ESSAY

WHY SUMMARY JUDGMENT IS UNCONSTITUTIONAL

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SUMMARY judgment is cited as a significant reason for the dramatic decline in the number of jury trials in civil cases in federal court. Judges extensively use the device to clear the federal docket of cases deemed meritless. Recent scholarship even has called for the mandatory use of summary judgment prior to settlement. While other scholars question the use of summary judgment in certain types of cases (for example, civil rights cases), all scholars and judges assume away a critical question: whether summary judgment is constitutional. The conventional wisdom is that the Supreme Court settled the issue a century ago in Fidelity & Deposit Co. v. United States. *But a review of that case reveals that the conventional wisdom is wrong: the constitutionality of summary judgment has never been resolved by the Supreme Court. This Essay is the first to examine the question and takes the seemingly heretical position that summary judgment is unconstitutional. The question is governed by the Seventh Amendment which provides that "[i]n Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." The Supreme Court has held that "common law" in the Seventh Amendment refers to the English common law in 1791. This Essay demonstrates that no procedure similar to summary judgment existed under*

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the English common law and also reveals that summary judgment violates the core principles or "substance" of the English common law. The Essay concludes that, despite the uniform acceptance of the device, summary judgment is unconstitutional. The Essay then responds to likely objections, including that the federal courts cannot function properly without summary judgment. By describing the burden that the procedure of summary judgment imposes upon the courts, the Essay argues that summary judgment may not be necessary to the judicial system but rather, by contrast, imposes significant costs upon the system.

INTRODUCTION

Summary judgment is unconstitutional. I understand that this assertion will face resistance from many. The procedure is well-entrenched in our federal courts through its ubiquity and lengthy history. Nevertheless, I will show that summary judgment fails to preserve a civil litigant's right to a jury trial under the Seventh Amendment.

A large number of civil cases do not move beyond discovery without at least one motion for summary judgment from the defendant. Summary judgment has been described as "probably the single most important pretrial device used today,"[1] and as "the only viable postpleading protector against unnecessary trials."[2] Indeed, the extensive use of summary judgment is cited as a significant reason[3] for

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[1] Edward Brunet et al., Summary Judgment: Federal Law and Practice 2 (3d ed. 2006).

[2] Martin H. Redish, Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix, 57 Stan. L. Rev. 1329, 1339 (2005).

[3] See, e.g., Stephen B. Burbank, Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?, 1 J. Empirical Legal Stud. 591, 592 (2004). In discussing the well-known trilogy of Supreme Court cases regarding summary judgment that were decided twenty years ago, Professor Redish recently stated that these "[c]hanges in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials." Redish, supra note 2, at 1330; cf. Adam N. Steinman, The Irrepressible Myth of *Celotex*: Reconsidering Summary Judgment Burdens Twenty Years after the Trilogy, 63 Wash. & Lee L. Rev. 81, 82, 86–88, 143–44 (2006) (presenting data that demonstrates that federal courts cite the trilogy of cases on summary judgment more often than any other cases). But see Burbank, supra, at 620–21 (arguing that the effect of summary judgment on the decline of trials did not begin with the trilogy but rather began earlier in the 1970s); Joe S. Cecil et al., A Quarter Century of Summary Judgment Practice in

the dramatic decline in the number of jury trials in civil cases in the federal courts.[4]

This use of summary judgment has caused noteworthy debate. A group of scholars has argued that judges overuse summary judgment, especially in civil rights cases.[5] Other scholars, in contrast, have argued that courts should increase their use of summary judgment, instead of encouraging settlement to dispose of these cases.[6] This debate is incomplete, however, because it assumes away the most fundamental question about the use of the proce-

Six Federal District Courts, Oct. 25, 2006, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=914147 (discussing empirical evidence that shows the trilogy has not increased the grant of summary judgment to the extent scholars have previously stated).

[4] "In the fiscal year ending two months before the Federal Rules of Civil Procedure took effect in 1938, 19.9% of cases terminated by trial. In 1952, the trial rate for all civil cases was 12.1%. In 2003, only 1.7% of civil terminations occurred during or after trial." Marc Galanter, The Hundred-Year Decline of Trials and the Thirty Years War, 57 Stan. L. Rev. 1255, 1258–59 (2005) (footnote omitted). These figures include trials before both judges and juries. See id; cf. Judith Resnik, Migrating, Morphing, *and* Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts, 1 J. Empirical Legal Stud. 783 (2004) (discussing competing explanations of the decline in trials). But see Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgment Grants from Eight District Courts, 2007 Wisc. L. Rev. (forthcoming), available at http://ssrn.com/abstract=912284 (arguing that the data used in empirical studies of summary judgment have significant inadequacies and urging more study with better data).

[5] See, e.g., Theresa M. Beiner, The Misuse of Summary Judgment in Hostile Environment Cases, 34 Wake Forest L. Rev. 71, 71 (1999); Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L. L. Rev. 99, 101–02 (1999); Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 206–07 (1993); cf. Rebecca Silver, Comment, Standard of Review in FOIA Appeals and the Misuse of Summary Judgment, 73 U. Chi. L. Rev. 731, 757 (2006) (arguing that summary judgment may be overused in FOIA cases). In *Kampouris v. St. Louis Symphony Society*, in his dissent, Judge Mark W. Bennett posed the issue of "the expanding use of summary judgment, particularly in federal employment discrimination litigation" and its "ominous specter of serious erosion of the 'fundamental and sacred' right of trial by jury." 210 F.3d 845, 850 (8th Cir. 2000) (Bennett, J., dissenting). Judge Bennett, sitting by designation on the Eighth Circuit, disagreed with the decision of the majority that the district court properly granted summary judgment for the defendant in a case in which the plaintiff had alleged a violation of the Americans with Disabilities Act. Id. For a discussion of the increased use of summary judgment to dismiss antitrust cases, see Peter D. Ehrenhaft, Is Interface of Antidumping and Antitrust Laws Possible?, 34 Geo. Wash. Int'l L. Rev. 363, 390 (2002).

[6] See Randy J. Kozel & David Rosenberg, Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment, 90 Va. L. Rev. 1849 (2004); Jonathan T. Molot, An Old Judicial Role for a New Litigation Era, 113 Yale L.J. 27, 43–46 (2003).

dure: whether summary judgment is constitutional at all. In this Essay, I examine the constitutional propriety of the device. I conclude that summary judgment should be eliminated altogether because it is unconstitutional under the Seventh Amendment.[7]

The Seventh Amendment provides that "[i]n Suits at *common law*, . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the *common law*."[8] The Supreme Court has definitively stated that the "common law" in the Seventh Amendment is the English common law in 1791, when the Amendment was adopted,[9] and that a new procedure will be constitutional under the Seventh Amendment if the procedure satisfies the substance of the English common law jury trial in 1791.[10] The Court has never described, however, what constitutes the substance of the common law jury trial. Instead, it has examined various common law procedures individually in attempts to compare those procedures to new procedures.[11]

In failing to examine appropriately the relevant history, the Supreme Court has upheld every new procedure that it has considered by which a court removes cases from the determination of a jury before, during, or after trial.[12] Under the governing English

[7] Some scholars who generally support the use of summary judgment in federal court have assumed that the device is constitutional. See, e.g., Molot, supra note 6, at 44. Others have acknowledged possible problems with some applications of the procedure, without any significant reference to the governing common law. See, e.g., Brunet et al., supra note 1, at 16 (stating that summary judgment rests on "potentially tenuous constitutional foundation"); Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982, 1074–1132 (2003) (discussing possible problems with procedure's constitutionality); cf. Patricia M. Wald, Summary Judgment at Sixty, 76 Tex. L. Rev. 1897, 1945 (1998) ("In sixty years summary judgment has grown from a wobbly infant to an aggressive gatekeeper to access to trial—by jury or otherwise. We need to ensure it does not exceed whatever role we want it to play, and to carefully define that role."). One scholar, Ellen Sward, has discussed modern procedures and their inconsistency with the common law. Ellen E. Sward, The Seventh Amendment and the Alchemy of Fact and Law, 33 Seton Hall L. Rev. 573 (2003).

[8] U.S. Const. amend. VII (emphasis added).

[9] See infra note 25.

[10] Id.

[11] See, e.g., infra Subsection II.B.2.

[12] See Suja A. Thomas, The Seventh Amendment, Modern Procedure, and the English Common Law, 82 Wash. U. L.Q. 687, 695–702 (2004).

common law, however, a jury would have decided these very same cases that are being decided by judges today, including cases dismissed by judges upon summary judgment.[13]

Indeed, the substance of the common law is surprisingly clear.[14] First, under the common law, the jury or the parties determined the facts. One party could admit the allegations or the conclusions of the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without such a determination by the jury or the parties, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. If the court decided that the evidence was insufficient to support the verdict, it would order a new trial. Another jury would determine the facts and decide which party won. In other words, if the court itself believed the evidence was insufficient, it would never determine who should win. Third, a jury would decide every case in which there was any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.

These core principles of the common law reveal that summary judgment is unconstitutional. Under summary judgment, a court decides whether a "genuine issue as to any material fact" exists[15] or, in other words, whether "a reasonable jury could return a verdict for the nonmoving party."[16] Under this standard, in contrast to under the common law, the court decides whether factual inferences from the evidence are reasonable, applies the law to any "reasonable" factual inferences, and as a result makes the determination as to whether a claim could exist. In other words, the court decides whether the case should be dismissed before a jury hears the case. Under the common law, a court would never engage in this determination. Cases that would have been decided by a jury under the common law are now dismissed by a judge under summary judgment.

[13] See infra Section I.B; Thomas, supra note 12, at 704–48.
[14] See infra Section I.B.
[15] Fed. R. Civ. P. 56(c).
[16] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Contrary to a common assumption, the Supreme Court has never decided this issue of the constitutionality of summary judgment. For years, the Court and scholars have cited the now century-old *Fidelity & Deposit Co. v. United States*[17] for the proposition that summary judgment is constitutional under the Seventh Amendment.[18] The procedure held constitutional in *Fidelity*, however, was not the same nor even similar to summary judgment under Rule 56. Under the procedure in *Fidelity*, the court accepted the facts alleged by the nonmoving party as true. Under summary judgment, in contrast, the court does not accept the facts of the nonmoving party as true but instead determines whether the evidence of the nonmoving party is sufficient.

How, then, did the constitutionality of summary judgment become so widely accepted by courts? I will argue that there are legal and institutional reasons for the acceptance and use of summary judgment by the courts. First, the failure of the Supreme Court to state what constitutes the substance of the common law has led the Court to move away from the common law and thus to the drastic change from the role of the jury as decision-maker under the common law to the role of the judge as decision-maker under summary judgment. Second, an idea prevails that the federal courts cannot function effectively without summary judgment. I argue that the necessity of summary judgment to the proper functioning of the federal courts has been overstated; indeed, summary judgment motions themselves are a significant burden on the federal courts.

In Part I of this Essay, I will demonstrate why summary judgment is unconstitutional. I begin with an explanation of the Supreme Court's jurisprudence on the Seventh Amendment, under which the Court has stated that the constitutionality of new procedures should be evaluated by comparison of those procedures to the substance of the English common law jury trial in 1791. I then describe the three core principles that emanate from the common law jury trial procedures. Next, I examine those common law procedures, which include the demurrer to the pleadings, the demurrer to the evidence, the nonsuit, the special case, and the new trial, and show that these procedures contrast with summary judgment. I

[17] 187 U.S. 315 (1902).
[18] See infra note 96.

then demonstrate that summary judgment violates the core principles or substance of the common law jury trial procedures, and I conclude that summary judgment is therefore unconstitutional. Part II will examine and reject the twentieth-century justifications for summary judgment. These justifications range from the argument that a court decides only law under summary judgment to the argument that the issue has already been decided by the Supreme Court to the argument that summary judgment is necessary to the proper functioning of the federal courts. In the Conclusion, I contrast the Court's jurisprudence on the civil jury under the Seventh Amendment with its jurisprudence on the criminal jury under the Sixth Amendment. In deciding that the criminal jury, rather than the judge, must decide facts that influence sentencing, the Court has emphasized the relevance of the power of the common law jury.[19] The Court has done so even though the text of the Sixth Amendment does not specifically mandate adherence to the "common law."[20] I argue that the Court should likewise follow the common law with respect to its jurisprudence on the Seventh Amendment, which indeed mandates adherence to the "common law," and in doing so, the Court should declare summary judgment unconstitutional.

I. SUMMARY JUDGMENT IS UNCONSTITUTIONAL UNDER THE SEVENTH AMENDMENT

Under summary judgment, a court enters judgment for the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[21] The Supreme Court has interpreted this rule to require that summary judgment is appropriate when "a reasonable jury could [not] return a verdict for the nonmoving party."[22] In making this determination,

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[19] See infra note 169.

[20] U.S. Const. amend. VI.

[21] Fed. R. Civ. P. 56(c).

[22] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 623, 627–28 (1944) (discussing summary judgment standard and holding that summary judgment is not appropriate under the evidence even though "[i]t may well be that the weight of the evidence would be found on a

a court considers the entire record in the light most favorable to the nonmoving party and draws only the "reasonable inferences [from the evidence] in favor of the nonmovant."[23] If the court decides that a reasonable jury could not find for the nonmoving party, the court enters judgment for the moving party. If the court decides that this standard is not met—in other words, that a reasonable jury could find for the nonmoving party—then the case proceeds to a trial before a jury.

A. The Seventh Amendment and the Common Law

The constitutionality of summary judgment is governed by the Seventh Amendment, which provides that "[i]n Suits at *common law* . . . the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the *common law*."[24] In its decisions interpreting the Seventh Amendment, the Supreme Court has stated that "common law" in the Seventh Amendment refers to the English common law in 1791, the year when the Amendment was adopted.[25] According to the Court, the Amendment does not

trial to be with defendant"); 10A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2725, at 401–40 (3d ed. 1998).

[23] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 149–50 (2000).

[24] U.S. Const. amend. VII (emphasis added).

[25] See, e.g., Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435–36 & n.20 (1996); Markman v. Westview Instruments, 517 U.S. 370, 376 (1996); Galloway v. United States, 319 U.S. 372, 388–92 (1943); Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Dimick v. Schiedt, 293 U.S. 474, 476–77 (1935); Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497–98 (1931); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377 (1913). Recently, the Court decided that an appellate court could not review the sufficiency of the evidence and order a new trial where the party who had lost had failed to move for a new trial or judgment notwithstanding the verdict after the jury verdict. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 126 S. Ct. 980, 989 (2006). In a footnote, the Court suggested that the arguments of the dissent might be problematic under the Seventh Amendment because of the requirement to follow "the rules of the common law." Id. at 986–87 n.4. In the early nineteenth century, following the adoption of the Amendment, Justice Story, while referring to the English common law as "the grand reservoir of all our jurisprudence[,]" stated that it was "obvious to every person acquainted with the history of the law" why the common law in the Seventh Amendment was the English common law. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750); see also Thompson v. Utah, 170 U.S. 343, 350 (1898) (stating that common law refers to English common law in 1791).

require that the common law is "fixed"[26] or that, in other words, the "form"[27] of the common law is preserved. Instead, the Amendment requires that the "substance"[28] of the English common law in 1791 must be satisfied.[29] Thus, a new procedure is constitutional if it satisfies the substance of the English common law jury trial in 1791.[30] The Court has not, however, defined what constitutes the substance of the English common law jury trial in 1791. Instead the Court has individually compared various common law procedures to modern procedures.[31] Under this approach, the Court has approved every procedure that it has considered that removes cases from juries, before, during, or after trials, even though such procedures did not exist under the English common law.[32]

While the Court has not endeavored to set forth the substance of the common law jury trial, an examination of the common law demonstrates that this substance, or the core principles, of the common law is quite clear. First, as explained in Section I.B, below, under the common law, the jury or the parties determined the facts. One party could admit the allegations or the conclusions of

[26] *Gasperini*, 518 U.S. at 436 n.20.

[27] *Gasoline Prods*., 283 U.S. at 498.

[28] Id.; see also, e.g., Colgrove v. Battin, 413 U.S. 149, 157–60 (1973); *Galloway*, 319 U.S. at 392.

[29] The Supreme Court has applied this test to the interpretation of both the first and second clauses of the Seventh Amendment. "[I]n the interpretation of the first clause of the Amendment, the Court has permitted the trial by jury in a broad set of cases including cases with legal remedies, cases that involve new causes of action and cases which involve both legal and equitable claims." Suja A. Thomas, Judicial Modesty and the Jury, 76 U. Colo. L. Rev. 767, 801 (2005). In these decisions, the Court "generally appears to have exercised some modesty by narrowly construing the judiciary's power in relationship to the jury's power." Id. The Court's interpretation of the first clause of the Amendment contrasts with its immodest interpretation of the second clause. See id. at 801–04.

[30] There has been scholarly criticism of the historical test. See, e.g., James Oldham, Trial by Jury: The Seventh Amendment and Anglo-American Special Juries 6 (2006) [hereinafter Oldham, Special Juries] (citing as an example Martin Redish's criticism of the test). Despite this criticism, the Court continues to state that the historical test should be followed.

[31] See, e.g., infra Subsection II.B.2.

[32] See Thomas, supra note 12, at 695–702. One might argue that summary judgment is unconstitutional simply on the basis that the right to a jury trial has been denied under the first clause of the Amendment. In other words, once a jury trial right exists, the case must be tried before a jury. Under the second clause of the Amendment, a judge can examine facts once tried by a jury and then only according to common law rules.

the evidence of the other party, or the parties could leave the determination of the facts to the jury. A court itself never decided the case without a determination of the facts by the parties or the jury, however improbable the evidence might be. Second, only after the parties presented evidence at trial and only after a jury rendered a verdict, would a court ever determine whether the evidence was sufficient to support a jury verdict. Where the court decided that the evidence was insufficient to support the verdict, the court would order a new trial. Another jury would determine the facts and decide which party won. The court itself would never determine who should win if it believed the evidence was insufficient. Third, a jury would decide a case with any evidence, however improbable the evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including the improbable facts and conclusions.

B. The Conflict Between the Common Law and Summary Judgment

In its decisions regarding the constitutionality of modern procedures under the Seventh Amendment, the Supreme Court has examined procedures under the English common law and made inaccurate comparisons between the English procedures and the modern procedures. Below, I examine the English common law procedures of the demurrer to the pleadings, the demurrer to the evidence, the nonsuit, the special case, and the new trial. I demonstrate that each of the common law procedures is fundamentally different than summary judgment. I then show that summary judgment conflicts with the core principles or the "substance" of the common law procedures.

1. Demurrer to the Pleadings and Summary Judgment

Demurrer to the pleadings is arguably the procedure that is most relevant to the summary judgment constitutionality analysis, because it was the only pretrial common law device by which a case would be dismissed before trial.[33] In other words, "[there was no]

[33] See Oldham, Special Juries, supra note 30, at 10; James Oldham, The Seventh Amendment Right to Jury Trial: Late-Eighteenth-Century Practice Reconsidered, *in* Human Rights and Legal History: Essays in Honour of Brian Simpson 225, 231

procedure (other than the demurrer) that would allow a judge to determine before trial that a case presented no issue to be decided by a jury, or that an issue in a case should be withheld from the jury."[34] Under the English common law, a demurrer to the pleadings allowed the court to enter judgment for one of the parties upon a party's admission of the truth of the plea or declaration of the opposing party.[35] Upon such admission, the demurring party argued that he was entitled to judgment under the law.[36] If he was correct, the court would enter judgment for that party.[37] If the demurring party was incorrect, then the other party received judgment.[38]

Under both summary judgment and the common law demurrer to the pleadings, cases are dismissed prior to the trial. The procedures do not otherwise share any significant characteristics, however. Under summary judgment, the judge considers the evidence of both the moving and nonmoving parties. Under demurrer to the pleadings, the court considered only the facts alleged by the opposing party.

Also, under summary judgment, considering both the evidence of the moving party and the nonmoving party, the judge decides whether a reasonable jury could find for the nonmoving party. Under the common law, by contrast, the court conducted no such reasonableness analysis of all of the evidence. Instead, the demurring party admitted the facts alleged by the opposing party and the court decided only if there was a claim or defense under those facts.

Summary judgment and demurrer to the pleadings also differ as to the respective effect each procedure has on the pending litigation. Under summary judgment, if the judge rules in favor of the nonmoving party, the case proceeds to trial. Under the demurrer to the pleadings, if the court ruled for the opposing party, the case ended and did not proceed to trial. There, because the demurring

(Katherine O'Donovan & Gerry R. Rubin eds., 2000) [hereinafter Oldham, Right to Jury Trial].

[34] Oldham, Right to Jury Trial, supra note 33, at 231.

[35] See William Blackstone, 3 Commentaries on the Laws of England *314–15 (1768).

[36] Id.

[37] Id.

[38] Id. For a more extensive description of this procedure, see Thomas, supra note 12, at 706–07.

party had admitted the facts alleged by the nonmoving party, the opposing party was entitled to judgment under those admitted facts.[39]

In addition to the specific differences between summary judgment and demurrer to the pleadings, summary judgment conflicts with the core principles or the substance of the common law, as reflected in the common law demurrer to the pleadings. The main difference between summary judgment and the demurrer to the pleadings is the role that the court plays in the decision whether to dismiss a case. While under summary judgment, the judge examines the sufficiency of the evidence and may dismiss a case for insufficient evidence, under the common law, no comparable procedure existed whereby the court dismissed a case based on a determination by the court that the evidence was insufficient. Under the common law, the court did not determine whether a reasonable jury could find for the opposing party. Rather, the court became involved prior to trial only upon the admission by the demurring party of the truth of the plea or declaration of the opposing party. The court applied only the law to the alleged facts and did not balance the sufficiency of the parties' evidence. Thus, summary judgment differs from the first core principle of the common law, as illustrated here by the demurrer to the pleadings. Under the common law, the jury or the parties determined the facts. A court itself never decided the case without a determination of the facts by the jury or the parties.[40]

2. Demurrer to the Evidence and Summary Judgment

Summary judgment also contrasts with a common law procedure called the demurrer to the evidence, a motion that was made during a jury trial. Under the common law demurrer to the evidence, the demurring party admitted the truth and conclusions of the evidence that the opposing party presented during the trial and re-

[39] While this discussion may imply that the motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) may be unconstitutional, my analysis of the common law does not suggest this result. Under the core principles or the substance of the common law, a motion to dismiss would be constitutional because the moving party admits the alleged facts before the moving party may obtain judgment from the court.

[40] See supra and infra Section I.B.

quested judgment on that evidence.[41] The court accepted as true any fact or conclusion to be drawn from the opposing party's evidence, whether such fact or conclusion was "probable or not."[42] "Whether probable or not, [was] for a jury to decide."[43] In describing this standard for the demurrer to the evidence in *Gibson v. Hunter*, the House of Lords, the supreme judicial body of England, stated that where a "matter of fact be uncertainly alleged, or that it be doubtful whether it be true or no, because offered to be proved by presumptions or probabilities" the demurring party cannot receive judgment "unless he will confess the matter of fact to be true."[44] The court determined whether a claim or defense existed under the law based on those admitted facts.[45] If no claim or defense existed, the demurring party received judgment.[46] If, on the other hand, a claim or defense existed, the court entered judgment for the opposing party, because the demurring party had admitted the truth and conclusions of the opposing party's evidence.[47]

Under the demurrer to the evidence, a court removed issues of fact from the jury's consideration, not because the court determined that there were none, but because the demurring party admitted the facts and conclusions of the opposing party's evidence. The court then applied the law to those facts to determine whether a claim or defense existed. The procedure was rarely used in practice because a party would agree to the facts and conclusions of the opposing party's evidence only in an unusual case;[48] a party would

[41] See Francis Buller, An Introduction to the Law Relative to Trials at *Nisi Prius* 307 (London, W. Strahan & M. Woodfall 1772).

[42] Cocksedge v. Fanshaw, (1779) 99 Eng. Rep. 80, 88; see also Gibson v. Hunter, (1793) 126 Eng. Rep. 499, 510 (stating that the defendant must admit "every fact, and every conclusion, which the evidence given for the Plaintiff conduced to prove").

[43] *Cocksedge*, 99 Eng. Rep. at 88.

[44] *Gibson*, 126 Eng. Rep. at 510.

[45] See *Cocksedge*, 99 Eng. Rep. at 88.

[46] See Buller, supra note 41, at 307.

[47] See id.

[48] See *Gibson*, 126 Eng. Rep. at 508, 510. Lord Chief Justice Eyre, writing for the Lords, concluded that "after this explanation of the doctrine of demurrers to evidence, I have very confident expectations that a demurrer like the present will never hereafter find its way into this House." Id. ("[The] proceeding, which is called a demurrer to evidence, and which though not familiar in practice, is a proceeding well known to the law.").

demur to the evidence only when it was concerned that a jury would not appropriately apply the law to the facts of the case.[49]

In his dissenting opinion in *Parklane Hosiery Co. v. Shore*,[50] Justice Rehnquist, citing *Gibson v. Hunter*, discussed above, stated that summary judgment did not violate the Seventh Amendment. "[I]n 1791 a demurrer to the evidence, a procedural device substantially similar to summary judgment, was a common practice."[51] Justice Rehnquist further stated that "summary judgment . . . [is a] direct descendant[] of [its] common-law antecedent[]. [It] accomplish[ed] nothing more than could have been done at common law, albeit by a more cumbersome procedure."[52]

Contrary to these statements by Justice Rehnquist, however, the demurrer to the evidence and summary judgment are fundamentally different. In its decision whether to grant judgment to a party moving for summary judgment, the court considers the evidence of both the moving and the nonmoving parties, while under the demurrer to the evidence, the court considered only the facts and conclusions of the evidence of the opposing party. Under summary judgment, the court decides whether a reasonable jury could find for the nonmoving party. In doing so, considering the evidence of both parties, the court makes only reasonable inferences from the evidence. Under the common law, such an action by the court was forbidden. The court was required to accept as true the facts and conclusions of the evidence of the opposing party, whether those facts and conclusions were probable or not. Summary judgment and demurrer to the evidence also differ as to the respective effect that each procedure has on the pending litigation. Under summary judgment, if the judge rules in favor of the nonmoving party, the case proceeds to trial. Under the demurrer to the evidence, if the

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[49] See James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 236–38 (Boston, Little, Brown, & Co. 1898); 2 William Tidd, The Practice of the Court of King's Bench, in Personal Actions 577 (London, A. Strahan & W. Woodfall 1794). For a more extensive description of this procedure, including case descriptions, see Thomas, supra note 12, at 709–15.

[50] 439 U.S. 322 (1979).

[51] Id. at 349 (Rehnquist, J., dissenting). Justice Rehnquist also compared the modern directed verdict to the directed verdict under the common law. See id. But see Thomas, supra note 12, at 731–32 (disputing Justice Rehnquist's characterization of the similarity of the devices).

[52] *Parklane Hosiery*, 439 U.S. at 350 (Rehnquist, J., dissenting).

court ruled for the opposing party, the case ended and did not proceed to trial. There, the demurring party was not entitled to judgment under the admitted facts and conclusions and, instead, the opposing party was entitled to judgment under those same facts and conclusions.[53] Additionally, courts employed summary judgment and demurrer to the evidence at different times. Summary judgment occurs before trial while the demurrer to the evidence occurred during the trial.

In addition to the specific differences between summary judgment and demurrer to the evidence, summary judgment conflicts with the core principles or the substance of the common law as embodied in the demurrer to the evidence. Similar to the difference between summary judgment and the demurrer to the pleadings, summary judgment and the demurrer to the evidence differ significantly in the role that the court plays in the decision whether to dismiss a case. While under summary judgment, the court examines the sufficiency of the evidence and may dismiss a case for insufficient evidence, under the common law, no comparable procedure existed whereby the court dismissed a case based on a determination by the court that the evidence was insufficient. Under the common law, the court did not determine whether a reasonable jury could find for the opposing party. Rather, the court became involved only upon the admission by the demurring party of the truth of the facts and conclusions of the opposing party, whether those facts and conclusions were probable or not. The court applied the law to the admitted facts and conclusions and did not assess the sufficiency of the parties' evidence. Only the common law jury could resolve the probability of the evidence and the resulting facts. Thus, summary judgment differs from the core principles or substance of the common law reflected in the demurrer to the evidence. Under the common law, the jury or the parties determined the facts.[54] Additionally, under the common law, a jury would decide a case that had any evidence, however improbable, unless the moving party had admitted the facts and conclusions of

[53] Compare Fed. R. Civ. P. 56 with supra text accompanying note 41.
[54] See supra and infra Section I.B.

the nonmoving party, including the improbable facts and conclusions.[55]

Justice Rehnquist stated that the procedures of summary judgment and demurrer to the evidence were substantially similar. In fact, they are not. Citing the House of Lords' decision in *Gibson v. Hunter*, the Justice also stated that the demurrer to the evidence was common.[56] One need look no further than *Gibson* itself to test these statements. There, the House of Lords stated that the procedure was "not familiar in practice" and surmised that following its clarification of the standard for the demurrer, under which the demurring party must admit all facts and conclusions to win, the parties would rarely use the procedure.[57]

3. Nonsuit and Summary Judgment

The nonsuit was another procedure under the English common law in 1791.[58] The English courts used the nonsuit in two different ways. The first, and more common, occurred when the plaintiff did not appear after his name was called in court[59] either because he believed that his evidence was insufficient or because he believed that he had no claim under the law.[60] The plaintiff would be nonsuited and could commence the same suit against the same defendant at a later date.[61] If, however, the plaintiff appeared or, in other words, did not withdraw from the case, the jury would decide the case, and the plaintiff could not try his case again.[62] Under the nonsuit, the plaintiff could not be compelled to withdraw.[63] Thus, "if he insist[ed] upon the matter being left to the jury, they must give in their verdict."[64]

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[55] See supra and infra Section I.B.
[56] *Parklane Hosiery*, 439 U.S. at 349 (Rehnquist, J., dissenting).
[57] Gibson v. Hunter, (1793) 126 Eng. Rep. 499, 508, 510.
[58] See 2 Tidd, supra note 49, at 586–87.
[59] See id.
[60] See id. at 586.
[61] See 3 Blackstone, supra note 35, at *376–77.
[62] Id. at *377.
[63] See 2 Tidd, supra note 49, at 588.
[64] Id. For a more extensive description of the procedure, see Thomas, supra note 12, at 722–23. James Oldham wrote that Judge Mansfield might nonsuit a plaintiff even without his "acquiescence," although the judge sometimes noted that he invited the plaintiff to move for a new trial. Oldham, Special Juries, supra note 30, at 11–12.

Summary judgment differs from the common law nonsuit. Under summary judgment, the court decides whether to dismiss a case because of the insufficiency of the evidence. In contrast, under the nonsuit, the decision to withdraw belonged only to the plaintiff, not to the court. Additionally, under summary judgment, the party against whom summary judgment is ordered cannot bring the case again. Under the nonsuit, the plaintiff could try his case again.

In addition to the specific differences between summary judgment and the nonsuit, summary judgment conflicts with the core principles or the substance of the common law reflected in the nonsuit. Under the common law, the jury or the parties determined the facts.[65] A court itself never decided the case without such a determination of the facts by the jury or the parties.

The second type of nonsuit, referred to as the "compulsory nonsuit," was rare.[66] This occurred without the plaintiff's consent and upon the defendant's motion following a jury verdict for the plaintiff.[67] Under the compulsory nonsuit, the court would enter judgment for the defendant only if the jury's verdict was unsupported as to a particular matter of law.[68] For example, the plaintiff may not have presented certain specific, required evidence.[69] In one case, the plaintiff had not produced the person who had signed the bond that was at issue in the case. While this was a "technical rule," this was required.[70] A compulsory nonsuit could not be ordered, however, upon general assertions regarding the insufficiency of the plaintiff's evidence.[71] As Justice Buller stated in *Company of Carpenters v. Hayward*, "[w]hether there be *any* evidence, is a question for the Judge. Whether [there be] *sufficient* evidence, is for the jury."[72]

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[65] See supra and infra Section I.B.

[66] See Oldham, Right to Jury Trial, supra note 33, at 231 n.35.

[67] See Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 301 (1966).

[68] See Co. of Carpenters v. Hayward, (1780) 99 Eng. Rep. 241; Pleasant v. Benson, (1811) 104 Eng. Rep. 590, 591.

[69] See, e.g., Abbot v. Plumbe, (1779) 99 Eng. Rep. 141.

[70] Id.

[71] See, e.g., *Co. of Carpenters*, 99 Eng. Rep. 241.

[72] Id. at 242 (emphasis added). For a more extensive description of this procedure, see Thomas, supra note 12, at 722–25.

Summary judgment is substantially different from the compulsory nonsuit. While both procedures involve judicial determinations without the plaintiff's consent, under summary judgment, the court determines the general sufficiency of the evidence. This differs from the compulsory nonsuit, under which the court played no such role. Also, summary judgment occurs before a jury trial, while the compulsory nonsuit occurred after a jury trial.

In addition to the specific difference between summary judgment and the compulsory nonsuit, summary judgment conflicts with the core principles or the substance of the common law as reflected in the compulsory nonsuit. Under the common law, the jury or the parties determined the facts. A court itself never decided the case without such a determination of the facts by the jury or the parties.[73]

4. Special Case and Summary Judgment

Under the special case, also referred to as the "case stated,"[74] a jury's general verdict for the plaintiff was subject to a legal determination by the court upon the case stated.[75] After the facts of the case were firmly established and stated by the court, either upon the parties' agreement or the jury's determination, the legal issues would then be decided.[76] The parties would argue the determina-

[73] See supra and infra Section I.B.

[74] See Oldham, Special Juries, supra note 30, at 13 (discussing the case stated and also arguing that Edith Henderson inaccurately described the role of the jury under the case stated); see also James Oldham, 1 The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 251–52, 258–59 (1992) [hereinafter Oldham, Mansfield Manuscripts] (discussing Luke v. Lyde, 452 nb 224 (1759) and Moses v. Macferlan, 455 nb 139 (1760)). But see Henderson, supra note 67, at 305–06 (arguing that the jury "scarcely participated at all" under the case stated).

[75] See 3 Blackstone, supra note 35, at *378.

[76] See id.; 2 Tidd, supra note 49, at 598 ("In a special case, as in a special verdict, the facts proved at the trial ought to be stated, and not merely the evidence of the facts. It is usually dictated by the court, and signed by the counsel, before the jury are discharged; and if in settling it, any difference arises about a fact, the opinion of the jury is taken, and the fact stated accordingly."). Oldham discusses the procedure of the Court of King's Bench, one of the common law courts. James Oldham, English Common Law in the Age of Mansfield 12–76 (2004). The full court would decide matters that under modern procedure might be decided by a single judge including motions for new trial and arrest of judgment and cases stated. See Oldham, supra, at 43; see also Thomas, supra note 12, at 753 n.399 (stating that the full court would decide de-

tive legal issue, strictly constrained to the case stated at the trial.[77] The court decided only a legal issue, which, under the common law special case, did not involve a question of the sufficiency of the evidence.[78]

Summary judgment contrasts with the common law special case. Under summary judgment, the court determines whether a reasonable jury could find for the nonmoving party. By assessing the sufficiency of the evidence, the court examines the facts and the law, independent of the jury's participation. In contrast, under the special case, the parties would have agreed to the facts of the case, or if the parties had disagreed, the jury would have determined the facts. The facts were conclusively established—or "stated"—prior to the judge's resolution of the legal issues. Under the special case, the court used these facts to decide the legal issues in the case. Also, summary judgment occurs before a jury trial, while the special case occurred after a jury trial.

In addition to the specific differences between summary judgment and the special case, summary judgment conflicts with the core principles or substance of the common law as reflected in the special case. Under the common law, the jury or the parties determined the facts. The court itself never decided the case without such a determination of the facts by the jury or the parties.[79]

5. New Trial and Summary Judgment

Under the common law, a party could move for a new trial after a jury trial had been held and the jury had rendered a verdict against that party.[80] A party could argue that the evidence did not support the jury verdict.[81] The court granted the motion if the verdict was strongly against the weight of the evidence.[82]

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murrer to pleadings, demurrer to evidence, special verdict, special case, and arrest of judgment).

[77] See 3 Blackstone, supra note 35, at *378; 2 Tidd, supra note 49, at 598–99.

[78] See 2 Tidd, supra note 49, at 598–99. For a more extensive description of this procedure, see Thomas, supra note 12, at 735.

[79] See supra and infra Section I.B.

[80] See 3 Blackstone, supra note 35, at *387.

[81] See id.

[82] See id. For a more extensive description of this procedure, see Thomas, supra note 12, at 742–46. For descriptions of other common law procedures, including the direction of a verdict, special verdict, and arrest of judgment, see id. at 728–30, 732–

Under summary judgment, like the common law motion for a new trial, the court may review the evidence to determine whether sufficient evidence supports the nonmoving party's case. However, unlike summary judgment, under which the court orders judgment for the moving party in cases in which it determines that there is insufficient evidence, under the common law, the court ordered a new trial by a jury. Under summary judgment, there is no jury trial at all. The court decides the sufficiency of the evidence without viewing the evidence at trial.

In addition to the specific differences between summary judgment and the common law new trial motion, summary judgment conflicts with the core principles or substance of the common law as reflected in the new trial motion. Under the common law, the jury or the parties determined the facts. The court itself never decided the case without such a determination of the facts by the jury or the parties. Moreover, a court would determine the sufficiency of the evidence only after a jury trial. If the court believed that the evidence was insufficient, it would order a new trial. The court would never order judgment. Additionally, under the common law, a jury would decide a case that had any evidence, however improbable that evidence was, unless the moving party had admitted the facts and conclusions of the opposing party, including improbable facts and conclusions.[83]

C. Summary Judgment Is Unconstitutional

The Supreme Court has stated that new procedures that affect the jury trial right, like summary judgment, must satisfy the substance of the jury trial under the English common law in 1791.[84] In

33, 737–40. All of these procedures share the characteristics of what I have referred to as the core principles or substance of the common law. Under these procedures, the jury or the parties determined the facts. The court itself never decided the case without such a determination of the facts by the jury or the parties. Moreover, a court would determine the sufficiency of the evidence only after a jury trial, and if the court believed that the evidence was insufficient, it would order a new trial. The court would never order judgment for the verdict loser. Additionally, a jury would decide a case that had any evidence, however improbable that evidence was unless the moving party had admitted the facts and conclusions of the nonmoving party, however improbable the facts and conclusions. See supra and infra Section I.B.

[83] See supra and infra Section I.B.

[84] See supra text accompanying notes 25–30.

its jurisprudence, however, the Court has failed to articulate what constitutes the substance of the common law. Instead, the Court has individually compared the new procedures to common law procedures[85] and, under this approach, has held constitutional every new procedure that it has considered that removes cases from juries before, during, and after trial.[86]

In the previous Section, I described the common law procedures that the Supreme Court has attempted to favorably compare to new procedures, including summary judgment. I demonstrated that summary judgment does not resemble those procedures. First, summary judgment, under which the court considers only reasonable inferences from the evidence, contrasts with the common law demurrer to the pleadings and the common law demurrer to the evidence, under which the court must consider as true the allegations or facts and conclusions of the opposing party, however improbable those facts or conclusions may be. Second, summary judgment, under which the court dismisses the case with prejudice after deciding that the evidence of the nonmoving party is insufficient, contrasts with the common law nonsuit, under which the plaintiff voluntarily withdraws from a case without prejudice when he believes his evidence may be insufficient. Third, summary judgment, under which the court dismisses a case upon a determination of the general insufficiency of the evidence, contrasts with the common law compulsory nonsuit and the common law special case, under which the court would never dismiss a case based on the general insufficiency of the evidence. Finally, summary judgment, under which the court dismisses a case based on the insufficiency of evidence, contrasts with the common law new trial, under which the court did not dismiss the case but rather ordered a new trial if the evidence was insufficient.

In the previous Section, I also demonstrated that core principles emanate from the common law procedures and that summary judgment violates these principles, or the substance, of the common law. Summary judgment violates the first core principle that the jury or the parties determined the facts. The court itself would never decide a case without such a determination of the facts by

[85] See, e.g., infra Subsection II.B.2.
[86] See supra note 32.

the jury or the parties. Under summary judgment, contrary to this principle, the court decides the case without a jury or the parties deciding the facts. The court assesses the evidence, decides what inferences from the evidence are reasonable, and decides whether a reasonable jury could find for the nonmoving party.

Summary judgment also breaches the second core principle of the common law that a court would determine whether the evidence was sufficient to support the jury verdict only after the parties presented evidence at trial, and only after a jury rendered a verdict. Even then, the court would order only a new trial, not judgment, if the evidence was insufficient. In contrast, under summary judgment, a court orders judgment for the moving party prior to trial if the court determines that the nonmoving party's evidence is insufficient.

Finally, summary judgment violates the third core principle of the common law that a jury, not a court, decided a case that had any evidence, however improbable, unless the moving party admitted all facts and conclusions of the nonmoving party, including the improbable facts and conclusions. In contrast, under summary judgment the moving party does not admit the truth of the nonmoving party's evidence. Instead, the court determines the reasonableness of the evidence and removes cases from the jury based on this assessment.

Using the test for constitutionality that the Supreme Court has articulated since the adoption of the Seventh Amendment in 1791, I have described how summary judgment violates the core principles or the substance of the common law and is therefore unconstitutional. The next Part examines and rejects the justifications for the continuation of summary judgment.

II. TWENTIETH-CENTURY ARGUMENTS TO JUSTIFY SUMMARY JUDGMENT

Although summary judgment did not exist under the common law, and the procedure does not satisfy the substance of the common law jury trial, a number of arguments can be anticipated in response to my assertion that summary judgment is unconstitutional. Those arguments, which are set forth below, are based on misconceptions about the constitutionality analysis and a failure to analyze the alleged necessity of summary judgment.

A. Argument #1: Summary Judgment Is Constitutional Because Under the Procedure the Court Decides Only Legal Questions, Not Factual Questions

Some may argue that summary judgment is constitutional, maintaining that under the motion, a court decides only legal questions and does not determine factual questions. In such cases in which "no genuine issue as to any material fact" exists,[87] the court only applies the law to the facts. Accordingly, there is no Seventh Amendment violation.[88]

Scholars emphasize and overstate the importance of this law-fact distinction.[89] The focus, instead, should be on the common law. The common law governs whether an issue is for a judge or a jury and whether an issue is one of fact or one of law. As described in Sections I.B and I.C, under the common law, in contrast to under summary judgment, the court could consider the sufficiency of the evidence only after a jury trial and a jury verdict. In cases in which the court found the evidence insufficient, another jury, not the judge, would decide the case upon a second trial. One might choose to characterize the court's determination as a legal question or a factual question. But, regardless of this characterization, under the common law, if the court determined that there was insufficient evidence, another jury decided the case, not the court.

Indeed, if there was a modern procedure by which the parties agreed on the facts of the case and the court decided the case based on those facts, then the procedure would be constitutional under the common law.[90] Summary judgment is not such a procedure. Upon a motion for summary judgment, the moving party argues that a reasonable jury could not find for the nonmoving party, and

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[87] Fed. R. Civ. P. 56(c).

[88] See, e.g., Miller, supra note 7, at 1075 ("[I]f no 'genuine issue of material fact' exists and the movant is entitled to judgment 'as a matter of law,' pretrial disposition does not raise questions of constitutional dimensions."). But see id. at 1074–1132 (acknowledging that under certain circumstances, summary judgment may be problematic constitutionally).

[89] See, e.g., id. at 1074–1132. Professor Paul Kirgis conducts an interesting analysis of certain changes in the Supreme Court's jurisprudence on this distinction. See Paul F. Kirgis, The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment, 64 Ohio St. L.J. 1125 (2003).

[90] See supra Section I.B; cf. Thomas, supra note 12, at 732–33 (describing the common law "special verdict," under which the jury decided the facts).

the nonmoving party argues, to the contrary, that a reasonable jury could find for him. In other words, the parties disagree on what their evidence demonstrates. The court must resolve this difference and decide what the evidence could show.[91] In *Anderson v. Liberty Lobby, Inc.*, one of the trilogy of cases decided by the Supreme Court regarding summary judgment, the Court described the non-moving party's burden as follows: "'*sufficient evidence* supporting the claimed factual dispute [must] be shown to require a jury . . . to resolve the parties' differing versions of the truth at trial.'"[92] In a typical case in which summary judgment is granted, the moving and nonmoving parties each present depositions, affidavits, and documents to demonstrate their versions of the facts, and the court decides that the nonmoving party has failed to show that his evidence is sufficient for a reasonable jury to find for him. Again, under the common law, a court could not make such a sufficiency determination before a trial had occurred and could never dismiss a case for insufficient evidence. After a jury trial, a court could decide that the evidence was insufficient. At that point, however, the court did not dismiss the case, but rather another jury heard the case.[93]

[91] See supra text accompanying notes 21–23.

[92] 477 U.S. 242, 249 (1986) (emphasis added) (quoting First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 289 (1968)); see also Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) ("The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make *a sufficient showing* on an essential element of her case with respect to which she has the burden of proof." (emphasis added)). In *Anderson*, the Court also stated:

> Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. 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 could properly proceed to find a verdict* for the party producing it, upon whom the *onus* of proof is imposed.

477 U.S. at 251 (second emphasis added) (quoting Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871)).

[93] Scholars have discussed whether certain specific questions of reasonableness were legal issues for judges under the common law. See, e.g., Oldham, Special Juries, supra note 30, at 37–39. In a previous article, I discussed that any such decisions by the common law court appear to be based upon undisputed or established facts. Thomas, supra note 12, at 715–16 n.164. A prominent example is the question of what notice is

The law-fact distinction will be a popular response to my argument that summary judgment is unconstitutional.[94] As shown here, however, this distinction has no meaning outside the context of the common law, and the common law demonstrates that courts could not exercise the power that they now employ under summary judgment.

B. Argument #2: The Constitutionality of Summary Judgment Has Already Been Decided

It will be shocking to courts and civil procedure scholars that the issue of the constitutionality of summary judgment is undecided. They will cite *Fidelity & Deposit Co. v. United States*[95] for the constitutionality of the procedure,[96] and for further support, they will

reasonable. Id. There are other possible arguments that have been made in support of the court deciding certain factual issues. James Oldham has argued that there may be a complexity exception to the right to a jury trial. Oldham, Special Juries, supra note 30, at 17–24. He has stated that there were some claims that sought equitable relief for which a jury trial would not be required for factual issues. For example, he observed: "Many eighteenth-century business disputes called for a financial accounting, and this equitable remedy would be sought in Chancery. If factual questions arose, the Court of Chancery was under no compulsion to send the factual questions to a jury." Id. at 22. Moreover, "most business cases tried in common-law courts in England in 1791 were tried by special juries, not common juries, and typically the special jurors were merchants who were encouraged to use their own familiarity with relevant mercantile customs and practices in deciding upon their verdicts." Id. Additionally, many such cases were decided by arbitration with the consent of the parties. See id. at 23. Each of these situations can be distinguished. One situation concerns equity. One situation involves a jury, albeit a special jury. Also, the last situation—arbitration—occurred with the consent of the parties. Oldham also discusses the role of the jury in cases in which the plaintiffs received judgment but the jury had not determined the damages. Id. at 49–56. He explained that this usually occurred where there had been a default judgment. Id. at 49. While the court could conduct a writ of inquiry to determine damages, this was done with the consent of the plaintiff. Id. at 56.

[94] A recent decision by the Fifth Circuit is interesting on this law-fact issue. There, after a jury granted maintenance and cure to the plaintiff seaman, a panel of the Fifth Circuit reversed the district court's denial of the defendant's motion for judgment as a matter of law. Then, the court denied rehearing en banc of the panel's decision. In the dissent to the court's denial of rehearing en banc, Judges Stewart, King, Higginbotham, Wiener, Benavides, and Dennis emphasized that "[t]he panel majority, under the guise of correcting errors of law, usurped the jury's Seventh Amendment function, replacing the jury's verdict with a verdict of its own." Brown v. Parker Drilling Offshore Corp., 444 F.3d 457, 458 (5th Cir. 2006) (Stewart, J., dissenting).

[95] 187 U.S. 315 (1902).

[96] See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 (1979) (citing *Fidelity & Deposit Co.*, 187 U.S. at 319–21, for the proposition that "summary judgment does

cite the cases that decided the constitutionality of judgment notwithstanding the verdict and the directed verdict.[97] None of those cases, however, supports the constitutionality of summary judgment.

1. Fidelity & Deposit Co. v. United States

The Supreme Court and scholars were wrong to have cited *Fidelity* as the case that established the constitutionality of summary judgment, because the procedure in *Fidelity* did not resemble summary judgment. In *Parklane Hosiery Co. v. Shore*, the Court prominently cited *Fidelity* for the constitutionality of summary judgment when it examined the constitutionality of non-mutual offensive collateral estoppel under the Seventh Amendment.[98] Similar to its analysis in other cases, in *Parklane*, the Court assessed the constitutionality of this new collateral estoppel procedure by comparing it to procedures under the English common law in 1791, when the Amendment was adopted.[99] In support of the addition of this procedure, in *Parklane*, the Court stated that other new procedures, including summary judgment, had been held constitutional under the Seventh Amendment, and the Court specifically cited *Fidelity* as holding that summary judgment was constitutional under the Seventh Amendment.[100]

The rule in *Fidelity* was not the same or similar to summary judgment, however. In *Fidelity*, the plaintiff sued the defendant under a contract claim.[101] Under a rule promulgated by the Supreme Court

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not violate the Seventh Amendment"); Brunet et al., supra note 1, at 20 (noting that "the Supreme Court unequivocally upheld the constitutional validity of summary judgment"); Samuel Issacharoff & George Loewenstein, Second Thoughts About Summary Judgment, 100 Yale L.J. 73, 76 & n.18 (1990); Miller, supra note 7, at 1019 & n.202 (remarking that the constitutionality of summary judgment has been "well accepted" since *Fidelity*); Margaret L. Moses, What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence, 68 Geo. Wash. L. Rev. 183, 227 & n.314 (2000); Colleen P. Murphy, Judicial Assessment of Legal Remedies, 94 Nw. U. L. Rev. 153, 172 & n.115 (1999); Sward, supra note 7, at 624–25; Patrick Woolley, Mass Tort Litigation and the Seventh Amendment Reexamination Clause, 83 Iowa L. Rev. 499, 504 & n.26 (1998).

[97] See infra Subsection II.B.2.

[98] *Parklane*, 439 U.S. at 336.

[99] Id. at 335–36.

[100] Id. at 336.

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

of the District of Columbia, the court could enter judgment for the plaintiff if two conditions were met: the plaintiff filed an affidavit that stated the cause of action and the amount owed, and the defendant failed to file an affidavit that denied the claim and stated a defense to it.[102] Pursuant to this rule, the plaintiff in the case filed an affidavit in which he alleged the existence of the contract and the amount owed by the defendant.[103] In response, the defendant filed an affidavit in which it asserted that it lacked sufficient knowledge as to the alleged contracts and debt.[104] Because the defendant failed to raise a defense in its affidavit, the trial court granted judgment to the plaintiff, and the court of appeals affirmed the judgment.[105]

In its review of the court of appeals' decision, the United States Supreme Court characterized the defendant's argument that the rule deprived the defendant of its right to a jury trial as "a constitutional right to old forms of procedure."[106] The Court responded to the defendant's argument by stating that Congress had the power to change the rules, and that the new rule, promulgated under the power granted by Congress, did not violate the right of the defendant to a jury trial.[107] The Court emphasized that under the rule, "the facts stated in the affidavit of defence [were to] be accepted as true" and that the purpose of the rule was to prevent delays where no defense existed.[108] The Court emphasized that here, the defendant had failed to raise any defense to the claim of the plaintiff.[109]

In *Parklane*, the Supreme Court cited *Fidelity* as establishing the constitutionality of summary judgment, and scholars have followed suit in citing *Fidelity* for this proposition.[110] However, the rule in *Fidelity* is dissimilar to summary judgment. Under summary judgment, the court examines the evidence and determines whether there is a genuine issue of material fact or, in other words, whether a reasonable jury could find for the nonmoving party. In deciding

[102] Id. at 318–19.
[103] Id. at 316–17.
[104] Id. at 317.
[105] Id. at 318.
[106] Id. at 321.
[107] Id. at 320–21.
[108] Id. at 320.
[109] Id. at 317–18, 322.
[110] See supra note 96.

this question, a court examines the evidence submitted by both parties, including any deposition transcripts and documents, to determine whether there is sufficient evidence for a jury to find for the nonmoving party. Thus, under summary judgment, while a court is to review the evidence in the light most favorable to the nonmoving party, the facts alleged by the nonmoving party *are not* accepted as true. In contrast to summary judgment, under the rule at issue in *Fidelity*, the court *did not* review the evidence that supported each party's case but rather accepted as true the facts alleged by the nonmoving party.[111] Indeed, the rule in *Fidelity* most closely resembled very different modern procedures—the motion to dismiss or judgment on the pleadings, by which a party moves for dismissal under the facts alleged by the nonmoving party.[112]

The actual analysis of the Seventh Amendment in *Fidelity* was quite sparse, constituting only a few paragraphs. The Court did not quote or cite the Seventh Amendment, nor did the Court compare the rule at issue to procedures under the common law. Nevertheless, the Supreme Court and scholars continue to—incorrectly—cite *Fidelity* for the critical proposition that summary judgment is constitutional.[113]

2. The Constitutionality of Judgment Notwithstanding the Verdict and the Directed Verdict

Although the rule in *Fidelity* did not resemble summary judgment, the Court has examined the constitutionality of other modern procedures that have some similarity to summary judgment. Upon a motion for judgment notwithstanding the verdict and a

[111] *Fidelity*, 187 U.S. at 320.

[112] Fed. R. Civ. P. 12; see also supra note 39 (arguing that the motion to dismiss is constitutional under the Seventh Amendment).

[113] An additional interesting point regarding the rule in *Fidelity* is that under the rule, only the plaintiff could win judgment. This contrasts with the procedure of summary judgment under which either the plaintiff or the defendant may move for judgment. Indeed, it is primarily the defendants who do so, and courts rarely order judgment in favor of plaintiffs. Professors Issacharoff and Loewenstein describe summary judgment as "a defendant's motion." Issacharoff & Loewenstein, supra note 96, at 92. They studied published federal district opinions that refer to *Celotex v. Catrett*, one of the trilogy of summary judgment cases decided by the Supreme Court in 1986. In the cases decided in the first quarter of 1988, they found that defendants made eighty-seven percent of the motions, and plaintiffs made only thirteen percent of the motions. Id. at 91–92.

motion for a directed verdict, like a motion for summary judgment, a court decides whether a reasonable jury could find for the non-moving party.[114] As a result of this similarity in the standards for granting these motions, the constitutionality analyses in the cases regarding judgment notwithstanding the verdict and the directed verdict might be argued to support the constitutionality of summary judgment. As described below, however, in those decisions, the Court failed to accurately describe the common law procedures to which it compared judgment notwithstanding the verdict and the directed verdict. Additionally, the Court has changed course on these issues, first deciding that judgment notwithstanding the verdict was unconstitutional and later deciding that the procedure was constitutional. Moreover, the procedures of judgment notwithstanding the verdict and the directed verdict differ significantly from summary judgment. Thus, as set forth below, the constitutionality analyses in the cases regarding judgment notwithstanding the verdict and the directed verdict fail to support the constitutionality of summary judgment.

a. The Constitutionality of Judgment Notwithstanding the Verdict

In *Baltimore & Carolina Line, Inc. v. Redman*, the Supreme Court effectively considered the issue of the constitutionality of judgment notwithstanding the verdict.[115] Under this procedure, after a jury finds for a party, the court decides whether a reasonable jury could have found for that party.[116] If the court determines that a reasonable jury would not have found for the verdict winner, the court enters judgment for the party who lost the jury verdict.[117]

In *Redman*, the Court emphasized the substance of the Seventh Amendment, which it stated required a judge to decide the legal issues and a jury to decide the factual issues.[118] After a review of the

[114] See Fed. R. Civ. P. 50; see also infra note 128. While Rule 50 refers to judgment as a matter of law, judgment notwithstanding the verdict was the terminology previously used in Rule 50 and as a result is the term used in many Supreme Court decisions.

[115] 295 U.S. 654, 659–60 (1935); Brunet et al., supra note 1, at 17 n.9 (noting that the Court found it constitutional for the lower court to have reserved the sufficiency question and to have decided this sufficiency question after the jury verdict).

[116] Fed. R. Civ. P. 50(a)(1) & 50(b).

[117] Id.

[118] 295 U.S. at 657.

common law procedures, the Court determined that the sufficiency of the evidence, which the procedure at issue involved, was such a question of law for the judge.[119] In support of its rationale, the Court compared this modern procedure to the common law special case.[120] The Court observed that under the common law, certain questions of law were reserved during the jury trial for the court's determination after the jury verdict.[121] The Court further noted that in some cases under the common law, courts had entered judgment for the party who lost the jury verdict.[122] Analogizing the determination of the sufficiency of the evidence under the modern procedure to questions of law that were reserved for judges under the common law, the Court held that the procedure was constitutional under the Seventh Amendment.[123] As a result, if a court found the evidence was insufficient at a trial, the court could order judgment against the verdict winner instead of ordering a new trial.[124]

In *Redman*, the Court inaccurately described the common law procedures. Under the common law, if a court determined that the verdict was not supported by the evidence, the court could not enter judgment for the party who lost a verdict. Instead, a jury would try the case and decide which party prevailed.[125] The procedure in *Redman*, which was effectively judgment notwithstanding the verdict, violated the common law by permitting a judge to decide both the sufficiency of the evidence and the outcome of the case. As shown below, *Redman* was a drastic change to the jurisprudence of the Court on the role of the jury. Just twenty years earlier in *Slocum v. New York Life Insurance Co.*, the Court held that juries should decide these same cases.[126]

b. The Constitutionality of the Directed Verdict

After the *Redman* decision, in *Galloway v. United States*, the Supreme Court considered the constitutionality of the directed ver-

[119] Id. at 659.
[120] Id. at 659–60.
[121] Id. at 659.
[122] Id. at 659–60 n.5.
[123] Id at 660–61.
[124] See id. at 661.
[125] See supra Subsection I.B.5.
[126] 228 U.S. 364, 399 (1913); see infra text accompanying notes 151–62.

dict.[127] Using the same standard as summary judgment and judgment notwithstanding the verdict, under the directed verdict, the trial court decides whether a reasonable jury could find for the nonmoving party.[128] If the court decides a reasonable jury could not find for the nonmoving party, the court enters judgment for the moving party during the trial and before a finding by the jury.[129]

In *Galloway*, the Court attempted to defend the constitutionality of the directed verdict by reference to the common law.[130] The Court compared the common law procedures of the demurrer to the evidence and the new trial to the modern directed verdict and incorrectly stated that all of the procedures were methods by which courts would weigh the evidence to determine whether to submit a case to a jury.[131]

The Court criticized arguments that the modern directed verdict violated the Seventh Amendment because under the common law, "allegedly higher standards of proof [were] required and . . . different consequences follow[ed] as to further maintenance of the litigation."[132] The Court first responded to the argument that the directed verdict was unconstitutional because different consequences followed from the common law and the new procedures. In this discussion, the Court stated that the Seventh Amendment "was designed to preserve the basic institution of jury trial in only its most fundamental elements."[133] The inconsistency between the consequences of the common law demurrer to the evidence, under which the motion ended the litigation, and the common law new trial, under which a party had another chance to prove his case, demon-

[127] 319 U.S. 372 (1943).

[128] Fed. R. Civ. P. 50(a); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251–52 (1986) (describing the "reasonable jury" standard under both procedures and stating "[i]n essence, . . . the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law").

[129] See *Galloway*, 319 U.S. at 372–73.

[130] Id. at 388–90. The Court first explained that the objection to the constitutionality of modern procedures that review the sufficiency of the evidence, like the directed verdict at issue here, came too late. This issue had been decided long ago and had been applied consistently since that time. Id.

[131] Id. at 390.

[132] Id. at 390.

[133] Id. at 392.

strated that "neither [consequence was] essential."[134] The Court was critical of the common law requirement, which it characterized as under the demurrer to the evidence, allowing a party to challenge the legal sufficiency of the other party's case if it admitted the opposing party's evidence and sacrificed his own case.[135] The Court found this procedure wholly inconsistent with the new trial. Unlike the demurrer to the evidence, under a motion for a new trial, the court also considered the evidence of the moving party when that party challenged the sufficiency of the evidence of the verdict-winner.[136] If the moving party lost, he lost not because he had admitted that he had no case.[137] He lost because the court found the winning party's evidence sufficient, and the jury had found that evidence outweighed the losing party's evidence.[138]

Despite the Court's analysis, the English common law in 1791 was very consistent. In *Galloway*, the Court had incorrectly described the common law, first by inaccurately describing demurrer to the evidence, and second by attempting to equate the procedures of demurrer to the evidence and new trial and then dismissing their different characteristics. Contrary to the Court's description, demurrer to the evidence was not a procedure that permitted a party to challenge the sufficiency of the opposing party's evidence.[139] It was the opposite. Upon the motion, the demurring party accepted the facts and conclusions of the opposing party's evidence, however improbable the evidence was. The court then applied the law to the facts agreed to by the parties. A party demurred and agreed to the opposing party's evidence because he believed that the jury would not follow the law.[140] Under a different common law procedure, the new trial motion, after a jury verdict, a

[134] Id. at 394.
[135] Id. at 393–94.
[136] Id. at 393 nn.28–29.
[137] Id.
[138] Id. at 393–94 n.29. The Court also explained that the common law continually changed, including the demurrer to the evidence, and accordingly, federal courts were not bound by any specific procedures of the common law in 1791. Id. at 391–92 & n.23. As described above, the common law does not support this proposition by the Court.
[139] See supra text accompanying note 41–57.
[140] See supra notes 41–49.

court would decide if the evidence was insufficient to support the verdict and, if so, the court would order a new trial.[141]

Under a core principle of the common law, reflected in the demurrer to the evidence and the new trial motion, only a jury or the parties decided the facts. The parties could agree on the facts, and the court could then apply the law to these facts, or the court could send a case to another jury if the court determined that the evidence was insufficient. The Court attempted to show that because the demurrer to the evidence and the motion for a new trial were different, neither of their characteristics was essential. As shown here, the procedures were different, but consistent and essential. Under the common law, the jury or the parties decided the facts. The court itself never decided a case without such a determination by the jury or the parties.

In a footnote, the Court discussed the common law procedure of the nonsuit.[142] Specifically, the Court stated that the nonsuit changed from a procedure that allowed the plaintiff to voluntarily withdraw his case to a procedure that allowed the defendant to challenge the sufficiency of the plaintiff's evidence.[143] The Court found that this transformed nonsuit differed from the directed verdict "only in form."[144] The Court again incorrectly described the common law procedures. Contrary to the description of the Court, under the common law a court could not consider the sufficiency of the evidence under the nonsuit.[145] Only after a jury trial could the court examine the evidence of the parties, and even then, the court would send the case to another jury if it found the evidence insufficient.[146]

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[141] See supra Subsection I.B.5.

[142] *Galloway*, 319 U.S. at 391 n.23.

[143] Id.

[144] Id. The Court did, however, recognize that unlike the modern directed verdict, the nonsuit permitted the plaintiff to retry his case. Id. In the same footnote in which the Court discussed the nonsuit, the Court also briefly stated that the directing of a verdict was not uncommon under the common law. Id. In fact, directing a verdict under the common law was not similar in any way to the modern directed verdict. Thomas, supra note 12, at 728–30.

[145] See supra Subsection I.B.3.

[146] See supra Subsection I.B.5. In analyzing the constitutionality of modern procedures, the Supreme Court has also examined the common law direction of a verdict, the special verdict, and the arrest of judgment. Thomas, supra note 12. Because summary judgment is a pretrial procedure, the other devices discussed by the Court are

In *Galloway*, the Court also responded to the argument that the modern directed verdict was unconstitutional because there were different standards of proof for submission of a case to a jury under the common law in comparison to under the modern directed verdict.[147] The Court stated that the differences were inconsequential and that, most importantly, the "essential requirement [to submit a case to a jury] is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked."[148]

Again the Court did not accurately state the common law requirements. A core principle of the common law was that a jury would decide a case with any evidence, however improbable, unless the moving party had admitted the facts and conclusions of the nonmoving party, including improbable facts and conclusions. This principle directly contradicts the Court's description of the "essential requirement" of the common law under which the court analyzes whether facts are "probative" and draws "reasonably possible inferences."[149]

Some may argue that the reasoning of the Court in *Galloway* should be followed with respect to the constitutionality of summary judgment. Under the Court's reasoning, under the common law new trial a court could determine the sufficiency of the evidence, and under the common law demurrer to the evidence, a court could dismiss a case for insufficient evidence. Thus, summary judgment, under which a court can dismiss a case for insufficient evidence, is not significantly different. However appealing this characterization of the common law is, it mischaracterizes the role of the jury and the judge under the common law. Under the common law, the court might decide that the jury found contrary to the

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not specifically relevant to this analysis. In any event, all of the procedures are consistent with the core principles. See generally id.

[147] *Galloway*, 319 U.S. at 390.

[148] Id. at 395. In discussing the proper standard by which to determine the constitutionality of a modern procedure, the Court held that "'substantial evidence' rather than 'some evidence' or 'any evidence' or vice versa" was not helpful to this determination. Id. Justice Black, joined by Justices Douglas and Murphy, dissented. Justice Black bemoaned the loss of the jury trial right and stated that "[t]oday's decision marks a continuation of the gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment." Id. at 397 (Black, J., dissenting).

[149] Id. at 395 (majority opinion).

evidence in a case. The court made this decision after it had viewed all the evidence at the trial and after the decision of the jury. The court would then order the case to be heard by another jury. Only rarely, using the demurrer to the evidence, would a court dismiss a case before a jury verdict. Under that procedure, a court did not determine the sufficiency of the evidence. In order to move for judgment under that procedure, a party must have admitted all of the facts and conclusions of the opposing party, including improbable ones. The only other option for that party was for the jury to determine such facts and conclusions. Almost never would parties invoke the demurrer to the evidence because they could not obtain from a judge a result that they could not obtain from a jury. In fact, parties moved for such judgment only in cases in which they believed that the jury would not apply the law. Summary judgment is very much unlike the procedures under the common law. Under summary judgment, a court decides that the evidence is insufficient and orders judgment for one party. In contrast, upon its finding that the evidence was insufficient, a common law court would order only a new trial. Again, under the common law, this finding would occur only after evidence was presented in court and only after a jury verdict. Thus, the *Galloway* decision on the constitutionality of the directed verdict does not support the constitutionality of summary judgment.[150]

[150] James Oldham has also been critical of the Supreme Court's articulation of the English common law. He argues that "[t]he Seventh Amendment historical test has become an American legal fiction in application, since many more things were lodged with juries in England in 1791 than modern American courts, including the Supreme Court, are prepared to acknowledge." Oldham, Special Juries, supra note 30, at 15; see also, e.g., id. at 7–9 (discussing problems with the Court's explanation of the English common law in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996)).

There are two other arguments that the procedure of summary judgment is constitutional because of various changes. First, before the enactment of the federal rules that require only notice pleading, more formal pleading rules eliminated more cases. Under notice pleading, the court now is not able to dismiss cases it otherwise previously would have been able to dismiss. As the Court stated in *Celotex*:

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

c. A Change in Supreme Court Jurisprudence Away from Jury Power and Toward Court Power

There is a telling sign of the problems in the Court's interpretation of the Seventh Amendment, particularly on the sufficiency of the evidence issue. In a period of twenty years, the Supreme Court's jurisprudence on the sufficiency issue completely changed. In *Redman*, the Court altered its analysis of the common law jury trial requirements from its previous decision in *Slocum v. New York Life Insurance Co*.[151] The Court had first, in *Slocum*, decided that a judge could not order judgment for a party upon a finding of insufficient evidence and, instead, a second jury must hear the case. Then, twenty years later, in *Redman*, the Court decided that a court could indeed order judgment in such a case.[152]

In *Slocum*, the Court addressed the constitutionality of judgment notwithstanding the verdict.[153] After the jury found for the plaintiff, and the district court refused to grant the defendant's motion for judgment notwithstanding the verdict, the Third Circuit reversed the jury verdict based on its conclusion that there was insufficient evidence to sustain the jury verdict for the plaintiff.[154] The Supreme

Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). In a recent article, Professor Burbank discussed this shift in the rules and the plans of the rule makers. Burbank argued that the rule makers failed to study the costs of notice pleading, discovery, and summary judgment to demonstrate that an appropriate balance was struck with the new rules. See Burbank, supra note 3, at 598–99, 603, 620. For a description of the reform of common law pleadings in the early postrevolutionary period, see William E. Nelson, Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830, at 67–88 (1975).

There is a second argument that summary judgment is constitutional because of other changes. The argument proceeds that various changes have occurred since the adoption of the Seventh Amendment, including the merger of law and equity, such that juries now hear some of the cases that judges might have heard in 1791, when the Seventh Amendment was adopted. Cf. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 516–19 (1959) (Stewart, J., dissenting).

Regardless of any changes, an examination of the substance of the common law in comparison to the new procedure—here, summary judgment—is the relevant constitutional inquiry. Summary judgment expands the procedures by which cases may be removed from a jury far beyond any procedure under the common law and contrary to the core principles of the common law.

[151] 228 U.S. 364 (1913); see also Brunet et al., supra note 1, at 17 n.9.

[152] See supra text accompanying notes 115–26; 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2522, at 244–46 (2d ed. 1995).

[153] *Slocum*, 228 U.S. at 369, 376–80.

[154] Id. at 376.

Court held that it was impermissible for a court to reexamine the facts of a dispute other than "according to the rules of the common law."[155] After a review of the common law procedures of the demurrer to the evidence and the nonsuit, the Court found that the *only* permissible way in which the facts tried by a jury could be reexamined under the common law was if a new trial was ordered based on an error of law, which included insufficient evidence.[156] Because under judgment notwithstanding the verdict, a court could reexamine the facts and grant judgment to the party that lost, the Court held the procedure unconstitutional.[157] The Court recognized that, under the common law, a case could be dismissed if the pleadings were accepted as true and there was no claim or defense under those facts. Here, however, the lower court did not accept the pleaded facts but, instead, decided the sufficiency of the evidence.[158] The Court's words regarding the Seventh Amendment right to a jury trial were significant.

> In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the cooperation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either or to permit one to disregard the province of the other is to impinge on that right.[159]

The Court further stated that

> [I]t is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence, and that while it is the province of the court to aid the jury in the right discharge of their duty, even to the extent of directing their verdict where the insufficiency or conclusive character of the evidence warrants such a direction, the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. In other words, the constitutional guar-

[155] Id. at 380.
[156] See id. at 399.
[157] See id.
[158] Id. at 381–82.
[159] Id. at 382.

> anty operates to require that the issues be settled by the verdict of a jury, unless the right thereto be waived. It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment, and this, we have seen, consists of the court and jury, unless there be a waiver of the latter.[160]

Despite this clear articulation by the Supreme Court of the roles of the judge and the jury under the common law and the inconsistency of judgment notwithstanding the verdict with these roles, in *Redman*, twenty years later, the Court disregarded this decision. In an about-face, the Court effectively decided that judgment notwithstanding the verdict was sufficiently consistent with the common law.[161] Despite the principle of the common law that only the jury or the parties decided the facts, and, as such, the court could not decide a case without such a determination, the Court decided that upon the trial court's own assessment of the evidence, the court could order judgment against the party who had won the jury verdict.[162]

The Supreme Court had the requirements of the common law correct in its first decision in *Slocum*. Although it is unclear what caused the change in its jurisprudence, this—in effect—reversal makes even more clear that the constitutionality analyses of judgment notwithstanding the verdict and the directed verdict do not support the constitutionality of summary judgment.

d. Differences Between the Procedure of Summary Judgment and the Procedures of Judgment Notwithstanding the Verdict and the Directed Verdict

One might argue that if summary judgment is unconstitutional, then the directed verdict and judgment notwithstanding the verdict, which both use the same standard as summary judgment, necessarily also must be unconstitutional. While the same standard is used for all of the procedures (whether a reasonable jury could find for the nonmoving party), there are differences between the procedures. Summary judgment occurs prior to a trial. In contrast, the

[160] Id. at 387–88.
[161] See supra text accompanying notes 115–26.
[162] Id.

directed verdict and judgment notwithstanding the verdict respectively occur during and after the trial. For this reason, summary judgment is the least justifiable of the procedures under the Seventh Amendment. Because summary judgment is employed prior to the presentation of any evidence, a court must decide the sufficiency of the evidence without being able to view the evidence in the context of the trial. For example, the court examines deposition transcripts and affidavits without hearing the witnesses themselves. This was never allowed under the common law, even upon a motion for a new trial. Under the common law, the court decided the sufficiency of the evidence after seeing the evidence presented at a trial and, if the evidence was insufficient, ordered a new trial. These differences make summary judgment the least compatible of the procedures with the Seventh Amendment.[163]

C. Argument #3: Summary Judgment Is Constitutional Because Summary Judgment Is Necessary to the Proper Functioning of the Federal Courts

Under conventional wisdom, summary judgment is a necessary procedure in the federal court system; the federal docket would be detrimentally affected by the elimination of summary judgment, including the effect that more trials would take place.[164] In other words, the grant of summary judgment currently prevents trials from occurring. Moreover, the possibility that courts will employ the procedure encourages the settlement of cases before the procedure is used and the grant of summary judgment also encourages the settlement of cases. Without the possibility of summary judgment, these cases would not settle and would go to trial. Moreover, if summary judgment was eliminated, lawyers might bring more cases with weak evidence because courts could not eliminate such cases on summary judgment.

Despite this conventional wisdom, it may be that the federal docket would not be significantly affected by the elimination of

[163] With this stated, there is good support to also question the constitutionality of both the directed verdict and judgment notwithstanding the verdict. The *Redman* and *Slocum* cases, described above, are appropriate places to start in reviewing the Court's decision to change course.

[164] Cf. supra notes 1–4 and accompanying text.

summary judgment. Without summary judgment, parties might continue to settle, because they can lose at trial.[165] Also, additional cases might not be brought for reasons that include that lawyers would not want to bring such weak cases, or lawyers do not have enough resources to bring these cases. Moreover, the elimination of summary judgment might have a positive impact on the federal docket. With the elimination of summary judgment, the courts—district and appellate alike—will be relieved of the significant burden of reviewing the evidence presented by the parties on the motion for summary judgment, which may constitute several inches and often many boxes of material.[166] Moreover, if a case that would have been dismissed on summary judgment goes to trial, the cost to the court of conducting the trial may be less than the cost would have been if the court had decided the summary judgment motion itself. Thus, the conventional wisdom regarding the importance of summary judgment to the management of the dockets may be

[165] The settlement posture of the parties will be different, however, than when the possibility of summary judgment influenced the proceedings. In most cases, defendants have benefited in settlements from the possibility of a court granting summary judgment. In settlements before a ruling on the motion, the likelihood that the plaintiff would lose on summary judgment would decrease the amount that a plaintiff would receive in settlement. In settlements after the motion was decided in favor of the defendant, the likelihood that defendant would continue to prevail on appeal would decrease any amount that plaintiff would receive in settlement. Thus, if summary judgment is eliminated, plaintiffs may receive more in settlements because they no longer can lose on summary judgment. Professors Issacharoff and Loewenstein stated that "perhaps the most striking and unambiguous impact of [summary judgment] is a transfer of wealth from plaintiffs to defendants." Issacharoff & Loewenstein, supra note 96, at 103. Their study showed that summary judgment never increased but often decreased the recovery for plaintiff and, accordingly, benefited defendants. Id. at 103–05 (describing summary judgment as "an easy or cost-free procedure for defendants to invoke"). In their discussion of the economic effect of summary judgment, Professors Issacharoff and Loewenstein emphasized that the availability of summary judgment might actually deter settlement, as "[n]umerous studies have demonstrated that bargainers are less likely to reach a settlement when inequities of power exist between them than when they are in positions of symmetrical power." Issacharoff & Loewenstein, supra note 96, at 103.

[166] The district courts also spend significant resources managing discovery disputes. Indeed, the parties generally expend much effort on summary judgment as well. The parties may engage in extensive discovery to attempt to win or alternatively not to lose the motion.

wrong and summary judgment may actually be instead a significant burden on the federal system.[167]

CONCLUSION

It is an appropriate time for the Court to change its jurisprudential course regarding the Seventh Amendment and hold summary judgment unconstitutional. Federal courts frequently employ summary judgment to dispose of cases, and the procedure has,

[167] For further discussion disputing the perception that summary judgment is necessary, see John Bronsteen, Against Summary Judgment, 75 Geo. Wash. L. Rev. (forthcoming 2007), available at http://ssrn.com/abstract=925158; Morton Denlow, Summary Judgment: Boon or Burden?, The Judges' Journal, Summer 1998; D. Theodore Rave, Note, Questioning the Efficiency of Summary Judgment, 81 N.Y.U. L. Rev. 875 (2006). While more specific study regarding the effects of summary judgment on the courts is desirable and beyond the scope of this Essay, the literature on the economics of settlement may be helpful. See, e.g., Robert Cooter & Thomas Ulen, Law and Economics 388–443 (4th ed. 2004); Thomas J. Miceli, Economics of the Law: Torts, Contracts, Property, Litigation 156–200 (1997); George L. Priest & Benjamin Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984).

Summary judgment has been stated to have originated from an English procedure established in 1855. See Fed. R. Civ. P. 56 advisory committee's note (1937); Burbank, supra note 3, at 592 ("Inspired by English procedure that originally existed for the benefit of plaintiffs seeking to collect debts with dispatch, the rule was made available to both sides and in all types of actions."); Charles E. Clark, The Summary Judgment, 36 Minn. L. Rev. 567 (1952); Miller, supra note 7, at 1016–17; Leland Ware, Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment, 4 Emp. Rts. & Emp. Pol'y J. 37, 42 (2000). Summary judgment bears little resemblance to the English procedure, however. Unlike summary judgment, the English procedure was available only to plaintiffs. Issacharoff & Loewenstein, supra note 96, at 76; Ware, supra, at 42. Moreover, it was available only in cases that involved a debt created by overdue bills and promissory notes, where the debtor could not dispute the existence of the agreement. Miller, supra note 7, at 1016–17. Under the procedure, defendants could not delay judgment with mere technicalities, "but instead had [to file an affidavit showing] the existence of a defense justifying a trial by raising an issue of fact or a difficult question of law." Id. at 1017. In other words, the court was concerned about whether a defense existed at all and not about the sufficiency of the evidence supporting the defense. The advisory committee appeared to ignore the differences between summary judgment and the English procedure. Fed. R. Civ. P. 56 advisory committee's note (1937). Professor Burbank wrote that the procedure represented a significant expansion from the procedure that first existed in England in the mid-nineteenth century. See Burbank, supra note 3, at 602. He observed that there is evidence that the advisory committee had the "tendency not to distinguish their radical new rule from the much more limited procedural tools with which they were familiar, including the English procedure." Id. He further stated that "Rule 56 was an experiment backed up by little relevant experience, let alone data." Id. at 592.

thus, contributed to the decrease in the availability of civil jury trials.

Having recently taken renewed interest in the proper role of the jury under the Sixth Amendment,[168] it would be fitting for the Court to examine this issue in the context of the Seventh Amendment. In the last seven years, in interpreting the Sixth Amendment, the Court has given power back to the criminal jury, emphasizing the historical role of the jury.[169] In comparison, the text of the Seventh Amendment, which requires the court to follow the "common law," dictates an even more significant role for history in the preservation of the right to a civil jury trial under the Seventh Amendment.

As described in this Essay, three core principles emanate from the common law that demonstrate the unconstitutionality of summary judgment. First, under the common law, the jury or the parties determined the facts. The court itself never decided a case without such a determination. Second, a court would determine the sufficiency of the evidence only after a jury trial, and if the court believed that the evidence was insufficient, it would order only a new trial. The court would never order judgment for the moving party upon a review of the sufficiency of the evidence. Third, a jury would decide a case that had any evidence, however improbable that evidence was, unless the moving party admitted the facts and conclusions of the nonmoving party, including improbable facts and conclusions. Summary judgment, under which a court dismisses a case after its assessment of the sufficiency of the evidence, including the reasonableness of the factual inferences, wholly contrasts with these principles. Accordingly, the Court should, following the historical mandate of the Amendment, declare summary judgment unconstitutional.

[168] U.S. Const. amend. VI.

[169] See United States v. Booker, 543 U.S. 220, 230–34 (2005); Blakely v. Washington, 542 U.S. 296, 305–06 (2004); Ring v. Arizona, 536 U.S. 584, 607, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476–80 (2000).