323, 1326 (1777) ("The Court left it to the jury: the jury threw it back upon the Court, and brought in a special verdict stating the lease verbatim."); Oldham, *Seventh Amendment Right*, *supra* note 103, at 231 & n.33; Scott, *supra* note 105, at 684; William H. Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296, 297 (1925); *cf.* Pugh v. Goodtitle, 1 Eng. Rep. 1429, 1430 (1787) (setting forth special verdict found by jury).

278. *See* 2 TIDD, *supra* note 109, at 596–97. The special verdict was also described as: "dictated by the court at the trial, and signed by counsel on both sides before the jury are discharged. If, in settling it, any difference of opinion arise about a fact, the opinion of the jury is taken, and the fact is stated accordingly." 1 JOHN FREDERICK ARCHBOLD, THE PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS, AND EJECTMENT 190–91 (1823).

279. *Id*.

280. 2 TIDD, *supra* note 109, at 596; *Ex Parte* Harrison, 28 Eng. Rep. 1062, 1067 (1782) ("the special verdict (being insufficient) should be, annulled, and that the court of *King's Bench* should award a *venire facias de novo*"). A decision by the court upon a special verdict could be reviewed by a higher court upon writ of error. *See* 3 BLACKSTONE, *supra* note 109, at 378; HALE, *supra* note 275, at

4. A Comparison of Modern Procedures to the Common Law Procedure of the Special Verdict

While there is some similarity between the modern special verdict and the modern general verdict with answers to interrogatories and the common law special verdict, there are significant differences. Under both modern and common law procedure, the jury finds the facts. However, unlike the common law procedure, under the modern procedure a judge may order a jury to render a special verdict whereby the jury will answer specific questions posed by the judge, or the judge may order a jury to render a general verdict based on answers to questions posed by the judge.[281] These procedures differ from the common law procedure where the jury itself would decide whether to render a special verdict.

In *Walker v. New Mexico*,[282] the Supreme Court compared the modern special verdict to the common law procedure. The Court reiterated that the Seventh Amendment required that only the substance of the jury trial right be preserved.[283] The Court acknowledged that it was open to question whether under the common law, a jury could be compelled to answer questions posed by a court or whether if the jury would not answer such questions, its general verdict would still be effective.[284] Even so, the Court decided that the substance of the common law was not violated by the requirement that a jury answer such questions and by the court's right to render judgment contrary to the general verdict if the jury's answers conflicted with the verdict.[285] In its determination that the substance of the jury trial right was not violated, the Court had stated that "the power of the court" should not be limited to the grant of a new trial when the jury's error is clear from the facts and the verdict.[286]

Because the English common law in 1791 governs the analysis of the constitutionality of modern procedures, principles derived from the common law procedure of the special verdict, which are consistent with those of the other common law procedures, should be applied in the constitutionality analysis. These principles include that, under the special verdict, the jury decided the facts and the court decided the outcome upon those facts. Moreover, while the Supreme Court has downplayed the

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166; Scott, *supra* note 105, at 685–86.

281. *See supra* text accompanying note 46–48.
282. 165 U.S. 593 (1897).
283. *See id.* at 596.
284. *See id.* at 597.
285. *See id.* at 598.
286. *See id.* at 597–98.

difference between the common law and the modern procedure under the common law, only when the jury specifically requested guidance from the court on the law would the jury's decision be replaced by the court's decision.

5. Special Case

Under the special case, the jury would enter a general verdict for the plaintiff, "but subject nevertheless to the opinion of the judge or the court above."[287] As under the special verdict, "the facts proved at the trial" would be stated "and not merely the evidence of facts . . . and if in settling it, any difference arises about a fact, the opinion of the jury [would be] taken, and the fact stated accordingly."[288] The special case was a cheaper and faster alternative to the special verdict.[289] Unlike the special verdict, where the full record with the legal issue in need of resolution was sent to the court en banc, the record remained in the hands of the officer of the nisi prius court while the legal issue was resolved by the judge at nisi prius or the court above.[290]

Both sides would at some point argue the determinative legal issue, but in so doing the sides were strictly constrained to the case as made out from the factual conclusions.[291] If the case was misstated, the parties must amend it or if the case was so defective that the judge or court could not render judgment on it, the judge or court would order a new trial so that a case might be made out from the facts at the new trial.[292]

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287. 3 BLACKSTONE, *supra* note 109, at 378; Allen v. Hearn, 99 Eng. Rep. 969, 969 (1785) ("the jury found the following special case:"); Roe v. Hutton, 95 Eng. Rep. 744, 744 (1763) ("verdict for the plaintiff, subject to the opinion of the Court, upon the following case:"); *see also* Hankey v. Smith, 100 Eng. Rep. 703 (1789); Hoare v. Parker, 100 Eng. Rep. 202 (1788). The special case was much more commonly employed than the special verdict. *See* Henderson, *supra* note 30, at 305.

288. 2 TIDD, *supra* note 109, at 598 ("It is usually dictated by the court, and signed by the counsel, before the jury are discharged."); *see* Palmer v. Johnson, 95 Eng. Rep. 744 (1763); 1 ARCHIBOLD, *supra* note 278, at 192; Henderson, *supra* note 30, at 306; *see also* James Oldham, *Eighteenth Century Judges' Notes: How They Explain, Correct and Enhance the Reports*, 31 AM. J. LEGAL HIST. 9, 29–30 (1987) [hereinafter Oldham, *Eighteenth Century Judge's Notes*] (describing the special case stating that additional information regarding this procedure was found in the notes of judges at the time).

289. *See* 3 BLACKSTONE, *supra* note 109, at 378; 2 TIDD, *supra* note 109, at 597–98.

290. *See* 3 BLACKSTONE, *supra* note 109, at 378; 2 TIDD, *supra* note 109, at 597–98; OLDHAM, THE MANSFIELD MANUSCRIPTS, *supra* note 109, at 131; Oldham, *Seventh Amendment Right*, *supra* note 103, at 231, 233–35.

291. *See* 3 BLACKSTONE, *supra* note 109, at 378; 2 TIDD, *supra* note 109, at 598–99.

292. *See* 2 TIDD, *supra* note 109, at 598–99. Under the special case, because the factual conclusions of the jury were not entered on the record, i.e., only a general verdict was entered on the record conditioned upon resolution of the law, "the parties [were] precluded . . . from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law." 3 BLACKSTONE, *supra* note 109, at 378; 2 TIDD, *supra* note 109, at 598. If the parties agreed, the court

6. A Comparison of Modern Procedures to the Common Law Procedure of the Special Case

Similar to the special verdict, some comparison can be made between the common law special case and the modern special verdict. Also some comparison can be made between the common law special case and the modern general verdict with answers to interrogatories. Like the modern procedures, under the special case, the facts are determined by the jury.[293]

In *Baltimore & Carolina Line, Inc. v. Redman*, the Supreme Court attempted to compare the procedure of the modern judgment notwithstanding the verdict to the common law special case.[294] In that case, the Court stated that at common law questions of law could be reserved for a later ruling by the court and the result could be judgment for one party when the jury had found for the other party.[295] The Court stated that the sufficiency of the evidence was such a question of law.[296] As a result, where the Court found the evidence was insufficient, judgment for the defendant rather than a new trial was appropriate.[297]

While the Supreme Court attempted to compare the common law procedure of the special case (in that case, referred to as reservation of an issue of law) to the modern procedure of judgment notwithstanding the verdict, the procedures are very different. Under the common law, the

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could permit a special case to be amended to a special verdict so that a law question would be resolved by a higher court on writ of error. *See* 2 TIDD, *supra* note 158, at 898. Henderson argued that the jury generally had little involvement under the procedures of the special case (also called case reserved or case stated) and the special verdict. *See* Henderson, *supra* note 30, at 305–07. Professor Oldham contested this finding of Henderson as to the special case. *See* Oldham, *Seventh Amendment Right*, *supra* note 103, at 235. Under his study of the notes of Lord Mansfield, he found that the jury was as much involved in suits that involved the special case as in other suits. *Id*.

293. Under the common law, this determination by the jury seemed to occur only when counsel did not agree on the facts. *See supra* text accompanying note 288.

294. Balt. & Carolina, Inc. v. Redman, 295 U.S. 654 (1935). In *Redman*, after both parties presented evidence to the jury, the defendant moved to dismiss the complaint and also for a directed verdict on the ground that the evidence did not support a jury finding for the plaintiff. *Id*. at 656. The court gave the jury the case subject to the court's reservation of its decisions on the motions. *Id*. Under the state law of New York, courts could reserve legal questions. *See id.* at 661. Because the Supreme Court ultimately decided this practice was similar to a practice of the common law, the New York state law can be disregarded for purposes of this Article. After the jury rendered a verdict for the plaintiff, the court denied the motions. *See id*. at 656. The court of appeals determined that the evidence did not support a verdict for the plaintiff, reversed the decision of the trial court and ordered a new trial. *Id*.

295. *See id*. at 659–60.

296. *See id*. at 659.

297. *See id.* at 661. The Supreme Court attempted to distinguish *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913), in which the Court found unconstitutional judgment notwithstanding the verdict. *See Redman*, 295 U.S. at 657–59. The Court stated that unlike in *Slocum*, the lower court had reserved the question of the sufficiency of the evidence posed by the defendant's motion to dismiss and motion for a directed verdict. *Id*. at 658–59.

facts were determined by the jury upon disagreement of the parties of the facts and then the judge or the en banc court, using the established facts, determined the legal issue.[298] In contrast, under the modern procedure of judgment notwithstanding the verdict, a party requests a re-examination of the facts and the law, and the judge, independent of the decision of the jury, examines the facts presented at trial and the governing law.[299] Under the common law, the only method by which such a determination of the sufficiency of the evidence could be made was by a motion for a new trial, described *infra*.[300]

The Supreme Court has held that the rules of the English common law in 1791 govern the constitutionality analysis under the Seventh Amendment. The special case is consistent with the other common law procedures described in this Article. Under this procedure, if the parties could not agree on the facts, the jury decided the facts, and the judge or the en banc court decided only legal questions.

D. Procedures After the Verdict

1. Arrest of Judgment

In addition to the use of procedures that affected the verdict before or surrounding the verdict, common law courts could "arrest the judgment" after trial.[301] According to Blackstone, a motion for arrest of judgment was

298. *See supra* text accompanying notes 287–92.

299. *See supra* text accompanying notes 42–45.

300. *Redman* cited the pre-Amendment English cases of *Carelton v. Griffin*, *Coppendale v. Bridgen*, *Bird v. Randall*, *Price v. Neal*, *Basset v. Thomas*, *and Timmins v. Rowlinson* regarding the procedure of case stated. *See id*. at 659–60 n.5. The cases do not, however, support the constitutionality of the modern judgment notwithstanding the verdict. *See* Timmins v. Rowlinson, 97 Eng. Rep. 1003 (1765) (after a jury verdict for plaintiff, court makes a legal determination interpreting statutes upon a case stated and grants judgment to defendant); Basset v. Thomas, 97 Eng. Rep. 916 (1763) (after a jury verdict for plaintiff, court makes legal determination upon the case stated—here, a document—and grants judgment to defendants); Bird v. Randall, 97 Eng. Rep. 866 (1762) (after a jury verdict for plaintiff, court makes a legal determination upon the case stated and grants judgment to defendant); Price v. Neal, 97 Eng. Rep. 871 (1762) (after a jury verdict for plaintiff, court makes a legal determination upon a case stated and grants judgment to defendant); Coppendale v. Bridgen, 97 Eng. Rep. 576 (1759) (after jury verdict for plaintiff, court makes legal determination interpreting statute upon the case stated and grants judgment to the defendants); Carleton v. Griffin, 97 Eng. Rep. 443 (1758) (after jury verdict for plaintiff, court makes a legal determination upon the case stated—here, the writings in a will—and grants judgment to the other party). The cases simply demonstrate the common law principles that the court decided questions of law upon undisputed facts and that courts interpreted writings. *See* Sward, *supra* note 168, at 616–19 (describing facts in the cases and distinguishing the case reserved from judgment notwithstanding the verdict). The facts were on the record or agreed to by the parties. *See* BAKER, *supra* note 115, at 84.

301. The en banc court decided this motion.

supported by error "intrinsic" to the record.[302] Such error occurred under three circumstances. The first circumstance was "where the declaration varie[d] totally from the original writ."[303] As an example, this happened where the plaintiff obtained a writ in debt or detinue and proceeded upon that writ to declare an action in assumpsit.[304] If the trial proceeded to verdict, the defendant could move for arrest of judgment, because "if the declaration does not pursue the nature of the writ, the court's authority totally fails."[305] The court had jurisdiction to hear only causes of action provided by writs.[306] If a trial proceeded to verdict where the declaration was not supported by writ, the verdict could not stand because the court did not have authority to hear that action.[307]

The second circumstance under which a court would grant a motion to arrest judgment was "where the verdict materially differ[ed] from the pleadings and issue thereon."[308] The verdict differed materially from the pleadings where, for example, the jury found something not alleged in the declaration.[309] Blackstone provided an example of such error where, in an action for words, the plaintiff declared "the defendant said that 'the plaintiff *is* a bankrupt'" and the jury returned a verdict finding that the defendant said "'the plaintiff *will be* a bankrupt.'"[310] The jury rendered a verdict of fact that the plaintiff did not declare. As a result, the defendant could properly move for an arrest of judgment on that verdict.[311]

The final circumstance under which a court would grant a motion for arrest of judgment was where "the case laid in the declaration [was] not sufficient in point of law to found an action upon."[312] The declaration was insufficient to found an action as a matter of law where the facts alleged could not give rise to the action.[313] The "invariable rule" was "'that whatever is alleged in arrest of judgment must be such matter, as would upon demurrer have been sufficient to overturn the action or plea.'"[314]

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302. 3 BLACKSTONE, *supra* note 109, at 393; *see* 2 TIDD, *supra* note, 109 at 612 ("The only ground of *arresting* the judgment, at this day, is some matter *intrinsic*, appearing upon the face of the record, which would render it erroneous and reversible.").
303. 3 BLACKSTONE, *supra* note 109, at 393.
304. *See id*.
305. *Id*.
306. *Id*.
307. *Id.*
308. *Id*.
309. *See id.*
310. *Id*.
311. *See id*. at 393–94.
312. *Id*. at 393.
313. *See id*. at 394.
314. *Id*.

While an arrest of judgment had at least to allege a matter that could have supported a demurrer to the pleadings, every such motion for arrest of judgment upon a matter sufficient to support a demurrer was not sufficient to support a motion for arrest of judgment.[315] The arrest of judgment was thus more narrow than the demurrer to the pleadings.[316] The reason, according to Blackstone, was:

> the verdict ascertains those facts, which before from the inaccuracy of the pleadings might be dubious; since the law will not suppose, that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant, unless he had proved those circumstances, without which his general allegation is defective. Exceptions therefore, that are moved in arrest of judgment, must be much more material and glaring than such as will maintain a demurrer: or, in other words, many inaccuracies and omissions, which would be fatal, if early observed, are cured by a subsequent verdict; and not suffered, in the last stage of a cause, to unravel the whole proceedings.[317]

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315. *See id*. at 394; *cf*. Henderson, *supra* note 30, at 316 (judgment *non obstante verdicto* or arrest of judgment appropriate only when demurrer would have been appropriate).

316. *See* 3 BLACKSTONE, *supra* note 109, at 394.

317. *Id*. Tidd stated:

> At common law, when any thing is omitted in the declaration, though it be matter of substance, if it be such as, without proving it at the trial, the plaintiff could not have had a verdict, and there be a verdict for the plaintiff, such omission shall not arrest the judgment. This rule however is to be understood with some limitation; for on looking into the cases, it appears to be, that where the plaintiff has stated his title, or ground of action, defectively or inaccurately, (because, to entitle him to recover, all circumstances necessary, in form or substance, to compleat [sic] the title so imperfectly stated, must be proved at the trial,) it is a fair presumption, after a verdict, that they were proved; but that where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption.

2 TIDD, *supra* note 109, at 614. In *Avery v. Hoole*, 98 Eng. Rep. 1383 (1778), cited by Tidd, in an action for "debt on the game laws," the declaration read, "that the defendant used a gun, being an engine to kill and destroy the game." *Id.* at 1383. The issue was whether this statement in the declaration sufficiently set forth a case for debt on the game laws. *See id*. After a verdict for the plaintiff, the defendant moved for arrest of judgment, arguing that the statement did not sufficiently support the action because the statement, literally construed, did not allege that the defendant actually destroyed the game. *See id*. Lord Mansfield noted that the defendant's original objection at *nisi prius* never contended that the plaintiff's declaration failed to allege the offense, but that the defendant objected only that the declaration was ambiguous, i.e., "that the offence was not charged in the declaration with sufficient certainty." *Id*. at 1383–84. In denying the motion to arrest judgment, Mansfield stated "It has been very truly said, that a verdict will not mend the matter, where the gist of the action is not laid in the declaration. But it will cure ambiguity." *Id*. at 1384. According to Justice Mansfield, *Frederick v. Lookup*, 98 Eng. Rep. 51 (1767), controlled in *Avery v. Hoole*. *Id.* In *Frederick*, which arose in debt on a gaming law, apparently the plaintiff alleged that the defendant lost money gambling at the parish of St. Paul's Covent Garden, but failed to pay. *See Frederick*, 98 Eng.

Blackstone cites as an example an action for slander against the defendant for his alleged reference to the plaintiff by an ethnic reference, which the defendant had denied that he had made.[318] If the jury returned a verdict that found that the defendant had indeed made the ethnic reference, the defendant could move for an arrest of judgment on the ground that to refer to the plaintiff by this ethnic term was not actionable.[319] If the court decided "to call a man [such an ethnic reference] is not actionable" the court would arrest the judgment because it is essential to the cause of action of slander that the words be actionable.[320] If, on the other hand, the date of the slander had not been declared, this would not be sufficient to arrest judgment.[321]

As another example, if a declaration was flawed because the plaintiff failed to plead a title, then the verdict would not permit the inference necessary for the verdict to cure the flaw—that is, that the jury found on evidence the fact of the title in reaching its verdict.[322] However, if the declaration was flawed because the plaintiff declared a title, but did so improperly or badly, then the verdict would permit an inference that the jury must have found the fact of the title in rendering a verdict, regardless of it having been badly declared.[323] "[O]r, in other words, nothing is to be presumed after verdict, but what is expressly stated in the declaration, or necessarily implied from the facts which are stated."[324]

Judgment could be arrested upon three circumstances. The declaration varied totally from the original writ. The verdict differed materially from the pleadings. Or the case in the declaration was not sufficient in law to found an action.

Rep. at 53. The plaintiff won a verdict in his favor at trial. *Id*. The defendant motioned for arrest of judgment, on the ground that "[i]t is not shewn nor alledged, that the offence was committed in that parish: it is laid to be 'at Westminster aforesaid,' without specifying any parish at all." *Id*. at 53. The court found, however:

> This is after verdict. It must have been proved at the trial, "that the offence was committed in the parish of St. Paul's Covent Garden:" for, the jury have found "that Sir Thomas doth owe to the poor of that parish." . . . "that wheresoever it may be presumed that anything must of necessity be given in evidence, the want of mentioning it in the record will not vitiate it after a verdict." . . . It is only a title defectively set forth. There is nothing upon the record contrary to it.

Id.

318. *See* 3 BLACKSTONE, *supra* note 109, at 393.
319. *See id*.
320. *Id*.
321. *Id*. at 394.
322. *See id*.
323. *See id*.; 2 TIDD, *supra* note 109, at 614–15.
324. 2 TIDD, *supra* note 158, at 919.

2. A Comparison of Modern Procedures to the Common Law Procedure of Arrest of Judgment

While both the modern judgment notwithstanding the verdict and the common law arrest of judgment occur after a jury verdict, judgment notwithstanding the verdict is not similar to the arrest of judgment.[325] Under the modern procedure of judgment notwithstanding the verdict, a judge may dismiss a case after a jury renders a verdict for the plaintiff.[326] The standard for judgment notwithstanding the verdict is the same standard for dismissal by summary judgment or directed verdict.[327] A judge determines whether a reasonable jury could find for the non-moving party.[328] Under the motion, the sufficiency of the evidence is examined unlike under the common law arrest of judgment (and the common law judgment notwithstanding the verdict), which examines only the sufficiency of the pleadings.

In the majority opinion in *Slocum v. New York Life Insurance Co.*, which is not the current law, the Supreme Court distinguished the modern judgment notwithstanding the verdict from the arrest of judgment. The Court described that under the common law, the only ways to avoid a verdict without a new trial was under the motion for judgment *non obstante verdicto* and under the motion to arrest judgment on the verdict.[329] Both of these motions could be granted after consideration of only the pleadings and not the evidence, unlike the action that the defendant sought in *Slocum*.[330] In the denial of a new trial to the plaintiff, the circuit court of appeals had found facts and usurped the power of the jury to decide facts.[331] The circuit court should have, however, instructed the jury that insufficient evidence had been presented on behalf of the plaintiff.[332] The Court stated that a court may direct the jury to find a certain verdict but may not avoid a jury, disregard a verdict, or decide fact issues itself.[333] The Court stated that even in a case in which the facts are undisputed, the jury must decide the facts unless the parties waive their

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325. Under the common law, although the equivalent motion to the arrest of judgment for the plaintiff was called judgment notwithstanding the verdict, there was no common law procedure similar to the modern judgment notwithstanding the verdict.

326. *See supra* text accompanying notes 42–45.

327. *See supra* text accompanying notes 42–45, 49.

328. *See supra* text accompanying notes 42–45, 49.

329. *See* Slocum v. New York Life Ins. Co., 228 U.S. 364, 381 (1913).

330. *See id.* at 382.

331. *See id.* at 380.

332. *Id.*

333. *See id.* at 387–88.

right to a jury trial.[334] The Court concluded that "[w]hether in a given case there is a right to a trial by jury is to be determined by an inspection of the pleadings, and not by an examination of the evidence."[335]

The dissent attempted to compare judgment notwithstanding the verdict to other practices including the Pennsylvania law and the federal practice in Pennsylvania courts of the reservation of a point of law under judgment *non obstante veredicto*.[336] The dissent stated that the fact that the judgment *non obstante verdicto* pertained only to a dismissal at the pleadings stage and not a dismissal after a jury verdict was a matter of form not substance.[337]

The analysis of the common law procedures by the majority in *Slocum* is sound. It essentially became irrelevant, however, given the subsequent decision in *Redman* that judgment notwithstanding the verdict was constitutional. The common law procedures of arrest of judgment and judgment *non obstante verdicto* did not permit the court to grant judgment contrary to the verdict of a jury that was found upon insufficient evidence. Instead, under the common law, a new trial was required under those circumstances.

Thus, in the discussion of modern procedure, the English common law procedure of the arrest of judgment has not been adequately taken into account. The common law principles underlying the arrest of judgment have not been recognized. Under the common law, if a jury found a verdict, it was presumed that it properly did so if the finding was generally supported by the pleadings. The finding of the jury was given great weight and the court arrested judgment only when there were legal deficiencies between the action or verdict and the pleadings. As described more below, these principles comport with the principles underlying the other common law devices.

3. New Trial

Another procedure by which common law courts in England affected verdicts after a jury trial was by order of new trials. Under the English common law, the power of the court to order a new trial after a jury verdict was a valued part of the jury system. Lord Mansfield commented: "if the Courts of Common Law had not power to grant new trials, and have the

334. *See id.* at 385.
335. *Id*. at 398.
336. *See id*. at 400–28 (Hughes, J.; Holmes, J., dissenting).
337. *See id*. at 401–02.

question again examined into (though a verdict had passed), trials by juries would never have subsisted so long as they have done."[338] Lord Mansfield also wrote that courts granted new trials with more liberality than in the past:

> But, for some centuries past, by increase of commerce, &c. matters of the greatest consequence, and containing a variety of intricate facts, are become the subjects of this sort of trial [(jury trials)]; and, therefore, though they are permitted to stand, from the real, and intrinsic, excellence of them, yet, to prevent the inconvenience, in modern times, of tying down the party absolutely by the verdict of a jury in all cases, Courts have been more liberal in granting new trials than formerly.[339]

A court could grant a new trial for a variety of reasons. Blackstone wrote: "a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel or attornies [sic], or even of the judge or jury."[340] The grounds for a new trial included: (1) "want of notice of trial";[341] (2) "any flagrant misbehavior of the party prevailing towards the jury";[342] (3) "any gross misbehavior of the jury among themselves";[343] (4) "the jury have brought in a verdict without or contrary to evidence";[344] (5) "exorbitant damages";[345] or (6) "if the judge

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338. Bright v. Eynon, 96 Eng. Rep. 1104, 1105 (1757) ("so necessary is this power to the attainment of justice—so beneficial is it to the people").

339. *Id.* at 1106. Previously, the only alternative to overturning a verdict was by attaint. Blackstone wrote, "Formerly the only remedy for reversal of a verdict unduly given, was by writ of *attaint*." 3 BLACKSTONE, *supra* note 109, at 389. However, the concept of attaint was replaced by a new trial and eventually attaint became obsolete in eighteenth century England. *See id*.

340. 3 BLACKSTONE, *supra* note 109, at 393.

341. *Id.* at 387; s*ee* 2 TIDD, *supra* note 109, at 605.

342. *See* 3 BLACKSTONE, *supra* note 109, at 387; *see also* 2 TIDD, *supra* note 109, at 605.

343. *See* 3 BLACKSTONE, *supra* note 109, at 387; 2 TIDD, *supra* note 109, at 605 (noting that the misbehavior of the jury can include "casting lots for their verdict"); BULLER, *supra* note 109, at 320 (stating, "New trials are often granted for the misbehavior of the jury, as if they cast lots for their verdict").

344. *See* 3 BLACKSTONE, *supra* note 109, at 387; 2 TIDD, *supra* note 109, at 606–07; BULLER, *supra* note 109, at 321; Woodgate v. Knatchbull, 100 Eng. Rep. 80, 84 (1787); Hoskins v. Pickersgill, 99 Eng. Rep. 623, 624 (1783); Bright v. Eynon, 96 Eng. Rep. 1104, 1106 (1757); *see also* THE COMPLETE JURYMAN, *supra* note 109, at 186 (1752) (A judge may order the jury attainted or a new trial when the jury makes a "finding contrary to the evidence" or when the jury "find[s] out of the Compass of the issue.").

345. *See* 3 BLACKSTONE, *supra* note 109, at 387; 2 TIDD, *supra* note 109, at 607–08 (noting that "the damages must be such, as appear at first blush to be outrageous, and indicate passion or partiality in the jury"). If a jury rendered excessive damages, a court could order a new trial, courts generally did not order such new trials in cases which involved uncertain damages. *See* BULLER, *supra* note 109, at

himself has mis-directed the jury."[346] It was within the "discretion" of the court to grant a new trial.[347] "[T]he courts [did not] lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there [were] strong probable grounds to suppose that the merits [had] not been fairly and fully discussed."[348] A court could not grant a new trial "where the scales of evidence [hung] nearly equal: that, which [leaned] against the former verdict, [was] ought . . . very strongly to preponderate."[349]

Only the en banc court would decide such motions for new trials.[350] The trial judge would report the evidence to the en banc court,[351] and "if [the judge] declare himself dissatisfied with the Verdict, it is pretty much of Course to grant" the new trial.[352] Lord Mansfield emphasized, however, the importance of the en banc decision when he stated that a new trial is ordered "where the jury have given a verdict against the opinion, not only of a single Judge, but of the whole Court."[353]

Bright v. Eynon,[354] decided in 1757, is an example of a case in which the en banc court ordered a new trial where the evidence was insufficient to support the verdict.[355] The case involved a debt owed by the defendant, which was never paid, and the issue in the case was whether the plaintiff, the executor of an estate, had proven fraud by the defendant in allegedly attempting to avoid the debt.[356] The plaintiff offered evidence of a note dated September 29, 1753, in which the defendant borrowed sixty pounds from a Mrs. H.C.[357] Under the terms of the loan, the defendant agreed to pay interest at the rate of five percent and to pay the principal upon six

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321; Thomas, *supra* note 25, at 775–82; *cf.* Lettow, *supra* note 109, at 512–13, 547 (distinguishing between the greater control of the jury by the King's Bench than the Common Pleas court).

346. 3 BLACKSTONE, *supra* note 109, at 387; *see* 2 TIDD, *supra* note 109, at 606; BULLER, *supra* note 109, at 321; *see also* THE COMPLETE JURYMAN, *supra* note 109, at 264 ("General Causes of new Trials are want of due Notice, Practice with, or Misdemeanors of the Jury, in either Party or their Agents, the Absence of some material Witness, which they could not then have, Verdict against Evidence, excessive damages, etc."); Henderson, *supra* note 30, at 311–12 (discussing English courts' practice of granting new trials).

347. *See* 3 BLACKSTONE, *supra* note 109, at 392.

348. *Id*. at 391.

349. *Id*. at 392.

350. Lettow, *New Trial*, *supra* note 109, at 525; Scott, *supra* note 105, at 682.

351. *See* BULLER, *supra* note 109, at 321; Lettow, *New Trial*, *supra* note 109, at 543.

352. BULLER, *supra* note 109, at 321.

353. Bright v. Eynon, 96 Eng. Rep. 1104, 1104 (1757). In at least some cases, a different judge would sit for the second trial. *See, e.g.*, Tindal v. Brown, 99 Eng. Rep. 1033 (1786).

354. *Bright*, 96 Eng. Rep. 1104 (1757).

355. *Id.*

356. *Id.*

357. *Id.*

months notice.[358] After the defendant admitted that the note was his and that the plaintiff had given him six months notice, the plaintiff rested his case.[359] Attempting to rebut this evidence, the defendant offered a "subsequent defeasance-note" from Mrs. H.C. dated October 10, 1753, all in the hand-writing of the defendant but purportedly also signed by Mrs. H.C.[360] This note stated:

> I do hereby promise to Mr. John Eynon, that, in consideration of his paying me interest for the £60 he has of mine, after the rate of £5 per cent. [sic] for my life, the money shall be his at my death; and the note he has given me for the same shall be null, and void.[361]

The plaintiff argued that the defendant forged the note.[362] The available evidence in the case included among other things that Mrs. H.C. had very little money, that she had no special relationship with the defendant, and that she also made several attempts to recover her money from the defendant.[363] The jury found for the defendant and the plaintiff moved for a new trial.[364] In his discussion of whether the motion for a new trial should be granted, Lord Mansfield, who had tried the case, stated that:

> [A]ll presumptions, arising either out of the evidence, or from the nature of the question, must be construed favourably in support of the verdict; therefore, the Judge certifying only, that he thinks the weight of evidence was against the verdict, or, that, if he had been on the jury, he should have been of a different opinion, this would not be a foundation for a new trial . . .; and, therefore, it is proper, that a special report should be made, to shew the foundation of the Judge's dissatisfaction, that the whole Court may judge whether it is well grounded, or not.[365]

Lord Mansfield found that this standard was satisfied in that case where there was sufficient evidence to infer fraud on the part of the defendant.[366] The rest of the court agreed and a new trial was granted.[367]

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358. *Id.*
359. *Id.*
360. *Id.*
361. *Id.*
362. *See id.*
363. *See id.* at 1105.
364. *See id.*
365. *Id*. at 1106.
366. *See id*. at 1107.
367. *See id*.; *see also* Shirley v. Wilkinson, 99 Eng. Rep. 529 (1781) (new trial ordered upon court determining that the jury should have found certain evidence material but they did not); Meres v.

Thus, under the common law, in considering a motion for a new trial, the en banc court would construe the evidence in favor of the verdict winner and would order a new trial only when the verdict weighed strongly against the evidence.

4. A Comparison of Modern Procedures to the Common Law Procedure of the New Trial

The modern procedure compares in some respects to the common law procedure of a new trial. Under the modern procedure of the new trial, like under the common law, a new trial could be ordered for many different reasons, including that the evidence is insufficient to support a verdict for the plaintiff, or the judge made an error with respect to the admission of evidence in the case.[368] However, the standard for a new trial under the common law was higher than under the present modern procedure. Under the common law, the evidence was to be construed in favor of the verdict, and in order for the new trial to be granted the evidence must not be nearly equal for both parties.[369] It was not enough for the trial judge to find the verdict against the weight of the evidence.[370] On the other hand, under modern procedure, a new trial may be granted if the judge finds the verdict against the weight of the evidence, and the evidence need not be construed in the light most favorable to the verdict winner.[371] Even if substantial evidence supports the jury verdict, a judge may order a new trial.[372]

The modern motion for judgment notwithstanding the verdict also differs from the common law motion for a new trial. While under both motions the sufficiency of the evidence is examined, under the common law a new trial was granted, while under the modern judgment notwithstanding the verdict, judgment is granted to the party who lost the jury trial.[373]

Justices of the Supreme Court have described the common law new trial in their discussion of the constitutionality of modern procedures. In *Slocum v. New York Life Insurance Co.*, in its consideration of the constitutionality of the modern judgment notwithstanding the verdict, the Court distinguished it from the common law new trial. The Court decided

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Ansell, 95 Eng. Rep. 1053 (1771) (new trial ordered after erroneous admission of evidence).

368. *See supra* text accompanying notes 50–53.

369. *See Bright*, 96 Eng. Rep. at 1106; 3 BLACKSTONE, *supra* note 109, at 392.

370. *See supra* text accompanying notes 348–49.

371. *See supra* text accompanying notes 50–53.

372. *See supra* text accompanying note 52.

373. *See supra* text accompanying notes 42–45, 49.

that although the evidence at the trial did not sustain a verdict for the plaintiff under the law, a new trial should have been granted instead of judgment for the defendant because the new trial was the only re-examination of the facts found by a jury permitted under the English common law.[374] Again, the analysis of common law procedure by the Court in this case essentially became irrelevant after the decision in *Redman* that judgment notwithstanding the verdict was constitutional.[375]

In *Gasperini v. Center for Humanities, Inc*.,[376] the majority of the Court, in its decision that the appellate review of the denial of a new trial motion for excessiveness was constitutional, abandoned any comparison to the common law. In his dissent, however, Justice Scalia distinguished the modern appellate review of the denial of a new trial motion for excessiveness from the practice under the English common law.[377] Justice Scalia stated that such review did not exist under the English common law.[378] If the trial judge did not recommend a new trial, the en banc court would not grant a new trial.[379] In his separate dissent, Justice Stevens interpreted the English common law differently than Justice Scalia.[380] Justice Stevens stated that the English common law did not indicate that the recommendation of the trial judge was required for the en banc court to grant a new trial.[381] While Justice Scalia was correct in stating that, at least in many circumstances, the en banc court would not grant a new trial except upon the recommendation of the trial judge,[382] it does appear that under certain circumstances a new trial could be granted without the permission of the trial judge.[383]

The common law procedure of the new trial has characteristics similar to other common law procedures. Under the common law, the verdict of the jury was given significant weight and the evidence was construed in favor of the verdict. Also, a case would not be retried unless the result clearly favored the party against whom the jury decided.

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374. *See* Slocum v. New York Life Ins. Co., 228 U.S. 364, 369–75, 379, 399–400 (1913).
375. *See supra* text accompanying notes 75–82.
376. 518 U.S. 415 (1996).
377. *Id.* at 455–57 (1996) (Scalia, J., dissenting).
378. *Id*.
379. *See id*.
380. *See id*. at 443–46.
381. *See id.* (Stevens, J., dissenting).
382. Justice Scalia cites the following cases which at least in part support the proposition that the trial judge must recommend a new trial for the entire court to grant the new trial: Berks v. Mason, 96 Eng. Rep. 874, 874–75 (1756); Bright v. Eynon, 97 Eng. Rep. 364 (1757); Boulsworth v. Pilkington, 84 Eng. Rep. 1216 (1682); Redshaw v. Brook, 95 Eng. Rep. 887 (1769); Sharpe v. Brice, 96 Eng. Rep. 557 (1774); and Wood v. Gunston, 82 Eng. Rep. 867 (1655). *See Gasperini*, 518 U.S. at 457 n.5.
383. *See* Oldham, *Eighteenth Century Judges Notes*, *supra* note 288.

The above discussion regarding the English common law procedures demonstrates that the common law procedures differ substantially from the modern procedures. Also, the common law devices could have been described more completely and comparisons to modern procedures could be said to be oversimplified. This may have contributed to the almost invariable constitutional yes associated with modern procedural devices. The Supreme Court has not set forth principles derived from the English common law apart from an apparent distinction between law and fact made by the Court. As seen above, however, consistent principles flow from the common law. The next Part explores the principles that the English common law expounds and urges the adoption of these principles in the assessment of the constitutionality of modern procedural devices.

III. COMMON LAW PRINCIPLES TO ASSESS THE CONSTITUTIONALITY OF MODERN PROCEDURAL DEVICES THAT AFFECT THE RIGHT TO A JURY TRIAL

In the first section of this Part, the differences between the common law procedures and the modern procedures are highlighted. In the section that follows, the principles that derive from the English common law are set forth to guide the future analysis of the constitutionality of modern procedures that affect the jury trial right.

A. The English Common Law and Modern Procedure

Early on, the Supreme Court stated that the common law to which the Seventh Amendment referred was the English common law in 1791.[384] The Court specifically recognized a role for the English common law in the analysis of the constitutionality of modern procedural devices that affected the jury trial right.[385] The Court examined procedures that affected the jury trial under the English common law and compared those devices to modern devices.[386] In these analyses, the common law procedures were described incompletely and stated to be inconsistent, although this was not a necessary conclusion. As a result, as set forth below, significant differences between the common law and modern procedures were characterized as insignificant.

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384. *See supra* text accompanying notes 59–67.

385. *See supra* text accompanying notes 59–103.

386. *See supra* text accompanying notes 168–99, 232–49, 269–73, 282–86, 294–300, 329–37, 374–82.

First, under none of the common law procedures, except under the motion for a new trial, did a court engage in an analysis of whether there was sufficient evidence to prove the cases of the respective parties. To the contrary, under modern procedures that play a significant role in litigation, including summary judgment, the directed verdict, and judgment notwithstanding the verdict, the judge engages in an evaluation of the sufficiency of the evidence to determine if a reasonable jury could find for the non-moving party.

Second, under the common law, except under the motion for a new trial, the court considered true all of the conclusions that the evidence of the non-moving party was to prove.[387] On the other hand, under modern procedures—again including summary judgment, the directed verdict, and judgment not withstanding the verdict—considering the evidence of both parties, the judge engages in a decision as to whether he thinks a reasonable jury could find for the plaintiff. Under the common law, the issue was whether there was any evidence for the case of the plaintiff, not how much or how a reasonable jury would view the evidence. Moreover, the judge did not decide whether no evidence existed. The parties agreed or were required to agree when, for example, only the meaning of a writing was at issue.

Next, under none of the common law procedures, except the motion for a new trial, did the court consider any of the evidence of the moving party.[388] The exclusion of the consideration of the evidence of the moving party under all motions, except motions for a new trial, demonstrates the characteristic under the common law that the jury decided any issue or ambiguity of fact. On the other hand, under modern procedures that play a significant role in litigation, including summary judgment, the directed verdict, and judgment notwithstanding the verdict, the judge considers the evidence of the moving party in addition to the evidence of the non-moving party. Thus, the modern procedural system is dissimilar in significant ways from the common law rules under which the federal system is constrained.

The constitutionalization of the modern procedures appears to have resulted from the formulation by the Court of a constitutionality test unconnected to principles of the English common law.[389] In the 1930s, in its assessment of the constitutionality of a new device that affected the jury trial, the Court decided a device that affected the jury trial right was

387. *See supra* text accompanying notes 111, 122–26, 340–49.
388. *See supra* text accompanying notes 111, 122–26, 340–49.
389. *See supra* text accompanying notes 54–108.

unconstitutional if it did not exist at English common law in 1791.[390] A minority of the Court stated that the standard to assess the constitutionality of modern procedural devices should be more general, not tied specifically to the procedures at common law.[391] This standard would preserve the substance or essentials of the jury trial in order to safeguard the functions of the jury. Later, a majority of the Court shifted from requiring that a procedure exist at English common law to this more indefinite standard that the jury trial must be preserved in its substance, in only its most fundamental elements, and not in the great mass of procedural forms and details.[392] While this anti-formalistic approach appears reasonable, the Court has never set forth the fundamental or essential elements of the common law. In this discussion, the Court has referred only to the characteristic that facts are decided by the jury and the law by the judge.

Recently, there has been a sharper turn from the original interpretation of the Seventh Amendment. The Court has justified the re-examination of facts tried by a jury by stating that facts may become law, at that time justifying the intervention of the judge.[393] This treatment of facts by the courts has been said to be necessary for the fair administration of justice. Also, the Court has recently examined whether a judge or a jury could better determine the issue at hand.[394]

Scholars who have examined the English common law procedures to attempt to evaluate the requirements of the Seventh Amendment have, like the Supreme Court, not described the devices completely and have referred to them as inconsistent. Their analyses have resulted in a conclusion similar to that of the Supreme Court—the adoption of a standard to assess the constitutionality of modern procedural devices that does not recognize specific characteristics of the English common law in 1791.[395]

The only element of the common law to which the Supreme Court and scholars have referred is a distinction between law and fact: law is decided by judges and facts are decided by juries. In its decisions, which have assessed the constitutionality of modern procedures that affect the jury trial right, the Court has not, however, enforced the law/fact distinction. Under most of the procedures, including summary judgment, for example,

390. *See supra* text accompanying notes 64–67.
391. *See supra* note 67.
392. *See supra* text accompanying notes 69–103.
393. *See supra* text accompanying notes 89–93.
394. *See supra* text accompanying notes 94–103.
395. *See supra* text accompanying notes 104–06.

judges themselves conduct a factual inquiry by an examination of the evidence to determine what a reasonable jury could find.[396] As described here, other than under a motion for a new trial, a factual inquiry by judges quite simply was not permitted under the common law. While the law/fact distinction may be an appealing characteristic of the common law, the common law procedures must inform this distinction, and principles developed from the procedures can facilitate this analysis.

B. Principles to Assess the Constitutionality of Modern Procedures that Affect the Jury Trial Right

The question then becomes by which principles should the constitutionality of modern procedures that affect the jury trial right be assessed. The Seventh Amendment preserves the right to a jury trial and requires that facts tried by a jury may be re-examined only according to the "rules of the common law."[397] The long-standing jurisprudence of the Supreme Court recognizes the English common law in 1791 as those "rules of the common law."[398] The Court's established constitutionality test preserves the substance of the jury trial at common law. Consistent principles derived from the English common law would give effect to both the Amendment and the Court's test.

Under the first principle, those procedures permitted explicitly under the English common law should be deemed constitutional as used in the federal courts. Because only the common law limits the procedures that affect the jury trial right, those procedures permitted under the common law would be constitutional. Second, a procedure that the English common law courts specifically proscribed would be deemed unconstitutional. Because the common law limits the procedures that affect the jury trial right, procedures proscribed under the common law would be unconstitutional. Third, if a procedure was not specifically proscribed under the common law, the procedure may be constitutional. The Court and scholars have correctly recognized that the English common law need not restrict the development of new procedures as long as those procedures comport with the common law. Fourth, modern procedures that relate to problems with the pleadings may be constitutional. Under the common law, those procedures were the demurrer to pleadings and the arrest of judgment. Under the demurrer to the pleadings, the defendant, for

396. *See supra* text accompanying notes 37–38.
397. U.S. CONST. amend. VII.
398. *See supra* text accompanying notes 54–103.

example, could demur to the declaration of the plaintiff such that the allegations of the plaintiff were taken as true. If there was no cause of action pursuant to the law, the defendant won; and if there was a cause of action, the defendant lost because he had admitted plaintiff's allegations. A motion for the arrest of judgment similarly involved a problem with the pleadings. Upon an error intrinsic to the record or, in other words, that arose on the face of the record, the authority of the court could fail. There, the court could arrest judgment, ordering judgment for the party against whom the jury had ruled. Because the common law permits the evaluation of the pleadings, modern procedures which so assess the pleadings should be constitutional.

The next three principles are related. Under the fifth principle, except upon a motion for a new trial, a court should not consider the evidence of the party that has requested judgment. Sixth, again, except upon a motion for a new trial, the moving party should admit the truth and conclusions of the evidence of the non-moving party. Seventh, except upon a motion for a new trial, a court should not analyze the sufficiency of the evidence of what facts the jury should find or should have found. Rather the court should decide only pure legal questions upon facts decided by the jury or agreed to by the parties. Eighth, the moving party loses if the admitted facts presented a legal claim. Under the common law, the admission of the facts by the moving party, and the consideration of the court of only this evidence, ensured that only the jury determined questions of fact. If the facts are not admitted, the court must necessarily engage in an analysis of the facts—an analysis confined to the jury under the common law. If evidence of the moving party is considered, the court necessarily must engage in an analysis of the facts—again an analysis confined to the jury under the common law. If the facts are admitted and there is a legal claim, there are no facts for the jury to decide and judgment is appropriately given to the nonmoving party.

For example, under the common law, the defendant could demur to the evidence of the plaintiff stating that the factual conclusions of the plaintiff did not amount to a legal cause of action. The evidence of the plaintiff and the resulting possible conclusions were taken as true, and the evidence of the defendant was not considered. The facts were specifically set forth by the parties for the legal decision of the court. The court would not weigh the evidence. Because the defendant admitted the evidence, the plaintiff would win and the defendant would lose if the factual conclusions represented by the evidence of the plaintiff were possible. The standard was not whether the conclusions were probable.

Under the ninth principle, the emphasis lies on the right of the parties for a jury to hear and decide the case. Under the common law, these procedures included the new trial motion, by which an error by the jury or judge resulted in a new trial; the nonsuit, by which a plaintiff could withdraw his case if he thought it insufficient and could try the case again; the direction of the verdict, by which the judge could direct but not require a jury to find a certain way; and the special verdict, whereby the jury would decide whether the court should decide a legal question upon the facts found by the jury. Moreover, other common law procedures, like the demurrer to the evidence, highlight this right by the requirement that the en banc court could not dismiss the case without a jury determination unless the facts and conclusions of the non-demurring party were admitted.[399]

Because the Supreme Court has stated that the English common law in 1791 governs the analysis under the Seventh Amendment, principles from this common law should guide the constitutionality assessment. The principles set forth above appropriately give weight to the common law but do not unnecessarily restrict the development of new procedures consistent with the principles underlying the common law. The analysis of whether modern devices are constitutional is multi-leveled, however. First, a court should examine whether the modern procedures comport with the common law principles. Whether the devices comport with the common law principles should involve an analysis of the apparent standard under which the modern devices operate and the actual manner in which courts have applied the standards, which may differ from the apparent standard. Second, if a modern procedure violates the common law principles, the role of the device in the federal litigation system must be examined. Many of the modern devices are well established procedures by which federal judges manage their crowded dockets. The constitutionality of these devices should be reviewed according to principles of stare decisis that recognize, among other things, reliance and the rule of the law.[400] A

399. A final principle that could derive from the common law is that certain issues should be determined only by a panel of trial judges. Under the common law, these procedures included the legal issues under the demurrer to the pleadings, demurrer to the evidence, special verdict, special case and the arrest of judgment. *See* BAKER, *supra* note 115, at 79, 83–85, 138–39. Moreover, under the common law, the en banc court also decided whether a lack of evidence required a new trial. *See id*. Because the Seventh Amendment provides that no fact should be re-examined by "any Court of the United States" except according to the rules of the common law, arguably the specific make-up or composition of the courts in England in 1791—in other words, that the court was en banc—is irrelevant to the requirements of the Seventh Amendment. *See* U.S. CONST. amend. VII.

400. *See* Planned Parenthood v. Casey, 505 U.S. 833, 854–55 (1992). How the Seventh Amendment itself is affected by stare decisis principles should be examined. In his dissent in *Parklane*

reanalysis of the constitutionality of modern procedural devices may lead to the conclusion that certain common law procedures that have in some form been adopted by modern courts, such as the special verdict, should be used more extensively because the procedures promote the role of the jury as the factfinder and permit a court to determine whether the jury followed the law. Moreover, such a reanalysis may lead to the conclusion that certain devices are unconstitutional. Only a reassessment of the modern procedural devices under the common law principles and stare decisis will adequately demonstrate the constitutionality or unconstitutionality of the procedures and guide the development of new procedures that affect the jury trial right.

CONCLUSION

Courts continue to remove matters from the consideration of juries and to review cases decided by juries. This occurs in the context of a Seventh Amendment jurisprudence under which the Supreme Court has almost invariably decided that new procedures that affect the jury trial right are constitutional. A look back at history reveals consistent principles derived from the English common law. These principles may begin to guide the future analysis of the constitutionality of modern procedures that affect the jury trial right.

Hosiery Co. v. Shore, 439 U.S. 322 (1979), Justice Rehnquist argued:

> [S]ince we deal here not with the common law *qua* common law but with the Constitution, no amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791.

Id. at 346 (Rehnquist, J., dissenting).