

THE RECENT EXPLOSION IN SUMMARY JUDGMENTS ENTERED BY THE FEDERAL COURTS HAS ELIMINATED THE JURY FROM THE JUDICIAL POWER

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I. THE JURY IS VANISHING FROM CIVIL CASES IN THE FEDERAL COURTS

The Federal Rules of Civil Procedure were adopted in 1938.¹ That year 19.9 % of the federal civil cases were tried.² The rate was 12.1% in 1952³ and 11.5% in 1962.⁴ By 2005, 1.7% of federal civil cases filed were tried.⁵ The decline in trials coincides with a significant increase in summary judgment.⁶ Today summary judgment is granted on issues of reasonableness, state of mind, and credibility, results that were inconceivable 23 years ago.⁷

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1. Marc Galanter, *The Hundred Year Decline of Jury Trials and the Thirty Years War*, 57 STAN. L. REV. 1255, 1258 (2005).
2. *Id.*
3. *Id.* at 1259.
4. D. Theodore Rave, *Questioning the Efficiency of Summary Judgment*, 81 N.Y.U. L. REV. 875, 883 (2006) (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004)).
5. Galanter, *supra* note 1, at 1258-59.
6. Rave, *supra* note 4, at 883-84; *But see* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Civil Cases: Drifting Toward Bethlehem or Gomorrah*, 1 J. EMPIRICAL LEGAL STUD. 591, 618 (2004) (more statistical study is needed to determine the role of summary judgment in the decline of civil trials due to the very different types of cases involved).
7. Rave, *supra* note 4, at 884 nn. 57-59 (citing Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141-164-77 (2000)) (outlining expansion of summary judgment in employment discrimination where motive is the determinative issue); Arthur L. Miller, *The Pretrial Rush to Summary Judgment: Are the Litigation Explosion, Liability Crisis, and Efficiency Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y. L. REV. 982, 1055, 1064-71 (2003) (discussing cases where summary judgment has displaced the fact finder).

Two prominent federal judges have observed, federal “trial” judges appear no longer very interested in doing their job [of trying cases].⁸ The preference for summary judgment over trial is a part of the twenty five-year turn away from the post World War II belief in law.⁹ Grants of summary judgments by district courts and affirmances by the Court of Appeals are now a daily ritual in civil rights cases.¹⁰

The summary judgment norm began with three 1986 Supreme Court decisions.¹¹ In each decision, Justice Brennan dissented. The Court has transformed summary judgment from a device limited to ascertaining whether there is any dispute about what the truth is to a trial on the merits by paper. Justice Rehnquist joined by Chief Justice Burger also dissented in *Anderson v. Liberty Lobby, Inc.*¹² They believed the court’s requirement that the judge determine whether there was sufficient evidence to meet the particular burden of proof imposed by the substantive law invaded the jury’s province of weighing the evidence.¹³

Those unconcerned with the elimination of the American civil jury take refuge in its absence in Britain. Parliament did respond to the post-World War I manpower shortage by restricting the right to a civil jury trial.¹⁴ However, the right to jury trial remains for cases involving the public interest: actions for false imprisonment and malicious prosecution, fraud, libel and slander, and cases seeking punitive damages for conduct involving an abuse of authority.¹⁵

Summary judgment proponents say its use is warranted because it is an efficient case management tool.¹⁶ This ignores the substantial increase in pre-

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8. In re Refalen Antitrust Litig., 231 F.R.D. 52, 90 (D.Mass. 2005) (William Young J.) (citing Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?* 55 SMU L. REV. 1405 (2002)). Judge Higginbotham sits on the U.S. Court of Appeals for the Fifth Circuit.
 9. Galanter, *supra* note 1, at 1258–59 (cited with approval in In re Refalen, 231 F.R.D. at 89).
 10. *Kamporous v. St. Louis Symphony Soc’y*, 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, D.J., dissenting).
 11. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
 12. *Anderson*, 477 U.S. at 268.
 13. *Id.* at 266–67 (Brennan, J., dissenting); *Id.* at 270–71 (Rehnquist joined by Burger, dissenting).
 14. Administration of Justice Act of 1933, Ch. 36 § 6 (United Kingdom); Hugh H. Bownes, *Should Trial by Jury be Eliminated in Complex Cases*, Risk Assessment & Policy Association § 1.75 Franklin Pierce Law Center (1990).
 15. Supreme Court Act of 1981, § 69 (United Kingdom); *H. v. Ministry of Defence*, 2 Q.B. 103 (1991) (holding medical malpractice action for amputation of penis did not involve the abuse of authority required for a jury trial).
 16. Rave, *supra* note 4, at 885, n.66–68 (citing Miller, *supra* note 7, at 1040) (describing views of proponents); William O. Bertelsman, *Views from the Federal Bench: Significant Developments in Summary Judgments*, KY. BENCH & BAR, Winter 1987, at 19 (reaffirmation of summary judgment as an efficient case management device); Steven Allen Childress, *A New Era for Summary Judgment: Recent Shifts at the Supreme Court*, 116 F.R.D. 183, 194 (1987) (summary judgment based on a

trial costs caused by liberal use of summary judgment.¹⁷ It also ignores the systemic judicial bias in favor of defendants created by today's summary judgment norm. The individual judge, regardless of how hard he tries to be fair, is under pressure to use summary judgment to clear his docket. He avoids a backlog of cases that keeps him in pace with the judges of his district and within the statistical norm for all federal judges published annually by the Administrative Offices of U.S. Courts.¹⁸

Arguments over the efficiency of summary judgment miss the point. The jury is the institutional check on the power of judges and central authority in the judicial branch.¹⁹ The common law did not allow the judge to withdraw a case from the jury on the evidence without the consent of the parties.²⁰ Directed verdicts were advisory comments on the evidence which could be enforced only by a new trial.²¹ Rule 50 of the Federal Rules of Civil Procedure required jurors sign a verdict directed by the judge until the 1963 Advisory Committee eliminated it.²² Summary judgment was a 19th Century procedure to prevent spurious defenses to debt collection actions extended to analogous cases.²³ When summary judgment was included in the Federal Rules of Civil Procedure in 1938, it existed in only 20 states.²⁴

desire for efficiency); William W. Schwarzer, *Summary Judgment and Case Management*, 56 ANTITRUST L.J. 213 (1987) (summary judgment encourages settlement and better case management); Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1033 (1988) (increased pressure of court congestion and litigation costs are foundation for more liberal use of summary judgment).

17. John Bronstein, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 533–38 (2007).
18. *Id.* at 539–42. See also James C. Duff, *Judicial Business of United States Court: 2007 Annual Report of Director*, Statistics Division, Office of Judges Programs, Administrative Office of U.S. Courts (2008), <http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf>.
19. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 379 (Cooley Ed. 1884). (quoted by Judge Samuel Bryan writing as Centinel, *Letters of the Centinel*, reprinted in, *Pennsylvania and the Federal Constitution 1787–1788*, 584 n.85 (J. McMaster & F. Stone Ed. 1888)); Charles I. Wolfram, *The Seventh Amendment Right to Jury Trial*, 57 MINN. L. REV. 639, 671–73 (1973); Stephen Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 599 (1993).
20. *Gibson v. Hunter*, 126 Eng. Rep. 499 (1793); *Cocksedge v. Fanshaw*, 99 Eng. Rep. 80 (1779) See also John C. Hogan, *Joseph Story on Juries*, 37 OR. L. REV. 234 n.1 (1958) (quoting Max Radin, *Handbook of Anglo-American Legal History*, 287 (1936)); JAMES OLDHAM, 1 THE MANSFIELD MANUSCRIPTS AND THE GROWTH IN ENGLISH LAW IN THE EIGHTEENTH CENTURY 70 (1992); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of the Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).
21. JAMES OLDHAM, TRIAL BY JURY, THE SEVENTH AMENDMENT AND ANGLO AMERICAN SPECIAL JURIES, 1, 18, 11–13 nn.38–46 (2006) (reviewing Lord Mansfield's trials from 1756 to 1788).
22. Advisory Committee Notes to 1963 Amendments to Civil Rules, Rule 50 (a).
23. Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. C. 67 (1855); Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 YALE L.J. 745 (1974).
24. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929).

The Supreme Court has held in three cases that the Sixth Amendment guaranty of the common law right to trial by jury in criminal cases limits the judicial power to increase criminal sentences based on facts found by the judge in the sentencing hearing.²⁵ The Framers rejected the civil law model of “efficiency in administration” and applied the common law model of “limited state power.” The Sixth Amendment guaranty of trial by jury exists to check the power of judges.²⁶ Those insisting on a constitutional guaranty of the common law trial by jury the Anti-Federalists insisted the jury exist in both criminal and civil cases.²⁷ These objections to the Constitution were satisfied by the Sixth and Seventh Amendment guarantees of the common law right to trial by jury.²⁸

The jury’s institutional independence, which allowed it to act as the institutional check balancing the power of the judge, was developed in the English Revolution of 1649–1660, the American Revolution of 1776–1783, and preserved in the adoption of the Sixth and Seventh Amendments in 1791. A discussion of that history, the limited nature of summary judgment included

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25. *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000); *Blakely v. Washington*, 542 U.S. 296, 308–09, 313–14 (2004); *United States v. Booker*, 543 U.S. 220, 243–44 (2005).
26. *Apprendi*, 530 U.S. at 478; *Blakely*, 542 U.S. at 308, 313–14.
27. “The common law right of trial by jury exists to guard against oppression and tyranny on the part of rulers.” 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 540–41 (4th Ed. 1873); “All crimes must have a trial which was speedy, public, and by an impartial jury of the county where the crime was committed, and that no person can be found guilty with the unanimous consent of such jury.” Laura Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 431–32, n.260–61 (2009) (quoting Letter from George Clinton, Governor of New York to Rhode Island General Assembly (July 26, 1788) available at [http://memory.loc.gov/cgi-bin/query/r?ammem/bdsbib:@field\(Number+@od1\(bdsdcc+c1801\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/bdsbib:@field(Number+@od1(bdsdcc+c1801)))). Letter XV of the Federal Farmer complained of the lack of a right to jury trial in the Constitution and explained the right of the people to give their general verdict as opposed to judges in all cases was an essential part of freedom: “Juries are constantly and frequently drawn from the body of the people, and freemen of the country, and by holding the jury’s right to return a general verdict in all cases sacred, we secure to the people at large their just and rightful controul in the judicial department.” *Id.* at n.264 (quoting Letter of the Federal Farmer No. XV, reprinted in *Additional Number of Letters from the Federal Farmer to the Republican; Leading to a Fair Examination of the System of Government, Proposed by the Late Convention; to Several Essential and Necessary Alterations in It; And Calculated to Illustrate and Support the Principles and Positions Laid Down in the Preceding Letters*, 130, 138 (Thomas Greenleaf 1788)). See *Blakely*, 542 U.S. at 306 (citing Letter XV by the Federal Farmer).
28. *Apprendi*, 530 U.S. 476–77, 484 n.11. One contributor in the ratification debates quoted Blackstone on the need “to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best, preservative of Liberty.” A New Hampshire Farmer, No. 3, June 6, 1788, quoted in the COMPLETE BILL OF RIGHTS 477 (N Cogan Ed. 1997); Blackstone, *supra* note 19, at 348. *Parsons v. Bedford, Breedlove, & Robeson*, 3 Pet. 433, 446, 7 L.Ed. 732 (1830) (“One of the strongest objections . . . against the Constitution of the United States was the want of an express provision securing the right of jury trial in civil cases.”).

in the adoption of the Federal Rules of Civil Procedure in 1938, and the expansion of summary judgment since 1986 is necessary to appreciate just how extensive an alteration of federal judicial power has occurred in the last 23 years. The elimination of the jury has occurred silently without discussion in the application of law to fact in individual cases over the past 23 years.²⁹

II. THE JUDICIAL POWER CONFERRED BY THE CONSTITUTION MANDATES TRIAL BY JURY AS IT EXISTED IN THE ENGLISH COMMON LAW AT THE TIME OF THE 1791 RATIFICATION OF THE SEVENTH AMENDMENT

Article III of the Constitution places the judicial power “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”³⁰ It is limited by the Seventh Amendment.³¹

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.³²

Seven States conditioned their ratification of the Constitution on guaranty of the right of trial by jury in civil and criminal cases.³³ The common law referred to in the Seventh Amendment is that of England as it existed at the time of ratification in 1791.³⁴ The systemic use of summary judgment by judges to prevent trials by jury was not the allocation of the judicial power

29. *Boyd v. United States*, 116 U.S. 616, 635 (1886) (“illegitimate and unconstitutional practices get their footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure.”); *A New Hampshire Farmer No. 3*, *Id.*; Blackstone, *supra* note 19, at 348.

30. U.S. CONST. art. III, §1.

31. *Id.*

32. U.S. CONST. amend. VII.

33. Landsman, *supra* note 19, at 600; Wolfram, *supra* note 19, at 673. The source of the language of preservation of the right to trial by jury as it existed at common law pre-dated the Constitutional Convention. *A Democratic Federalist*, PENNSYLVANIA PACKET, (October 23, 1787) (quoted in Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 297 (1966)); *Parsons v. Bedford, Breedlove, & Robeson*, 28 U.S. at 446.

34. *United States v. Wonson*, 28 F.Cas. 745, 750 (C.C. Mass. 1812) (No. 16,750); *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 377 (1913); *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935); *Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996).

conferred by the Constitution and applied for nearly 200 years since its ratification.³⁵

III. THERE WAS NO COMMON LAW PROCEDURE WHICH ALLOWED THE JUDGE TO TAKE A DECISION FROM THE JURY ON THE EVIDENCE WITHOUT THE CONSENT OF THE PARTIES

A. The Magna Charta and Contemporaneous Acts of Parliament Required Trial by Jury

1. *The Demurrer to a Pleading Admitted the Truth of the Allegations and All Inferences Submitting the Case on the Merits for or Against the Demurrant*

Trial by jury has its origins in Saxon times with vestiges in Germany, France, and Italy.³⁶ The increasing use of trial by battle after the Norman Conquest placed trial by jury in jeopardy until the 1215 adoption of the Magna Charta.

JOHN, by the grace of God King of England, . . . to all his officials and loyal subjects, Greeting

. . .No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by Law of the Land.³⁷

A 1363 Act of Parliament provided “that no man be taken or imprisoned, nor put out of his freehold, without process of law.”³⁸ Lord Coke concluded in

35. The subject has been exhaustively addressed in the works of Professor Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007); Professor Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L. Q. 687 (2004) [hereinafter Thomas, *The Seventh Amendment*]. See also John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007). (The present article addresses the historical development of the independent jury, its intended role as the institutional check to balance the power of the judge, and the alteration of that judicial power effected through the summary judgment norm of the past 23 years.).

36. BLACKSTONE, *supra* note 19, at 349.

37. 9 Hen. 3, c. 29 (1225) (*discussed in* In re Winship, 397 U.S. 358, 378–79 n.4 (1970) (Black, J., dissenting)). The original report of The Magna Charta placed this clause in Chapter 39.

38. 37 Edw. 3, c. XVIII. A 1350 Act of Parliament provided the Great Charter confirmed no one shall be put out of his freehold, franchises or custom unless it be by the Law of the Land. 25 Edw. 3, Stat. 5, c. IV. The 1354 Act of Parliament provided no man shall be put out of land or tenement, taken or

1642 from this and two other 14th century Acts of Parliament guaranteeing trial by jury that “law of the land” was “synonymous” with “due process of law.”³⁹ The Fifth Amendment guaranty of due process of law and the Sixth and Seventh Amendment guaranty of the common law trial by jury in criminal and civil cases are based on Lord Coke’s interpretation.⁴⁰

The original common law writs of Henry II were simple commands to the Sheriff. The plaintiff filed a declaration setting forth the facts of the form of action of the writ. The King’s Chancellor issued the writ allowing the action to proceed in the Court of King’s Bench or of Common Pleas.⁴¹ The defendant who wished to challenge the legal sufficiency of the declaration did so by filing a demurrer. The demurrer’s admission of the declaration ran to the entire action.⁴² Blackstone’s example was a trespass action where the plaintiff demurred to the defendant’s plea of hunting. The demurrer was overruled and judgment entered for the plaintiff if hunting was not a defense. If hunting was a defense, then the demurrer was sustained and judgment entered for defendant.⁴³ Today’s motions to dismiss and for summary judgment are fundamentally different in that the defendant receives a free shot at dismissal without risk to his defense on the merits.

2. *A Plaintiff Facing a Demurrer to the Evidence at Trial Avoided a Decision by the Judge For or Against the Demurrant and Received a Jury Trial by Refusing to Join the Demurrer*

The House of Lords addressed the demurrer to evidence at trial in the 1793 case of *Gibson v. Hunter*.⁴⁴ The question of law presented in the

imprisoned, disinherited or put to Death without being brought to Answer by due Process of the Law. 28 Edw. 3, c. III., (*discussed in Winship*, 397 U.S. at 379 nn.5–7).

39. Coke’s Institutes, Second Part, 50 (1st ed. 1642) (*discussed in Winship*, 397 U.S. at 379 n.8).

40. *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276–77, (1855) (holding the Fifth and Fourteenth Amendment guarantys of due process of law incorporated “the usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.” Justice Black believed this was an overly broad reading of due process, but he did not command a majority. *Winship*, 397 U.S. at 380 (Black, J., dissenting).

41. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY, 54 (4th ed. Reed Elsevier UK, Ltd. 2002). The plaintiff’s complaint was referred to as a declaration and the defendant’s answer was called a plea. JAMES OLDHAM, TRIAL BY JURY, THE SEVENTH AMENDMENT AND ANGLO AMERICAN SPECIAL JURIES, 21 n.33 (2006).

42. Thomas, *The Seventh Amendment*, *supra* note 35, at 707.

43. BLACKSTONE, *supra* note 19, at 323–24 n.109.

44. *Gibson v. Hunter*, 126 Eng. Rep. 499 (1793). Plaintiff brought a deceit action alleging defendant executed a bill of exchange with the name of a person that does not exist. The defendant demurred to plaintiff’s evidence of the bill and the testimony of the two clerks preparing it for defendant. The

demurrer could not be reached until the facts were determined. Since plaintiff had not joined in the demurrer, the court held the facts were uncertain and no judgment could be entered.⁴⁵

Cocksedge v. Fanshaw was a 1779 action of a London merchant seeking a refund of a duty paid on corn he held as a factor.⁴⁶ The merchant contended the ancient custom providing an exemption from the duty on corn owned by the merchant included corn he held for another. The collector demurred to the evidence at trial contending the custom was the result of fraud.⁴⁷ The Court of Appeals found the demurrer admits the truth of all the evidence. Because it was possible the custom could have a legal origin such as to promote the corn trade, it entered judgment for the plaintiff.⁴⁸

Justice Rehnquist's comparison of the demurrer to evidence to today's motion for summary judgment in dissent to the majority's holding offensive use of collateral estoppel from a prior judgment against the defendant in later actions was appropriate requires a further word.⁴⁹ Blackstone was the common law to American lawyers, in English courts, and Parliament "because, for one thing, they had no other book."⁵⁰ Blackstone described the demurrer to the evidence as available only on admission of every fact in evidence by consent and submitting the sufficiency of those facts in law to the court for judgment.⁵¹ Buller's 1772 treatise states a party faced with a demurrer to evidence may

discussion of *Gibson* and *Cocksedge* here is based on the description of those cases contained in Thomas, *The Seventh Amendment*, *supra* note 35, at 710–12.

45. *Gibson*, 126 Eng. Rep. at 499–506.

46. *Cocksedge v. Fanshaw*, 99 Eng. Rep. 80 (1779).

47. *Id.* at 80–81, 85.

48. *Id.* at 88–89.

49. *Parklane Hosiery, Inc. v. Shore*, 439 U.S. 322, 337, 349 (1979) (Rehnquist, dissenting). The majority held offensive application of collateral estoppel of an adverse prior judgment in favor of a plaintiff who was not a party to the prior action was appropriate and did not violate the Seventh Amendment. *Id.* at 330–31. The English courts applied collateral estoppel precluding litigation of matters decided in prior actions whether it be an action at law, in equity, or in the ecclesiastical courts. *Hopkins v. Lee*, 19 U.S. 109, 113–14, 1821 WL 2196 (1821). Justice Rehnquist believed offensive use of collateral estoppel in favor of a plaintiff who was not a party to the prior action denied the defendant its Seventh Amendment right to jury trial. *Parklane*, 439 U.S. at 337. His dissent included the statement that the motion for summary judgment was substantially similar to the demurrer to the evidence. *Id.*

50. John C. Hogan, *Joseph Story on Juries*, 37 OR. L. REV. 234 n.1 (1958) (quoting RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY, 287 (1936)); JAMES OLDHAM, I THE MANSFIELD MANUSCRIPTS AND THE GROWTH IN ENGLISH LAW IN THE EIGHTEENTH CENTURY 70 (1992); Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of the Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

51. BLACKSTONE, *supra* note 19, at 372.

refuse to join in the demurrer and the case will be tried.⁵² Other commentators of the times agreed.⁵³

3. *The Trial of William Penn Established the Common Law Jury's Independence From the Judge*

Medieval jurors who refused a judge's directions were subject to prosecution for the offense of attain, giving a false verdict. General dissatisfaction with the severity of attain led to its 16th century demise.⁵⁴ The jury's institutional independence from the judge developed as a part of the limitations on the royal prerogative culminating in the English Civil War which ended with the 1649 execution of Charles I, the rule of Cromwell as Lord Protector through the Restoration Parliaments, and the Restoration of Charles II in 1660.⁵⁵

In 1670, William Penn and William Meade were tried on indictment for speaking outside the closed Quaker Meeting House at Greenpeace Street in breach of the King's peace.⁵⁶ The Judge directed the jury to find Penn and Mead guilty of the offense.⁵⁷ Three times the jurors returned with a verdict finding defendants guilty of speaking at Greenpeace Street, omitting the essential element of the crime that it was in breach of the King's peace. The Judge confined the jurors without food, water, or a chamber pot overnight.⁵⁸ The jury returned the next morning with a verdict of not guilty. The Judge found the defendants guilty and sentenced them to Newgate Prison. The Judge

52. FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, 307 n.109 (London W. Strahan and M. Woodfall for C. Bathurst) (1772) (*quoted in* Thomas, *The Seventh Amendment*, *supra* note 35, at 709 n.124).

53. 2 WILLIAM TIDD, THE PRACTICE OF THE COURTS OF KING'S BENCH AND COMMON PLEAS IN PERSONAL ACTIONS AND EJECTMENT, 866 (R. H. Small ed. 3d Am. ed.) (1840); JAMES BRADLEY THAYER, A PRELIMINARY TREATISE OF EVIDENCE AT THE COMMON LAW 235 (1898).

54. OLDHAM, TRIAL BY JURY, *supra* note 21, at 63 n.107. A royal pardon was given to the jurors convicted of attain for a verdict of excessive damages. *Gaynesford v. Guildeford*, (K.B. Easter 1506) reported in J.H. BAKER, REPORTS OF CASES BY JOHN CARYLL, PART III 1501–1522 (London Seldon Society 2000), 517–18 (*discussed in* Oldham, *supra* note 21). The pardon erased the standard punishment of forfeiture of all goods, chattels, lands, and tenements to the King with their wives and children uprooted. The royal pardon was issued in response to popular dissatisfaction with the offense of attain. Prosecutions for attain ceased after the pardon of the *Gaynesford* jurors. *Id.*

55. This period was also marked by objections to general warrants that were the basis of the Fourth Amendment guaranty against unreasonable searches and seizures and conflicts between the Crown and the press. *Stanford v. State of Texas*, 379 U.S. 476, 482–83 (1965).

56. *The Trial of William Penn and William Meade*, 6 HOWELL'S STATE TRIALS 651 (1670) *reprinted at* <http://www.constitution.org/trials/penn/penn-mead.htm>.

57. *Id.* at 6.

58. *Id.* at 8–9.

found the jurors in contempt and sent them to Newgate Prison as well if they did not pay the assessed fine.⁵⁹

Penn and Mead were released.⁶⁰ Edward Bushell and three other jurors refused to pay their fines and filed for a writ of habeas corpus in the Court of Common Pleas.⁶¹ Chief Justice Vaughan ruled that while the judge determines the law, he cannot know the law until the jury has found the facts.⁶² No attainr or contempt can lie against jurors for their verdict as “the judge and jury may honestly differ in the result in the evidence as well as two judges may, which often happens.” The prisoners were discharged.⁶³

The relationship between judge and jury at common law was the same in criminal and civil cases. Professor James Oldham reviewed the trial notes of Lord Mansfield in trespass on the case actions, which are representative of civil cases of the time.⁶⁴ If the jury did not follow Mansfield’s directions, he either entered judgment on the verdict or suggested a new trial, which had to be decided by other judges of the court en banc.⁶⁵

4. Nonsuits Did Not Preclude Re-Filing the Action and Could Not Be Entered Without the Plaintiff’s Consent

The nonsuit—ancestor of today’s voluntary dismissal—existed so plaintiffs could avoid the medieval liability for amercement, a fine for bringing a false suit. If the plaintiff did not appear at trial, the nonsuit was entered, and

59. *Id.* at 10.

60. William Penn was the son of Admiral Sir William Penn, the conqueror of the Dutch and of Jamaica, who owned estates in England and Ireland. Admiral Penn obtained his son’s release. William Penn inherited his father’s estates and became a confidant of Charles II and James II. He received a royal grant of land on the Delaware River in America to satisfy the Crown’s debt to Admiral Penn. William Penn wanted to name it Sylvania, but others prevailed on him to name it Pennsylvania. Penn opened it for settlement in brotherly love. WILLIAM L. DWYER, *IN THE HANDS OF THE PEOPLE*, 43, 59 (St. Martin’s Press New York) (2002).

61. *Case of Edward Bushell*, 6 HOWELL’S STATE TRIALS 999 (22 Charles II A.D.) (1670) reprinted at <http://www.constitution.org/trials/bushell/bushell.htm>.

62. *Id.* at 5, 9. Chief Justice Vaughan also relied upon the fact the jurors can consider matters they knew from outside the courtroom, a fiction by 1670 when jurors did not have knowledge of the case as they did in the early years of the common law. See Dwyer, *supra* note 60.

63. *Bushell’s Case*, *supra* note 61.

64. OLDHAM, *supra* note 21, 1, 8, 11–13 nn.38–46. The cases involved claims for private nuisance, damage from public riots, false arrest, damages from the sheriff who allowed a prisoner to escape, negligence, breach of promise to marry, threatening a worker boycott, and malicious prosecution. These cases are discussed in detail in Professor Oldham’s published review of Lord Mansfield’s notes. See JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* (University of North Carolina Press) (1992).

65. BAKER, *supra* note 41, at 84–85.

amercement was not assessed.⁶⁶ Amercement was not used at the time of Blackstone, but the plaintiff retained the ability to take a nonsuit which left him the option to re-file the writ.⁶⁷ Blackstone stated the nonsuit was voluntary.⁶⁸ The Court of Appeals held in 1788 that a nonsuit could not be entered on defendant's motion for bringing the case in the wrong place without the consent of the plaintiff.⁶⁹ Oldham concluded from his review of the notes of Lord Mansfield's cases from 1756 to 1788 that an involuntary nonsuit could be entered on a question of law only with the plaintiff's consent to the applicable facts.⁷⁰

5. The Only Way a Judge Could Alter a Verdict Was to Recommend a New Trial to Be Determined by Other Judges of the Court En Banc; Special Verdicts Required the Consent of the Parties and Motions in Arrest of Judgment Were Limited to the Absence of Any Evidence in Support of the Action

By the 17th Century, the motion for new trial was the only means for judge to review a jury verdict.⁷¹ Blackstone stated the grounds for a new trial were: (1) want of notice of the trial, (2) misbehavior of the prevailing party to the jury, (3) misbehavior of the jurors themselves, (4) a verdict contrary to the evidence, (5) an award of exorbitant damages, or (6) an error in the judge's instructions to the jury or admission of evidence.⁷² New trials could be granted only by other judges of the court who did not preside at the trial sitting en banc on a report from the trial judge.⁷³ The evidence was construed strongly in favor of the verdict and a new trial ordered only when the verdict weighed strongly against the evidence.⁷⁴

66. BLACKSTONE, *supra* note 19, at 376–77 n.109.

67. *Id.* at 376 n.109. The primitive travel conditions of the day made appearance at trial problematic.

68. *Id.*

69. *Watkins v. Towers*, 100 Eng. Rep. 150, 153 (1788).

70. OLDHAM, *supra* note 21, at 1 n.8, 11–12 nn.38–46.

71. BLACKSTONE, *supra* note 19, at 389 n.109.

72. *Id.* *Meres v. Ansell*, 95 Eng.Rep. 1053 (1711) (new trial for erroneous admission of evidence) *described in* Thomas, *The Seventh Amendment*, *supra* note 35, at 746 n.367.

73. Austin Wakeman Scott, *Trial by Jury and Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 682 (1918); Rennee Lettow, *New Trial for Verdict Against the Law: Judge-Jury Distinctions in Early 19th Century America*, 71 NOTRE DAME L. REV. 505, 525 (1996); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, 307, 321 (London W. Strahan and M. Woodfall for C. Bathurst) (1772).

74. *Bright v. Enyon*, 96 Eng.Rep. 1104, 1106 (1757) (denying new trial in action for debt where defendant admitted note, but offered a later note postponing payment until his death holding the fact plaintiff had little money supported her response that the second note was a forgery); *Shirley v. Wilkinson*, 99 Eng. Rep 529 (1781) (new trial ordered based on jury's rejection of certain material

Special verdicts could be submitted to the jury only on an agreed statement of facts from the evidence at trial. However, the jury was still free to return a general verdict.⁷⁵ The parties could avoid putting on evidence by using the special case. The specific facts were given to the jury for a general verdict subject to the opinion of the judge on the legal question presented.⁷⁶

Blackstone described the circumstances in which a motion in arrest of judgment after a jury verdict was available.⁷⁷ (1) Plaintiff sought the wrong writ, such as a writ for debt supported by a declaration for assumpsit. (2) The jury found something not alleged in the declaration such as the plaintiff will be bankrupt on an allegation that he is bankrupt.⁷⁸ (3) The declaration was insufficient in law to support the action alleged. The ground for arrest of judgment was much narrower than a demurrer to the pleadings. An arrest of judgment was appropriate where the plaintiff failed to plead his title to land because there was no basis for jury inference of title. However, where the plaintiff had alleged a title improperly or badly, the judgment was entered on the verdict as if the jury had found the plaintiff had title.⁷⁹

B. Common Law Juries in England and the American Colonies Vindicated Freedom of Speech, Freedom of the Press and Freedom From Unreasonable Searches and Seizures in Cases Involving the Crown's Officers

Pamphleteers John Wilkes and John Entick were critics of the Crown's government. They brought trespass actions for the search of their houses and seizures of their papers on general warrants.⁸⁰ Wilkes obtained a 1763 judgment in the Court of Common Pleas on a jury verdict of £1,000 against Wood for the search and £4,000 against Lord Halifax, Secretary of State to King George III for issuing the warrant.⁸¹ In Entick's 1765 case, Lord

evidence) described in Thomas, *The Seventh Amendment*, *supra* note 35, at 746 n.367.

75. Thomas, *The Seventh Amendment*, *supra* note 35, at 732-33 n.276 (citing BLACKSTONE, reprinting Justice Story who stated a jury need not render a special verdict and can choose to return a general verdict).

76. *Id.* at 735 n.287 (citing BLACKSTONE; *describing* Allen v. Hearn, 99 Eng.Rep. 969 (1785) (jury found the following special case)); Roe v. Hutton, 95 Eng.Rep. 744 (1763).

77. BLACKSTONE, *supra* note 19, at 393 n.109.

78. *Id.*

79. *Id.*

80. Sanford v. State of Texas, 379 U.S. 476, 483-84 (1965) (discussing Wilkes v. Wood, 19 How.St.Tr. 1153 (1763) and Entick v. Carrington & Three King's Messengers, 19 How.St.Tr. 1029 (1765)).

81. *Sanford*, 379 U.S. at 483-84; *Boyd*, 116 U.S. at 625-26 (discussing *Wilkes v. Wood*). The £4,000 verdict is worth \$175,200 in 1993 dollars. James E. Newell, *How Much Is That ...?*, Summer 1996, <http://www.continentalline.org/articles/article.php?date=9602&article=960203>. Jurors of the time were drawn from the English middling classes. There were 30,000 people in the upper class of London constituting 2% to 3% of the population with an annual income of more than £200. The

Camden sustained the trespass action because general warrants were void under the common law of England and could not provide legal justification for the defendants' entry into Entick's dwelling.⁸²

Jurors in Massachusetts had broad control over resolution of the case because three judges presided at each trial. They each would instruct the jury on their differing views of the law.⁸³ The judges did, however, have control over the jury through evidentiary rulings that excluded evidence.⁸⁴

John Peter Zenger of New York was a publisher who accused Crown Governor William Cosby of corruption. He was tried in 1735 on indictment of seditious libel.⁸⁵ The jury was instructed that if Zenger published the document, which he plainly did, they must find him guilty. Andrew Hamilton argued for Zenger that there could be no liability unless the charges were proven untrue. The jury returned a defense verdict.⁸⁶ Were Zenger a defendant in a civil case today on the same state of the law, the judge would enter summary judgment against him because truth was not a defense to libel.

Royal Governors responded to the Zenger and Massachusetts jury verdicts by bringing actions in the Courts of Chancery and Admiralty, which sat without a jury.⁸⁷

midling classes were anything below an aristocrat or rich merchant banker and above a butcher or employer of one person constituting 16% to 20% of the population earning annual income of £80 to £130. The remaining 75% of the population were workmen of some kind. L.D. Schwartz, *Income Distribution and Social Structure in 18th Century England*, THE ECON. HIST. REV., Vol.32, Issue 2, 254–55, 258 (1979).

<http://www3.interscience.wiley.com/search/allsearch?mode=citation&contextLink=blah&issn=1468-0289&volume=32&issue=2&pages=254>.

82. Entick v. Carrington & Three King's Messengers, 19 How.St.Tr. 1029 (1765) (*discussed in Boyd*, 116 U.S. at 626–29).

83. Landsman, *supra* note 19, at 592–93 (discussing William E. Nelson, AMERICANIZATION OF THE COMMON LAW: IMPACT OF LEGAL CHANCE ON THE MASSACHUSETTS SOCIETY, 1760–1830, 3, 13–23, 45–47 (1975)).

84. *Id.* (citing Nelson, 25, J.S. Cockburn, A HISTORY OF ENGLISH ASSIZES 1558–1714, 122 (1972)).

85. James Alexander, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, (Harvard Univ. Press 1963) (relied on in William L. Dwyer, IN THE HANDS OF THE PEOPLE, THE TRIAL BY JURY'S ORIGINS, TRIUMPHS, TROUBLES, AND FUTURE IN AMERICAN DEMOCRACY, 65–68 (St. Martin's Press 2002)).

86. *Id.*

87. Landsman, *supra* note 19, at 594 n. 87 (citing Stanley N. Katz, *The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century*, LAW IN AMERICAN HISTORY 257, 274–82 (Donald Fleming & Bernard Bailyn Ed. 1971)); *Id.* at 595 n.91 (citing Harold M. Hyman & Catherine M. Tarrant, *Aspects of American Jury Trial History*, THE JURY SYSTEM IN AMERICA 29 (Rita J. Simon Ed. 1975) (use of admiralty courts to enforce Navigation Acts controlling colonial commerce to retain royal monopolies)); *Id.* at 595 n.92 (citing Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 654–55 (1973) (use of admiralty courts to collect customs duties)).

IV. THE CROWN'S USE OF JUDGES INSTEAD OF JURIES TO
DECIDE CASES WAS A PRINCIPAL GRIEVANCE OF THE
AMERICAN REVOLUTION ADDRESSED BY THE SEVENTH
AMENDMENT

The Stamp Act Congress of 1765 declared “trial by jury is an invaluable right of every British subject in these colonies.”⁸⁸ Royal regulations were issued that interfered with the selection of Massachusetts jurors. These regulations and the use of the Chancery and Admiralty courts without juries to collect customs and seize vessels were addressed in the First and Second Continental Congresses.⁸⁹ The Declaration of Independence included denial of “the benefits of trial by jury” in its grievances.⁹⁰

The Constitutional Convention delegates said they omitted reference to trial by jury because of a “drafting problem.”⁹¹ The debate on ratification showed the true reason was controversy over the refusal of some States to enforce the debts held by domestic and British creditors whose rights were guaranteed in the 1783 Treaty of Ghent that ended the Revolutionary War.⁹²

The Anti-Federalists, who insisted on guaranty of trial by jury during ratification were suspicious of judges.⁹³ Trial by jury was necessary to: (1)

88. Landsman, *supra* note 19, at 595, n. 93–94 (citing *Resolution of Stamp Act Congress 1765*, Sources of Our Liberties, 270 (Richard L. Perry & John C. Cooper Ed.1952)).

89. Landsman, *supra* note 19, at 595–96. (Declaration and Resolves of the First Continental Congress, 1774, Res. 5, Sources of our Liberties, 281–82 288; Declaration of the Causes and Necessities of Taking Up Arms, 1775, Sources of Our Liberties, 296).

90. THE DECLARATION OF INDEPENDENCE, cl. 20 (1776).

91. Statement of Nathaniel Gorman, James Madison, DEBATES IN THE FEDERAL CONVENTION OF 1787 (1937) (cited in Edith G. Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 292, 293, n. 106 (1996)).

92. Landsman, *supra* note 19, at 598, n.10. Forrest McDonald, *NORVUS ORDO SECLORUM*, 290–91 (1985); Wolfram, *supra* note 19. The Rhode Island Legislature responded to a Rhode Island Supreme Court case holding a creditor was not required to accept payment in depreciated currency by replacing the judges. Landsman, *supra* note 19, at 597, n.102 (citing Forrest McDonald, *NOVUS ORDO SECLORUM*, 156 (1985)).

The enforcement of British debts problem remained after ratification. The Supreme Court held federal diversity jurisdiction existed in a British creditor's action against the State of Georgia. *Chisholm v. Georgia*, 2 U.S. 419, 1793 WL 685 (1793). The Eleventh Amendment, which withdrew actions against a state from the diversity jurisdiction, was quickly ratified. The problem was finally resolved by the agreement of the United States in the 1793 Jay Treaty to make payment of any British debt which could not be collected under state law. 8 Stat. 116, T.S. 105; Wolfram, *supra* note 19, at 675, n. 92. The present day Supreme Court has expanded the Eleventh Amendment to include a broad implied grant of sovereign immunity to States in federal question cases. *Seminole Tribe v. State of Florida*, 517 U.S. 44 (1996)

93. Wolfram, *supra* note 19, at 639, n.89; *Id.* at 723, n.246. The Seventh Amendment laid to rest the Anti-Federalist concern that Article III appellate jurisdiction over matters of fact would impose trial by judge. *Id.* The Anti-Federalists argued the absence of a guaranty of trial by jury would encourage

protect against unwise legislation and judicial practices such as the use of the Courts of Chancery and Admiralty by Royal Governors, (2) vindicate the rights of citizens against the government, and (3) protect litigants against overbearing judges.⁹⁴

The jury was necessary for the very reason it would reach results judges would not.⁹⁵ The Anti-Federalists believed as Blackstone did that civil juries were necessary to correct the bias of judges in favor of those who appointed them.⁹⁶ They did not contemplate that judges would overturn jury verdicts or otherwise keep a case from the jury.⁹⁷ The jury was a libertarian device to protect litigants and society as a whole. Whether it was an efficient and cost effective means of judicial administration was beside the point.⁹⁸

V. SUMMARY JUDGMENT WAS LIMITED TO DEBT COLLECTION AND ANALOGOUS CASES IN BRITAIN AND THE TWENTY STATES THAT ADOPTED IT IN THE 19TH AND EARLY 20TH CENTURIES

The only means to resolve an action before trial at common law was by the demurrer to the pleadings.⁹⁹ Parliament passed Keating's Act in 1855 to eliminate debtors' assertion of spurious defenses in debt collection actions.¹⁰⁰ The creditor plaintiff obtained a special writ advising the defendant debtor that judgment would be entered within 12 days of the writ. Leave to defend was

the development of an American Court of Star Chamber enforcing the prerogatives of the national government as that English court had done in the reign of Charles I. *Id.* at 708–09 n. 190, Eldridge Gerry, *NEW YORK JOURNAL*, April 30, 1788, in P. Ford, *Essays on the Constitution*, 131 (1892). Gerry made an earlier statement to this effect at the Constitutional Convention. 2 Farrand, *Records of the Federal Convention of 1787*, 633, n. 54.

94. Landsman, *supra* note 19, at 599. Professor Wolfram reviewed the results of the legislative debates of the States on ratification. Wolfram, *supra* note 19, at 671–725. He reached the same conclusion. *Id.* at 671–73.

95. Wolfram, *supra* note 19, at 671.

96. Wolfram, *supra* note 19, at 695–96, 141; BLACKSTONE, *supra* note 19, at 378–79 (quoted by Judge Samuel Bryan writing as Centinel, *Letters of the Centinel*, reprinted in *Pennsylvania and the Federal Constitution 1787–1788*, 584, n. 85 (J. McMaster & F. Stone Ed. 1888)).

97. Wolfram, *supra* note 19, at 723, n. 246.

98. *Id.* at 671–72, n. 88. Those who would restrict the jury for efficiency should be required to demonstrate the threats the jury was designed to meet in 1791 are no longer important today. Wolfram wrote this in 1973. The expansive use of summary judgment to eliminate the jury from federal decision making without discussion of the alteration of federal judicial power being effected, was not contemplated in 1973.

99. Martin B. Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 *YALE L.J.* 745 (1974).

100. Summary Procedure on Bills of Exchange Act, 18 & 19 Vict. C. 67 (1855) [hereinafter Keating's Act]; Louis, *supra* note 99, at 745–56.

granted based on the defendant's payment of the amount claimed into court or affidavits that disclosed a defense.¹⁰¹

Kentucky enacted an 1805 statute that provided an action on a bond or note was commenced by a petition attaching the instrument and alleging non-payment. A trial was held promptly after the appearance.¹⁰² Five other states adopted similar summary judgment procedures.¹⁰³

In 1832, Virginia enacted a statute providing for summary judgment on a motion with notice to the defendant in actions against sheriffs and other public officers on their bond.¹⁰⁴ The plaintiff filed a notice and a motion and the action proceeded on that motion on the defendant's appearance.¹⁰⁵ That summary procedure was extended to actions against sureties on the principal's debt and to clients whose money was wrongfully withheld by an attorney.¹⁰⁶ The summary procedure was extended further in 1849 to actions on a contract and later to certain tort actions, statutory penalties, and recovery of specific personal property.¹⁰⁷ In 1919, Virginia extended summary judgment to all actions at law. Seven states had a similar remedy on notes and bonds independently by statute, common law, or in bank charter statutes.¹⁰⁸

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101. John A. Bauman, *The Evolution of the Summary Judgment Procedure*, 31 *IND. L. REV.* 329 (1956).
102. Robert Wyness Millar, *Three American Ventures in Summary Civil Procedure*, 38 *YALE L.J.* 193, 204, n.58; 3 Littell, *Statutes of Kentucky* 319–21 (1811).
103. Arkansas, Iowa, Kansas, Illinois, and Missouri had procedures similar to Kentucky. Millar, *supra* note 102, at 208, n. 90. (An Act Simplifying Proceedings at Law for Collection of Debts, 2 Digest of the Laws of Missouri 620–21 (1825)); *Id.* at 210, n. 100. (Gale, Public and General Statute Laws of Illinois 538–39 (1839), n. 101 *Ill.Rev.Stat. C.* 83 §§ 33–37 (1845)); *Id.* at 211, n. 204. (Ark.Rev.Stat. 152–53 (1837); *Id.* at 212, n.108, Statute Laws of the Territory of Iowa 380–81 (1839)); *id.* at 212, n.110. (Statutes of the Territory of Kansas 140–41 (1855); Kansas repealed its statute when it adopted the Ohio Code of Civil Procedure.) *Id.* at 212, n. 111. (Hepburn, *Historical Development of Code Pleading*, 104 (1897)).
104. Millar, *supra* note 102, at 215, n.116; Acts of May, 1732, C. 10 § 8, 4 Va.Stat. 352 (Hening).
105. *Id.* at 216, n.93; *Wilson v. Dawson*, 96 Va. 687, 691 (1899).
106. *Id.* at 215, n.117; Acts of October, 1748, C. 12, § 14, 5 Va.Stat. 534 (Hening); *Id.* at n. 118, Acts of November 1753, C. 1, § 25, 12 Va.Stat. 344 (Hening); *Id.* at n. 119, Acts of October, 1786, C. 15 §§ 1, 2, 12 Va.Stat. 268 (Hening).
107. *Id.* at 215–16, n.125, Va.Code C. 167, §§ 5, 6 (1849); *Id.* at n.127, Va.Code § 3211 (1887); *Id.* at n.128, Va.Acts. 140 (1896); *Id.* at n. 129, Va. Acts 15, 651 (1912); *Id.* at n. 132, Va.Acts 760 (1916); *Id.* at n. 132, Va.Code § 6046 (1919).
108. States having a similar procedure to Virginia were West Virginia, Kentucky, Tennessee, Alabama, Maryland, Ohio, and Mississippi. *Id.* at 213, n.113–114; *Logwood v. Planter's & Merchant's Bank*, Minor Min. 23 (Ala. 1820); *Duncan v. Toombeckbee Bank*, 4 Port. 181 (Ala. 1836)[other citations omitted]; *Bank of Columbia v. Sweeney*, 2 Pet. 671 27 U.S. 671 (1829) (referring to Maryland bank charter act providing for notice and summary judgment in action on note); *Fullerton v. Bank of United States*, 26 U.S. 604 1 Pet. 604 (1828) (Ohio statute allowing bankers to sue drawers and indorsers jointly on notes); n. 155, *Knox v. Homer*, 51 S.E. 97958 W.Va. 136 (1905); *Citizens Nat. Bank v. Dixon*, 117 S.E. 68694 W.Va. 21 (W. Va. 1923).

The Judges of the Superior Court of Connecticut adopted a 1929 Rule providing for summary judgment in actions on bills, notes, contracts, to recover personal property, quiet title, and to foreclose or discharge a mortgage.¹⁰⁹ Clark and Samenow listed 20 jurisdictions providing similar summary judgment procedures at the time the Federal Rules of Civil Procedure were drafted and then adopted in 1938.¹¹⁰

VI. THE 1938 ADVISORY COMMITTEE ADOPTED THE EXISTING LIMITED SUMMARY JUDGMENT DEVICE, WHICH REMAINED FOR FORTY EIGHT YEARS UNTIL IT WAS ABRUPTLY EXPANDED

A. In Its First Three Cases Interpreting the Motion for Summary Judgment, the Supreme Court Applied the 1938 Advisory Committee Belief That Summary Judgment Was Confined to Determining if Any Disputed Material Fact Existed in Narrow Circumstances Analogous to Debt Collection Actions

Congress ended the 1912 to 1934 debate over adoption of uniform rules of civil procedure in the federal courts with passage of the Rules Enabling Act.¹¹¹ The Act authorized the Supreme Court to adopt federal rules of procedure merging law and equity.¹¹² The statute provides a six month interval between adoption and the effective date of Rules to allow Congress to make alterations. Congress has rarely exercised that power, but the six-month period remains.¹¹³ The Rules Enabling Act provides that the Rules shall not restrict any substantive right.¹¹⁴

The Advisory Committee was formed, the Federal Rules of Civil Procedure were drafted, and the Rules were adopted with little controversy

109. Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 440–741 (1929)

110. *Id.* The States with a summary judgment procedure were Connecticut, New Jersey, New York, Michigan, Illinois, Delaware, Pennsylvania, Indiana, Virginia, formerly Kentucky and South Carolina, Alabama, Kentucky, Arkansas, Tennessee, West Virginia, Missouri, and the District of Columbia.

111. Jack B. Weinstein, U.S. District Judge, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOK. L. REV. 1, 8–13, 16 (1988).

112. 48 Stat. 1064, 28 U.S.C.A. §§ 723b, 723c (West 1934) ([as amended 28 U.S.C. §§ 2072–2074] quoted in Charles Clark, *A New Federal Procedure I: The Background*, 44 YALE L.J. 387 (1935)); Charles Clark & James Wm. Moore, *A New Federal Procedure II: Pleadings and Parties*, 44 YALE L.J. 129 (1935).

113. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, 1001. An exception was Congress's revision of the provisions of Rule 4 on service of process in 1982 when it removed the U.S. Marshall's office from serving civil process.

114. 48 Stat. 1064, 28 U.S.C. §§ 723b, 723c; 28 U.S.C. § 2072 (b).

four years later in 1938.¹¹⁵ Dean Charles Clark of the Yale Law School was the principal draftsman of the Federal Rules of Civil Procedure.¹¹⁶ He prevailed in his view that summary judgment procedure be adopted. The summary judgment procedure of that time was contained in Keating's Act¹¹⁷ and its American counterparts,¹¹⁸ which limited summary judgment to debt collection cases and analogous circumstances.¹¹⁹ Clark and Shulman's study of Connecticut cases showed summary judgment was sought in only 60 cases from 1929 to 1932.¹²⁰ The Advisory Committee believed summary judgment would not affect the right to jury trial as it was an easy task to obtain an affidavit creating a factual dispute sufficient to avoid summary judgment.¹²¹

The original Advisory Committee's belief in the supremacy of the jury was expressed in the requirement that jurors sign verdicts directed by the judge.¹²² The 1963 Amendment removed this requirement because jurors may take offense to signing a verdict they did not reach. The Notes on the 1963 Amendment make no mention of the restraint the former procedure placed on the judge. He was required to convince the jurors of his reasons for directing the verdict to obtain their signatures. The judge also had to consider what he would do if the jurors refused to sign the verdict he directed because it was the judge's verdict, not their own.¹²³

The Supreme Court confined summary judgment to its intended narrow scope for the next 48 years. Three cases exemplified the limited nature of summary judgment.

The issue in a 1944 breach of contract action for natural gas royalties was whether the contract price of the "market at well" as opposed to delivery

115. Weinstein, *supra* note 111, at 17.

116. Landsman, *supra* note 19, at 68, 6123, n.184197; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961-75, n. 184 (1987).

117. *See supra* note 100.

118. *See supra* notes 102-103.

119. Keating's Act, *supra* note 100. *See supra* note 110 (listing those 20 states).

120. C. CLARK & H. SHULMAN, A STUDY OF LAW ADMINISTRATION IN CONNECTICUT: A REPORT OF AN INVESTIGATION OF THE ARTICLES OF CERTAIN TRIAL COURTS OF THE STATE, 6452 (1937) (*cited in* Stephen N. Surbin, *How Equity Conquered the Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 980, n.471329 (1987)).

121. Edmund M. Morgan, Transcripts of Advisory Committee contained at Harvard Law Library, 806 [Donworth] (February 1938) cited in Surbin, *supra* note 120, at 962, n. 309; 980, n. 472. ("The transcripts of the Feb. 20-25, 1936 Advisory Committee meetings are in six volumes as part of the Advisory Committee documents donated by Edmund M. Morgan, a member of the Advisory Committee, to the Harvard Law Library.")

122. FED. R. CIV. P. 50(a).

123. *Id.*

where price was usually determined, was more than 3 cents per m.c.f.¹²⁴ The district court entered summary judgment for the defendant on affidavits of eight interested persons stating the “market at well” price was 3 cents per m.c.f.¹²⁵ The Fifth Circuit affirmed.¹²⁶ The Supreme Court found plaintiff’s evidence of a 3 cent cost of transportation, a market quotation for 3.3 cents, and payment of 10% of the contracts at 4 cents established a genuine issue of material fact on the credibility of the interested witnesses.¹²⁷ Justice Jackson held summary judgment can be granted “only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . not to cut litigants off from their right of trial by jury if they really have issues to try.”¹²⁸

In 1962, the court reversed a defense summary judgment in an antitrust action for CBS’ cancellation of its local television affiliate’s contract and elimination of its UHF frequency station entirely from Milwaukee market.¹²⁹ Plaintiff offered evidence that owners in 90% of the Milwaukee television market paid \$20 per unit for UHF reception. The number of CBS UHF stations declined from 94 to 88 in a two year period. A broadcasting station expressed an interest in offering \$2 million to plaintiff for the UHF station. It withdrew from discussions when CBS sent it a warning. CBS then terminated plaintiff’s contract and awarded a VHF license to the broadcasting station which had earlier expressed interest in purchasing the plaintiff’s station.¹³⁰ Justice Clark held antitrust cases—where conspirators control the proof and hostile witnesses abound—are particularly inappropriate for summary judgment. The motion cannot be granted when it was not “quite clear what the truth is.”¹³¹ Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of ‘even handed justice.’¹³²

The 1970 case was a Section 1983 civil rights action for false arrest against a Mississippi store arising out of the arrest of the plaintiff white woman who was denied service at the store’s segregated lunch counter because she was with blacks.¹³³ The required state action for the civil rights liability of the store existed only if there was a conspiracy between the store manager

124. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944).

125. *Id.* at 623–24.

126. *Id.* at 621, 627.

127. *Id.* at 625–626, 628.

128. *Id.* at 626–27.

129. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962).

130. *Id.* at 471–72.

131. *Id.* at 472.

132. *Id.* at 473–74.

133. *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 157 (1970); 42 U.S.C. § 1983.

and police.¹³⁴ The district court granted summary judgment for the store on the affidavit of its manager that he had no contact with the police prior to plaintiff's entry and telephoned them only when a disturbance arose.¹³⁵ The Second Circuit affirmed.¹³⁶ The Supreme Court reversed. Justice Harlan held the burden of the summary judgment movant was to negate the existence of a triable issue of fact.¹³⁷ The close sequence in time between the plaintiff's entry and arrival of the police (five minutes) and the testimony of plaintiff that there was no disturbance was sufficient circumstantial evidence for the jury to disbelieve the store manager's affidavit.¹³⁸

B. The Supreme Court's Abrupt Departure From Summary Judgment as a Limited Device in the 1986 Trilogy of *Anderson*, *Celotex*, and *Matsushita Electric*

The twenty-three year explosion in summary judgments began with three 1986 Supreme Court cases.¹³⁹ The Justices who decided *Sorter* in 1944 the Supreme Court's first interpretation of summary judgment were intimately familiar with the deliberations of the Advisory Committee five years before in 1938. The Justices who decided *Poller* in 1962 and *Adickes* in 1970 retained that familiarity.

The Justices who decided the trilogy in 1986 had no institutional memory of the events of 1938.¹⁴⁰ The majority opinions in the trilogy made no mention of the Seventh Amendment right to jury trial, the absence of a common law procedure for summary judgment, or the court's limitation of summary judgment to cases where it was "quite clear what the truth is."¹⁴¹

A public figure brought a defamation action in *Anderson v. Liberty Lobby, Inc.*¹⁴² The court reversed the District of Columbia Circuit's holding

134. *Id.* at 152.

135. *Id.* at 148.

136. *Id.* at 148.

137. *Id.* at 157.

138. *Id.* at 1523.

139. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Electrical Industries, Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

140. Justice William O. Douglas, the last of the Justices of the original Advisory Committee era, retired in poor health in 1975 and died in 1980. Justices Hugo L. Black and John Marshall Harlan retired and died in 1971. William O. Douglas was an Associate Justice from 1939 to 1975. Hugo L. Black, was an Associate Justice from 1937 to 1971; John Marshall Harlan, was an Associate Justice from 1955 to 1971 (Justice Harlan was not on the court in 1938 but had been an accomplished New York City practitioner from 1924 until his 1954 appointment to the Second Circuit). Judges of the United States Courts, Federal Judicial Center, <http://www.fjc.gov/history/home.nsf>.

141. *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 471-72 (1962).

142. *Anderson*, 477 U.S. at 242 (1986).

summary judgment was inappropriate for resolution of whether the plaintiff met the *New York Times v. Sullivan* burden of proving actual malice.¹⁴³ Justice White held the substantive law determined what was “material” in the summary judgment standard of the “absence of a genuine issue of material fact.”¹⁴⁴ Factual disputes are not “genuine” if a “reasonable jury” could not return a verdict for the non-movant.¹⁴⁵ Justice Brennan dissented.¹⁴⁶ Judges were now charged on summary judgment with determining “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”¹⁴⁷ The court’s general admonition that the judge is not to weigh the evidence does not overcome its specific direction that the judge assess “the ‘quantum’ of proof and consider whether the evidence is of sufficient ‘caliber or quantity’ to meet that ‘quantum.’”¹⁴⁸ The court had previously limited the judge on summary judgment to the question of whether the defendant had negated the existence of a triable issue of fact.¹⁴⁹ This is a “brand new procedure that will transform what is meant to provide an expedited ‘summary’ procedure into a full-blown paper trial on the merits.”¹⁵⁰ It raises “grave concerns” of denial of the Seventh Amendment right to jury trial.¹⁵¹

Justice Rehnquist, joined by Chief Justice Burger, also dissented. The holding that the judge on summary judgment evaluate the evidence on the basis of a particular standard of proof invariably involves weighing the evidence.¹⁵² That is a function for the jury whether the burden of proof is beyond a reasonable doubt, clear and convincing evidence, or a preponderance of the evidence.¹⁵³

Anderson’s expansion of summary judgment to include weighing of evidence against the particular standard of proof had been rejected by the Supreme Court in 1944 and 1962.¹⁵⁴ It is inconsistent with the rules of the common law and the summary judgment procedure contemplated by Advisory

143. *Id.* at 246; *New York Times v. Sullivan*, 376 U.S. 254 (1964) (First Amendment precludes a public official from recovering libel judgment without proof of actual malice, knowledge that the statement was false or in reckless disregard of whether it was false or not).

144. *Id.* at 247–48.

145. *Id.* at 255.

146. *Id.* 258–59.

147. *Id.*

148. *Id.* at 265–66.

149. *Id.* at 261–64 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 157 (1970)).

150. *Id.* at 267.

151. *Id.* at 266–67.

152. *Id.* at 270–71.

153. *Id.* at 270–71.

154. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. at 620, 627 (1944); *Poller v. Columbia Broad. Sys.*, 368 U.S. 464, at 473–74 (1944).

Committee, which was limited to the narrow issue of whether the summary judgment movant had demonstrated the truth was clear.¹⁵⁵

However, the holding of *Anderson* itself was within the narrow confines of the common law motion for arrest of judgment. The verdict of a defamation plaintiff who did not prove *New York Times v. Sullivan* actual malice could not be sustained under the heightened First Amendment burden of proof.¹⁵⁶ This was akin to Blackstone's example of a motion for arrest of judgment as the remedy for a jury finding the plaintiff *will* be bankrupt on a declaration requiring proof that he *was* bankrupt.¹⁵⁷ The problem with *Anderson* is that this decision was made at common law on narrow grounds after the jury had entered a verdict at a trial on the evidence.

In the asbestos products liability case of *Celotex Corp. v. Catrett*, the manufacturer sought summary judgment contending plaintiff could not prove the deceased was exposed to its products.¹⁵⁸ Justice Rehnquist held a movant may obtain summary judgment by demonstrating that the non-movant, after an adequate opportunity for discovery, could not prove an essential element of her case.¹⁵⁹ The movant has the initial burden of demonstrating from the Rule 56(c) & (e) materials that the non-movant cannot meet his burden of proof on an element of his case.¹⁶⁰ Justice White provided the fifth vote.¹⁶¹ He emphasized that the defendant's mere assertion that plaintiff cannot meet his burden was insufficient; a plaintiff is not required to depose his witnesses or produce affidavits on such a motion.¹⁶² The movant's initial burden is satisfied only if he satisfies the *Adickes* requirement of negating the basis of the suit in his motion and supporting materials.¹⁶³

The District of Columbia Circuit's decision in *Celotex* applied the movant's burden on remand.¹⁶⁴ The court held summary judgment was inappropriate because defendant did not negate plaintiff's materials indicating the deceased's exposure to asbestos in defendant's product.¹⁶⁵ Plaintiff had filed the 1971 worker's compensation deposition testimony of the deceased, stating that he worked with the product on a job in Chicago. She also filed her answers to interrogatories attaching letters from one of plaintiff's employers

155. *Poller*, 368 U.S. at 473-74.

156. *New York Times*, 376 U.S. 254, 279-80 (1964).

157. BLACKSTONE, *supra* note 19, at n.15.

158. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319-20 (1986).

159. *Id.* at 322-23.

160. *Id.* at 323 (Rehnquist, J).

161. *Id.* at 318.

162. *Id.*

163. *Id.* at 328 (White, J., concurring); *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 157 (1970).

164. *Catrett v. Johns Manville Sales Corp.*, 826 F.2d 33, 34 (D.C. Cir. 1987).

165. *Id.* at 40.

and an insurance company confirming the deceased's work with the product, which were listed as witnesses.¹⁶⁶

Celotex was consistent with the narrow scope of summary judgment contemplated by the Advisory Committee on the 1938 Civil Rules. Like the debtor defendant required to prove a good faith defense under Keating's Act, the products liability plaintiff had to provide evidence that the deceased was exposed to defendant's asbestos product for the lawsuit to proceed.

A summary judgment for the defendants in an antitrust case was reviewed in *Matsushita Electrical Industries, Co. v. Zenith Radio Corp.*¹⁶⁷ Plaintiffs were twenty American consumer electronic products manufacturers who brought a Sherman Act attempt to monopolize claim against Japanese manufacturers.¹⁶⁸ They claimed defendants engaged in a predatory pricing scheme to sell their products below market cost in the United States funded by artificially high prices in their home Japanese market.¹⁶⁹ Plaintiffs presented four expert witnesses who analyzed the concerted activities of the defendant Japanese manufacturers, which included price fixing in Japan and a five company rule dividing the United States market.¹⁷⁰ The experts also presented quantitative data supporting their use of predatory pricing in the United States.¹⁷¹ The district court ruled the relevant portions of the exhaustive studies inadmissible and granted summary judgment.¹⁷² The Third Circuit reversed the exclusion of the plaintiff's expert witness testimony and the summary judgment.¹⁷³

Justice Powell rejected plaintiffs' contention that defendants' monopolization of the Japanese market was circumstantial evidence relevant to prove the predatory pricing claim.¹⁷⁴ Summary judgment is proper when the plaintiff's claims are implausible as in this case where it "makes no economic sense."¹⁷⁵ He found predatory pricing among the Japanese competitors made no economic sense because they would have had to maintain prices below cost

166. *Id.* at 38–40.

167. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

168. *Id.* at 577.

169. *Id.* at 578.

170. *Id.* at 601–03.

171. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 505 F.Supp. 1313, 1320, 1335–43, 1354–57, 1380 (E.D. Pa. 1980); *Matsushita*, 475 U.S. at 602–04 (White, J., dissenting).

172. *Zenith*, 505 F.Supp. at 1335–43, 1354–57 (ruling relevant portions of the studies of plaintiffs' four expert witness inadmissible); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd.*, 513 F.Supp.1100 (E.D. Pa. 1981) (granting summary judgment to defendants).

173. *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238 (3d Cir. 1983) (reversing exclusion of expert testimony and summary judgment finding that plaintiff presented triable issue of fact).

174. *Matsushita*, 475 U.S. at 584, 592–94.

175. *Id.* at 587–88.

for two decades to put themselves in the market position to set higher than competitive prices.¹⁷⁶ Justice Powell relied upon antitrust authorities critical of predatory pricing claims.¹⁷⁷ The case was remanded for determination of whether there was sufficient direct evidence of predatory pricing to submit the case to the jury.¹⁷⁸

Justice White, joined by Justices Brennan, Blackmun, and Stevens, dissented.¹⁷⁹ The court's ruling the plaintiff's evidence was implausible either overturned the law that the judge is not to evaluate the evidence on summary judgment or uses overly broad language.¹⁸⁰

Abraham Lincoln, who knew a lot about juries and American democracy, did not share the *Matsushita Electrical* majority's belief in the superiority of direct evidence.

We better know there is fire whence we see much smoke rising than we could know it by one or two witnesses swearing to it. The witnesses may commit perjury, but the smoke cannot.¹⁸¹

The smoke in *Matsushita Electrical* was the domination of the 20th century Japanese economy by zaibatsu, the families of Mitsui, Mitsubishi, Yasuda, Sumitomo and several others, who controlled all major industry.¹⁸² General MacArthur's occupation policy was to break up the zaibatsu, but the Korean War ended the occupation and that policy.¹⁸³ The Supreme Court majority saw *Matsushita Electrical* through the American culture of individualism, ignoring the Japanese belief in the subservience of the individual to the group, which was the basis of the plaintiffs' case.¹⁸⁴

176. *Id.* at 587–91.

177. *Id.* at 589–92 (citing R. BORK, *THE ANTITRUST PARADOX* 145 (1978)); John S. McGee, *Predatory Pricing Revisited*, 23 J. LAW & ECON. 289, 295–297 (1980); Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981); Ronald H. Koller, *The Myth of Predatory Pricing, An Empirical Study*, 4 ANTITRUST LAW & ECON. REV. 105 (1971); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. LAW & ECON. 137 (1958); McGee, *Predatory Pricing Revisited*, 23 J. LAW & ECON., at 292–294.

178. *Matsushita*, 475 U.S. at 598.

179. *Id.* at 598.

180. *Id.* at 601.

181. Abraham Lincoln, Unsent Letter to J.R. Underwood and Henry Grider, October 26, 1864, *reprinted in* THE QUOTABLE LAWYER 323 (Schrager and Frost Ed.) (1986) (*cited in* *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992)).

182. Tetsuji Okazaki, *Holding Company and Bank: An Historical Comparative Perspective on Corporate Governance in Japan*, SEUL JOURNAL OF ECONOMICS (2004).

183. *American Occupation of Japan*, <http://www.cyberessays.com/History/98.htm>.

184. See *supra* note 177 (American antitrust authorities). The Japanese of the post World War II period considered in *Matsushita Electrical* did not share the American belief in individual autonomy. “The Japanese language has no term for the word leadership . . . Responsibility is diffused through the

Matsushita Electrical was also a substantial departure from existing antitrust law. The antitrust authorities held sufficient to defeat the plaintiffs' expert analysis on long term predatory pricing by the Japanese zaibatsu to gain market share in the United States were studies of the American market.¹⁸⁵ The authors relied upon by the majority—Professor Robert Bork and his progeny—believe the antitrust law exists to promote economic efficiency.¹⁸⁶ The Sherman Act is based on the view that industrial consolidation in a few large firms was bad for the American democracy and its economy.¹⁸⁷

Forty one years earlier, Judge Learned Hand and his Second Circuit panel were assigned the appeal of the Sherman Act monopolization claim against Alcoa because the Supreme Court lacked a quorum.¹⁸⁸ The district court entered summary judgment for Alcoa on the injunction principally because Alcoa's conduct had no discernible effect on prices. Judge Hand reversed. The Sherman Act was enacted to prevent industrial concentration even though it might be more economically efficient.¹⁸⁹

group as a whole and the entire collective becomes one functional body in which all individuals, including the manager, are amalgamated into a single entity." Dr. Chie Nakane, Professor of Sociology, Tokyo University (1970). <http://www.nancho.net/kipower/kisoma.html>.

185. *Zenith Radio*, 505 F.Supp. at 1335–43, 1354–57. Judge Posner noted a publication detailing the belief that Japanese conglomerates fix prices. In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 662 (7th Cir. 2002) (citing Julie A. Shepard, Comment, *Using United States Antitrust Laws Against the Keiretsu as a Wedge Into the Japanese Market*, 6 TRANSNAT'L LAWYER 345, 349–50 (1993)) (reversing a summary judgment for Archer Daniels Midland in the class action for fixing prices in the high fructose corn syrup market, which was not investigated in the Justice Department's investigation leading to criminal convictions for fixing the price of lysine in the world market).
186. Robert R. Porter, *Preface* to Frank H. Easterbrook, et al., *ESSAYS IN HONOR OF JUDGE ROBERT H. BORK*, 31 HARV. J.L. & PUB. POL'Y 439 (2008).
187. *United States v. Aluminum Co. of America*, 148 F.2d 416, 428–29 (2d Cir. 1945) (Hand, J.).
188. *Id.* at 421.
189. *Id.* at 429. Today's highly concentrated investment and commercial banking institutions in the United States are the product of mergers of the past 15 years. The mergers were allowed because they were thought to be economically efficient. Those same institutions have been effectively nationalized while financial institutions in Britain and the European Union have been expressly nationalized to remedy the worst financial crisis since the Great Depression. Mark Landler and Eric Dash, *Drama Behind a \$250 Billion Banking Deal*, N.Y. TIMES, Oct. 14, 2008, at A1, http://www.nytimes.com/2008/10/15/business/economy/15bailout.html?_r=1&scp=7&sq=Paulsen%20Bank%20Stock&st=cse&oref=slogin (last visited Mar. 3, 2009); Patrick Wintour, Jill Treanor and Ashley Seager, *50bn Bid to Save UK Banks*, GUARDIAN, Oct. 8, 2008, at 1, <http://www.guardian.co.uk/business/2008/oct/07/banking.economy1> (last visited Mar. 3, 2009); Angela Balakrishnan, *Financial Crisis: Action Taken by Central Banks and Governments*, GUARDIAN, Oct. 21, 2008, <http://www.guardian.co.uk/business/2008/oct/13/creditrunch-marketturmoil1> (last visited Mar. 3, 2009). The United States authorized \$700 billion to bail out financial institutions in the Economic Stabilization Act, Pub. L. No. 110–343, 122 Stat. 3765, 12 U.S.C. §§ 1787, 1821, 5201, 5225, 26 U.S.C. §§ 162, 280G, 382, 31 U.S.C. § 3105 (2008). The Obama Administration is asking for another \$250 billion for fiscal year 2010. Stephen Labaton, *An Additional \$250 Billion Sought for Ailing Banks*, N.Y. TIMES, Feb. 27, 2009, <http://www.nytimes.com/2009/02/27/washington/27web>

Matsushita Electrical went to the heart of the American economy and its relationship with one of its significant competitors. Justice Powell's opinion is based on the implicit belief that judges are competent to resolve those issues and jurors are not.¹⁹⁰ But the Seventh Amendment guarantees trial by jury to check the power of judges and central authority. The Anti-Federalists remembered well the Royal Judges' use of the Chancery and Admiralty courts to reach legal results colonial juries would not. The Crown's insistence that the colonists pay a portion of costs of the French and Indian War, which saved the colonists from defeat, was justifiable. Indeed, it was likely the only policy available for a nation with global responsibilities facing crushing debt incurred in a war fought on three continents.¹⁹¹ The colonists thought otherwise and their exclusion from colonial decision making lead to the Revolutionary War.

bailout.htm?scp=5&sq=financial%20institution%20bailout%20budget&st=cse (last visited Mar. 3, 2009).

The United Kingdom has authorized £50 billion (\$86 billion) to bail out its banks. Banking Special Provisions Act, <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=34500001> (last visited Mar. 3, 2009); Currency Converter 10/10/08 <http://www.oanda.com/convert/classic>.

The European Union has authorized € 3 trillion (\$3.9 trillion) to inject into its financial institutions. Ian Traynor and Angeliqe Chrisafis, *EU Takes a 2 Trillion Financial Gamble*, *GUARDIAN*, Oct. 14, 2008, p.4, <http://www.guardian.co.uk/business/2008/oct/14/europe-europeanbanks> (last visited Mar. 3, 2009). Currency Converter 10/10/08 <http://www.oanda.com/convert/classic>.

That is just the bank bailouts. Congress has passed a \$787 billion economic stimulus to remedy the effects of the financial crisis and avoid another Great Depression. American Recovery and Reinvestment Act of 2009, PL 111-5, 2009 HR 1 (Feb. 17, 2009); Omnibus Appropriation Act, PL 111-8, 2009 HR 1105 (Mar. 11, 2009); Sheryl Gay Stolberg, *Signing Stimulus, Obama Doesn't Rule Out More*, *N.Y. TIMES*, Feb. 17, 2009, <http://www.nytimes.com/2009/02/18/us/politics/18webstim.html?scp=4&sq=%24787%20Billion%20Economic%20Recovery%20President%20Signing&st=cse> (last visited Mar. 3, 2009).

These momentous events suggest Judge Hand and the Sherman Act Congress had it right.

190. Had the Supreme Court in *Matsushita Electrical* affirmed the Third Circuit's reversal of the defense summary judgment, the case would have been set for a jury trial. A settlement would have been likely. The parties know their business and are in the best position to reach an acceptable remedy. If the parties did not settle, the jury would have decided the validity of the theory that antitrust laws promote economic efficiency and whether in fact the Japanese zaibatsu engaged in a 20 year campaign of predatory pricing to increase their American market share. The absence of any American manufacturers of consumer electronic products today strongly suggests the validity of the *Matsushita Electrical* plaintiffs' case, unless one believes the American electronics industry – which invented and mass marketed the television, transistor, personal computer, and would soon develop and market the Internet – could no longer competitively manufacture consumer electronic products in 1980. <http://www.tvhistory.tv/1960-2000-TVManufacturers.htm>.
191. Europeans refer to the French and Indian War as The Seven Years War. Prussia joined by Britain fought Austria, Russia, and Sweden in Europe. The British and French also fought in North America and India with the British ousting the French from Canada and India. *See* <http://www.ushistory.org/Declaration/related/frin.htm>.

VII. SUMMARY JUDGMENT HAS BECOME THE PAPER TRAIL
JUSTICE BRENNAN PREDICTED, OFTEN RESOLVED ON THE
TECHNICAL FORM OF THE RESPONSE; THE RESULTS IN
DISCRIMINATION CASES CONFIRM THIS PREDICTION¹⁹²

The Seventh Circuit has stated “an unfortunately common error” is the failure to apply the summary judgment movant’s initial burden of negating an issue of material fact.”¹⁹³ But the court has mentioned that burden in only six reported cases in the 23 years since the trilogy. It made no difference as the court affirmed summary judgment in each case.¹⁹⁴ The movant’s initial burden is further undermined by the court’s holding the failure to meet the initial burden is waived if not specified in the response.¹⁹⁵

The district courts have adopted rules requiring detailed statements of facts and denials of the defendant’s statement of facts with record citations.¹⁹⁶ The six Seventh Circuit cases on the movant’s burden are contrasted by the 133 reported cases addressing the form of summary judgment responses.¹⁹⁷ Summary judgments have been affirmed for omission of a court reporter’s certificate from a deposition, the lack of reference to the deposition page in a 15 page deposition, or in some districts, the specific line of the 24 lines on the page of a deposition.¹⁹⁸

192. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 266–67 (Brennan J. dissenting).

193. *Logan v. Commercial Union Ins. Co.*, 96 F.3d 971, 978 (7th Cir. 1996).

194. *Madison v. Frazier*, 539 F.3d 646 (7th Cir. 2008); *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672 (7th Cir. 2008); *Outlaw v. Newkirk*, 259 F.3d 833 (7th Cir. 2001); *Logan*, 96 F.3d at 971; *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231 (7th Cir. 1995); *Roger v. Yellow Freight Sys., Inc.*, 21 F.3d 146 (7th Cir. 1994); *Cooper v. Lane*, 969 F.2d 368 (7th Cir. 1992).

195. *Logan*, 96 F.3d at 979.

196. N.D. Ill Rule 56(a) requires a motion to be accompanied by affidavits and other Rule 56(e) materials, a memorandum of law, and statement of material facts the party contends there is no genuine issue and entitles him to judgment in numbered paragraphs. Rule 56(b) requires the opposing party to file affidavits and Rule 56(e) materials, a memorandum of law, and a concise response to the movant’s statement of facts including (A) a response to each of the numbered paragraphs and if there is disagreement, specific references to the record, and (B) a statement of any additional facts requiring denial of the motion with reference to the records.

197. The latest at the time of completion of the page proof of this article was *Cracco v. Vitran Exp., Inc.*, 559 F.3d 625, 632 (7th Cir. 2009).

198. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 775 n.12 (9th Cir. 2002) (affirming summary judgment based on affidavit of counsel verifying excerpts of deposition, which was improperly authenticated because the court reporter’s certificate was not included). *Orr* is not an anachronism. See Ann K. Wooster, *Application of Local District Court Summary Judgment Rules to Nonmoving Party in Federal Courts Statements of Facts*, § 6 Improper Form or Content of Statement.

Summary judgment is necessarily decided on materials such as affidavits, pleadings, and answers to interrogatories that are inadmissible at trial.¹⁹⁹ Before the trilogy, district courts were encouraged to exercise their discretion to deny motions for summary judgment despite technical defects in the response or when there was doubt, even though the motion met the initial burden.²⁰⁰ After the trilogy, opinions discuss at length the admissibility of evidence at trial of documents, affidavits, and depositions in the summary judgment record. Summaries of voluminous documents have been excluded because of an inadequate authentication affidavit.²⁰¹ This is contrary to the procedure of the Manual of Complex Litigation. Section 11.492 states an opportunity for objections and a ruling on the summaries must be provided in time to allow the proponent to make corrections before trial.²⁰² Testimony or documents have been excluded on summary judgment for lack of citation to the record, or where citation to the record was contained in the memorandum, but not the separate statement of facts required by Local Rule.²⁰³

The plaintiff is at a significant disadvantage in today's summary judgment paper trial. There is no pre-trial conference to obtain waiver of authentication proof and to identify objections to the admissibility of the

199. "The judgment sought should be rendered if the pleadings, the discovery, and disclosure materials on file, any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law" FED. R. CIV. P. 56(c). Additionally,

A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated When a motion for summary judgment is properly made and supported an opposing party may not rely merely on allegations or denials in its own pleading; rather its response must be by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial

FED. R. CIV. P. 56(e). Rule 56(e) is now stated in three subparagraphs as a part of the linguistic 2007 Amendments. Advisory Committee Notes on 2007 Amendments to Rule 56.

200. 10A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2728 (2008).
201. *Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*, 529 F.3d 371, 382 (7th Cir. 2008) (summaries of voluminous documents not considered due to lack of adequate authentication of FED. R. EVID. 1006).
202. *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 11.492 (2008). (Summaries should be used in lieu of underlying voluminous data. An opportunity for the assertion of objections and a ruling in time to allow the proponent of the summaries to make necessary corrections before trial should be provided).
203. *Tibbs v. City of Chicago*, 469 F.3d 661, 664 (7th Cir. 2006) (affirming summary judgment for lack of citation to admissible evidence of arrestee's statement that he pointed out to police officers that his address and physical description did not correspond to that contained in the arrest warrant); *Bennett v. Roberts*, 295 F.3d 687, 696 (7th Cir. 2002) (affirming summary judgment ruling district court could disregard references to depositions and other materials appearing in responsive brief, but not in the Local Rule statement of facts).

summary judgment materials.²⁰⁴ The plaintiff must compile the case he would put on at trial, without notice of objections, to meet the inevitable summary judgment motion.

The decisions on the credibility of the evidence that Justice Brennan feared would result from evaluation of the sufficiency of the evidence under a particular burden of proof in *Anderson* are now routine.²⁰⁵ Title VII hostile environment and age discrimination summary judgments exemplify this.²⁰⁶ The plaintiff's burden is to prove harassment that was sufficiently severe and pervasive to meet the statutory prohibition against "discrimination . . . with respect to . . . the terms, conditions, or privileges of employment"²⁰⁷

The Fourth Circuit ruled a female supervisor's conduct of asking her male subordinate out numerous times, "she would like to know what it felt to have [him] inside her, and offensive touching on 10 occasions were not sufficiently severe or pervasive to constitute a hostile work environment."²⁰⁸

The Sixth Circuit held that comments that "people over 55 should not be working" and "old people should be seen and not heard" together with evidence the court described as an unquestionably hostile and abusive work environment was insufficient proof of age bias.²⁰⁹

The Tenth Circuit considered the evidence of a male supervisor who referred to the female plaintiff as a "cunt", said "get your ass back in the truck and don't get out of it until I tell you", referred to plaintiff was "dumb", used profanity to describe her, and offered to buy her a case of beer if she would tell another to "go fuck himself". Only two of forty women under the man's

204. Objections to competence, materiality, and relevance of evidence at a deposition are not waived unless the ground might have been corrected at the time. Fed.R.Civ.Proc. 30 (d)(3)(A). The Southern District of New York is a notable exception. A pre-motion conference is held prior to the filing of a motion for summary judgment by common practice. Joe S. Cecil, Rebecca N. Eyre, Dean Miletich, & David Rindskopf, *Trends in Summary Judgment Practice: 1975-2000*, FEDERAL JUDICIAL CENTER, 21 n. 37 (2007), available at <http://www.uscourts.gov/rules/Summary%20Judgment%201975-2000.pdf>.

205. *Anderson*, 477 U.S. at 251-52, 266-67.

206. Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 100 (1999) (Table of Summary Judgments Upheld and Overturned : 1995: 9-2; 1996: 6-1; 1997: 16-2, 1998: 4-1); (Table of Summary Judgments Granted and Denied: 1995: 22-14; 1996: 37-32; 1997:49-41; 1998:25-2). The hostile environment cases discussed here were addressed in Professor Beiner's article.

207. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 106 S.Ct. 2399 (1986). Title VII proscribes discrimination in "the compensation, terms, conditions, or privileges of employment". 42 U.S.C. § 2000e-2 (a)(1).

208. *Hosey v. McDonald's Corp.*, 113 F.3d 1232 (7th Cir. 1997)

209. *Crawford v. Medina General Hosp.*, 96 F.3d 830, 836 (6th Cir. 1996).

supervision for the year completed the 1990 construction season.²¹⁰ The court affirmed the summary judgment for the defendant.²¹¹

The Seventh Circuit has held the Title VII requirement of discrimination “with respect to the terms, conditions, or privileges of employment” requires harassment be “hellish.”²¹² That court has held a male’s reference to his ex-girlfriend over four years as a “bitch” and “sick bitch” were gender neutral terms.²¹³ The plaintiff fared no better on the evidence of obscene gestures and “suck this bitch” over that four year period. The summary judgment for the defendant was affirmed.²¹⁴

The Seventh Circuit reversed a plaintiff’s jury verdict based on evidence of seven months of calling plaintiff a “pretty girl”, making grunting noises as she left his office, said his office got “hot” when she was there, “all pretty girls [should] run around naked” in the office, and said she should be Anita Hill and listen to his sexual comments.²¹⁵ The court held this conduct did not alter the terms and conditions of employment.²¹⁶

These cases are representative. A survey of employment discrimination appeals from 1979 to 1997 showed defendants obtain reversals in 44% of their appeals while plaintiffs obtain reversals in only 6% of their appeals.²¹⁷ An expanded survey of employment discrimination cases from 1979 to 2006 shows that plaintiffs succeed in only 15% of the federal employment discrimination cases. Plaintiffs in other federal cases succeed in 51% of the time. This has resulted in a 37% decline in employment discrimination cases brought in federal courts from 1997–2007.²¹⁸

The civil rights issue of the day in 17th and 18th Century England and America was freedom of speech, freedom of the press and unreasonable search

210. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1537 (10th Cir. 1995).

211. *Id.* at 1547–48.

212. *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005).

213. *Galloway v. Gen. Motors Corp.*, 78 F.3d 1164, 1168 (7th Cir. 1996).

214. *Id.* at 1165.

215. *Whittaker*, 424 F.3d at 646.

216. *Id.*

217. Kevin Clermont and Theodore Eisenberg, *Plaintiffphobia in the Appellate Courts: Civil Rights Really Do Differ From Negotiable Instruments*, U. ILL. L. REV. 947, 958 (2002) (surveying results in employment discrimination appeals from 1988 to 1997). Employment discrimination cases were tried to a judge until the right to demand a jury was provided in the Civil Rights Act of 1991. 42 U.S.C. § 1981a (c) Pub. L. 102-166, 105 Stat. 1071-1099. Professor Clermont’s more detailed survey of results from 1979 to 2007 showed a comparable 44% reversal rate for defendants and a 9% reversal rate for plaintiffs. Kevin Clermont and Stewart Schwartz, *Employment Discrimination Plaintiffs In Federal Court: From Bad To Worse*, 3 HARV. L. & POLICY REV. 103 (Winter 2009).

218. Clermont & Schwartz, *supra* note 217, at 117, n. 41. Mary Pat Gallagher, *Where Have All the Employment Cases Gone*, NATIONAL LAW JOURNAL (2008).

and seizure. Those cases were decided by common law juries.²¹⁹ The civil rights issue of today is discrimination based on race, national origin, sex, age, and disabilities in employment. Jurors know far more about the reality of employer conduct, the workplace environment, discrimination, and disabilities than judges. Yet judges are systemically excluding the jury from federal judicial decision making. When district judges do allow juries to decide a case, court of appeals judges are setting aside the jury decisions they would not reach themselves. The very reason the Seventh Amendment exists is that juries will reach decisions judges will not.²²⁰

Congress has twice expressly responded to restrictive Supreme Court civil rights decisions. The Civil Rights Act of 1991 was enacted to remove the barriers to recovery by victims of discrimination erected by the Supreme Court.²²¹ The Americans With Disabilities Amendments Act of 2008 was passed to overturn Supreme Court decisions that narrowed the broad scope of protections to disabled individuals Congress had intended the 1991 statute to provide.²²²

VIII. THE SUPREME COURT HAS REJECTED EXPANSIVE USE OF SUMMARY JUDGMENT IN THREE CASES ON THE SUBSTANTIVE LAW IN CIVIL RIGHTS CASES

Discrimination is rarely admitted.²²³ The plaintiff must prove discrimination circumstantially usually by proof that the stated reasons for employment action were false. The jury is free to infer from such proof that the stated reasons were a pretext for discrimination.²²⁴ Some courts of appeal imposed the requirement that proof of pretext was insufficient; the plaintiff must provide additional evidence beyond pretext to prove discrimination.²²⁵ The Supreme Court reversed the Fifth Circuit's application of a pretext-plus standard. Plaintiff's evidence that the employer's stated reason that he was

219. *Wilkes v. Wood*, 19 How.St.Tr. 1153 (1763); *Entick v. Carrington*, 19 How.St.Tr. 1029 (1765); James Alexander, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER*, (Harvard Univ. Press 1963).

220. Wolfram, *supra* note 19, at 871, n. 80.

221. 42 U.S.C. §§ 1981, 1981a, & 1988; Pub. L. 102-166 reported at 42 U.S.C.A. § 1981a.

222. 42 U.S.C. § 12101 et seq. amended by Pub. L. 110-325 § 3 (effective Jan. 1, 2009), Sept. 25, 2008, 122 Stat. 3554.

223. See 3 DEVITT, BLACKMAR, & WOLF, *FEDERAL JURY PRACTICE AND INSTRUCTIONS*, § 106.03 (4th Ed. 1987); *Hossack v. Floor Covering Assocs. of Joliet, Inc.*, 492 F.3d 853, 861-62 (7th Cir. 2007).

224. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000).

225. *Id.* at 139.

discharged for shoddy record keeping of attendance was false was sufficient to sustain his jury verdict.²²⁶

In a voting rights case, the Supreme Court reversed a summary judgment on controverted expert and testimonial evidence that the gerrymandered district was constructed not to favor blacks, but Democrats.²²⁷ The case was remanded to a three judge court for trial, which found the districts were the product of racial discrimination.²²⁸ The Supreme Court's reversal of the three judge court in the appeal from the remand is consistent with the pre-trilogy cases holding summary judgment is not a substitute for trial.²²⁹

Bragdon v. Abbott is known for holding that asymptomatic AIDS is a per se disability under the Americans With Disabilities Act.²³⁰ The plaintiff brought the action against a dentist who refused to treat her. The court reversed the First Circuit's summary judgment for the plaintiff on the lack of any basis for belief that a health provider was at risk for the transmission of the HIV infection. It remanded for a consideration of whether the lack of any medical basis for the perception of that risk existed in 1994.²³¹

The Supreme Court considered the effect of a plaintiff's statement that he was completely disabled under oath in a Social Security Disability Insurance ("SSDI") application on his Americans With Disability Act action.²³² The Fifth Circuit granted summary judgment finding the statements in the SSDI application conclusively demonstrated plaintiff could not meet the ADA requirement of being able to perform the essential function of the job.²³³ The court reversed, holding the plaintiff's explanation and the circumstances of the discrepancy must be considered to determine if there was a genuine issue of fact on plaintiff's ability to work.²³⁴ The court did not endorse the exclusion of a plaintiff's affidavit contradicting his prior testimony on summary judgment unless explained unanimously applied by the courts of appeal. However, it found the rule was appropriate in resolving whether the statements in the plaintiff's SSDI application precluded proof of an ADA disability.²³⁵

226. *Id.* at 144.

227. *Hunt v. Cromartie*, 526 U.S. 541 (1999).

228. *Id.*

229. *Easley v. Cromartie*, 532 U.S. 234 (2001).

230. *Hunt*, 526 U.S. at 638. (asymptomatic AIDS limits a number of major life activities including that of reproduction which plaintiff had chosen as the basis of his ADA case); Americans With Disabilities Act, 42 U.S.C. § 12102(2)(A).

231. *Id.* at 648, 653.

232. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).

233. *Id.* at 799–800.

234. *Id.* at 806–07.

235. *Id.* at 807.

The systemic exclusion of the jury from federal judicial power by summary judgment has occurred silently in the application of law to fact in individual cases over the past 23 years.²³⁶ Commentators have observed this trend. District Judge Jack B. Weinstein cautioned that liberalized use of summary judgment tilts the balance of the scales of justice in favor of defendants and eliminates the jury as a counterweight to central authority.²³⁷ Federal courts must not allow this anti-jury trend to deny plaintiffs their day in court.²³⁸ District Judge Rya Zobel of Boston noted the “near unanimous agreement” of commentators that summary judgment is overused as a case management tool.²³⁹ Judge Nancy Gertner described a training session she attended as a judge telling how to get rid of discrimination cases. Summary judgment has eliminated jury trials and transformed substantive discrimination law on what sexual comments are harassing, what racial epithets are discriminatory, what environments disadvantage women and what words constitute discrimination.²⁴⁰

236. *Boyd v. United States*, 116 U.S. 616, 635 (1886) (“illegitimate and unconstitutional practices get their footing that way, namely, by silent approaches and slight deviations from legal modes of procedure.”); BLACKSTONE *supra* note 19, at 348. “So that the liberties of England cannot subside so long as the palladium remains sacred and inviolate ... by introducing new and arbitrary methods of trial ... And however, *convenient* these may appear to be at first (as doubtless all arbitrary powers, well executed, are the most *convenient*), that delays and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters . . .”

237. *In re Zyprexa Prods. Liab. Litig.*, 489 F.Supp.2d 230, 263–64 (E.D.N.Y.2007).

238. *Id.* at 264. Judge Weinstein was a submarine lieutenant in World War II. He then worked on the New York City docks to put himself through Columbia Law School where he later was a Professor of Law until his 1967 appointment as a United States District Judge. Judge Weinstein is an author of a leading treatise on evidence and one of the most influential judges of the past 40 years. Well into his 80s, he still maintains a docket of complex cases, regularly issuing influential opinions. Judges of the United States Courts, Federal Judicial Center, <http://www.fjc.gov/history/home.nsf>; WEINSTEIN’S FEDERAL EVIDENCE (2d Ed. 1997); William Glaberson, *Dressing Down Lawyers, and Dressing Up Gigante*, NEW YORK TIMES (July 20, 1997), available at <http://query.nytimes.com/gst/fullpage.html?res=9803E5DF143BF933A15754C0A961958260>.

239. *In re One Star Class Sloop Sailboat Built in 1930 With Hull Number 721 Named “Flash II”*, 517 F.Supp.2d 546, 555 (D.Mass. 2007).

240. Judge Nancy Gertner, ADDRESS TO EMPLOYMENT LAW CONFERENCE, *reprinted in*, MASSACHUSETTS BAR ASSOCIATION (May 7, 2007) (*quoted in Flash II*, 517 F.Supp.2d at 555).

IX. THE SUPREME COURT'S RECENT CASES HOLDING THAT AN INCREASED CRIMINAL SENTENCE BASED ON FACTS FOUND BY THE JUDGE AT SENTENCING VIOLATES THE SIXTH AMENDMENT GUARANTY OF TRIAL BY JURY CONFIRM THE JURY EXISTS TO LIMIT THE POWER OF JUDGES

An informed discussion of the Supreme Court's recent decisions on the scope of the Sixth Amendment guaranty of trial by jury cases in criminal cases requires reference to the radical change in criminal sentencing effected by the Sentencing Act of 1984.²⁴¹ For nearly a century, federal and state criminal sentences were determined under an indeterminate system. Congress and the state legislatures provided the range of sentences for particular crimes by statute. The judge determined whether the defendant would be incarcerated and if so, the length of incarceration, whether a fine should be imposed and if so, the amount, and whether probation should be given.²⁴² Dissatisfaction with the disparity in criminal sentences given under the existing discretionary system and rejection of any goal rehabilitation of the offender from criminal sentencing lead Congress to eliminate judicial discretion from sentencing in the Sentencing Reform Act of 1984.²⁴³ Many States followed to some degree.

The Sentencing Act provided determinate sentences to be increased or reduced by the district judge based on aggravating and mitigating factors determined at the sentencing hearing.²⁴⁴ The aggravating or mitigating circumstances and the weight to be given those factors were to be applied

241. 28 U.S.C. § 994; 18 U.S.C. § 3553.

242. *Mistretta v. United States*, 488 U.S. 361, 363–64 (1989).

243. 28 U.S.C. § 994 (k) (rejecting rehabilitation as a goal of imprisonment); 18 U.S.C. § 3553(a)(2) (imprisonment serves the goals of retribution, education, deterrence, and incapacitation of offenders) (discussed in *Mistretta*, 488 U.S. at 367). The elimination of rehabilitation replaced by retribution as the purpose of criminal sentencing has resulted in highest rate of incarceration in the world and a system which 86.4% of federal judges believed required changing. *United States v. Jones*, 145 F.3d 959, 969–74 (8th Cir. 1998) (Bright, dissenting) (citing Statements by Vincent L. Broderick Before the Subcommittee on Crime and Criminal Justice of the Committee on the Judiciary of the House of Representatives (July 28, 1993)). The United States has 2,310,984 persons in prison followed by China with 1,565,771, *World Prison Brief*, King's College, International Centre for Prison Studies, (London, U.K. 2009), available at http://www.kcl.ac.uk/depsta/law/research/icps/worldbrief/wpb_stats.php?area=all&category=wb_poptotal. The United States is home to less than 5% of the population, but has 25% of the world's prisoners. Adam Liptak, *Inmate Count Dwarfs Other Nations*, NEW YORK TIMES (Apr. 23, 2008), available at <http://www.nytimes.com/2008/04/23/us/23prison.html>.

244. *Mistretta*, 488 U.S. at 367. (discussing 18 U.S.C. §§ 3624(a) and (b)); 18 U.S.C. § 3553(a) and (b)).

according to the mandatory standards of the Sentencing Guidelines of the United States Sentencing Commission.²⁴⁵

The Supreme Court rejected the first constitutional challenge to the Sentencing Reform Act in a 1989 case.²⁴⁶ The Court ruled Congress had not delegated its legislative power to the Sentencing Commission.²⁴⁷ It also held placing the Commission in the judicial branch did not violate separation of powers.²⁴⁸

The Supreme Court's consideration of the effect of the Sixth Amendment right to trial by jury enhanced sentences based on facts found at a sentencing hearing began as a matter of statutory interpretation.²⁴⁹ The district judge enhanced the defendant's federal sentence for carjacking based on his finding at the sentencing hearing that the victim's perforated eardrum involved serious bodily injury.²⁵⁰ The Supreme Court reversed the enhanced sentence ruling as a matter a statutory construction that the increased penalty for serious bodily harm was an element of the offense that had to be decided by the jury. This avoided the constitutional issue of whether such a sentence violated the Sixth Amendment guaranty of the right to trial by jury.²⁵¹

The Court directly addressed whether an increase in a criminal sentence based on findings of fact by the judge at sentencing violated the Sixth Amendment guaranty of trial by jury in a New Jersey case.²⁵² The defendant had been convicted to an enhanced sentence based on the judge's finding that he acted with a purpose to intimidate a member of a protected class under the New Jersey hate crime statute.²⁵³ Justice Stevens' majority opinion found there was no distinction between an element of a felony and a factor in sentencing in common law criminal procedure. The jury determined all relevant facts and circumstances in trial on the indictment. After the verdict, the judge was bound to pronounce the judgment annexed to the crime found

245. *Mistretta*, 488 U.S. at 367. (discussing 18 U.S.C. §§ 3553(a) and (b)). The Act created the Sentencing Commission as an independent commission of the judiciary. The Commission consists of seven voting members appointed by the President with the advice and consent of the Senate, three judges appointed from six recommendations, the Attorney General, and four other members appointed by the President. *Id.* at 368. (discussing 28 U.S.C. § 998 (c)).

246. *Id.* at 361.

247. *Id.* at 371–80.

248. *Id.* at 404, 407–08.

249. *Jones v. United States*, 526 U.S. 227 (1999).

250. *Id.* at 229, 230–31; 18 U.S.C. § 2119 (2).

251. *Id.* at 247, 252–53.

252. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

253. *Id.* at 469–70. The New Jersey statute provided for an increased sentence when the defendant's purpose was intimidate because of a person's race, color, gender, handicap, religion, sexual orientation, or ethnicity. N.J. Stat. § 2C:44–3 (c).

by the jury.²⁵⁴ In order to obtain a higher degree of punishment, the indictment must expressly charge the circumstances mandating that increased punishment.²⁵⁵ The Court held the New Jersey statute allowing increase of a criminal sentence based on facts found by the judge at sentencing was a deprivation of the Sixth Amendment right to trial by jury.²⁵⁶

The Court next considered a Washington statute which increased the penalty for crimes if the judge found at the sentencing hearing that the defendant acted with deliberate cruelty.²⁵⁷ Justice Scalia for the majority concluded, “Just as suffrage ensures the people’s ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”²⁵⁸ He quoted John Adams, “[T]he common people, should have as complete a control . . . in every judgment of a court of judicature.”²⁵⁹ Thomas Jefferson stated it in stronger terms, “Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative.”²⁶⁰

The Sixth Amendment guaranty of trial by jury limits judicial power to the extent it infringes on the province of the jury.²⁶¹ Justice Scalia noted the “Framers paradigm for criminal justice [was] not the civil-law ideal of administrative perfection, but the common law ideal of limited state power accomplished by strict division of authority between judge and jury.”²⁶² The petitioner’s sentence to three years more than allowed by the law for the crime he confessed on the finding of the judge, “a lone employee of the State.” violated the Sixth Amendment.²⁶³ The State is required to “submit its accusation to ‘the unanimous suffrage of twelve of his equals and neighbors.’”²⁶⁴

254. *Id.* at 478. (citing 4 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 369–70 (Cooley 3d Ed. 1884) (1769)).

255. *Id.* at 480. (citing 2 M. Hale, PLEAS OF THE CROWN, 170).

256. *Id.* at 497. The Sixth Amendment right to common law trial by jury in criminal cases is applicable against state action by its incorporation as a part of the guaranty of due process of law of the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

257. *Blakely v. Washington*, 542 U.S. 296, 298 (2004).

258. *Id.* at 306 (citing Letter XV by Federal Farmer, (Jan. 18, 1788) reprinted in 2 *Complete Anti-Federalist* 315, 320).

259. *Id.* (quoting John Adams, Diary Entry (Feb. 12, 1771) reprinted in 2 WORKS OF JOHN ADAMS, 252, 253 (C. Adams Ed. 1850)).

260. *Id.* at 306 (quoting Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789) reprinted in 15 PAPERS OF THOMAS JEFFERSON, 282, 283 (J. Boyd Ed. 1958)).

261. *Id.* at 308–09.

262. *Id.* at 313.

263. *Id.*

264. *Id.* at 313 (quoting BLACKSTONE, *supra* note 254, at n.229).

The Supreme Court followed *Apprendi* and *Blakely*'s consideration of state sentencing statutes in holding the provisions of the Federal Sentencing Act providing for the increase of a sentence based on facts other than a criminal conviction found by the judge was a deprivation of the Sixth Amendment right to trial by jury.²⁶⁵ The court severed the provisions of the statute making the Sentencing Guidelines mandatory as incompatible with the Sixth Amendment trial by jury.²⁶⁶ The Sentencing Guidelines may be applied by the judge only insofar as they are compatible with the facts found by the jury.²⁶⁷

X. CONCLUSION

Alexis de Tocqueville found the value of trial by jury in civil cases is political.²⁶⁸ The jury is the embodiment of the American belief in popular sovereignty.²⁶⁹ Trial by jury ensures the law applies the customs of the community, involves the people in the law, and increases respect for the law. The jury's involvement in the law in England and America gave the law and judges a respect and power that did not exist in 19th Century France.²⁷⁰

Trial by jury is both an individual right and a community right securing popular control over the judicial branch in the same manner as the right to vote ensures popular control of the executive and legislative branches.²⁷¹ The Anti-Federalists insisted on the Seventh Amendment to protect against overbearing judges and vindicate the rights of citizens against the government.²⁷² They relied on Sir William Blackstone.

But if [the impartial administration of justice] be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, *their decisions, in spite of*

265. *United States v. Booker*, 543 U.S. 220, 243–44 (2005).

266. *Id.* at 767–68. (*excising* 42 U.S.C. §§ 3553 (b)(1), 3742 (e)).

267. *Id.* at 764–66, 769.

268. Alexis de Tocqueville, *DEMOCRACY IN AMERICA* BOOK 1, CH. XVI (Penguin Books 2003) (1835) reprinted at http://xroads.virginia.edu/~Hyper/DETOC/1_ch16.htm.

269. *Id.*; *Cohens v. State of Virginia*, 19 U.S. 264, 347, 1821 WL 2186, 31 (1821) (Marshall, C.J.) (“The People of the United States are the sole sovereign” who surrender their sovereignty and powers they had previously established in the states in the Constitution).

270. Tocqueville, *supra* note 268.

271. *Blakely v. Washington*, 542 U.S. 296, 306 (2004) citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 *The Complete Anti-Federalist* 315, 320 (H. Storing ed. 1981) (describing the jury as “secur[ing] to the people at large, their just and rightful controul in the judicial department”).

272. Landsman, *supra* note 19, at 599. Professor Wolfram reviewed the results of the legislative debates of the States on ratification. Wolfram, *supra* note 19, at 671–725. He reached the same conclusion. *Id.* at 671–73.

*their own natural integrity, will have frequently an involuntary bias toward those of their own rank and dignity: it is not to be expected from human nature, that the few should always be attentive to the interests of the many*²⁷³

For 300 years, the jury was the institutional check to balance the power of judges. The judge had no power under the English common law to consider sufficiency of the evidence prior to a jury verdict.²⁷⁴ Under today's broad summary judgment standard, the jury sits only if the judge rules the evidence is such that a "reasonable jury" could return a verdict.²⁷⁵ The Seventh Amendment was adopted because juries would reach results judges would not.²⁷⁶

The experience with employment discrimination cases is that when district judges allow the jury to decide the case, the court of appeals judges overturn jury verdicts they themselves would not reach.²⁷⁷

The Supreme Court has recognized the right to trial by jury is a limitation on the power of judges in holding the Sixth Amendment guaranty in criminal cases precludes enhancement of a criminal sentence based on findings of a judge at sentencing.²⁷⁸ The Anti-Federalists made no distinction between the value of trial by jury in criminal and civil cases in conditioning ratification of the Constitution on the Sixth and Seventh Amendment guarantys of jury trial in criminal and civil cases.²⁷⁹

The common law standard for review of verdicts applied on summary judgment before the Supreme Court trilogy of 1986 cases asked if there was any evidence to support the claim.²⁸⁰ This was equivalent to the deferential standard for judicial review of Acts of Congress; whether any rational basis exists that supports the statute.²⁸¹ The jury will not long survive if its ability to sit on cases depends on the judge's review of the evidence.

273. BLACKSTONE, *supra* note 19 (emphasis added).

274. *See supra* Part V.

275. *Anderson*, 477 U.S. at 248.

276. Wolfram, *supra* note 19, at 871, n. 80.

277. Clemont & Eisenberg, *supra* note 217, at 958; Clermont & Schwab, *supra* note 217.

278. *Blakely v. Washington*, 542 U.S. 296, 308–09 (2004).

279. 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 540–41 (4th Ed. 1873); Laura Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 431–32, n.260–61 (2009); *Parsons v. Bedford, Breedlove, & Robeson*, 3 PET. 433, 446, 7 L. Ed. 732 (1830).

280. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 623–24, 64 S.Ct. 724 (1944); *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962). *See supra* Part V.

281. *Bowen v. Gilliard*, 483 U.S. 587 (1986) (deferential standard of whether any rational basis exists is applied to judicial review of legislation); *Miller v. Albright*, 523 U.S. 420 (1998) (great deference is applied to judicial review of acts of the Congress or the President).

Alerted to effective elimination of the jury from the federal judicial power by expansive use of summary judgment in the past 23 years, the Supreme Court may return the jury to the role it occupied for 300 years prior to 1986. It will not reach the issue until parties raise the issue and courts of appeals resolve it.²⁸² A grant of certiorari will be likely only if the courts of appeals reach conflicting decisions on the expansive use of summary judgment. The likelihood of a conflict among the court of appeals, which developed the expansive use of summary judgment, is uncertain. Institutions that acquire power are often reluctant to give it up.

Congress has the ultimate authority over the federal courts. It can easily restore the jury. Rule 56 can be amended to state summary judgment can be entered only when the movant has negated the existence of any genuine issue of material fact to the extent that no reasonable person can disagree on what is true.²⁸³ A standard of truth would remind that judges are no more competent—and are often less competent—to decide the outcome of lawsuits than six or twelve jurors. Summary judgment would remain for cases where the truth is not in dispute such as Blackstone's example of a trespass action where the defendant was hunting and hunting is a defense.²⁸⁴

This will return the federal courts to the common law standard applied in the 48 years from the 1938 adoption of the Federal Rules of Civil Procedure to the 1986 trilogy. A popular assumption is that reduced summary judgments would undermine the judicial system by creating innumerable trials. Actual experience shows the error. The vast majority of cases settle immediately after summary judgment is denied.²⁸⁵ Summary judgment is rarely granted in personal injury cases, but nearly all settle before trial.

282. Certiorari is granted to resolve conflicts among the circuits or state courts of last resort on questions of federal law or an important federal question that must be settled by the Court. SUP. CT. R. 10.

283. Case of Imprisonment of Edward Bushell, 6 HOWELL'S STATE TRIALS 999 (22 Charles II A.D.) (1670); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 626–27 (1944).

284. BLACKSTONE, *supra* note 19, at 323–24, n.109.n

285. Bronstein, *supra* note 17, at 525, 537–38, n.72; *relying upon* Samuel Isscharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100, 107 (1990) (changes that facilitate disposition of cases impede, if not exacerbate, court congestion because they give defendants an incentive to avoid early settlement and take their free shot on summary judgment of prevailing on the merits). Bronstein, *supra* note 18. (citing Isscharoff & Lowenstein, 100 YALE L.J. 73, 97. (Absent summary judgment, the legal dispute consists of a two stage process, (1) negotiations before the action and during discovery and (2) a trial if a settlement is not reached)).

