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Controlling the Civil Jury: Towards a Functional Model of Justification

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Controlling the Civil Jury: Towards a Functional Model of Justification

BY PAMELA J. STEPHENS*

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INTRODUCTION

Ambivalence toward the right to a jury trial in civil cases has been a feature of our judicial system from the outset. The

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1 See generally M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 131 (1936); Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289 (1966); discussion infra notes 7-55 and accompanying text.
jury has been hailed as the very essence of our freedom\textsuperscript{2} and contemporaneously attacked as inept and "lawless."\textsuperscript{3} Since the origin of the jury, the common law has devised various ways of controlling the power of that institution; currently, federal rules of procedure embody many of these jury control devices.\textsuperscript{4} Those assessing the usefulness and constitutional validity of these procedural devices often have found them in conflict with the jury-trial right. This apparent conflict results, at least in part, because those assessing control devices have relied upon excessively narrow and incomplete theoretical models of the civil-jury-trial right. Generally, these prior models describe and circumscribe a role for the civil jury without giving adequate consideration to the dynamics of a judge/jury system or without giving a convincing justification for power allocation within that system. This Article seeks to create a model that remedies these shortcomings.

Traditional models describing the role of the civil jury rest primarily upon historical, legal, and political grounds. Historical models define the jury's role under the seventh amendment's mandate to follow common law practices. Legal models focus on the law/fact distinction and limit the jury's role to consideration of those matters defined as factual. Political models emphasize the democratizing influence of juries in an otherwise antimajoritarian judicial system and describe the necessity of jury participation. While each of these models explains some aspect of the jury's role, none of them systematically explores the limits of what that role is or should be. Thus, they are not useful in describing what and when jury control devices are appropriate. This Article proposes a functional model that provides a basis for making such decisions.

Because the seventh amendment\textsuperscript{5} compels preservation of the jury-trial right as it existed at common law,\textsuperscript{6} all civil jury models have a historical component. Therefore, this Article begins with

\footnotesize{\textsuperscript{2} See, e.g., Wilder, The Clown of the Law, 20 ALB. L.J. 45 (1879).}
\footnotesize{\textsuperscript{3} Scott, Should Trial by Jury in Civil Cases Be Abolished? 20 AM. L. REV 661 (1886). See generally Campbell, Some Hints on Defects in the Jury System, 4 S. L. REV 521 (1878).}
\footnotesize{\textsuperscript{4} See, e.g., FED. R. CIV P 49(a), 50, 59(a).}
\footnotesize{\textsuperscript{5} See infra note 27 (text of amendment).}
\footnotesize{\textsuperscript{6} See infra notes 29-30 and accompanying text.}
a discussion of the civil-jury origins with the aim of later drawing from that history to measure the current validity of various jury control devices. Criticism of traditional models of the jury follows. Each model fails to explain existing jury practice or to prescribe a future role for civil juries.

Due to inadequacies in existing models, a new theoretical model is proposed—one dependent upon a functional analysis of the respective roles of the judge and the jury. Jury control devices are assessed in relation to this new functional model, supporting the thesis that the tension between the jury-trial right and jury control devices is a consequence of the failure of traditional models to clarify the appropriate allocation of decision making between judge and jury in our adjudicatory process.

I. DEVELOPMENT OF THE CIVIL JURY AND EARLY ATTEMPTS AT CONTROL

A. Early History

1. English

Although details of its origins are obscure, scholarly consensus is that the English jury, despite being perceived as democratic and representative, derived from Frankish royal administrative practices of the early ninth century. Brought to England by the Norman conquest, the civil jury was originally an administrative device for the government to obtain desired information. This early use of the "jury," known as an inquisition, bore little resemblance to the modern institution. Thayer has described twelfth-century jury practice:

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8 J. Thayer, supra note 7, at 47-48.

9 During this earliest period there are many illustrations of the use of the inquisition in ordinary administration. The conspicuous case is that of the compilation of Domesday Book in 1085-6. This was accomplished by a
When once the twelve knights have assembled, it is first ascertained by their oath whether any of them are ignorant of the fact. If there be any such, they are rejected and others chosen. If the twelve differ in their verdict, others are added until there are twelve who agree. The knowledge required of them is their own perception, or what their fathers have told them, or what they may trust as fully as their own perceptions.

This notion—that the jury would make a decision based on the knowledge of its members, rather than on the evidence presented to it—was to persist for several centuries, well beyond the time when juries routinely heard witnesses and were presented with evidence. As late as 1670, in *Bushell's Case*, the court reaffirmed the jury's independence in this regard. Although the jury hears the evidence, it may 'act upon evidence of which the court knows nothing; and may rightfully decide a case without any evidence publicly given for or against either party.'

With its continued existence confirmed by the Magna Carta, the jury became an embodiment of popular representation in government. This position was largely due to its role in eighteenth-century criminal trials, in particular, criminal libel cases that pitted political activists against a repressive government.

*commission, making inquiry throughout England, by sworn men of each neighborhood, responsible and acquainted with the facts. Domesday is a record of all sorts of details relating to local customs, and the possession, tenure, and taxable capacity of the land owners. Incidentally much else came in, as where an inquest relates in its answers the proceedings of a litigation in the popular court, and how, upon Ralph's failure to appear on a day fixed by the sheriff, the men of the hundred had adjudged the land to his adversary.*

*Id.* at 51.

10 *Id.* at 62-63 (emphasis added).


13 J. Thayer, *supra* note 7, at 168 (drawing a conclusion from the opinion in *Bushell's Case*).

14 See *id.* at 66.

15 See generally *id.* at 68.

16 The King v. Shipley, 99 Eng. Rep. 774 (K.B. 1784); The Case of Henry Sampson Woodfall, 20 How. St. Tr. 895 (K.B. 1770); Trial of John Miller, 20 How. St. Tr. 870 (K.B. 1770); Trial of John Almon, 20 How. St. Tr. 803 (K.B. 1770); Trial of William...
These libel cases resulted in Fox’s Libel Act of 1792, ensuring the jury’s right to return a general verdict in libel cases, thereby effectively giving the jury power to nullify an unjust law.

2. American

In the English historical context, the framers of the United States Constitution considered the right to a jury trial in civil cases. During the Constitutional Convention, the framers devoted very little debate to the civil jury trial. Late in the proceedings, the convention members discussed the judiciary articles without mentioning civil juries. Three days after a final draft reporting, the civil jury issue was considered on the Convention floor for the first time. The framers rejected a motion to amend Article III’s guarantee of jury trial in criminal cases to include the language: “And a trial by jury shall be preserved as usual in civil cases.” The problem was not lack of support for the notion of a right to jury trial; instead, the framers failed to agree on the precise content of a guarantee.

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17 32 Geo. 3, Ch. 60 (1792).

18 For a comprehensive discussion of the colonial perspective on jury trials, see 4 C. Andrews, The Colonial Period of American History (1964); Henderson, supra note 1; Wolfram, The Constitutional History of the Seventh Amendment, 57 MINN. L. REV 639 (1972-73).

19 The Records of the Federal Convention of 1787 (M. Farrand ed. 1937) [hereinafter Farrand]; Henderson, supra note 1, at 293.

20 J. Madison, reprinted in Debates in the Federal Convention, 2 Farrand, supra note 19, at 587.

21 Id. at 628.

22 For example, Alexander Hamilton wrote:

The friends and adversaries of the plan of the convention if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them, it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

The Federalist No. 83, at 382 (A. Hamilton) (Hallowell ed. 1852).

23 Henderson suggested that the reason the framers did not include a civil jury guarantee in the Constitution was “at least in part that the convention members simply wanted to go home. They had worked hard through a hot, steamy Philadelphia summer on the more difficult and more central problems of representation in Congress and choice of a national executive, and they had had enough.” Henderson, supra note 1, at 294-95.
practice of civil jury trial was well established in the American colonies but varied greatly in scope and application.\textsuperscript{24} The failure to include a civil-jury-trial guarantee in the Constitution was one of the major objections raised by the document's opponents.\textsuperscript{25} Many viewed the failure to provide for the jury trial as a move to abolish it.\textsuperscript{26} These objections (along with others expressed in the ratification process) resulted in the adoption of the Bill of Rights, including the seventh amendment.\textsuperscript{27} Essentially, no legislative history regarding the seventh amendment exists. House debate focused not on the content of the amendment but rather on whether amending the Constitution at all, or so soon after ratification, was advisable.\textsuperscript{28}

The final form of the seventh amendment "preserved" the right to jury trials "according to the rules of the common law."\textsuperscript{29}

\textsuperscript{24} See P. Ford, Pamphlets on the Constitution, reprinted in 3 Farrand, supra note 19, at 101, for James Wilson's speech defending the failure to include a civil-jury-trial guarantee:

The cases open to a jury, differed in the different states; it was therefore impracticable, on that ground, to have made a general rule. The want of uniformity would have rendered any reference to the practice of the states idle and useless: and it could not, with any propriety, be said, that 'the trial by jury shall be as heretofore: since there has never existed any federal [sic] system of jurisprudence, to which the declaration could relate.

Id.

\textsuperscript{25} See, e.g., Debates and Proceedings in the Convention of the Commonwealth of Massachusetts 80 (1856). Several states including Massachusetts, New Hampshire, New York, Virginia, and Rhode Island included recommendations for a civil jury guarantee in their motions for ratification. 1 J. Elliott, The Debates in the Several States Conventions on the Adoption of the Federal Constitution 326 (2d ed. 1986); 3 id. at 658; Henderson, supra note 1, at 298.

\textsuperscript{26} See Henderson, supra note 1, at 296-97, quoting a speech by "A Democratic Federalist" reprinted in Pennsylvania and the Federal Constitution 152-53 (J. McMaster & F. Stone ed. 1888) ("I am therefore right in my assertion, that trial by jury in civil cases is by the proposed Constitution entirely done away and effectually abolished.").

\textsuperscript{27} The seventh amendment provides:

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.

U.S. Const. amend. VII.

\textsuperscript{28} Senate proceedings were not made public at that time. Henderson, supra note 1, at 292. See also, the preamble to the joint resolution submitting the Bill of Rights to the states, 1 Stat. 97 (1789), which reflects Congress' wish to reassure the minority who opposed the Constitution that their civil liberties would be protected.

\textsuperscript{29} U.S. Const. amend. VII.
Because the amendment refers to the practices of the common law, the Supreme Court initially took a historical approach in interpreting the seventh amendment:

By *common law*, [the framers] meant suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

The court left for a much later day the question whether the framers envisioned the common law as an evolving process or as a rigid historical context. The historical test, as described by Justice Story above, was to define the outer boundaries of the civil-jury-trial right until well into the twentieth century.

**B. Nineteenth-Century Development**

The public perception of the jury as a popular, democratic institution reached a highwater mark during the first half of the nineteenth century, corresponding, some suggest, to the rise of Jacksonian democracy. Although Coke’s maxim was often cited, *ad quaestionem facti non respondent judices* [judges do not answer a question of fact] *ad quaestionem juris non respondent juratores* [juries do not answer a question of law],

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31 For a discussion of the Beacon Theatres case and subsequent case law, see infra notes 60-71 and accompanying text.
33 E. COKE, *Commentary on Littleton* § 234 (15th ed. 1794).
the practices of the early nineteenth century did not correspond to an allocation of fact-finding functions to the jury and law-finding functions to the judge.

In the several states the power of the judge became more and more restricted in the era that accompanied the rise of Andrew Jackson and the reorganized Democratic Party with the emphasis shifting more and more to the jury. In many jurisdictions, judges were prevented from commenting on the evidence.34

This emphasis upon the jury as a safeguard against abuse of government power was consistent with the prevailing political philosophy of the colonial period, a philosophy that rested upon popular control over and participation in government. Thomas Jefferson wrote that “it is necessary to introduce the people into every department of government, as far as they are capable of exercising it; and that this is the only way to insure a long-continued and honest administration of its powers.”35 Moreover, many people distrusted crown-appointed colonial judges and believed that the jury curbed the unbridled exercise of royal power.36

Two developments characterized the eighteenth and early nineteenth century shift of power away from judges and toward juries. First, many states forbade judges from commenting on the evidence in the process of instructing juries.37 This practice—contrary to both English common law and that used in federal courts—continues in most jurisdictions today.38 Second, courts and commentators acknowledged the jury’s right as well as its power to decide the law in a case.39

Even the Supreme Court in an early case within its original jurisdiction, in which it empaneled a jury, expressly allowed the jury to decide the law as well as the facts of the case:

34 M. RADIN, supra note 1, at 217.
36 4 C. ANDREWS, supra note 18, at 225; R. POUND, CRIMINAL JUSTICE IN AMERICA 115 (2d ed. 1945); R. POUND, THE FORMATIVE ERA IN AMERICAN LAW 91-92 (1938).
37 Comment, supra note 32, at 170 (quoting M. RADIN, supra note 1, at 217).
38 “By 1926, 38 states had prohibited the judge from commenting on the evidence.” Id. at 173 n.20 (citing Hogan, The Strangled Judge, 14 J. AM. Jud. Soc’y 119-20 nn.18-20 (1930)).
39 Howe, Juries as Judges of Criminal Law, 52 HARV. L. REV 582 (1939).
It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

The state courts accepted this view also. By reference to English common law and to criminal libel actions in particular, this view is consistent with the views expressed by the drafters of the Constitution. At some point the pendulum began to swing back. The Supreme Court reversed itself in 1895 by holding that even in criminal cases the jury must apply the law as given by the judge to the facts it finds.

Roscoe Pound characterized the period from independence to the end of the Civil War as the formative era of American law. During this era, courts evolved from a position of public distrust, with many nonlawyer judges on the bench, to the point at which "reported judicial experience became the decisive agency of lawmaking." Judicial decision making also moved away from the influence of the natural law toward a more analytical or historical theory. By the latter part of the nineteenth century, jurists thought of law as the imperative of the state, applied mechanically by tribunals in the administration of justice, or as a body of traditional legal precepts by which the state permitted causes to be adjudicated for the time being in the absence of its imperatives, or as a body of formulations of

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40 Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).
41 See supra note 16 and accompanying text.
42 John Adams, although not a drafter of the Constitution, took the position that with respect to the "general rules of law and common regulations of society," a juror should not be compelled to accept the judge's view, but rather "[i]t is not only his right, but his duty, in that case, to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 2 THE WORKS OF JOHN ADAMS 254, 255 (C. Adams ed. 1850).
43 Sparf v. United States, 156 U.S. 51, 102 (1895).
44 R. POUND, THE FORMATIVE ERA IN AMERICAN LAW, supra note 36, at 3.
45 Id. at 93; see also M. HORWITZ, supra note 32.
46 R. POUND, THE FORMATIVE ERA IN AMERICAN LAW supra note 36, at 110.
experience of human conduct, and of experience of human administration of justice, the universal governing principles of which were to be discovered by historical inquiry.\(^{47}\)

Given the judiciary's increased professionalism and the new emphasis in legal philosophy upon the analytical and historical, it is not surprising that by the end of the nineteenth century the jury was coming under increasing attack.\(^{48}\) Procedural changes that appeared to coincide with this diminished view of the jury included the evolution of the rules of evidence, the development of the judicial notice doctrine, the growing distinction between questions of fact and questions of law, and the development of the special verdict and special interrogatory devices.\(^{49}\) One late nineteenth-century commentator found the "diminished influence and power of juries in England and the United States—especially in the Federal Courts—is clearly illustrated by the force and language used and expressed in instructions to the jury."\(^{50}\)

Key to the division of responsibilities between judge and jury was the evolving distinction between law and fact. As Coke's maxim would indicate, this distinction was well known at common law and it was also acknowledged in the language of the seventh amendment. However, during the course of the nineteenth century "[a]n attempt was made to sharpen the law-fact dichotomy and give it concrete institutional expression."\(^{51}\) As the jury's "right" to decide questions of law was called into question, the continued proscription on the judge's ability to comment on the evidence was a further reinforcement of the allocation of responsibility: the judge would not be allowed to intrude upon the jury's function, nor the jury upon the judge's.\(^{52}\)

This sharpening of the distinction between law and fact corresponded with the widespread adoption of the Field Code of Procedure, with its pleaded requirement of a "statement of

\(^{47}\) Id.

\(^{48}\) See Comment, supra note 32, at 190-92.

\(^{49}\) See generally id. at 173.

\(^{50}\) Id.

\(^{51}\) Comment, supra note 32, at 173.

\(^{52}\) Id.

See generally Scott, supra note 3 at 666; Wilder, supra note 2, at 47.
the facts constituting the cause of action." This seemingly straightforward requirement resulted in considerable litigation over whether a given issue concerned a matter of fact versus a conclusion of law, or an evidentiary as opposed to an ultimate fact. Such distinctions necessarily carried over into the debate on whether a matter was appropriate for jury decision: facts certainly were, law presumably was not, and questions of mixed law and fact were anyone's guess.

C. Right to Jury Trial

Criticism of the civil jury continued into the twentieth century. Dissatisfaction with the jury as a fact-finding body and as a part of the adjudicatory process grew. Some people suggested abolishing the jury trial in civil cases or, at the very least, strictly controlling the jury through procedural devices. Despite this criticism, the civil-jury-trial right remained intact and arguably expanded; however, the critics were vindicated by the continued acceptance of jury control devices. Detailed discussion of those control devices necessitates a brief inquiry into the current scope of the jury-trial right.

The line of Supreme Court decisions beginning with Beacon Theatres, Inc. v. Westover and Dairy Queen v. Wood currently defines the scope of the civil-jury-trial right. In those cases, the Court opted for a jury-trial right that is not tied so tightly to the specifics of historical conditions. While acknowledging the seventh amendment's reference to the common law, the Court stated a rule that depended less upon divisions between

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53 N.Y. Laws (1848), ch. 379 § 120(2) (Amended in 1851 to read: "A plain and concise statement of the facts constituting a cause of action.")


57 See, e.g., Scott, supra note 56; Sunderland, supra note 56.

58 See, e.g., Sunderland, supra note 56.

59 See infra notes 60-71 and accompanying text.

60 359 U.S. 500 (1959).

law and equity and more upon underlying historical bases for equitable relief—irreparable harm and inadequacy of legal remedy. If, by virtue of modern procedural rules, an adequate remedy exists at law, a jury trial is mandated in that proceeding—even if the proceeding (for example, an accounting) was heard traditionally in equity. Moreover, *Beacon Theatres* rejected the equitable clean-up doctrine which permitted an equity court hearing a case involving legal issues to decide those issues without empaneling a jury; the Court held that when legal and equitable issues necessitate overlapping factual determinations, the legal issues are decided first and are accorded a jury trial. Such a rule "applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not."

*Beacon Theatres* and subsequent cases expanded the jury-trial right to issues traditionally not afforded a jury and allowed jury trials in the context of procedural devices (for example, class actions and interpleader) that were developed by and existed only in the equity courts. The Supreme Court has excepted from the broad jury-trial right only the situation in which arguably legal issues arise in the context of "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." The Court's last major statement on the jury-trial right is contained in a 1970 case, *Ross v. Bernhard*, and more specifically in an enigmatic footnote. This footnote provides: "As our cases indicate, the 'legal' nature of

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63 *Id.* at 508-09.
64 *Dairy Queen*, 369 U.S. at 477-78.
The respondents' contention that this money claim is "purely equitable" is based primarily upon the fact that their complaint is cast in terms of an "accounting," rather than in terms of an action for "debt" or "damages." But the constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings.

*Id.*
65 *Beacon Theatres*, 359 U.S. at 508.
66 *Dairy Queen*, 369 U.S. at 473.
an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." At least one commentator concludes that the Court’s approach indicates a movement away from an historical test and toward a truly "functional jury trial test."

Some lower federal courts have suggested another limitation on the jury-trial right based upon the third consideration in the Ross footnote. This is the complexity exception which precludes the use of a jury trial when complexity of issues, technological sophistication of the evidence, numbers of parties, or difficulty of the substantive law indicate that the "practical abilities" of the jury do not allow for rational decision making. Courts justify the complexity exception with three arguments. First, the historical argument is that the common law in 1791 recognized such an exception. Second, it is argued that, because of the difficulties of decision making in these complex cases, they are better left to the knowledge and experience of the judge. Finally, a due process argument contends that submitting a case to the jury that exceeds its capacity for rational decision making violates the litigants' due process rights. The Supreme Court has not addressed the complexity exception directly.

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70 Id. at 538 n.10.
71 Kane, Civil Jury Trial: The Case for Reasoned Iconoclasm, 28 Hastings L.J. 1, 11 (1976). But cf. Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 NW U.L. REV 486, 530 (1975) ("Only by clearly rejecting the limits imposed by the rational approach and openly adopting a rigid historical approach in all cases will the courts be fulfilling their obligation to provide a reasoned, generalizable interpretation of the seventh amendment right.").
75 See United States Fin. Secs. Litig., 75 F.R.D. 702 (S.D. Cal. 1977), rev'd, 609 F.2d 411 (9th Cir. 1979).
76 See Japanese Elec. Prods. Antitrust Litig., 631 F.2d at 1084 (The third circuit held that if a court determines that a jury cannot reach a rational decision because of
II. Modern Implementation by Procedural Devices

Jury control devices are as old as the jury itself. Some, such as the attaint, no longer exist; others evolved and continue in use. What these devices have in common is not a shared history or even a shared theoretical imperative; rather, each device developed in response to certain practical exigencies of jury practice. The discussion below describes the origins of these control devices, their current use, and constitutional questions that the devices raise. Examination of these devices is undertaken to expose the inadequacies of traditional theoretical models and to lay the groundwork for discussing a more functional approach to allocation of decision making between the judge and the jury.

A. Special Verdicts

1. History

The special verdict evolved to protect the jury from penalties of attaint. Because early jurors in England were chosen by virtue of their knowledge of the facts and circumstances, and because evidence was not presented, the determination that the jury had reached a false conclusion subjected it to punishment. The practice of attaint apparently preceded the notion that the court could set aside the jury’s verdict. Instead, the losing party could request that a second, larger jury, made up of members of a higher social rank than the original jury, hear the case. Other methods of attaint existed: jurors might be attainted upon

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the complexity of the case, fifth amendment due process and seventh amendment right to jury trial concerns should be balanced.); see also Culley, In Defense of Civil Juries, 35 Me. L. Rev. 17 (1983).

77 The following discussion does not include all possible procedural devices which control the jury’s function. For example, summary judgments and dismissals under Federal Rules 56 and 41 are not explored. The devices in this section are representative of types and rationales of jury control.


79 J. Thayer, supra note 7, at 137-82.

80 See, e.g., id. at 140.
their own answers on later examination, or, upon confession of the party in whose favor they found, that the verdict was false.\textsuperscript{81} Serious fines and even imprisonment were possible if the original jury was found to have rendered a false verdict.\textsuperscript{82}

In order to protect itself from the attaint, particularly as law grew more complex and subtle, the jury developed the practice of submitting findings of fact to the judge who applied the law to those facts.\textsuperscript{83} By the time of enactment of the Statute of Westminster\textsuperscript{84} in 1285 which gave juries the permission to find special verdicts, the statute was said to be only declaratory of common law\textsuperscript{85} The writ of attaint was abolished by statute in 1825, but by then it had long been obsolete, and the special verdict was firmly in place in the English common law\textsuperscript{86}

Despite its origins as a self-protective device for jurors, "the practice books of the eighteenth century make it clear that by that time a special verdict was usually moved for and largely drawn up by counsel."\textsuperscript{87} Counsel consulted and agreed upon questions to submit. Under the usual practice, the jurors consulted, then gave their answers to the judge privately. The next day the tentative verdict was read in open court and lawyers could object. When counsel agreed, the jurors were asked if this

\textsuperscript{81} Id.  
\textsuperscript{82} Id. at 151; see Morgan, \textit{A Brief History of Special Verdicts and Special Interrogatories}, 32 \textsc{Yale L.J.} 575, 576 (1923).  
\textsuperscript{83} Morgan, \textit{ supra} note 82, at 577-80. Morgan describes five forms of the "special verdict" that existed at the end of the twelfth century and during most of the thirteenth century:

(1) Direct answers followed by a statement of facts as reasons for the answers.

(2) A statement of facts followed by direct answers to the questions as conclusions from the statement.

(3) A statement of facts followed by the conclusion that they cannot answer the question put.

(4) A statement of facts without any reference to a direct answer to the questions submitted.

(5) A statement of facts with the request that the judges draw there-from the conclusions which should constitute answers to the questions put.

\textit{Id.} at 577-80.  
\textsuperscript{84} 13 Edw., ch.30.  
\textsuperscript{85} See generally J. \textsc{Thayer, supra} note 7.  
\textsuperscript{86} See, e.g., \textit{id.} at 154; Finz, \textit{Does the Trend in Our Substantive Law Dictate an Expanded Use of the Special Verdict?} 37 \textsc{Alb. L. Rev} 229, 239 (1973).  
\textsuperscript{87} Henderson, \textit{ supra} note 1, at 307
was their verdict. If they agreed, then the final verdict was entered.\textsuperscript{88}

Less clear than the origins of the special verdict is whether a court could coerce a jury to return a special verdict, or whether the choice of the verdict form rested solely with the jurors.\textsuperscript{89} The early evidence on this point is scant.\textsuperscript{90} While instances exist in which the judge demanded a special verdict and the jury complied, or in which the judge demanded a special verdict, the jury refused, and the judge did not press the demand, neither occurrence demonstrates conclusively that the jury could or could not be compelled to return a special verdict.\textsuperscript{91}

In the ordinary civil case, the jury complied with a request for a special verdict with rare exception.\textsuperscript{92} In the few cases in which it refused to comply, the authority is less than clear. In an anonymous 1697 case, Lord Holt stated:

\begin{quote}
In all cases and in all actions the jury may give a general or special verdict, as well in causes \textit{criminal} as \textit{civil}, and the Court ought to receive it, if pertinent to the point in issue, for if the jury doubt they may refer themselves to the Court, but they are not bound so to do.\textsuperscript{93}
\end{quote}

In other cases in the same period, however, the contrary is true.\textsuperscript{94} Lord Holt only five years later, in a case in which the jury

\begin{itemize}
\item \textsuperscript{88} See Henderson, supra note 1, at 307 (citing G. Crompton, The Practice of the Courts of King's Bench and Common Pleas 472-74 (B. Sellor 1st Am. ed. 1813); J. Lilly, The Practical Register: Or a General Abridgement of the Law 791C (2d ed. 1735); W Tidd, The Practice of the Court of King's Bench 808 (4th Am. ed. 1856)).
\item \textsuperscript{89} See generally Henderson, supra note 1, at 307-09; Morgan, supra note 82, at 589.
\item \textsuperscript{90} See generally Henderson, supra note 1, at 307-09; Morgan, supra note 82, at 589.
\item \textsuperscript{91} Compare Gay v. Cross, 87 Eng. Rep. 1078 (K.B. 1702) (denying a new trial although jury had refused to state reasons for its verdict) \textit{with} The Queen v. Bewdley, 24 Eng. Rep. 357 (ch. 1712) (granting a new trial because jury used general verdict when directed to use special verdict); Mayor and Burgesses of Devizes v. Clark, 111 Eng. Rep. 506 (K.B. 1835) (holding that jury has privilege to decline special verdict); Baker's Case, 77 Eng. Rep. 216 (K.B. 1600) (allowing jury to decide question of law by "special matter").
\item \textsuperscript{92} Henderson, supra note 1, at 307.
\item \textsuperscript{93} 91 Eng. Rep. 881 (K.B. 1697).
\end{itemize}
returned a general verdict when a special verdict was requested, proclaimed that "he never had known the like, and that he would have but little value for the verdict of a jury that would not, at a Judge's desire, declare the reason which had induced them. Consequently, he refused to set the verdict aside. Nevertheless, he refused to set the verdict aside.95

No cases on point are available later than the eighteenth century, although some references to the earlier cases are made in the writings of that period.97 Lilly's Abridgement of 1735 does not contain the early cases; instead, it states: "Although the Plaintiff and the Defendant do consent to have the Jury find a Special Verdict, yet they may find a General Verdict. But it is a very unusual [t]hing for them to do it."98

Commentators agree that justices attempted to compel a special verdict only in rare cases.99 Perhaps contributing to this practice was the apparently common practice of interrogating the jurors post verdict as to the reasons for their decisions.100 In any event, the major writings on eighteenth-century courts do not reveal any references to the jury's noncompliance with a special verdict request as a ground for a new trial.101 Therefore, compelling the jury to use a particular form of verdict apparently was not an accepted practice.102

96 Id.
97 Henderson, supra note 1, at 308.
98 Id. at 308-09 (quoting J. Lilly, supra note 88, at 793E).
99 See, e.g., Henderson, supra note 1, at 309.
One could speculate that the bar as a whole decided that these cases were not good law, or that no jury in a civil case ever again refused to find a special verdict. But perhaps the least unlikely guess would be that because of the criminal libel cases of the period, a motion for a new trial on this ground became so politically unpopular that practitioners considered it a great tactical mistake.

Id.
100 See Morgan, supra note 82, at 591.
101 "Neither Blackstone's Commentaries (1768), Buller's Law of Nisi Prius (1785), Tidd's Practice of the Court of King's Bench (1785), nor Chitty's Practice of the Law (1842) mention this as a possible ground for a new trial." Henderson, supra note 1, at 309.
102 Henderson and Morgan draw this conclusion although Henderson finds the evidence more ambiguous and the conclusion less clear. Id., Morgan, supra note 82, at 592.
In this country, at the time the federal Constitution was drafted, the special verdict was in use in all of the states for which records are available\textsuperscript{103} except Georgia, which had a constitutional provision prohibiting the device.\textsuperscript{104} The form of the device seems to have varied from state to state.\textsuperscript{105} Some early cases demonstrate that the American and English practices were very similar: counsel prepared the special verdict and the jury was not free to depart materially from the special verdict form as drawn up by the lawyers.\textsuperscript{106} In at least one early case, a court raised, but did not rule upon, the issue of whether the jury could be compelled to bring in a special verdict.\textsuperscript{107}

As a consequence of the scant debate surrounding adoption of the seventh amendment,\textsuperscript{108} apparently the framers did not consider details, such as the issue of the special verdict, as a part of the right-to-jury-trial issue. Neither did the framers consider the allocation of decision-making responsibility between the judge and jury, "[n]or can any implicit understanding as to this relationship be presumed, for among the thirteen original states there were at least half a dozen widely differing patterns of civil practice.\textsuperscript{7109} The federal courts, prior to the adoption of the seventh amendment, were governed by the Judiciary Act of 1789, under which issues of fact were triable by the jury except in cases of admiralty and equity \textsuperscript{110}

As the nineteenth-century debate over the jury continued, the advisability of unchecked jury decision making in the form

\textsuperscript{103} Brown v. Cornwell, 1 Root 60 (Conn. 1773); Wright’s Lessee v. Cannon, 1 Del. Cas. 42 (Del. 1794); Hath’s Lessee v. Polk, 1 H. & McH. 363 (Md. 1770); Aphorp v. Shepard, Quincy 298 (Mass. 1768); Act Relative to Juries and Verdicts, ch. 674 § 18 N.J. Laws 249, 253 (1797); Jackson v. Dunsbaugh, 1 Johns. Cas. 91 (N.Y. Sup. Ct. 1799); Sasser v. Blyth, 2 N.C. (1 Hayw.) 209 (N.C. 1796); Price v. Watkins, 1 Dall. 8 (Pa. 1763); Dott v. Cunningham, 1 S.C.L. (1 Bay) 453 (S.C. 1795); Henderson v. Allens, 11 Va. (1 Hen. & M.) 113 (Va. 1807). Insufficient evidence exists that the device was used in New Hampshire and Rhode Island.

\textsuperscript{104} GA. Const. art. XLI (1777), reprinted in 2 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 448 (F Swindler ed. 1973).

\textsuperscript{105} See supra note 1, at 310.

\textsuperscript{106} See, e.g., Brent’s Lessee v. Tasker, 1 H. & McH. 89 (Md. 1737).

\textsuperscript{107} See supra note 1, at 42.

\textsuperscript{108} See supra notes 18-24 and accompanying text.

\textsuperscript{109} Henderson, supra note 1, at 290.

\textsuperscript{110} Judiciary Act of Sept. 24, 1789, Ch. 20, 9, 1 Stat. 73, 77 (amended 1948).
of the general verdict was called into question. This questioning continued into the twentieth century when much support coalesced for broader use of the special verdict to control the jury. Jury control devices came into more widespread use toward the end of the nineteenth century. Eastern states adopted procedures more quickly, "but by 1925 a majority of the states had authorized use of the special verdict and the general verdict with interrogatories." Although federal courts were not bound by state practice, many federal courts used these devices. Nevertheless, authority to use jury control devices did not mean that courts frequently resorted to them; to the contrary, courts used such devices very infrequently due, some writers suggest, to the pitfalls of technical requirements of the device.

Advocates of the special verdict sought to distinguish the civil jury from the criminal jury; they argued that the power of a criminal jury to decide the law as well as the facts made sense. No similar justification exists in civil cases which are private disputes between parties, usually concerning money and not evoking the threat of a repressive government's abuse of power.

Professor Sunderland set out the anti-general verdict position:

[T]he general verdict is not a necessary feature of litigation in civil actions at law, it confers on the jury a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform, by confusing it in aggregating instead of segregating the issues, and by shrouding

111 See, e.g., Campbell, supra note 3; Scott, supra note 3.
112 See, e.g., J. Frank, COURTS ON TRIAL 141-43 (1950); Sunderland, supra note 56.
113 See James, supra note 78, at 218; Comment, supra note 32, at 173.
114 Note, supra note 78, at 487
115 Id.
117 See, e.g., Green, supra note 116, at 716; Sunderland, supra note 56, at 261-62; Note, supra note 78, at 487
118 See, e.g., Sunderland, supra note 56, at 260-61.
119 Id. at 260 n.15 (citing Justice Gray's lengthy dissent in Sparf & Hansen v. United States, 156 U.S. 51 (1894)).
120 Id. at 260-61.
in secrecy and mystery the actual results of its deliberations. Every one of these defects is absent from the special verdict. Why then should not the general verdict in civil cases be abolished and the special verdict take its place?121

Sunderland also indicated that the principal objections to the special verdict were the risks that immaterial matters might be presented to the jury; material matters might not be presented; conclusions of law or evidentiary instead of ultimate facts might be found; and, misleading or prejudicial questions might be put to the jury.122 As Sunderland recognized, however, the practical problems of framing special verdicts were not the real concern of the device's detractors. Instead, their objections stemmed from their acceptance of the jury's power and right to decide the law. "The real objection to the special verdict is that it is an honest portrayal of the truth, and the truth is too awkward a thing to fit the technical demands of the record."123 Sunderland further characterized the general verdict as "the great procedural opiate," one "which draws the curtain upon human errors and soothes us with the assurance that we have attained the unattainable."124

Judge Jerome Frank also took up the banner of the special verdict.125 He was the most vocal and insistent advocate for the view that the general verdict invited the jury to misbehave by taking the law into its own hands and allowed bias and prejudice to form the basis of jury decision making.126 In Skidmore v Baltimore & Ohio Railroad Co.,127 Judge Frank wrote a scholarly opinion extolling the evils of the general verdict and the virtues of the special verdict. The former, he argued, grants the jury "the power utterly to ignore what the judge instructs it concerning the substantive legal rules, a power which, because generally it cannot be controlled, is indistinguishable from a 'right.'"128

11 Id. at 261.
12 Id.
13 Id. at 262.
14 Id.
15 J. Frank, supra, note 112, at 141-43.
16 Id.
17 167 F.2d 54 (2d Cir. 1948).
18 Id. at 57-58.
Moreover, he contended that the principal underlying premise of the general verdict—"the assumption that the jury fully comprehends the judge's instructions concerning the applicable substantive legal rules"—is a fiction.\textsuperscript{129}

The special verdict, Frank argued in \textit{Skidmore}, avoids those problems of the general verdict, reducing, although not eliminating, the likelihood that jurors' prejudice or sympathy affect their verdict.\textsuperscript{130} In addition, the special verdict results in judicial economy because appeals focus on more specific errors—for example, in the phrasing of a question or the giving of an instruction—that could be resolved by less drastic remedies than granting a new trial on all issues.\textsuperscript{131}

This endorsement of the special verdict was not a unanimous one among commentators.\textsuperscript{132} Another federal judge, Judge Ernest Guinn, disagreed with Judge Frank: "The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved."\textsuperscript{133} Judge Guinn argued that the jury reflects the morals and standards of the community: "Of necessity, its verdict reflects the philosophy, the background, the training, the experience and the morals of each juror.\textsuperscript{134}

Judge Guinn was not alone in his position that the jury should have the power to decide the law in a case.\textsuperscript{135} As noted earlier, the Supreme Court briefly acknowledged such a right. The view that the jury is a representative of the people that takes the sharp edges off the law and does justice is a powerful part of our legal history.\textsuperscript{136} Those who favor the jury’s right to

\begin{itemize}
  \item Id. at 64.
  \item Id. at 66.
  \item Id. at 65.
  \item See generally Sunderland, supra note 56, at 261-67
  \item Gunn, \textit{The Jury System and Special Verdicts}, 2-ST. MARY'S L.J. 175, 177 (1970) (quoting Wigmore, \textit{A Program for the Trial of Jury Trial}, 12 AM. JUD. SOC. J. 166, 170 (1929)).
  \item Id. at 181.
  \item See, e.g., Pound, \textit{Law in Books and Law in Action}, 44 AM. L. REV 12 (1910); Wigmore, supra note 133.
  \item In \textit{Skidmore}, Judge Frank acknowledged this view; however, he argued that the jury is not the appropriate body by composition or disposition to nullify duly enacted laws. See \textit{Skidmore}, 167 F.2d at 58-60.
\end{itemize}
decide the law leave unanswered the issue of whether the jury should be advised of that right; many courts deem such an instruction improper.\textsuperscript{137}

2. \textit{The Federal Rule}

While the relative virtues of the special versus the general verdict were being debated, the Federal Rules of Civil Procedures were enacted.\textsuperscript{138} In Rule 49, the drafters took a middle ground, authorizing, but not requiring, the use of special verdicts and general verdicts with interrogatories.\textsuperscript{139} The use and form of these devices is left almost entirely to the discretion of district court judges. Neither the Rule 49 devices nor the general verdict is mandated in any particular kind of case.\textsuperscript{140}

The drafters of the Federal Rules attempted to deal with some of the practical concerns that arose with pre-rule use of special verdicts. In practice, pre-rule criticism of the devices focused on several problems: (1) exactly what facts the jury should determine, that is, evidentiary or ultimate facts;\textsuperscript{141} (2)

\begin{footnotesize}
\begin{enumerate}
\item But cf. United States v. Dougherty, 473 F.2d 1113, 1143 (D.C. Cir. 1972) (Judge Bazelon takes the position that such an instruction is appropriate and not likely to lead to jury nullification of the applicable law, since jurors would be influenced as much by the need to see justice done as by their sympathy for a party.).
\item FED. R. CIV P 49; see the extended discussion of the role commentators played in the enactment of Rule 49 in Note, supra note 78, at 489-501.
\item Rule 49(a) provides:
The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waves his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.
\item Rule 49(a) states: "The court \textit{may require} \ldots" (emphasis added).
\item See Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897) (jury trial right only applies to fact issues); J. FRANK, supra note 15, at 142 n.14 (citing CLEMENTSON, SPECIAL VERDICTS (1905)); Wicker, \textit{Special Interrogatories to Juries in Civil Cases}, 35 YALE L.J. 296 (1925).
\end{enumerate}
\end{footnotesize}
whether omnibus questions could be used;\textsuperscript{142} (3) whether jury unanimity should be essential;\textsuperscript{143} (4) what action to take if material factual issues were not made the subject of a question to the jury;\textsuperscript{144} and (5) whether the jury should be advised of the consequences of its answers.\textsuperscript{145} Complete exploration of the special verdict device requires further discussion of these problems.

a. Evidentiary Versus Ultimate Facts

The evidentiary/ultimate fact distinction exemplifies the legal conundrum courts created in interpreting the code pleading requirements. Courts were unable to develop any consistent definition of evidentiary or ultimate facts. Consequently the terms, while often used, were frequently of little help in predicting what a court would do with a given set of facts.\textsuperscript{146} With special verdicts, the generally (but by no means universally) accepted view was that only ultimate facts should be the subject of special jury questions.\textsuperscript{147} Distinguishing ultimate facts from evidentiary facts proved problematic. At the other extreme, as ultimate facts approached conclusions of law, they were likely to be characterized as mixed questions of law and fact.\textsuperscript{148} In the special verdict situation, this characterization led inevitably to concerns over instructing the jury on the law to apply to the facts. To the extent that proponents of the special verdict foresaw the elimination or minimization of jury instructions complicated by legal

\textsuperscript{142} Note, supra note 78, at 499.


\textsuperscript{144} See Green, supra note 116, at 715-16.

\textsuperscript{145} See, e.g., L'Urbaine v. Rodriguez, 268 F.2d 1, 5 (5th Cir. 1959); McCourtie v. United States Steel Corp., 93 N.W.2d 552, 562-64 (Minn. 1958); Anderson v. Seelow, 271 N.W. 844, 846 (Wis. 1937).

\textsuperscript{146} Sunderland, supra note 56, at 261-65.

\textsuperscript{147} See James, supra note 78, at 242 ("To support a judgment the verdict has to include findings upon all the material facts in issue, and it must do so by stating without ambiguity facts, not evidence or conclusions of law.").

\textsuperscript{148} Id., see Sunderland, supra note 56, at 261 (The history of the use of special verdicts is "a rocky road strewn with innumerable wrecks.").
language and definitions, the existence of mixed questions seemed an impediment.\(^{149}\)

Rule 49 takes no position on the evidentiary/ultimate fact distinction. The rule does require that the jury make a finding upon "each issue of fact."\(^{150}\) This distinction, however, has been raised in objections to the form of particular special verdicts under the rule.\(^{151}\) The rule specifies only "written questions susceptible of categorical or other brief answer or written forms of the several special findings which might properly be made under the pleadings and evidence; or such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate."\(^ {152}\) Also, the rule anticipates that juries will be required in some instances to apply the law to the facts they have found: "The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."\(^ {153}\) Generally, courts have taken the position that only ultimate facts require questions to the jury;\(^ {154}\) however, asking a question regarding an evidentiary fact does not constitute reversible error.\(^ {155}\) Mixed questions of law and fact continue to cause problems for the courts in interpreting Rule 49(a).\(^ {156}\)

b. The Omnibus Question

The omnibus question and evidentiary/ultimate fact issues are related. The omnibus question concerns whether the judge,

\(^{149}\) See Note, supra note 78, at 493.


\(^{152}\) Fed. R. Civ. P. 49(a).

\(^{153}\) Id.

\(^{154}\) See, e.g., Erwin v. Keck, 351 F.2d 403, 406 (6th Cir. 1965); Maryland Casualty Co. v. Broadway, 110 F.2d 357, 360 (5th Cir. 1940); Truitt v. Travelers Ins. Co., 175 F. Supp. 67, 72 (S.D. Tex. 1959), aff'd, 280 F.2d 784, 789 (5th Cir. 1960).


in the interest of reducing the number of questions sent to the jury, but still wishing to exercise a measure of control, may simply ask: "Was the defendant negligent, was the plaintiff negligent, and what damages if any are due?" The obvious concern is whether the special verdict in this form retains any benefits over the general verdict.\textsuperscript{157} The possibility that sympathy or other improper considerations will influence the jury’s answers increases as the consequences of the special verdict become clearer to the jury Rule 49 does not discuss the omnibus question, and courts have found the omnibus question to be within the discretion of the district judge.\textsuperscript{158}

c. \textit{Jury Unanimity}

Defining jury unanimity is a problem in the special verdict context,\textsuperscript{159} particularly when different theories are advanced to support a party’s ultimate liability In a negligence suit, for example, the plaintiff may advance several negligence theories which might support a verdict in the plaintiff’s favor. A question exists whether jury unanimity on at least one theory is necessary or whether a unanimous finding of the defendant’s negligence is sufficient even though the jurors do not agree on any one theory.\textsuperscript{160} In truth, this problem also occurs with general verdicts which theoretically require jury unanimity on all issues;\textsuperscript{161} however, the special verdict procedure highlights the unanimity problem. Commentators have grappled with this issue,\textsuperscript{162} courts have not to any great extent, and Rule 49 does not address the issue.\textsuperscript{163}

d. \textit{Material Issue Not Covered by Questions}

Ensuring that all material issues went to the jury was a problem in pre-rule use of the special verdict.\textsuperscript{164} The only remedy

\textsuperscript{157} Note, supra note 78, at 499-500.
\textsuperscript{158} See, e.g., Erwin, 351 F.2d at 406. "Negligence being a relative term, the trial judge was justified in submitting the questions of negligence to the jury. ‘When the trial court utilizes the device of a special verdict, [he/she] has wide discretion as to the form and contents of the questions.’" Id. (quoting Mickey v. Trenco Mfg. Co., 226 F.2d 956, 957 (7th Cir. 1955)).
\textsuperscript{159} See Ginsburg, supra note 143, at 258-63; Trubitt, supra note 143, at 474.
\textsuperscript{160} Ginsburg, supra note 143, at 260; Trubitt, supra note 143, at 473-74.
\textsuperscript{161} Trubitt, supra note 143, at 512.
\textsuperscript{162} In addition to the Trubitt and Ginsburg articles, see Driver, supra note 143.
\textsuperscript{163} See supra note 139.
\textsuperscript{164} See supra notes 147-48.
for omitting a question concerning a material issue appeared to be a new trial, thus obviating the supposed benefits of the device. Rule 49(a) tackles this issue head-on in two ways. First, the rule requires that the jury return a "special written finding upon each issue of fact."165 Second, the rule contains a waiver provision; if the court "omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury."166 With an omitted issue, Rule 49(a) allows the court to make a finding, "or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict."167

e. Informing the Jury of the Consequences of Its Answers

To the extent that the special verdict device represents distrust of the jury and its ability to make a rational decision unswayed by passion or prejudice,168 requiring or even allowing the jury to be advised of the result of its answers seems senseless. Nevertheless, practices prior to Rule 49 varied from jurisdiction to jurisdiction, with some courts taking a very firm stand in favor of informing the jury of the consequences of its answers.169 Two factors mitigate the seeming irrationality of that stance. First, eliminating all reference to the relationship of the evidence to the ultimate result in the case is difficult; second, the jury's inability to discern the result of its answer may be exaggerated. Therefore, some people argue, the jury should know the true

165 FED. R. CIV P 49(a).
166 Id.
167 Id.
168 Note, supra note 78, at 495 ("Underlying the commentators' case was a deep-seated distrust of the jury."); see also Skidmore, 167 F.2d at 66.

When using a special verdict, the judge need not—should not—give any charge about the substantive legal rules beyond what is reasonably necessary to enable the jury to answer intelligently the questions put to them. As, accordingly, the jury is less able to know whether its findings will favor one side or the other, the appeal to the jurors' cruder prejudices will frequently be less effective.


consequences rather than speculate. The rule does not address this issue except to give the judge discretion to instruct on the applicable law.

Finally, Rule 49(a) allows the district court to "require a jury to return only a special verdict." Thus, the rule goes further than the common law in allowing the trial court to compel such a verdict. The rule does not spell out the consequence of a jury's refusal to comply and its insistence on returning a general verdict; presumably, the court would order a new trial.

3. Rule 49 in the Courts

The rule drafters gave district courts broad discretion to use the special verdict. This discretion provides maximum flexibility in use and form, which is consistent with the goal of the rules to eradicate formalism and needless procedural rigidity. In addition, district courts may develop guidelines governing the use and form of special verdicts. This flexibility was necessitated by the relative newness of the device and perhaps by the drafters' reluctance to lock in any specific procedures before the federal courts had a chance to work out the problems with the device.

The rule's flexibility has not resulted in a body of law supplying guidelines. Instead, district judges appear reluctant to pioneer for the benefit of the federal court system; attorneys do not advocate its use, and consequently the special verdict is not a popular device.

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170 See, Note, supra note 169, at 826-27.
172 Id.
173 See supra notes 89-99 and accompanying text.
174 See Clark, Fundamental Changes Effected by the New Federal Rules I, 15 Tenn. L. Rev. 551 (1939) ("[P]rocedural rules are but means to an end, means to the enforcement of substantive justice, and therefore there should be no finality in procedural rules themselves except as they attain that objective.").
175 Note, supra note 78, at 506.
Rule 49 case law is very sparse and generally not helpful.\textsuperscript{177} District judges have used the device in a variety of cases\textsuperscript{178} but have declined to use it in others;\textsuperscript{179} they have asked evidentiary and ultimate questions,\textsuperscript{180} have asked omnibus questions,\textsuperscript{181} have taken back questions asked,\textsuperscript{182} and have failed to advise attorneys of their intention to use the special verdict form.\textsuperscript{183} In almost all instances, the appellate court approved the district judge's actions due to the broad grant of discretion under Rule 49. Lately, the appellate courts have suggested the best cases for a special verdict\textsuperscript{184} and have pointed out that a judge might utilize single-issue questions better in the future.\textsuperscript{185} Nevertheless, courts continue to affirm district court action.\textsuperscript{186}

4. Constitutionality of Special Verdicts

Unlike other jury control devices, most notably the directed verdict and judgment notwithstanding the verdict, special verdicts were an established procedure at common law.\textsuperscript{187} Therefore,

\begin{footnotesize}
\textsuperscript{177} For an excellent review of the case law up to 1965, see Note, \textit{supra} note 78. Cases have followed the same pattern: very limited appellate review with broad discretion vested in the district judge.


\textsuperscript{179} See Garwood v. International Paper Co., 666 F.2d 217 (5th Cir. 1982); Sadowski v. Bombardier Ltd., 539 F.2d 615 (7th Cir. 1976).

\textsuperscript{180} See \textit{supra} notes 154-55.

\textsuperscript{181} See \textit{supra} notes 157-58 and accompanying text.

\textsuperscript{182} See, e.g., \textit{Diniero v. United States Lines Co.}, 288 F.2d 595, 599-600 (2d Cir. 1961), \textit{cert. dened}, 368 U.S. 831 (1961) (trial judge had discretion to withdraw ambiguous questions even after jury had deliberated on them); \textit{Recent Developments, Discretion of a Federal Trial Judge to Withdraw Special Interrogatories}, 14 \textit{STAN. L. REV} 395 (1962) (discusses \textit{Diniero}).

\textsuperscript{183} See, e.g., \textit{Cate v. Good Bros., Inc.}, 181 F.2d 146, 148 (3d Cir. 1950), \textit{cert. dened}, 340 U.S. 826 (1950) (overruled defendant's objection to a court's mid-trial announcement of its intention to submit special interrogatories).

\textsuperscript{184} See, e.g., \textit{Baumstlimler v. Rankin}, 677 F.2d 1061, 1071 (5th Cir. 1982) (multiparty patent case is appropriate for special verdict).

\textsuperscript{185} See, e.g., \textit{Cunningham v. M-G Transp. Serv., Inc.}, 527 F.2d 760, 762 (4th Cir. 1975) ("We strongly recommend that when special interrogatories are utilized they be put in the form of questions, and that always the questions of damages be separated from the questions of liability.").

\textsuperscript{186} See, e.g., \textit{Baumstlimler} 677 F.2d at 1061; \textit{Cunningham}, 527 F.2d at 760.

\textsuperscript{187} See \textit{supra} notes 78-86 and accompanying text.
\end{footnotesize}
few constitutional questions have arisen concerning the device. A most notable exception is the statement of Justices Black and Douglas in opposition to the adoption of certain 1963 amendments to the federal rules.\footnote{See Order Amending the Federal Rules of Civil Procedure, 374 U.S. 865 (1963) (statement by Justices Black and Douglas).} The justices argued that "Rule 49 should be repealed [because] [s]uch devices are used to impair or wholly take away the power of a jury to render a general verdict."\footnote{Id. at 867} General verdicts, they urged, are "an indispensable part of a free government."\footnote{Id. at 868.} "Rule 49 is but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments."\footnote{Id.} The two justices also attacked the special verdict device on a non-constitutional ground arguing that its use results in confusion.\footnote{Id.}

While the use of the special verdict at common law seems to preclude a seventh amendment attack, a constitutional argument exists that Justices Black and Douglas did not make. If one accepts the historical evidence suggesting that the court could not compel the jury to render a special verdict,\footnote{See supra notes 89-99 and accompanying text.} then the compulsory nature of Rule 49 limits the jury-trial right as it existed at common law.\footnote{Rule 49(a) states that "[t]he court may require the jury to return only a special verdict" (emphasis added).} Because the device concerns the jury decision making process, compelling the jury to use the special verdict is not merely a refinement or modification of the procedural device. Therefore, the limitation on the common law right to jury trial violates the seventh amendment.\footnote{John Adams acknowledged that judges determine the law and juries only the facts, "[b]ut it will by no means follow from thence, that they are under any legal, or moral, or divine obligation, to find a special verdict, when they themselves are in no doubt of the law." 2 THE WORKS OF JOHN ADAMS, supra note 42, at 254.}

Unlike the special verdict device which intrudes upon the jury's decision making function by structuring its deliberative process, the jury control devices that follow take the decision away from the jury completely. Each of these devices turns to
a greater or lesser extent on the notion of "sufficiency of the evidence." That notion, as Professor James points out, "is addressed to the court's function, not the jury's." 196

B. Directed Verdicts

1. History

Early use of the directed verdict was stymied by the accepted rule that jurors were not bound to decide cases exclusively on the basis of evidence presented in court, but rather "[t]hey may have evidence from their own personal knowledge, by which they may be assur'd, and sometimes are, that what is depos'd in Court, is absolutely false." 197 As the jury transformed from a body of witnesses to judges of fact, and as the court lost the ability to punish jurors by attainting them for "wrong" verdicts, new means to ensure that juries decided cases on the evidence presented became necessary. 198 These new means were the origin of the directed verdict device. 199 The comparative lateness of their development explains the relatively unfinished state of the directed verdict device in 1791. 200

a. Directed Verdict in Early Eighteenth-Century England

Existing evidence confirms that judges directed verdicts in eighteenth-century English courts; 201 however, courts gave two types of "directions" on the law and advice on the facts. 202 Unlike the modern practice in which the court takes the case away from the jury because no question of fact exists, the

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196 James, supra note 78, at 218.
199 Id. at 559.
200 Id. at 559-61.
202 Blume, supra note 198, at 560.
early use of directions lacked such force. If the jury ignored the court's instructions or advice, then the court could grant a new trial.

b. Demurrer to the Evidence

According to Thayer, the demurrer to the evidence came into existence "when the general introduction of witnesses to the jury and the requirement that evidence must be given to them publicly in open court, had wrought the first revolution in this great mode of trial." The demurrer is a somewhat closer corollary to the modern directed verdict device and was well established in English practice prior to 1791. The demurrer to the evidence, like the demurrer to pleading, required the moving party to admit all facts that his or her opponent's evidence proved or tended to prove. By demurring, the moving party agreed that the jury would not hear the case. Furthermore, if the court found for the party moved against on applying the law to the facts admitted, the verdict was entered against the moving party

Early cases did not require making the admission of facts favorable to the opposing party explicit. The final development and death knell for the demurrer was Gibson v Hunter, which required that the demurrant admit in writing, on the record, all the facts that the opponent's evidence proved and all reasonable inferences. After this 1793 case, the device fell into disuse. Apparently, the Gibson requirement, not any determination that

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203 See, e.g., Sir Christopher Musgrave v. Nevinson, 92 Eng. Rep. 384 (C.P. 1724) (The evidence was "summed up to the jury by Lord Chief Justice Pratt, with great stress laid on the evidence for the defendant." However, the jury found for the plaintiff.).
205 J. Thayer, supra note 7, at 237.
206 See id. at 122, 234; Blume, supra note 198, at 561-62.
207 Blume, supra note 198, at 561.
208 Id.
209 Id. at 562.
210 J. Thayer, supra note 7, at 235.
212 Id. at 509.
the procedure was an improper encroachment on the jury-trial right, caused the demurrer's demise.\textsuperscript{213}

Although the demurrer to the evidence existed in the American colonies, it was not a long-lived or popular device.\textsuperscript{214} One commentator in the mid-nineteenth century explained:

Where the evidence on the part of the plaintiff is all introduced, if the defendant's counsel are of the opinion that, in point of law, the plaintiff cannot recover, he may \textit{demur to the evidence}. But this course has now become nearly obsolete, and can seldom be adopted with safety, since such a demurrer admits not only all the facts directly stated in it, but also all the facts which the evidence legally tends in any degree to prove.\textsuperscript{215}

c. \textit{Directed Verdict in American Courts}

The modern form of the directed verdict device came into widespread use in state courts during the nineteenth century\textsuperscript{216} when concern over unbridled jury decision making was strong. By 1850, the Supreme Court had acknowledged the right of a requesting party defendant to have an instruction "that, if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover."\textsuperscript{217} The Court noted that a jury had no right to assume the truth of any material fact.

Hence the practice of granting an instruction like the present, which makes it imperative upon the jury to find a verdict for the defendant, and which has in many States superseded that ancient practice of a demurrer to evidence. It answers the same purpose, and should be tested by the same rules.\textsuperscript{218}

\textsuperscript{213} See J. THAYER, supra note 7, at 235-37. According to Thayer, Gibson "compelled the demurring party to abandon wholly a notion, which seems to have existed in the profession, that by this proceeding he was shifting to the court the duty of 'judging the facts, and was thus avoiding the uncertainties of the jury." Id. at 235.

\textsuperscript{214} See Note, Has a Trial Judge of a United States Court the Right to Direct a Verdict, 24 YALE L.J. 127 (1914).

\textsuperscript{215} Colby's (Massachusetts) Practice 242 (1848).

\textsuperscript{216} See generally Comment, supra note 32, at 173.

\textsuperscript{217} Parks v. Ross, 52 U.S. (11 How.) 652, 653 (1850).

\textsuperscript{218} Id.
The Court did not spell out the consequences of the jury’s failure to comply with such an imperative instruction.

From subsequent Supreme Court cases, a standard for allowing the direction of a verdict evolved. The earliest cases required that “no evidence whatever” exists to prove the plaintiff’s claims.\(^{219}\) By 1871, the Court had rejected its earlier view.

Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.\(^{220}\)

### 2. Developing a Federal Standard

Although the directed verdict gained early acceptance in federal courts, establishing a clear standard for the device remained. The Supreme Court rejected the “*scintilla rule,*” the standard that allowed the trial court to direct a verdict only when *no* evidence supported the party moved against. In the place of the *scintilla rule*, the Court adopted a general standard for state and federal courts: Could a reasonable person find in favor of the party moved against based on the presented evidence? If yes, then sufficient evidence exists for jury consideration. If no, then insufficient evidence exists as a matter of law; therefore, no facts exist for jurors to determine.\(^{221}\) After the

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\(^{219}\) Id. at 654. See Richardson v. City of Boston, 60 U.S. (19 How.) 263, 268-69 (1856).  
If there be “*no evidence whatever,*” as in the case of Parks v. Ross to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be *some* evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court.  
*Id.*

\(^{220}\) Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871).

\(^{221}\) Cf. Continental Ins. Co. of New York v. Sherman, 439 F.2d 1294, 1300 (5th Cir. 1971); Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970). *But see* Pennsylvania R.R. Co. v. Chamberlain, 288 U.S. 333, 343 (1933) (A directed verdict is appropriate “if a verdict were rendered for one of the parties [and] the other would be entitled to a new trial. ‘’”).
Court established a standard and its corollary that evidence must be considered in the light most favorable to the party moved against—an echo of the demurrer to evidence—important questions remained: First, what evidence must be considered upon a directed verdict motion? Second, how are questions of credibility handled?

a. Evidence to Be Considered

Three views exist under a directed verdict motion: the judge may consider (1) all of the evidence, (2) only the evidence favorable to the party moved against, or (3) all the evidence favorable to the party moved against and any evidence favoring the moving party that is uncontradicted and unimpeached. The second view probably originated in the demurrer to evidence which requires that the moving party admit the truth of the opponent's evidence and forego presenting any evidence. In Wilkerson v McCarthy, the Supreme Court stated that this second view is the "established rule." The Court failed to cite cases supporting its statement, and arguably the statement is dictum. Nevertheless, courts frequently cite Wilkerson to support the rule that a federal court must consider only the evidence that is favorable to the party moved against on a directed verdict motion.

The first view that the court should consider all the evidence in a case has its supporters. Some believe that the court cannot assess the reasonableness of the jury's belief in the plaintiff's case without also examining the defendant's proof in opposition. Professor Blume conceded that a directed verdict motion

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223 Rule 50 of the Federal Rules of Civil Procedure does not establish a directed verdict standard. Therefore, federal courts must develop a standard.
224 See Simblest, 427 F.2d at 4-5; Curne, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev 72, 72-76 (1979).
226 Id. at 57.
227 See Blume, supra note 198, at 580-81. (This "established rule" statement "must be challenged as incorrect.").
228 See Curne, supra note 224, at 73; cf. Simblest, 427 F.2d at 4.
229 See, e.g., Blume, supra note 198, at 581.
230 Curne, supra note 224; at 75-76.
at the close of the plaintiff's case of necessity requires the court to consider only the plaintiff's evidence.

But where the motion is made at the close of the whole case, the court cannot, with any degree of realism, look only at part of the evidence without considering the whole. A layman would think it strange to see a judge wearing blinders to keep himself from seeing more than a part of the truth reflected by the evidence in a case. One may wonder if it is possible for a mind which has seen the whole truth to accurately shut out a part.231

In addition, Currie pointed out that "if we begin with the premise that the directed verdict is a device to keep juries from acting unreasonably, any limitations on what evidence the judge may consider appear highly artificial."232

Most federal courts support the third view233 a court should consider all evidence favorable to the party moved against and any unimpeached, uncontradicted evidence that favors the moving party.234 Courts consider the latter uncontradicted evidence because the jury is not free to disbelieve such evidence. As usual, stating the rule is easier than applying it. Uncontradicted evidence issues arise infrequently with documentary evidence and more often with testimonial evidence.235

b. Credibility Questions

Whether a seemingly disinterested witness whose testimony is uncontradicted may be disbelieved poses a serious problem for courts applying the directed verdict standard.236 Courts should not compel juries to credit such testimony, the argument goes,

231 Blume, supra note 198, at 581.

232 Currie, supra note 224, at 75.


234 See McClure, 300 F.2d at 543; see also Annotation, Credibility of Witness Giving Uncontradicted Testimony as Matter for Court or Jury, 62 A.L.R.2d 1191, 1201 (1956).


236 Id.
because witnesses are often wrong. Moreover, the determination of a witness's credibility is an inherently appropriate jury function. Jurors must bring their life experience and social expectations to bear in evaluating the demeanor of the witness. "[T]he candor and forthrightness of the witness, his hesitancy or willingness to testify, his evasion or concealment, his poise or frustration, and his emotional reaction to questions indicated through his demeanor and conduct on the witness stand also aid in determining the credit to be given his testimony." The actual ability of jurors (or lawyers or judges for that matter) to assess the demeanor of a witness is not at all certain. Thus, while some courts have followed the lead of the Second Circuit Court of Appeals to permit the jury to reject all testimony, however disinterested, unimpeached, or uncontradicted it may be, the majority rule requires jury acceptance of such testimony.

3. Constitutionality of the Directed Verdict

No procedure comparable to the modern directed verdict device existed at common law in 1791. Its closest analogy, the demurrer to the evidence, while in existence at that time, was waning in use and by 1793 was effectively dead. Thus, that directed verdicts were challenged as an unconstitutional imposition on the jury-trial right as it existed at common law is not surprising. What is surprising, however, is that the Supreme Court did not address this issue until 1943 in Galloway v United States. Although federal courts had utilized the directed verdict

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239 Id. at 257.
240 See H. Kalven & H. Zeisel, The American Jury 169 (1966) ("There is today almost no real knowledge about how credibility judgments are formed, and a moment's introspection is sufficient to remind us how mysterious must be this process.").
241 See Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952).
242 See, e.g., Chicago, R.I. & P Ry. v. Howell, 401 F.2d 752, 754 (10th Cir. 1968) (dictum); Chicago & N.W Ry. v. Strand, 300 F.2d 521, 524 (8th Cir. 1962); Walton v. Owens, 244 F.2d 383, 387 (5th Cir. 1957).
243 See supra notes 197-215 and accompanying text.
244 See supra notes 205-15 and accompanying text.
245 319 U.S. 372 (1943).
since the first half of the nineteenth century, the Supreme Court declined to resolve the constitutional issue on at least one earlier occasion.\textsuperscript{246}

In \textit{Galloway}, the plaintiff sought to establish that he was permanently and totally disabled by reason of insanity and had been so disabled continuously since May 31, 1919, the day on which his G.I. term insurance lapsed for nonpayment.\textsuperscript{247} The plaintiff presented some evidence, principally witnesses who testified to his erratic behavior at various times. The most important witness was a physician who examined the plaintiff just prior to trial and testified, based on the examination and the plaintiff's medical records, that the plaintiff was born with an inherent mental instability, "began to go to pieces" in France during World War I, and was insane at all times subsequent to July 1918.\textsuperscript{248} Clearly such evidence would have been sufficient to withstand a directed verdict under the scintilla test.

The district court granted the government's motion for a directed verdict,\textsuperscript{249} and the court of appeals affirmed.\textsuperscript{250} Before the Supreme Court, the plaintiff contended that the evidence was sufficient to go to the jury and that the directed verdict deprived him of a trial by jury contrary to the seventh amendment.\textsuperscript{251} The Supreme Court, in agreeing with the lower courts on the sufficiency of the evidence question,\textsuperscript{252} relied primarily upon an eight-year gap in the evidence.\textsuperscript{253} This eight-year period occurred in the midst of the plaintiff's alleged total insanity, during the period of time when he was married, yet the plaintiff failed to offer evidence establishing his whereabouts, activities, or mental condition during that time.\textsuperscript{254} Since the plaintiff's wife brought this action on his behalf as his guardian, the court found that the lack of evidence was a fatal defect:

\textsuperscript{246} \textit{See} \textit{Parks}, 52 U.S. at 652.
\textsuperscript{247} \textit{Galloway}, 319 U.S. at 375.
\textsuperscript{248} \textit{Id.} at 381.
\textsuperscript{249} \textit{Id.} at 373.
\textsuperscript{250} \textit{Galloway v. United States}, 130 F.2d 467, 471 (9th Cir. 1942), \textit{affd}, 319 U.S. 372 (1943).
\textsuperscript{251} \textit{Galloway}, 319 U.S. at 373.
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.} at 385.
\textsuperscript{254} \textit{Id.} at 385-86.
No favorable inference can be drawn from the omission. It was not one of oversight or inability to secure proof. The only reasonable conclusion is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient to present no evidence or perhaps to withhold evidence readily available concerning this long interval, and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.255

"To allow this," the Court held, "would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced."256

Addressing the constitutional issue, the Court concluded that "the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure."257 This latter point lacks force in light of the enabling act for the rules. That statute states that "[s]uch rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."258 If the Court meant to suggest that the rules precluded Galloway's constitutional challenge, it was clearly in error.

The Court was no more receptive to the plaintiff's historical argument, pointing out that trial courts in 1791 had the power to withdraw cases from the jury "by at least two procedures, the demurrer to evidence and the motion for a new trial."259 The plaintiff objected "that the directed verdict as now administered differs from both those procedures because, on the one hand allegedly high standards of proof are required and, on the other, different consequences follow as to further maintenance of the litigation."260

255 Id. at 386-87.
256 Id. at 387.
257 Id. at 389.
259 Galloway, 319 U.S. at 390.
260 Id.
In disposing of the plaintiff's argument, however, the Court held that "[t]he amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing." 261 The common law rules for controlling the jury's fact-finding role were "changing and developing during the late eighteenth and early nineteenth centuries," 262 producing in 1791 "widely divergent rules among the states, and between them and England." 263 The Court rejected the argument that the seventh amendment embodies the cumulative effect of these 1791 procedures in favor of a historical view that finds that "the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions." 264

Justice Black's dissent in Galloway took a wholly different view of the history of the seventh amendment and its consequences for the modern directed verdict. He cited Alexander Hamilton for the proposition that the basic judicial control of the jury function is found in a court's power to order a new trial. 265 He also cited the Court's 1830 statement:

The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings. 266

Justice Black argued that the Court's tacit 1850 acceptance of the directed verdict in Parks v. Ross was "a departure from the traditional rule." 267

The potential of the directed verdict for judicial control of the jury—control that did not exist in 1791—is at the heart of

261 Id.
262 Id. at 391.
263 Id. at 392.
264 Id.
265 Id. at 400.
266 Id. (quoting Parsons v. Bedford, 28 U.S. (3 Pet.) 474, 480 (1830)).
267 Galloway, 319 U.S. at 402 (citing Parks, 52 U.S. at 362).
Justice Black’s objections. Coupled with the Court’s adoption of the substantial evidence rule and the possibility that a trial judge may grant judgment notwithstanding the verdict, Black saw a “transition from jury supremacy to jury subordination” in the federal courts from mid-nineteenth to mid-twentieth century.

The Galloway Court provided little in the way of policy-based justification for its conclusion that the directed verdict was constitutional. Instead, the Court relied on a view that the seventh amendment embodies only the essence of the common-law right to trial by jury, which included jury control devices.

C. Judgment Notwithstanding the Verdict

1 History

Judgment notwithstanding the verdict, like the directed verdict, bears a superficial resemblance to the demurrer to the evidence. Its principal distinction from the demurrer and the directed verdict is, of course, its timing, which allows the judge to second guess the jury. Henderson traces the device to English common law and to what she describes as the “rather obscure motion in arrest of judgment.” The judgment non obstante veredicto (JNOV) evolved from that motion around 1750; however, use of the JNOV was very limited. It was appropriate only when the defense in a case “was deficient at law—so that a demurrer would have been proper—but when the case had nevertheless been allowed to go to the jury.” The device came into more popular use in England in the 1790’s.

Two of the original states, Delaware and New Jersey, prohibited use of the JNOV. No real evidence of its early use in

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268 Id. at 404.
269 Henderson, supra note 1, at 316.
270 Id.
271 Id.
the other states is recorded. In 1828 the Supreme Court affirmed a JNOV without discussion of the device.

2. Constitutionality of the JNOV

Once challenged, the Court did not give the JNOV the same summary validation that the directed verdict received in Galloway. In fact, the Supreme Court initially rejected the JNOV in the 1913 opinion of Slocum v New York Life Insurance Co. Arguably, because the standard for the directed verdict and the JNOV are the same, the degree of court control over the jury fact-finding function is equal with both devices. Hence, validation of one, as within the ambit of common law rules concerning jury control, suggests validation of the other. In addition to the absence of a comparable device at common law, however, the Court was troubled with the JNOV's apparent conflict with the seventh amendment: "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." Two conflicts with the common law were apparent. First, the appellate court ordered the JNOV in Slocum; according to the common law, an appellate court could set aside the verdict below for an error of law (e.g., the district judge's failure to grant a directed verdict motion), but could not determine the facts itself. Therefore, when the court set aside the first verdict, the right to jury trial arose anew, and the appellate court's only option was to grant a new trial.

Second, more damaging to the JNOV was the Court's apparent conclusion that the jury-trial right includes the right to a jury verdict. Therefore, even when the evidence is clearly insufficient and warrants the trial court's granting of a directed verdict motion, "the court cannot dispense with a verdict, or

274 Henderson, supra note 1, at 317.
276 228 U.S. 364 (1913).
277 See Cooper, supra note 235, at 903 n.1.
278 U.S. CONST. amend. VII.
279 Slocum, 228 U.S. at 380.
280 Id.
281 Id. at 387-88.
disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guaranty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived.' The logical consequence of this latter position is that the trial judge could not invoke the JNOV constitutionally The obvious challenge to the court's position, and one Justice Hughes raised in dissent, is that the Court's own standard for a directed verdict requires that no factual issues exist for jury resolution. Whether any evidence exists for jury consideration is a question of law, regardless of when the court makes that determination.

In 1935, the Supreme Court addressed the JNOV question again in Baltimore and Carolina Line, Inc. v Redman. In Redman, the defendant moved for a directed verdict at the conclusion of the presentation of all evidence. The trial court reserved its decision on that motion and submitted the case to the jury, which found for the plaintiff. At that point, the court held the evidence sufficient to support the verdict and denied the directed verdict motion. The court of appeals held that the evidence was insufficient and ordered a new trial on the basis that Slocum precluded any other course of action.

The Supreme Court found great solace in the trial judge's action: "At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved." The Court then cited the policies supporting such a practice with approval and held:

Whatever may have been its origin or theoretical basis, it undoubtedly was well established when the Seventh Amendment was adopted, and therefore must be regarded as a part of the common-law rules to which resort must be had in testing and measuring the right of trial by jury as preserved and protected by that Amendment.

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281 Id. at 388.
282 Id. at 401-02 (Hughes, J., dissenting).
283 Id.
284 Id.
286 Id. at 656.
287 Id. at 659.
288 Id. at 660.
With that largely unsupported assessment of the history of reserving questions of law, the Court reinstated the JNOV in this new limited form in the federal courts. The last vestiges of the Slocum case were eradicated in Neely v Martin K. Eby Construction Co. The trial court denied the defendant's directed verdict motion. The jury found for the plaintiff, and the court denied the defendant's subsequent motion for a JNOV. The court of appeals reversed and ordered a dismissal. On writ of certiorari, the Supreme Court rejected "an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal." Only Justice Black, in dissent, raised the ghost of Slocum, contending that the appeals court "is entirely powerless to order the trial court to dismiss the case."

3. The Federal Rule

Rule 50(b), which provides for the JNOV, codifies the purported constitutionally mandated procedures of Redman; however, the rule has done away with an express requirement of a reservation. Instead, "[w]henever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." In addition, the appellate court may enter a JNOV if it concludes that the trial court erred in denying it. Thus, the rule laid to rest the major constitutional barriers to the JNOV outlined in Slocum.

The Rule 50 procedure not only encourages parties to join new trial motions with their JNOV motions, thus providing the

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289 Id. at 661.
291 Id. at 319.
292 Id. at 319-20.
293 Id. at 326.
294 Id. at 331 (Black, J., dissenting).
295 See supra notes 285-89 and accompanying text.
296 FED. R. CIV P 50(b) (emphasis added).
297 Id.
judge with two sufficiency of the evidence standards from which to choose, but also requires the judge to rule conditionally on the new trial motion if the JNOV is granted. Therefore, in the case in which the trial judge has granted the new trial conditionally, the appellate court that disagrees with the JNOV ruling may simply go along with the new trial grant. In fact, the rule requires that the "new trial shall proceed unless the appellate court has otherwise ordered." If the trial court conditionally denied the new trial motion, a party may raise the denial as error on appeal, and the appellate court may order a new trial. The obvious advantage of Rule 50 procedures is that the new trial will proceed in most cases, saving time and resources of both courts.

D. New Trial Motions

1. History

a. English

Of all the jury control devices, the granting of new trials has raised the least objections and has caused the fewest concerns. The explanation is twofold: first, granting new trials was well established at common law to correct errors or to remedy unjust verdicts; second, this procedure does not take the decision making in a case away from the jury, just away from a particular jury. One body of fact finders is substituted for another, but the parties' right to a jury verdict is maintained. This latter point suggests that the impact on the seventh amendment is lessened greatly when another jury rather than the judge decides the facts and the sufficiency thereof.

The earliest uses of the new trial at common law involved jury misconduct. In several instances, courts granted new trials

298 Fed. R. Civ P 50(c).
299 Id.
300 Id.
301 J. Thayer, supra note 7, at 169. But cf. Riddell, New Trial at Common Law, 26 Yale L.J. 49 (1916) (Canadian practice does not allow the trial judge to grant a new trial).
302 To a judicial system which used the attaint, the notion of a second jury reconsidering the factual determinations of the first would not have seemed strange.
303 J. Thayer, supra note 7, at 169.
when jurors had accepted food from a party while they were out, or when the bailiff had permitted jurors to eat and to drink during their deliberations. Jurors' acceptance of papers delivered to them outside court by a party was also grounds for a new trial.

Practically speaking, the attaint became obsolete by the seventeenth century (although not officially abolished until the nineteenth century), and the court in Bushell's Case held that the jurors could not be fined or imprisoned for refusing to convict William Penn and William Mead of taking part in an unlawful assembly. Thus, common law courts faced the problem of how to control the jury. One response of the English courts involved using some form of the special verdict, but Bushell's Case and subsequent law in England also affirmed the jury's right to return a general verdict. Moreover, the special verdict device did not solve the problem of a jury that, in the court's view, decided incorrectly

Extension of the court's power to grant a new trial was a logical path. Granting a new trial based upon jury misconduct is not far from a new trial based upon the jurors acting contrary to law or in an irrational manner. Thayer suggests that this new power evolved slowly, however, because it involved the courts "undertaking to revise the action of the jury in a region belonging peculiarly to them, and was going beyond anything that had formerly been done." In addition, the argument in Bushell's Case—that the judge could not know the basis for the jury's decision because the jury was free to draw upon its own knowledge of the circumstances surrounding the case—was equally applicable to granting a new trial based on the judgment that the jury's verdict was against the weight of the evidence.

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304 Riddell, supra note 301, at 54-55 n.12.
305 Id.
306 J. Thayer, supra note 7, at 169.
308 Id.
309 Id., see supra notes 89-99 and accompanying text.
310 J. Thayer, supra note 7, at 169.
311 Id.
312 Id.
313 Id.
"[H]ow should the court know the jury's verdict was against evidence? And how should they know what the law was until they knew what the facts were, since the law, as applicable to the case, was inextricably bound up with some definite supposition of fact?"

Nevertheless, courts used the new trial as early as the first half of the seventeenth century under a procedure whereby jurors revealed publicly their private knowledge about the case. Thayer claims the jury's right to rely on its private knowledge continued well into the eighteenth century. Also, he suggests that increasing use of the new trial device helped transform the jury system by constricting the instances in which the jury might rely upon its private knowledge. By 1816, the accepted maxim was that the juror "should enter the box altogether uninformed on the issue which he will have to decide", in fact, "a judge who should tell jurors to consider as evidence their own acquaintance with matters in dispute would misdirect them."

Thayer claimed that the earliest reported case of this "modern new trial" occurred in 1655 in the Upper Bench, when a court set aside a jury award as excessive and granted a new trial. In a 1757 case, however, Lord Mansfield suggested that the practice may predate 1655, but the "old report books do not give any accounts of determinations made by the court upon motions." He thereby rejected a case stating that no new trials were granted after a trial at bar. Thayer's conclusion, after examination of the range of opinion in the English case law of the time, is that "in the early part of the seventeenth century the practice of revising and setting aside the verdicts of juries,

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314 Id.
315 Id., Riddell, supra note 301, at 55.
316 J. THAYER, supra note 7, at 170.
317 Id.
318 Id.
319 2 L. PIKE, HISTORY OF CRIME IN ENGLAND 368-69 (1876) (discussing The King v. Sutton, 105 Eng. Rep. 931 (K.B. 1816)).
320 J. THAYER, supra note 7, at 170 (citing Wood v. Gunston, 82 Eng. Rep. 863, 864, 867 (K.B. 1655)).
322 Id.
as being contrary to the evidence, was first introduced, or, at any rate, clearly recognized and established.”

Sir William Holdsworth cited an additional reason for the more expansive use of the new trial device in the common law courts. In the sixteenth century the Star Chamber could punish jurors for incorrect or false verdicts. The ground for such punishment was that the jury must have been corrupt to enter such a verdict. Holdsworth wrote that courts tended to use this power by the end of the sixteenth century “only if the verdict was so obviously foolish that corruption might be assumed.” After the Restoration and following the abolition of the Star Chamber in 1640, the onus was upon the common law courts to devise a means of dealing with these false, corrupt, or unjust verdicts. This may then have served as an additional impetus for those courts to develop the new trial motion.

b. American

The attaint had a very short ineffective life in colonial America. The demurrer to the evidence, while used more frequently, was rendered less effective by the requirement of a written admission to the truth of the facts as shown by the moved-against party’s evidence. New trial motions based on jury verdicts contrary to the evidence were readily accepted in state and federal courts. The standard that emerged was that of the English common law:

[I]t is the duty of the trial judge to set aside a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will

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323 J. Thayer, supra note 7, at 172.
324 W Holdsworth, supra note 7 at 343.
325 Id., see J. Thayer, supra note 7, at 172 n.4.
326 See W Holdsworth, supra note 7, at 343.
327 Id. at 344.
328 Id. at 343-44.
329 See Henderson, supra note 1, at 307.
330 See Note, supra note 214, at 134-36 (citing Colby’s (Massachusetts) Practice 242 (1848)).
result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.332

In the federal courts, two issues arose regarding the granting of motions for a new trial. The first concerned the power of an appellate court to order a new trial based on the failure of the evidence to support the jury's verdict.333 The second issue pertained to a challenge that the jury's determination of the damage amount was not supported by the evidence.334

2. Appellate Court's Right to Grant a New Trial

The Judiciary Act of 1789 and the seventh amendment were sources of objection to vesting the power to grant new trials in the appellate courts. The Judiciary Act was adopted about twenty-seven months before the seventh amendment took effect.335 The Act contained an express prohibition against appellate court reversal based upon any error of fact336 that some said precluded an appellate court from granting a new trial because the verdict was contrary to the evidence.337 To do so, it was argued, would reverse the court below on an error of fact.338 As the notion evolved that the granting of such a motion depended upon a question of law, that is, upon the sufficiency of the evidence, appellate courts entered new trial orders or, even on rare occa-

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332 Id. at 352-53.
334 See, e.g., Sunray Oil Corp. v. Allbritton, 187 F.2d 475 (5th Cir. 1951), cert. denied, 342 U.S. 828 (1951).
335 For a detailed discussion of the congressional actions leading to the adoption of the Judiciary Act of 1789, see Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923). In Erie R.R. v. Tompkins, the Supreme Court relied upon this article to explain in part the reversal of Swift v. Tyson. See Erie R.R. v. Tompkins, 304 U.S. 64, 72-73 (1938).
337 See, e.g., United States v. Laub, 37 U.S. (12 Pet.) 1, 5 (1838); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940) ("Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review.").
338 The Act's limitation on federal appellate courts continued in effect until 1948 when the new Judiciary Act repealed section 22. See Sunray Oil Corp., 187 F.2d at 475 (historical discussion); Judiciary Act, ch. 20, 22, 1 Stat. 73.
sions, reversed the trial court's grant of a new trial.\footnote{339 See, e.g., Taylor v. Washington Terminal Co., 409 F.2d 145, 147 (D.C. Cir. 1969), cert. denied, 396 U.S. 835 (1969); Community Nat'l Life Ins. Co. v. Parker Square Sav. & Loan Ass'n, 406 F.2d 603 (10th Cir. 1969); Brown v. Burr-Brown Research Corp., 378 F.2d 822 (5th Cir. 1967); Minnesota Mut. Life Ins. Co. v. Wright, 312 F.2d 655 (8th Cir. 1963); Sloan v. Colebank, 304 F.2d 668 (4th Cir. 1962); Southern Ry. Co. v. Miller, 285 F.2d 202 (6th Cir. 1960); Hardware Mut. Casualty Co. v. Chapman, 272 F.2d 614 (7th Cir. 1960); Georgia-Pacific Corp. v. United States, 264 F.2d 161 (5th Cir. 1959); Eisenberg v. Smith, 263 F.2d 827 (3d Cir. 1959), cert. denied, 360 U.S. 918 (1959). On the question of whether this evolution is desirable, compare Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV 751 (1957) with Carrington, The Power of District Judges and the Responsibility of Courts of Appeals, 3 GA. L. REV 507 (1969); Note, Appealability of Rulings on Motion for New Trial in Federal Courts, 98 U. PA. L. REV 575 (1950).} Even in those appellate courts that found no statutory bar to granting a new trial motion, the statutory limitation manifested itself in the standard of appellate review. That standard found that the determination of a new trial was within the purview of the district court judge; therefore, the standard allowed for reversal only when a clear abuse of discretion occurred at the trial level.\footnote{340 See, e.g., Aetna Casualty & Sur. Co., 122 F.2d at 350.}

The seventh amendment, in contrast, prohibited the reexamination of any fact tried by a jury other "than according to the rules of the common law."\footnote{U.S. CONST. amend. VII; see Blume, Review of Facts in Jury Cases—The Seventh Amendment, 20 J. AM. JUDICATURE SOC'Y 130 (1936).} Those rules recognized that the court might grant a new trial if it believed the jury's verdict was against the weight of the evidence;\footnote{342 See J. THAYER, supra note 7, at 172.} however, at issue was whether appellate courts had such power at common law.\footnote{343 See Parsons, 28 U.S. at 433.}

Blackstone's Commentaries, the most widely available general statement of the common law at the time the seventh amendment was ratified,\footnote{344 See R. POUND, THE FORMATIVE ERA OF AMERICAN LAW supra note 36, at 9 (Pound lists books available for the country's founders in 1774 and concludes that "[f]or practical purposes Coke's Second Institute and Blackstone are the repositories of the law.").} outlined an English judicial system in which the Court of King's Bench had appellate jurisdiction over the Court of Common Pleas and all other inferior courts of record. Blackstone cites authority in support of the proposition that the King's Bench had the jurisdiction to correct the errors in fact and in law of all the courts of the land; in particular, the court could
resort to the opinion of a second jury when the first jury returned an incorrect verdict.\textsuperscript{345} Failure to provide for correction with a new jury, according to Blackstone, would tend to destroy trial by jury \textsuperscript{346}

3. \textit{Remittur and Additur}

The federal courts’ power to change an excessive or inadequate jury verdict or to condition a new trial on the benefited party’s willingness to concede to a reduction or an addition posed a special problem.\textsuperscript{347} The power to increase or to decrease a jury verdict amount was never seriously urged by the courts. However, federal courts would condition the denial of a new trial upon the plaintiff’s acceptance of a reduced amount (remittitur), and the Supreme Court gave approval to remittitur in \textit{Northern Pacific Railroad Co. v Herbert}.\textsuperscript{348} The corresponding practice of requiring a defendant to submit to an increase in the verdict amount to avoid a new trial (additur) never gained wide acceptance.\textsuperscript{349}

In 1935, the Supreme Court considered the constitutionality of additur in a diversity case involving an automobile accident in Massachusetts.\textsuperscript{350} The plaintiff moved for a new trial on the ground \textit{inter alia} that the jury award of $500 was inadequate. The trial court ordered a new trial on this ground unless the defendant would consent to an increase of the damages to $1500. The defendant consented, the plaintiff’s consent was neither sought nor given, and the court denied the new trial motion.\textsuperscript{351}

The court of appeals reversed, finding that the conditional order violated the plaintiff’s seventh amendment right to a jury trial.\textsuperscript{352}

The court of appeals acknowledged that federal courts allowed

\begin{itemize}
  \item[345] 3 W Blackstone, Commentaries *388-90.
  \item[346] Id., see Fed. R. Civ. P 50(c)-(d) (trial court has the power to grant or to deny motion for a new trial, and this decision is subject to appellate review).
  \item[348] 116 U.S. 642, 646-47 (1885).
  \item[349] This was partially attributable to the fact that no English common law precedent existed for additur as the term is used in the modern cases.
  \item[350] See Dimick, 293 U.S. at 474.
  \item[351] Id. at 476.
  \item[352] See Schiedt v. Dimick, 70 F.2d 558 (1st Cir. 1934).
\end{itemize}
remittitur but held that the trial court could not condition a new trial upon the defendant's refusal to consent to an increase in damages.\textsuperscript{353}

The Supreme Court affirmed the court of appeals, citing both the history of such devices and their differing impact on the jury-trial right.\textsuperscript{354} The Court considered the common law of 1791 and held that a "careful examination of the English reports prior to that time fails to disclose any authoritative decision sustaining the power of an English court to increase, either absolutely or conditionally, the amount fixed by the verdict of a jury in an action at law, with certain exceptions."\textsuperscript{355} Those exceptions included some very early cases recognizing the court's right to increase damages awarded the plaintiff, \textit{super visum vulneris}.\textsuperscript{356} The last reported case that acknowledged the right was decided in 1742, and the last that affirmatively exercised the right was decided in 1733.\textsuperscript{357} Courts rarely invoked this power, apparently confining its use to en banc proceedings.

In any event, the rule was obsolete in England at the time of the adoption of the Constitution; and we are unable to find that it ever was acted upon or accepted in the colonies, or by any of the federal or state courts since the adoption of the Constitution.\textsuperscript{358}

A second exception was the English court's power to increase or to diminish damages assessed upon a writ of inquiry on the ground that the justices might have awarded damages without the writ; therefore, the inquisition was conducted only for informational purposes.\textsuperscript{359} The last exception cited by the Court was a practice in "some of the old cases" holding that when the plaintiff's damages were a sum certain, the court had the authority to increase or abridge the verdict of the jury\textsuperscript{360} in 1764, an English "court reviewed the subject and reached the

\textsuperscript{353} Id. at 560-61.
\textsuperscript{354} Dimick, 293 U.S. at 488.
\textsuperscript{355} Id. at 477.
\textsuperscript{356} Id.
\textsuperscript{357} Id.
\textsuperscript{358} Id. at 477-78.
\textsuperscript{359} Id. at 479.
\textsuperscript{360} Id. at 479.
conclusion that the English courts were without power to either increase or abridge damages in any action for a personal tort, unless in the exceptional cases just noted. The Supreme Court concluded that:

[W]hile there was some practice to the contrary in respect of decreasing damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury in actions such as that under consideration.

The petitioner urged the Court to consider extending the constitutionally valid practice of remittitur to cover this analogous practice of additur, even though the additur did not exist in this precise form at common law in 1791. The Court declined for two reasons. First, and somewhat surprisingly, the Court challenged the view established in the federal courts by Justice Story, writing as a circuit judge, that remittitur was an accepted feature of the common law in 1791. In his opinion, Story cited two English cases, antedating the Constitution, in which the court granted new trials based upon excessive damages; he concluded from these cases that conditioning such a trial on the plaintiff's willingness to remit a portion of his damage award was proper. He cited no case to support that conclusion. The subsequent Supreme Court case upholding the practice of remittitur in federal court simply cited Justice Story's opinion and two state cases. The Court concluded, "[i]n the light reflected by the foregoing review of the English decisions and commentators, it, therefore, may be that if the question of remittitur

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361 Id.
362 Id. at 482.
363 Id. at 483.
364 Id.
365 Id. at 483-84.
were now before us for the first time, it would be decided otherwise. However, because the practice had been the law
in the federal courts for more than a hundred years and because it does find "some support in the practice of the English courts
prior to the adoption of the Constitution," the Court in Dimick
concluded that the practice should be upheld.367

Having found that even remittitur hangs upon a very fragile
common law thread, the Court was unwilling to extend it by
analogy to the additur practice. Although both additur and
remittitur appear to impact equally upon the jury's fact-finding
role, the Court found that remittitur simply excises a portion of
an amount found by the jury; with additur, increasing the dam-
age amount "is a bald addition of something which in no sense
can be said to be included in the verdict."368 Such an assessment
by the trial court, with the consent of the defendant only, may
"bring the constitutional right of the plaintiff to a jury trial to
an end in respect of a matter of fact which no jury has ever
passed upon either explicitly or by implication."369

III. JUSTIFICATION FOR JURY CONTROL

To this point this Article has been concerned with establish-
ing the dichotomy between what society says about the jury-trial
right and what society's actions in the form of procedural devices
designed to control that right tell us about the place of the civil
jury in modern law. Procedural control devices exist and have
existed in some form since the beginnings of the jury.370 That
fact indicates the perceived need for limits on the jury's power;
howerever, the extent of that need is not clear. The remainder of
this Article sets out and critiques various theories that explain
or seek to justify control of the jury. It suggests an analytical
framework for identifying those limits on the jury-trial right
which preserve its value to modern litigation. This Article offers
a less formal, more functional analysis to justify controlling the
constitutional right to trial by jury in a civil action.

366 Id. at 484.
367 Id. at 485.
368 Id. at 486.
369 Id. at 486-87.
370 See supra, notes 77-85 and accompanying text.
A. Historical Model

The preservation language of the seventh amendment and subsequent judicial interpretation of its language suggest a historical model to describe the evolution of the civil jury's role. Such a model defines the scope of civil jury-trial in two possible ways. First, in a view long held by the federal courts, the scope of the jury-trial right was defined by the division between law and equity that existed in 1791. To the extent that the 1791 law courts and a jury were available to address the issues raised in the modern case, a right to jury trial was implicated. A second way of defining the scope of the jury-trial right and the one that the Supreme Court currently follows requires consideration not only of the historical division between law and equity but also of the underlying rationale for such a division. Thus, if modern procedural devices provide "an adequate remedy at law," a jury trial is appropriate even when it never existed at common law in 1791.

Within each of these definitions of the jury-trial right, justification for controlling the jury exists. In the traditional historical context, a modern jury control device is justified if that device or something very much like it existed at common law in 1791. Such a determination might of course turn on which common law is applicable. The Supreme Court has held that English common law is the relevant law given the diffuse and confused state of United States common law. On occasion, however, the Court has resorted to the common law of the colonies to support its view of the scope of the jury-trial right.

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371 See, e.g., Dimick v. Schiedt, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.").
373 See, e.g., Dimick, 293 U.S. at 474 (discussing historical basis for remittitur and additur); Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913) (rejecting JNOV in part on a historical analysis).
374 See Slocum, 228 U.S. at 377; Capital Traction Co. v. Hof, 174 U.S. 1, 5-8 (1899).
375 See, e.g., Dimick, 293 U.S. at 474; Ex Parte Peterson, 253 U.S. 300, 307-09 (1920).
The more modern view of the scope of the jury-trial right also provides justification for control of the jury. Since under this modern view the Supreme Court only requires adherence to the essentials of common law jury trial and not to particular procedural details, one may argue that inherent in the definition of the jury-trial right is the notion that such a jury would be subject to controls. Even Blackstone, with his perception of the jury as the "glory of the English law" and "the most transcendent privilege which any subject can enjoy," found limits on the jury's power essential to ensure its integrity. Clearly controls existed at common law, and, therefore, controls limit the jury-trial right.

Both types of historical arguments are unsatisfactory to justify the current treatment of the jury. If, as the Supreme Court has suggested, the seventh amendment preserves only the essence of the common law jury trial, and if particular procedural aspects of the common law system are not followed in the face of modern procedural reform merely because they existed in 1791, then the argument resting upon the preexistence of particular devices is not very persuasive. Yet, left with the essence of the jury-trial right and a virtually free hand in connecting the dots, how can a court pick and choose among the control devices? Is the answer that any jury control device is presumptively constitutional and hence within the discretion of the trial court? The Supreme Court's treatment of additur would suggest not. To what extent does the seventh amendment's express prohibition against reexamination of any fact limit a court's hand in this matter? That some courts view the clause as a separate limitation seems clear, and an argument exists that the restrictions implicit in that phrase should prevent both trial court and appellate court reversal of jury decisions.

If one accepts that only the essence of the jury trial must be preserved and, therefore, that the question is not whether to control the jury but instead how to control the jury, then some other theory of justification, whether political, legal, or eco-

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377 3 W. BLACKSTONE, supra note 345, at 379.
378 See supra notes 349-69 and accompanying text.
nomic, must be factored in to account for the choices made. A
historical model framed in this way only poses the question and
does not afford the means for answering it. It is merely a starting
place in our analysis.

A more serious flaw lies in relying upon an assessment of
the essence of the jury-trial right and correspondingly appropri-
ate restrictions on that right. Reasonable minds can and do differ
on the essence of that common law right. For example, Justice
Black viewed the jury-trial right as a broad right in which many
particular procedural notions are essential. A more serious
jury-trial right would very narrowly circumscribe the ability of judges
to control juries. For Black, the essence of the jury trial is a
dozen people, unencumbered by judge-made restrictions, render-
ing a decision upon the facts, which the judge may not recon-
sider. This fact-finding (and consequent law-applying) function
would be so sacrosanct that only when one could show that no
evidence whatsoever supported the party with the burden of
proof could the case be kept from the jury

Dismissing such a notion as unfounded is difficult in light
of the English common law origins of the jury and the corres-
ponding colonial acceptance of broad jury power to determine
facts and law in a case. Even Justice Black did not go so far,
however, as to suggest that no limits exist on the jury’s right to
decide the facts. Apparently he would have limited such controls
to the new trial motion and the demurrer to the evidence, both
of which existed at common law. Moreover, he would have
accepted a new procedural device that embodied the essential
characteristics of the new trial or the demurrer to the evidence,
for example, that a second jury rather than the judge would
determine the facts or that the movant took the risk of judgment
upon him or herself in the event the judge denied the motion.

Justice Black’s acceptance of some control devices suggests
that his perspective was more than solely historical: he also was

379 See Green, Jury Trial and Mr. Justice Black, 65 Yale L.J. 482 (1956),
380 See, e.g., Galloway, 319 U.S. at 396 (Black, J., dissenting).
381 Id. at 407 (“I believe that a verdict should be directed, if at all, only when,
without weighing the credibility of the witnesses, there is in the evidence no room
whatever for honest difference of opinion over the factual issue in controversy.”).
382 Id. at 400-03.
383 See id.
engaging in an analysis of the respective roles of judge and jury, based on notions of how the adjudicatory process should work. While an argument exists that the sources of his analysis are historical, such analysis requires more than simply locking oneself into a rigid law-equity allocation between the judge and jury. Instead, consideration of the best allocation of responsibility, the extent of the power the jury should have, and the level of intrusion on that power which society is willing to accept as necessary or good must be sorted out on other than the historical playing field. Historical models are not merely theoretically flawed. Rather, history simply provides no model for evaluating jury control issues. It only describes how each control device emerged in reaction to a specific perceived jury failing or abuse of power. Unless one is committed to recreating the judicial cosmos of 1791—an uncertain if not impossible task—one has no other clear directive on what control devices are appropriate. Barring such re-creation, the historical model leaves one with only the broadest lessons of jury history: control is desirable and institutional balance should be adapted to changing circumstances. The alternative models of jury control justification build upon the historical model and, therefore, retain certain historical aspects, although history is not their dominant feature.

B. Legal Model

The legal model of the civil jury rests upon the assumption that an allocation of decision-making responsibilities can exist between judge and jury, based principally upon the law-fact dichotomy. Thus, juries are to determine facts, judges are to determine the law, and the jury-trial right extends only to questions of fact. This dichotomy of course has historical origins. See, J. Thayer, supra note 7, at 183. The best evidence that such a division is inherent in the jury-trial right, besides the preservation language, is found in the seventh amendment prohibition against reexamining facts tried by juries.

384 See, e.g., Frank, supra note 112; Sunderland, supra note 56.
law giver and the jury as fact finder, those devices are justified. Correspondingly, to the extent that uncontrolled jury discretion is inconsistent with the performance of those rules, it necessitates control. This justification is also the one most often relied upon by those who support control or even abolition of the civil jury right. It is, in its most common incarnation, the most functional of the existing theories justifying control and takes into consideration the most advantageous allocation of responsibility between the judge and jury, based upon presumed goals of the adjudicatory process—to render correct decisions in an efficient manner. The justification-of-control argument further assumes that the jury trial is a flawed procedure, whose "major defects can be mitigated."

The legal justification for controlling the civil jury rests upon several arguments. These arguments have arisen both in the context of determinations of sufficiency of the evidence and determinations regarding control over the jury's decision-making process, that is, special verdicts and general verdicts with special interrogatory. First, one may argue that the general jury verdict by its nature grants the jury "the power utterly to ignore what the judge instructs it concerning the substantive legal rules, a power which is indistinguishable for all practical purposes from a 'right'" Therefore, "cases are often decided 'according to what the jury suppose [sic] the law is or ought to be,' " and in a jury trial the law becomes "'as fluctuating and uncertain as the diverse opinion of different juries in regard to it.'" Thus, such juries are not only the judges of the law but also assume a legislative role.

The legislative role is the feature of the jury trial that its advocates most wholeheartedly embrace. Wigmore wrote:

Law and Justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated

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386 To the extent that such an analysis implies economic concerns, see infra notes 455-59 and accompanying text.
388 Id. at 57-58.
389 Id. at 58 (quoting Sparf v. United States, 156 U.S. 51 (1895)).
390 Id., see infra notes 430-43 and accompanying text for consideration of the political implications of this legislative role.
exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances.

The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.

That is what jury trial does. It supplies that flexibility of legal rules which is essential to justice and popular contentment.

And that flexibility could never be given by judge trial. The judge must write out his opinion, declaring the law and the findings of fact. He cannot in this public record deviate one jot from those requirements. The jury, and the secrecy of the jury room, are the indispensable elements in popular justice.391

Others find the jury's role in this regard to be advantageous since the jury can do "justice" in a given case and yet its decision has no lasting adverse impact on the law; that is, "hard cases tried with a jury do not make bad law, for they make no law at all, as far as the findings of the jury are concerned."392 This outcome is preferable, some argue, to having the judge distort or qualify the law to reach a just decision, for the judge's decision on the law has precedential value.393

The proponents of jury control respond to this argument in favor of jury nullification in several ways. First, they point out that if juries were unavailable or unwilling to ignore the law, judges might have abandoned antiquated rules earlier or modified the impact of legislative judgments upon certain classes of litigants.394 For example, Judge Frank suggests that the "fellow-servant" rule, often cited in support of unbridled jury nullification, might actually support the contrary view. That is, if the jury had been unable to ignore that harsh judge-made rule, the courts might have abolished the rule sooner. Because the courts

391 Wigmore, supra note 133, at 170.
392 Skidmore, 167 F.2d at 59 n.13 (quoting Judge Chalmers).
did not abolish the rule quickly and because some juries presumably applied the law as instructed, a lack of uniformity in the decisions resulted. "Aside from its episodic and capricious character," Judge Frank argued, "[s]uch 'law making' by juries seems an unnecessarily clumsy method of nullifying undesirable precedents." In addition, in courts in which juries historically do not sit, equity and admiralty courts, for example, "the judges have been less reluctant to contrive flexible rules and to revise undesirable precedents."

Lastly, some argue that assigning a legislative role to juries or allowing nullification of duly enacted laws by a "series of legislatures, each consisting of twelve men or women, casually selected as jurors" makes little sense. Allowing a jury to assert a legislative role is absurd in light of the suggestion that jurors are often not consciously nullifying unjust laws but instead are ignoring (or perhaps misunderstanding) the judge’s instruction and bringing in a verdict for the party they believe should win.

A more specific argument in favor of jury control by special verdict arises in this legal context. The general verdict device merges the fact-finding and law-deciding functions into one inseparable conclusion. Thus, the purported division of responsibilities between the judge and the jury never really existed because the jury had the power to render a decision without regard to the law that the judge explained. Sunderland described the consequences of this merger:

It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown ele-

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395 Id.
396 Id.
397 Id.
398 Some experimental research indicates that juries do not remember or do not understand the judge’s instruction of the law, or they choose to ignore the judge because of factors the judge instructed them to disregard. See, e.g., R. Hastie, S. Penrod & N. Pennington, Inside the Jury 80 (1983); Erlanger, Jury Research in America, 4 Law & Soc. Rev 345, 348-51 (1970).
ments which enter into the general verdict: (a) the facts; (b) the law; (c) the application of the law to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. It is also clear that if error does occur in any of these matters it cannot be discovered, for the constituents of the compound cannot be ascertained. The general verdict is as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi. Both stand on the same foundation—a presumption of wisdom.399

According to Sunderland, the solution is to make the use of the special verdict compulsory: the jury reveals precisely the facts it finds and the judge, for the most part, applies the law to the facts. Because the general verdict allows juries to disregard the law not only when they feel it is unjust but also whenever they are swayed by bias or prejudice to find for a particular party, the measure of control provided by the special verdict is preferable.400

Another argument that supports the use of the special verdict, but perhaps is more generally applicable to the question of whether a broad jury-trial right should exist, is the contention that because jury trials necessitate elaborate and often lengthy instructions on the law, the potential for error is greatly enhanced.401 Special verdicts mitigate this effect by reducing the instructions that the judge gives. More broadly construed, by limiting the availability of the jury trial or by expanding the situations in which the court may take the case away from the jury, jury instructions and their contribution to reversals would decline substantially.

Proponents of very liberal standards for taking cases away from juries on the basis of insufficiency of the evidence have a straightforward legal argument. If judges decide law and juries find fact, then no jury function exists in cases in which no "facts" are to be found. Therefore, using one of the jury control devices that turns upon sufficiency of the evidence is consistent

399 Sunderland, supra note 56, at 258.
400 Id. at 258-59.
401 Note, supra note 78, at 490.
with the accepted allocation of responsibility between judge and jury.  

Several obvious problems exist with this argument. First, life is seldom as simple as the argument suggests. The usual case in which a sufficiency of the evidence question arises is not the case in which the party with the burden of proof presents no evidence. Rather, in the usual case, the party presents some evidence and the question remains as to how much evidence is sufficient to require jury consideration. The proponents of the sufficiency of the evidence devices maintain, and the courts generally agree, that the sufficiency question is one of law that the judge decides; however, some believe that this question of sufficiency is a jury function involving weighing the evidence.

In addition, the legal model leaves the question of which procedural device is appropriate to the discretion of the court. The accepted view is that upon deciding that the evidence is insufficient as a matter of law, the court may enter a judgment by directed verdict or JNOV; however, Justice Black suggested that the appropriate remedy is a new trial so that the party has a second chance to cure the insufficiencies of proof. Granting a new trial lessens the impact on the jury-trial right and is arguably less offensive to the seventh amendment. The new trial motion itself is further justified in that the judge must have the power to refuse to accept what is a patently incorrect verdict—the determination having been made that the jury's verdict is contrary to the evidence and that therefore the jury verdict must rest upon an incorrect view of the law or bias or prejudice.

In summary, the legal justification for jury control presumes a clear delineation between the roles of the judge as lawgiver and the jury as fact finder. This is, of course, its major flaw as a working model. The line between law and fact is illusory.

402 See Galloway, 319 U.S. at 372.
403 See, e.g., id.
404 See supra notes 221-23 and accompanying text.
405 See Galloway, 319 U.S. at 401-05 (Black, J., dissenting).
406 See supra notes 245-68 and accompanying text.
407 Galloway, 319 U.S. at 400-01.
408 See, e.g., L. Green, JUDGE AND JURY 270 (1930) ("No two terms of legal science have rendered better service than 'law' and 'fact.' They readily accommodate themselves to any meaning we desire to give them. What judge has not found refuge in them? The man who could succeed in defining them would be a public enemy.").
Moreover, judges make some factual decisions, and juries often make legal determinations; Judge Frank and his followers do not seem to argue for a sweeping revision of what constitutes "judge questions" or "jury questions." Thus, a model that rests on the law-fact dichotomy fails to explain adequately the allocation of decision making between the judge and the jury. As a consequence, a kind of circular reasoning and apparent confusion exists regarding the sufficiency of the evidence control devices. For example, courts and commentators have agonized over how to explain within the legal model that a judge's assessment of a jury's verdict as against the weight of the evidence differs from the jury's assessment of the evidence in the first place. Both decisions clearly require evaluation of the evidence and factual conclusions, yet the former is characterized as a question of law for the judge, and the latter is a question of fact for the jury. Such characterizations do nothing to explain why one decision is appropriately the judge's and the other appropriately the jury's.

C. Political Model

This section explores three variations on the political model: (1) the traditional democratic model, (2) the legislative model, and (3) the political-economy model.\(^{409}\) Under the traditional democratic model, the civil jury provides a check on tyranny: the jury introduces a democratic aspect into the judiciary, a nondemocratic institution.\(^{410}\) The political rationale for the civil-jury trial has roots in the English common law and the view that the jury was a check on the Crown's oppressive application of the law.

The jury-trial right in civil and criminal cases was embodied in the Magna Carta when the distinction between criminal and civil law was not well developed.\(^{411}\) However, this view of the jury as the defender of civil liberties in the face of unjust law...
reached its high point on the criminal side. In criminal cases, refusals to convict defendants of capital offenses were common, in part perhaps because of the proliferation of such capital offenses. As a group, however, the seventeenth century criminal libel cases perhaps were known most widely by the colonial supporters of a strong jury-trial right.

The most notorious example of a criminal jury resisting the power of the Crown occurred during the trial of William Penn and William Mead on a charge of taking part in an unlawful assembly. The jurors at first attempted to bring in an ambiguous verdict, insufficient to convict the defendants. The court held the jurors without food or drink until they brought in a proper verdict. At that point, the jurors came back with a "not guilty" verdict, and the court ordered the jury fined and imprisoned. The jury was discharged on a writ of habeas corpus, and the right to return a verdict seemingly unsupported by fact or law was affirmed:

A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can infer [sic] and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after.

The American colonists took this jury-trial right seriously. John Adams, discussing the need for a broad jury-trial right in 1771, noted:

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

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412 See J. Thayer, supra note 7, at 166-69 (discussing Bushell's Case and the jury's right to decide law as well as fact).
413 See Henderson, supra note 1, at 328 (since truth was no defense and malice was irrelevant, jurors who disagreed with the "archaic and unpopular substantive law of libel" had little choice but to acquit defendants using a general verdict).
415 Id. at 1006.
416 Id. at 1009.
This notion of the jury as a democratic part of the judiciary, which was otherwise viewed as an antimajoritarian check on our democracy, was critical to Adams, who maintained that the notion was as crucial as popular elections to those who favored popular participation in government. Moreover, Adams viewed the jury as having the power and the right to decide both the law and the fact in a given case. A jury should not be compelled to find a special verdict or to render a general verdict in accordance with the judge's instruction if it is inconsistent with fundamental principles of "general rules of law and common regulations of society." The juror has the duty in such a case "to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court."

Thomas Jefferson's view of the jury as a necessary element of a participatory democracy is also recorded; however, he acknowledged that jurors should "determine all matters of fact, leaving to the permanent judges, to decide the law resulting from those facts." Jefferson's favorable view of the jury rested in part on his distrust of judges who "acquire an Esprit de corps; that being known, they are liable to be tempted by bribery; that they are misled by favor, by relationship, by a spirit of party, by a devotion to the executive or legislative power." If the jurors believe that the judge is under any bias or influence regarding the case, they have the power, according to Jefferson, "to take on themselves to judge the law as well as the fact. They never exercise this power but when they suspect partiality in the judges; and by the exercise of this power, they have been the firmest bulwarks of English liberty."

The colonists clearly embraced the English sentiments in favor of jury trial, both civil and criminal. The first Congress remedied the lack of a constitutional guarantee for the civil-

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418 Id.
419 Id. at 254.
420 Id. at 255.
421 Id. at 255.
422 3 The Writings of Thomas Jefferson, supra note 35, at 81.
423 Id.
424 Id. at 82.
jury-trial right by proposing the seventh amendment, duly rati-

fied in 1791. Although circumstances have changed greatly since

1791, political arguments in favor of the jury have not evolved

much. Arguably, juries protect against government oppression

by refusing to apply unjust laws. Participation by common

citizens in the adjudicatory process ensures that the process

reflects the sentiments and beliefs of society And lastly, jury
duty serves an educational function, which is an important fea-
ture of a participatory government. Jurors learn how the insti-
tutions of their government work and that education may serve
a validating function for the judicial system—ensuring the pop-
ulace that the courts dispense justice.425

Some modern-day commentators have seized upon this last
factor and argued for a socio-political justification for the civil
jury 426 These commentators maintain that a process such as jury
trial is essential to the perception that the judicial system is
responsive to the common will thus enhancing the cohesive na-
ture of society Judge Higginbotham suggested that United States
courts have a greater need for a broad civil-jury-trial right than
English courts because, under our federal system of separation
of powers, “the power of judicial review is inextricably linked
with the concept of an independent judiciary and its attendant
risk of autocratic behavior ”427 This results, he claims, in a
politically conscious judiciary and the “peculiar need for the
democratizing influence of the jury because the success of judi-
cial review ultimately depends upon the public's acceptance of
judicial decisions.”428 Consequently, “the power of the great
constitutional decisions rests upon the accuracy of the Court’s
perception of this kind of common will and the Court’s ability,
by expressing its perception, ultimately to command a consensus.”

Political scientists suggest a variation on the traditional democratic model by considering the jury as a legislature. Particularly in the criminal law context, they argue that jurors in the adjudicatory process act as legislators because they assess the soundness of the policies of the criminal law. This argument hypothesizes that jurors also reflect public opinion when making such judgments; hence, they perform a legislative role.

Criticisms of the traditional democratic political model are many and varied. Commentators attack the notion that civil juries protect society against government oppression on several bases. They distinguish between civil and criminal juries: while they would allow the criminal jury to ignore the law when the government engages in oppressive behavior, this same concern is not present in civil litigation between private parties. Even conceding that the potential for government abuse is present equally in civil as in criminal cases, abuse is virtually nonexistent in either, and certainly insufficient to support jury nullification as a practice.

Jury nullification also runs contrary to the rule of law. If the political system envisions the elimination of the arbitrary application of laws, then that certainly mandates an adjudicatory process which applies standards uniformly and dispassionately. Judge Frank noted that “[i]n the courts, this conception is embodied in the idea of ‘equality before the law’—the similar treatment, judicially, of substantially similar cases.”

Jury-made

429 Id. (quoting A. Cox, The Role of the Supreme Court in American Government 118 (1976)).
433 See Scott, supra note 3, at 673; Sunderland, supra note 56, at 260-61.
434 See J. Frank, supra note 112, at 127-35.
435 Id. But see M. Kadish & S. Kadish, Discretion to Disobey 54-72 (1973) (illustrates attempt to reconcile jury departure from instructions and rules of law with the need to administer justice uniformly).
436 J. Frank, supra note 112, at 131.
law in which the jury chooses to ignore the judge’s instructions violates this concept. “For ‘jury made law’ is, par excellence, capricious and arbitrary, yielding the maximum in the way of lack of uniformity, of unknowability.” Some legal rules are “excessively inflexible” and may result in injustice unless individualized in a particular case. “But individualization should be accomplished openly, not furtively by such a surreptitious technique as ‘jury lawlessness,’ which, as portrayed by Pound and others, smacks of something very close to hypocrisy and to deception of the public.”

Actually, little evidence exists to support the notion that juries act as little legislatures, amending the law to conform to public opinion. Few studies have determined how and why juries decide as they do, and little solid data exists. In the most ambitious of the recent studies on this subject, James Levine hypothesized that juries, in making their decisions, reflect prevailing public opinion. In support of this hypothesis, he examined jury trial decisions convicting or acquitting defendants charged with violating selective service laws during the Korean and the Vietnam wars. Levine correlated the conviction rate in such cases with fluctuating public approval of United States military efforts. The results of Levine’s study are far from conclusive; they establish only a weak correlation between public opinion and jury actions.

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437 Id. at 132.
438 Id.
439 Id. at 134-35.
440 A few studies exist linking certain juror characteristics, e.g., race or gender, to how the juror decides a case. The results of the studies are inconclusive. See, e.g., R. Hastie, S. Penrod & N. Pennington, supra note 398, at 141-44; Adler, Socioeconomic Factors Influencing Jury Verdicts, 1973 N.Y.U. REV. L. & SOC. CHANGE 1; Mills & Bohannon, Juror and Characteristics: To What Extent Are They Related to Jury Verdicts?, 64 JUD. 22 (1980); Strodtbeck & Mann, Sex Role Differentiation in Jury Deliberations, 19 SOCIOLOGY 3, 3-4 (1956).
441 Levine, supra note 430.
442 Id. at 612-13. Levine relied upon Gallup Polls and National Surveys to gauge public opinion. Two types of questions were used: first, “those asking respondents whether they thought American entry into the Korean War or the Vietnam War was a mistake, and [second,] those asking whether they favored escalatory or de-escalatory military policies.” Id. at 612-13.
443 Id. at 618. While Levine charted a parallel between public opinion trends and verdict trends, even he acknowledges that “the correspondence is far from perfect
Some have suggested that juries do not reject the law as unfair, unjust, or oppressive; nor do they find contrary to the judges' instructions because they believe the judge to be biased, as Jefferson suggested. Rather, juries ignore the law because they do not understand it or because they are swayed by bias or by prejudice to find for one party, regardless of the law (what Judge Frank calls the "realistic theory" of jury decision making).444

As to the argument that jury service educates the citizenry and reaffirms confidence in our system of justice, Judge Frank noted that no proof exists for the latter and that, just as likely, jury service makes jurors cynical about the judiciary process.445 Moreover, should private litigants assume the expense of educating the citizenry?446

Some have questioned the jury as a representative body and a democratic institution by examining jury composition.447 Juries tend not to mirror society at large. Members of lower socioeconomic groups are grossly underrepresented on jury panels, as are women and blacks.448 Those called for service are quickly

especially in the first few years of the Vietnam War; the correlation (r) between the two measures is an unimpressive 1.1. 444 J. FRANK, supra note 112, at 111; Holstein, Juror's Interpretations and Jury Decisionmaking, 9 L. & Hum. Behav 83 (1985); Sunderland, supra note 56, at 258.

445 J. FRANK, supra note 112, at 135.

446 Id.

[T]he need for popular participation in the administration of justice is the argument most frequently advanced in defense of the jury system. If we take that argument seriously—as something more than a rationalization of an irrational adherence to tradition—then we face a clash of social policies: (1) the policy favoring such popular participation undermines (2) the policy of obtaining that adequate fact-finding which is indispensable to the doing of justice. Which policy should yield? Is it less important to do justice to litigants than to have citizens serve on juries?

Id.


culled of doctors, lawyers, and other professionals. Underrepresentation of some sectors of our population and the consequent overrepresentation of others seemingly impairs the jury's ability to act as the conscience of the populace or the vindicator of the popular will.\footnote{Levine suggested that jury composition may have skewed the results of his study. Levine, supra note 430, at 632.}

Avid supporters of the jury trial characterize it as an essential element of a democratic, free society. They compare the jury-trial right to the right to vote. Yet, ample evidence exists that democracies get along quite well without the guarantee of a jury in civil litigation.\footnote{See Tullock, \textit{Why I Prefer Napoleon} (unpublished draft 1985).} England abandoned the civil jury during the two world wars due to a shortage of "manpower" and never returned to the jury system in any significant way. Currently England provides for juries as a right in only a few serious criminal cases.\footnote{See the discussion of the English move away from jury trials in civil cases in Higginbotham, supra note 425, at 50-53.} Because England's civil jury was not constitutionally mandated, its abatement was undoubtedly easier; however, that alone does not explain the lack of popular demand for its return after the Second World War.\footnote{Id. at 50-51.}

Moreover, if juries serve such an important political role, why was the jury-trial right not extended to traditional equity cases? Surely issues regarding the potential oppressive nature of government arise in the context of injunctive relief. Historical circumstances may explain in part why the division between law and equity has been maintained, even after the separate systems were abolished. Nevertheless, nothing prevents Congress from expanding the jury-trial right to these cases; that it has not done so suggests that the political model does not explain fully the jury's role in the adjudicatory process.\footnote{For example, consider the fact that the jury-trial right has never been extended to criminal contempt cases.}

The third variation on the political model contains a political role for the jury and an economic analysis of the efficacy of that role—a model that could be characterized as one of political

\footnote{\textsuperscript{449} Levine suggested that jury composition may have skewed the results of his study. Levine, supra note 430, at 632.} \footnote{\textsuperscript{450} See Tullock, \textit{Why I Prefer Napoleon} (unpublished draft 1985).} \footnote{\textsuperscript{451} See the discussion of the English move away from jury trials in civil cases in Higginbotham, supra note 425, at 50-53.} \footnote{\textsuperscript{452} Id. at 50-51.} \footnote{\textsuperscript{453} For example, consider the fact that the jury-trial right has never been extended to criminal contempt cases.}
The political justification of a broadly available jury-trial right, resting upon the fear of tyranny and the jury's role in the "checks and balances" of our political system, is analyzed in economic terms. Various costs arise with the jury's involvement in a case. *Voir dire*, jury instructions, opening and closing statements, and jury deliberation add time and expense to the process. Other costs are less clear. For example, the jury's presence necessitates adherence to the rules of evidence, causing possible delays in the trial and exclusion of relevant information due to policy decisions. Exclusion of evidence may render the decision-making process less efficient because it may make the decision more difficult and time consuming; also, it may make the decision less likely to be correct.

The benefits of the jury trial are a direct consequence of the inefficiency it introduces into the adjudicatory process. That is, by slowing down the process, by making the exercise of government power, in the form of judicial power less efficient, the jury checks the oppressive use of such power The question then is, given the "formidable array" of checks and balances that the Constitution provides, what is "the marginal checking value of the procedural inefficiencies of the jury trial?" Some have suggested that an answer to this question requires both a normative conception of tyranny and a determination of the relative importance of avoiding such tyranny, compared to the potential costs involved. Only then will society be in a position to analyze "[u]nder what conditions does one or another institutional arrangement check the effort of would-be tyrants of one or another kind to dominate the government." Such an analysis may vindicate the position that jury nullification of laws is not the best way to deal with injustice. Compared to direct checks on governmental power, jury actions seem a weak corrective; jury actions may make the systematic implementation of

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455 Ackerman, supra note 454, at 5.

456 *Id.* at 6 ("More generally, what we require is a theory of optimal checks and balances.").

457 *Id.* at 6-7

458 *Id.*
legitimate laws more difficult and thereby add to the inefficiencies of the system.\textsuperscript{459}

IV PROPOSAL. THE FUNCTIONAL MODEL

None of the models presented offers a wholly satisfactory justification for controlling the civil jury. Each affords some basis for rejecting the concept of a broad, freely available civil-jury-trial right subject to few if any controls. What is lacking is any principled way of distinguishing valid from invalid jury control devices. Therefore, use of certain devices creates apparent conflicts with the scope of the jury right. The model that comes the closest to grappling with that problem is the legal model. Its principle defect is its strong reliance upon the law-fact dichotomy to distinguish between the functions of the judge and the jury. Recognizing that characterizing judges as lawgivers and juries as fact finders is not particularly helpful in allocating decision making between them is not an original idea.\textsuperscript{460} Some have suggested looking past the labels of "law" and "fact" to determine more precisely the theoretical basis for assigning the former to judges and the latter to juries.\textsuperscript{461} One commentator designated the distinction a tautology: "A question of law or a question of fact is a mere synonym for a judge question or a jury question."\textsuperscript{462}

I suggest that one may look beyond the law-fact labels to identify valued facets of judge and jury decision making. Then, one may evaluate the current jury control devices in light of the extent to which they encourage or discourage performance of the valued functions. Adding my voice to other voices attempting to define law and fact is not my intention. Rather, those labels are merely symbolic of the underlying functions of decision making allocated to the judge and the jury.

\textsuperscript{459} But cf. Higginbotham, supra note 425, at 55 ("The dollar cost of juries is insufficient to support any argument for the elimination of jury trials.").


\textsuperscript{461} To most commentators, however, this means refining the definitions of law and fact. See, e.g., Weiner, supra note 460.

\textsuperscript{462} Id. at 1868.
this section focuses upon those functions, identifies valued judge and jury functions, and suggests possible ways to weigh the functions in balancing the interests involved. Full exploration of the weight to accord the functions belongs to later research.\textsuperscript{463} The following analysis proceeds upon two assumptions: first, that the civil jury will continue to be a feature of the judicial system, and second, that the jury serves some valid purpose in that system.\textsuperscript{464}

A. Identifying Valued Jury Functions

Three categories of valued jury functions suggest themselves: (1) special competency, (2) public acceptance, and (3) equity functions. The first assumes that the jury is well suited for certain tasks and, therefore, that it should be encouraged to perform them. Within this category two subgroups exist: determinations of factual issues and determinations of credibility.\textsuperscript{465} The latter is often identified as a type of factual issue, but is sufficiently different to require separate treatment.

Even at the time Coke set forth his maxim, juries did not make all factual determinations.\textsuperscript{466} Certain factual matters were within juries' purview while others were not. One may argue that jury factual determinations in early cases were by and large determinations regarding circumstances with which jurors were very familiar. Since early jurors were selected based upon their familiarity with the facts surrounding the case, one may assume that jurors made factual decisions at trial that were similar to their day-to-day decisions.\textsuperscript{467} Thus, the issues before the civil jury were relatively simple.\textsuperscript{468}

\textsuperscript{463} For example, are juries better at gauging witness credibility than judges? If so, should the value of juries performing that function be accorded greater weight when credibility issues are determinative?

\textsuperscript{464} Obviously, these assumptions are subject to attack on several levels. See, e.g., J. Frank, supra note 112; Scott, supra note 3.

\textsuperscript{465} Although one may consider that credibility is a factual issue, it is sufficiently different to require separate treatment.

\textsuperscript{466} J. Thayer, supra note 7, at 185.

\textsuperscript{467} Id. at 184-85.

\textsuperscript{468} See Ross v. Bernhard, 396 U.S. 531, 538 n.10; see also supra notes 69-74 and accompanying text.
It is reasonable, then, to posit as the first special competency function of the jury its ability to render determinations in the context of everyday factual decisions jurors must make in their own lives. Therefore, evaluations of the evidence in order to reach determinations of how something happened—did the defendant stop at the stop sign; was the plaintiff in the crosswalk; did the defendant intend harm to the plaintiff—are determinations with which the jury is charged. The jury's competency to decide factual issues within common experience has been traditionally assumed to exceed that of the judge.\textsuperscript{469}

Jurors may bring to the credibility decision, as to other factual decisions, a certain expertise gained through life experiences which makes them good judges of a witness's reliability and truthfulness.\textsuperscript{470} However, no evidence, other than anecdotal, suggests that jurors are any good at gauging credibility based upon the outward appearances and manifestations of a witness or are correct more often than a judge might be.\textsuperscript{471} It has been hypothesized several jury members collectively may determine credibility better than a single judge.\textsuperscript{472} This argument, however, may be inconsistent with the existing evidence on small-group decision making in general and jury decision making in particular.\textsuperscript{473} Nonetheless, the prevailing view is that credibility determinations belong to the special competency of the jury.

\textsuperscript{469} This assumption is not universally shared. See J. Frank, supra note 112, at 126.

Would any sensible business organization reach a decision, as to the competence and honesty of a prospective executive, by seeking, on that question of fact, the judgment of twelve men or women gathered together at random—and after first weeding out all those men or women who might have any special qualifications for answering the questions? Id. Empirical data suggests, however, that twelve member juries as a group do better with fact finding and with application of the law than individual members or than six member juries. See, e.g., M. Saks, Small-Group Decision Making and Complex Information Tasks 26-33 (1981); Sperlich, And Then There Were Six: The Decline of the American Jury, 63 Judicature 262 (1980).


\textsuperscript{471} See supra note 240.


\textsuperscript{473} See Cooper, supra note 235, at 934-38; Vinson, Psychological Anchors: Influ-
The traditional assumptions regarding both commonplace fact determinations and credibility determinations as within the special competency function of the jury are subject to challenge on more general grounds. No longer is a jury composed of people who are familiar with local facts and circumstances, while the judge travels the countryside. No longer are jurors asked to apply their special familiarity with a particular case. Judges are theoretically as capable as juries to make the everyday factual determinations with which the modern case is concerned. In addition, if special competency with factual determinations were an important factor in the jury trial, one would expect to see greater use of “blue ribbon” juries and other panels comprised of experts. This does not suggest that special competency is not a valued function in our adjudicatory process. Various trends in decision making—for example, increased use of arbitration, use of special masters in complex cases, and growth of administrative agency fact finding—illustrate the value that the judicial system and society place on special competency. The point is, however, civil juries do not bring such special competency to their fact finding task.

Submission of common-experience factual determinations to jurors suggests an alternative function is being served. I would characterize that function as one of “public acceptance.” By virtue of public acceptance of verdicts, the behavioral norms embodied in substantive law are transmitted to and acquiesced in by society. The public accepts the verdict as valid only to the extent that it perceives jury verdicts as representing determinations of what actually happened, rather than as a consequence of procedural rules.

encaging the Jury, 8 Litigation 20 (1982) (jurors’ credibility determinations may be influenced if press attends testimony or number of people in courtroom increases).


475 Id.

476 Id.

The Verdict can articulate a legal rule: “You did the thing enjoined by the law; therefore, you will pay the penalty.” This message encourages each of us to conform our conduct to the behavioral norms embodied in the substantive law. Alternatively the verdict can emphasize a proof rule: “We will convict and punish you only if your violation is proved by due process
Juries serve a particular function in gaining such acceptance. When neither the judge nor the jury has special competency, when no indication exists that a given result has social value, and when the need or desire for a lasting precedent is not present, the judge should allocate decision-making responsibility to the jury. Nesson suggests that the nature of the jury decision-making process is sufficiently obscure so as to "cloud the nature of jury verdicts." That obscurity allows the judge to "project the verdict as a statement about what happened. This institutional acceptance of the verdict justifies the imposition of a sanction on the defendant and furthers the inculcation of the applicable legal rule." Dispersion of the decision-making process over twelve persons rather than one decision maker may reinforce a view of the verdict as valid and therefore acceptable to the public as a judgment regarding what actually happened and as a basis for imposing a remedy upon the defendant. This function serves also to preserve the integrity of the judicial system.

The last major category of valued jury functions is the equity function. This category also is subject to division into two subcategories: decision making regarding so-called black box decisions and equity by jury nullification. Black box decisions are the difficult decisions that appear to compel arbitrary results "in the sense that they can only be based on the specific equities of each individual case and cannot convincingly be explained on wholly logical or rational grounds." The consequent jury individualization of the law is a concept embedded in our notion of what the jury does. Examples of such jury individualization include close cases concerning "no criteria other than pure intuition." Mr. Justice Holmes described these cases as resulting from the law's necessity to engage in line drawing; the apparent

of law." This message invites people to act not according to what they know is lawful, but according to what they think can be proved against them.

*Id.*

47 *Id.* at 1365.
47 Id. at 1366.
479 See Higginbotham, *supra* note 425, at 56.
480 *Id.*
481 *Id.* at 57.
arbitrariness of that line can be demonstrated by those cases that come very near to the line on either side.

But the theory of the law is that such lines exist. As that difference has no gradation about it, when applied to shades of conduct that are very near each other it has an arbitrary look. We like to disguise the arbitrariness, we like to save ourselves the trouble of nice and doubtful discriminations. And so, as we get near the dividing point, we call in the jury.

The equity function does more than simply let the court off the hook as Holmes suggests. In addition, these jury decisions provide for individualized determinations that do not constitute precedents and hence do not lock the adjudicatory process into an identical result in a later case. This aspect of the equity function is also of value to the judicial system.

The second subcategory of jury equity function is more problematic. This function arises in those cases in which the jury, for reasons of its own, chooses to ignore or to distort the legal rule in order to reach a result contrary to that suggested by the rule. Whether the jury's nullification of the law is a valued function may be a consequence of two factors: the reasons for ignoring the law and the type of case. As to the first factor, supporters of the jury's right to ignore the law generally argue that such a right is necessary to correct unjust laws or to prevent enforcement of oppressive laws. As suggested earlier, however, much of the jury nullification that occurs may result from the jury's misunderstanding of the instruction or its decision to find for one party because of some improper motive such as sympathy, bias, or prejudice. In cases of misunderstanding or improper motivation, broad jury powers to nullify make little sense. That such reasons for nullifying exist suggests that this equity function might be viewed skeptically.

The type of case may influence the weight accorded this subcategory of equity function. For example, the rationale that supports jury nullification may make sense in a criminal case,

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482 Holmes, Law in Science and Science in Law, 12 Harv L. Rev 443, 457 (1899).
483 See supra notes 393-98 and accompanying text.
484 See, e.g., Wigmore, supra note 133, at 170.
especially a criminal case with political overtones which may raise the concerns of oppressive government. On the other hand, in a commercial law civil suit, the arguments for the jury's right to ignore the law become less compelling, particularly in view of the commercial law's interest in uniformity and predictability.

B. Identifying Valued Judge Functions

Valued judge functions fall into two broad categories: (1) those involving the special competency of judges and (2) those involving the supervisory functions of judges. Within the special competency of judges are not only decisions on those issues pertaining to the law; judges in the common law system always have decided some issues that could be characterized as factual. Therefore, isolating the special competency function of the judge is necessary—what makes it appropriate for him or her to decide those issues, whether labeled fact, law, or mixed questions of fact and law.

Judges presumably bring to the adjudicatory process expertise based upon their formal education and their courtroom education. This expertise gives them an advantage in resolving issues that require such expertise, such as the construction and interpretation of statutes. In addition, issues may arise in the context of litigation, the resolution of which is intended or desired to have a long-term impact. To the extent that the judge renders a long-term impact decision, the social value of that decision is an issue. For example, in certain areas of the law,

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486 J. Thayer, supra note 7, at 185.

Courts pass upon a vast number of questions of fact that do not get on the record, or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an allotting of all questions of fact to the jury. The jury simply decides some questions of fact. [Coke's maxim] was never true, if taken absolutely.

*Id.*
consistency and predictability have a substantial impact on the primary conduct of the parties involved. The judge rather than the jury has traditionally been assigned the function of determining such issues, and the traditional rationale for doing so appears to have continued validity.

The second of the valued judge function categories is comprised of the supervisory functions. This category encompasses a range of functions pertaining to both the rules of the litigation game and the promotion of rational decision making. Some functions overlap and some functions fall into both subcategories. The judge's function as keeper of the rules of the game manifests itself in several ways. The judge acts as a case manager, a role that takes on added significance as the complexity of the case increases. As case manager, the judge structures the case even before the trial begins. During the trial, the judge may take an active role in managing the case, depending upon his or her perception of the need for such judicial activism. In addition, during the trial, the judge applies the rules of evidence and, therefore, controls the flow of information to the jury.

Supervisory functions of the court that ensure a rational decision making process may also be implicated by evidentiary decisions, for example, excluding certain evidence from the jury's consideration because it is inflammatory or otherwise prejudicial. The trial judge also ensures that the rule of law prevails and that the jury's decision does not rest upon bias, prejudice, or other improper motives. Such a valued judge function explains, in part, the judge's ability to override the jury's determination on issues such as credibility.

One issue that should be addressed in the context of valued judge functions is that of the trial judge as allocator of decision.

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487 In the commercial law context, parties are presumed to have the capacity to bargain on their own behalf and to agree to private contractual arrangements governing their behavior vis à vis each other. Essential to such freedom of contract is a sense on the actors' part that they know the legal consequences of their bargains. Moreover, if their deal falls through, an understanding of the legal "back up" provisions may affect their willingness to bargain at all.

making responsibility If the functional model is to be explored further, certain behavioral assumptions regarding the judge must be made. The discussion that follows assumes that the judge behaves in a way that promotes rational, efficient decision making, and that motives such as distrust of the jury, impatience with delay, or ego do not enter into decisions allocating responsibility between the judge and jury. Obviously, how and why judges decide as they do are fertile questions for study. 489

C. Jury Control Devices and the Functional Model

This Article sets out two different types of jury control devices. The first, epitomized by the special verdict device, represents an attempt to control the jury’s decision-making process by structuring it in a way that avoids pitfalls or perceived abuses. The second type of control device takes decision making away from the jury upon the judge’s determination that insufficient evidence exists to allow the jury to make a decision or to allow a decision the jury has already made to stand. Representative of this latter type of control device are the directed verdict, JNOV, and new trial motions. This Article assesses these two broad categories in light of the judge/jury allocation of functions set out previously to determine the extent that such control devices are justified.

1. Controlling Decision Making: The Special Verdict

The special verdict of Rule 49(a) allows the judge, in collaboration with the attorneys in the case, to isolate certain material issues in the case for jury determination. By isolating these issues of fact, the jury can do what it does best: apply its common life experiences in evaluating the evidence and deciding what happened. The judge in this scenario takes the jury’s factual conclusions and applies his or her expertise to determine the law

489 An empirical study could correlate various factors with a judge’s use of control devices. For example, one could test the relationship between a serious backlog and the judge’s decision to take cases away from the jury. In addition, research is necessary concerning the impact of the trial judge’s managerial functions upon the judge’s ability to act as a rational, impartial decision maker. See, Resnik, supra note 488, at 424-45.
The special verdict enhances the judge's ability to structure the case so as to isolate the jury's principal function. The special verdict also enhances the judge's ability to ensure that the verdict is rational and is not based upon improper motive, although highly motivated and biased jurors may circumvent this feature of the special verdict.

The functional model works well to clarify the purposes being served by a device such as the special verdict. The judge's supervisory function is apparently well served in that he or she is able to structure the case in such a way that the jury's traditional fact-finding function is preserved, and the rationality of adjudicatory process is enhanced. Of course, the jury may lack special competency regarding common, everyday factual determinations, and therefore the real rationale may be a resort to the public acceptance function. In this regard the special verdict may not appear as valuable as the general verdict since the very purpose of the device is to eliminate some of the obscurity of the general verdict. However, the special verdict does serve the public acceptance function as well. The judge's application of the law is usually routine. The jury decides what happened; the judge merely characterizes that decision in legal terms. Thus, to the extent that public acceptance is a function of verdicts representing the jury's conclusion that the defendant did the acts proscribed by law (and thus the law will "punish" him or her), the special verdict as well as general verdict may serve that function. In addition, once the court decides that it has no special competency to make such determinations and that no strong policy supports taking the case away from the jury, then the fact that the jury trial is a constitutional right, while the judge trial is not, should dictate deference to the jury.

There remains the question of the extent to which the special verdict impairs the jury's equity function and the weight to be accorded such an impairment. The general verdict is the vehicle by which the jury does its equitable work; by separating the specific factual determinations from the application of the law, the jury's power to nullify unjust results is precluded. Nevertheless, assuming that juries who answer special verdict questions are unaware of the consequences of their answers and are unwilling to bend the factual determinations to reach their intended result is probably unrealistic. Moreover, jury nullification power
may have societal value only in a very narrow range of cases, principally criminal cases and civil cases that raise grave issues of social concern. Perhaps identifying those cases is a first step to defining appropriate cases for the special verdict.

In the vast majority of civil cases, the balance between justifying the special verdict or not should be struck in favor of the control device. The device promotes the valued judge functions relating to uniformity of result, expertise, management of the process, and ensuring a rational adjudicatory process and promotes the valued jury functions of fact finding in the interest of public acceptance. In this balancing, only the jury's equity function is not promoted, but one may assign slight weight to that function in the usual civil case.

2. **Control Devices Based on Sufficiency Questions: Taking the Case from the Jury**

The directed verdict and JNOV create the most difficulties in justifying jury control under any of the traditional models. It may be argued that by wholly abrogating the jury's role in the adjudicatory process, these devices do not promote any of the valued jury functions, but that argument takes a narrow view of the process. It can also be argued that such devices reinforce the respective functions of judges and juries by making clear the situations in which those functions are properly exercised. Thus, certain factual determinations are left to juries not because of any special competency they have in deciding those facts, but rather because their verdicts in such cases serve a social function. In certain cases no need may exist for the jury to serve that function. Cases in which the judge determines that only one result is possible may be the cases in which jury intervention is not necessary to preserve public acceptance of the verdict.

Elimination of juries in certain cases might suggest a disregard of the constitutional limits the Supreme Court has expressed. Let no misunderstanding exist regarding this proposal. Traditional formulation of the directed verdict standard requires that the court determine that insufficient facts exist upon which a jury could find for the party moved against. What is being proposed is a recognition that leaving the decision to the jury when "sufficient" evidence exists is not premised upon a clear
choice of the jury as an especially competent decision maker. Thus, the standard does not change under the functional model but only the rationale for that standard. When jury fact finding serves no function, then the interest in having the jury perform such fact finding is weak.

The difficulty commentators have in explaining these devices under the existing models lies in the apparent functioning of the court as a fact finder in the jury's stead. With the new trial motion granted on the basis that the verdict is against the weight of the evidence, arguing that the judge's role is otherwise is difficult. Viewed functionally, however, the judge's role in granting a directed verdict or JNOV is different from that of the jury. The judge applies a standard of law, meant to apply in the long term. That standard regulates the burden of producing evidence. Consistent levels of proof arguably serve the rational decision-making process because they remove decisions from the jury's province that are insufficiently supported by rational proof.

Implicit in the court's decision to grant a directed verdict or a JNOV is the notion that for the jury to reach any other decision would require an improper bias or prejudice. The devices promote the judge's function to determine the law applicable to the merits of the case and the standard that determines in a uniform way when reasonable minds could not differ. In addition, the judge's expertise in dealing with similar situations over a period of time is called upon. The strong emphasis on valued judge functions and the relatively weak jury interests in nonapplication of the judge's power also favor the justification of these devices.

The new trial motion on its face represents a direct conflict between the functions of the judge and the jury. While allowing the judge to take the case away from the jury when the jury's decision is against the weight of the evidence promotes the judge's function of ensuring that verdicts are based upon rational decision making, a new trial grant conflicts with the traditional view of the jury's function of rendering specific factual determinations. Moreover, to the extent that the jury's verdict is evidence of its equity function, the judge's decision to grant a new trial abrogates that function.

The explanation for the view that this device has caused little concern among courts and commentators is consistent with the
functional model. First, in functional terms, the judge determines that jury fact finding was not a rational process and, therefore, should not stand. In addition, the jury’s decision against the weight of the evidence is contrary to the notion of gaining public acceptance for verdicts. Lastly, the jury’s functions are not abrogated; rather, they are deferred to a second trial in which the parties are free to prove their cases. Therefore, granting a new trial represents a validation of the function of the jury trial.

The functional model explains the use of the new trial grant rather than the directed verdict or the JNOV. Under existing models justifying jury control, once the judge determines that insufficient evidence exists under the directed verdict test, the judge has discretion to make use of any of the sufficiency-of-the-evidence devices. None of those models illuminates that choice for the trial judge; however, the functional model clarifies the appropriate situation in which to use one or the other of the devices. If the judge determines that the jury decision serves no function and that the result is clearly dictated, then the directed verdict or JNOV is appropriate since changing the jury would not change the judge’s conclusion. On the other hand, when the judge decides that a particular jury engaged in irrational decision making and that another jury might serve valued functions, the judge should grant a new trial.

**Conclusion**

The historical, political, and legal models that justify the control of the civil jury fail to provide a clear analytical framework to discuss issues concerning the appropriate use and the limitations upon control devices. Framing the justification in functional terms provides the basis for discussing these control issues in a context amenable to further development. As research progresses into the actual, as opposed to the perceived, value of the respective functions of the judge and the jury, balancing those functions will promote theorizing about the extent to which control of the civil jury is appropriate.