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ARTICLE: THE JURY'S HISTORIC DOMAIN IN COMPLEX CASES.

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SUMMARY:
... The seventh amendment to t he United States Constitution declares that "the right of trial by jury shall be preserved." ... The bold abandonment of historical precedent can be seen in the holding that the fifth amendment due process clause permits denial of a seventh amendment right to jury trial in complex cases. ... Of most interest here are the development and application of the law–equity historical test, the development of the due process argument for the complexity exception, and the emergence of the nullification argument. ... The classic nullification doctrine required that the law be kept simple enough for the average juror, no matter how complicated the situation to which the law applied. ... The combination of the persistence of the nullification argument in negligence cases and the recent attention to the ratification history increases the apparent attractiveness of a definition of the jury's role in complex cases that includes a direct political role. ... The usual procedures of summary judgment or directed verdict are not sufficient to reduce some of the complex cases to a size the jury can handle, especially if judges believe that the seventh amendment requires that every possible factual dispute be decided by the jury. ...

TEXT:

[*1] The seventh amendment to the United States Constitution declares that "the right of trial by jury shall be preserved." n1 There have been many disputes about the correct int erpretation of that brief phrase. In the past decade the major dispute has been the "complexity debate." Judges, lawyers, and writers have argued about whether there should be a new interpretation of the seventh amendment for complex litigation. The proponents of a complexity exception or interpretation contend that certain antitrust, securities, and patent cases in federal court are too complicated for a jury to understand; they want to eliminate or restrict any cons titutional right to jury trial in "complex" cases. Their opponents defend the use of the jury in complex cases and argue that any problems can be solved by procedural changes short of eliminating jury trial.

The opposing sides in the complexity debate have expended tremendous effort to produce a number of lengthy judicial opinions n2 and an extensive **[*2]** law review literature. n3 The first round of effort culminated in the Ninth Circuit case of *In re United States Financial Securities Litigation* n4 and the Third Circuit case of *In re Japanese Electronic Products Antitrust Litigation.* n5 These courts agreed on the disposition of some arguments but disagreed on the main issue in the debate. Additional articles have suggested new arguments in support of either a complexity exception or special procedures for trying complex cases. n6

Despite the substantial efforts of so many, this issue of constitutional interpretation is not yet resolved, a result that

might suggest that only a more radical reinterpretation of the seventh amendment will solve the **[*3]** complexity problem. I believe that a radical reinterpretation is not required; in fact, the complexity debate has gone on so long without being resolved because the search for a solution has gone in the wrong direction. This article does not advocate any narrow procedural step. Instead, it argues for a perspective different from those previously suggested.

The jury is not to blame for the complexity problem. Any blame belongs to the federal judges, who have expected juries to play an impossible role. Therefore, they must now reconsider the role of the jury in these complex cases. The complexity debate has gone on for years, without mention of the most valuable guidance available — the precedent that developed the judge–jury historical tests. This precedent defines the jury's role, or "historic domain," and controls the division of power and responsibility between the judge and jury. Ignoring the judge–jury historical test has skewed the debate, making it appear that traditional doctrine forbade any substantial change in the jury's role. The judge–jury historical test should not be ignored any longer because it demonstrates that the seventh amendment can be interpreted in a way that permits necessary flexibility while preserving the constitutional protection.

It may appear that historical research has been overabundant in the complexity debate so far. This does not confirm that history can provide no more guidance of the complexity problem; it only confirms that the history of the jury has been approached from the wrong perspective. The history of the civil jury has been either minutely examined as an exercise in strict historicism, or boldly abandoned. Strict historicism can be seen in the attempts to prove or disprove that complexity was a head of equity jurisdiction in 1791, and in the argument that the only role of the civil jury is the political role of jury nullification described in the debates over ratification of the Constitution. The bold abandonment of historical precedent can be seen in the holding that the fifth amendment due process clause permits denial of a seventh amendment right to jury trial in complex cases.

St rict historicismignores the problem of defining the proper role of the jury by assuming that the matter should be controlled by a single source, either the 1791 division of jurisdiction between law and equity or what was said in the ratification debates. The due process approach abandons all the historical precedent that has contributed to the proper role of the jury and suggests no substitute for it.

The proper role of a civil jury cannot be defined in a single sentence. There is a consensus defintion useful for ordinary applications, n7 but each new debate about the jury demonstrates the diversity of opinion about the **[*4]** jury and the consequent differences in defining its proper role. This diversity of opinion is the inevitable result of both the complexity of the jury as an institution and the conflicting themes in the history of the jury and the seventh amendment. Although there is clearly disagreement among the participants in the complexity debate about the proper role of the jury, they rarely discuss their assumptions about what that role is. Without agreement on such a basic foundation, the debate is doomed to be one in which the parties do not join on the real issues. Much of the complexity debate has been of the "is competent–isn't competent" variety, with cases and arguments displayed in the hope that the opther side will not have a rejoinder.

Resolving the complexity problem will require an interpretation of the seventh amendment that will permit judges to handle complex cases without making the jury useless or creating such unrestrained discretion for judges that the constitutional protection is destroyed. Protection from the "slippery slope" of ever–increasing judicial discretion to eviscerate the amendment must come from history, but solutions to modern problems require using history as a guide without being needlessly bound by it. More raw data, even more knowledge about the history of jury trial, will be of little value without the perspective of a sound theoretical base for understanding the history. The previously ignored judge–jury historical test must be the starting point for interpreting the seventh amendment in the complexity debate.

Part I of this article will review the major developments in the complexity debate. Part II will discuss the development and modern employment of the judge–jury historical test. Part III will examine how the judge–jury historical test accommodates both judicial control of the jury and a political role for the jury. Part IV will discuss how application of the judge–jury historical test will permit judges to use new or expanded powers, such as direct judicial factfinding on some issues in complex cases. Part V will compare the judge–jury historical test with other approaches to the complexity problem.

I. THE COMPLEXITY DEBATE IN REVIEW

The argument that the jury is incapable, inefficient, or error–prone has been voiced for centuries in support of proposals to reform the jury, change its role, or eliminate it entirely from civil litigation. n8 Although **[*5]** most proposed changes were never acted upon, the most recent round of criticism of the jury spawned by the complex cases quickly produced

results. Several federal district judges denied jury trials in cases that they determined were too complicated for a jury to decide. n9 I will assume that the reader is familiar with the general history of the complexity cases and the accompanying law review literature. I will only summarize the highlights and discuss those developments important to the subject of this article. Of most interest here are the development and application of the law–equity historical test, the development of the due process argument for the complexity exception, and the emergence of the nullification argument.

This article makes no attempt to define a complex case or to categorize any particular case as too complex or not. The very existence of the complexity debate and the conflicting conclusions drawn by judges and commentators makes it clear that there is a serious problem in the way federal courts handle certain complicated cases, however "complex" is defined.

A. The Law–Equity Historical Test

The first argument in the complexity debate was that actions too complicated for a jury should be considered equitable actions under the law–equity historical test, thus eliminating any constitutional right to jury trial. n10 This was the first time the issue of the jury's performance had been such a central issue in the law–equity historical test. The argument is that the weakness of jury trial was an accepted ground for equity jurisdiction in 1791, and that modern complex cases are analogous to actions heard by equity in 1791. This argument has been buttressed by the claim that the Supreme Court, in *Ross v. Bernhard,* n11 held that courts could weigh the ability of the jury as a factor in determining whether a particular case was legal or equitable. Despite the unprecedented efforts by the proponents of the argument to find historical evidence in support of the argument, it has been rejected by two courts of appeals. n12

The argument that *Ross* recognized jury weakness as a ground of equity jurisdiction requires brief mention, even though most judges have been **[*6]** unpersuaded by it. The *Ross* argument is based on footnote ten of the opinion, which states:

As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre–merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries. n13

Some proponents of the complexity exception read the third item in footnote ten as the Court's blessing for creating the complexity exception. The better–reasoned opinions have refused to so read the footnote, as the Court gave no hint that the footnote was intended to announce a revision of the historical test and never applied footnote ten to any later seventh amendment case. In fact, in *Curtis v. Loether,* the Court held that policy arguments about how well the jury could perform its role were "insufficient to overcome the clear command of the Seventh Amendment." n14 Reliance on footnote ten demonstrates a lack of true respect for the seventh amendment as a constitutional provision. The Supreme Court could eliminate the right to jury trial in a new category of cases in such a cursory manner only if it did not consider the amendment very important.

Although commentators have consistently concluded that the division of jurisdiction between law and equity in 1791 was the result of historical accident, n15 must effort has been spent on attempts to find precedent establishing that the ability of the jury was a factor in deciding which claims were legal and which were equitable. Proponents of the complexity exception have presented three arguments for considering complex cases under equity jurisdiction. These are, first, that complex cases are analogous to accounting actions over which equity had jurisdiction; second, that equity had a general jurisdiction over cases not suited for jury trial; and third, that the Chancellor in 1791 had power to control the flow of litigation and would have sent such complex cases into equity if any had arisen. n16

The first argument, based on accounting jurisdiction, developed into ever–lengthening discussions of the relative jurisdictions of law and equity in accounting actions. n17 At the moment, it appears accepted that a **[*7]** complex case is not an equitable action of account and that, in any event, equity did not have exclusive jurisdiction over actions of account. n18 The second argument, based on a general equity jurisdiction over complex lawsuits, has rapidly become a narrow battle over relatively few and often obscure cases; at the moment we know more about a few lines in a 1603 notebook than will ever be useful. n19 This argument has not been accepted by either the Ninth Circuit or the Third Circuit. n20 Both this and the accounting argument seek to analogize the modern complexity cases to cases falling under equity jurisdiction in 1791; they fail because the analogies to common–law jurisdiction are at least as good and the precedent for equity jurisdiction over such cases is sparse.

The third argument, based on the 1791 power of the Chancellor, although more sophisticated, has also been unsuccessful. The argument apparently was developed by Lord Devlin, an English judge. n21 He was commissioned by

IBM, a frequent defendant in complex cases, to develop an historical argument in support of the complexity exception. He concluded that if a modern complex case had arisen in 1791, the Chancellor would have used his power to control the jurisdiction of the courts to prevent a jury trial in the law courts. Lord Devlin's conclusion has not persuaded the courts of appeals for several reasons. First, it depends upon a fair amount of conjecture about what might have happened, and second, the novelty of his conclusion is made more suspect by his English perspective. It is, after all, an American constitution we are interpreting with the historical test. The right to jury trial and the power of the equity courts were political issues when the seventh amendment was adopted. n22 Lord Devlin's conclusion that equity in 1791 had this unused power to eliminate trial by jury because of the inabilities of jurors clashes with the political history of the seventh amendment, and he offers no reconciliation of the two. This is illustrated by his brief explanation for the use of Irish Chancery precedent, where recent American legal history would call for a fuller defense. n23 Finally, Lord Devlin's conclusion is undercut by his effort **[*8]** to make all arguments support equity jurisdiction under the law–equity historical test even though some of the supporting material is based on the historical development of the judge–jury relationship in the law courts. n24 The use of the judge–jury historical material illustrates both the weakness and value of his work. The weakness is the underlying assumption that the only solution for the complexity cases is equity jurisdiction. That assumption removes the need fully to define the role of the civil jury and appears to make evidence that judges controlled juries supportive of his conclusion. The value is that the judge–jury history developed in this recent work and in his earlier book n25 contributes to better understanding of the judge–jury historical test.

A tremendous amount of effort has been devoted to the law–equity historical test. Although this part of the debate has been fought to a draw, the effort was not totally wasted because it has shown that this is the wrong place to seek a solution to the complexity problem. Perhaps it has also demonstrated the futility of strict historicism as an approach to defining the role of the jury. It seems incredible that application of the seventh amendment to modern problems should depend on what one judge may have said in 1603.

B. The Due Process Clause

The newer argument for a complexity exception is that allowing a civil jury to decide complex cases violates the due process protection guaranteed by the fifth amendment. n26 The argument is that due process requires a decision maker who can decide on the basis of the legal rules and evidence presented, and some cases may be too complicated for a jury to be able to understand the law and evidence. n27 The Third Circuit, in *Japanese Electronic Products*, accepted this framing of the issue and held that "due process precludes trial by jury when a jury will be unable to perform **[*9]** [its] task with a reasonable understanding of the evidence and the legal rules." n28

Basing the complexity exception on the fifth amendment appears more defensible than basing it on the law–equity test because the fifth and seventh amendments are of equal authority. Consequently, a court applying this standard is not weakening a constitutional protection for policy reasons but is reaching an accommodation of conflicting constitutional provisions.

This due process argument for the complexity exception, however, is based on a false conflict between the two amendments. As argued by Judge Gibbons, dissenting in *Japanese Electronic Products*, n29 the due process argument is based on the assumption that complex litigation must be as complicated as it currently is. Yet, one major cause of complexity is the liberal federal rules on joinder of claims and parties. n30 While there is a strong policy argument that it is most efficient to have the joinder provisions of the federal rules, such joinder does not appear essential to allow litigation of disputes and certainly the joinder rules are not mandated by the due process clause. Therefore, the conflict is really between federal procedural rules and the seventh amendment and not between the two amendments. The first step should be to divide the complex case into separate issues with fewer parties in each action and then determine whether the smaller actions are still too complex for a jury to handle competently.

A second flaw in the argument that using a jury may violate due process is that those making the argument fail to explain why only the jury is considered a source of the problem. In *Japanese Electronic Products*, the Third Circuit implicitly assumed that the amount and incomprehensibility of the evidence was a necessary given and that the complexity of the issues decided by the jury was foreordained. Basically, it assumed that the only solution was eliminating the jury. If instead we view the jury as an instrument of legal procedure, then it is clear that there are other elements of the process that may be the primary cause of the problem. Lawyers may present too much evidence or may present it improperly. The judge may admit too much evidence or may instruct the jury in a manner technically correct but practically incomprehensible. The law permitting introduction of the evidence and requiring the jury instruction may

itself be uncertain or contradictory. The jury's province is defined by the judges; **[*10]** the jury may be expected to perform a task that is too complicated as a whole, even though it could perform substantial portions of it if properly handled.

The Third Circuit and other proponents of the complexity exception have assumed that there is no middle ground between continuing to allow the jury to be overwhelmed and eliminating the jury. The bold step of holding that due process requires a complexity exception avoids the strict historicism of the equitable jurisdiction argument by swinging fully to the other extreme. There is no precedent to provide guidance on when a jury trial violates due process. The due process argument simply goes too far and creates a serious "slippery slope" problem.

The only way to develop limits on a due-process-based complexity exception will be by analogy to the historical development of the judge-jury relation. But reasoning by analogy would be a two-step process, which can be needlessly complicated and potentially misleading. It would seem preferable to attack the problem issue by issue under the judge-jury historical test instead of trying to determine when the entire case is too complicated.

C. The Nullification Role of the Jury

Initial opposition to the creation of a complexity exception focused on the weakness of arguments based on the law-equity historical test. As the debate continued, there was some discussion of the proper definition of the jury's role and disagreement about that definition. The proponents of the complexity exception argued that, in complex cases, the jury cannot perform its role of accurate factfinding and logical application of the law to the facts. n31 Opponents of the complexity exception responded with either a reaffirmation that the jury can understand even the most complex cases n32 or a definition that emphasizes the political role of the jury. n33 The reaffirmation of the jury's understanding and ability is unlikely to stand as a firm defense even if major litigation gets no more complicated than it now is. If the length and complexity of the cases continue to increase, this reaffirmation will appear increasingly hollow. The problem with this asserted confidence in the ability of the jury is that there is no attempt to explain what the jury's role is or why we should believe it is performing its role correctly.

[*11] The argument for the political role of the jury is a challenge to the basic assumption that the role of the civil jury is limited to finding facts and applying the law. Among the better-known advocates of the political role are two federal district court judges, Judge Higginbotham of Texas n34 and Judge Becker of Pennsylvania. n35 Their argument is that the jury allows the courts to deliver individualized justice, a role they term the "black box" function, n36 and that the jury provides a needed check on judicial power. n37 The explanation of the "black box" function is based on the assertion that the formal law is sometimes too devoted to uniform rules; the general verdict of a jury is valuable because it allows the jury to do equity by reaching results at variance with the law without creating a precedent to upset legal uniformity, thus allowing actual decisions to reflect community attitudes.

Both the "black box" label and that explanation of the role of the jury are unfortunately wrongly chosen. Proponents of the complexity exception have responded that many cases are so complicated that the jury does not understand them well enough to return a verdict consistent with community values, n38 unless community values means nothing more than unreasoned prejudice for or against certain parties. Given the complexity of current antitrust and securities law, it is simply impossible to argue that the six members of a federal civil jury understand both the law and the community view so that its verdict will provide a "contemporaneous expression of the community values that bear on the issues in each case." n39 As so far articulated by Judges Higginbotham and Becker, the "black box" function in complexity cases describes not a source of rough community justice but a random number generator in which the verdict is a product of random chance. A random number generator is a "black box," but it is hardly a means of deciding law suits consistent with due process.

The nullification argument also is a product of a strict historicism. It elevates the ratification debates to central importance in interpreting the seventh amendment and appears to accept the positions stated in 1787-88 literally and uncritically. n40 Even though the ratification debates reflect **[*12]** and support a certain political role for the American jury, such strict historicism has been generally rejected because the judge-jury historical test supports a much more sophisticated definition of the jury's role. The nullification argument has some value as a reminder of the American jury's political role, but it will not long be a defensible position in the complexity debate.

II. THE JUDGE-JURY HISTORICAL TEST

An often-stated interpretation of the seventh amendment is that the language requires an historical test based on the

English legal practice of 1791. n41 The historical test is not a unitary test. One historical test is applied to d etermine whether an action or an issue in an action is legal or equitable, while another is used to evaluate whether procedural devices that affect the judge–jury relation are consistent with the seventh amendment. n42 Roughly stated, the law–equity historical test defines whether a jury is available, while the judge–jury historical test defines the role of the jury if it is available.

The law–equity historical test has been developed in the recent line of Supreme Court cases that includes *Beacon Theatres, Inc. v. Westover,* n43 *Dairy Queen, Inc. v. Wood,* n44 *Katchen v. Landy,* n45 *Ross v. Bernhard,* n46 *Curtis v. Loether,* n47 and *Pernell v. Southall Realty.* n48 In such cases the right to jury trial depends on the classification of an action or issue as legal instead of equitable. The historical inquiry is focused on the jurisdictional lines that separated law and equity in 1791. n49 There is little discussion of the ability of the jury or the value or disadvantages of jury trial, and consequently there is little explicit discussion of the role of the jury. The judge–jury historical test has been developed in such Supreme Court cases as *Gasoline Products Co. v. Champlin Refining Co.,* n50 *Dimick v.* **[*13]** *Schiedt,* n51 *Baltimore & Carolina Line, Inc. v. Redman,* n52 *Galloway v. United States,* n53 and *Parklane Hosiery v. Shore.* n54 In these cases, the legal nature of the action is conceded and the issue is whether a particular procedural device developed after 1791 so affects the civil jury's role of "historic domain" n55 that it is i nconsistent with the seventh amendment. The historical inquiry in these cases is focused on the role of the jury and the relationship between judge and jury. Although the role of the jury is often assumed or implied in the discussion rather than explicitly defined, the mandate to "preserve the basic institution of jury trial in its most fundamental elements" n56 requires attention to the proper role of the jury.

The massive efforts to find a basis for a complexity exception under the law–equity historical test were a product of both the greater attention to the law–equity test since *Beacon Theatres* and the apparent merger of both lines of precedent in the Supreme Court's recent opinion, *Parklane Hosiery Co. v. Shore.* n57 In many cases this merger may cause no harm, as the two historical tests are related. Nevertheless, each historical test is particularly applicable to certain problems, and application of each requires close attention to different sorts of history. For the law–equity historical test, the relevant history is the development of the jurisdiction of the common law courts and their rivals. For the judge–jury historical test, the relevant history is the interrelation of the judge and jury in both the English common–law courts and in American courts as uniquely affected by the American Revolution.

A. Historical Development of the Role of the American Jury

Although the seventh amendment declares that the right of jury trial shall be preserved, it is wrong to think of jury trial as an object that can be preserved as a museum would preserve a piece of colonial furniture. Jury trial is more accurately seen as a political process, with power and responsibility shared by both judges and jurors. n58

Preserving a political process is far more difficult than preserving a concrete object. Fixed and final answers are hard to find, and sensitive **[*14]** interpretation of history is necessary for developing useful guidelines. But even though there will be flexibiltity, there can be widely accepted constitutional limits. The relative powers of and interrelations between Congress and the President, for example, are part of a political process that has changed many times over two centuries, but constitutional limits on each still exist.

The relative power and responsibility of judges and jurors have also changed over two centuries, but it is still possible to determine seventh amendment limits on the powers of each. It is misleading to consider any particular procedural step in isolation; correct interpretation of the amendment requires consideration of the entire judge–jury relation. The historical development of the civil jury is important because the jury trial preserved by the seventh amendment was a political process that was undergoing change in 1791 and that has continued to change up to the present.

The civil jury we inherited developed during several centuries as a part of the procedure used in the common–law courts of England. n59 The body that eventually became the jury began as a group of local residents who knew at least some of the facts of the dispute before the trial. The jurors returned a verdict based on what they knew, what they were told before trial, and what they were told at trial. The early juror was both a witness and a judge of facts, and a jury verdict was much like a group declaration of what the facts were. n60

The earliest means of correcting a wrong verdict was the attaint, a procedure based on the assumption that the jury had willfully returned a false verdict. n61 The attaint was analogous to a prosecution of the jury for perjury. In the attaint, the original parties and the first jury were parties in a trial before a larger jury. If the attaint jury found a different verdict, the first judgment was reversed and the first jury was convicted and punished.

The attaint was a crude and cumbersome jury–control device. It became illogical as the jury began to depend less on its own prior knowledge and increasingly became a factfinder listening to evidence at trial. The attaint was eventually replaced by the more direct means of jury control of finding and imprisoning a jury that returned a verdict that the judge thought wrong. n62 In the common–law courts it seems the jury would be punished only if it refused to return the verdict that the judge said was proper. This **[*15]** was an early form of a directed verdict, and a directed verdict with real teeth. n63 Perhaps because it was too direct, the power of punishing jurors was disputed. The power ended in 1670 with the opinion in *Bushel's Case*, n64 a well–known habeas corpus action brought by the jurors who had acquitted William Penn and William Mead.

During the next century, the English judges created and refined a number of other jury–control devices to replace the attaint and fine. The jury was not allowed unrestrained power to decide all cases, so there was still the problem of how to guide or control the jury to prevent incorrect verdicts. There were three types of procedures: one type removed the jury as a factfinder, one reviewed what the jury did, and one guided the jury.

The two procedures that most clearly removed the jury as a factfinder were the demurrer to the evidence and the nonsuit. The party demurring to the evidence admitted the truth of the other's allegations and proof and asserted that on such facts the law clearly required judgment for the demurring party. n65 Although the procedure had limited effectiveness because the demurring party had to admit all adverse factual inferences and thus gave up the right to offer contrary evidence, the use of the demurrer to the evidence did establish that the judge could determine if there was a factual issue for the jury to decide. The rule nonsuit likewise had limited effectiveness, but it also required that the judge evaluate the evidence. n66 A defendant who thought that the plaintiff's evidence was insufficient could move at the end of the plaintiff's case that the plaintiff be nonsuited. If the motion was denied, the defendant could still offer evidence, so the risks to the defendant were not as great as in the demurrer to the evidence. The benefits, however, were not as great either, as the nonsuit required the plaintiff's agreement. Although plaintiffs would often agree to the nonsuit to avoid other actions the judge might take, some plaintiffs refused to agree and insisted on a jury verdict. n67

Several other procedures kept the case or particular issues in the case from the jury without requiring judicial evaluation of the evidence. The intricacies of common–law pleading, with the quest for a single issue and with doctrines such as color, often allowed the lawyers to frame the issues so that the judge would decide the whole case. n68 At trial, the rules on **[*16]** admissibility of evidence, burden of proof, and presumptions limited which evidence the jury heard or the effect of the evidence. n69 Special verdicts were used to remove factual disputes and leave the real decision to the judge as a matter of law. n70 Although none of these procedures gave the judge full power to control the jury, as the facts of the case might preclude their use or counsel might not consent, together they often eliminated the jury's general verdict.

With the end of fining jurors in 1670, the common–law courts had to develop some procedure for handling an incorrect verdict, not only to maintain certainty in the law but to defend their jurisdiction. Otherwise, the losing party would try to upset the verdict by an equity action. n71 One procedure that gradually developed was a motion for a new trial. After the jury returned a verdict, the judge could review its action on a motion for a new trial. n72 When the reason for the motion was that the verdict was against the weight of the evidence, the judge had to evaluate the evidence. The practice of granting a new trial when the verdict was against the evidence was used as early as 1655. n73

The grant of a new trial because the verdict was against the evidence was a bold step when first taken because the judges had to consider directly whether the jury had performed its role correctly. n74 The grant of a new trial was not as direct as fining the jury, nor did it give the judge as much power because a second jury still had to return a verdict. Still, it did establish that the judges had a way to supervise and control jury verdicts.

Of course, controlling the jury by granting a new trial is indirect and creates delay, so English judges eventually took more direct steps to guide the jury. The judges had for a long time instructed the jury in a charge that included both law and comments on the facts. When it was clear that one party had to lose because that party had introduced no evidence, the judges would direct the jury to return a verdict for the other party. n75 Again, the procedure had its limitations, for it could be used only if there were no evidence presented on an element of the action. Also, the jury still had to formally find the verdict that it was directed to reach. Fines were no longer permitted, so a stubborn jury could not be forced to follow the direction, but the judge could always grant a new trial and thus avoid the incorrect verdict.

[*17] Finally, there were certain procedures used after the trial that could negate a jury verdict, although in theory they did not require the judge to review the jury's action. These were the defendant's motion to arrest judgment and the plaintiff's motion for judgment notwithstanding the verdict. Both motions raised the issue of whether the pleadings

permitted judgment for the party who had won the verdict. On such motions the court might nonsuit the plaintiff, enter judgment for the plaintiff, or award a new trial.

Common-law procedures such as the nonsuit, demurrer to the evidence, directed verdict, and new trial seem to have been generally used in the colonial and early state courts. n76 There was great variety, however, as all the jury-control procedures were still evolving in the English courts and probably in no colony was English procedure copied exactly. More importantly, the power of the civil jury became a political issue in the revolutionary period and thereafter, and political events had some impact on the evolution of these jury-control procedures in the federal courts.

During the decades before the Declaration of Independence, the colonists learned that a colonial jury could effectively nullify the enforcement of unpopular British laws. n77 Colonial juries hostile to the Trade Acts returned verdicts that exonerated smugglers and imposed civil liability on royal officers for enforcing those statutes. Since the judges did not have enough power to control such juries, such cases were transferred to new admiralty courts sitting without juries. n78 The colonists also saw that the colonial chancery courts sitting without juries were not vulnerable to the nullification power of the jury. n79 The nonjury procedure of equity and admiralty was seen as an instrument of tyranny, and by 1787 the political role of the jury had become strongly established. The civil jury was said to be a source of natural justice that was better than the formal law applied by judges, and the jury was praised as a shield protecting citizens against unpopular government policy. n80

The role and power of the civil jury became an issue in the debates over ratification of the Constitution. n81 Opposition to the Crown and to the **[*18]** Trade Acts was replaced by reluctance to repay British creditors and fear of the unknown evils that would be created by the new federal government. The civil jury was proposed as a protective device, with the hope that local juries would nullify the treaty guarantees for British creditors and protect local citizens against abuses by federal officers. The ratification controversy led to the Bill of Rights as an answer to the fears voiced by the anti-Federalists. As a result, the original understanding of the seventh amendment included a strong flavor of a nullification role for the civil jury.

For nullification to be effective, the parties must be able to insist on a jury verdict, and the jury must be free of judicial control and able to return a general verdict that must be accepted. Freedom for judicial control means that the jury is free to ignore the law given in the instructions and to follow instead a better natural law. Such a position is clearly seen in the early Supreme Court case of *Georgia v. Brailsford,* n82 in which the jury was told that it was not bound to follow the law stated by the court.

Some observers appear to consider the jury's power seen in *Georgia v. Brailsford* as the only correct interpretation of the seventh amendment and, therefore, view of the development of modern jury-control devices as a continuous and improper usurpation of power by judges. n83 An opposing group tends to view the nullification history as a mistaken excess to be ignored or minimized. n84 Both positions are too inflexible. Ignoring the nullification roots of the seventh amendment does not eliminate them; they keep returning, as in recent cases. Accepting the nullification roots as controlling ignores other aids for interpreting the seventh amendment and overemphasizes the value of a brief period in the history of the civil jury. Debate over the meaning of the seventh amendment has suffered from an absence of attention to the current significance of the original intent. n85

The surviving evidence for the nullification interpretation is well canvassed by Professor Wolfram's review of the ratification debates. n86 Those debates, however, were political rhetoric and included a fair amount of overstatement and hyperbole. The predominant concern with the single **[*19]** topic of debts owed to British creditors is not surprising, since those creditors were one of the groups expected to use the alienage jurisdiction of the new federal courts. This was a highly visible political issue, and it should be expected that the earlier political use of the jury would be recalled. But political speeches are not a good source of information about the role of the jury in the full variety of cases on the courts' dockets.

The nullification roots must be placed in perspective because other evidence indicates that various jury-control devices then in use in many state courts restricted juries and prevented the nullification that was described. n87 The new federal courts began to use a variety of jury-control devices soon after 1789. n88 Even on the highly visible issue of debts owed to British creditors, the federal courts entered many judgments without an outbreak of nullification. n89

These nullification roots cannot be given determinative weight in interpreting the seventh amendment because they are based on false premises. The nullification-natural-law argument assumes that there will be a coherent and consistent set of community values, an assumption that is only partially true for the visible political issues and that is not at all

true for the countless routine matters tried by courts. n90 The idea of constitutional government and due process of law requires some consistency in the application of the law as well as equal treatment of all litigants. The idea that all British creditors should lose, solely because of their status, is hard to justify as due process; whatever justification might be possible cannot be extended to many other kinds of cases. It was inevitable, as the population grew and as lawsuits became more complex, that judges would have to continue to use jury-control procedures, and even to refine **[*20]** or expand the procedures that had been developed in the seventeenth and eighteenth centuries. n91

The nullification roots of the seventh amendment need not be totally ignored. Even though the original case for nullification may have been based on crass and immediate motives that were not fully examined, there was also a nobler goal of maximizing citizen participation in the courts. That goal does not have to conflict with consistent, fair application of the law to all parties, even though there is clearly tension between them. The seventh amendment requires judges to develop and use jury-control procedures that minimize this tension.

B. The Historical Test and Modern Procedure

As the modern jury-control devices evolved in the nineteenth century, there were several occasions on which the constitutionality of a particular procedure was debated. The Supreme Court refused to allow an involuntary nonsuit n92 or to direct appellate review of the jury's factfinding, n93 but permitted directed verdicts n94 and new trials on the weight of the evidence. n95 The trend in the nineteenth century was one of gradual refinement of jury-control devices, a trend clearly reflected in the firm rejection of the nullification doctrine at the end of the century. n96

The modern jury-control devices of summary judgment, directed verdict, new trial, partial new trial, and judgment notwithstanding the verdict have all been upheld, often over strongly argued constitutional objections. The cases reflect a clear contrast between two standards for interpreting the seventh amendment. The dominant standard followed by the Supreme Court requires full consideration of the history of the judgejury **[*21]** relationship to preserve the fundamental elements of jury trial. The other standard, at times followed but most often rejected, requires examination of each procedure in isolation as an exercise in strict historicism.

The classic opinion, which well illustrates the difference between considering the full history and considering only a particular procedure, is *Galloway v. United States.* n97 Galloway has retained its primary importance because the directed verdict considered there is the most obvious jury-control device, and because of the well-written dissent of Justice Black.

The *Galloway* opinion can be easily misunderstood. Justice Black argued in dissent that each of the 1791 jury-control procedures had limits or risks to a party, and that there should be no modern procedure that more effectively controlled the jury. His dissent implies that strict historicism is the only legitimate standard for interpreting the seventh amendment because he argued that each particular procedure had to be considered separately. The eloquence of his argument makes it easy to assume that the majority opinion should be so evaluated, a tendency further enhanced today by the substantial attention in the law-equity historical test cases to the details of the jurisdiction exercised in 1791. n98

It would be wrong to read *Galloway* as adopting such a narrow interpretation because Justice Rutledge's opinion ignores strict historicism and establishes the constitutionality of the directed verdict by examining the full history of the judge-jury relationship. Both the flexibility and limits of the judge-jury historical test are well set out:

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were the "rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system . . . .

. . . The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial only in its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions. n99

The particular procedures used in 1791 were not of individual importance; **[*22]** what was important was that the judge controlled the jury's factfinding role. The jury's province in 1942 did not extend to mere speculation or drawing unreasonable inferences, and thus the judge could determine whether there was enough evidence to go to the jury, as judges had done in 1791.

T he Supreme Court had similarly considered the jury's historic role when it earlier upheld the constitutionality of

summary judgment. n100 Summary judgment was unknown to the common law, but the Court held that it was permitted under the seventh amendment because it was a procedure for determining if there was a factual issue for the jury to decide. The Court properly assumed that it was clear that the jury had no role if there were no issue of fact to decide. The standard for modern summary judgment is analogous to that for the old demurrer to the evidence, but the Court avoided historicism and made no effort to equate summary judgment with any 1791 analogue. n101

Not all modern procedures were so easily upheld against constitutional challenge. Judgment notwithstanding the verdict was at first rejected in an opinion that followed the strict-historicism interpretation. n102 The opinion compared the judgment n.o.v. with several 1791 procedures and found that it differed from each. As the full history of the jury's role was ignored, the opinion was inconsistent, asserting that only a jury verdict would do while conceding that there could be a binding directed verdict. n103 The dissent of four Justices was centered on the general role of the jury and judicial control of the jury and was not tied to a particular common-law procedure. n104 That dissenting view eventually prevailed twenty-two years later when the Supreme Court upheld the judgment n.o.v. by analogizing it to the common-law practice of reserving a legal point for decision after the verdict. n105 This time the issue was briefly discussed, without dissent. The analogy to the common-law practice was more a verbal formula for distinguishing the prior decision than an exercise in strict historicism. n106

The grant of a new trial on the grounds that the verdict was against the weight of the evidence was never a matter of serious debate because of the solid common-law roots of that procedure. n107 Granting a new trial on **[*23]** some of the issues was upheld, even though it appeared that common-law procedure required a full new trial. n108 The strict historicism was rejected on the assumption that, if employed in a case with separate and distinct issues, it would not infringe on the jury's role. However, the new trial conditioned on additur did not survive a constitutional challenge in *Dimick v. Schiedt,* n109 an opinion that followed the strict historicism analysis and examined each common-law procedure. The *Dimick* opinion has never been well received, as the distinction between the forbidden additur and the concededly valid remittitur n110 is hard to accept. This point was made by the dissenters, who again took the fuller view of judicial control of the jury's factfinding. n111

The Supreme Court most recently rejected strict historicism as the standard of interpretation for the judge-jury test in 1979 in *Parklane Hosiery Co. v. Shore.* n112 There the Court upheld offensive collateral estoppel in the absence of mutuality in a law action even though the estoppel came from a judgment in a prior equity action, thus eliminating any jury trial on the facts. The Court relied on the "fundamental elements" language of *Galloway* n113 and rejected the argument that collateral estoppel was limited by 1791 practice. The lengthy dissent of Justice Rehnquist demonstrates, however, that strict historicism still retains some appeal as a standard of interpretation for procedural changes that affect the role of the jury. n114 The persistent appeal of strict historicism, seen also in the complexity debate, requires that there be further attention to its inadequacy as a tool for constitutional interpretation.

No matter how fervently one tries to ban any greater limitation on the province of the jury than was known in 1791, it cannot be done by color matching modern and common-law procedures. It sometimes looks possible, but only if the full range of procedures is ignored. This can be seen in a major modern area of dispute over the jury's province — personal injury litigation.

[*24] Assume a pedestrian is injured by an automobile driver, and an action is brought for injuries. The position of Justices Black and Rehnquist appears to be that the plaintiff should be able to avoid an adverse verdict if there is any evidence of negligence, that the plaintiff should not be entitled to a directed verdict if the defendant disputes the evidence of negligence, and that neither party should suffer entry of a judgment n.o.v. after winning the verdict. n115 The central argument is that a judge is forbidden by the seventh amendment to evaluate evidence of negligence in order to control the jury. The erron eous assumption is that the cause of action must be negligence and that the elements of it must include negligence and proximate cause.

Of course, nothing in the seventh amendment declares what defines a cause of action, and negligence did not emerge as a specific cause of action until the nineteenth century. n116 If forbidden to use the modern jurycontrol procedures and forced to use those known to the common law, the judges could still control jury verdicts by manipulating the definition of the cause of action. If judges thought plaintiffs too often won erroneous verdicts, they could refine the cause of action to include as an element of the plaintiff's case proof that the defendant violated a specific regulatory statute, such as by speeding or driving on the wrong side of the road. n117 With such an element to plead and prove, many plaintiffs would be kept from the courtroom altogether by a demurrer to the complaint. For many defendants, the demurrer to the evidence would be risk free because there would be no evidence of a statutory violation, and many plaintiffs would be forced to

accept a nonsuit because of their failure of proof. Most of the remainder would hear the jury return an adverse verdict in response to the judge's direction that the element of statutory violation was unproven, and those rare diehards who actually won a jury verdict would have it upset by the grant of a new trial.

If instead the jury verdicts ran too heavily against the plaintiffs, the negligence cause of action could be replaced by strict liability. Similarly, the violation of statute could be kept as an element, but the burden of proof could be on the defendant to prove nonviolation. n118 Of course, the next step would be development of presumptions, so that for certain facts, a statutory violation would be presumed or even made unnecessary, while for other facts, the plaintiff might carry the burden of proof. n119 This, of **[*25]** course, considers only the definition of the cause of action. Defenses and exceptions to defenses such as contributory negligence and last clear chance could also be controlled by common-law pleading rules and the common-law jury-control procedures. n120

It seems accepted that some body can establish the law. Whether courts or legislatures do so does not matter, but it is clearly not for the jury to decide whether the civil liability standard is strict liability, negligence, or statutory violation. The only way to allow the jury to do so would be to limit pleadings to the equivalent of a common count and the general issue. That would allow the plaintiff to say, "You hurt me," the defendant to reply "I did not," and would create a single cause of action — civil wrong — covering everything. That was not true in 1791 and is not really advocated today. But then the power of the court to continue the common-law practice of developing the law necessarily means that it is hopeless to expect that color matching 1791 procedures will establish an inherent definition of the province of the jury. n121

Perhaps two more examples should be considered. A central part of Justice Black's position concerned the quantum of evidence needed to avoid a directed verdict. He argued that the modern rule of "some credible evidence" was more objectionable than the "scintilla" rule. n122 Again, the argument makes sense only with the erroneous assumption that the legal standard is frozen. The standard could as well be gross negligence as negligence, and then barely credible evidence of negligence would fall short of being even a scintilla of evidence of gross negligence. For damages as well, there is no constitutionally mandated standard, a point ignored in *Dimick*. If damages cannot be controlled directly by remittitur and additur, the courts can further define the measure of damages. Damages in contract cases have long been more controlled than those in tort cases. n123 In tort cases, it might be harder to define damages precisely, and it has been less necessary because the problem of an erroneous amount has been strongly one-sided and subject to remittitur. n124 **[*26]** If the problem of insufficient verdicts became so great that new trials were necessary too often, a broader and more specific definition of damages could be used to raise the level of damages in plaintiff's verdicts.

The trend in the development of procedural innovations has not been solely toward increasing judicial control over the jury. The ability to exercise control at the pleading stage has all but disappeared because federal pleading rules require substantially less detail than did common-law pleading rules. The interdependence of all the procedural steps must be clear; federal pleading would create an impossible system if the later procedures did not exist. n125

Since judges can achieve the same results by more than a single procedure, it is of little value to consider any one procedure either by itself or in the abstract. The real concern must be with the application of the procedure to the facts of a specific case. n126 There will always be a continuum of cases, ranging from those in which all agree that there is no jury issue to those in which all agree that there is a jury issue, and in the middle, a band of cases in which judges dispute whether there is a jury issue. There may be no inherent precise definition of when there is a jury issue or when the matter is within the province of the jury, but the whole of the cases provides a body of guiding precedent.

III. THE POLITICAL ROLE OF THE AMERICAN JURY

A. The Jury as an Institution

The general principle advocated in the ratification debates was maximum citizen participation in the work of the courts. Jurors were not to be limited to deciding historical facts, such as whether the defendant was exceeding the speed limit, or even to applying the community standard, such as whether the defendant drove negligently. Jurors were also to decide the wisdom of the speed limit or the validity of negligence as a legal standard. Nullification is an unworkable example of now the general principle can be put into practice because it requires that every jury be allowed to play a political role. The general principle can still be followed, but the jury's political role must be played by the jury as an institution. Some day a specific jury may have to play a major political role if there is another confrontation on the scale of the American Revolution, but for the more modest problems of modern litigation, a moer modest, gradual, **[*27]** and

institutional political role will suffice. Neither Smith v. Jones nor even Memorex v. IBM is on the scale of Colonists v. King George III.

The jury's institutional effect on the substantive law is an integral part of the judge–jury historical test. An issue may become a matter of law for the judge and cease being a matter of fact for the jury for several reasons. These can include the need to accommodate legislative policy, the need to balance competing equities, the danger that a jury will be swayed by improper influences, or the need to have a settled and stable rule. n127 Whatever the reason the issue was withdrawn from the jury, judges will always hold differing opinions and there will be a chance to reevaluate whether the issue should continue to be withdrawn from the jury. In negligence litigation, for example, certain fact situations were held to be negligence or contributory negligence as a matter of law in order to withdraw the issue from the jury. n128 With the change to comparative negligence, the old rationale is no longer valid and the courts must reconsider the extent of jury control. n129 The development and refinement of such procedures as summary judgment and the directed verdict did not destroy jury trial even though issues and cases were taken from the jury. As trial and appellate judges considered whether a reasonable factfinder could possibly reach more than one conclusion, they had to consider how a jury might find based on the facts. Then the judges had to consider whether the jury could be allowed to reach more than a single conclusion without damaging the general interest in legal stability and equality. These limitations do not keep the jury as an institution from playing a political role consistent with the seventh amendment history.

The civil jury also plays a political role in that its presence is a reaffirmation that the American form of government is a universal suffrage republic in which every citizen has a right to vote and be heard. n130 In many ways, the full promise of the constitutional doctrine of equality has taken centuries to accomplish. In the federal courts, it was only in 1968 n131 that Congress mandated a juror selection system intended to assure that jurors would be a "fair cross–section of the persons residing in the community." **[*28]** n132 The idea of a cross–section jury appears daring or radical when compared with the practice in England before 1791, the practice in the United States in 1791, or the practice in most of the rest of the world. n133 The requirement that the judge and jury share the decision–making responsibility is a powerful reminder of the basic democratic principle of American government.

One of the arguments for the seventh amendment and for nullification was the need to keep the law courts from becoming instruments of oppression. In the modern United States there is little danger that the federal courts will become agents of the British Crown or enemies of the people, as the revolutionaries asserted colonial courts had become. n134 Still, lawyers and judges inevitably, by education and profession, do not typify the average American and are generally somewhat removed from the needs and wants of the rest of the country. Lawyers and judges from law school onward increasingly focus on legal doctrine and abstract policy. Although both are extremely important in the effort to make the law stable and equal, it is possible to get wrapped up in the quest for logical doctrine and well–executed policy and to forget about the real effects of the law and litigation. n135 The classic nullification doctrine required that the law be kept simple enough for the average juror, no matter how complicated the situation to which the law applied. Such a limitation is not necessary. Since the jury does not always have to decide all issues in the case, the law can, in some places, be complicated beyond the understanding of the jurors when that complication is required by the factual situation. n136

The jury can also change the substantive law, but in a more indirect way than suggested by classic nullification doctrine and the "black box" argument of Judge Becker. Under that doctrine, the jury's political role has been described as a little parliament. n137 Unfortunately, the jury lacks **[*29]** knowledge of what prior parliaments have done and cannot influence what later ones will do. Again, the rejection of the classic nullification doctrine requires some alternative description of how the jury can play its political role of affecting the substantive law.

As an alternative to such a catch phrase, perhaps the jury as an institution should be considered an ongoing referendum. Each jury panel provides one bit of data that in sum, over all juries, provides an enormously useful amount of information about the substantive law. Each jury verdict provides the courts and lawmakers with the most valuable information about the community view of a particular law because each verdict is based on careful consideration of the application of the law to a fact situation that the jury has considered in great detail. The difference between the little–parliament theory and the ongoing–referendum theory is both a difference in emphasis and in result.

Again, the history of the contributory negligence doctrine provides an illustration. In the decades when contributory negligence was the reigning doctrine, many jury verdicts for plaintiffs were set aside on judgment n.o.v. on the ground that the plaintiff was contributorily negligent as a matter of law. In other cases, the verdict was set aside and a new trial awarded. Through it all, the jury was either condemned for erroneous factfinding or defended for nullifying the law. A better view is that these jury verdicts were a referendum response that the substantive tort doctrine was no longer

acceptable in a significant number of factual situations.

The judicial response should have been either to change the substantive law to follow the referendum or to further withdraw the issue from the jury because verdicts were being consistently based on improper factors. n138

Finally, the jury performs a political role as a reminder of the independence of the courts, assuring that the judgment in each case is based only on the law and on the facts proven at trial. Judges and lawyers get used to handling the same kind of cases repeatedly, so there is always the occupational risk of bureaucratization. n139 The view that the facts of a particular case are no different from those of the last case robs the law of its vital force and defeats consistent justice. The jury is less likely to stereotype a case because every case is new to it. The knowledge that the jury will see each cash afresh reminds judges and lawyers that they should also. In **[*30]** addition, the jury is more or less anonymous, so that judges and lawyers cannot assume that the jury panel shares their own biases, prejudices, or world outlook. The jury is thus a valuable guard against hasty treatment of ideas or people, and a force for a just decision that is independent of the immediate concerns of the day.

One procedure unique to jury trial that serves to keep the law free from transient political pressure is the voir dire. Jurors have the habit, annoying at times, of answering bluntly and openly on voir dire when asked for their views. n140 The case law on challenges for cause represents an ongoing discussion about how to respond to these juror disclosures, as the courts try to keep the trial free from improper taint without at the same time striking every juror who ever though about any issue. Without voir dire, the influence of political, racial, social, economic, religious, ethnic, and countless other factors would be ignored by assuming that the judge would not be affected. With voir dire they cannot be ignored. Even with voir dire the influence of irrelevant factors may not be eliminated and at times the effort to weed out prejudice may be overdone. Still it is better to discuss the issue than to ignore it.

B. Nullification in Negligence Litigation

The jury's institutional political role can be easily overlooked because too much attention has been given to a direct, nullification–type political role for the jury. This description of the jury's role is both logically unsound and inconsistent with the nullification arguments of the ratification debates. It has been stated so often, however, and has a strong enough surface appeal that it persists, appearing again in the complexity debate.

The nullification description of the jury's role was most strongly advocated to defend or describe the jury's performance in negligent tort cases, for several decades the prime area of dispute about the value or inadequacy of the civil jury. n141 Critics of the jury argued that jurors would find negligence when it was not supported by the evidence, and that they would refuse to find contributory negligence when it clearly was present. On such evidence the jury was variously condemned as effete and sterile, n142 a societal antique, n143 or the quintessence of governmental arbitrariness. n144 The defenders of the jury accepted the argument that the jury was **[*31]** finding negligence even if not proven and not finding contributory negligence that was proven. They defended the jury by asserting that it was playing a political role by returning verdicts at odds with the formal law. The defense of this renegade role was that jury nullification made the law more just and more in conformance with community sentiment by lowering the standard of negligence and applying comparative negligence. n145

This kind of a nullification role for the jury is logically unsound. In ordinary negligence cases it assumes juries will exercise a consistent pro–plaintiff, anti–corporation, anti–insurer bias. Of course, juror biases are not so predictable nor do all cases involve a sympathy–deserving plaintiff suing a corporate defendant. The proponents of this nullification role never fully analyzed or discussed what were good or bad biases. The nullification role required that every jury play a political role, so every jury needed all the right biases and none of the wrong. That is impossible, because there is no way to tell about any particular jury and no discreet way to explain it to the individual jurors. n146 As new types of cases, such as civil rights actions, were added to the federal docket, the weakness of an argument based on juror bias should have become even clearer. n147

Despite the appearance of similarity, the modern nullification argument for negligence actions is not the same as the nullification argument in the ratification debates; it is at most only sometimes nullification. The modern jury–control devices, such as summary judgment and the directed verdict, keep clear cases from the jury and so beyond any nullifying power. In contrast, the ratification speakers implied that even in clear cases juries would be able to deny recovery to British creditors solely because they were aliens. n148 The effect of this misleading appearance can be seen in Judge Becker's two opinions in *Zenith* — the approving quotations of the **[*32]** ratification position in one opinion n149 are

followed by another opinion granting summary judgment. n150

The nullification argument in the negligence cases did not prevent development of jury-control devices or application of those devices to limit jury power in negligence litigation. That may have been in part because the nullification argument was primarily an overstated position by those in favor of more relaxed limits on jury factfinding. The argument that the facts presented an issue for the jury could always be buttressed by the claim that the jury should always resolve all factual disputes with the quotations from the nullification history added as a gloss. n151

The combination of the persistence of the nullification argument in negligence cases and the recent attention to the ratification history increases the apparent attractiveness of a definition of the jury's role in complex cases that includes a direct political role. That apparent attractiveness is misleading because the substantive issues in the cases are substantially different. In negligence cases, the nullification argument supports jury factfinding on issues within the experience and understanding of the jury, such as whether a driver was negligent, but the same is not true for all issues in the complex cases. n152 The seventh amendment does not require that the jury be the sole factfinder, and it does not forbid development of judicial factfinding under the judge-jury historical test.

IV. JUDICIAL FACTFINDING UNDER THE HISTORICAL TEST

The gene ral problem withjury trial in complex cases is that the jury may be expected to do too much, whether deciding too many issues, deciding issues that are too complicated, or both. It may be possible to subdivide a case into parts with fewer issues, it may be possible to refine the substantive law to make issues less complicated, and it may be possible to make the jury a more efficient or expert factfinder. n153 All these steps seem likely to fall short of reducing every complex case to a manageable size. **[*33]** Then the only alternative to complete elimination of a right to jury trial will be greater direct factfinding on some issues by the judge.

The judge is already allowed to do some factfinding in deciding motions, such as for summary judgment, directed verdict, or new trial, but those motions just establish outer limits on what can be reasonably inferred from the evidence. Can the judge do more and directly establish certain issues by, for example, defining the relevant market in an antitrust case? n154 If so, some cases might no longer reach the jury because summary judgment would then be proper. Others would be shorter and less complicated because the jury instructions would define the relevant market and the jury would not have to hear the evidence on that issue.

The historical judge-jury test establishes that the seventh amendment does not forbid such direct judicial factfinding. In applying the judge-jury historical test, it is essential to avoid two false paths. One false path is strict historicism, or trying to match modern complex cases to 1791 cases issue by issue. The cases and issues are too different to permit such direct comparisons. The other false path is the distinction between questions of law and questions of fact. The often stated division of labor that assigns questions of law to the judge and questions of fact to the jury is too superficial because there is no natural or inherent distinction between issues of fact and law. n155 These are labels, useful when judicial factfinding is disguised by calling the matter a question of law, n156 but hardly useful when trying to decide if the issue should be given to the jury.

It should not be too surprising to find no perfect analogy in 1791 procedure that can be simply dusted off and put to use today. Modern issues, such as defining the relevant market in an antitrust case, are substantially more complicated than 1791 issues. Judges also are not doing very much obvious direct factfinding today because such direct factfinding does not persist. Developing case law and statutory enactments refine the substantive law, producing more specific standards and narrower issues that can be submitted to the jury. n157 For example, in negligence cases, the judicial factfinding controls only at the edges, determining what reasonably could be found as negligence or contributory negligence.

It is notable that many of the examples of direct judicial factfinding have involved a test of reasonableness, such as determinations of reasonable time in commercial cases or reasonable cause in cases of malicious prosecution or false imprisonment. The test of reasonableness appears to **[*34]** create a fixed legal standard, while allowing flexibility in application to the facts of particular cases. The reasonableness standard may offer only limited guidance if a jury is the factfinder, as the jury is given only limited information about what is done in practice and no information about what has been found reasonable in other cases. As a result, the issue of reasonableness has at times been decided by judges and at time by juries. n158

Many English and early American cases treated the issue of reasonableness in contract cases and negotiable instrument cases as an issue for the judge in order to have fixed rules that would allow greater precision in business. n159 Today

statutes such as the Uniform Commercial Code establish many definite standards of what is reasonable, so direct judicial factfinding is not as necessary. n160 In actions for malicious prosecution or false imprisonment, the judges also decided whether there was reasonable cause for the action in order to protect those who came forward in aid of public justice from the uncertainty of the jury's factfinding. n161 For such cases there are fewer modern statutes defining what is reasonable, but judges still decided the limits of what might be considered reasonable cause. Negligence cases might have been similarly treated, but there was no equivalent need for precision or protection of a public policy. Therefore, judges did not directly decide the reasonableness issue in each case. n162

Some issues in complex cases may be similar to these reasonableness issues — not yet well defined but flexible, either deliberately so or as the result of differing judicial interpretations of the law. n163 In these complex cases there is a need for some precision, predictability, and a public policy to effectuate. The usual procedures of summary judgment or directed verdict are not sufficient to reduce some of the complex cases to a size the jury can handle, especially if judges believe that the seventh amendment requires that every possible factual dispute be decided by the jury. The next step in making the case manageable must be greater judicial factfinding on certain issues, such as the definition of the relevant market or the meaning of monopolization.

Once the need for greater judicial factfinding on a certain issue is recognized, it is necessary to have some procedure to make it possible. For **[*35]** some cases and some issues, it may suffice to raise the standard of what is sufficient evidence to defeat a motion for summary judgment, but that will dispose of only a few. For most of the complex cases the only way to reduce the number or complexity of the issues will be by actual judicial resolution of factual disputes, a process that appears to necessitate some form of bench hearing on certain issues.

Of course a bench hearing on certain issues may look like a bench trial of the entire case, if those issues are controlling, it will be a bench trial of the case. However, that would not be a goal, and often the result would be only a set of jury instructions framing certain issues for the jury to decide on the basis of evidence presented in the usual trial. If the hearing were held on the issue of market definition, the jury instructions would establish the relevant markets; if it were on the meaning of monopolization, the hearing would establish which specific actions would be sufficient if proven at the trial. Such a hearing would go beyond the modern pretrial conference or conference on jury instructions because the judge would resolve factual disputes in order to narrow the issues to a number that comfortably could be tried and decided by the jury. n164

The jury should have a nontrivial role, but it should not operate unchecked. As suggested by Judge Becker in his *Zenith* opinion, the jury serves a line-drawing function by returning a general verdict in "borderline" cases. n165 The borderline case may be one of two kinds. In one, the "who did what" facts are unclear so that the factfinder must determine the credibility and value of the evidence. Although this is sometimes a difficult job, it is not the real source of the complexity problem, particularly if the issues are clearly defined by the judge. The complexity problem concerns borderline cases in which the "facts" in dispute depend on more important policy choices — intent to monopolize, monopoly power, intent to defraud — and for such factfinding line drawing has the effect of policy making. If the issue is clear, a summary judgment or directed verdict **[*36]** makes the jury unnecessary. When the issue is not clear, Judge Becker implies that the jury should always decide because it is a borderline case. The judge-jury historical development, on the other hand, indicates that the jury should not decide every borderline case and certainly not if the jury seems unable to grasp the important issues. In automobile negligence cases, product liability cases, or even professional negligence cases, the jury may seem able to grasp the issues that are defined, and therefore is allowed to play a policy-making role by deciding issues such as the definiti on of negligence. Since the jury does not seem as able in the complex cases, the jury role must be cut back, either by changing the substantive law to make the borderline issue irrelevant or by more direct judicial factfinding. Reevaluation of the judge-jury relationship is a job that never ends because the substantive law and jurors' experience and ability never stops changing.

The question of which particular issues should be decided by the judge will not be further explored here. That is a matter of detail in the substantive law. n166 This article is primarily concerned with establishing the need for a different procedural perspective. Since the judge-jury historical test makes clear that there is no inherent seventh amendment definition of a jury issue, the search for the perfect historical analogy for a modern issue or procedure is no longer necessary. The province or historic domain of the jury must be considered and reconsidered issue by issue.

V. PRESERVING THE PROTECTION OF THE SEVENTH AMENDMENT

The proposed solution of more direct judicial factfinding might make it seem that the end result of the judge-jury

historical test is the same as for many of the other approaches. Whatever the appearance, the judge–jury historical test will better preserve the protection of the seventh amendment because it will better avoid the danger of the "slippery slope" of unrestrained judicial discretion. The solutions that eliminate the jury entirely from certain cases, whether by the law–equity historical test or the due process approach, create a great risk that lawyers and judges will get used to trying those cases without a jury. Once such cases become exclusively tried by judges, it is unlikely they will ever be tried to a jury again, even if the law becomes better refined so that some issues could be handled by a jury. Even worse, the absence of any clear precedent to define **[*37]** the boundary of the nonjury category creates the risk of an ever–increasing number of cases found too complex for a jury. n167

Direct judicial factfinding under the judge–jury historical test does not eliminate such risks, but it does reduce them. The judge–jury relationship is treated as a political process in which both parties have responsibility and power. The jury is potentially available in every case, and judges will always have to consider whether, under the substantive law and evidence, there is an issue proper for decision by a jury. Judicial opinion on the ability and value of the jury will vary across a range, and the use made of the jury as a factfinder will vary among judges and across time. n168 Instead of a frozen position, the cases will produce swings like a pendulum, depending on which judicial opinion is prevalent. The limits on the pendulum swings at each end are also not fixed or frozen, but there is always a general consensus about the jury's role that limits the swings. That consensus is developed from precedent, in the common–law, case–by–case style, a process that permits change and evaluation of change but avoids great leaps into unknown areas that may be impossible to undo. n169

[*38] This article advocates an approach to the complexity problem that considers the jury a valuable part of civil procedure, but one that must be used correctly. It has not sought to defend the civil jury in general, as it seems that most participants in the complexity debate are not deeply committed jury abolitionists. Most proponents of the complexity exception appear motivated by the frustration of lengthy trials on complicated issues, all to jury that apparently never will understand what it takes vears for judges and lawyers to understand. They are willing to eliminate the jury, and risk the "slippery slope" problem, because the value of the jury appears clearly outweighed by the damage done.

The value of the jury as an institution may not be apparent in i ndividual cases. In each case, the jury's primary role is adjudication — finding the facts and applying the law. But as an institution, the value of the jury lies in its political role of maximizing citized participation in the courts. The civil jury is becoming more and more a uniquely American institution that affirms our commitment to citizen involvement in government. It is necessarily a complex institution, and like any complex institution, it has a learning curve for those who use it. Because of the learning curve, the civil jury system probably could not be set up successfully in the United States today and could not be reinstituted if abandoned for even a short time. n170 Fortunately, we have 190 years of experience under the seventh amendment and centuries of experience before that to provide guidance on how efficiently to operate a civil trial system in which both judge and jury are partners with shared responsibility.

Each debate in the controversy about the civil jury should refine the definition of the role of the civil jury because, after each debate, more is known about the value, ability, disadvantage, and history of the civl jury. The complexity debate has demonstrated that there are very finite limits to the value of precedent under the law–equity historical test, and that the jury nullification doctrine is fundamentally unsound. The complexity debate has further shown that an institutional political role for the jury will best accommodate the full history of the seventh amendment. It is now time to move forward in each area of the substantive law so that the jury can continue to play its proper role in civil trials.

FOOTNOTES:

n1 The seventh amendment to the United States Constitution states in full: In suits at Common Law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re–examined in any Court of the United States, than according to the rules of the Common Law.

n2 Opinions supporting the complexity exception include: *In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); ILC Peripherals Leasing Corp. v. Int'l Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978), aff'd on other grounds sub nom. Memorex Corp. v. Int'l Business Mach. Corp., 636 F.2d 1188 (9th Cir. 1981)* (mem.); *Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); In re United States Fin. Sec. Litig., 75 F.R.D. 702 (S.D. Cal. 1977), rev'd, 609 F.2d 411 (9th Cir. 1979); cert. denied sub Nom. Gant v. Union Bank, 446 U.S. 929 (1980); In re Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976).*

Opinions holding that there is no complexity exception include: *In re United States Fin. Sec. Litig., 609 F.2d 411 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980); Kian v. Mirro Aluminum Co., 88 F.R.D. 351 (E.D. Mich. 1980); Davis–Watkins Co. v. Service Merchandise Co., 500 F. Supp. 1244 (M.D. Tenn. 1980); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979), vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980); American Can Co. v. Dart Ind., Inc., 28 Fed. R. Serv. 2d 555 (N.D. Ill. 1979); In re IBM Peripheral EDP Devices Antitrust Litig., 459 F. Supp. 626 (N.D. Cal. 1978); Radial Lip Mach., Inc. v. Int'l Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977); Jones v. Orenstein, 73 F.R.D. 604 (S.D.N.Y. 1977).*

Other opinions discussing the issue include: *Berkey Photo, Inc. v. Eastman Kodak Co., 444 U.S. 1093 (1980)* (Rehnquist and Powell, JJ., dissenting from denial of cert.); *City of New York v. Pullman, Inc., 662 F.2d 910 (2d Cir. 1981); Cotten v. Witco Chem. Corp., 651 F.2d 274 (5th Cir. 1981), cert. den ied, 102 S. Ct. 1256 (1982); Rosen v. Dick, 639 F.2d 82 (2d Cir. 1980); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 279 n.20 (2d Cir. 1979), cert. denied, 446 U.S. 1093 (1980); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chem. Corp., 579 F.2d 20* (3d Cir.), $Icert. denied, *439 U.S. 876 (1978); In re N–500L Cases, 517 F.Supp. 821 (D.P.R. 1981); In re Corrugated Container Antitrust Litig., 441 F.Supp. 921 (S.D. Tex. 1981); McMahon v. Prentice–Hall, Inc., 486 F. Supp. 1296, 1300 (E.D. Mo. 1980); Friends For All Children, Inc. v. Lockheed Aircraft Corp., 87 F.R.D. 560 (D.D.C. 1980); Rosen v. Dick, 83 F.R.D. 540 (S.D.N.Y. 1979), modified, 639 F.2d 82 (2d Cir. 1980); Berkey Photo, Inc. v. Eastman Kodak Co., 457 F. Supp. 404 (S.D.N.Y. 1978), modified, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); SEC v. Assoc. Minerals, Inc., 24 Fed. R. Serv. 2d 172 (E.D. Mich. 1977).*

n3 Articles arguing for the complexity exception include: Campbell & Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold, 128 U. PA. L. REV. 965 (1980);* Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment, 80 COLUM L. REV. 43 (1980);* Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation, 1 REV. OF LITIGATION 3 (1980);* Margolis & Slavitt, *The Case Against Trial by Jury in Complex Civil Litigation,* 7 LITIGATION, Fall 1980, at 19; Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation, 34 U. MIAMI L. REV. 243 (1980).*

Articles opposing the complexity exception include: Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation, 128 U. PA. L. REV. 829 (1980);* Blecher & Daniels, *In Defense of Juries in Complex Antitrust Litigation, 1 REV. OF LITIGATION 47 (1980);* Blecher & Carlo, *Toward More Effective Handling of Complex Antitrust Cases, 1980 UTAH L. REV. 727;* Corboy, *In Defense of the Civil Jury,* 5 LITIGATION NEWS, Jan. 1980, at 2; Edquist; *The Use of Juries in Complex Cases,* 3 CORP. L. REV. 277 (1980); Hawkins, *The Case for Trial by Jury in Complex Civil Litigation,* 7 LITIGATION, Fall 1980, at 15.

Other articles discussing the issue include: Harris & Liberman, *Can the Jury Survive the Complex Antitrust Cases?, 24 N.Y.L. SCH. L. REV. 611 (1979);* Ungar & Mann, *The Jury and the Complex Civil Case,* 6 LITIGATION, Spring 1980, at 3. *See also* M. SAKS, SMALL GROUP DECISION MAKING AND COMPLEX INFORMATION TASKS (Federal Judicial Center 1981); Address by Chief Justice Warren E. Burger to the Conference of State Chief Justices (August 7, 1979) (on file with the *Washington Law Review*).

n4 *609 F.2d 411 (9th Cir. 1979).*

n5 *631 F.2d 1069 (3d Cir. 1980).*

n6 AMERICAN COLLEGE OF TRIAL LAWYERS, RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION (1981); Devitt, *Should Jury Trial be Required in Civil Cases?, 47 J. AIR L. & COM. 495 (1982);* Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues, 69 CALIF. L. REV. 1 (1981);* Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment, 80 MICH. L. REV. 68 (1981);* Loo, *A Rationale for an Exception to the Seventh Amendment Right to a Jury Trial, 30 CLEV. ST. L. REV. 647 (1981).* Luneberg & Nordenberg, *Specifically Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation, 67 VA. L. REV. 887 (1981);* Withrow & Suggs, *Procedures for Improving Jury Trials of Complex Litigation, 25 ANTITRUST BULL. 493 (1980).*

n7 *E.g.,* "The jury . . . finds the facts and applies the law as stated by the judge to those facts, thus reaching an

ultimate conclusion or verdict." C. JOINER, CIVIL JUSTICE AND THE JURY 16 (1962).

n8 Various works are listed in *C. JOINER, supra* note 7, at 235–38; H. KALVEN & H. ZEISEL, THE AMERICAN JURY 4 n.2 (1966); MODERN JUDICIAL ADMINISTRATION 189–204 (R. Fremlin ed. 1973); Green, *Juries and Justice — The Jury's Role in Personal Injury Cases, 1962 U. ILL. L.F. 152, 167–71 (1962).*

n9 *ILC Peripherals Leasing Corp. v. Int'l Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); In re United States Fin. Sec. Litig., 75 F.R.D. 702 (S.D. Cal. 1977), rev'd, 609 F.2d 411 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980); In re Boise Cascade Sec. Litig., 420 F. Supp. 99 (W.D. Wash. 1976).*

n10 *See, e.g.,* Lynch, *su pra* note 3, at 29–37.

n11 *396 U.S. 531, 538 n. 10 (1970).*

n12 *In reJapanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1080–83 (3d Cir. 1980); In re United States Fin. Sec. Litig., 609 F.2d 411, 419–24 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980).*

n13 *Ross v. Bernhard, 396 U.S. 531, 538 n. 10 (1970).*

n14 *Curtis v. Loether, 415 U.S. 189, 198 (1974).*

n15 *See* F. JAMES, CIVIL PROCEDURE 344 (1965); Wolfram, *The Constitutional History of the Seventh Amendment, 57 MINN. L. REV. 639, 731 (1973).*

n16 *See, e.g., In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1080–83 (1980).*

n17 *Compare Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 907–14 (E.D. Pa. 1979)* (rejecting motion for jury trial in complex litigation), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980), with Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 67–68 (S.D.N.Y. 1978)* (granting motion for jury trial in complex litigation).

n18 *In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1080–81 (3d Cir. 1980)* (vacating *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889 (E.D. Pa. 1979)).*

n19 See the discussion of *Clench v. Tomley, Cary 23, 21 Eng. Rep. 13 (Ch. 1603)* in Arnold, *supra* note 3, at 840–45; Campbell & Le Poidevin, *supra* note 3, at 974–85; and Arnold, *A Modest Replication to a Lengthy Discourse, 128 U. PA. L. REV. 986, 987–88 (1980).*

n20 *In re United States Fin. Sec. Litig., 609 F.2d 411, 423–24 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980); In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1081–83 (3d Cir. 1980).*

n21 Devlin, *supra* note 3.

n22 *See* Arnold, *supra* note 3, at 830–40; Campbell & Le Poidevin, *supra* note 3, at 966–73; Wolfram, *supra* note 13. *Compare* P. DEVLIN, TRIAL BY JURY 12–13 (1956) (discussing the English history of judge–jury relations).

n23 Lord Devlin justifies his quotation of Irish precedent with only this footnote: "[L]aw and procedure in Ireland were the same as in England. With rare exceptions the Lord Chancellors of Ireland were English lawyers." Devlin, *supra* note 3, at 56 n.40. Reid suggests that the Irish experience is not at all helpful in interpreting an American constitution. J. REID, IN A DEFIANT STANCE: THE CONDITIONS OF LAW IN MASSACHUSETTS BAY, THE IRISH COMPARISON, AND THE COMING OF THE AMERICAN REVOLUTION (1977). *See also,*

Teachout, Book Review, *53 N.Y.U.L. REV. 241, 254 (1978).*

Also compare Lord Devlin's report of one English judge's "horror at the idea of a judge taking as much as a fortnight over one case," Devling, *supra* note 3, at 67 n.89, with the contrasting American experience in *Vanhorne v. Dorrance, 2 Dall. 304 (C.C.D. Pa. 1795),* in which the trial continued for 15 days.

n24 Devlin, *supra* note 3, at 83–85.

n25 P. DEVLIN, *supra* note 22. *See also* P. DEVLIN, THE JUDGE 117–76 (1979).

n26 The fifth amendment provides in part: "[N]or shall any person . . . be deprived of life, liberty, or property, with out due process of law . . . ." U.S. CONST. amend. V.

n27 *See, e.g.*, Lynch , *supra* note 3, at 18–19.

n28 *In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980).*

n29 *Id. at 1091–92. See also In re United States Fin. Sec. Litig., 609 F.2d 411, 428 n.58 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980).*

n30 *FED. R. CIV. P. 18* (joinder of claims and remedies); *FED. R. CIV. P. 19* (joinder of persons needed for just adjudication); *FED. R. CIV. P. 20* (permissive joinder of parties); *FED. R. CIV. P. 21* (misjoinder and nonjoinder of parties); *FED. R. CIV. P. 22* (interpleader).

n31 *See supra* text accompanying note 28.

n32 *In re United States Fin. Sec. Litig., 609 F.2d 411, 429–32 (9th Cir. 1979), cert. denied sub nom. Gant v. Union Bank, 446 U.S. 929 (1980).*

n33 *See infra* text accompanying notes 34–37.

n34 Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power, 56 TEX. L. REV. 47 (1977);* Higginbotham, *Panel Discussion on Proposed Increased Judicial Pre–trial and Trial Management: Can It Work?, 48 ANTITRUST L.J. 525, 532–34 (1980).*

n35 *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 934–42 (E.D. Pa. 1979), vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).*

n36 *478 F. Supp. at 938.*

n37 *Id. at 941–42.*

n38 *See, e.g., In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1085 (3d Cir. 1980);* Lynch, *supra* note 3, at 24–26.

n39 Higginbotham, *supra* note 34, at 58.

n40 An example of the use of the Constitution ratification debates appears in *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 938–41 (E.D. Pa. 1979)* (citing Wolfram, *supra* note 13), *vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).*

n41 *See* Wolfram, *supra* note 15, at 639–44.

n42 There is also a related historical test that was used by the Court to determine whether the denial of a jury trial

that resulted from use of a nonjudicial forum violated the seventh amendment. *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977). S ee infra* note 168.

n43 *000500 359 U.S.500 (1959).

n44 *369 U.S. 469 (1962).*

n45 *382 U.S. 323 (1966).*

n46 *396 U.S. 531 (1970).*

n47 *415 U.S. 189 (1974).*

n48 *416 U.S. 363 (1974).*

n49 *See generally* Kirst, *Jury Trial and the Federal Tort Claims Act: Time to Recognize the Seventh Amendment Right, 58 TEX. L. REV. 549, 561–73 (1980).*

n50 *283 U.S. 494 (1931).*

n51 *293 U.S. 474 (1935).*

n52 *295 U.S. 654 (1935).*

n53 *319 U.S. 372 (1943).*

n54 *439 U.S. 322 (1979).*

n55 *Id. at 336.*

n56 *Galloway v. United States, 319 U.S. 372, 392 (1943).*

n57 *439 U.S. 322, 333–37 (1979).* Various commentators also implied that only the law–equity historical test could be used to limit the role of the jury. *See, e.g.,* F. JAMES, *supra* note 15, at 377–81; Wolfram, *supra* note 15, at 731–47.

n58 F. JAMES, *supra* note 15, at 240.

n59 *See generally* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 298–350 (7th ed. 1956); F. JAMES, *supra* note 15, 237–48; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 137–262 (1898).

n60 1 W. HOLDSWORTH, *supra* note 59, at 317.

n61 J. THAYER, *supra* note 59, at 140–55.

n62 *Id.* at 160–66; 1 W. HOLDSWORTH, *supra* note 50, at 341–46.

n63 The practice of finding was first used by Star Chamber to punish corrupt jurors after the trial was ended. Star Chamber was abolished in 1641 and after the Restoration the common law courts exerci sed the power offining. 1 W. HOLDSWORTH, *supra* note 59, at 343–44.

n64 *Vaughn, 135, 124 Eng. Rep. 1006 (C.P. 1670).*

n65 J. THAYER, *supra* note 59, at 234–39.

n66 F. JAMES, *supra* note 15, at 244–45.

n67 *See* Macbeath v. Haldimand, 1 T.R. 172, *99 Eng. Rep. 1036 (K.B. 1786);* Watkins v. Towers, 2 T.R. 276, *100 Eng. Rep. 150, 153 (K.B. 1788).*

n68 J. THAYER, *supra* note 59, at 114–15, 232–34.

n69 *Id.* at 212–16.

n70 *00217 Id. at217–19.*

n71 *Id.* at 172–74 n.4.

n72 *Id.* at 169–79.

n73 *Wood and Gunston, Style 466, 82 Eng. Rep. 867 (K.B. 1655).*

n74 J. THAYER, *supra* note 59, at 169.

n75 F. JAMES, *supra* note 15, at 245.

n76 Henderson, *The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 300, 318–20 (1966).*

n77 *See* J. REID, *supra* note 23; J. REID, IN A REBELLIOUS SPIRIT (1979).

n78 C. UBBELOHDE, THE VICE ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960); *see* 4 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 168–71, 254–69 (1938).

n79 *See generally* Arnold, *supra* note 3, at 830–38 (discussing the historical relationship of equity and jury trial).

n80 *See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343–44 (1979)* (Rehnquist, J., dissenting).

n81 Wolfram, *supra* note 15, at 667–725. *See also* Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment, 126 U. PA. L. REV. 1281, 1322–28 (1978)* (discussing the development of the jury's role in tax cases).

n82 *3 U.S. (3 Dall.) 1, 3 (1794).*

n83 *See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 339 (1979)* (Rehnquist, J., dissenting); *Galloway v. United States, 319 U.S. 372, 405 (1943)* (Black, J., dissenting); M. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 28–29, 141–43 (1977); Johnston, *Jury Subordination Through Judicial Control,* 43 LAW & CONTEMP. PROBS., Autumn 1980, at 24.

n84 *See* J. THAYER, *supra* note 59, at 253–56.

n85 The substantial attention to the original intent of the fourteenth amendment provides a strong contrast. *See generally* Sandalow, *Constitutional Interpretation, 79 MICH. L. REV. 1033 (1981)* (discussing constitutional interpretation not only by consideration of original intent but also by consideration of "the entirety of our history").

n86 Wolfram, *supra* note 15.

n87 Henderson, *supra* note 76.

n88 *Id.* The Henderson article discusses only reported opinions, and is therefore unable to account for the practice in every state or in the various federal trial courts. Some early federal court Minutes are available. A review of the Minutes for the Circuit Court for New York indicates that this federal court made use of some of the jury control devices. For example, in the second civil trial held by the court, the plaintiff was nonsuited. Culbertson v. Godet, Minutes of the U.S. Circuit Court for the District of New York, Sept. 5, 1795 (National Archives Microfilm, Record Group 21, M854). The motion for a new trial was in use, although the grounds are not stated. Bowen v. Kemble, Sept. 4, 1804, *id.;* Parsons v. Barnard, April 8, 1813, *id.* The directed verdict was in use, Jackson v. Stiley, April 3, 1815, *id.*, as was the special verdict, Lanefae v. Barker, April 11, 1815, *id. See also United States v. Giles, 13 U.S. (9 Cranch) 210 (1815)* (appeal from Circuit Court for District of New York, jury found special verdict). The directed verdict was also in use in the United States Circuit Court for the District of Pennsylvania. *Vanhorne v. Dorrance, 2 Dall. 304 (C.C.D. Pa. 1795).*

n89 *See* D. HENDERSON, COURTS FOR A NEW NATION 72–82, 89 (1971).

n90 *See* R. McBRIDE, THE ART OF INSTRUCTING THE JURY § 1.08A (Supp. 1978). *See also* Reid, *In the Taught Tradition — The Meaning of Law in Massachusetts–Bay Two–Hundred Years Ago, 14 SUFFOLK U.L. REV. 931, 956–57, 968–74 (1980).*

n91 The story of Massachusetts developments is told in Note, *The Changing Role of the Jury in the Nineteenth Century, 74 YALE L.J. 170 (1964). See also* R. ELLIS, THE JEFFERSONIAN CRISIS 184–206 (1971); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 28–29, 140–59 (1977); W. NELSON, AMERICANIZATION OF THE COMMON LAW 165–74 (1975); Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts, 55 MINN. L. REV. 903, 912–16 (1971). But see* Teachout, *supra* note 23, at 274–75.

n92 *Elmore v. Grymes, 26 U.S. (1 Pet.) 469 (1828); D'Wolf v. Rabaud, 26 U.S. (1 Pet.) 476, 497 (1828).*

n93 *Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830).*

n94 *Parks v. Ross, 52 U.S. 362 (1850); M'Lanahan v. Universal Ins. Co., 26 U.S. (1 Pet.) 170, 182 (1828).* The practice appears, without objection, as early as *Kempe's Lessee v. Kennedy, 9 U.S. (5 Cranch) 173 (1809). See also Oscanyon v. Winchester Repeating Arms Co., 103 U.S. 261, 264 (1881)* ("Involuntary nonsuits not being allowed in the Federal Courts, the course adopted [of a directed verdict] was the proper proceeding.").

n95 Actually, there was almost no debate about the power to grant a new trial. $ISee *Walker v. New Mexico & S.P.R.R., 165 U.S. 593, 596 (1897); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448–49 (1830).*

n96 *Sparf v. United States, 156 U.S. 51 (1895).*

n97 *319 U.S. 372 (1943).*

n98 An example that shows the effect of such uncertainty about the correct interpretation of *Galloway* is Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts, 55 MINN. L. REV. 903, 916–17 (1971).*

n99 *319 U.S. at 390–92.*

n100 *Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902).*

n101 A contrary suggestion by Justice Rehnquist in *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 349 (1979)* (dissenting), is not supported by Justice McKenna's *Fidelity & Deposit Co.* opinion.

n102 *Slocum v. New York Life Ins. Co., 228 U.S. 364 (1912).*

n103 *Id. at 387–88.*

n104 *Id. at 400.*

n105 *Baltimore & C. Line v. Redman, 295 U.S. 654 (1935).*

n106 *See* F. JAMES, *supra* note 15, at 333 & n.11.

n107 *See supra* note 95.

n108 *Gasoline Prods. Co. v. Champlin Refining Co., 283 U.S. 494 (1931).*

n109 *293 U.S. 474 (1935).*

n110 Under remittitur practice, the judge overrules defendant's motion for a new trial, on the condition that plaintiff first give up or remit a stated portion of the verdict; if plaintiff refuses to do so, there is a new trial. Under additur practice, the judge overrules plaintiff's motion for a new trial, on the condition that defendant first add a stated amount to the verdict; if defendant refuses, there is a new trial.

n111 *Id. at 488. See also* F. JAMES, *supra* note 15, at 324–25.

n112 *439 U.S. 322 (1979).*

n113 *Id. at 336–37.*

n114 "For to sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment." *Id. at 346.*

n115 *See id. at 346–49* (Rehnquist, J., dissenting); *Galloway v. United States, 319 U.S. 372, 405–07 (1943)* (Black, J., dissenting).

n116 W. PROSSER, THE LAW OF TORTS 139–40 (4th ed. 1971); White, *The Intellectual Origins of Torts in America, 86 YALE L.J. 671, 683–86 (1977).*

n117 *See* F. JAMES, *supra* note 15, at 270–71; 9 J. WIGMORE, EVIDENCE 517–18 (3d ed. 1940).

n118 *See* F. JAMES, *supra* note 15, at 255–59.

n119 *See id.* at 259–66; J. THAYER, *supra* note 59, at 212–13.

n120 *See* W. PROSSER, *supra* note 113, at 416–18, 427–29. *See also* James, *Assumption of Risk, 61 YALE L.J. 141, 166–68 (1952).*

n121 "[J]udges are thus . . . forever advancing, incidentally, but necessarily and as part of their duty, on the theoretical province of the legislator and the juryman." J. THAYER, *supra* note 56, at 208. *See generally* Scott, *Trial by Jury and the Reform of Civil Procedure, 31 HARV. L. REV. 669 (1918).*

n122 *Galloway v. United States, 319 U.S. 372, 403–07 (1943)* (Black, J., dissenting).

n123 *Cf.* Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. LEGAL STUD. 249, 267–74 (1975)* (limitations on jury damage awards in contract cases developed during the nineteenth century in order to maintain judicial efficiency and predictability in coping with increased numbers of contract disputes spawned by the rapid pace of industrialization).

n124 In England, the judges could not use remittitur to control the amount of damages, Watt v. Watt, 1905 A.C. 115, and the need to have greater judicial control over damage awards was a stated reason for the virtual elimination of jury trial for personal injury litigation. *Ward v. James, [1966] 1 Q.B. 273. See* W. CORNISH, THE JURY 229–37 (1968).

n125 *See* F. JAMES, *supra* note 15, at 84–88.

n126 "The matter is essentially one to be worked out in particular situations and for particular types of cases." *Galloway v. United States, 319 U.S. 372, 395 (1943).*

n127 Weiner, *The Civil Jury and the Law–Fact Distinction, 54 CAL. L. REV. 1867, 1918–38 (1966).*

n128 James, *Functions of Judge and Jury in Negligence Cases, 58 YALE L.J. 667 (1949).*

n129 *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE 275–318 (1974); *see generally* James, *Tort Law in Midstream: Its Challenge to the Judicial Process, 8 BUFFALO L. REV. 315, 342–44 (1959)* (suggesting that allowing juries broad latitude in factfinding promotes equitable results).

n130 Carrigan, *The Importance of Being Unpopular — And Independent,* 5 LITIGATION, Summer 1979, at 5, 67; Renfrew, *The Vital Role of the Jury,* 2 LITIGATION, Winter 1976, at 5; Wigmore, *A Program for the Trial of Jury Trial,* 12 J. AM. JUDICATURE SOC. 166, 169–70 (1929).

n131 Jury Selection and Service Act of 1968, Pub. L. No. 90–274, 82 Stat. 53 (1968) (codified at *28 U.S.C. §§ 1861–*74 (1976)).

n132 *28 U.S.C. § 1863* (b) (3) (1976).

n133 Contrast the federal court standard with that used in Germany to select lay members for a mixed court, as described in Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?,* 1981 AM. B. FOUND. RESEARCH J. 195, 206–08 (1981).

n134 *See* Devitt, *Federal Civil Jury Trials Should be Abolished, 60 A.B.A. J. 570, 572 (1974);* Steuer, *The Case Against the Jury, 47 N.Y.ST. B.J. 101, 144–46 (1975);* Norton, *What a Jury Is, 16 VA. L. REV. 261 (1930).*

n135 1 W. HOLDSWORTH, *supra* note 59, at 347–50; Curtis, *The Trial Judge and the Jury, 5 VAND. L. REV. 150 (1952).*

n136 The recent article by Professors Luneburg and Nordenberg advocates that complex cases should be tried to a special jury, with each juror being required to have at least a college degree. Luneburg & Nordenberg , *supra* note 6, at 946–47. Their argument for such a standard depends upon the assumption that the complexity problem is caused by jurors' lack of education and that judges will be unable to better define the issues in the complex cases. In addition, their choice of a college degree as the standard appears arbitrary and inconsistent with the historical trend toward representative jury panels.

n137 P. DEVLIN, *supra* note 20, at 164.

n138 *See generally James, supra* note 128, at 685–90 (when judges adhere to tort law theories that do not conform to popular expectations of what the law should be, jury verdicts hasten the demise of such theories); Wyzanski, *A Trial Judge's Freedom and Responsibility, 65 HARV. L. REV. 1281, 1283–88 (1951)* (judges should instruct the jury in extant, though unpopular, legal doctrines, but they may and should allow the jury to reach an equitable result in the Anglo–American legal tradition of using the jury to modify the rigor of the law and effect gradual reform).

n139 *See* Summers, *Some Merits of Civil Jury Trials, 39 TUL. L. REV. 3, 11–12 (1964).*

n140 *See, e .g., Malvo v. J.C. Penney Co., 512 P.2d 575 (Alaska 1973).*

n141 *See, e.g.,* J. FRANK, COURTS ON TRIAL. 120–23, 127–35 (1949); J. **ULMAN,** A **JUDGE** TAKES THE STAND 21–34 (1933); Green, *supra* note 8; *James, supra* note 128. *See also* Weiner, *supra* note 127, at 1876–94 (analyzing the degree to which juries decide questions of law in negligence actions).

n142 Sebille, *Trial by Jury: An Ineffective Survival, 10 A.B.A. J. 53, 55 (1924).*

n143 L. GREEN, JUDGE AND JURY 416 (1930).

n144 J. FRANK, *supra* note 141, at 132.

n145 *See* W. HOLDSWORTH, *supra* note 59, at 349–50; *Curtis, supra* note 135; Holmes, *Law in Science and Science in Law, 12 HARV. L. REV. 443, 459–60 (1899);* James, *Sufficiency of the Evidence and Jury–Control Devices Available Before Verdict, 47 VA. L. REV. 218, 246–48 (1961);* Joiner, *supra* note 8, at 18–19; Pound, *Law in Books and Law in Action, 44 AM. L. REV. 12, 18–19 (1910);* Traynor, *Fact Skepticism and the Judicial Process, 106 U. PA. L. REV. 635, 638–40 (1958);* Wigmore, *supra* note 130, at 169–71; Wyzanski, *supra* note 138, at 1285–86; *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 354–55 (1979)* (Rehnquist, J., dissenting). *See also 374 U.S. 865–68 (1963)* (Black & Douglas, JJ., dissenting from approval of amendments to Federal Rules of Civil Procedure that would permit special verdicts); G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 57–64, 208 n.12 (1978) (observing that the jury is the prototype of a responsible agency charged with making difficult, perhaps tragic, choices).

n146 *See* Redish, *supra* note 85, at 507–08; Steuer, *supra* note 131, at 140.

n147 *See* Rendleman, *Chapters of the Civil Jury, 65 KY. L.J. 769 (1977).*

n148 Wolfram, *supra* note 15, at 703–05.

n149 *Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 938–42 (E.D. Pa. 1979), vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).*

n150 *Zenith Radio Corp. v. Matsushitz Elec. Indus. Co., 513 F. Supp. 1100 (E.D. Pa. 1981).*

n151 Even Justice Black's dissent in *Galloway* can be so interpreted, as he concluded his nullification argument with a concession that some directed verdicts might be proper. *Galloway v. United States, 319 U.S. 372, 407 (1943)* (Black, J., dissenting). Part II of Justice Black's dissent indicates that one major reason for his difference of opinion on the existence of a jury question was a basically different approach to the central factual issue of "total and permanent" disability. *Id. at 408–11.*

n152 *See* F. JAMES, *supra* note 15, at 298–99.

n153 *See* Lempert, *supra* note 6, at 97–132.

n154 *See* Jorde, *supra* note 6, at 36–43.

n155 *See* F. JAMES, *supra* note 13, at 266–71; Morris, *Law and Fact, 55 HARV. L. REV. 1303 (1942);* Weiner, *supra* note 124, at 1867–76. *See generally* J. THAYER, *supra* note 56, at 183–262.

n156 J. THAYER, *supra* note 59, at 202, 230; Devlin, *supra* note 3, at 83.

n157 J. THAYER, *supra* note 59, at 207–08; 9 J. WIGMORE, *supra* note 117, at 520.

n158 Weiner, *supra* note 127, at 1876.

n159 *Id.* at 1895–1910.

n160 *Id.* at 1903–06.

n161 *Id.* at 1910–18; J. THAYER, *supra* note 59, at 230. *See also* W. CORNISH, *supra* note 124, at 224–27.

n162 Some judges, and particularly Justice Holmes, did advocate judicial determination of what was negligent. Weiner, *supra* note 127, at 1893–94. *See also* J. THAYER, *supra* note 59, at 208. Another area of continuous reexamination of the jury's role has been that of contract interpretation. *See* 3 A. CORBIN, CONTRACTS 218–27 (1960).

n163 *See* Blecher & Daniels, *supra* note 3, at 79–82.

n164 The Supreme Court has upheld some other kinds of nonjury factfinding. *In re Walter Peterson, 253 U.S. 300 (1920).* There the Court rejected a seventh amendment challenge to the power of a district judge to appoint an auditor in an action at law to simplify and clarify the issues. There was no specific common–law analogy for such an auditor, but again the Court relied on the judge–jury historical test and held:

The command of the Seventh Amendment . . . does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence . . . . New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice.

Id. at 309–10. It is worth emphasizing again that *Peterson* should not be subject to a strict historicism interpretation that the factifinding must be done by an auditor and not a judge. *Peterson* is instead a further illustration of the flexibility of the judge–jury historical test. *See also* Scott, *supra* note 121, at 690–91.

n165 *Zenith Radio Corp. v Matsushita Elec. Indus. Co., 478 F. Supp. 889, 941 (E.D. Pa. 1979), vacated sub nom. In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980).*

n166 Some commentators have considered whether current antitrust law requires jury factfinding on issues the jury cannot understand. *See, e.g.,* II P. AREEDA & D. TURNER, ANTITRUST LAW 52 (1978); Report to the President and the Attorney General of the Nat'l Comm'n for the Review of Antitrust Laws & Procedures (1979); Blecher & Carlo, *supra* note 3, at 741–52.

n167 This absence of clear guiding precedent is also the prime objection to a solution that would transfer trials of complex cases to a nonjury expert tribunal as advocated in one article. Luneburg & Nordenberg, *supra* note 6, at 950–1007. Their proposal is based on the opinion in *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977),* and further depends on the broadest interpretation of that opinion. I have previously argued that the *Atlans* conclusion is not supported by the precedent cited in the opinion. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment, 126 U. PA. L. REV. 1281 (1978).* Professors Luneburg and Nordenberg appear to agree at least in part with my conclusion that the cases do not support the *Atlas* conclusion. *E.g., 67 VA. L. REV. at 958–59* (discussing *Crowell v. Benson*). Nowhere do they state any disagreement with my conclusion. Novertheless, they do not adequately explain why *Atlas* should be read as broadly as possible.

Administrative agencies may not fit well with the classic doctrine of sepa ration of powers, and advocates of administrative action can hail *Atlas* as a correct result. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 59–148, 188–93 (2d ed. 1978). Such a view may eventually be shown to be preferable, but under that view many constitutional limits, including the seventh amendment, must be considered irrelevant or interpreted differently. Such a policy debate about the continued wisdom of the seventh amendment is always possible, but the approach of Professors Luneburg and Nordenberg does not reach the real issues of the policy debate because they assume that *Atlas* is a correct interpretation of precedent.

The historical test applied in *Atlas* might be called a judicial–nonjudicial power historical test. It has typically been employed with the same attention to historical detail as for the law–equity historical test. It has not used the

broader approach to historical detail of the judge–jury historical test, and it is difficult to understand how that could be done. In any event, the Court in *Atlas* purported to follow historical detail carefully. I agree that the historical detail should be followed carefully and consider it dangerous to build any further on an unsound foundation of misinterpreted precedent.

n168 P. DEVLIN, THE JUDGE 128 (1979). *See generally id.* at 117–48.

n169 The history of the special verdict or general verdict with interrogatories in negligence litigation is instructive. Both were strongly advocated as necessary devices to limit the jury to a narrow factfinding role. *See, e.g., Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 56, 70 (2d Cir. 1948), cert. denied, 355 U.S. 816 (1948)* (opinions of Frank & Hand, JJ.). The special verdict and the general verdict with interrogatories were authorized in federal court. *FED. R. CIV. P. 49*. Justices Black and Douglas argued that Rule 49 violated the seventh amendment. *374 U.S. 865, 867–68 (1963)* (Minority Statement opposing transmission to Congress of 1963 amendments to the Federal Rules of Civil Procedure). To date, neither device can be said to have destroyed the protection of the seventh amendment; in practice federal judges have made sparing use of them. The decision to use either device must be made on a case–by–case basis and depends on each judge's assessment of the need for or value of the device. *See generally* F. JAMES, *supra* note 15, at 295–302.

n170 P. DEVLIN, *supra* note 169, at 174–76; Haines, *Preface to C. JOINER, supra* note 8, at vii.