2002

The Seventh Amendment Right to a Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away

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THE SEVENTH AMENDMENT RIGHT TO CIVIL JURY TRIAL: THE SUPREME COURT GIVETH AND THE SUPREME COURT TAKETH AWAY

Joan E. Schaffner†

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The Seventh Amendment right to trial by jury has attracted the attention of the Supreme Court numerous times throughout history and several times just within the past decade. It has also received the attention of many outstanding academics and commentators. The Seventh Amendment provides that:

1. See Cooper Indus., Inc v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) (reviewing a manufacturer's claim of trade infringement, false advertising, and unfair competition and reviewing what level of appellate review shall be used in determining if a jury award is consistent with due process and the reexamination clause of the Seventh Amendment); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (addressing a suit under 42 U.S.C. § 1983 based upon a city's denial of its development proposals and addressing whether there was a right to a jury in § 1983 actions); Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (reviewing whether copyright infringement actions are afforded a jury trial under the Seventh Amendment); Hetzel v. Prince William County, Va., 523 U.S. 208 (1998) (deciding whether a writ of mandamus violated the Seventh Amendment right to jury trial); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (deciding whether a New York statute empowering appellate courts to order new trials when the jury's award "deviates materially from what would be reasonable compensation" violated the Seventh Amendment); Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996) (discussing whether the construction of a patent claim was a matter of law for a judge or a matter of fact for a jury); Wooddell v. Int'l Bhd. of Elec. Workers, Local 71, 502 U.S. 93 (1991) (discussing whether the Labor Management Reporting Disclosure Act provided a right to jury); Teamsters Local No. 391 v. Terry, 494 U.S. 558 (1990) (discussing whether an employee is entitled to a jury trial when seeking backpay for a union's alleged breach of its fiduciary duty). The Court's analysis in Terry governed its decision in Wooddell and therefore is included in the cases decided within the past decade.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried to a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.\footnote{3}

This amendment establishes the balance of power among federal juries, federal trial judges, and federal appellate courts by “preserving” the essential aspects of the right to a jury trial as it existed under the English common law system when the Amendment was adopted.\footnote{4}

In analyzing Seventh Amendment jurisprudence generally, the Court divided its inquiry into three separate and distinct inquiries. The first, and perhaps most commonly addressed inquiry, in light of the multitude of new statutory causes of action, is whether the cause of action was tried at law at the time of the founding or is analogous to one that was tried at that time.\footnote{5} This inquiry focuses upon the nature or character of the cause of action and first compares “‘the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity [and] [s]econd . . . examine[s] the remedy sought [to] determine whether it is legal or equitable in nature.’”\footnote{6}

If the action had been tried at law, the Court would move to the second inquiry. The Court would determine “whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791.”\footnote{7} If the issue falls within this category, then the issue must fall to the jury.\footnote{8} Finally, the third component of the inquiry involves the level of judicial review permitted once the jury has returned a verdict on this issue, including both

\footnote{3}{Civil Procedure, 31 Harv. L. Rev. 669 (1918); Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923).}

\footnote{4}{Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); see also United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). Justice Story cavalierly stated: Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of our jurisprudence. It cannot be necessary for me to expound the grounds of this opinion, because they must be obvious to every person acquainted with the history of the law. Id. at 750.}

\footnote{5}{E.g., Tull v. United States, 481 U.S. 412, 417 (1987) (holding that there was a Seventh Amendment right to a jury trial to determine governmental liability under the Clean Water Act).}


\footnote{7}{Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996).}

\footnote{8}{Id. at 376-79.}
the proper function of the trial judge and the proper scope of appellate review.9

The language of the Amendment bases all three inquiries upon the historical treatment as it existed in 1791 common law England.10 In its analysis of Seventh Amendment jurisprudence, the Court, predominantly through the first inquiry, carefully "preserves" the basic right to jury over the cause of action. However, at the same time, the Court denigrates that right by finding few incidents of the jury right fundamental to the essence of the trial by jury and allowing fairly aggressive review of jury decisions.11 This trend is highlighted by several recent decisions of the Supreme Court: Teamsters Local No. 391 v. Terry,12 Feltner v. Columbia Pictures Television, Inc.,13 and City of Monterey v. Del Monte Dunes at Monterey Ltd.,14 with those of Markman v. Westview Instruments, Inc.,15 Gasperini v. Center for Humanities, Inc.,16 and Cooper Industries, Inc. v. Leatherman Tool Group.17

This Article begins with a discussion of the Supreme Court cases decided in the past decade that deal with the right to a jury trial.18 First, the Article analyzes the Court’s decisions regarding the basic right to a jury trial in the statutory actions of Terry, Feltner, and Del Monte Dunes.19 Next the Article analyzes Markman, Gasperini, and Cooper Industries, which address the essential aspects of a jury trial and the scope of the reexamination clause in an attempt to determine their significance and impact on the Court’s Seventh Amendment jurisprudence.20 The Article then discusses how these decisions are indicative of a trend that is consistent with the history of the Court’s

9. Id. at 384-91.
11. See infra Part III.B.
12. 494 U.S. 558 (1990); see also infra Part II.A.1.
14. 526 U.S. 687 (1999); see also infra Part II.A.3, Part II.B.3.
15. 517 U.S. 370 (1996); see also infra Part II.B.1.
16. 518 U.S. 415 (1996); see also infra Part II.C.1.
17. 532 U.S. 424 (2001); see also infra Part II.C.2.
18. See infra Part II.
19. See infra Part II.A.
20. See infra Part II.B-C.
Seventh Amendment jurisprudence. 21 The Court emphasizes the preservation of the basic right to jury under the first inquiry, while it de-emphasizes the essence and scope of that right under the second and third inquiries. 22

II. THE MOST RECENT SUPREME COURT DECISIONS ON SEVENTH AMENDMENT DOCTRINE

A. The Basic Right to Jury Trial

1. Teamsters Local No. 391 v. Terry

In 1990, the Supreme Court in Teamsters Local No. 391 v. Terry 23 extensively addressed the basic right to trial by jury in an Article III court. 24 The Court held that the Seventh Amendment entitled "an employee who seeks relief in the form of backpay for a union's alleged breach of its duty of fair representation [to] a right to trial by jury." 25 The plaintiffs were employed by McLean Trucking Company. 26 McLean and the Union were parties to a collective-bargaining agreement that set forth the terms and conditions of the plaintiffs' employment. 27 The plaintiffs, objecting to various employment practices of McLean, as well as the Union's treatment of certain grievances filed against McLean, filed an action in federal court alleging that McLean had violated section 301 of the Labor Management Relations Act by breaching the collective-bargaining agreement. 28 Additionally, the plaintiffs alleged that the Union "violated its duty of fair representation." 29 The plaintiffs requested a permanent injunction and damages for lost wages and health benefits, as well as a jury trial. 30 During litigation, McLean filed for bankruptcy and was dismissed from the suit along with the claims for injunctive relief. 31 Thus, the remaining claim was against the Union for payment of lost wages and health benefits. The Union brought a motion to strike plaintiffs' request for jury on the ground that no Seventh Amendment right existed. 32

21. See infra Part III.
22. See infra Part III.
23. 494 U.S. 558 (1990). The Supreme Court has since decided Wooddell v. International Brotherhood of Electrical Workers, Local 71, 502 U.S. 93 (1991), which held that Terry governed the right to jury analysis of a claim brought under Title I of the LMRDA, 29 U.S.C.A. § 401 (1998), seeking injunctive relief, lost wages and benefits, and other monetary damages. Because the Court performed an extensive analysis in Terry rather than Wooddell, this article discusses Terry.
25. Id. at 561.
26. Id.
27. Id.
28. Id.
29. Id.
30. Terry, 494 U.S. at 562-63.
31. Id. at 563.
32. Id.
The *Terry* Court set forth the traditional Seventh Amendment two-step inquiry\(^{33}\) to determine whether a right to jury existed for a statutory cause of action by examining "both the nature of the issues involved and the remedy sought."\(^ {34}\) The Court stated, "[f]irst we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature."\(^ {35}\) The Court continued by stating that "[t]he second inquiry is the more important in our analysis."\(^ {36}\)

a. The Plurality

The Justices disagreed over the proper analogy to the breach of duty of fair representation, arguing between an attorney malpractice action, an action at law, and an equitable action involving a breach of fiduciary duty claim brought by a trust beneficiary against a trustee.\(^ {37}\) The plurality determined that the equitable action captured "the relationship between the union and the represented employees" more fully; however, it did not persuade the plurality to characterize the claim as "wholly equitable."\(^ {38}\) Rather, because "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action" and the breach of duty is only one issue to be resolved in this action, the character of the employee's action against McLean for violation of the collective-bargaining agreement must also be considered.\(^ {39}\) The plurality opinion noted that this

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33. *Id.* at 565. The majority noted that a third step, "whether 'the issues [presented by the claim] are typical grist for the jury's judgment,'" does not affect this analysis as it "is relevant only to the determination of 'whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency ... and whether jury trials would impair the functioning of the legislative scheme.'" *Id.* at 565 n.4 (quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989)). In his concurrence, Justice Brennan noted that the historical step should comprise of only one step: characterization of the nature of the relief sought. *Id.* at 574 (Brennan, J., concurring in part and concurring in the judgment). This would simplify the analysis and make it "more manageable than the current test" and "more reliably grounded in history." *Id.* at 578 n.7. However, the characterization of the remedy is not always easy. For example, the circuits were horribly split on the question of whether a party has a right to trial by jury under the copyright laws when requesting statutory damages. *E.g.*, Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 638-41 (8th Cir. 1996) (reviewing the various circuits decisions and noting the split among them). The Eighth Circuit held that the statutory damages were "legal" in nature and that the jury should determine the amount of the award. *Id.* at 643-44. The Supreme Court ultimately resolved this issue in *Feltner*. See *infra* Part II.A.2.


35. *Id.* (quoting Tull v. United States, 481 U.S. 412, 417-18 (1987)).

36. *Id.* (citing Granfinanciera, S.A. v. Nordberg, 492 U.S. 33,42 (1982)).

37. *Id.* at 567-68.

38. *Id.* at 568.

39. *Id.* at 569 (quoting Ross v. Bernhard, 396 U.S. 531, 538 (1970)).
issue was "comparable to a breach of contract claim – a legal issue" leaving the plurality in "equipoise" to be resolved by the characterization of the remedy.40

Turning to the request for damages for back pay and health benefits, the Court noted that because these damages were not wrongfully withheld by the Union, but rather by McLean, the damages were not restitution damages.41 There was no longer any injunctive relief sought; therefore, the damages were not equitable as "incidental to or intertwined with injunctive relief."42 Finally, the Court distinguished the relief sought with the characterization of relief sought under Title VII, which some courts have held to be equitable, holding that the remedy requested was legal and that a right to jury attached to "all issues presented in [the] suit."43

b. The Dissent

The dissent argued that the plurality opinion created an "analytic innovation" to expand the right to jury trial over an action that is purely equitable.44 However, such a trend appears consistent with prior Supreme Court cases addressing the basic right to a jury.45 The dissent agreed that the breach of fiduciary duty was the closest analogous action at common law, but found it improper to separate this issue from the contract issue and characterize them separately.46 Further, the dissent distinguished the Beacon Theaters,47 Dairy Queen,48 and Ross49 cases50 upon which the majority relied for such treatment stating:

Although we have divided self-standing legal claims from equitable declaratory, accounting, and derivative procedures, we have never parsed legal elements out of equitable claims absent specific procedural justifications ... just as the plaintiff in a duty of fair representation action against his union must show breach of the collective-bargaining agreement as an initial matter, in an action against a trustee for failing to pursue a claim the beneficiary must show that the claim had some merit ... Proving the breach of the collective-bargain-

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40. Terry, 494 U.S. at 569-70.
41. Id. at 570-71.
42. Id. at 571 (quoting Tull v. United States, 481 U.S. 412, 424 (1987)).
43. Id. at 573.
44. Id. at 584 (Kennedy, J., dissenting).
45. See infra Part III.A.
46. Terry, 494 U.S. at 585, 588 (Kennedy, J., dissenting)
47. 359 U.S. 500 (1959).
50. Terry, 494 U.S. at 590 (Kennedy, J., dissenting); see also infra Part III.A (discussing Beacon Theatres, Dairy Queen, and Ross).
ing agreement is but a preliminary and indispensable step to obtaining relief in a duty of fair representation action. 51

Justice Marshall, in response to the dissent, distinguished the nature of the two “issues” from the “examination of the nature of each element of a typical claim” 52 by noting that the two “issues” here would be brought as separate claims: one claim against the employer and the other claim against the Union. 53 Furthermore, Justice Marshall noted that the treatment of the claims should not be determined by whether the plaintiff could have maintained the suit against both defendants. 54 In other words, had McLean not been dismissed, the plaintiff would have had a right to jury over its claim against McLean and the issues resolved by the jury would have precluded relitigation of them by the judge in the claim against the Union. 55

Additionally, the dissent argued that the plurality characterized the relief incorrectly. 56 Specifically, the dissent argued that the remedy for a breach of duty of fair representation is designed “to make the injured employee whole.” 57 Moreover, neither exemplary nor punitive damages were available to the plaintiffs. 58 Such relief “parallels the remedies prevailing in the courts of equity in actions against trustees for failing to pursue claims . . . and differ[s] somewhat from those available in attorney malpractice actions” brought in common law courts that could award exemplary damages. 59 Justice Marshall, in response, criticized the dissent for “conflat[ing] the two parts of our Seventh Amendment inquiry” by relying on the nature of the action to determine the nature of the remedy. 60

2. Feltner v. Columbia Pictures Television, Inc.

In 1998, the Court in Feltner v. Columbia Pictures Television, Inc., 61 addressed the question of whether the Seventh Amendment provides a right to jury trial on all issues relevant to an award of statutory damages in a copyright infringement action, including the amount itself. 62 Feltner had acquired several television stations and had licensed several television series for those stations from Columbia Pictures. 63 Felt-

51. Terry, 494 U.S. at 590-91 (Kennedy, J., dissenting).
52. Id. at 569 n.6. This question was also presented in Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996). See also infra Part II.B.1.
53. Terry, 494 U.S. at 569 n.6.
54. Id.
55. Id.
56. Id. at 587 (Kennedy, J., dissenting).
57. Id.
58. Id.
59. Terry, 494 U.S. at 587-88.
60. Id. at 571 n.8.
62. Id. at 342.
63. Id. Feltner owns Krypton International Corporation. Id.
ner failed to pay the royalty payments and Columbia terminated the licenses. Nevertheless, Feltner continued broadcasting the shows. Columbia brought suit against Feltner alleging copyright infringement and seeking various forms of relief, which included a permanent injunction, impoundment of all program copies, actual damages, or alternatively, statutory damages, attorney's fees and costs.

a. The Ninth Circuit's Holding

The Copyright Act of 1976 allows a copyright owner "to recover, instead of actual damages and profits, an award of statutory damages . . . in a sum of not less than $500 or more than $20,000 as the court considers just." The trial judge denied Feltner's request for a jury on statutory damages and the Ninth Circuit agreed. The Ninth Circuit had held that under the Copyright Act of 1909, the judge was to assess statutory damages. The court then "reasoned that '[i]f Congress intended to overrule [that decision] by having the jury determine the proper award of statutory damages, it would have altered' the language 'as the court considers just'" when it amended the Act in 1976. Thus, the statute does not grant a jury trial. Furthermore, the Ninth Circuit reasoned that the Seventh Amendment does not provide a right to jury for statutory damages because statutory damages are equitable in nature.

b. The Supreme Court's Holding

The Supreme Court, although agreeing that there is no statutory right to a jury, disagreed with the Ninth Circuit with respect to its Seventh Amendment analysis. The Court noted that there are close analogues to actions seeking statutory damages for copyright infringement from 18th century England. The Court followed the historical

64. Id. at 342-43.
65. Id. at 343.
66. Id.
68. Feltner, 523 U.S. at 342 (quoting 17 U.S.C. § 504(c) (1995)).
69. Id. at 344.
70. Id.
71. Id. at 345 (quoting Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 293 (9th Cir. 1997)).
73. Feltner, 523 U.S. at 345. Equity is defined, in part, as a "remedy recognizable by a court of equity." BLACK'S LAW DICTIONARY 560 (7th ed. 1999).
74. Feltner, 523 U.S. at 345-47. Thus, the Court held that § 504(c) (the statutory damages provision) violated the Seventh Amendment and is unconstitutional. Id. at 345. Nevertheless, this does not render the provision constitutionally unenforceable. Columbia Pictures v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1192 (9th Cir. 2001).
75. Feltner, 523 U.S. at 348-49.
development of a suit for the infringement of a property right, begin­ning in the mid-17th century, where “the common law recognized an author’s right to prevent the unauthorized publication of his manu­script.”76 Such suits seeking damages for infringement were tried as actions on the case in courts of law.77 When the first English copy­right statute was enacted, actions seeking damages under the statute were again tried in courts of law.78 Moreover, this practice was fol­lowed in this country by the common law79 and continued to be fol­lowed after the Congress passed the first copyright statute in 1790.80

Columbia did not dispute this historical evidence, arguing instead that statutory damages were equitable in nature.81 The Court disagreed, explaining that monetary relief is generally legal and “an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.”82 Further, monetary relief is not deemed equitable “simply because it is ‘not fixed or readily calculable from a fixed formula’ . . . [as] there is his­torical evidence that cases involving discretionary monetary relief were tried before juries.”83 Thus, the Court held that the Seventh Amendment applies to a copyright infringement action seeking statu­tory damages.84

3. City of Monterey v. Del Monte Dunes at Monterey, Ltd.

The following year, the Court again addressed the right to jury trial, this time for a claim brought under § 198385 in City of Monterey v. Del Monte Dunes.86 In this case, Del Monte Dunes held interest in land that it wanted to develop within the jurisdiction of the City of Monte­rey.87 After repeated proposals and subsequent rejections by the City, Del Monte Dunes brought suit under § 1983 claiming that the City had affected a regulatory taking “without paying compensation or pro­viding an adequate post-deprivation remedy for the loss.”88 At trial, the court submitted the question of liability under the regulatory tak­ings claim to the jury.89 The Court, in determining whether this was

76. Id. at 349.
77. Id.
78. Id.
79. Id. at 350.
80. Id. at 351.
81. Feltner, 523 U.S. at 352.
82. Id.
83. Id. at 353 (quoting Tull v. United States, 481 U.S. 412, 422 n.7 (1987)).
84. Id. The second question, whether that right includes the right to have the amount determined by the jury, is discussed below. See infra Part II.B.2.
87. Id. at 693-94.
88. Id. at 694.
89. Id. at 707.
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proper, reiterates two questions presented under the Seventh Amendment: first, whether the claim "'was tried at law at the time of the founding or is at least analogous to one that was," and, if so, "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791." With respect to the first question, the Court explained that the Seventh Amendment's phrase "'suits at common law' include not merely suits, which the common law recognized among its old and settled proceedings, but [also] suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered." The Court concluded that the claim sounded in tort, a traditional legal claim. Moreover, the monetary relief for just compensation and the unconstitutional denial of such compensation was compensatory in nature and, thus, traditional legal relief, making the claim a proper one for jury consideration.

Four Justices dissented on the grounds that the plurality "misconceives a takings claim under § 1983 and draws a false analogy between such a claim and a tort action." The dissent agreed with the City that the proper analogy is an inverse condemnation proceeding "given their common Fifth Amendment constitutional source and link to the sovereign's power of eminent domain." In fact, "[t]he ultimate issue is identical in both direct and inverse condemnation actions: a determination of 'the fair market value of the property [taken] on the date it is appropriated,' as the measure of compensation required by the Fifth Amendment." Thus, at common law at the time of the framing, the closest analogue to the inverse condemnation claim "was that of direct condemnation, and the right to compensation for such direct takings carried with it no right to a jury trial."

90. Id. "We next address whether it was proper for the District Court to submit the question of liability on Del Monte Dunes' regulatory takings claim to the jury." Id.
92. Id. For an analysis of the second step see infra Part II.B.3.
93. Del Monte Dunes, 526 U.S. at 708 (quoting Parsons v. Bedford, 3 Pet. 433, 447 (1830)).
94. Id. at 709 (stating that "[j]ust as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law").
95. Id. at 709-11. Del Monte Dunes was seeking to restore what it had lost, not what the taker had gained. Id. at 710.
96. Id. at 733 (Souter, J., concurring in part and dissenting in part).
97. Id. at 734.
98. Del Monte Dunes, 526 U.S. at 734 (quoting Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 10 (1984)).
99. Id. at 739.
Furthermore, the dissent argued that the analogy to tort must fail.\textsuperscript{100} The dissent asserted that the Supreme Court had previously denied the right to a jury trial in direct condemnation proceedings, which is an equally sound tort analogue.\textsuperscript{101} Moreover, analyzing the action as one under § 1983 is generally too sweeping. The dissent stated that "the remedy is not damages for tortious behavior, but just compensation for the value of the property taken."\textsuperscript{102} The dissent further explained:

While the statute is indeed a prism through which rights originating elsewhere may pass on their way to a federal jury trial, trial by jury is not a uniform feature of § 1983 actions. The statute provides not only for actions at law with damages remedies where appropriate, but for "suit[s] in equity, or other proper proceeding[s] for redress." Accordingly, rights passing through the § 1983 prism may in proper cases be vindicated by injunction . . . orders of restitution . . . and by declaratory judgments . . . none of which implicate, or always implicate, a right to jury trial.

. . . .

Even if an argument for § 1983 simplicity and uniformity were sustainable; however, it would necessarily be weaker than the analogy with direct condemnation actions. That analogy rests on two elements that are present in each of two varieties of condemnation actions: a Fifth Amendment constitutional right and a remedy specifically mandated by that same amendment. Because constitutional values are superior to statutory values, uniformity as between different applications of a given constitutional guarantee is more important than uniformity as between different applications of a given statute.\textsuperscript{103}

Once again the plurality held that the basic right to a jury trial attaches to the statutory cause of action.\textsuperscript{104} Thus, in three out of three cases, the Court held that a right to a jury attached to statutory actions.\textsuperscript{105} Moreover, in two of the cases there were strong and persuasive dissenting opinions.\textsuperscript{106} These results are consistent with the historical trend of an aggressive stance when interpreting the right to jury trial for statutory claims.\textsuperscript{107} This trend, however, reverses when the Court is confronted with "incidents" of the right to jury.\textsuperscript{108}

\textsuperscript{100.} \textit{Id.} at 748.
\textsuperscript{101.} \textit{Id.} at 749-50.
\textsuperscript{102.} \textit{Id.} at 752.
\textsuperscript{103.} \textit{Id.} at 751-52 (alterations in original) (citations omitted).
\textsuperscript{104.} \textit{Del Monte Dunes}, 526 U.S. at 709.
\textsuperscript{105.} \textit{See supra} notes 25, 84, 95, 97 and accompanying text.
\textsuperscript{106.} \textit{See supra} notes 44-60, 96-103 and accompanying text.
\textsuperscript{107.} \textit{See infra} Part III.A.
\textsuperscript{108.} \textit{See infra} Parts II.B, III.B.
B. Incidents of the Right to Jury

1. Markman v. Westview Instruments, Inc.

In a rather unusual move, the Supreme Court granted certiorari in Markman v. Westview Instruments, Inc.,\(^\text{109}\) a patent case on appeal from the Federal Circuit.\(^{110}\) The Court addressed the applicability of "a Seventh Amendment guarantee that a jury will determine the meaning of any disputed term of art about which expert testimony is offered" to "the interpretation of a so-called patent claim . . . ."\(^{111}\) This seemed unusual because the Supreme Court has heard relatively few patent appeals from the Federal Circuit since the Federal Circuit was established in 1982 to be the exclusive arbiter of patent cases.\(^\text{112}\) There is less need for Supreme Court review of these cases because the expertise and jurisdictional grant of the Federal Circuit to resolve issues of patent law for the nation sets national precedent and uniformity in the creation of the patent laws.\(^\text{113}\) However, the Federal Circuit was severely divided on the issue presented in Markman,\(^\text{114}\) providing some incentive for the Supreme Court to review the decision. Because the Court ultimately sided with the majority of the Federal Circuit, it seems likely that the Court wanted to seize an opportunity to set Seventh Amendment precedent more generally than merely to address an issue specific to the patent law community.\(^\text{115}\)

a. The Lower Court Decisions

Markman v. Westview Instruments, Inc.\(^\text{116}\) raised significant issues concerning the proper roles of the jury, trial judge, and Federal Circuit in patent infringement litigation. The determination of patent infringement is a two-step inquiry.\(^\text{117}\) First, the meaning and scope of the patent claim language as understood by "one skilled in the art" must be determined.\(^\text{118}\) Second, the accused product must be compared to the properly construed claim language to determine if, in fact, the

\(^{109}\) 517 U.S. 370 (1996) [hereinafter Markman I].
\(^{110}\) Id. at 376; see also infra text accompanying notes 135-56.
\(^{111}\) Markman I, 517 U.S. at 372.
\(^{114}\) See infra note 139.
\(^{115}\) See infra Part II.B.1.b.
\(^{117}\) Markman II, 52 F.3d 967, 976 (Fed. Cir. Pa. 1995).
\(^{118}\) Id.
accused product "reads on," or infringes, the patent claim.\textsuperscript{119} The issue for the court was to decide whether the first step was a question of fact or law, and if a question of fact, whether a Seventh Amendment right to jury applied.\textsuperscript{120}

Herbert Markman was the inventor and owner of a patent on an inventory control and reporting system for dry-cleaning stores that he licensed to Positek, Inc., a dry-cleaner.\textsuperscript{121} Markman sued Westview Instruments, Inc. and Althon Enterprises, Inc. in the Eastern District of Pennsylvania for infringement of multiple claims of his patented invention.\textsuperscript{122} Westview manufactured and sold electronic devices to the dry-cleaning industry, including the accused product used by Althon, a dry-cleaning establishment.\textsuperscript{123} The accused device, an inventory control and reporting system, records descriptions of the articles of clothing but retains in memory only the invoice number, date, and cash total for each customer by means of a data input device, processor, printer, and scanner.\textsuperscript{124}

In dispute at trial was the proper interpretation of the term "inventory" in the patent claim.\textsuperscript{125} If inventory included articles of clothing and not only cash totals, then the Westview device would not infringe.\textsuperscript{126} At trial, the jury was presented evidence concerning the meaning of the term inventory, including: the patent specification, claim language and prosecution history, Markman's own testimony, the testimony of a patent expert, and the testimony of the president of Westview.\textsuperscript{127} At the conclusion of Markman's case-in-chief, Westview moved for judgment as a matter of law.\textsuperscript{128} The trial judge deferred ruling on the motion.\textsuperscript{129} At the close of the evidence, the court charged the jury on infringement, instructing the jury to determine the meaning of the claims and then to compare the claims with the Westview device to determine whether there was infringement.\textsuperscript{130} The jury returned a verdict of infringement on two claims.\textsuperscript{131}

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.} at 970-71.
  \item \textsuperscript{121} \textit{Id.} at 971. The patented invention is designed to solve inventory-related problems of the dry-cleaning business: for example, the loss of clothing and the theft of proceeds by employees. \textit{Id.} at 971. To accomplish this, the patented invention monitors and reports the "status, location and throughput of inventory in an establishment" by means of a data input device, processor, printer, and scanner. \textit{Id.} at 971-72.
  \item \textsuperscript{122} \textit{Id.} at 972.
  \item \textsuperscript{123} \textit{Id.}
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Id.} at 975.
  \item \textsuperscript{126} \textit{Id.} at 973.
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.}
  \item \textsuperscript{129} \textit{Id.}
  \item \textsuperscript{130} \textit{Id.}
  \item \textsuperscript{131} \textit{Id.}
\end{itemize}
The court then granted Westview's deferred motion for judgment as a matter of law, finding that claim construction was a matter of law for the court. The court based its decision on the established notion that a "mere dispute concerning the meaning of a term does not itself create a genuine issue of material fact." The court held that "inventory" meant "articles of clothing" and, because it was undisputed that Westview's device was incapable of tracking articles of clothing, it did not infringe Markman's patent.

Markman appealed the court's grant of judgment as a matter of law to the Federal Circuit. Markman argued that the meaning of the claim language is a question of fact to be decided by the jury at trial, and that the jury verdict was "supported by substantial evidence." Thus, Markman asserted that the trial judge deprived him of his right to a jury by reinterpreting the claims merely because he disagreed with the jury's interpretation. Furthermore, Markman argued that the trial judge misinterpreted the term inventory to necessarily include articles of clothing.

The Federal Circuit, en banc, affirmed the district court's grant of judgment as a matter of law, with Judges Mayer and Rader concurring in the judgment and Judge Newman dissenting. The majority held that determining the meaning of claim language is an issue of law consistent with Supreme Court precedent and notwithstanding inconsistencies in prior Federal Circuit precedent. The majority based its decision on the "fundamental principle of American law that 'the construction of a written evidence is exclusively with the court,'" and on the need for consistency in the determination of the scope of a patentee's rights. Moreover, the majority held that the court may rely upon extrinsic evidence external to the patent and prosecution history, including expert and inventor testimony, dictionaries, and treatises, to determine the proper meaning of the claim language when the court is unfamiliar with the terminology of the art. This process, however, does not involve the crediting of evidence, the making of factual findings, or the clarifying of ambiguous language; thus

132. Id.
133. Markman III, 772 F. Supp. at 1536 (quoting Becton Dickerson & Co. v. C.R. Bard, Inc., 922 F.2d 792, 797 (Fed. Cir. 1990)).
134. Markman II, 52 F.3d at 973.
135. Id.
136. Id. at 974.
137. Id. at 973-74.
138. Id. at 974.
139. Id. at 970.
140. Id.
141. Id. at 978 (quoting Levy v. Gadsby, 7 U.S. (3 Cranch) 180, 186 (1805) (Marshall, C.J.)).
142. Id.
143. Id. at 980.
the inquiry is not an issue of fact, but rather one of law. Consequently, the majority reviewed the record de novo, and affirmed the trial court's determination that the term inventory included articles of clothing.

Judge Mayer, in his concurrence, claimed that the majority "jettisons more than two hundred years of jurisprudence, and eviscerates the role of the jury preserved by the Seventh Amendment ... [and] marks a sea change in the course of patent law that is nothing short of bizarre." Judge Mayer argued that while the ultimate issue of claim scope is one of law, it is based upon "underlying factual issues." Such factual issues may need to be resolved by resorting to extrinsic evidence. Judge Mayer asserted that "[i]f this information clarifies the meaning of the claims and is uncontested, the judge may rule as a matter of law." However, if the claim scope is unclear even with extrinsic evidence, the resulting genuine factual dispute over the meaning of a term falls to the fact finder for resolution. Moreover, Judge Mayer argued that because an action for patent infringement requesting damages would have been heard in the law courts of England and because the determination of the meaning of a term in the claim language goes to a fundamental element of the substantive claim, the jury must resolve the underlying factual dispute.

Judge Newman, in dissent, also stated that when the meaning of claim terms is in dispute, the resolution is a question of fact that depends upon credibility, weight, and the probative value of conflicting evidence. This is an issue of fact for the jury, given the historical 200-year precedent of patent infringement jury trials in the United States. Moreover, Judge Newman argued that to allow an appellate court to review de novo such a determination results in less accurate decision making because the determination is the result of an evidentiary showing and not intellectual abstraction. Judge Rader, concurring, declined to address the question of whether claim interpretation is an issue of law or one of fact for a jury because the record at trial lacked substantial evidence to support the jury verdict. Therefore, Judge Rader opined that the grant of judgment as a matter of law was correct.

144. Id. at 981.
145. Id. at 981-82.
146. Id. at 989 (Mayer, J., concurring).
147. Id.
148. Id. at 991.
149. Id.
150. Id.
151. Id. at 992.
152. Markman II, 52 F.3d at 999-1000 (Newman, J., dissenting).
153. Id.
154. Id. at 1009.
155. Id. at 998-99 (Rader, J., concurring).
156. Id.
b. The Supreme Court Decision

In *Markman v. Westview Instruments, Inc.*, Justice Souter delivered the court's unanimous opinion. Justice Souter began by framing the issue quite narrowly. However, the holding appeared a bit more expansive stating: "We hold that the construction of a patent, including terms of art within its claim, is exclusively within the province of the court."

After briefly describing the nature of patent actions and the facts of *Markman*, the Court launched into its Seventh Amendment analysis. The Court noted that modern patent infringement actions descend from "infringement actions tried at law in the 18th century, and there is no dispute that infringement cases today must be tried to a jury." Thus, as to the first inquiry, the Court held that there is clearly a right to a jury in patent infringement actions.

(1) Characterizing the Issue: Construction of a Patent Claim

The second inquiry of the Court's seventh amendment jurisprudence was at issue in this case. The Court questioned "whether a particular issue occurring within a jury trial (here the construction of a patent claim) is itself necessarily a jury issue, the guarantee being essential to preserve the right to a jury's resolution of the ultimate dispute." The Court described this guarantee as depending upon "whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.'" The Court further stated that "'[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature.'

These guidelines have been more narrowly defined as referencing a "distinction between substance and procedure" and as "between is-
sues of fact and law." Interestingly, the Court did not look to these traditional distinctions to decide this issue but rather stated that the:

[S]ounder course, when available, is to classify a mongrel practice (like construing a term of art following receipt of evidence) by using the historical method, much as we do in characterizing the suits and actions within which they arise. Where there is no exact antecedent, the best hope lies in comparing the modern practice to earlier ones whose allocation to court or jury we do know[,] seeking the best analogy we can draw between an old and the new.\(^{168}\)

To characterize the historical analogue approach as more sound — especially when, as here, "the old practice provides no clear answer"\(^{169}\) — is peculiar given the Court’s difficulties in the past in reconstructing accurately an appropriate analogue to the cause of action.\(^{170}\) Reconstructing the treatment of specific issues within the cause of action as it existed in 1791 England was more difficult for the Court because the Court attempted to determine the closest 18th century analogue of modern claim construction even though claims were not a part of patent practice at that time, but became statutorily recognized in the United States in 1836.\(^{171}\)

Admittedly, drawing lines between substance and procedure or fact and law are also highly problematic and unpredictable.\(^{172}\) Neverthe-


\(^{168}\) Markman I, 517 U.S. at 378 (citations omitted).

\(^{169}\) Id. at 377.


\(^{171}\) Markman I, 517 U.S. at 379.

\(^{172}\) For problems inherent in distinguishing procedure from substance see CHARLES F. CHAMBERLAYNE, EVIDENCE § 191 (1911) ("The distinction between substantive and procedural law is artificial and illusory."); Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 YALE L.J. 333, 343, 352, 356 (1933) (explaining that the line between "substance" and "procedure" does not exist in a vacuum but rather must be drawn to better carry out the underlying purpose of making the distinction). The category in which to place statutes of limitations provides an excellent example of this quandary. The Court, in Sun Oil Co. v. Wortman, 486 U.S. 717 (1988), explained that such statutes can have different characterizations depending upon the context. Id. at 726. For example, for choice of law purposes, statutes of limitations are "procedural" and the forum state may apply its own statute of limitations even if applying another state’s "substantive" law. Id. at 727. However, for Erie purposes, the statute of limitations is considered "substantive." Id. The "substance-procedure" dichotomy is a function of the purpose of the context in which the characterization is made. Id. For choice of law purposes, the characterization is made to "delimit spheres of state legislative competence," whereas for Erie purposes, the characterization made is to establish uniformity between state and federal fora. Id. at 727. Thus, any given rule or law may be "procedural" in one context yet "substantive" in another. Id. For problems inherent in distin-
less, they have been relied upon over the years and provide useful tools for analyzing the rationale behind the allocation of a particular issue to the jury or judge. 173 Moreover, the distinction between fact and law is crucial to determining the standard of appellate review as well. 174 Blindly searching the historical cases for an analogous issue that was perchance submitted to a jury during the infant stages of jury patent practice in the late 1700s, 175 combined with the documented uncertainty of practitioners at that time, 176 merely reflects the "manufacture of a historical fiction." 177

The Markman Court proceeded to wade through numerous old cases, scholarly articles, and treatises in an attempt to determine distinguishing questions of fact from those of law see Baumgartner v. United States, 322 U.S. 665, 671 (1944) (noting the difficult nature of the distinction between questions of fact and questions of law); Martin Louis, Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, The Judge/Jury Question, and Procedural Discretion, 64 N.C. L. Rev. 993 (1986); James Thayer, "Law and Fact" in jury Trials, 4 Harv. L. Rev. 141 (1890); Stephen A. Weiner, The Civil jury Trial and the Law-Fact Distinction, 54 Cal. L. Rev. 1867 (1966).

173. For example, in Pullman-Standard v. Swint, 456 U.S. 273 (1982), the Court addressed the distinction between questions of law and fact in the context of a Title VII employment discrimination action. Id. at 287-88. The question was "whether the differential impact of the seniority system" of an employer "reflected an intent to discriminate on account of race" in violation of Title VII was a pure question of fact, subject to a clearly-erroneous standard of review rather than a question of law or a mixed question of law and fact. Id. Federal Rule of Civil Procedure 52(a) establishes the standards of review as a function of the nature of the issue, but provides no guidance with respect to distinguishing questions of law from questions of fact. Id. at 288. See also Fed. R. Civ. P. 52(a). The Court relied on precedent that had held that in other contexts, questions of intent had always been deemed a matter of pure fact. Pullman-Standard, 456 U.S. at 288 (relying on Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 534 (1979) (holding that the intent to discriminate is a factual finding); Comm'r v. Duberstein, 363 U.S. 278 (1960) (holding that the intent of the donor to establish a "gift" under the tax code is a factual finding)); and United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949) (holding that intent to restrain trade under anti-trust laws is a factual finding)). The Pullman-Standard Court distinguished a finding of intent, which is factual, from the use of evidence to support such a finding based upon the consequences of the defendant's actions. Id. at 288-89. For example, the substantive law may allow the introduction of discriminatory impact to help establish actual "intent," but the law is not satisfied based upon "a legal presumption . . . drawn from a factual showing of something less than actual motive." Id. at 289-90. Courts have relied upon legal presumptions over the years as these presumptions provide useful tools for analyzing the rationale behind the allocation of a particular issue to the jury or judge. See generally Miller v. Fenton, 474 U.S. 104, 114 (1985); United States v. Goodwin, 457 U.S. 368, 369-70 (1982); Sandstrom v. Montana, 442 U.S. 510, 523 (1979).


175. Markman I, 517 U.S. at 360.

176. Id. at 380-81.

whether juries routinely decided the closest analogue to claim construction: specification construction.\textsuperscript{178} The Court distinguished the role that the specification played historically from the role the claims play today, relying heavily upon the general proposition that judges customarily interpreted written documents.\textsuperscript{179} Accordingly, the Court found no persuasive authority indicating more than a possibility that juries historically interpreted terms of art in a specification.\textsuperscript{180} Consequently, the jury guarantee of the Seventh Amendment did not encompass the jury's construction of the claim.

The Court next turned to other indicators in order to allocate the issue between judge and jury.\textsuperscript{181} These indicators included "existing precedent and consider both the relative interpretative skills of judges and juries and the statutory policies . . . furthered by the allocation," specifically the need for uniformity in the construction of patent documents.\textsuperscript{182} These indicators do not involve the Court's Seventh Amendment precedent because the Court had already determined, based solely upon its historical analogue analysis, that there was insufficient evidence of common law practice to invoke a constitutional right to have a jury decide this issue.\textsuperscript{183}

Ultimately, the Court held that the issue would be determined by a judge.\textsuperscript{184} The Court found that although precedent provided no certain answer, judges are better suited to construct written documents, even when credibility determinations are at issue.\textsuperscript{185} This opinion was based upon the Court's expectation that:

\begin{quote}
[A]ny credibility determinations will be subsumed within the necessarily sophisticated analysis of the whole document, required by the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole. Thus, in these cases a jury's capabilities to evaluate demeanor, to sense the "mainsprings of human conduct," or to reflect community standards, are much less significant than a trained ability to evaluate the testimony in relation to the overall structure of the patent.\textsuperscript{186}
\end{quote}

The importance of uniformity in patent construction is another ground for allocating the determination to the judge.\textsuperscript{187} Uniformity

\textsuperscript{178} Markman I, 517 U.S. at 378-80.
\textsuperscript{179} Id. at 381-83.
\textsuperscript{180} Id. at 384.
\textsuperscript{181} Id.
\textsuperscript{182} Id. at 384, 390-91.
\textsuperscript{183} Id. at 383-84.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 388.
\textsuperscript{186} Id. at 389-90 (citations omitted).
\textsuperscript{187} Id. at 390.
is essential in providing the public with clearly defined limits of the patentee's rights.\textsuperscript{188}

(2) Unresolved Issues

Perhaps the most telling aspect of the Court's decision lies in the findings the Court deliberately chose not to make. Several times throughout the opinion, Justice Souter expressly stated issues that might be important but were not decided in this case.\textsuperscript{189} First, the Court noted that the "formulations of the historical test do not deal with the possibility of conflict between actual English common law practice and American assumptions about what that practice was, or between English and American practices at the relevant time."\textsuperscript{190} Next, relying fairly heavily on the general practice of judges construing terms in a written document, the Court explained that it need not consider "whether [the] conclusion that the Seventh Amendment does not require terms of art in patent claims to be submitted to the jury supports a similar result in other types of cases."\textsuperscript{191} Finally, the Court noted that:

Because we conclude that our precedent supports classifying the question as one for the court, we need not decide either the extent to which the Seventh Amendment can be said to crystallize a law/fact distinction,\textsuperscript{192} or whether post-1791 precedent classifying an issue as one of fact would trigger the protections of the Seventh Amendment if (unlike this case) there were no more specific reason for decision.\textsuperscript{193}

\textsuperscript{188} Id. The Court noted that while "issue preclusion could not be asserted against new and independent infringement defendants . . . treating interpretive issues as purely legal will promote (though it will not guarantee) intrajurisdictional certainty through application of \textit{stare decisis} on those questions not yet subject to interjurisdictional uniformity under the authority of the single appeals court." \textit{Id.} at 391 (first emphasis added) (alteration in original).

\textsuperscript{189} Id. at 376 n.3, 383 n.9, 384 n.10.

\textsuperscript{190} Id. at 376 n.3. Although an inquiry of American interpretation of English common law may affect Seventh Amendment analysis, the question of how American practices differ from English practice should not be a concern because the language of the Seventh Amendment was based upon English common law practices. \textit{United States v. Wonson}, 28 F. Cas. 745, 750 (C.C. Mass. 1812) (No. 16,750).

\textsuperscript{191} \textit{Markman I}, \textit{517 U.S.} at 383 n.9. The Court came to this conclusion, despite an observation of a late 18th century historian that "interpretation by local usage for example (today the plainest case of legitimate deviation from the normal standard) was still but making its way." \textit{Id.} at 383.

\textsuperscript{192} Id. at 384 n.10. This comment is startling because perhaps the most accepted role of the jury is to be the fact-finder in a case to which the right to jury attaches. \textit{See infra} Part III.B.1 (discussing precedent supporting the fundamental notion of the jury as fact-finder).

\textsuperscript{193} \textit{Markman I}, \textit{517 U.S.} at 384 n.10 (citations omitted). This comment reflects yet another interesting point. Although English common law practices would not have provided for a jury right, American practice since 1791, may
Interestingly, the following year, *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*\(^{194}\) was accepted by the Court on appeal from the Federal Circuit.\(^{195}\) The primary issue on appeal concerned the proper scope of the "doctrine of equivalents," that is, a judicially created doctrine which allows a finding of infringement when there are "insubstantial differences" between the patent and the allegedly infringing product.\(^{196}\) Related to this issue was the issue of whether the scope of the doctrine in a given case was for the judge or jury to decide.\(^{197}\) The Federal Circuit had determined that it was an issue for the jury.\(^{198}\) The Supreme Court declined to address the issue, as it was not necessary to its decision.\(^{199}\) In this manner, the Court left the issue as one for the jury, pursuant to the Federal Circuit decision, but expressly stated that it was not deciding that it would side with the Federal Circuit if it was presented with the issue.\(^{200}\)


Recall that in *Feltner*,\(^{201}\) the Court held that a right to jury attached to a copyright infringement claim seeking statutory damages.\(^{202}\) Also invoke a right to jury under the Seventh Amendment. On the other hand, the Court, at least on one occasion, has essentially allowed entrenched federal precedent that established a procedure detracting from the right to jury based upon a misunderstanding or ignorance of the English common law, to remain intact even after recognizing the error made. In *Dimick v. Scheidt*, 293 U.S. 474, 483 (1935), Justice Sutherland noted that Justice Story, in 1822, had cited no authority whatever for the conclusion that the Court had power to grant a new trial unless the plaintiff were willing to remit a portion of its award. *Id.* He remarked that:

> [T]he sole support for the decisions of this court and that of Justice Story, so far as they are pertinent to cases like that now in hand, must rest upon the practice of some of the English judges-a practice which has been condemned as opposed to the principles of the common law by every reasoned English decision . . . which we have been able to find.

*Id.* at 484. He further stated that if the question of remittitur was to be taken up again, the decision might well be decided differently. *Id.* However, because the doctrine "has been accepted as the law for more than a hundred years and uniformly applied in the federal courts . . . [it] would not be . . . disturbed." *Id.* at 484-85. Nevertheless, the *Dimick* Court refused to find additur constitutional by extending "doubtful precedent . . . by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." *Id.* at 485.

195. See *id*.
196. See *id.* at 21, 39.
197. See *id.* at 38.
200. *Id.* at 38-39.
201. 523 U.S. 340 (1998); *see also supra* Part II.A.2.
in question was whether Feltner had the right to have the jury assess the amount of statutory damages in an action historically brought in a court of law.\textsuperscript{203} The Court concluded that a right did exist, relying on a long history that “the jury are judges of the damages”\textsuperscript{204} and that this was consistent practice in copyright cases as well.\textsuperscript{205}

Columbia argued that the Court’s prior decision in \textit{Tull} demonstrated that a jury determination of damages was not necessary to uphold “the substance of the common-law right of trial by jury.”\textsuperscript{206} In \textit{Tull}, the Court “held that the Seventh Amendment grants a right to a jury trial on all issues relating to liability for civil penalties under the Clean Water Act, but then went on to decide that Congress could constitutionally authorize trial judges to assess the amount of the civil penalties.”\textsuperscript{207} However, the Court in \textit{Feltner} distinguished \textit{Tull}.\textsuperscript{208} In \textit{Tull}, there was no historical evidence that a jury must assess the amount of civil penalties to be paid to the government.\textsuperscript{209} Additionally, awarding such penalties was more analogous to sentencing in a criminal proceeding, a decision made by a judge.\textsuperscript{210} Here, however, “there is no similar analogy, and there is clear and direct historical evidence that juries, both as a general matter and in copyright cases, set the amount of damages awarded to a successful plaintiff.”\textsuperscript{211}

3. \textit{City of Monterey v. Del Monte Dunes of Monterey, Ltd.}

The Court in \textit{City of Monterey v. Del Monte Dunes of Monterey, Ltd.}\textsuperscript{212} after finding that Del Monte had a right to a jury trial generally, also had to determine whether the particular issues of liability were proper for jury determination.\textsuperscript{213} The Court, using the historical method, found that the determination of liability in a tort action for monetary damages was most often decided by a jury rather than a judge.\textsuperscript{214} Nevertheless, the Court explained that neither the historical method, nor existing precedent established a definitive answer and, thus, turned to considerations of process and function.\textsuperscript{215} However, unlike the result in \textit{Markman},\textsuperscript{216} the \textit{Del Monte Dunes} Court held that the questions

\begin{itemize}
\item \textsuperscript{203} \textit{Feltner}, 523 U.S. at 342.
\item \textsuperscript{204} \textit{Id.} at 353.
\item \textsuperscript{205} \textit{Id.} at 354.
\item \textsuperscript{206} \textit{Id.} (quoting Colgrave v. Battin, 413 U.S. 149, 157 (1973)).
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.} at 355.
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.}
\item \textsuperscript{211} \textit{Id.}
\item \textsuperscript{212} 526 U.S. 687 (1999).
\item \textsuperscript{213} \textit{Id.} at 718.
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{215} \textit{Id.} at 718-20.
\item \textsuperscript{216} \textit{See supra} notes 178-200 and accompanying text; \textit{see also} \textit{Markman I}, 517 U.S. 370, 391 (1996) (holding that patent claim construction is an issue for the judge).
\end{itemize}
presented were predominantly factual issues and were therefore proper for jury consideration. 217

The Court then divided the liability issue into two questions. 218 First, on the question of eminent domain, the Court held that the conclusion that a landowner had been deprived of "all economically viable use of his property" is a factual determination to be reserved for the jury. 219 The Court arrived at this holding because regulatory takings cases often involve an assessment of a particular set of facts in light of the economic impact and purposes of the government's actions. 220 Under the Seventh Amendment, a jury is the final arbiter of the ultimate dispute in eminent domain actions because of the case-specific nature of the facts and the necessity to make specific inquiries in order to ensure just compensation to the landowner. 221

The resolution of the second question regarding "whether a land-use decision substantially advances legitimate public interests within the meaning of [the Supreme Court's] regulatory takings doctrine" was less clear to the Court. 222 This question was more "difficult," the Court opined, because the question "mixed" both factual and legal components. 223 However, the trial court limited this "mixed" question to a factual determination by asking the jury "whether, [considering all of the circumstances], the city's decision to reject a particular development plan bore a reasonable relationship to its proffered justifications." 224 The Supreme Court upheld the submission of this question to the jury because the question was "narrow [and] fact-bound." 225

The Court determined that while there was no constitutional right to a jury trial in eminent domain actions, 226 the jury was the better deliberator of fact-based questions in those actions. 227 Recall that in Markman, 228 the Court refrained from deciding whether the Seventh Amendment crystallized a law/fact distinction. 229 It appears that once the historical inquiry fails to show that a jury must determine the issue, the Court finds there is no constitutional right to jury and turns instead to functional considerations in order to allocate the decision, although the decision does not rise to a constitutional right.

218. Id.
219. Id.
220. Id. at 720.
221. Id. at 720-21 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
222. Id. at 721.
223. Del Monte Dunes, 526 U.S. at 721.
224. Id.
225. Id.
226. Id. at 711.
227. Id. at 720.
229. Id. at 378; see also supra note 199 and accompanying text.
As in Markman, the Del Monte Dunes Court circumscribed its decision, noting several limitations on its holding.230 The Court stated that it was not addressing the jury's role in an ordinary inverse condemnation suit, in a temporary regulatory takings claim, nor in deciding whether a zoning decision substantially advances legitimate governmental interests.231 Here, the narrow questions disputed by the parties, and properly submitted to the jury, were "whether the government had denied a constitutional right in acting outside the bounds of its authority and, if so, the extent of any resulting damages."232

Markman, Feltner, and Del Monte Dunes demonstrate the Court's reluctance to find a Seventh Amendment right to have a jury decide specific issues or incidents of the cause of action to which a jury right attaches.233 In two of the three cases, a Seventh Amendment right did not attach.234 This reluctance is further demonstrated by the Court's Reexamination Clause precedent, where the Court allows rather vigorous review of jury decisions.235

C. The Reexamination Clause

1. Gasperini v. Center for Humanities, Inc.

Gasperini v. Center for Humanities, Inc.,236 the second decision of the Supreme Court's 1996 term dealing with the right to trial by jury,237 involved interpretation of the Reexamination Clause of the Seventh Amendment: the scope of review of factual issues tried to a jury.238 In Gasperini, a journalist brought a diversity suit seeking damages for loss of 300 photographic transparencies under New York state law.239 New York state law empowered appellate courts to review the amount awarded by juries "and to order new trials when the jury's award 'deviates materially from what would be reasonable compensation.'"240 This standard was designed by the state to influence the outcome of a jury's award of damages by tightening the range of tolerable awards.241 This conflicted with the more traditional standard, applied in New York prior to 1986 as well as in federal courts, under which

231. Id. at 722.
232. Id. at 722.
233. See supra Part II.B.1-3.
234. See supra notes 160, 226-27 and accompanying text.
235. See infra Part II.C.
237. Id. at 418. See also generally Markman I, 517 U.S. 370 (1996). Markman I was the first decision dealing with a right to jury decided during the 1996 term. Id.
238. Gasperini, 518 U.S. at 418.
239. Id. at 419.
240. Id. at 418 (quoting N.Y. C.P.L.R. § 5501(c) (McKinney 1995)).
241. Id. at 419.
trial judges "would not disturb an award unless the amount was so exorbitant that it 'shocked the conscience of the court.'" 242 Ordinarily, "appellate judges . . . deferred to the trial court's judgment," overturning the judge's decision only upon a finding of abuse of discretion. 243

The application of the New York standard involves two separate inquiries: first, whether the state law should govern in accordance with *Erie Railroad Co. v. Tompkins*, 244 and, if so, if application of the standard would violate the Seventh Amendment right to jury that applies to all federal court cases. 245 The Court recognized that the state law involved both substantive and procedural issues: controlling the amount that a plaintiff can be awarded (substantive); and assigning the decision-making authority to the state appellate courts (procedural). 246 The procedural component of this law would be contrary to federal allocation of trial and appellate court functions, "an allocation weighted by the Seventh Amendment." 247

The Court analogized the standard imposed by the state law to a state statutory cap on damages, which all parties agreed would supply substantive law for *Erie* purposes. 248 The Court noted that while it had not addressed the issue, the "courts of appeal have held that district court application of state statutory caps in diversity cases, post-verdict, does not violate the Seventh Amendment." 249 The only difference between the two is that the cap established here is set by case law rather than statute and, thus, is manifestly substantive such that the "twin aims of the *Erie* rule" are implicated. 250

But does application of the state law violate the Seventh Amendment by shifting the fact-finding responsibility from the jury to the appellate court? The Court compared its decision in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.* 251 to the situation at hand, noting that the appellate court failed to account for an "'essential characteristic of the [federal court] system.'" 252 In *Byrd*, the Court explained that countervailing federal interests must be balanced against the state in-

242. *Id.* at 422 (quoting Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1012-13 (2d Cir. 1995)).
243. *Id.*
244. 304 U.S. 64 (1938); see also *Gasperini*, 518 U.S. at 426.
246. *Id.*
247. *Id.*
248. *Id.* at 428.
249. *Id.* at 429 n.9 (citing Davis v. Omitowoju, 883 F.2d 1155, 1161-65 (3d Cir. 1989); Boyd v. Bulafa, 877 F.2d 1191, 1196 (4th Cir. 1989)).
250. See *id.* at 428 (stating that "the twin aims of the *Erie* rule [are] discouragement of forum-shopping and avoidance of inequitable administration of the laws").
terests in applying its laws. Based upon this balancing, the Byrd Court determined that although the state court denied the parties a jury determination of the factual issue involving the "sameness of the work of plaintiff and defendant's own employees," the distribution of "functions between judge and jury . . . under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury." Thus, the Court held that federal law would control in light of the strong federal interest demonstrated by the "trial by jury" clause. In Gasperini, a similar issue was raised, but it involved the Reexamination Clause.

The Gasperini Court did not expressly decide the scope of the Seventh Amendment. Rather, the Court reviewed prior case precedent, noting that several changes in appellate review standards since common law England 1791 have been accepted by the courts. For example, although once deemed incompatible with the Seventh Amendment, appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is now allowed by circuit courts under an abuse of discretion standard. The Court noted that it approved of these decisions because such control is "necessary and proper to the fair administration of justice." The determination of whether an upper limit "has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law" and thus reconcilable with the Seventh Amendment.

However, the majority was unwilling to go so far as to disrupt the allocation of power between the trial and appellate judges by allowing the appellate court to apply the "deviates materially" standard as dictated by the state law, instead of an "abuse of discretion" standard. Instead, the Court held that the district judge should determine whether the jury's verdict is within the confines set by the state law, subject to review by the appeals court under an abuse of discretion standard.

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253. See id. at 431-32 (citing Byrd, 356 U.S. at 537-38).
254. Id. at 432 n.13 (discussing Byrd).
255. Byrd, 356 U.S. at 537 (citing Jacob v. New York, 315 U.S. 752 (1942)).
256. See id. at 538; see also Gasperini, 518 U.S. at 432.
257. Gasperini, 518 U.S. at 432.
258. Id. at 434.
259. Id. at 436 n.20.
260. Id. at 434-35.
261. Id. at 435.
262. Id. (citing Dagnello v. Long Island R.R. Co., 289 F.2d 797, 806 (2d Cir. 1961)). The Court noted that this alteration to the 1791 practice at common law is consistent with other changes made to common law practice over time, such as the current six-member jury, new trials restricted to determination of damages, motions for judgment as a matter of law determined after a jury's verdict, and issue preclusion without mutuality of parties. Gasperini, 518 U.S. at 436 n.20.
263. Id. at 438-39.
standard.\textsuperscript{264} In this manner, the state and federal interests are preserved.

This result potentially violates the Seventh Amendment in two ways. First, it allows appellate review of a trial court's refusal to set aside a jury's verdict using an abuse of discretion standard.\textsuperscript{265} Second, the result allows the trial judge to review the jury findings under a "deviates materially" standard.\textsuperscript{266}

With respect to the first possible violation, Justice Scalia argued in his dissenting opinion that under common law, appeals courts could not review trial courts' refusals to set aside a jury verdict.\textsuperscript{267} "[I]t is not possible to review such a claim without engaging in a 'reexam[ina]tion' of the 'facts tried by the jury,'"\textsuperscript{268} Justice Scalia argued. Scalia noted that granting a new trial under this state law requires a two-step process.\textsuperscript{269} The reviewing court must: (1) "determine the range it regards as reasonable" and (2) "determine whether the particular jury award deviates materially from that range."\textsuperscript{270}

The first step in this process requires the reviewing court to reexamine facts decided by the jury, namely the amount of damages based on the evidence presented.\textsuperscript{271} Scalia noted that:

\begin{quote}
[T]he sort of "legal error" involved here is the imposition of legal consequences (in this case, damages) in light of facts that, under the law, may not warrant them. To suggest that every fact may be reviewed, because what may ensue from an erroneous factual determination is a "legal error," is to destroy the notion that there is a factfinding function reserved to the jury.\textsuperscript{272}
\end{quote}

This is precisely that to which the Anti-Federalists objected. As Justice Story explained in 1812: "[O]ne of the most powerful objections urged against [the Constitution prior to adoption] was that [the authority granted to the court] . . . would enable that court, with or without a new jury, to reexamine the whole facts, which had been settled by a previous jury."\textsuperscript{273} Thus, the appellate court was limited to procedures available under the common law for reexamination of

\textsuperscript{264} Id. at 438.
\textsuperscript{265} Id. at 448-49 (Scalia, J., dissenting).
\textsuperscript{266} Id. at 450.
\textsuperscript{267} Id. at 461.
\textsuperscript{268} \textit{Gasperini}, 518 U.S. at 461 (quoting Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494 (1934)).
\textsuperscript{269} Id. at 449.
\textsuperscript{270} Id. (quoting Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1013 (2d Cir. 1995)).
\textsuperscript{271} Id. at 450; \textit{see also} Metro. R.R. Co. v. Moore, 121 U.S. 558, 574 (1887) (holding that the issue of excessive damages is a question of fact).
\textsuperscript{272} \textit{Gasperini}, 518 U.S. at 464 n.10.
\textsuperscript{273} United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750).
facts. The common law allowed review only on writ of error regarding questions of law. With respect to the second possible violation, the majority did not independently decide whether review by the trial judge of the jury’s verdict under a “deviates materially” standard was available at common law, and thus, compatible with the Seventh Amendment. Instead, the majority relied on two federal circuit court opinions for the proposition that application of a prescribed statutory cap on damages to limit a jury award is not violative of the Seventh Amendment, without discussing the differences between a statutorily defined cap and a cap defined as a function of the standard of judicial review.

In Davis v. Omitowoju, the Third Circuit analyzed the Seventh Amendment constraints governing the reduction of a jury verdict based upon a state statute setting an upper limit of $250,000 for damages in medical malpractice cases. The plaintiff argued that the judicial reduction of the jury verdict to the legislative limit violated the Reexamination Clause. The court, noting the paucity of precedent to govern this issue, discussed two relevant Supreme Court cases, Dimick v. Schiedt and Tull v. United States, although neither case was dispositive of the issue. The court examined the holding in Tull, which asserted that a civil penalty does not need to be decided by a jury. It then distinguished this holding with the issue presented in Davis: whether, once a remedy determination has been submitted to a jury, the jury’s remedial authority can be limited by legislation.

The Davis court based its holding that legislation may limit a jury’s determination, after the fact, upon two different rationales. First, the court explained that, while the jury is a fact-finder and a court may

274. Gasperini, 518 U.S. at 452 (Scalia, J., dissenting).
275. Id.
276. See id. at 449-50.
277. Id. at 429 n.9, 433 (relying on the Third and Fourth Circuits).
278. 883 F.2d 1155 (3d Cir. 1989). The Fourth Circuit analysis in Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) held that the reduction of a jury verdict to the legislative cap governing in malpractice actions is a matter of law and thus does not violate the Seventh Amendment. The holding was quite abbreviated as compared to that of the Third Circuit. Id.
279. Davis, 883 F.2d at 1157.
280. Id.
281. 293 U.S. 474 (1935) (holding that the practice of additur violated the Seventh Amendment, but upholding prior federal court precedent allowing remittitur despite the fact that this practice was disfavored by the English common law). Consistent with the notion that a remittitur was disfavored by the common law, the Court held that when imposing a remittitur, a court must allow the party the option of a new trial under Seventh Amendment principles. Kennon v. Gilmore, 131 U.S. 22, 29-30 (1889), discussed in Hetzel v. Prince William County, 523 U.S. 208, 211 (1998).
283. Davis, 883 F.2d at 1159-60.
284. Id. at 1160.
285. Id.
not reexamine the facts decided by a jury, the legislative limit established by statute is a matter of law.\textsuperscript{286} If the legislature may abolish a cause of action altogether, it certainly has the power to limit its damages.\textsuperscript{287} Thus, a reduction of the jury award to the legislative limit is merely conforming the verdict to the substantive law of the state.\textsuperscript{288}

The second rationale was based on a separation of powers argument and the underlying concern of judicial bias and tyranny that the Framers sought to avoid when establishing the Seventh Amendment.\textsuperscript{289} The court noted that the Reexamination Clause expressly limits the reexamination of facts tried by a jury by any court, stating that it understood the language of the Seventh Amendment to guarantee the "integrity of the judicial process" and to act as a check on the trial judge’s powers.\textsuperscript{290}

In \textit{Davis}, the district court judge did not reduce the jury’s damage verdict because of a reexamination of the verdict.\textsuperscript{291} Instead, the judge reduced the verdict to comply with legislation.\textsuperscript{292} The court did not read the second clause as a limitation on the exercise of legislative authority and, hence, found that the Seventh Amendment was not violated by the reduction of the verdict.\textsuperscript{293} In fact, the court noted that, had the jury been instructed as to the statutory cap, a Seventh Amendment issue would not have arisen.\textsuperscript{294}

Finally, the court reviewed several historical authorities in order to analyze the Framers’ intent in drafting the second clause.\textsuperscript{295} Each authority supported the proposition that the Framers were concerned with judicial bias and corruption, and designed the second clause to protect against an abuse of judicial power, not legislative power.\textsuperscript{296}

\begin{itemize}
\item \textsuperscript{286} \textit{Id.} at 1161-62.
\item \textsuperscript{287} \textit{Id.} at 1161 (discussing Boyd v. Bulala, 877 F.2d 1191, 1196 (4th Cir. 1989) and Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1331 (D. Md. 1989)).
\item \textsuperscript{288} \textit{See id.} at 1162.
\item \textsuperscript{289} \textit{Davis}, 883 F.2d at 1164.
\item \textsuperscript{290} \textit{Id.} at 1161-62. The court opined that, while the legislature is not completely free from Seventh Amendment restrictions, the second clause "does not restrict the power of the legislature as it was exercised in enacting the malpractice damage cap at issue . . . ." \textit{Id.} at 1162 n.11.
\item \textsuperscript{291} \textit{Id.} at 1162.
\item \textsuperscript{292} \textit{Id.}
\item \textsuperscript{293} \textit{Id.}
\item \textsuperscript{294} \textit{Davis}, 883 F.2d at 1163.
\item \textsuperscript{295} \textit{Id.} at 1163-65.
\item \textsuperscript{296} \textit{Id.} Among the authorities cited were: \textit{Blackstone’s Commentaries on the Law}, 689-90 (B. Gavit ed., 1941); \textit{Henry Hallam, The Constitutional History of England}, 139 (1847); \textit{The Federalist No. 83}, at 563 (Alexander Hamilton) (J. Cooke ed., 1961); Henderson, supra note 2, at 293; Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), in 5 \textit{Kurland & Lerner, The Founder’s Constitution} 364 (1986); \textit{John Phillip Reid, Constitutional History of the American Revolution, The Authority of Rights} 51 (1986).
\end{itemize}
However, the Davis court's second rationale fails in the case of Gasperini, which involved a legislative grant of authority to the courts to establish the statutory cap based upon a "deviates materially" standard.\textsuperscript{297} In Gasperini, the district court judge did reduce the jury's damage verdict by an act of reexamination, followed by an independent finding of a verdict for a different amount.\textsuperscript{298}

2. Cooper Industries, Inc. v. Leatherman Tool Group, Inc.

The most recent Supreme Court decision to address the scope of the reexamination of a civil jury decision is Cooper Industries, Inc. v. Leatherman Tool Group, Inc.\textsuperscript{299} In Cooper, the plaintiff asserted trade-dress infringement, unfair competition, and false advertising claims, and requested punitive damages.\textsuperscript{300} The jury returned its verdict, awarding $50,000 in compensatory damages and $4.5 million in punitive damages.\textsuperscript{301} The trial court rejected constitutional arguments that the punitive damages were "grossly excessive," and the defendant appealed.\textsuperscript{302} The appellate court affirmed the punitive damage award, finding that the trial court "did not abuse its discretion in declining to reduce the amount of punitive damages."\textsuperscript{303}

At the Supreme Court level, the Court was asked to decide whether the appellate court used the correct standard of review.\textsuperscript{304} The Court held that "the constitutional issue merits de novo review."\textsuperscript{305} Such review does not implicate the Seventh Amendment because "the level of punitive damages is not really a 'fact' 'tried' by the jury,"\textsuperscript{306} but is rather "a constitutional standard [applied] to the facts of a particular case."\textsuperscript{307} The Court noted that its decision in Gasperini, which held that the appropriate appellate standard of review was abuse of discretion, was consistent, as that case involved the review of compensatory damages — not punitive damages.\textsuperscript{308} Furthermore, although the amount of punitive damages is generally left to the discretion of the jury, such precedent does not mean "that the amount of punitive damages is left to the discretion of the jury."\textsuperscript{309}

\textsuperscript{298} See id. at 420. Justice Scalia expressly stated that he did not consider the reexamination issue because he rejected the decision on other grounds, namely that altering the trial judge review standard to "deviates materially" so disrupts the federal judge-jury relationship that the state law should not apply. Id. at 463 (Scalia, J., dissenting).
\textsuperscript{299} 532 U.S. 424 (2001).
\textsuperscript{300} See id. at 428.
\textsuperscript{301} Id. at 429.
\textsuperscript{302} Id.
\textsuperscript{303} Id. at 431 (emphasis added).
\textsuperscript{304} Id.
\textsuperscript{305} Id.
\textsuperscript{306} Cooper, 532 U.S. at 437.
\textsuperscript{307} Id. at 435 (quoting United States v. Bajakajian, 524 U.S. 321, 336-37 (1998)).
\textsuperscript{308} See id. at 437.
damages imposed by the jury is itself a ‘fact’ within the meaning of the Seventh Amendment’s Reexamination Clause.”

The Court again imposed certain limits on its holding, stating that it was expressing no opinion on the question of whether Gasperini would govern “if a State were to adopt a scheme that tied the award of punitive damages more tightly to the jury’s finding of compensatory damages.” Accordingly, it is clear that in the two most recent decisions concerning the Reexamination Clause, the Court is less protective of the right to jury and allows review of the jury verdict.

III. THE SUPREME COURT GIVETH AND THE SUPREME COURT TAKETH AWAY

A. The Supreme Court Giveth – Upholding the Basic Right to Jury Trial

The Seventh Amendment preserves to litigants the right to jury trial in suits at common law—not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

The jury’s role as a fact-finding body has been found so important and vital to this country’s jurisprudence that any limitation of the right to a jury trial “should be scrutinized with the utmost care.” Throughout history, the Court has safely guarded this basic right to the “preservation” of trial by jury in cases determining “legal” rights.

This trend is seen quite clearly in two lines of cases. One holds that the right extends beyond the common-law forms of action recognized in 1791 and is applicable to new causes of action created by Congress. The other line of cases stands for the proposition that “ex-

309. Id. at 437 n.11 (citing Gasperini, 518 U.S. at 432).  
310. Id. at 440 n.13.  
311. See supra notes 236-311 and accompanying text for a discussion of Gasperini and Cooper.  
315. See Curtis v. Loether, 415 U.S. 189, 193-94 (1974) (reviewing prior Supreme Court precedent and stating that “[w]hatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the
pansion of adequate legal remedies provided by . . . the Federal Rules necessarily affects the scope of equity."316

1. Statutory Causes of Action

Regarding statutory causes of action, as demonstrated above,317 the Court has been quite liberal in finding a right to jury trial over statutorily-created claims when Congress provides for judicial enforcement of the remedy provided.318 In fact, in Granfinanciera, S.A. v. Nordberg,319 the Court extended this view, and held that a person sued for fraudulent conveyance had a right to a jury, despite Congress’ designation of these actions as “core proceedings” adjudicated in Article I Courts.320 Additionally, in Curtis v. Loether,321 the Court held that a Seventh Amendment right to a jury trial applied to an action pursuant to “section 812 of the Civil Rights Act of 1968,322 [which] authorizes private plaintiffs to bring civil actions to redress violations of Title VIII, the fair housing provisions of the Act.”323

This trend is consistent with the recent Supreme Court cases of Teamsters Local No. 391 v. Terry,324 Feltner v. Columbia Pictures Television, Inc.,325 and City of Monterey v. Del Monte Dunes of Monterey, Inc.326 In each instance, the Court analyzed various historical analogues, but focused more emphasis on the characterization of the remedy.327 For example, in Curtis, the Court drew the analogue that “[a] damages action under the statute sounds basically in tort – the statute merely defines a new legal duty, and authorizes the courts to compensate a
plaintiff for the injury caused by the defendant's wrongful breach."\textsuperscript{328} This rather broad characterization would be satisfied by numerous statutory claims. In fact, this is the same characterization the Court made in \textit{Del Monte Dunes} when analyzing § 1983 claims.\textsuperscript{329} The Court explained that such claims, independent of their specific characteristics, are sound in tort and are legal.\textsuperscript{330}

After characterizing the historical analogue, the issue of the right to jury is often resolved by classification of the remedy requested. When the remedy requested is monetary, the Court classifies the award as "legal," although noting that they "do not go so far as to say that any award of monetary relief must necessarily be 'legal' relief."\textsuperscript{331} However, the only example to which the Court has referred, without deciding expressly, is the possible characterization of the remedy available under title VII of the Civil Rights Act of 1964 in an action for back pay and reinstatement as "equitable."\textsuperscript{332}

2. Procedural Technicalities and Advancements

The second line of cases demonstrate that mere procedural technicalities, unique to the common law system and irrelevant after the merger of law and equity, as well as the procedural advancements made pursuant to the Federal Rules of Civil Procedure, will allow a finding of a right to a jury trial.\textsuperscript{333} For example, in \textit{Beacon Theatres v. Westover},\textsuperscript{334} the Court held that when legal and equitable claims are joined in one suit, the legal claims must be resolved first by a jury, so as to protect the party's right to jury trial over the legal issues.\textsuperscript{335} The rationale of the Court rested on a finding that "the justification for equity's deciding legal issues once it obtains jurisdiction, and refusing to dismiss a case, merely because a subsequent legal remedy becomes available, must be re-evaluated in the light of the liberal joinder [rules]."\textsuperscript{336}

Justice Stewart, in dissent, chastised the majority for expanding the right to jury in a "marked departure from long-settled principles."\textsuperscript{337} Justice Stewart argued that the majority:

[S]weeps away these basic principles as 'precedents decided under discarded procedures' . . . . [and] suggests that the Federal Rules of Civil Procedure have somehow worked an 'expansion of adequate legal remedies' so as to oust the Dis-

\textsuperscript{328} Curtis, 415 U.S. at 195.
\textsuperscript{329} See supra notes 88-94 and accompanying text.
\textsuperscript{330} Del Monte Dunes, 526 U.S. at 709.
\textsuperscript{331} Curtis, 415 U.S. at 196; see also Teamsters v. Terry, 494 U.S. 558 (1990).
\textsuperscript{332} Curtis, 415 U.S. at 196-97.
\textsuperscript{333} See infra notes 334-54 and accompanying text.
\textsuperscript{334} 359 U.S. 500 (1959).
\textsuperscript{335} Beacon Theatres, 359 U.S. at 508-09.
\textsuperscript{336} Id. at 509.
\textsuperscript{337} Id. at 517 (Stewart, J., dissenting).
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strict Courts of equitable jurisdiction, as well as deprive them of their traditional power to control their own dockets.\textsuperscript{338}

Three years later, the Court, continuing in the \textit{Beacon Theatres} tradition, decided \textit{Dairy Queen, Inc. v. Wood}.\textsuperscript{339} This case involved breach of contract and trademark infringement claims in which the plaintiff requested injunctive relief and an accounting to determine the amount owed and judgment for that amount.\textsuperscript{340} The defendant in \textit{Dairy Queen} argued that the entire action was purely equitable according to the equitable relief sought – injunction and an accounting – or, in the alternative, “if not purely equitable, whatever legal issues that were raised were ‘incidental’ to equitable issues, and, in either case, no right to trial by jury existed.”\textsuperscript{341} The Court disagreed and held that an “incidental” rule may not be applied in the federal courts after \textit{Beacon Theatres} because the right to trial by jury over all legal issues may be preserved under the liberal procedural rules.\textsuperscript{342} The Court further explained that:

The constitutional right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. The necessary prerequisite to the right to maintain a suit for an equitable accounting . . . is the absence of an adequate remedy at law . . . . In view of the powers given to [courts under the Federal Rules] to appoint special masters to assist the jury in those exceptional cases where legal issues are too complicated for the jury adequately to handle alone, the burden of such a showing is considerably increased [if not impossible].\textsuperscript{343}

Thus, the Court found another example of “procedural changes which remove the inadequacy of a remedy at law . . . sharp[ly] diminish[ing] the scope of traditional equitable remedies by making them unnecessary in many cases.”\textsuperscript{344}

\textit{Ross v. Bernhard}\textsuperscript{345} is a final example of the trend of procedural changes resulting in an “expansion” of legal remedies and an “expansion” of the basic right to trial by jury.\textsuperscript{346} The Court in \textit{Ross} held that a shareholder has a right to a jury on all legal issues presented in the shareholder’s derivative suit, regardless of whether such an action at common law was purely equitable, because the shareholder was with-

\textsuperscript{338} \textit{Id.} at 518 (quoting the majority opinion).
\textsuperscript{339} 369 U.S. 469 (1962).
\textsuperscript{340} \textit{Id.} at 475.
\textsuperscript{341} \textit{Id.} at 470.
\textsuperscript{342} \textit{Id.} at 479 n.19 (quoting \textit{Beacon Theatres}, 359 U.S. at 509).
\textsuperscript{343} \textit{Id.} at 477-78.
\textsuperscript{344} \textit{Id.} at 478 n.19.
\textsuperscript{345} 396 U.S. 531 (1970).
\textsuperscript{346} \textit{Id.} at 540.
out standing to sue in a court of law.\textsuperscript{347} The Court reasoned that the derivative action "has dual aspects: first, the stockholder's right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors or third parties on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial."\textsuperscript{348}

The shareholder's derivative suit is similar to the class action, in that prior to the merger of law and equity they were equitable devices.\textsuperscript{349} Due to the merger of law and equity, a class action plaintiff now has a right to a jury on all legal issues presented, as do shareholders, because "[a]fter adoption of the rules there is no longer any procedural obstacle to the assertion of legal rights before juries [in these instances] . . . ."\textsuperscript{350}

Justice Stewart, in dissent, argued that:

"Somehow the Amendment and the Rules magically interact to do what each separately was expressly intended not to do, namely, to enlarge the right to a jury trial in civil actions brought in the courts of the United States . . . . Today the Court tosses aside history, logic, and over 100 years of firm precedent . . . ."\textsuperscript{351}

Justice Stewart explained that a shareholder's suit at common law was not viewed as a suit to enforce a corporate cause of action, but rather "was conceived of as an equitable action to enforce the right of a beneficiary against his trustee."\textsuperscript{352} Unlike prior cases involving multiple claims:

"[A] derivative suit has always been conceived of as a single, unitary, equitable cause of action . . . . [T]here are for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and 'like chameleons [they] take their color from surrounding circumstances.' . . . If history is to be so cavalierly dismissed, the derivative suit can, of course, be artificially broken down into separable elements. But so then can any traditionally equitable cause of action, and the logic of the Court's position would lead to the virtual elimination of all equity jurisdiction."\textsuperscript{353}

Some twenty years later, the Supreme Court came close to proving Justice Stewart correct in \textit{Terry}, a case in which the Court used the

\begin{thebibliography}{9}
\bibitem{347} Id. at 532.
\bibitem{348} Id. at 538.
\bibitem{349} Id. at 542.
\bibitem{350} Id. at 541-42.
\bibitem{351} Id. at 543-44 (Stewart, J., dissenting) (citations omitted).
\bibitem{352} Id. at 545.
\bibitem{353} Id. at 549-50 (quoting J. Moore, \textit{Federal Practice} \S 38.11 [5] (2d ed. 1969)).
\end{thebibliography}
“dual nature” of an action against a Union to support finding a right to jury trial on all legal issues presented in that case.354

B. The Supreme Court Taketh Away – Whittling Away at the Right to Jury

Over fifty years ago, “Justice Black lamented 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.’”355 About a quarter century ago Justice Marshall cried “[t]oday, the erosion [of the Seventh Amendment guarantee] reaches bedrock.”356 Again, some twenty years ago, Justice Rehnquist exclaimed that the majority “reduces this valued right [to jury trial], which Blackstone praised as ‘the glory of the English law,’ to a mere ‘neutral’ factor . . . [and imposes a] wholesale abrogation of jury trials.”357 Moreover, only six years ago, Justice Scalia, continuing these observations of his predecessors, stated that “this is a bad day for the Constitution’s distinctive Article III courts in general, and for the role of the jury in those courts in particular.”358 In each instance, the Court had deprived parties of their Constitutional right to a jury, either under the guise that the issue involved was a mere procedural reform not essential to the right to trial by jury or by deciding that the court had a right to review the jury’s decision.

It is interesting to contrast the language of the Court when assessing the basic right to a trial by jury versus when addressing incidents of the right to jury or reexamination of the jury’s decision. In the first group of cases, the right to a jury trial is viewed in the highest regard:

The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence that is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.359

In contrast, in cases addressing incidents of the right to jury or reexamination of the jury’s decision, the Court plays down the significance of the jury, stating that “the presence or absence of a jury as fact finder is basically neutral . . . . [In fact,] many procedural devices developed since 1971 . . . have diminished the civil jury’s historic do-

354. See Teamsters Local No. 391 v. Terry, 494 U.S. 558 (1990); see also supra Part II.A.1.
main.” Furthermore, the Court asserted, “it is the substance of the right to jury trial that is preserved, not the incidental or collateral effects of common-law practice in 1791.”

Do the mere procedural devices introduced, or the incidents of the right to jury found not fundamental to the jury right, severely denigrate the right to jury contemplated by the Constitution? Is the characterization of an issue as legal or factual devoid of meaningful inquiry today and, thus, no longer a basis for defining the scope of a jury right? To determine the answers to these questions, one must review the devices or issues that involve the right to jury that have been held not to violate the Seventh Amendment. For example, the modern directed verdict, retrial limited to the question of damages, summary judgment, remittitur, nonmutual collateral estoppel, and appellate review of a trial court’s denial to set aside a jury’s verdict as excessive have all been upheld after Seventh Amendment challenge. Are these cases consistent with the cases preserving the basic right to jury under the common law?

1. The Jury as Fact Finder: The Essence of the Right to Jury Trial

At issue in Walker v. New Mexico & Southern Pacific Railroad Company was the power of the trial judge to render final judgment after a jury verdict when the specific findings of the jury were found by the judge to be inconsistent with its general verdict. The Court began by noting, with no citation to prior precedent, that the Seventh Amendment:

361. Id. at 345 (Rehnquist, J., dissenting).
362. See Galloway v. United States, 319 U.S. 372, 388-93 (1943). History and previous decisions support the notion that the Seventh Amendment was designed to protect the basic institution of the jury trial, not “the mass of procedural forms and details.” Id. at 392.
363. See Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497-98 (1931) (declining to follow the ancient rule where a verdict erroneous as to one issue but correct as to others must be set aside entirely).
364. See Fid. & Deposit Co. v. United States, 187 U.S. 315, 319-21 (1902) (holding that summary judgment does not deprive the defendant of the right to a jury trial because there is no issue of fact if summary judgment is granted).
366. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979) (holding that the use of defensive collateral estoppel does not violate the right to a jury trial).
367. See Gasterini, 518 U.S. at 436 (holding that the Seventh Amendment is not violated by appellate review of the trial court’s denial of a motion to set aside a verdict as excessive).
368. 165 U.S. 593 (1897).
369. Id. at 596.
The Seventh Amendment Right to Civil Jury Trial

[D]oes not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. So long as this substance of right is preserved, the procedure by which this result shall be reached is wholly within the discretion of the legislature . . . .

The argument attacking the constitutionality of such a power was based on the common law rule that the judge, while authorized to grant a new trial, could not overturn the general verdict in favor of a judgment consistent with the special interrogatories. The Court disagreed, reasoning that the answers to the special interrogatories comprised the factfinding of the jury. Thus, the Court found that issuing a judgment consistent with those findings did not tread upon the party's right to a jury trial because the party had only a right to have the jury decide the facts. A general verdict under these circumstances was an application of the law to the facts and within the authority of the judge to decide.

In 1920, the Supreme Court held that use of an "auditor" to initiate a factual investigation, examine the parties and witnesses, and file a report to the court for the limited purpose of "simplifying the issues for the jury," without making any final determination of the issues, did not violate the Seventh Amendment. The Court relied upon the same rationale as in Walker—that the Constitution "does not require that old forms of practice and procedure be retained . . . [but rather allows] the introduction of new methods for determining what facts are actually in issue [in order to make the court] . . . an efficient instrument in the administration of justice." The right to jury is not obstructed so long as the jury may make its final determination of the facts without interference. Thus, despite an opinion formed by the auditor on the facts and items in dispute that may "be treated, at most, as prima facie evidence . . . . The parties will remain free to call, ex-

370. Id. (emphasis added).
371. Id. at 597-98.
372. Id. at 597.
373. Id. at 598.
375. In re Peterson, 253 U.S. 300, 304 (1920) (quoting Peterson v. Davison, 254 F. 625, 629 (S.D.N.Y. 1918)). The use of an auditor is similar to the use of a special master.
376. Id. at 309-10 (citing Walker, 165 U.S. at 596).
377. Id. at 310.
amine, and cross-examine witnesses . . . [and thus] [n]o incident of the jury trial is modified or taken away . . . .”

2. Mere Procedural Incidents

The *Slocum v. New York Life Insurance Co.* case is one of the few cases in which a “procedural” incident to the right to jury was found unconstitutional by the Court. The issue was whether a court could overrule a jury verdict and enter judgment in the defendant’s favor. Justice Van Devanter reasoned that at common law, the court could have ordered a new trial on the grounds that the plaintiff failed to present sufficient evidence, but could not enter judgment in defendant’s favor. Because a new trial was viewed as qualitatively different from the entry of a judgment for the defendant, the Court found that judgment notwithstanding the verdict was unconstitutional.

Twenty years later, in *Baltimore & Carolina Line, Inc. v. Redman*, a case almost identical to *Slocum*, the Court “virtually” overruled *Slocum*. The *Redman* court held that the Seventh Amendment is not violated if the trial court reverses a jury verdict and enters judgment in defendant’s favor, as long as it reserves its ruling on the defendant’s motion for a directed verdict based on the asserted insufficiency of the evidence to support a verdict for the plaintiff. Because the sufficiency of the evidence is deemed a matter of law for the court, the verdict for plaintiff by the jury “was taken pending the court’s rulings on the motions and subject to those rulings.” This distinction was considered significant by Justice Van Devanter (the same Justice who authored *Slocum*) because reserving questions of law arising during a trial by jury and taking verdicts subject to those rulings were well-established at common law. The rationale for such authority was that it provided a better opportunity for considered rulings and made new trials less frequent.

The constitutionality of the modern directed verdict came under attack in *Galloway v. United States*. It was argued that at common law, courts could withhold cases from the jury or set aside the verdict for insufficiency of the evidence by two motions: the demurrer to the

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378. *Id.* at 311 (emphasis in original).
379. 228 U.S. 364 (1913).
380. *Id.* at 385.
381. *Id.* at 376.
382. *Id.* at 380.
383. *Id.* at 399. The plaintiff, at least, gets a second chance at a jury verdict.
385. *Id.* at 658-59.
386. *Id.*
387. *Id.* at 659.
388. *Id.* The authority to grant a new trial and direct a verdict for the “losing” party were also well-established at common law. *Id.*
evidence or motion for new trial. The directed verdict today, however, differs from these two motions because the directed verdict involves a "higher standard[ ] of proof . . . and . . . different consequences follow" the court's ruling. The majority, consistent with the rationale that the Seventh Amendment does "not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing," held that the modern-day directed verdict does not offend the right to trial by jury. The majority relied on the recognition that the rules of the common law were not "crystallized in a fixed and immutable system . . . [but] were constantly changing and developing during the late eighteenth and early nineteenth centuries."

The Court then cited to cases and commentary from England and the United States, illuminating the constant development of the nonsuit and demurrer to the evidence between 1779 and 1828. It is unclear why this is even relevant, as the relevant inquiry is English law in 1791. Moreover, the Court explained that "the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes." From these propositions the Court determined that the "logical conclusion . . . is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

Next, the majority turned from the historical approach, because it had determined that there was no Constitutional requirement that the specifics be "preserved," and instead looked to functional considerations to decide the question presented. This technique is similar to that recently used in Markman and Del Monte Dunes. Under the common law approach, the moving party was required to concede the full scope of the opponent's evidence and to admit that they have no case if the opponent's case is found legally sufficient. In other words, if the demurrer was granted, the judge entered judgment for the moving party, and if it was denied, the judge entered judgment for

391. Id.
392. Id.
393. Id.
394. Id. at 392.
395. Id. at 391.
396. Galloway, 319 U.S. at 391 n.23.
397. Id. at 392 (citing Henry Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465 (1913)).
398. Id.
399. See id. at 394-95.
400. See supra notes 166-70, 226-35 and accompanying text.
the nonmoving party.\textsuperscript{401} Today, of course, if the directed verdict is
denied or reserved, the case is presented to the jury. The majority in
\textit{Galloway} reasoned that the directed verdict provides for more deci­sions
by the jury when the motions are denied and, therefore, upheld
the directed verdict.\textsuperscript{402} However, as the dissent pointed out, few par­ties brought demurrers because of their draconian nature, and as a
result, there were more cases decided by juries under the common law
approach.\textsuperscript{403}

Additionally, the majority allowed a less strict standard of review,
stating that standards:

\begin{quote}
[C]annot be framed wholesale for the great variety of situa­tions in respect to which the question arises . . . . It hardly
affords help to insist upon “substantial evidence” rather than
“some evidence” or “any evidence” . . . . The matter is essen­tially one to be worked out in particular situations . . . [T]he
essential requirement 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.\textsuperscript{404}
\end{quote}

The dissent took exception to this explanation because the “sub­stantial evidence” standard “permit[s] directed verdicts even though
there [is] far more evidence in the case than a plaintiff would have
needed to withstand a demurrer.”\textsuperscript{405} Initially, federal courts allowed
the case to go to a jury unless there was “no evidence” to support the
nonmoving party’s case.\textsuperscript{406} Soon it was declared that “some evidence”
was not enough, and that “there must be evidence sufficiently persua­sive to the judge so that he thinks ‘a jury can properly proceed.’”\textsuperscript{407}
Clearly, although these are mere terms to be applied, they set differ­ent standards, and the current rule allows for the granting of more
directed verdicts, resulting in less jury decisions. As the dissent ex­plained: “Either the judge or the jury must decide facts, and to the
extent that [the judge] take[s] this responsibility, we lessen the jury
function.”\textsuperscript{408}

Another “procedural” issue addressed by the Supreme Court arose in
\textit{Gasoline Products, Co. v. Champlin Refining Co.}\textsuperscript{409} In \textit{Gasoline Products},
the Court held that setting aside a verdict in part and ordering a re-

\begin{footnotes}
402. Id.
403. Id. at 402-03 (Black, J., dissenting).
404. Id. at 395.
405. Id. at 403.
406. Id. at 403-04.
407. Id. at 404 (citing Schuylkill & Dauphin Improvement Co. v. Munson, 81
U.S. 442, 448 (1871)).
408. Id. at 407.
409. 283 U.S. 494 (1931).
\end{footnotes}
trial of damages alone did not violate the Seventh Amendment. It was undisputed that such a procedure was unavailable at common law. At common law, if a verdict was deemed erroneous with respect to any issue, an entire new trial was held. The Court, nevertheless, found this to be merely a form of procedure that need not be retained as it was under the common law.

_Dimick v. Schiedt_ was the second rare instance in which the Court disallowed a "procedural" incident, additur, as volatile of the Seventh Amendment. The Court distinguished the accepted practice of remittitur by explaining that:

> Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict . . . . But where the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict.

The Court found it necessary to distinguish the two procedures in order to avoid extending doubtful precedent upholding remittitur to the practice of additur. Perhaps the Court would have fared better if it recognized the error in its precedent allowing remittitur and found both practices in violation of the Seventh Amendment.

Justice Stone, in his dissent, focused on the popular refrain that the Seventh Amendment has always been construed to "preserve the essentials of the jury trial" in actions at law, but has never been construed "to perpetuate in changeless form the _minutiae_ of trial practice as it existed in the English courts in 1791." In analyzing the historical guides, Justice Stone reasoned that:

> [T]he common law was something more than a miscellaneous collection of precedents. It was a system, then a growth of some five centuries, to guide judicial decision. One of its principles, certainly as important as any other, and that which assured the possibility of the continuing vitality and usefulness of the system, was its capacity for growth and development, and its adaptability to every new situation . . . .

. . . . If this Court could thus, in conformity to common law, substitute a new rule for an old one because it was more con-

410. _Id._ at 499.
411. _See id._ at 498.
412. _Id._ at 497.
413. _Id._ at 498 ("It is the Constitution which we are to interpret; and the Constitution is concerned, not with form, but with substance.").
414. 293 U.S. 474 (1935).
415. _Id._ at 486.
416. _Id._ at 486.
417. _Id._ at 485.
418. _Id._ at 490 (Stone, J., dissenting) (emphasis added).
sonant with modern conditions, it would seem that no vio-
rence would be done to the common law by extending
the principle of the remittitur to the case where the verdict is
inadequate, although the common law had made no rule on
the subject in 1791.\footnote{419}

The majority responded that although the common law is flexible:

\textit{[H]ere, we are dealing with a constitutional provision which}
\textit{has in effect adopted the rules of the common law, in respect}
of trial by jury, as these rules existed in 1791. To effectuate
any change in these rules is not to deal with the common
law, qua common law, but to alter the Constitution.}\footnote{420}

Recently, the Court in \textit{Hetzel v. Prince William County}\footnote{421} circum-
scribed the ability of courts to allow remittitur.\footnote{422} The \textit{Hetzel}
Court held that the Seventh Amendment requires that a judge allow the
plaintiff the option of a new trial when imposing a remittitur.\footnote{423}

3. The Definition of “Jury”

Aside from these “procedural” incidents, the actual definition of
the “jury” has been challenged. Specifically, in \textit{Colgrove v. Battin},\footnote{424} the
Court determined that reducing the size of the civil jury from
twelve to six persons did not violate the Seventh Amendment.\footnote{425} The
dissent warned that the reduction in jury size is not “some minor tink-
ering with the role of the civil jury, but [involves] its wholesale aboli-
tion and replacement with a different institution which functions
differently, produces different results, and was wholly unknown to the
Framers of the Seventh Amendment.”\footnote{426} Nevertheless, the majority
argued that on its face, the language of the Seventh Amendment “is
not directed to jury characteristics, such as size, but rather defines the
kind of cases for which jury trial is preserved, namely ‘suits at common
law.’”\footnote{427} Because the state practices varied so widely as to the cases in
which civil jury trial was provided, the proponents were left resorting
to the general words “suits at common law.”\footnote{428} This reasoning, how-
ever, does not explain what the Framers had in mind by the term
“jury.” As the dissent argued: “To the extent that anything at all can
be inferred from the rejection of these arguments [that state practices
differed], it follows . . . that the Framers intended to override state

\footnotesize{419. \textit{Id.} at 495-96.}
\footnotesize{420. \textit{Dimick,} 293 U.S. at 487.}
\footnotesize{421. 523 U.S. 208 (1998).}
\footnotesize{422. \textit{Id.} at 211.}
\footnotesize{423. \textit{Id.}}
\footnotesize{424. 413 U.S. 149 (1973).}
\footnotesize{425. \textit{Id.} at 160.}
\footnotesize{426. \textit{Id.} at 166-67 (Marshall, J., dissenting).}
\footnotesize{427. \textit{Id.} at 152 (quoting U.S. CONST. Amend. VII).}
\footnotesize{428. \textit{Id.} at 153-55.}
differences as to both the cases in which a jury right would attach and
the characteristics of the jury itself. 429

Further, as there was little debate over the use of the term "jury,"
one could argue that even when a dispute arose regarding whether a
right to jury trial attached, all parties would agree to the nature of the
jury. 430

To further support its decision, the majority in Colgrove analyzed
whether the size of a jury was necessary to maintain the essence of the
right to a jury trial. 431 The Court cited numerous studies conducted
to determine the impact of six versus twelve member juries and con­
cluded that, because there was no significant difference between ver­
dicts of the different-sized juries, a jury of six satisfied the Seventh
Amendment. 432 The majority reasoned that the only jury require­
ment is to have enough people, who represent a cross-section of the
community, to engage in deliberation. 433 The dissent found an inher­
en problem with this analysis:

[T]he composition of the jury itself is a matter of arbitrary, a
priori definition. As Mr. Justice Harlan argued, "[t]he right
to a trial by jury . . . has no enduring meaning apart from
historical form." It is senseless then to say that a panel of six
constitutes a "jury" without first defining what one means by
a jury, and that initial definition must, in the nature of
things, be arbitrary . . . .
Since some definition of "jury" must be chosen, [we should]
rely on the fixed bounds of history which the Framers, by
drafting the Seventh Amendment, meant to "preserve." 434

As far back as 1899, Justice Gray in Capital Traction Co. v. Hof 435
analyzed the history of the Seventh Amendment extensively and
explained:

"Trial by jury," in the primary and usual sense of the term at
the common law and in the American constitutions, is . . . a
trial by a jury of twelve men, in the presence and under the

429. Id. at 175 (Marshall, J., dissenting). The majority only noted the variety of
state practices, concerning when the right to jury applied, suggesting that
the state practices were uniform regarding what comprised the jury (twelve
persons). However, the dissent pointed out that other state practices re­
garding "[t]he manner of summoning jurors, their qualifications, of whom
they should consist, and the course of their proceedings" vary widely. Col­
grove, 413 U.S. at 174 (quoting 3 M. FARRAND, RECORDS OF FEDERAL CONVEN­
tION 101, 164 (1911)).
430. Id. at 173.
431. Id. at 157.
432. Id. at 159-60 and n.15.
433. Id. at 160 n.16.
434. Id. at 180, 182 (Marshall, J., dissenting) (alterations in original) (citations
omitted). This raises an interesting contrast between "essentialist" versus
"constructivist" approaches to defining what a jury is.
435. 174 U.S. 1 (1899).
superintendence of a judge empowered to instruct them on
the law and to advise them on the facts . . . . This proposi-
tion has been so generally admitted, and so seldom con-
tested, that there has been little occasion for its distinct
assertion. . . .

. . .

The terms 'jury' and 'trial by jury' are, and for ages have
been, well known in the language of the law . . . . A jury for
the trial of a cause was a body of twelve men, described as
upright, well-qualified and lawful men, disinterested and
impartial, not of kin nor personal dependents of either of the
parties, having their homes within the jurisdictional limits of
the court, drawn and selected by officers free from all bias in
favor or against either party, duly empanelled under the di-
rection of a competent court, sworn to render a true verdict
according to the law and the evidence given them; who, after
hearing . . . the instructions of the court relative to the law
involved in the trial, and deliberating, when necessary, apart
from all extraneous influences, must return their unanimous
verdict upon the issue submitted to them. 436

The majority approach in Colgrove is thus unusable. How does one
determine how many persons are enough? As Justice Marshall noted
in dissent, "[m]erely observing that a certain level of group represen-
tation is constitutionally required fails to tell us what that level is.
And, more significantly, it fails to tell us how to go about deciding
what that level is." 437

4. Reexamination of the Jury's Decision

Finally, the Supreme Court's treatment of the Reexamination
Clause of the Seventh Amendment further denigrates the right to
jury. As discussed above, the Court in Gasperini held for the first time
that an appellate court could review the trial court's denial to set aside
a jury's verdict as excessive, 438 over the vigorous dissent of Justice
Scalia. 439 Also, the Court found that a trial judge could review the
findings of the jury under the standard provided by state statutes. 440
Thus, pursuant to Gasperini, a trial judge in a New York court will re-
view the size of jury verdicts under a "deviates materially" standard. 441

436. Id. at 13-15 (citations omitted) (quoting Opinion of Justices, 41 N.H. 550,
551 (1860)). In fact, as recently as 1987, Justice Scalia referred to the jury
437. Colgrove, 413 U.S. at 180 n.8 (Marshall, J., dissenting).
439. Id. at 461 (Scalia, J., dissenting).
440. Id. at 437-38.
441. Id. at 437-38. The "deviates materially" standard is significantly more strict
than a "shocks the conscience" standard used at common law. See id. at
425.
Additionally, the Court in *Cooper Industries* held that the standard of appellate review of a jury award of punitive damages is de novo review, not abuse of discretion.\(^{442}\) The Court stated that the "jury's award of punitive damages does not constitute a finding of 'fact' . . . [and thus] does not implicate the Seventh Amendment . . ."\(^{443}\)

These two recent decisions are further examples of the Court's diminishing the significance of the parties' right to jury trial. In sum, there are numerous instances when the Court denigrated the right to jury by allowing judicial intervention that was not found at common law.

**IV. CONCLUSION**

The Supreme Court clearly wants to have its cake and eat it too. On the one hand, the Court eloquently speaks of the fundamental right to trial by jury and carefully preserves that right by adherence to historical analogies with almost a predisposition to find that a right existed at common law.\(^{444}\) In the next breath, however, the Court finds that a jury need not determine particular issues as these issues are merely incidents to the right to jury.\(^{445}\) Further, the Court allows decisions to be reviewed by both the trial and appellate judges and the results overturned, damages reduced, or a new trial granted, reducing the integrity of the right to jury trial.\(^{446}\) Moreover, there is no essence to what constitutes a "jury" even though certain basic attributes of the jury were fairly well-established in the minds of the Framers.\(^{447}\) The result, as Justice Marshall said some twenty-eight years ago is "that the common-law jury is destined to expire, not with a bang, but a whimper."\(^{448}\) Perhaps, we are beginning to hear the final sobs today.

\(^{443}\) Id. at 437.
\(^{444}\) See supra Part III.A.
\(^{445}\) See supra Part III.B.
\(^{446}\) See supra Part III.B.
\(^{447}\) See supra Part III.B.3.