ARTICLE

THE ARTICLE III JURY

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INTRODUCTION

THE right to trial by jury in civil litigation continues to be a topic of interest in legal scholarship. Procedure scholars have focused on the requirements of the Seventh Amendment, addressing issues such as Congress's power to dispense with jury trials in the federal courts1 and the permissible extent of judicial control of jury decisionmaking.2 Legal historians and others have explored

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2 See, e.g., Edith Guild Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289 (1966); Fleming James, Jr., Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict, 47 Va. L. Rev. 218 (1961); Margaret L. Moses, What the Jury Must Hear: The Supreme Court's Evolving Seventh Amendment Jurisprudence, 68 Geo. Wash. L. Rev. 183, 189–91 (2000); Colleen P. Murphy, Determining Compensation: The Tension Between Legislative Power and Jury Authority, 74 Tex. L. Rev. 345 (1995); Colleen P. Murphy, Judicial Assessment
the origins of the Seventh Amendment, as well as the changing role of the jury in the context of broader historical events. In addition, social science scholars have produced an important body of research on jury behavior, and recent empirical studies have begun to cast light on areas of potential jury irrationality, both in the determination of liability and in the award of damages, including punitive damages.

This Article will offer a different perspective on jury trial rights by focusing on them in the broader context of the role of the federal courts in the federal system. A background assumption of modern Federal Courts scholarship is that the subject involves the allocation of power between federal courts and state courts, and between federal courts and the political branches, including administrative agencies. The question of "who decides" is at the heart of

of Legal Remedies, 94 Nw. U. L. Rev. 153 (1999) [hereinafter Murphy, Judicial Assessment].


See, e.g., David Baldus et al., Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages, 80 Iowa L. Rev. 1109, 1116 n.7 (1995) (gathering authorities as to the question of the arbitrariness of damages awards).

Federal Courts scholarship—with implications for federalism, separation of powers, and federal rights enforcement. On closer inspection, however, the subject of Federal Courts has typically focused on the allocation of decisionmaking power between the Article III judge and these other potential decisionmakers. Yet if federal judges really are the central focus of Federal Courts scholarship, then the federal jury itself becomes a potentially competing decisionmaker—analogous to the ones on which Federal Courts scholars have traditionally tended to focus. Indeed, Article III’s provision for federal judicial power at the expense of state judicial power, and the ability of federal courts to engage in judicial review of the political branches, would be of little moment if the consequence were merely to hand decisional power over to the federal jury. The history of federal court judge-jury relations, therefore, is inextricably linked to the study of federal courts as alternatives to state courts, agencies, and the political branches more generally. 7

This Article will thus develop the parallelism between federal judge-jury relations and the federal courts’ treatment of other alternative decisionmakers. The Supreme Court set about early on to limit the reach of law and procedures developed by state legislatures and state courts, in pursuit of what the Court saw as its Article III mission to protect property, contract, and commerce from localism and redistribution. With similar ends in view, the Court reined in the power of juries, such that judicial control came to be seen as infusing the right to jury trial in the federal courts. Indeed, the Court would see its role in policing the sphere of proper action of juries as similar to its role in policing the spheres of proper action of state and federal legislatures, and later, regulatory agencies. This Article III-infused notion of jury trial rights continued until the New Deal, when the federal courts’ policing the boundaries of proper action of other decisional bodies with regard to economic interests was sharply reduced on various fronts. This picture of federal judicial control of juries continuing well into this century runs counter to the views of many modern judges and scholars that the power of juries has diminished over time. Rather, this Article will suggest that judges, not juries, lost relative power.

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7 See Amar, supra note 3, at 89 (seeing jury trial rights as an important aspect of federalism).
This history, moreover, suggests that many modern efforts to rein in jury power may be consistent with the Seventh Amendment.

Part I of this Article will discuss the (potentially conflicting) centralizing tendencies of the federal judicial power under Article III of the Constitution and the apparently decentralizing tendencies of the Seventh Amendment's jury trial guarantee. Article III seemed to ensure an element of nationalism in federal litigation that the Seventh Amendment threatened to dilute. In addition, enactments of the First Congress appeared to introduce further localizing influences. The Rules of Decision Act\(^8\) indicated that state substantive law might control in diversity actions between citizens of different states,\(^9\) while the early Process Acts prescribed a kind of conformity to state procedures.\(^10\) Professor Akhil Amar sees the Seventh Amendment, the Rules of Decision Act, and the Process Acts as introducing important localizing restraints on federal power.\(^11\) But Part I will show that whatever the original understanding, the Court early on reined in local influences over substance through the development of general common law and related doctrines, just as it did in the area of procedure. This substantive and procedural independence from state law was developed with a view toward protecting commerce and common law interests in property and contract, and was implemented by an expansive view of the federal courts' jurisdiction—particularly diversity of citizenship jurisdiction.

Part II will address how the Court also effectively prevented resort to state law to control the availability and incidents of jury trials in the federal courts, again with a view toward protecting substantive rights under federal law and the general common law. For the most part, the Court used this independence from state practice in judge-jury relations to carve out more stringent judicial control of juries than was available in many state courts at the time. Modern commentators generally assume that federal judicial control of juries has increased in the modern era, due to the expansion

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9 Id. § 34, 1 Stat. 73, 92.
10 See, e.g., Act of Sept. 29, 1789, ch. 21, 1 Stat. 93; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276.
11 Amar, supra note 3, at 89, 91 n.*.
of formal controls such as summary judgment and judgment notwithstanding the verdict.\textsuperscript{12} In his famous dissent in \textit{Galloway v. United States},\textsuperscript{13} Justice Hugo Black bemoaned the ever-declining power of the jury,\textsuperscript{14} and his view continues to have modern adherents.\textsuperscript{15} We will show, however, that pre-modern federal control of juries by the elaboration of law, the direction of verdicts, and the liberal use of commentary on the evidence along with new trials likely exceeded the overall level of modern judicial controls.

Part II will offer an analysis of how pre-modern federal jury practice reflected that judicial control was itself considered to be part and parcel of the Seventh Amendment jury trial right in the federal courts. Central to the federal judicial role as then understood was the function of policing the boundaries of proper jury action,\textsuperscript{16} similar to the role of the federal courts in defining the spheres of action for legislatures and agencies, as well as policing the border of state and federal power.\textsuperscript{17} In these contexts, the judi-

\begin{itemize}
\item \textsuperscript{12} See, e.g., Carrington, supra note 1, at 44–46 (indicating that during the last century juries lost power with the growth of formal mechanisms for jury control); Laura Gaston Dooley, Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury, 80 Cornell L. Rev. 325, 332–33 (1995) (stressing the decline in jury power in the late nineteenth and early twentieth centuries, and emphasizing the growth of formal jury control devices); Moses, supra note 2, at 183, 207 (stating that the parameters of jury trial rights have generally been restricted over time, although noting expansions of the jury role as a result of the law-equity merger); cf. Landsman, supra note 4, at 22–23 (taking position that modern reductionism of role of jury to fact finding has made jury less important); Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 923–24 (1987) (stating that the adoption of the underlying philosophy of equity procedure in the Federal Rules resulted, inter alia, in control over juries); Note, supra note 4, at 173–74 (stating that the jury’s power to decide law was denied, and special verdicts and directed verdicts were developed to keep law determinations from the jury).
\item \textsuperscript{13} 319 U.S. 372, 399 (1943) (Black, Douglas, & Murphy, JJ., dissenting).
\item \textsuperscript{14} Id. at 399–405 (Black, Douglas, & Murphy, JJ., dissenting).
\item \textsuperscript{15} See supra note 12.
\item \textsuperscript{16} See infra Section III.A.1.
\item \textsuperscript{17} Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940, 3 Res. in L. & Soc. 3, 4–5 (1980) (discussing the role of the judiciary in marking out spheres of power of private party to private party, private party to state, legislature to judiciary, and state to federal government); G. Edward White, Revisiting Substantive Due Process and Holmes’s \textit{Lochner} Dissent, 63 Brook. L. Rev. 87, 117 (1997) (discussing the judicial role in marking out boundaries between the police power and the sphere of private autonomy).
\end{itemize}
cially-defined scope of power of these competing governmental decisionmakers was often said to be one of "rationality" or "reasonableness" as to matters within their respective spheres. But this was not rationality in its modern construct. Rather, it was a legally circumscribed term of art that referred to the property-protective and anti-redistributive norms of the general common law and later substantive due process, and that presupposed a limited set of appropriate governmental ends.

Part IV will show how, with the rise of Progressive and Realist legal thought, the New Deal Court largely abandoned earlier notions of defined rationality that the Court had used to police legislatures, agencies, and juries. It did so in favor of a less legalistic, more common sense notion of rationality that was highly deferential to these nonjudicial decisionmakers. While this changeover had a variety of causes, one of them was the abandonment of an older notion that government was limited to pursuing a narrow set of nonredistributive ends. Thus, not only did the Court begin to give perfunctory scrutiny to the rationality of governmental action in the area of economic regulation; it similarly withdrew from rigorous scrutiny of jury decisionmaking by employing a highly deferential standard to review jury rationality. In particular, the Supreme Court's approach to a series of decisions under the Federal Employer's Liability Act reflected the abandonment of the older, nondistributionist norm in policing juries.

Finally, Part V will suggest that the New Deal Court may have overdrawn the analogy between juries and other governmental actors such as legislatures. And this, in turn, may have led to the reassertion of some degree of federal judicial control, as well as discontent with the failure of modern juries to follow either formalist or even less legalistic notions of rationality. This Article therefore will endorse reinvigoration of federal judicial control of juries, to bring the system more in line with a somewhat more judicially infused notion of rationality. The history of Article III control of juries, moreover, indicates that many suggestions for increased judicial control of juries proposed by others would be consistent with the Seventh Amendment, if not compelled by due process.
I. FEDERALIST COURTS; ANTI-FEDERALIST JURIES?

At the time of their framing, Article III and the Seventh Amendment seemed to pull in different directions. The former, with its provision for a separate federal judiciary, manifested the centralizing tendencies of the original Constitution. The latter, by its promise of local popular input, manifested the decentralizing tendencies of the Bill of Rights. If the Constitution embodied the concerns of Federalists, the Bill of Rights reflected those of Anti-Federalists, who signed on to the Constitution with the expectation that Amendments would be forthcoming.

The centralizing tendencies of Article III are particularly evident in the grant of federal jurisdiction based on diversity of citizenship. Historians have pointed out that high on the list of reasons for diversity jurisdiction was the goal of providing a neutral forum for out-of-state and foreign creditors suing local debtors. Such creditors faced not only debtor-protective statutes enacted by state legislatures (which could run afoul of the Contracts Clause if they retrospectively impaired contractual obligations), but also—some have suggested—a general local-debtor-protective bias in the state courts and juries.

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8 See, e.g., Essays by a Farmer, No. 4, Maryland Gazette, Mar. 21, 1788, reprinted in The Complete Anti-Federalist 38 (Herbert J. Storing ed., 1981) ("The trial by jury is—the democratic branch of the judiciary power—more necessary than representatives in the legislature....") (italics omitted); Letter from Thomas Jefferson to Abbe Arnoux (July 19, 1789), reprinted in The Complete Bill of Rights 596 (Neil H. Cogan ed., 1997) [hereinafter Jefferson Letter] (stating that participation of the people in the judicial branch was more important than in the legislative branch).

9 See, e.g., Wolfram, supra note 3, at 677 (noting that diversity, alienage, and treaty provisions were all partly pro-creditor); see also Wythe Holt, The Origins of Alienage Jurisdiction, 14 Okla. City U. L. Rev. 547, 548-49 (1989) (discussing the poor record of state judiciaries on British debt as a reason to establish the federal judiciary).

10 Professor Holt has noted the tendency of state courts and state legislatures to respond "in a more or less democratic fashion to the needs and desires of an essentially debtor-oriented, pre-capitalist majority of the citizenry." Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1425-26; see also Landsman, supra note 4, at 37 (indicating that the lack of mention of civil jury trials in the Constitution reflected an attempt to minimize the role of juries by a powerful segment of society); Wolfram, supra note 3, at 691 (noting that in ratification debates, Madison defended diversity and alienage jurisdiction as necessary for collection of debts which local courts and juries refused to enforce).
Although Article III guaranteed jury trials in criminal prosecutions, it made no similar guarantee regarding civil trials in the federal courts; instead, the matter was left to Congress. The possibility that lower federal courts might proceed without juries prompted criticism. More significantly, Article III allowed for review "both as to law and fact" as part of the Supreme Court's appellate jurisdiction. This led to even greater complaints that Article III effectively abolished the right to trial by jury in civil cases.

21 See, e.g., Remarks of Mr. Bloodworth in the North Carolina Ratifying Convention (July 28, 1788), reprinted in 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 142-43 (photo. reprint 1968) (1888) [hereinafter Elliot's Debates] (wondering whether, in cases over which federal courts exercise concurrent jurisdiction with the states "the trial by jury is not cut off"); Essays of Cincinnatus, No. 2 (Nov. 8, 1787), reprinted in 6 The Complete Anti-Federalist, supra note 18, at 10-13 (noting that "the trial by jury does seem to be taken away in civil cases" insofar as federal trial courts are concerned); Luther Martin, Genuine Information (Nov. 29, 1787), reprinted in 3 The Records of the Federal Convention of 1787, at 221 (Max Farrand ed., rev. ed. 1966) (noting that the absence of a provision for jury trials in the first instance in federal court, combined with Supreme Court review of both law and fact, "absolutely takes away" trial by jury); id. at 222 (noting that leaving the question of jury trials up to Congress was like the decision to leave to Congress the power to provide for lower federal courts; "as they could not trust State judges, so would they not confide in State juries"); Wat Tyler, Proclamation (Oct. 24, 1787), reprinted in The Complete Bill of Rights, supra note 18, at 558 (noting that because Congress had power under unamended Article III to define what shall be triable by jury, "trial by jury is abolished in all civil cases"); Essay by Timoleon (Nov. 1, 1787), reprinted in The Complete Bill of Rights, supra note 18, at 559 (noting that silence in the civil context, when added to the express guarantee in the criminal context, meant that juries were "unnecessary," and the right to trial by jury could be destroyed).

22 U.S. Const. art. III, § 2, cl. 3.

23 Remarks of Patrick Henry in the Virginia Ratifying Convention (June 20, 1788), reprinted in 3 Elliot's Debates, supra note 21, at 539-40 (noting that the provision for appellate jurisdiction "will, in its operation, destroy the trial by jury"); Letters of Centinel, No. 1 (Oct. 5, 1787), reprinted in 2 The Complete Anti-Federalist, supra note 18, at 143 (stating that the "trial by jury in civil cases is taken away" given the Supreme Court's appellate jurisdiction); Essays of Cincinnatus, No. 2, supra note 18, at 12 (noting that jury trial was taken away both because of Article III's reference to appellate jurisdiction and its silence on original trials); Essay of a Democratic Federalist (Oct. 17, 1787), reprinted in 3 The Complete Anti-Federalist, supra note 18, at 59-60 (commenting on "the entire abolition of the trial by jury in civil cases," given the federal appellate power over law and fact) (emphasis added); see also Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 Wis. L. Rev. 39, 108-10 & nn.193-95 (noting that the primary basis for the Anti-Federalists' claim that Article III destroyed jury trials was grounded in the fear of federal appellate review of jury fact finding).
because it left open the possibility that the Court could set aside decisions of state (or federal) court juries based on its own reassessment of the facts. Indeed, during the ratification debates, supporters of the Constitution suggested that jury trials in diversity actions could sometimes be problematic because of local prejudice against foreign and out-of-state commercial interests. Some scholars have suggested that the provision for appellate jurisdiction in the Supreme Court of both law and fact was designed precisely to allow for Supreme Court review of jury verdicts in cases falling within the federal judicial power under Article III.

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24 At common law, judicial reassessment of jury-found facts was limited. See Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448 (1830) (Story, J.) (noting that the granting of a new trial by the trial court and the awarding of a venire facias de novo by the appellate court for error of law were the only modes for reexamination of fact known to the common law).

25 In the Pennsylvania ratifying convention, James Wilson addressed the topic of “trial between citizens of different states” as follows: “[T]he plaintiff comes from another state; he comes a stranger, unknown as to his character or mode of life, while the other party is in the midst of his friends, or perhaps his dependants. Would a trial by jury, in such a case, insure justice to the stranger?” Remarks of James Wilson in the Pennsylvania Ratifying Convention (Dec. 11, 1787), reprinted in 2 Elliot’s Debates, supra note 21, at 517; see also id. (asking another speaker whether he would want to trust a Rhode Island jury if he were in a conflict with a Rhode Islander); Wolfram, supra note 3, at 693–94 (discussing Wilson’s comments). Perhaps Wilson’s statement is consistent with the notion that he assumed a jury trial might be proper in some more neutral forum and does not exclude the idea of a jury trial altogether. A more forthright suggestion was made by another supporter of the Constitution:

A suit is depending between a citizen of Carolina and Georgia, and it becomes necessary to try it in Georgia. What is the consequence? Why, the citizen of this state must rest his cause upon the jury of his opponent's vicinage, where, unknown and unrelated, he stands a very poor chance for justice against one whose neighbors, whose friends and relations compose the greater part of his judges. It is in this case, and only in cases of a similar nature with this, that the right of trial by jury is not established; and judging from myself, it is in this instance only that every man would wish to resign it, not to a jury with whom he is unacquainted, but to an impartial and responsible individual.

Remarks of Robert Barnwell in the South Carolina Convention (Jan. 17, 1788), reprinted in 4 Elliot's Debates, supra note 21, at 295; see also 3 Joseph Story, Commentaries on the Constitution of the United States § 1757, at 629 (Boston, Hilliard, Gray 1833) (noting that the “convention were greatly divided in opinion” on the “subject of a trial by jury in civil cases”); cf. Matthew P. Harrington, The Law-Finding Function of the American Jury, 1999 Wis. L. Rev. 377, 396–400 (positing that the framers of Article III “had become wary of the jury's power” and that juries were held in “relatively low esteem,” particularly given their anti-creditor bias).

26 See Holt, supra note 20, at 1465. Holt indicates that Article III’s provision for “appellate Jurisdiction, both as to Law and Fact” was meant to allow for revision of
The Article III Jury

Justice Joseph Story once remarked that the absence of any provision for civil jury trials in Article III was "[o]ne of the strongest objections" to the ratification of the Constitution; clearly, the desire for a jury trial guarantee was an impetus for the Bill of Rights. The language of the Seventh Amendment, ratified in 1791, addressed both the problem of providing for federal juries in civil actions in the first instance and of limiting federal judicial review of jury fact finding on appeal. It did so by declaring that the right to trial by jury in actions "at common law" would be "preserved," and by guaranteeing that "no fact tried by a jury" should be reviewed in a federal court other than according to the common law. The second provision (the Reexamination Clause) clearly spoke to federal court review of state as well as federal court jury decisionmaking. The first clause has generally been read as a constitutional command as to when jury trials are required in the lower federal courts.

The Seventh Amendment, with its double guarantee—jury trials in the first instance and limitations on review of fact on appeal—arguably moderated Article III's provision of a neutral forum for interstate commercial interests, by interjecting a local and popular element. Professor Akhil Amar, although emphasizing the jury's role in protecting citizens from overreaching federal officials, has noted that the civil jury guarantee counteracted the centralizing tendencies of the federal courts. Insofar as local juries would serve as the decisionmakers in citizens' trespass actions against officials

judy fact determinations. Id. at 1468; see also Wolfram, supra note 3, at 678 (noting that one speaker explained the provision "in the ratification debates as necessary in order to prevent juries from making determinations based on local biases that might give affront to foreign economic interests and to those in other states").

27 *Parsons*, 28 U.S. (3 Pet.) at 445; see also The Federalist No. 83, at 558 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (stating that the absence of a provision of civil jury trials in the Constitution was the objection to ratification "which has met with most success" in New York and perhaps several other states); 3 Story, supra note 25, § 1757, at 628 (noting that Article III's provision for appellate review of both law and fact "was a subject of no small alarm").

28 U.S. Const. amend. VII.

29 Id.

30 See Holt, supra note 20, at 1455–58 (suggesting that the vehement opposition of the Anti-Federalists to the lack of a jury trial guarantee in the Constitution was inspired by local, debtor-protectionist sentiments); Wolfram, supra note 3, at 671, 679–705 (indicating that ratification debates showed that a concern for lack of jury trial focused, inter alia, on protection of debtors).
for overstepping the bounds of their lawful authority, they provided a popular check against government oppression. And, as others have noted, juries would also serve to limit the power of the otherwise politically unaccountable federal judiciary. Professor Amar has pointed out that this infusion of localism was complemented by the early Process Acts, which regulated federal court procedures in actions at law, calling for conformity to state practice and seeming to ensure that local customs and procedural law would prevail in federal courts. In addition, the Rules of Decision

31 Amar, supra note 3, at 68–70; see also Robert Brauneis, The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law, 52 Vand. L. Rev. 57, 103 (1999). Amar also alludes to juries’ providing just compensation and limiting libel judgments sought by government officials. Amar, supra note 3, at 88; see also Douglas G. Baird, The Seventh Amendment and Jury Trials in Bankruptcy, 1989 Sup. Ct. Rev. 261, 275–77 (noting link of jury trial issue to debtor-creditor issues as well as citizen-government suits); Landsman, supra note 4, at 38 (noting that Anti-Federalists saw juries as a means to protect debtors from inflexible rules, as well as a way to thwart unpopular laws); Wolfram, supra note 3, at 671, 705–08 (noting Anti-Federalist concern for the vindication of interests of private citizens in litigation against government).

32 See, e.g., Amar, supra note 3, at 84; Klein, supra note 3, at 1034 (observing the Anti-Federalists’ fear that without juries, judges would become “courtroom kings”); Landsman, supra note 4, at 38 (noting that Anti-Federalists, inter alia, argued for juries as a means to rein-in judges).

33 See Act of Sept. 29, 1789, ch. 21, 1 Stat. 93, providing that:

[Until further provision shall be made, and except where by this act or other statutes of the United States is otherwise provided, the forms of writs and executions, except their style, and modes of process and rates of fees, except fees to judges, in the circuit and district courts, in suits at common law, shall be the same in each state respectively as are now used or allowed in the supreme courts of the same.]

Id. § 2, 1 Stat. at 93. The Permanent Process Act, ch. 36, 1 Stat. 275 (1792), was worded similarly, but also provided that this borrowing was subject to “such alterations and additions as the said courts respectively shall in their discretion deem expedient,” as well as to the rulemaking power of the Supreme Court and the lower federal courts. Id. § 2, 1 Stat. at 276. Subsequent acts adopted to accommodate later-admitted states contained similar provisions. E.g., Act of Aug. 23, 1842, ch. 188, 5 Stat. 516; see Richard H. Fallon et al., Hart and Wechsler’s Federal Courts and the Federal System 661–63 (4th ed. 1996) [hereinafter Hart & Wechsler].

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Act appeared to direct the use of state substantive law by the federal courts in diversity actions in common law, thus further ensuring that local law would prevail.

Professor Amar sees this combination of local law, local procedures, and local juries as advancing the enforcement of "majoritarian" rights—particularly the property rights protected against federal governmental invasion by the Fourth Amendment's proscription against unreasonable searches and seizures and the Fifth Amendment's Takings and Due Process Clauses. Only with Reconstruction does he see the role of juries as potentially undermining the new, more minority-protecting rights recognized by the Civil War Amendments.

This Part argues that from the very beginning of the Republic, and not just with Reconstruction, juries presented this dual aspect of simultaneously protecting and undermining rights. On the one hand, the civil jury trial guarantee itself was a right intended to protect other rights, particularly the rights of citizens to be free from unwarranted governmental invasions of property. On the other hand, the jury had the potential to undermine rights as well, such as the contractual and property rights of private parties.

of a strong federal judiciary protective of creditors and advocates of restrictions on the judiciary that would allow greater protection for debtors).

Judiciary Act of 1789, ch. 20, § 34, 1 Stat. at 92.

Amar, supra note 3, at 89.

Id. at 67–68, 73–77; see also Mark A. Graber, Naked Land Transfers and American Constitutional Development, 53 Vand. L. Rev. 73, 74 (2000) (noting that the anticonfiscation norm was endorsed by virtually every prominent politician of the founding era).

See Amar, supra note 3, at 110 (indicating that the localism of the jury needed to be reconstructed); id. at 271–72 (discussing the problems of giving jury trial rights to African-Americans without including them on juries). Amar assumes that judges are better guardians of minority rights. Id. at 68.

Amar sees the jury trial as not merely an individual right, but also an institution of localism and popular sovereignty. Id. at 82–84; see also Ellen E. Sward, Legislative Courts, Article III, and the Seventh Amendment, 77 N.C. L. Rev. 1037, 1062 (1999) (seeing the Seventh Amendment as reflecting values of participatory democracy); Alan Howard Scheiner, Note, Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power, 91 Colum. L. Rev. 142, 154, 184 (1991) (arguing that the Anti-Federalists saw the role of the jury as an organ of democratic government, and that they believed it more legitimate for juries rather than judges to make subtle changes in the law).

See, e.g., Wolfram, supra note 3, at 704 (attributing the desire for jury trials in British debt and paper money cases to a wish to avoid judges' applying the law as written or previously declared).
article III had been designed in part to ensure enforcement of constitutional limits on the state as well as the federal governments, and to protect common-law interests of aliens and out-of-staters in property and contract. Such rights, as well as the interests of other interstate actors, were in many senses minority rights that juries, not just legislatures, could threaten.

As developed below, the federal courts early and consistently undertook to protect such minority rights in the exercise of their diversity jurisdiction, in the course of which local influences were minimized. Reducing local influence occurred by way of federalizing the applicable substantive law, expansively construing the scope of diversity jurisdiction, and federalizing many procedures, including those in the areas of jury trial rights and jury control. If there was tension between Article III and the Seventh Amendment, it would ultimately be resolved by putting the jury under the firm command of the Article III judge, thus resulting in more of a Federalist than an Anti-Federalist accommodation of the two constitutional provisions.

To put the federal jury in the context of the role of federal courts more generally, we first describe the substantive constitutional and general common law rights that the Article III courts enforced during the nineteenth and early twentieth centuries, and the Court’s expansive interpretation of the diversity jurisdiction to reinforce these rights. We then discuss the federal courts’ procedural independence from state practices, which the federal courts similarly exercised with a view toward reinforcing federal and general law rights. Against this background, we then analyze the federal courts’ treatment of the availability of jury trial and its incidents.

A. Substantive Law and the Independence of the Federal Courts

I. The Contracts Clause

At the substantive level, federal courts quickly took on the role of protecting property and contract through the enforcement of a constellation of related constitutional and common law rights that operated independently of state law. Perhaps the most lively source of constitutional litigation for federal courts in the antebel-
lum era was the Contracts Clause,⁴¹ which protected vested contractual rights from after-the-fact abrogation by state legislative majorities.⁴² In addition to prohibiting states from enacting certain forms of retroactive debtor-protective legislation, the Clause was read as prohibiting the abrogation of promises made in contracts entered into by the states themselves, notably through legislatively granted corporate charters. Although federal courts would not exercise general federal question jurisdiction until 1875, constitutional litigation under the Contracts Clause often proceeded in federal court on the basis of diversity jurisdiction.⁴³

2. The General Common Law

a. Private Litigation.

Because the Contracts Clause was interpreted as extending only to legislative impairments, it could not address judicial impairment of contractual rights in a given case. Related to enforcement of the Contracts Clause, therefore, was the federal courts' protection of contract and property through the mechanism of the general common law under the regime of *Swift v. Tyson.*⁴⁴ Although it might be argued that Congress, in the Rules of Decision Act,⁴⁵ had adopted state law as the applicable substantive law in diversity actions, the Court concluded early on that a uniform general common law⁴⁶

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⁴¹ U.S. Const. art. I, § 10.
⁴² See Herbert Hovenkamp, Enterprise and American Law, 1836–1937, at 17 (1991) (noting the waning of the Contracts Clause in favor of due process litigation after 1868); Benjamin Fletcher Wright, Jr., The Contracts Clause of the Constitution, at xiii (1938) (noting that the Contracts Clause was the provision that supplied the most frequent basis for Supreme Court constitutional decisions in the nineteenth century).
⁴³ See, e.g., Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827) (deciding a Contracts Clause question in a diversity suit); see also infra Section I.B.1 (discussing the Court's expansive interpretations of diversity jurisdiction). The Court could enforce the Clause on direct review of state court decisionmaking when the affected party was an in-stater and could not invoke diversity. See, e.g., Ann Woolhandler, The Common Law Origins of Constitutionally Compelled Remedies, 107 Yale L.J. 77, 111–25 (1997) (discussing Contracts Clause actions that arose in state courts).
⁴⁶ State courts might also see themselves as applying general common law. See, e.g., Ryan v. Baldrich, 14 S.C.L. (3 McCord) 498, 503–04 (1826) (employing general common law, and indicating courts should narrow room for jury discretion).
would better protect interests in contract and property in many cases.  

In particular, *Swift* interpreted the grant of diversity jurisdiction and the Rules of Decision Act as authorizing the federal courts to apply a uniform general commercial law independent of state law.  

And the federal courts' early forays into general common law protected settled expectations in contracts that dovetailed with the minority rights protected by the Contracts Clause. While the Contracts Clause protected contracts from abrogation by state legislatures, the general common law protected contracts from ad hoc nullification by state courts—for example, by a state court's refusal to recognize the enforceability of a negotiable instrument, as happened in *Swift* itself. The uniform general common law applied by the federal courts would later expand to cover a broad variety of areas, including the tort docket that burgeoned late in the nine-

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47 See, e.g., Randall Bridwell & Ralph U. Whitten, The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism 4-5, 61–97 (1977) (arguing that the general law was designed to vindicate the legitimate expectations of parties to disputes and demonstrating this with commercial law); Tony Freyer, Harmony & Dissonance: The *Swift & Erie* Cases in American Federalism 156 (1981) (discussing the Court's use of diversity jurisdiction to resolve mercantile litigation with general principles of commercial law and thus to promote economic development); Horwitz, supra note 4, at 250 (seeing general common law as "an attempt to impose a procommercial national legal order on unwilling state courts"); Hovenkamp, supra note 42, at 86–87 (indicating that Justice Story saw the general law as necessary to avoid the extraterritorial application of state law). Early concerns about the federal courts' exercising common law powers partly resulted from a view that federal judicial power implied coextensive congressional power. See G. Edward White, The Marshall Court and Cultural Change, 1815–1835 (1991); Stewart Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003, 1090–91 (1985).

48 *Swift* involved a defense to a suit on a negotiable instrument; the Court held that a preexisting debt was valuable consideration, thereby rejecting a defense urged under state law. 41 U.S. (16 Pet.) at 16–19. *Swift*, moreover, was likely no novelty, but rather reflected the prior practice of the Supreme Court and lower federal courts. See Bridwell & Whitten, supra note 47, at 66–70 (noting that *Swift* reflected the late-eighteenth century and early nineteenth century understanding that commercial transactions would be governed by customary law and general principles); Horwitz, supra note 4, at 220–23, 249–50 (concluding that *Riddle v. Mandeville*, 9 U.S. (5 Cranch) 322, 331 (1809), was the first clear assertion by federal courts that a general commercial law existed independent of state law); William A. Fletcher, The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance, 97 Harv. L. Rev. 1513, 1554 (1984) (noting that federal courts would ignore state statutes in marine insurance cases because they believed they were deciding questions of general common law).
teenth century with the expansion of the railroads. With the use of doctrines such as the fellow-servant rule and assumption of risk, the federal courts protected the railroads and other interstate actors through a uniform, and often liability-reducing, set of substantive rules.

b. General Constitutional Law.

The federal courts also developed a uniform body of general constitutional limitations on state action that neatly paralleled the uniform private law of Swift. To be sure, the Supreme Court in *Barron v. Baltimore* read the Bill of Rights (and in particular, its just compensation provision for governmental takings) as applicable to the federal government only. But the federal courts nevertheless routinely enforced just compensation principles against state officials and local governments on behalf of out-of-state property holders as a matter of general constitutional law, in the exercise of their diversity jurisdiction.

For example, using general constitutional principles, federal diversity courts protected investor expectations by refusing to apply novel state court decisions that would have retroactively abrogated


53 Id. at 249.

54 See Collins, supra note 51, at 1288–91; see also Graber, supra note 37, at 74 (arguing that the prohibition on “naked” property transfers was “almost universally recognized as an unenumerated . . . constitutional property right”).
locally issued bonds, on the supposed grounds that they had not been validly issued under state law in the first place.\textsuperscript{55} The practical result of these once-notorious decisions was to extend Contracts Clause-like principles to judicial decisionmaking, as was also true for private contracts under the general common law. In addition, even before substantive due process came into its own toward the end of the century, the federal courts had imposed public purpose limitations on state and local governmental taxation and spending, and reasonableness limitations on ratemaking, all as matters of general rather than federal law.\textsuperscript{56}

The upshot of these and similar limitations was to assure that the benefits and burdens of government action were spread evenly-handedly rather than favoring one group at the expense of another.\textsuperscript{57} The scope of legitimate government regulatory power was thus limited to activities that were injurious to others within a common-law framework. Government activity not so limited was seen by the Supreme Court as illegitimately transferring property from \textit{A} to \textit{B}, in violation of what it considered to be the fundamental principles "of all free governments."\textsuperscript{58} Out-of-staters, of course, were the primary beneficiaries of the Court's general law principles, because in-staters ordinarily could not invoke the protection of the lower

\textsuperscript{55} See Collins, supra note 51, at 1277; see also Hovenkamp, supra note 42, at 90–91 (noting that some 300 bond cases went to the Supreme Court in the three decades following \textit{Gelpcke v. Dubuque}, 68 U.S. (1 Wall.) 175 (1863), and that the Court almost invariably upheld the validity of the bonds notwithstanding state repudiation).

\textsuperscript{56} See Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874) (referring to the government-limiting, property-respecting principles "of all free governments"). See generally Collins, supra note 51, at 1284–93 (discussing the use of public purpose, just compensation, and reasonableness limitations by federal diversity courts).

\textsuperscript{57} Collins, supra note 51, at 1295–96; see Barry Cushman, Rethinking the New Deal Court 47 (1998) (discussing the centrality of the public/private distinction, and its relationship to the principle of governmental neutrality); Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence 64–75, 104–14 (1993); Hovenkamp, supra note 42, at 28 (describing judicial doctrines such as the public purpose limitation and substantive due process as designed to limit state power to subsidize businesses, thus allowing cream to rise to the top); White, supra note 17, at 88–89, 93–97 (discussing the widespread concept forbidding "partial legislation," which conferred benefits on one class of citizens rather than the citizenry as a whole).

\textsuperscript{58} \textit{Loan Ass'n}, 87 U.S. (20 Wall.) at 663.
federal courts against state or local officials. But this extra measure of protection for interstate actors through diversity jurisdiction arguably reinforced the interstate anti-discrimination norm of Article IV's Privileges and Immunities Clause and augmented the national government's role in the oversight of interstate commerce.

3. Substantive Due Process

By the late nineteenth century, these state-limiting, property-protective presumptions of general constitutional law—applicable principally in the exercise of the federal courts' diversity jurisdiction—would be transformed into substantive due process limitations under the Fourteenth Amendment. The Court eventually held, for example, that uncompensated takings of property for public use violated due process, and that takings and taxation for nonpublic purposes were off-limits altogether, not merely as a matter of general constitutional principles as before, but as a matter of federal law. Similarly, the Court held that due process required governmental rate regulation to be "reasonable," meaning that rates would have to provide a fair return on the current value of invested capital to avoid being considered confiscatory.

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59 As discussed below, however, the Court expansively interpreted diversity jurisdiction. See infra Section I.B.1. In addition, admiralty allowed suits between co-citizens in many cases. See infra Section II.A.3.

60 Substantive due process cases were considered at that time to be "police power" cases. See, e.g., G. Edward White, The Constitution and the New Deal 241-68 (2000); White, supra note 17, at 108.


62 Mo. Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896) (prohibiting a state from requiring a railroad to allow a grain elevator to be built on the railroad's right of way).

More generally, the Court would closely scrutinize economic legislation to ensure that it was a reasonable exercise of a state's police power, properly addressed to a limited number of governmental ends within the Court's common-law framework. Of course, when the Court held that such matters implicated due process, it not only federalized what previously were general law limitations on state action, but also extended the benefits of such limitations to in-staters in addition to the out-of-staters who had always been able to rely on diversity jurisdiction.

B. Jurisdiction and Procedure

1. Jurisdictional Accommodation

The Court's concerns for the protection of common law interests were reflected in jurisdictional decisions that expanded the potential application of the general common law and provided a sympathetic forum for the elaboration of general law as well as federal constitutional norms. It did so through a broad construction of the federal courts' diversity jurisdiction, well before the advent of federal question jurisdiction. For example, the first Congress had restricted diversity jurisdiction in debtor-creditor litigation through the Assignee Clause, which instructed the federal courts to disregard assignments of promissory notes to out-of-state creditors and to disallow diversity jurisdiction when the original debtor and creditor were nondiverse. The Court, however, significantly limited the force of this potentially broad jurisdictional limitation by expansively interpreting an exception in the same statute for "foreign bills of exchange." Consequently, a great many more

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66 Id. §§ 11-12, 1 Stat. at 78-79.

67 Buckner v. Finley, 27 U.S. (2 Pet.) 586, 590 (1829) (holding that a bill drawn by a resident of one state upon a resident of another was a foreign bill of exchange); see also Hovenkamp, supra note 42, at 84-86 (discussing Buckner).
cases involving the interstate market in negotiable instruments came into the federal courts than would otherwise have been the case, which also meant that those instruments would be interpreted according to uniform general common law principles rather than state law.  

In addition, the Court interpreted provisions relating to corporate citizenship in ways that greatly expanded federal jurisdiction. For example, rather than looking at actual citizenship, the Court presumed that all shareholders were citizens of the corporation's state of incorporation, which enhanced prospects that cases involving corporations would meet the complete diversity requirement. This presumption later hardened into a separate notion of citizenship for the corporation itself. At the same time, the Court did not allow its presumption of shareholder citizenship to get in the way of diversity-based challenges to state regulation by nonresident shareholders on behalf of their corporations in derivative actions. Instead, it upheld diversity jurisdiction based on the actual citizenship of the shareholder, even in disputes that were in reality between an in-state corporation and state officials. Similarly, the

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68 See Hovenkamp, supra note 42, at 86 (stating that the Court's broad interpretation of foreign bills of exchange made bills more easily negotiable by giving greater assurance that the general common law would apply); see also Woolhandler, supra note 43, at 88–89 (discussing expansive interpretations of diversity to extend the reach of the general common law).

69 The Court had first said that the citizenship of a corporation depended on that of its shareholders. See Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 66 (1809) (upholding jurisdiction based on the allegation that all shareholders were from Pennsylvania); see also Dudley O. McGovney, A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts, 56 Harv. L. Rev. 853, 865–70 (1943) (characterizing Deveaux as expanding diversity as much as was consistent with treating a corporation as a non-citizen). The Taney Court, however, developed an irrebuttable presumption that all shareholders were citizens of the state of incorporation. See Marshall v. Balt. & Ohio R.R., 57 U.S. (16 How.) 314, 327 (1853) (basing diversity on the presumption that all shareholders resided in the state of incorporation).

70 See Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 554 (1844) (indicating that a corporation could be treated as a citizen of state of incorporation for purposes of diversity jurisdiction); see also Ohio & Miss. R.R. v. Wheeler, 66 U.S. (1 Black) 286, 296 (1861) (treating Letson as based on the presumption of shareholder citizenship); Hovenkamp, supra note 42, at 19 (tying the rise of substantive due process to a shift to conceptualizing the corporation as a person).

Court liberally upheld diversity-based challenges to state action by nonresident corporate trustees and receivers on behalf of in-state corporations. Such manipulation of party structure enabled in-state corporations to bring diversity actions claiming that states had violated promises in their charters in violation of the Contracts Clause. And it later enabled in-state entities to use diversity jurisdiction to challenge state rate regulation on general constitutional law grounds, and eventually, on substantive due process grounds.

2. Procedural Conformity and Flexibility

Until the advent of uniform rules of civil procedure in 1938, practice in the federal courts in actions at law ostensibly conformed to state law, thereby differing from state to state. Although federal court actions in equity and admiralty were never governed by state law, the federal courts' diversity jurisdiction occurred through doctrines that treated corporations that were chartered in multiple states as citizens of only one state for diversity purposes. See Woolhandler, supra note 43, at 98 n.108 (citing authorities). In addition, federally chartered railroads could invoke federal question jurisdiction. See, e.g., Pac. R.R. Removal Cases, 115 U.S. 2, 11 (1885) (holding that suits by federally chartered corporations arose under federal law). The Court also rejected state regulatory efforts designed to undermine the federal courts' diversity jurisdiction by compelling corporations to prosecute certain challenges to state laws in a state's own courts. See Woolhandler, supra note 43, at 105-06 (discussing the rejection of state forum restrictions). The ease with which corporations could secure federal diversity jurisdiction proved to be a serious concern in the late nineteenth century among Populists and Progressives who consistently, but unsuccessfully, urged measures that would have largely stripped the federal courts of their diversity jurisdiction where corporations were involved. William G. Ross, A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937, at 58 (1994) (describing proposals to eliminate diversity jurisdiction in the early twentieth century). See generally Edward A. Purcell, Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958, at 13 (1992) (stating that diversity jurisdiction was the matrix in which a variety of legal rules and practices interacted with changing social conditions to create systematic practices that overall favored national corporations). The Court's liberal interpretations of diversity in these individual and corporate settings reflected its view that diversity jurisdiction was a kind of "constitutional right" that out-of-staters could invoke to protect their property from local depredations. See infra notes 271-72 and accompanying text.
practice, early Congresses enacted a series of Process Acts, later followed by the 1872 Conformity Act, requiring federal courts to adhere to the “forms” and “modes” of state proceedings in actions at law. These provisions might be supposed to have left little room for federal court procedural independence. But while procedural conformity was likely the norm, none of these Acts prevented the federal courts from deviating from state procedures when necessary to protect against threats to federal or general law rights. And, as discussed in Part II, important aspects of judge-jury relationships were characterized by their independence from state procedure rather than by their conformity to it.

According to the Supreme Court, under the Process Acts, state procedures did not operate of their own force in federal courts, but rather because they had been adopted by Congress. Consequently, the Court was reluctant to permit borrowed rules of state practice unduly to constrain the federal courts in the enforcement of general or federal law norms. In *Wayman v. Southard*, a diversity case involving enforcement of a debt, Kentucky law allowed judgment debtors to delay executions on judgments for two years by posting a bond. The statute—enacted as part of the state’s debtor-relief legislation and after the underlying debt at issue in *Wayman* was created—likely violated the Contracts Clause, as indicated by a later decision involving a similar statute. Indeed,

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75 Act of June 1, 1872, ch. 255, 17 Stat. 196.
76 Id. § 5, 17 Stat. at 197 (“The practice, pleadings, and forms and modes of proceeding in other than equity and admiralty causes in the circuit and district courts of the United States shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.”).
77 See, e.g., Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51, 63–64 (1825) (stating that a federal officer cannot be controlled in the discharge of his duties by state law unless adopted by Congress, and, if adopted, the officer then acts under federal not state authority); cf. Benjamin Robbins Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States 218 (George Ticknor Curtis & Benjamin R. Curtis eds., Boston, Little Brown 1880) (stating, with reference to the Conformity Act, that the states have no power to legislate as to the federal courts).
79 Id. at 2–3.
80 Bronson v. Kinzie, 42 U.S. (1 How.) 311 (1843) (holding that state statutes providing for a twelve-month redemption period and requiring judicial sales to be for two-thirds of
Chief Justice Marshall observed in *Wayman* that states had sometimes structured their procedures to affect debtor-creditor relations in ways that deviated from "the spirit of the constitution." But the Court avoided the constitutional issue in *Wayman* by concluding that the Process Acts called only for static or backwards-looking conformity with state procedures that had existed in 1789—the time of the enactment of the first Process Act. Subsequent state procedural innovations such as Kentucky's were therefore inapplicable in federal court. A similar result was reached in *Bank of the United States v. Halstead*, in which the Court held inapplicable a post-1789 Kentucky statute, which provided that real property could not be sold to satisfy a judgment unless it was sold for at least three-fourths of its appraised value.

The Process Acts' requirement of static conformity notwithstanding, the Court sometimes approved the federal courts' adoption of newer state procedures, particularly where they were conducive to the enforcement of general common law or federal rights. Indeed, the 1792 Process Act allowed for the possibility of lower federal courts' adopting such changes at their discretion. And the Court in *Wayman* noted that it was "probably" Congress's hope that states might alter their dubious pro-debtor procedures and that federal courts might adopt those salutory changes. For

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82 Id. at 32; see also Kendall v. Stokes, 37 U.S. (12 Pet.) 524, 625 (1838) (noting that the adoption of state practice had reference to the procedures existing at the time of the adoption and was unaffected by subsequent state legislation); Charles E. Clark & James Wm. Moore, A New Federal Civil Procedure: I. The Background, 44 Yale L.J. 387, 399 (1935) (discussing *Wayman*’s use of 1789 procedures). After the decision in *Wayman*, Congress in 1828 required that federal courts use the mechanisms for enforcement of judgments then in existence (i.e., at the time the 1828 statute became law) for courts of the state in which the federal courts sat. Process Act of May 19, 1828, ch. 68, § 1, 4 Stat. 278, 278-82. But this apparent dissatisfaction with the particular result in *Wayman* did not detract from *Wayman*'s reading of the Process Acts; rather, it implicitly confirmed such a reading.
83 23 U.S. (10 Wheat.) 51 (1825).
84 Id. at 52, 58-59.
85 The Permanent Process Act, ch. 36, § 2, 1 Stat. 275 (1792).
86 Id. § 2, 1 Stat. at 276 (referring to "such alterations and additions as the said courts respectively shall in their discretion deem expedient").
example, in *Fullerton v. Bank of the United States*, the Court concluded that a federal circuit court could adopt a state procedure—"a very wise and benevolent law"—regulating actions on negotiable instruments even though the statute was passed after the note in question had been executed. And in *Halstead*, the Court held that federal courts could enforce judgments by executing against the defendant's land even though the state had only allowed for such executions after 1789. The Court thereby interpreted the early Process Acts to provide federal courts with a certain amount of flexibility to adopt or ignore state procedures, and the Court often exercised this flexibility in a way that would be conducive to the enforcement of federal or general law rights and federal judgments.

Even when Congress called for adherence to contemporaneous, rather than past, state procedures in the 1872 Conformity Act, federal courts continued to exercise flexibility when using state procedures. Indeed, by the time of the promulgation of the Fed-
eral Rules of Civil Procedure in 1938, the Conformity Act was generally treated as giving federal courts broad discretion to accept or reject state practice rather than as commanding unqualified adoption.

II. THE AVAILABILITY AND INCIDENTS OF JURY TRIALS

As discussed in Part I, federal constitutional law and general common law reinforced each other by protecting common law interests in property and contract from the forces of localism, confiscation, and abrogation. Federal jurisdictional decisions extended the reach of these federalized substantive doctrines—for example, by expanding diversity jurisdiction to reach cases involving negotiable instruments and corporate challenges to state regulation. Federal flexibility to adopt or ignore state procedures under the Process and Conformity Acts further limited the effects of localism on federal and general common law rights. As they did in the areas of substance and procedure discussed above, the federal courts used an independent federal law to determine both the availability and incidents of jury trials in federal courts, at least in part to reinforce similar substantive rights.

A. The Availability of Jury Trials

1. The Impact of the Seventh Amendment

The availability of jury trials in federal courts presented a question of federal law. This might seem unremarkable given that the Seventh Amendment purports to govern the availability of jury trial rights in civil cases in the federal courts and that it does not apply to state courts. States were free to expand or contract common law jury trial rights without running afoul of the Amendment in a way that federal courts seemingly were not. There is at least some argument, however, that the measure of jury trial rights

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called for by the Amendment's language of "preserv[ation]" meant that state law was to provide the yardstick for when jury trials were required in federal court under the Seventh Amendment.

This suggestion, advanced by Professor Charles Wolfram and more recently by Professor Akhil Amar, has at least some support in the history of the Seventh Amendment and in the 1789 Judiciary Act's apparent provision for procedural and substantive conformity to state law. A number of those who opposed ratification of the Constitution expressed the desire that jury trials be available in federal court, at least as to matters that were within the state courts' concurrent jurisdiction and in which the states would have supplied a jury. To this end they supported some kind of amendment securing civil jury trial rights in federal court. Federalist defenders of unamended Article III argued that the reason for the absence of a civil jury trial guarantee was that it was not possible to come up with a single constitutional provision for the federal courts that could take account of the diverse jury trial practices in the states, and that the matter was better left to Congress. Finally, the Amendment itself, rather than guaranteeing the right to trial by jury outright (as was true for criminal cases), purported only to "preserve" it, thus arguably lending additional weight to the argu-

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94 U.S. Const. amend. VII.
95 Wolfram, supra note 3, at 712 (noting that some Anti-Federalists would have measured the right by what existed in particular states, although there has been no such suggestion in decisional law following the adoption of the Seventh Amendment).
96 Amar, supra note 3, at 89.
97 A substantial listing of such support is provided in Amar, id. at 90 n. *.
98 See, e.g., The Federalist No. 83, supra note 27, at 566 (stating that "no general rule" could accommodate the diversity of state practices); Remarks of James Iredell in the North Carolina Ratifying Convention (July 29, 1788), reprinted in 4 Elliot's Debates, supra note 21, at 165-66 (expressing similar sentiments); Remarks of James Wilson in the Pennsylvania Ratifying Convention (Dec. 7, 1787), reprinted in 2 Elliot's Debates, supra note 21, at 488-89 (noting that "no particular mode of trial by jury could be discovered that would suit them all" and noting that Congress will conform the practices of the federal courts); cf. An American Citizen, No. 4 (Oct. 21, 1787), reprinted in The Complete Bill of Rights, supra note 18, at 557 (observing that jury trials were not "excluded" in diversity cases by unamended Article III, and that the matter would be regulated by Congress "as favorably as possible to property" (italics omitted).
ment that what was preserved in the federal courts was the right to trial by jury as it existed in the state courts.99

As suggestive as the evidence for jury trial conformity might be, this particular perspective scarcely received the attention of the federal courts in the early Republic.100 Rather, jury trial rights quickly came to be governed by an independent federal approach that resembled the Court's treatment of the general common law. While riding circuit in 1812, \textit{Swift's}101 author, Justice Story, stated in \textit{United States v. Wonson}102 with reference to the meaning of the "common law" in the Seventh Amendment, that "[b]eyond all question, the common law here alluded to is not the common law of any individual State, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."103 Later, speaking for a nearly unanimous Court in \textit{Parsons v. Bedford},104 he observed that what was an action at common law was to be determined without regard to the label affixed to it by

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99 Amar, supra note 3, at 89 (discussing meaning of "preserve" in the Seventh Amendment).

100 First, the language of preservation may not denote anything short of an outright guarantee. State constitutions at the time tended to use such an expression to guarantee jury rights, and it is understandable that such language would be borrowed when it was so familiar and was aimed at doing something similar (and uniformly) at the federal level. See The Complete Bill of Rights, supra note 18, at 508–17 (collecting state constitutions). Second, the argument of the Federalists, while perhaps implying that the goal of jury trial conformity in the lower federal courts was not possible, might just as easily be read as referring to the difficulty of having a single provision that would provide for Supreme Court conformity with state appellate practice in cases coming to it from state courts on direct review. Although there were those who objected to the absence of federal jury trial rights in the first instance and expressed a desire for federal court jury trial conformity, see supra note 21, the bulk of the debate of civil jury trial rights was over federal appellate review of state jury decisionmaking and the extent to which review (or even new trials) might be had in the Supreme Court. See Collins, supra note 23, at 108–10.


102 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16,750) (Story, Circuit Justice).

103 Id. at 750. Professor Krauss notes that \textit{Wonson} is "widely thought to have enunciated a 'unified field theory' of the Seventh Amendment, in which both clauses were read to have mumified English common-law rules concerning the right to jury trial in civil cases." See Krauss, supra note 3, at 473. Krauss, however, doubts whether \textit{Wonson} may fairly be read as having frozen jury trial rights in the federal courts as they existed in 1791. See id. at 460–78.

104 28 U.S. (3 Pet.) 433 (1830).
state law and would include "all suits, which are not of equity and admiralty jurisdiction" in which "legal rights" were in dispute.\textsuperscript{105}

Although Parsons, like Wonson, dealt mainly with the Amendment's Reexamination Clause,\textsuperscript{106} the references to English practice and the scope of equity and admiralty had clear significance for the availability of jury trials in federal court in the first instance. By referring to English practice,\textsuperscript{107} Justice Story provided an anchor for Seventh Amendment analysis that was independent of existing state law, much in the same way that the Court had dealt with conformity to state practice under the Process Acts by reference to 1789 state practice. Also, as noted below, by defining the scope of the "common law" with reference to equity and admiralty, the Court's eventual interpretation of those two provisions would substantially affect the interpretation of the Seventh Amendment.

2. The Impact of Federal Equity

Had the Constitution required federal courts to follow state rules as to when a jury trial was available, states would have been able to reduce the scope of federal equity, which proceeded with-

\textsuperscript{105} Id. at 446–47. Professor Currie believes that Justice Story came down on the side of static interpretation of the common law for appellate review, and on the side of dynamic interpretation when it came to original trials in the federal courts. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 112 & n.141 (1985); see also Krauss, supra note 3, at 473, 477 (coming to a similar conclusion); Redish, supra note 1, at 519–20 (noting that Justice Story's approach did not limit jury trial rights to proceedings that had previously existed).

\textsuperscript{106} In Parsons, the Court concluded that because the lawsuit involved neither equitable rights nor admiralty, federal courts would not have to follow state practice that would have allowed for on-the-record fact review in jury tried cases. Parsons, 28 U.S. (3 Pet.) at 446–48; see Currie, supra note 105, at 112 n.141. And in Wonson, Justice Story refused to read a federal statute as allowing for appellate re-trials (which were allowed under local practice) of actions tried by juries in the first instance. Wonson, 28 F. Cas. at 750. These cases indicate that federal independence from state practice was sometimes exercised in ways that led to less judicial control of juries.

\textsuperscript{107} See Wolfram, supra note 3, at 642 (suggesting that the first Supreme Court mention of a specific time reference for jury trial rights was in Thompson v. Utah, 170 U.S. 343 (1898)); see also Moses, supra note 2, at 189–91 (indicating that before the 1930s, the federal courts did not use a specific time reference for jury trial rights, but rather either rejected the English common law as controlling, did not refer to it, or referred to the common law practice of both countries). It may be that the reference to English practice was more to put jury trial rights within the general common law as distinguished from state practice, rather than to bind the federal courts to a specific historical test.
The first Congress, however, seems to have contemplated that federal courts would not follow state practice respecting the availability of equity. In fact, the Court suggested early on that it was the “intention of Congress” in the 1789 Judiciary Act to make up for the possible absence of equity proceedings in some states and to have federal courts give equitable relief even when the states would not. This independent approach to the availability of federal equity jurisdiction was reiterated with the early Court’s statement that equity was to be administered, “not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law.”

At a practical level, the fighting issue in deciding whether federal equity was available in any given case often centered around the requirement in Section 16 of the first judiciary statute that reme-

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108 See, e.g., Miss. Mills v. Cohn, 150 U.S. 202, 204–05 (1893) (stating that a state’s provision of a remedy at law for fraudulent conveyances did not affect the availability of federal equity); McConihay v. Wright, 121 U.S. 201, 206 (1887) (same); see also Woolhandler, supra note 43, at 133–34 (discussing injunction actions against illegal state taxes, despite attempts by states to restrict remedies to refund actions).

109 The initial Process Act provided that “the forms and modes of proceedings in causes of equity, and of admiralty . . . shall be according to the course of the civil law.” Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93–94. The Permanent Process Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276, provided that procedures would be governed “according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law.” The Court was authorized to provide rules governing equity and admiralty. Id. The Court soon concluded that it would adopt the English practices of King’s Bench and Chancery. See Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 547 & n. 178 (1971).

110 See Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222 (1818); see also Arnold, supra note 1, at 832 (stating that regular equity courts existed only in five of the thirteen original states in 1791).

111 Boyle v. Zacharie, 31 U.S. (6 Pet.) 635, 658 (1832); see also Harrison v. Rowan, 11 F. Cas. 666, 667 (C.C.D.N.J. 1819) (No. 6143) (stating that the 1789 Judiciary Act “recognise[d] and adopt[ed] the long and well established principles of the English court of chancery”). Recently, in Grupo Mexicano de Desarrollo v. Alliance Bond Fund, 527 U.S. 308, 318–19 (1999), the Court concluded over a four-person dissent that the version of equity adopted in the early judiciary statutes was relatively static and historically determined, despite precedents exhibiting a relatively dynamic quality of federal equity. See, e.g., Union Pac. Ry. v. Chi., Rock Island & Pac. Ry., 163 U.S. 564, 601 (1896) (referring to federal equity’s ability to evolve to address “new primary rights and duties” and “new kinds of wrongs”); Seynour v. Freer, 75 U.S. (8 Wall.) 202, 218 (1868) (referring to equity’s “flexible and comprehensive jurisdiction”).
dies at common law be inadequate.\textsuperscript{112} States sometimes expanded their actions at law, or adopted new actions at law that might supersede traditional equity actions, thereby giving rise to arguments that remedies at law were adequate, that federal equity was therefore unavailable, and that a jury trial was required.\textsuperscript{113} But because the Court early on interpreted federal equity to be governed by traditional English practice, it rejected arguments that these expanded or novel legal actions were "adequate" remedies at law within the meaning of the statute.\textsuperscript{114} Rather, by anchoring federal practice in English practice, the federal courts developed an equity jurisprudence independent of the states, whereby a party could often invoke equity on certain fact patterns without regard to whether state legal remedies might address the problem.\textsuperscript{115} This

\textsuperscript{112} Section 16 provided that "suits in equity shall not be sustained in either of the courts of the United States, in any case where [sic] plain, adequate and complete remedy may be had at law." Judiciary Act of 1789, ch. 20, § 16, 1 Stat. 73, 82. The fact that a remedy was available in equity in state courts, however, did not dictate its availability in federal courts. See, e.g., Cates v. Allen, 149 U.S. 451, 456-57 (1893) (indicating that a creditor could not invoke federal equity to set aside a fraudulent conveyance without reducing his claim to judgment, even if the state would allow the claim).

\textsuperscript{113} See, e.g., Dodge v. Woolsey, 59 U.S. (18 How.) 331 (1855) (discussed infra text accompanying notes 116-117).

\textsuperscript{114} See supra note 108; see also Mayer v. Foulkrod, 16 F. Cas. 1231, 1235 (C.C.E.D. Pa. 1823) (No. 9341) (Washington, Circuit Justice) ("But because the state courts, from a necessity, which the want of a court of chancery induces, entertain actions at law upon equitable rights; or because a statute of the state shall authorise such suits, it does not follow that such practice or such laws can affect the marked distinction between legal and equitable remedies in the courts of the United States."); Curtis, supra note 77, at 170-71 (noting that states' addition of remedies available at law did not affect the availability of federal equity); Benjamin F. Keller, Jurisdiction of the Federal Equity Courts as Affected by State Statutes, 47 Am. L. Rev. 190, 191, 204 (1913) (stating that state legislation expanding remedies at law could not curtail federal equity jurisdiction). If states created new substantive rights that could be enforced in accordance with federal equity, however, such enforcement could be had in a case of proper jurisdiction. See, e.g., Henrietta Mills v. Rutherford County, 281 U.S. 121, 127 (1930); William Meade Fletcher, Equity Pleading and Practice 13 (1902) (stating that it is well settled that the federal courts' equity jurisdiction is uniform and independent of state law, although an enlargement of equitable rights by the state would be administered in federal as well as state court); cf. Krauss, supra note 3, at 439-41 (observing that independent equity practice in federal courts is incompatible with Professor Amar's jury-trial conformity thesis).

\textsuperscript{115} See, e.g., Chi., Burlington, & Quincy R.R. v. Osborne, 265 U.S. 14 (1924) (indicating that the availability of an action at law in state court did not affect the availability of federal equity); Smyth v. Ames, 169 U.S. 466, 516 (1898) (holding that a suit to enjoin
dovetailing of the law-equity boundary by use of English practice made it easy for the Court simultaneously to reject arguments that remedies at law were adequate and that jury trial rights were somehow violated by federal proceedings in equity.

Arguments that federal equity was not properly invoked could encompass not just questions of jury trial rights, but also the availability of a federal forum as a jurisdictional matter. Party structure in federal equity actions might differ from what it would have been in state court actions at law—a difference that often helped to create diversity jurisdiction. For example, as noted in Part I, out-of-state shareholders of an in-state corporation were able to bring federal court diversity actions against state officials to challenge the constitutionality of state laws, even when a suit between the official and the corporation would have been between co-citizens. In *Dodge v. Woolsey*, a shareholders' derivative suit by an out-of-state shareholder contesting a state tax on an in-state corporation as violative of the Contracts Clause, the Court simultaneously rejected arguments that federal diversity jurisdiction was absent, that the corporation's remedy against the collector at law was adequate, and that the right to a jury trial (which would have been available in state court) was violated by invoking equity:

And when it was urged that the jurisdiction of the case belonged exclusively to the state courts of Ohio, under the 7th article of the amendments to the constitution, and the 16th section of the judiciary act of 1789 was invoked to sustain the position, it seems it was forgotten that this court and other courts of the United States had repeatedly decided that the equity jurisdiction of the courts of the United States is independent of the local law of any State, and is the same in nature and extent as the equity jurisdiction of England, from rates could proceed in federal courts and that the requirement of an inadequate remedy at law was unaffected by a remedy available under state law), overruled on other grounds by *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942); *In re Tyler*, 149 U.S. 164, 188–89 (1893) (noting that a state requirement to pay tax and sue the county could not affect the availability of federal equity to enjoin payment of the allegedly unconstitutional tax). The actions in state court, however, did not necessarily involve juries. See *Osborne*, 265 U.S. at 16 (indicating that the remedy was a "writ of error" to the state supreme court).

*59 U.S. (18 How.)* 331 (1855).
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which it is derived, and that it is no objection to this jurisdiction, that there is a remedy under the local law.\textsuperscript{117}

As was true in actions at law that were explicitly governed by the Rules of Decision Act, the substantive law that applied in federal equity proceedings was frequently either federal or general law rather than state law.\textsuperscript{118} For example, even prior to Swift's adoption of a general common law of negotiability in actions at law, the Court had already recognized the doctrine of negotiability in equity, state law to the contrary notwithstanding.\textsuperscript{119} In addition, equity

\textsuperscript{117}Id. at 347; see also In re Tyler, 149 U.S. at 181 (noting that ancillary jurisdiction existed as to a suit by a receiver regardless of diversity); id. at 188–89 (rejecting an argument that the state's requirement of payment under protest and suit against the county meant that there was an adequate remedy at law and holding that the state's requirements had no application to federal equity); cf. Barton v. Barbour, 104 U.S. 126, 133 (1881) (rejecting an argument that jury trial rights were violated by requiring the permission of the (state) receiver to sue at law, stating, "[b]ut those who use this argument lose sight of the fundamental principle that the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction").

\textsuperscript{118}Cf. Curtis, supra note 77, at 212–15 (stating that the rules of decision in equity cases are derived from the equity law of England, and that changes in equity law in the states can have no effect in the federal courts); Laura Fitzgerald, Is the Judicial Power Jurisdictional?, 95 Nw. U. L. Rev. (forthcoming 2001) (noting federal equity's substantive independence of state law); Woolhandler, supra note 43, at 99–111 (concluding that federal courts used general law rather than state law causes of action as vehicles to enforce federal rights in the nineteenth century).

\textsuperscript{119}See Horwitz, supra note 4, at 223; see also supra note 48; cf. Arnold, supra note 1, at 846–47 (noting Justice Story's complaints about the difficulty of trying commercial cases to juries). Toward the latter part of the century, attention focused on the use of federal equity and general law to issue labor injunctions, and the absence of jury trials in prosecutions for contempt for violating the injunctions. See generally Felix Frankfurter & Nathan Greene, The Labor Injunction 189–91 (1930) (complaining of the power of a single judge in labor injunction cases). In addition, the Court at one point indicated that tort claims against railroads in receivership required the permission of the receiver, and could be heard in equity without a jury—a decision Congress overturned by legislation. See Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 553 (1887), as corrected Act of Aug. 13, 1888, ch. 866, § 1, 25 Stat. 433, 434 (1888) (abolishing common law rule that a receiver could not be sued without permission of the court that appointed him); Barton, 104 U.S. at 128, 133–34 (holding that the federal court did not have jurisdiction in a personal injury suit without permission from the state receiver and discussing the broad ability of equity courts to try matters without juries in cases of patent and insolvency); id. at 137–38 (Miller, J., dissenting) (noting that of approximately fifty railroads in his circuit, hardly a half dozen had escaped receivership).
was often used to challenge state and local statutes as inconsistent with federal and general law constitutional norms.\textsuperscript{120}

3. The Impact of Admiralty

If the scope of equity jurisdiction operated in some measure as an outer limit on the scope of jury triable actions at common law, the federal courts’ expansive approach to admiralty jurisdiction made affirmative inroads into matters once triable only by jury. This result came about because, unlike with equity, the Court ultimately rejected English precedents that would have limited admiralty’s scope. At the time of Article III and the ratification of the Seventh Amendment, English admiralty jurisdiction was limited to the high seas and tidal waters.\textsuperscript{121} Consequently, transactions or occurrences respecting purely inland waters, or other waters beyond the reach of the tide, were not generally subject to admiralty’s jurisdiction even if those waters were navigable and interstate.\textsuperscript{122} Absent diversity, they were ordinarily the stuff of state law, the state courts, and juries.

\textsuperscript{120} Thus equity jurisdiction often proved a flashpoint for criticisms of the federal courts. See Ross, supra note 74, at 23–48; see also 28 U.S.C. §§ 1341–42 (1994) (Tax and Rate Injunction Acts restricting federal equity jurisdiction).

\textsuperscript{121} Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214, 1214 (1954). Even transactions on waters within the ebb and flow of the tide were excluded from English admiralty jurisdiction if the waters were \textit{infra corpus comitatus} (within the body of a county). See, e.g., Waring v. Clark, 46 U.S. (5 How.) 441, 452 (1847) (noting but rejecting this English limitation). Admiralty jurisdiction was conferred on the federal courts by § 9 of the first Judiciary Act. See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

\textsuperscript{122} See, e.g., The Steam-Boat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825) (holding that admiralty jurisdiction only extended to such seamen’s employment contracts as were to be performed on waters within the ebb and flow of the tide). Although during this early period Congress could legislate a rule of decision in matters involving interstate navigation of waters lying beyond the tide’s ebb and flow based on the commerce power, it felt obliged to provide for juries on factual questions arising under such statutes. This was apparently what Congress did in 1845 by enacting a statute governing interstate commerce on the Great Lakes—bodies of water beyond the tide’s ebb and flow. See Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, 726–27 (current version at 28 U.S.C. § 1873 (1994)). Justice Story is reputed to have drafted the Act. See Note, supra note 121, at 1222. This Admiralty Extension Act was later construed by the Court (after it had recognized that admiralty jurisdiction could extend beyond the ebb and flow) as having been enacted, not pursuant to Congress’s commerce power, but pursuant to its power to enforce Article III. See id. at 1230–35.
But with Justice Story often leading the way, the antebellum federal courts soon professed abandonment of the English tidal limitation and extended admiralty's reach inland to all navigable waters. The argument given by the Taney Court in overruling any potentially contrary precedents was that, in England, there were "no navigable stream[s]... beyond the ebb and flow of the tide," and that the English tidal limitation was in fact synonymous with "navigability." The Court also suggested that insufficient attention had been given to the question in its prior decisions, decided at a time "when the commerce on the rivers of the west and on the lakes was in its infancy, and of little importance, and but little regarded compared with that of the present day." With the English limitation abandoned, admiralty's scope continued to expand over the course of the nineteenth century to all transactions on navigable waters, whether or not they implicated interstate commerce as then understood.

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123 His earliest expressions were made while riding circuit. See, e.g., De Lovio v. Boit, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) (Story, Circuit Justice) (concluding that admiralty jurisdiction extended to a suit to enforce a marine insurance policy, English precedent notwithstanding); see also Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902) (Story, Circuit Justice) (suggesting that, if the wrong occurred on navigable waters, the action was within admiralty jurisdiction); Horwitz, supra note 4, at 251 (discussing De Lovio and noting the perceived commercial advantage of a decision that would have allowed maritime contract cases to proceed without juries, but noting that such a move came only after the Civil War). Justice Story rendered these decisions long before the Court explicitly abandoned the "ebb and flow" limitation.


126 See In re Garnett, 141 U.S. 1, 12 (1891) (noting that the scope of Article III's admiralty provision was broader than the Commerce Clause); see also Note, supra note 121, at 1230-37 (indicating that The Propeller Genesee Chief may have limited its expansion of admiralty jurisdiction to transactions on navigable waters that Congress might have reached under its Commerce Clause powers). In addition, the Court resolved that admiralty jurisdiction would cover the important class of contractual litigation involving marine insurance policies. Once again, the Court rejected English practice that had limited admiralty jurisdiction to contracts made upon or performed on the seas. See New Eng. Mut. Marine Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1, 24 (1870). In so doing, it followed Justice Story's much earlier decision in De Lovio. See supra note 123.
The expansion of admiralty, similarly to equity, had a number of related federalizing impacts. Not only did it aggrandize federal subject matter jurisdiction by bringing in disputes once triable only by the state courts, but federal courts would apply uniform principles of general maritime law as well as their own procedures—much as they applied general common law principles in the exercise of diversity jurisdiction under Swift. As Professor David Currie put it, "It was no accident that the author of Swift v. Tyson was also in large part responsible for the expansion of the admiralty power and for the concomitant growth of federal maritime law." The expanding reach of admiralty also narrowed the room for jury trials that would have occurred in either state or federal court. A substantial minority of the Court once protested on federalism grounds that abandonment of the English limitation on admiralty jurisdiction would not only undermine previously exclusive state court jurisdiction over ordinary tort and contract suits between co-citizens, but would also erode jury trial rights. To be sure, the admiralty jurisdiction conferred by the first Judiciary Act purported to preserve a litigant's "right of a common law remedy" for

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127 Note, supra note 121, at 1226 (referring to The Propeller Genesee Chief as accomplishing "one of the great expansions of federal judicial power").

128 Indeed, a primary reason for admiralty's expansion was said to be "the important national interest in uniformity of law and remedies" that the federal courts would be able to supply. Robert N. Clinton et al., Federal Courts—Theory and Practice 404 (1996).


130 Waring v. Clark, 46 U.S. (5 How.) 441, 467–68 (1847) (Woodbury, J., dissenting); see also id. at 472–73 (discussing colonists' hostility to admiralty's proceeding without a jury); id. at 503 (Daniel, J., concurring generally with Woodbury's dissent); id. at 504 (Grier, J., concurring in Woodbury's dissent). In Waring, which involved a substantial liberalization of the tidal limitation without clearly abandoning it, the Court was badly split (4–3), unlike in The Propeller Genesee Chief decided six years later.

131 At the founding of the Republic, one of the great sources of irritation had been the expansive admiralty jurisdiction exercised by English courts, without juries, and often at great distance. In Waring, Justice Woodbury noted in dissent that Madison had stated in the Federalist Papers that ordinary suits between co-citizens would not be within the federal courts' jurisdiction. Waring, 46 U.S. (5 How.) at 496 ("All controversies directly between citizen and citizen will still remain with the local courts.") (quoting 3 Elliot's Debates, supra note 21, at 538); see also Horwitz, supra note 4, at 141 (discussing merchants' satisfaction with Justice Story's extension of admiralty jurisdiction given their dislike of juries in mercantile litigation).
which a jury trial was possible. A jury trial thus might still be available to the plaintiff who sought one by invoking a common law remedy, but the Court’s decisions significantly enhanced the opportunities for resourceful litigants to proceed as plaintiffs in federal court without a jury.

B. Federal Judicial Control of the Jury

The Supreme Court’s adoption of the general common law, its expansive interpretations of federal jurisdiction, and its flexible applications of statutes governing procedure all helped to establish the independence of federal courts from state law and state courts. In addition, the Court’s understanding of the respective scope of the common law, equity, and admiralty ensured that federal rather than state law would govern the availability of jury trials. Given these efforts, it is perhaps not surprising that the newly created federal courts would also take control of the incidents of jury trial and that they would exercise this independence to keep a firm hand on juries to ensure that the juries did not interfere with federal and general law rights.

The Process and Conformity Acts might have suggested that state practices regarding judge-jury relations would apply in the federal courts. Under the Process Acts, the Court never squarely addressed whether the “forms and modes of procedure” included the judge-jury relationship, but nevertheless declined to treat state practices as controlling—sometimes by failing to mention the Acts

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132 See Krauss, supra note 3, at 432–33 (concluding that by dispensing with jury trials in admiralty cases (as well as in suits in equity), the first Congress insured that the availability of jury trials in suits at common law in the federal courts would generally not be keyed to state law).

133 See Henderson, supra note 2, at 319–20 (stating that it appears, although the evidence is not complete, that the early district courts more or less adopted the practice prevailing in the states in which they sat, and used a variety of jury-control devices). Section 29 of the first Judiciary Act called for jury selection in civil and criminal cases in federal court to conform to state law. Judiciary Act of 1789, ch. 20, § 29, 1 Stat. 73, 88. But as Judge Peters stated regarding this provision, “[a]lthough...it would be well to accommodate our practice with that of the state, yet the judiciary of the United States should not be fettered and controlled in its operations, by a strict adherence to state regulations and practice.” United States v. Insurgents, 26 F. Cas. 499, 513–14 (C.C.D. Pa. 1795) (No. 15,443) (Peters, District Judge).
altogether. Under the Conformity Act, however, the Court eventually rejected the notion that state practice could control federal judge-jury relations, stating that “state laws cannot alter the essential character or function of a federal court.” But throughout the nineteenth and early twentieth centuries, the Court sometimes invoked state procedures to support a federal practice, particularly when state procedures enhanced judicial control of juries. It thus showed a flexibility in rejecting and accepting such state judge-jury procedures similar to its treatment of other, non-

See, e.g., Parks v. Ross, 52 U.S. (11 How.) 362 (1850) (alluding to state practice in support of the use of a directed verdict for evidentiary insufficiency, but not mentioning the Process Act nor stating that judge-jury relations were controlled by existing state law).

In some cases, the Court relied on the Conformity Act in approving the use of state or territorial jury control practices. See Coughran v. Bigelow, 164 U.S. 301, 308 (1896) (following territorial practice in allowing a compulsory nonsuit, and also alluding to Conformity Act); Cent. Transp. Co. v. Pullman's Palace Car, 139 U.S. 24, 38-40 (1891) (alluding to the Conformity Act and following state practice in allowing a compulsory nonsuit); see also Austin Wakeman Scott, Trial by Jury and the Reform of Civil Procedure, 31 Harv. L. Rev. 669, 687 (1918) (noting that compulsory nonsuit differed from directed verdict in that the plaintiff could refile the action after a nonsuit); Slocum v. N.Y. Life Ins. Co. 228 U.S. 364, 395-97 (1913) (distinguishing cases that allowed compulsory nonsuit under state or territorial law on this ground).


See, e.g., Balt. & Carolina Line v. Redman, 295 U.S. 654, 661 (1935) (citing New York practice in support of allowing a federal court to enter a judgment notwithstanding the jury's verdict); Pease v. Rathbun-Jones Eng'g Co., 243 U.S. 273, 278-79 (1917) (citing state practice in support of the use of summary judgment against sureties, over objections that resort should have been had to action at law); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 130-31 (1851) (noting that commentary on evidence was allowed under New York state practice and suggesting the desirability of conformity to state practice); Parks, 52 U.S. (11 How.) at 373 (citing the practice of “many [s]tates” in support of directing a verdict for evidentiary insufficiency); Kendall v. Stokes, 44 U.S. (3 How.) 87, 97-99 (1845) (holding that the trial court should have given an instruction that the evidence was not competent to maintain the action, and noting the use of the practice in Maryland and other states).
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jury related procedures that fell more squarely within the Process and Conformity Acts.

This early assertion of strong judicial control in federal court jury trials may seem contrary to certain aspects of contemporary scholarship and jurisprudence. First, it is often assumed, at least as to the incidents of the judge-jury relationship, that there has historically been a gradual enhancement of judicial control and a corresponding diminution of the jury's role. This impression is premised on the understanding that in eighteenth century America, juries could be the judges of law as well as fact in civil cases and, additionally, on the more recent development of formal mechanisms for taking matters from the jury, such as the use of judgments notwithstanding the verdict. Justice Black's famous dissent in Galloway v. United States,\(^{139}\) in which the Supreme Court definitively allowed for entry of final judgments contrary to the jury's verdict without having to grant a new trial, painted a doleful picture of the ever-declining role of the jury.\(^{140}\) Despite occasional criticism, Justice Black's version of historical events has been widely accepted.\(^{141}\)

Without minimizing the importance of the contemporary availability of formal devices for jury control, a more complete picture of the history of federal judicial control of jury decisionmaking requires attention to the willingness of the federal courts to apply such formal means as were traditionally at their disposal. From this perspective, it can be argued that federal judicial control of juries has, in the aggregate, declined rather than expanded over time.

1. Instructions of Law and Their Specificity

a. Juries as Judges of Law as well as Fact?

Scholars have focused on the recognition of the colonial jury's power to decide both law and fact, and the loss of that power, as decisive occurrences in the law of judge-jury relations.\(^{142}\) Professor

\(^{139}\) 319 U.S. 372 (1943).
\(^{140}\) Id. at 396–411 (Black, Douglas, & Murphy, JJ., dissenting).
\(^{141}\) See supra note 12 and accompanying text.
\(^{142}\) See Arnold, supra note 1, at 830, 833 (stating that juries had more power to decide both law and fact in the eighteenth century and arguing against a complexity exception to jury trial rights); Harrington, supra note 25, at 414–23 (arguing that instrumentalist concerns prompted the erosion of jury power in the early 1800s); see
William Nelson, for example, has described Massachusetts practice in the colonial period as providing for jury decisions on questions of law, and others have noted evidence of a similar practice not long after the ratification of the Constitution and the Seventh Amendment. Much is made, for example, of Chief Justice John Jay’s statement in the Supreme Court’s only jury trial, in *Georgia v. Brailsford*, that the jury had the right to “to take upon [itself] to judge of both, and to determine the law as well as the fact.” Such charges are contrasted with later, more pronounced delineations of law and fact and the respective roles of judge and jury as evidence of the jury’s declining role. Some scholars see this increasing delineation of law and fact as an accommodation to the needs of

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also Horwitz, supra note 4, at 28 (noting that, although colonial judges had means to control juries, juries were nevertheless considered judges of both law and fact, but that greater jury control, particularly through delineation of a law-fact distinction, emerged in the early nineteenth century); id. at 143-53 (discussing the demise of juries’ and arbitrators’ prerevolutionary share of lawmaking in the first few decades of the nineteenth century as aspects of judges’ resistance to competing sources of law).


144 See, e.g., Harrington, supra note 25, at 398-99.

145 3 U.S. (3 Dall.) 1 (1794). See Amar, supra note 3, at 100-01 (discussing *Brailsford*); R.J. Farley, Instructions to Juries—Their Role in the Judicial Process, 42 Yale L.J. 194, 202 (1933) (citing *Brailsford* for the proposition that juries were judges of law); Note, supra note 4, at 173-74 (discussing *Brailsford* to illustrate that juries had been judges of law). In addition, attention has focused on the attempted impeachment of Justice Samuel Chase, inter alia, for not allowing juries to be judges of law in criminal actions. See Amar, supra note 3, at 98-99 (discussing the attempt to impeach Justice Chase for disallowing argument of a law’s unconstitutionality to the jury); Landsman, supra note 4, at 42-43 (discussing Justice Chase’s impeachment as showing the continuing importance of the jury in deciding law).

146 *Brailsford*, 3 U.S. (3 Dall.) at 4. The case went to the jury on agreed facts, and only an issue of law remained. Id. at 1 (referring to “an amicable issue”). In *Bingham v. Cabbot*, 3 U.S. (3 Dall.) 19 (1795), Justice Iredell, in one of the seriatim opinions, mentioned that “though the jury will generally respect the sentiments of the court on points of law, they are not bound to deliver a verdict conformably to them.” Id. at 33; see also Jefferson Letter, supra note 18, at 595-96 (noting that while the jury can be the judge of the law, the jury should disregard the law only when it suspects the court of partiality).

147 See, e.g., Harrington, supra note 25, at 403-05 (indicating that early federal court practices tending to differentiate law from fact involved an abandonment of eighteenth century practice); Note, supra note 4, at 173 (stating that the law-fact dichotomy was sharpened in the nineteenth century).
merchants and creditors for greater predictability in commercial relations.¹⁴⁸

The significance of Chief Justice Jay's remark that juries were judges of law, however, has perhaps been overstated.¹⁴⁹ That judges, not juries, had control of law in civil cases was implicit in the Seventh Amendment itself, with its concern for protecting jury-found facts from subsequent federal judicial review. Anti-Federalist critics of federal appellate power over "law as well as fact" were not so much concerned about appellate review of questions of law, as with questions of fact.¹⁵⁰ In addition, the 1789 Judiciary Act,¹⁵¹ crafted simultaneously with the Seventh Amendment,¹⁵² repeatedly refers to "trial[s] of issues in fact" as the occasions for jury trial.¹⁵³ Similarly, the Act provided for new trials in jury-tried cases "for reasons for which new trials have usually been granted in the courts of law"¹⁵⁴—one such reason being that a jury's verdict was inconsistent with the law on which they were in-

¹⁴⁸ See Horwitz, supra note 4, at 140–41 (attributing the curtailment of jury power to the alliance of commercial interests with the bench and bar); Nelson, supra note 143, at 8 (stating that business interests deprived juries of their right to decide law); Landsman, supra note 4, at 43.

¹⁴⁹ See United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815) (Curtis, Circuit Justice) (casting doubt on the reported instructions in Brailsford); Henderson, supra note 2, at 317–18 (suggesting that the Chief Justice's instructions in Brailsford may have been anomalous); see also Sparf v. United States, 156 U.S. 51, 64–65 (1895) (Harlan, J.) (citing Morris with approval); cf. Commonwealth v. Anthes, 71 Mass. (5 Gray) 185, 301–02 (1855) (Shaw, C.J.) (characterizing statements that juries were judges of law as referring merely to their right to return a general verdict); Landsman, supra note 4, at 33 (advising caution in assessing the role of juries as deciders of law, given other constraints on juries).

¹⁵⁰ Letters from the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist, supra note 18, at 319–20; see also Colleen P. Murphy, Integrating the Constitutional Authority of Civil and Criminal Juries, 61 Geo. Wash. L. Rev. 723, 749, 752 (1993) (concluding from functional arguments, as well as constitutional history and structure, that a jury should not be deemed to have constitutional authority to decide issues of law).

¹⁵¹ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73.


¹⁵³ Judiciary Act of 1789, § 9, 1 Stat. at 77 ("[T]rial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury."); id. § 12, 1 Stat. at 80 ("[T]he trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.").

¹⁵⁴ Id. § 17, 1 Stat. at 83.
structed. Furthermore, the "writ of error" provided in the Act as the exclusive method for Supreme Court review clearly allowed for review of questions of law from state and federal courts while it insulated from review questions of fact.

What is more, the jury instructions in Brailsford show already well-delineated roles of judge and jury along the law-fact divide. The State of Georgia claimed that it had confiscated a debt owed partly to a British subject and partly to a South Carolinian under a state law enacted prior to the effective date of a treaty that had forbidden the confiscation of property of British subjects. The issue of state confiscation versus treaty protection was similar to that which would arise in Martin v. Hunter's Lessee, and it was an issue as to which the Supreme Court was determined to establish federal judicial control over local confiscatory impulses—both with respect to state courts in Martin and federal juries in Brailsford. Chief Justice Jay therefore told the jury that questions of fact were for the jury, but that "on questions of law, it is the province of the court to decide." Although the jury had power to decide the law in rendering its general verdict, the Court had "no doubt that [the jury would respect] the opinion of the court."

The Court then proceeded to tell the jury exactly what to do—namely, to find for the private creditors because the debts had not

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155 See, e.g., Henderson, supra note 2, at 302, 311 (discussing the availability of new trials where a verdict was against the law); see also sources cited infra note 250.


158 14 U.S. (1 Wheat.) 304 (1816). Martin reversed the state court's refusal to obey the mandate of Fairfax's Devisee. In Fairfax's Devisee, the Court held that title of the allegedly confiscated land had not vested in the state at the time of the 1794 treaty, because Virginia acts had not altered the common law requirement of inquest in office necessary to vest title in the state. Fairfax's Devisee, 11 U.S. (7 Cranch) at 622–26.

159 See also Carver v. Jackson, 29 U.S. (6 Pet.) 1, 89–90, 100 (1830) (holding that land was not forfeited under New York statutes).

160 Brailsford, 3 U.S. (3 Dall.) at 4.

161 Id.
been confiscated under Georgia law—and the jury duly complied. The Court thereby effectively directed a verdict by telling the jury that the law demanded a particular decision on the facts. Directing a verdict at common law only meant that the court would tell the jury how it should rule, however, not that the court could take the case from the jury and enter judgment on its own. But even if a hearty enough jury could theoretically have returned a contrary verdict, the possibility of new trial remained. The jury’s decision on the matter of law would therefore have only allowed them to return a verdict contrary to law, but not necessarily an effective or final one. Consequently, to say that the jury was the judge of the law as well as fact in civil actions was true only in a contingent and limited sense.

b. Specificity of Law

In any event, early federal courts quickly ceased to speak of the jury as deciding the law in civil cases, Brailsford notwithstanding. Their taking control of issues of law was enhanced by their willingness to elaborate applicable legal standards with a great deal of specificity in certain areas. This translated into judgments on the

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162 The Court instructed that the Georgia statute did not reach the debts owed to the South Carolinians and that the debt owed to the British subject under Georgia law had only been sequestered, not confiscated, and therefore his right to recover was revived by the peace treaty. Id.

163 See Edward H. Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903, 910 (1971) (stating that “the remedy for disobedience was a new trial” as distinguished from entry of judgment); cf. Curtis, supra note 77, at 87–88 (describing how a litigant would ask for an instruction to the jury that a state statute that impaired his contract was invalid).

164 See Henderson, supra note 2, at 302, 311 (noting that a new trial could be awarded if the jury ignored the direction of verdict); see also infra text accompanying note 250 (noting that a new trial was the ordinary mechanism for policing a jury’s failure to follow the court’s instructions).

165 See, e.g., Stettinius v. United States, 22 F. Cas. 1822, 1830–31 (C.C.D.C. 1839) (No. 13,387) (observing that in civil and criminal cases alike, the jury has the “physical power” to ignore the court’s legal instructions, but that “it has never been supposed that the power of the jury, in a civil case, to render a general verdict on the general issue, was a right, or implied a right, to decide the law of the case”).

166 See Horwitz, supra note 4, at 28 (noting a tendency in the nineteenth century for judges to treat certain issues as matters of law for the first time); cf. Friedman, supra note 50, at 399 (noting that judges used to instruct juries in “frank, natural” language, but later became technical and opaque).
pleadings\textsuperscript{167} and grants of demurrers to the evidence at the close of plaintiff's case when the court found plaintiff's showing insufficient to support a verdict.\textsuperscript{168} It also translated into the federal courts' use of directed verdicts respecting the application of law to fact at the close of the case. Many civil cases went to juries under directions that told jurors what to do, just as in \textit{Brailsford}, albeit without \textit{Brailsford}'s express mention that they could decide the law. The impression that modern summary judgment practice has greatly enhanced judicial control, and that more cases once "went to trial"\textsuperscript{169} than do today, underappreciates the extent to which federal courts once successfully directed verdicts as a matter of law in cases that actually did go to trial.\textsuperscript{170}

\textsuperscript{167} At common law, a demurrer to the evidence and a motion for judgment on the pleadings both raised questions of law regarding the sufficiency of the pleadings and, if granted, would keep a case from going to the jury. See Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 388 (1913); Fleming Jaines, Jr. et al., Civil Procedure 329–30 (4th ed. 1992).

\textsuperscript{168} A demurrer to the evidence at common law would test whether there was sufficient evidence for the plaintiff's case to go to the jury, but the defendant would have to waive his right to present evidence of his own should he be unsuccessful. See Frank Warren Hackett, Has a Trial Judge of a United States Court the Right to Direct a Verdict, 24 Yale L.J. 127, 145–46 (1914–15) (indicating that the moving party had to admit facts and inferences therefrom); Henderson, supra note 2, at 304–05 (same). An alternative to a demurrer that did not involve this risk was to ask for a peremptory instruction to the jury at the close of the case. See Bates v. Clark, 95 U.S. 204, 206 (1877) (stating that the issue of law of whether the defendants made seizure within Indian territory was properly raised by a request for instructions, although it could have been raised by demurrer). A related procedure, the compulsory nonsuit, was a way for a defendant, at the close of the plaintiff's case, to have the suit dismissed, but it did not prevent the plaintiff from bringing suit again or the defendant from putting on evidence if the motion was denied. See supra note 135.

\textsuperscript{169} See Hackett, supra note 168, at 133 (arguing that there were no directed verdicts before 1850 because "unless the defendant demurred to the evidence, upon which the case was withdrawn from the jury, the plaintiff had a right to go to the jury, no matter how slight was his chance of obtaining a verdict"); see also id. at 136 (reiterating that if the defendant did not demur to the evidence, "the evidence went to the jury. As we have already observed, there was no such practice known at that time as directing a verdict.").

\textsuperscript{170} See, e.g., \textit{Bates}, 95 U.S. at 206 (approving a charge to a jury indicating that the defendant officers were liable as a matter of law). The ability of a federal court to enter a judgment rather than merely to employ directed verdicts with new trial as the only enforcement option is obviously an advance in jury control. See infra text accompanying notes 232–33.
(1) Instructions of Law in Private Law Litigation

Detailed instructions from the federal judge on the application of law to fact were critical for securing diversity jurisdiction's and the general common law's protections of out-of-state creditors and other interstate actors. In fact, the general common law and judicial control of juries went hand in hand. A determination that a particular matter in a lawsuit was one of general law often meant not only that state law would not control, but also suggested that the matter might be treated as one of law rather than fact in the allocation of judge-jury relations.\textsuperscript{171} For example, in cases involving written instruments, the Court might invoke \textit{Swift} for the proposition that their construction was a matter of general law, and also, in the same opinion, declare that the construction of written instruments was a legal rather than a factual question to be determined by the judge rather than the jury.\textsuperscript{172} In cases involving contests of

\textsuperscript{171} See, e.g., Camden v. Doremus, 44 U.S. (3 How.) 515, 529–30 (1845) (noting that requirements of law merchant had been met); id. at 532–33 (interpreting terms of contract and requirements of due diligence); cf. Horwitz, supra note 4, at 140–44 (seeing a decline in the power of juries early in nineteenth century as resulting from concern for protection of commercial interests).

\textsuperscript{172} See, e.g., Watson v. Tarpley, 59 U.S. (18 How.) 517, 520 (1855) (quoting language from \textit{Swift} to the effect that questions of a general nature, such as the construction of ordinary contracts and written instruments, were part of the general law and that state law could be ignored); id. at 518–19 (indicating that the adequacy of notice was a matter for the court, not the jury); see also Marine Ins. Co. v. Young, 9 U.S. (5 Cranch) 187, 190 (1809) (Livingston, J.) (noting at argument that "[a] written contract, a bond, note & c. . . . is a subject for the construction of the court"); United States v. Delaware, 25 F. Cas. 811, 814 (C.C.E.D. Pa. 1823) (No. 14,942) (Washington, Circuit Justice) (directing a verdict, "the facts being all in writing, and agreed between the parties"); cf. James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 203 (Boston, Little, Brown & Co. 1898) (noting that it was not uncommon to call the interpretation and construction of writings "a pure question of law"). Thayer thought such matters partook of fact, but were still better performed by the judge:

The judge has to ascertain the usual meaning of words in the vernacular language, and what modifications of that meaning are allowable as a mere matter of the fair use of language. . . . Such questions are addressed to the trained faculties of an educated man, acquainted with the use and the rules of language, and with the sort of business to which the writing relates . . . .

Id. at 203; see also John H. Wigmore, A Student's Textbook on the Law of Evidence 470 (1935) (indicating that the interpretation of the terms of a document is for the judge because the terms are inextricably connected with the legal effect of the document).
interpretation of deeds, insurance contracts, and surety bonds, the Court therefore took matters from the jury or approved instructions to juries wherein the federal court itself construed the document and told the jury exactly how to rule.

Perhaps the area of contract construction dearest to the heart of the early general common law was the negotiability of commercial paper. A determination that a party was a holder in due course meant that many defenses otherwise available would be foreclosed, thereby removing many issues of fact (as well as law) from debt cases. One remaining defense for the drawer or prior endorsers that might have created a jury issue was whether the holder had given adequate notice of dishonor of the instrument by the drawee. Nevertheless, in a number of cases both before and after Swift, the Court reversed lower courts that had allowed the issue of reasonableness or adequacy of notice to be determined by the jury when the historical facts were uncontested, but the inference

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173 See, e.g., Brown v. Huger, 62 U.S. (21 How.) 305 (1858) (rejecting, in a case that technically was submitted to the jury, the plaintiff's argument that the construction of a land patent was an issue for the jury); Chinoweth v. Lessee of Haskell, 28 U.S. (3 Pet.) 92, 98 (1830) (reversing a verdict for the plaintiff and sustaining the defendant's demurrer to the evidence based on judicial construction of the deed); cf. Evans v. Eaton, 20 U.S. (7 Wheat.) 356, 432-35 (1822) (approving instructions to the jury, including an instruction that an invention patent was defective for failure to specify the nature of improvement); id. at 438 (Livingston, J., dissenting) (arguing that it should be left to the jury to determine whether the improvement patented was set forth with the necessary precision).

174 See, e.g., Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 374-75 (1913) (agreeing with the Court of Appeals that the trial court should have directed a verdict against the plaintiffs on the issue of whether the insurance company had agreed to accept partial payment on a life insurance contract).

175 See, e.g., Coughran v. Bigelow, 164 U.S. 301, 310-11 (1896) (affirming an involuntary nonsuit against a plaintiff bringing action for breach of a surety bond when it was authorized by laws of territory).

176 See, e.g., Brown, 62 U.S. (21 How.) at 318. In affirming the role of the court in construing written documents, the Court noted that the need for "legal deductions drawn therefrom must be conformable with the scope and purpose of the entire document," and that such construction and deductions were a judicial function. Id.

177 See Friedman, supra note 50, at 536–37 (indicating that bills and notes were an important area of nineteenth century legal practice).

178 Cf. Hovenkamp, supra note 42, at 84 (explaining bills of exchange).

179 See, e.g., Watson v. Tarpley, 59 U.S. (18 How.) 517, 518–19 (1855) (deciding the issue of whether the holder had given adequate notice of nonacceptance to the drawer). As the Court put it in Watson, "[t]his is a matter which must, upon the facts given in evidence, be determined by the court as a question of law, and which cannot
of reasonableness was contested. Taking the notice issue from the jury was, as the Court stated in one such decision, "best calculated to have fixed [and] uniform rules . . . and is highly important for the safety of holders of commercial paper" and to prevent a clog on its circulation.

When the Court reversed judgments that had been entered for debtors in cases involving notice, it would order a new trial. But the new jury would have little room to do anything other than render a verdict for the creditor based on the instructions of law from the bench. Even when the parties did contest the underlying historical facts of notice, the Court urged the lower federal courts to provide specific instructions as to the legal consequences of specific fact findings—often instructions favorable to finding notice ade-

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180 In some areas, the application of a general standard to uncontested facts could go to a jury. See, e.g., M'Lanahan v. Universal Ins. Co., 26 U.S. (1 Pet.) 170, 191 (1828) (holding that the issue of materiality of risk in a marine insurance case was a jury issue); see also Henderson, supra note 2, at 299 (noting the problem of assessing the degree of jury control of law given the problem of mixed questions). Thus, it was by no means foreordained that the reasonableness of notice should be a nonjury question, as also indicated by the resurfacing of the question of whether the judge should have taken the notice issue from the jury.

181 Bank of Columbia, 26 U.S. (1 Pet.) at 583; see also Lambert, 50 U.S. (9 How.) at 557 (stating that it was of "first importance to the commercial community" that the rules of negotiable instruments be certain and conform to the usages of trade).

quate—to provide the holder of commercial paper with "a fixed standard, on a like state of facts, for protecting as well as knowing their rights." \(^{184}\)

(2) Instructions of Law in Public Law Litigation

The use of legal standards that obviated jury issues either by way of blanket exclusions of defenses or by judicial specification of law as applied to facts was also apparent in cases involving government officials. Professor Amar opined that civil juries were to provide protections of property by deciding trespass suits brought by citizens who claimed that government officials had invaded their property without legal justification. \(^{185}\) Under this view, state law would supply the trespass action and local juries would make the liability determinations thereunder—whether in state or federal court—thereby providing an affirmative check on governmental power. \(^{186}\)

Although trespass suits against officers provided important limitations on governmental power, general law rather than state law tended to supply the relevant cause of action in these suits when brought in federal court, \(^{187}\) and thus moved the federal judge to the center of decisionmaking. \(^{188}\) Under the general common law standards applicable in these officer actions, a plaintiff would typically claim that the defendant official had committed a trespassory

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\(^{183}\) See Harris v. Robinson, 45 U.S. (4 How.) 336, 344–45 (1846) (approving an instruction telling a jury that if it believed that the notary made the inquiries concerning the endorser's address, it was due diligence); see also id. at 349–52 (McLean, J., dissenting) (arguing that due diligence had not been shown).

\(^{184}\) Id. at 345.

\(^{185}\) See Amar, supra note 3, at 89–91.

\(^{186}\) See id.

\(^{187}\) See Woolhandler, supra note 43, at 106–11 (indicating that the federal courts did not use the elements of state claims in actions contesting legality of government action). See generally Collins, supra note 51, at 1283–99 (indicating that the federal courts used general constitutional law in interpreting state constitutions); Graber, supra note 37, at 78–91 (focusing on development of "general principles" of anti-taking jurisprudence in early federal cases).

\(^{188}\) Similarly, the federal officer removal statutes suggest a fear that local courts and juries would not fairly adjudicate claims against federal officers. See Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 253 (1867) (approving federal officer removal and noting that without removal, federal officers, no matter how regular their conduct, would be subject to harassing litigation "if the views of those [state] tribunals and of the juries which sit in them, should be adverse").
harm, and the defendant would claim that his actions were legally justified by statute or other authority. The plaintiff, in turn, might respond that the officer’s actions were not legally justified—that the officer had no valid authority to do what he did, either because his actions were not statutorily authorized or because the statute under which he claimed authorization was unconstitutional. In such contexts, the decision as to the legality of the officers’ action presented a legal question, thus allowing for many judgments based on the pleadings or on agreed facts.

In cases that went to full trial, officers sometimes argued that the issue of their good faith should go to the jury—either to relieve them of liability, or to mitigate damages. The Court, however, repeatedly refused to allow good faith as a defense to basic liability, even though it noted that good faith would be a defense to exemplary damages. The Court, moreover, was willing to determine

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189 See, e.g., Pickard v. Pullman S. Car Co., 117 U.S. 34 (1886) (affirming a judgment giving a tax refund to a corporation in a case that was tried on agreed facts); Dynes v. Hoover, 61 U.S. (20 How.) 65, 83-84 (1857) (approving a judgment for the defendant on the pleadings, in that a marshal was not liable for executing the judgment of a valid court martial); cf. Martin v. Mott, 25 U.S. (12 Wheat.) 19, 39 (1827) (reversing a state court’s judgment for the plaintiff and against a deputy federal marshal for seizing goods to collect military fines imposed by a court martial; the plaintiff had demurred to the defendant’s plea in justification, in which demurrer the defendant had joined).

190 See, e.g., Bates v. Clark, 95 U.S. 204, 209 (1877); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 94-95 (1836) (holding that instructions from the Secretary of the Treasury could not justify illegal action); Gelston v. Hoyt, 16 U.S. (3 Wheat.) 245, 330-332 (1818) (rejecting in a trespass action the defense that presidential orders could justify illegal seizure); id. at 333-34 (opinion of Johnson, J.) (indicating that a presidential order could not justify trespass); cf. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64, 122-24 (1804) (indicating in an admiralty case that good faith should relieve officer of vindictive or speculative damages only).

191 Punitive damages often were not awardable, based on the Court’s own determination. See, e.g., Conard v. Pac. Ins. Co., 31 U.S. (6 Pet.) 262, 282 (1832) (approving a charge that did not allow for exemplary damages against an officer who executed against the wrong goods); The Amiable Nancy, 16 U.S. (3 Wheat.) 546, 558 (1818) (stating that on the facts presented, exemplary damages would have been available against wrongdoers who plundered a Haitian vessel despite knowing almost immediately that the vessel’s papers were in order, but that damages were not available against owners of plundering ship); cf. Tracy, 35 U.S. (10 Pet.) at 94-97 (holding that while a compensatory award should be available against a collector who, under directions of the Secretary of the Treasury, demanded a bond greater than that required by law, the case would not have been appropriate for exemplary damages). The Supreme Court adopted and policed a general law requirement that more than gross negligence be shown to obtain punitive damages in federal courts. See, e.g., Milwaukee & St. Paul Ry. v. Arms, 91 U.S. 489, 495 (1875) (finding error in allowing a
for itself whether official acts were justified under highly elaborated factual situations; even the issue of probable cause, which Professor Amar anticipated would go to juries in trespass actions, seems often to have been treated as a judicial question. Thus, to the extent that cases against officers went to trial as opposed to being decided on the pleadings, they might well go to the jury with instructions to find the officer liable in the particular case because his claim for legal justification had failed on the particular facts shown.

The general law's foreclosing of good faith defenses to the officer was comparable to the general law of negotiability, which similarly cut off defenses that might have mitigated the more or less strict liability on negotiable instruments. Strict liability in both cases, moreover, may be seen as protecting common law interests in contract and property of the respective plaintiffs. But contrary to Professor Amar's supposition that juries would protect citizens' property against official invasions, it was the limitation of the jury's role that provided such protections in federal courts.

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1 Cf. Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 402 (1851) (stating that probable cause goes to the judge in a malicious prosecution case, citing English authority); Thayer, supra note 172, 203 n.1 (indicating that it was sometimes said that facts and law amounting to probable cause were a judicial question); id. at 207 (saying probable cause in malicious prosecution cases is a judicial question).

2 The Court also recognized a discretionary immunity for high level federal executive officers, which was a form of absolute immunity, thereby also excluding jury decisionmaking in such cases. See Kendall v. Stokes, 44 U.S. (3 How.) 87, 96–98 (1846).
2. Control of Facts: Directed Verdicts and Evidentiary Insufficiency

In addition to employing and elaborating on legal standards that enhanced the judiciary’s role at the expense of the jury’s, federal courts maintained significant control of fact finding, even apart from their rulings on evidence. One way the federal courts maintained control of fact finding was by the use of directed verdicts for evidentiary insufficiency. Stringency in directing verdicts accorded with the federal courts’ role of protecting against the transfer of property contrary to the fault principles of the general common law and later substantive due process. Indeed, as discussed more fully below, the Court eventually saw its directed verdict practice as a matter of substance rather than procedure, and as part of the general common law.

a. Parks v. Ross

It has sometimes been claimed, perhaps most notably by Justice Black, that directed verdicts did not exist in federal practice before the Supreme Court’s 1850 decision in Parks v. Ross. It is not, however, altogether clear what is meant by this claim, nor is it clear how novel Parks was in any respect. At times the claim appears not to be limited to the directing of verdicts for evidentiary insufficiency alone (as occurred in Parks), but possibly to encompass directed

(1845) (holding that an officer had discretionary immunity from damages and that the trial court should have directed a verdict against the plaintiff); Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W. Res. L. Rev. 396, 422-29 (1987) (discussing the history of discretionary immunity). Occasionally the Supreme Court indicated that there were jury issues in an officer suit, but the instructions to the jury in those cases were quite detailed. See, e.g., Dinsman, 53 U.S. (12 How.) at 404 (allowing the issue of whether an officer maliciously inflicted more punishment than necessary due to malice to go to the jury); id. at 402-05 (discussing various acts for which the defendant officer could not be held liable).

197 See Galloway, 319 U.S. at 401-02 (Black, J., dissenting) (treating Parks as the first directed verdict case); Hackett, supra note 168, at 127, 140 (tracing directed verdicts to Parks and treating them as illegitimate).


One could attempt to distinguish (although the cases do not necessarily do so) between two types of cases: (1) cases in which the plaintiff claims only to have proved facts A, but the court finds that facts A are legally insufficient and (2) cases in which the plaintiff claims to have proved facts B, which if proved would be legally sufficient, but the court finds the plaintiff’s evidence insufficient to show B. The latter would more squarely be a directed verdict for evidentiary insufficiency. But in both cases the evidence may be said to be insufficient "as a matter of law." Cf. Metro. R.R. v.
verdicts for legal insufficiency as well. As discussed above, however, federal judges directed juries regarding how to apply the law to specific facts as part of the allocation of judge-jury relations from the outset.

The claim is sometimes couched to suggest that directed verdicts for evidentiary insufficiency (as opposed to directions as a matter of law only) were an innovation with Parks. Direction of verdicts for factual insufficiency, however, also predated Parks. In addition, those who argue that Parks was a novelty themselves acknowledge the prior practice of instructing juries that there was "no evidence" on a particular point if requested—a practice that clearly involved the direction of a verdict for a type of evidentiary insufficiency.

Moore, 121 U.S. 558, 569 (1887) (distinguishing new trials for insufficiency of law, when there was a total lack of evidence, from insufficiency of fact, when there was competent evidence to sustain every element, yet countervailing proof was so strong as to leave no reasonable doubt).

See Hackett, supra note 168, at 127 ("It is the purpose of this article to enquire into the origin of a practice that since about 1850 has obtained in trial courts of the United States, whereby the judge, when he deems it proper, directs the jury as to the verdict they shall render."); cf. Galloway, 319 U.S. at 401–02 (Black, J., dissenting) ("A long step toward the determination of fact by judges instead of by juries was the invention of the directed verdict. In 1850, what seems to have been the first directed verdict case considered by the Court, Parks v. Ross, 11 How. 362, was presented for decision."). To the extent that the argument may encompass even directions of verdicts as to law, it may implicitly suggest that juries were judges of law as well as fact. See Section II.B.1.a.

See Galloway, 319 U.S. at 389 ("If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century.").

William Wirt Blume, Origins and Development of the Directed Verdict, 48 Mich. L. Rev. 555, 561 (1950) (describing directions as to law and fact in the early 1700s); see also Kendall v. Stokes, 44 U.S. (3 How.) 87, 96–97 (1845) (holding that the court should have instructed the jury that the action could not be maintained); Greenleaf v. Birth, 34 U.S. (9 Pet.) 292, 299 (1835) (stating that the judge should instruct that there is no evidence on a particular point if requested); cf. Kendall, 44 U.S. (3 How.) at 791 (McLean, J., dissenting) (objecting that an instruction that the evidence was insufficient should not be given when there was any legal evidence before the jury). In Kendall, however, the majority's direction of a verdict seemed to be based more on legal than factual insufficiency. See id. at 96–97.

See Greenleaf, 34 U.S. (9 Pet.) at 299; see also Galloway, 319 U.S. at 402 (Black, J., dissenting) (discussing Greenleaf).

In addition, the willingness of the federal courts to provide detailed elaborations of legal standards to fit various sets of facts itself necessarily presupposed a notion of
Alternatively, the claim based on Parks may be that the Court moved from a "no evidence" standard to a "no legally sufficient evidence" standard as the basis for directing a verdict based on factual inadequacy. Parks, however, used both the "no evidence" and "legally sufficient" evidence formulations interchangeably, and it would have been nearly impossible to police a "no evidence" standard without bringing to bear some notion of sufficiency of the evidence to meet a legal standard. But even if one supposes a true no-evidence rule ever existed and that the federal courts be-

what would be an insufficient showing of historical facts under the governing legal standard.

205 See Greenleaf, 34 U.S. (9 Pet.) at 299 ("Where there is no evidence tending to prove a particular fact, the court are bound so to instruct the jury, when requested: but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have.").

206 Justice Black, however, saw such a shift as happening many years after Parks. See Galloway, 319 U.S. at 403-04 (Black, J., dissenting) (claiming that the "substantial evidence" test arose in Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 447 (1871)); see also Curtis, supra note 77, at 222-23 (indicating that a directed verdict is appropriate only where there is no evidence).

207 In Parks, the plaintiff claimed against an agent for the Cherokee Indians for certain money appropriated by Congress for moving the Cherokees, after the plaintiff had been paid in full under his contract. Among other things, the Court stated that there was "no evidence" that the Cherokees' agent whom the plaintiff had sued had undertaken personally to pay the plaintiff. Parks, 52 U.S. (11 How.) at 373-74.

208 Id. at 373 ("It is undoubtedly the peculiar province of the jury to find all matters of fact, and of the court to decide all questions of law arising thereon. But a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it. It is, therefore, error in the court to instruct the jury that they may find a material fact, of which there is no evidence from which it may be legally inferred.").

209 See Greenleaf, 34 U.S. (9 Pet.) at 299. In Greenleaf, the Court, while reversing a lower federal court as to some other instructions, indicated that it had properly refused an instruction that there was no evidence of rescission of a sale prior to the execution of a deed to certain real property. See id. at 294-95 (discussing the evidence, which indicated that the person who was supposed to have bought the property had soon thereafter suffered insolvency, that his representatives had not claimed the property, and that others then had supervised and paid taxes on the property). The Court in Greenleaf did not indicate that it thought that the evidence of rescission was particularly weak, so the decision is inconclusive as to the standard of evidentiary insufficiency that the Court employed. What is more, grants of new trials were not limited to instances of "no evidence." See infra text accompanying notes 255-59.

210 The historical pedigree of the notion that a case would have to proceed to the jury if there was a "mere scintilla" of evidence beyond "no evidence" also seems doubtful. See James, supra note 2, at 218-19 (referring to the scintilla rule as "judicial legend"). It was only later that the Supreme Court seemed to suppose that there had
came progressively more willing to evaluate evidentiary sufficiency, such a truly de minimis evidentiary standard would be highly problematic as a matter of due process.209

Finally, the argument may be that such directing of verdicts (whether as to law or fact) prior to Parks was merely advisory.210 Admittedly, at the time of Parks, the judge’s direction would still require the jury to return a verdict, and if it returned one contrary to the judge’s direction the jury would not be punished as they once would have been under the older practice of "attaint."211 In that sense, therefore, the directed verdict was not strictly mandatory. On the other hand, the trial judge in most cases could be expected to order a new trial if the jury came back with a verdict against his directions. And the willingness of juries to resist the court’s instructions was, as noted below, rare.212 Thus, as a practical matter, the directed verdict seems to have been effectively mandatory, whatever it was in theory.213

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209 See Murphy, supra note 150, at 741 ("Absolute jury authority to find facts and apply standards would be inconsistent with the overriding goal of just adjudication."); infra Section V.C.2.

210 See Blume, supra note 200, at 561 ("It seems reasonably clear that the directed verdict of the early 1700’s was either instruction on the law or advice on the facts, or a mixture of the two. It was not a device for taking a case from a jury on the ground that there was no issue for the jury to try."); Hackett, supra note 168, at 138 (bemoaning that the federal judge would direct the jury, even though the case was submitted to the jury); see also Henderson, supra note 2, at 302 (noting but rejecting the argument that directed verdicts as they existed at the time of the Seventh Amendment’s adoption were not true directed verdicts, but rather in the nature of advice to the jury).

211 See Thayer, supra note 172, at 137–54 (describing attaint as the check on juries for centuries); Scott, supra note 135, at 681 (describing the practice whereby a new jury would be summoned and, if it found the first verdict to be false, the original jury could be punished through attaint); Stephen C. Yeazell, The New Jury and the Ancient Jury Conflict, 1990 U. Chi. Legal F. 87, 93 (stating that new trials replaced attaint during the 150 years before 1800).

212 See infra text accompanying notes 260–61.

213 See M’Lanahan v. Universal Ins. Co., 26 U.S. (1 Pet.) 170, 191 (1828) (distinguishing between advising a jury “by an exposition of the nature, bearing, and pressure of the facts,” and directing an absolute verdict upon a contested matter of fact); Henderson, supra note 2, at 302 (indicating that the jury was bound to obey the instructions, and that a new trial would be awarded if it did not); cf. Galloway, 319 U.S. at 400–401 n.9 (Black, J., dissenting) (acknowledging the existence of the new trial, including a statement from Cowperthwaite v. Jones, 2 Dall. 55 (Phila. Ct. Com. Pl. 1790), that a new trial would be available when "the jury have proceeded on an evident mistake,
b. Directed Verdicts and Arbitrary Wealth Transfers

While directed verdicts were a fixture in federal court commercial litigation in the first half of the nineteenth century (for example, on the legal issue of reasonable notice), they were later prominent in the railroad negligence cases that became a growing part of the federal courts' dockets in the last half of the century.\(^{214}\) The deployment of general law doctrines such as contributory negligence, assumption of risk, and the fellow-servant rule all served to limit the railroads’ liability,\(^{215}\) and made it easier for federal courts to direct verdicts for defendants.\(^{216}\) In *Herron v. Southern Pacific Co.*,\(^{217}\) the Court rejected the plaintiff's arguments that a federal diversity court was bound to follow a state constitutional provision that required the jury to be the final arbiter on all questions of contributory negligence even when federal practice would have

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\(^{214}\) Cf. Malone, supra note 50, at 155 (noting a rise in personal injury litigation against common carriers during the nineteenth century).

\(^{215}\) Id. at 152, 169 (noting that juries in tort litigation were unable to adjust to legalistic notions of fair play, leading to efforts by judges through the contributory negligence doctrine to take matters into their own hands); see also Friedman, supra note 50, at 470, 476 (noting that the principles that limited entrepreneurial liability did not reflect a conspiracy against the injured, but rather a spirit of the times favoring limits on recovery, although by the 1890s the “rage of victims” was a “roaring force”); Landsman, supra note 4, at 44–45 (discussing judges’ nineteenth century belief that jurors were “irremediably biased against all corporate defendants”); Malone, supra note 50 at 160, 162 (indicating that judges in railroad cases tended to focus more on contributory negligence than on the inadequacy of a showing of negligence or causation). But cf. Schwartz, supra note 50, at 1773–75 (discussing the fairly broad negligence liability imposed by California and New Hampshire courts).

\(^{216}\) See Randall v. Balt. & Ohio R.R., 109 U.S. 478, 482–83 (1883) (indicating that a verdict was properly directed based on an insufficient showing of negligence, as well as based on assumption of risk and the fellow-servant rule); Malone, supra note 50, at 169 (indicating that courts used doctrines such as contributory negligence more easily to remove matters from juries).

\(^{217}\) 283 U.S. 91 (1931).
called for a directed verdict.\textsuperscript{218} Indeed, Chief Justice Hughes saw the defendant's right to a directed verdict on contributory negligence not as a matter of procedure to which the Conformity Act was even applicable, but as one of substance. If such a right was substantive, state law might have been relevant under the Rules of Decision Act. But the Court rejected the applicability of the Rules of Decision Act as well, concluding that such matters, along with other judge-jury matters, were part of the general common law which the Court was enforcing on diversity.\textsuperscript{219}

As a matter of substance, directed verdict practice protected the defendant from a wealth transfer without the required common-law showings of the defendant's fault and plaintiff's lack of fault. The state provision at issue in \textit{Herron}, said the Court, "'cuts deep into the right, observed at common law, by which a defendant can obtain a decision by the court, upon a proven state of facts.'"\textsuperscript{220} This tie of directed verdict practice to substantive protections from illicit property transfers was also manifest in the familiar decision of \textit{Pennsylvania Railroad v. Chamberlain.}\textsuperscript{221} In cases based on circumstantial evidence, said the Court, "where proven facts give equal support to each of two inconsistent inferences," judgment had to go against the party who bore the burden of persuasion.\textsuperscript{222} The

\textsuperscript{218}Id. at 93–95. The Court, however, noted that it would not violate due process for a state to have such a rule or to do away with the jury in its own courts. Id. at 93; cf. Schwartz, supra note 50, at 1763 (concluding that the "New Hampshire and California Courts recognized the primary jurisdiction of the jury over questions of negligence and contributory negligence"). Rather, federal judicial control of juries, emanating from Article III, provided something beyond what due process would have required.

\textsuperscript{219}\textit{Herron}, 283 U.S. at 94.

\textsuperscript{220}Id. at 93 (quoting \textit{Atchison, Topeka & Santa Fe Ry. v. Spencer}, 20 F.2d 714, 716 (9th Cir., 1927)). The Court also noted that it treated defendants as having the burden of persuasion on contributory negligence even when state law was to the contrary. Id at 93–94.

\textsuperscript{221}288 U.S. 333 (1933). The plaintiff's claim of negligence to support liability under the Federal Employers' Liability Act depended on showing that the crew of a string of rail cars had allowed it to collide with a string of cars in front of it. Id. at 335–36. Plaintiff's evidence of collision consisted primarily of the testimony of one witness as to the respective speeds of the two strings of cars at different times and as to a subsequent noise that might have been a collision between the two strings of rail cars. Id. at 336–37. This circumstantial evidence of a collision was contradicted by direct evidence given by the crew members on the trailing string of cars that no such collision had occurred. Id. at 336.

\textsuperscript{222}"[W]here proven facts give equal support to each of two inconsistent inferences . . . neither of them being established, judgment, as a matter of law, must
Court's approach allowed the federal judge to maintain control of the jury by positing the judge's ability to find that inferences from the direct evidence were "equal," and by giving the burden of persuasion the meaningful role of requiring a directed verdict when such equal inferences were present. The Court seemed to believe that the judiciary could provide a relatively consistent determination of evidentiary sufficiency, bringing "scientific certainty" to the fact finding process. From its perspective, the heightened standards of proof of causation and fault were necessary to prevent wealth transfers based on "mere speculation."

c. The Slocum Diversion

The Court's independence of state practice, while often used to enhance judicial control of juries, occasionally limited such control. The most noted instance, and one that perhaps leaves a misimpression that the Seventh Amendment historically served as more of a limit on federal judicial supervision of juries than it actually did, was the decision in *Slocum v. New York Life Insurance*

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223 The Court, however, viewed the testimony of the plaintiff's main witness as "insubstantial." Id. at 342.

224 Id. at 343 (quoting *Bowditch v. Boston*, 101 U.S. 16, 18 (1879)); see also Barrett v. Virginian Ry., 250 U.S. 473, 476 (1919) (using scientific certainty language); Herbert v. Butler, 97 U.S. 319, 323 (1877) (approving a directed verdict against the plaintiff who claimed part of a legal fee paid to another attorney, based in part on the burden of proof and fact that direct evidence favored the defendant). Professor James attacked the point made in *Chamberlain* as follows: "This test suggests mathematical precision, but the suggestion is spurious. For one thing, we lack the quantitative data about most matters which would be needed to make meaningful statements in terms of probabilities." James, supra note 2, at 222.

225 *Chamberlain*, 288 U.S. at 344 (citations omitted); see also N. Ry. v. Page, 274 U.S. 65, 72-73 (1927) (stating that a verdict for the plaintiff could not be sustained "if essential facts are left in the realm of conjecture and speculation") (citing *St. Louis-San Francisco Railway v. Mills*, 271 U.S. 344, 347 (1926)). The Court employed a number of additional formulas for limiting jury decisions on weak circumstantial evidence. For example, it reasoned that unimpeached direct evidence that an event did not occur should trump circumstantial evidence that it did. *Chamberlain*, 288 U.S. at 340-41; see also S. Ry. v. Walters, 284 U.S. 190, 194 (1931) (holding that the verdict should be directed where the only evidence that the train did not stop was testimony as to its subsequent speed and where the evidence was overcome by the testimony of five witnesses that the train came to a full stop).

226 See supra note 106.
Co." There, a badly divided Supreme Court concluded that a federal court could not enter a judgment notwithstanding the verdict for insufficiency of the evidence, but must always order a new trial, state practice to the contrary notwithstanding. The majority found that a federal court's entry of final judgment upon a determination of evidentiary insufficiency amounted to review of jury-found facts not sanctioned at common law.

Perhaps more characteristic of the federal courts' control of juries was not the Slocum Court's disallowance of a power to enter judgments notwithstanding a jury's verdict, but rather its conclusion that the evidence was insufficient to sustain a verdict for the plaintiff and that the trial judge erred as a matter of law in failing to direct a verdict in favor of the defendant at the close of all of the evidence. The facts in Slocum were extremely sympathetic to the plaintiff. But the Court's willingness to construe written documents and to elaborate the law of what was reasonable on a given set of facts led it to conclude that a directed verdict for the defendant was proper. Thus, the new trial that the Court ordered on remand would presumably have resulted in a verdict in favor of the defendant in light of the judicial directions that it ordered to be given to the jury, even if the lower court still could not enter judg-

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227 228 U.S. 364 (1913). Slocum distinguished Pawling v. United States, 8 U.S. (4 Cranch) 219 (1808), and Chinoweth v. Lessee of Haskell, 28 U.S. (3 Pet.) 92 (1830), as cases in which both parties joined in demurrers to the evidence. Slocum, 228 U.S. at 391. The Court distinguished cases that had allowed for nonsuits based on the fact that the plaintiff could refile the action. Id. at 396; see also supra note 135. The dissent noted that it had been common for the Pennsylvania federal courts to use Pennsylvania-style directed verdicts. Slocum, 228 U.S. at 402–03 (Hughes, Holmes, Lurton & Pitney, JJ., dissenting).

228 Slocum, 228 U.S. at 399.

229 The grace period for the last payment on a life insurance policy expired four days before the insured died. Id. at 370. The insured's wife forwarded partial payment, which an agent had agreed to accept, but it was not considered effective without the signature of the insured on a "blue note." The wife had told the agent that the insured, Mr. Slocum, was ill, and that it would be several days before she could send the note back. The agent told her that would be all right and to mail it as soon as she could. Mr. Slocum died four days later without signing the blue note. Id. at 371–72. The Court construed the terms of the written contract, which disallowed a partial payment without signature of a note, and further held that the insured and his wife could not have reasonably understood the contract as allowing partial payment without signature of the note, id. at 374–75, despite the agent's having told the wife to send the note in when she could. Id. at 372.

230 Id. at 374–75.
ment on its own.\footnote{See Curtis, supra note 77, at 222 (noting in an 1872 lecture that, although the federal courts could not grant a motion for an involuntary nonsuit and had to submit every common law case to the jury, this was a matter of form inasmuch as the refusal to instruct the jury that the evidence did not warrant a verdict as a matter of law was grounds for appeal).} In any event, Slocum’s refusal to permit entry of judgment contrary to the jury’s verdict was relatively short lived. The Court all but reversed itself when it approved entry of such a judgment outright, without the need of ordering a new trial,\footnote{Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1935). The practice was found not to run afoul of the Seventh Amendment insofar as there had been a tradition at English common law of reserving decisions on questions of law prior to a case’s being sent to the jury and resolving them post-verdict. Id. at 658. As a consequence, the traditional ability of a plaintiff to force a new trial upon the court’s rejection of a jury’s verdict for failure of proof was denied constitutional status. See also N. Ry. v. Page, 274 U.S. 65, 67, 75 (1927) (finding unproblematic a federal court’s instructing the jury, pursuant to state practice, to enter an alternative verdict for the defendant in case the plaintiff’s evidence should be found to be legally insufficient).} so long as the moving party had moved for a directed verdict before the case was submitted to the jury.\footnote{In Redman, in contrast to Herron, the Court relied partly on state practice in upholding the district court’s entry of a post-verdict judgment as a matter of law. Redman, 295 U.S. at 661.}

3. Commentary on the Evidence at Common Law

In addition to pointed instructions of law and their directed verdict practice, federal courts once exercised significant additional control of juries by way of extensive comment on the evidence, long the practice of English common law courts. Although judicial willingness to direct a jury’s verdict has a modern parallel in the federal courts’ current practice of granting judgments as a matter of law, commentary on the evidence, while technically still allowed in federal practice, really has no modern equivalent. As discussed below, federal judges in the early Republic not only summed up the evidence for the jury and indicated to them what legal consequences should follow depending on how the jury found the facts,\footnote{See infra notes 243-45.} but they also freely gave their views as to the strengths and weaknesses of the evidence for one side or the other, assessed the credibility of witnesses, and even gave their opinions as to the
weight of the evidence and how the jury should decide the facts in issue.\footnote{See, e.g., Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 94-95 (1836) (noting that federal courts can give their opinion to the jury as to facts in evidence and stating that “[a] court may not only present the facts proved, in their charge to the jury; but give their opinion as to those facts, for the consideration of the jury”); M’Lanahan v. Universal Ins. Co., 26 U.S. (1 Pet.) 170, 190-91 (1828) (noting that at common law, courts may sum up the facts along with “the inferences [of law] deducible therefrom” and that the Court could aid the jury “by an exposition of the nature, bearing, and pressure of the facts”); id. at 180 (discussing the argument of counsel that Maryland law disallowed judicial comment on the evidence); Pope v. Barrett, 19 F. Cas. 1018, 1019 (C.C.D. Mass. 1816) (No. 11,273) (stating to the jury that a showing of agency was “very strong[,]” and that “the most unfavorable presumptions” against the defendant “ought to be made against him” for failure to produce sales accounts); Consequa v. Willings, 6 F. Cas. 336, 337-38 (C.C.D. Pa. 1816) (No. 3128) (Washington, Circuit Justice) (noting that the court felt comfortable giving commentary on the weight of the evidence and whether a particular fact has been proved, and that it was within the discretion of the court to do so). In Willings, the court stated that it made sense to express an opinion as to the weight of the evidence, “because upon a motion for a new trial, upon the ground of the verdict being against evidence, the court must decide whether it be so or not.” Id. at 337.}

Many states, beginning in the antebellum period, enacted legislation that severely limited or altogether disabled their judges from commenting on the evidence.\footnote{See Friedman, supra note 50, at 399 (noting the decline in power of state judges to comment on evidence); Edson R. Sunderland, The Inefficiency of the American Jury, 13 Mich. L. Rev. 302, 307-09 (1915) (noting that federal courts differ from most state courts in their ability to advise the jury on facts); Note, supra note 4, at 170 (noting attempts made in the majority of states to limit the judge’s role in commenting on the evidence); Note, Limitations on Power of Court to Direct Verdict, 16 Harv. L. Rev. 515, 515 (1903) (stating that “in the states generally there are statutes forbidding a judge to express any opinion as to the weight of the evidence”).} The Supreme Court, however, held such limitations inoperative in the federal courts, both under the Process and Conformity Acts.\footnote{M’Lanahan, 26 U.S. (1 Pet.) at 190 (treating the question as one of general law, and apparently ignoring Maryland law prohibiting a judge from advising the jury on the facts).} The Court stated that such limitations would greatly interfere with the traditional power of the federal judge “as defined by the common law” to make such comments,\footnote{Nudd v. Barrows, 91 U.S. 426, 442 (1875). The Court stated that, were the Act read otherwise, “the powers of the judge, as defined by the common law, were largely trenched upon.” Id.} and even hinted at possible constitutional problems if the
federal courts could be restricted in the manner called for by state law.  

The federal courts’ practice of judicial commentary was generally unreviewable so long as it could be characterized as the judge’s nonbinding “opinion” on the evidence which the jury was free to ignore (in contrast to the court’s instructions regarding the law). If the commentary slipped into instructions on the law, however, it could then be reviewed as to whether the court had properly directed a verdict. Nevertheless, judicial commentary was given considerable latitude, and even highly opinionated characterizations of the evidence would often be considered proper commentary rather than a legal direction to the jury.

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29 The Nudd Court framed the issue: “There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them, or dictate the manner of their exercise, are interesting questions; but it is unnecessary in this case to consider them.” Id.

28 Indeed, Justice Story repeatedly said that judicial commentary on the evidence should not be reviewed on appeal, because it was more of a factual than legal matter. See, e.g., Carver v. Jackson, 29 U.S. (4 Pet.) 1, 80 (1830). In 1832, the Supreme Court made this part of its rules. Sup. Ct. R. 38, 31 U.S. (6 Pet.) iv (1832), discussed in 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence § 5082, at 393 & n.33 (3d ed. 1998).

24 See, e.g., Vicksburg & Meridian R.R v. Putnam, 118 U.S. 545, 553 (1886) (indicating that comment on the evidence, “when no rule of law is incorrectly stated,” is not reviewable by writ of error); Nudd, 91 U.S. at 439 (noting that the jury should not be misled into the belief that it is bound alike by views expressed upon the evidence and instructions of law); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 130 (1851) (rejecting argument made by counsel (at 119) that the commentary on the evidence was a peremptory instruction); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 96 (1836) (“[S]uch an expression of opinion by the court should be so guarded as to leave the jury free in the exercise of their own judgments.”); M’Lanahan, 26 U.S. (1 Pet.) at 182 (noting that “care should be taken . . . to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury”).

22 See, e.g., Carver, 29 U.S. (4 Pet.) at 81 (“If, indeed, in the summing up, the court should mistake the law, that would justly furnish a ground for an exception.”).

21 For example, in an action of trespass against a government official, the defendant objected to certain judicial commentary as effectively directing the jury’s verdict against him on a particular ground; the commentary included a statement to the jury that “this ground has, as I understand the evidence, altogether failed.” Mitchell, 54 U.S. (13 How.) at 118 (argument of counsel for the defendant). The Court, however, held that the statement was within the scope of permissible commentary and not an improper direction of the jury’s verdict. Id. at 130. In Wilson v. Stolley, 30 F. Cas. 227, 229 (C.C.D. Ohio 1849) (No. 17,840), Justice McLean stated to the jury in a patent infringement action that while “abandonment” of a license by the defendant was a question of fact for them to resolve, abandonment had more than occurred on facts of the case. Id. at 229. “Under these facts, it will not be difficult for you to render a
Commentary on the evidence could also cover issues such as credibility and motivation for a particular witness to lie. In approving commentary to the effect that the defendant's testimony should not be credited in *Nudd v. Burrows*, the Court noted how the jury was in need of guidance even on prototypically factual issues:

> [I]t is the right and duty of the court to aid them by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts.... There is none more important [duty] resting upon those who preside at jury-trials. Constituted as juries are, it is frequently impossible for them to discharge their function wisely and well without this aid. In such cases, chance, mistake, or caprice, may determine the result.

While commentary on the evidence was generally considered to be an issue of unreviewable fact rather than reviewable law, such commentary was on a continuum with the Court's willingness to provide highly specific applications of law to fact by way of directed verdicts and instructions, and to direct verdicts for factual insufficiency, as discussed above. Because it largely escaped ap-
pellate supervision, judicial commentary itself might have proved a source of disuniformity and arbitrariness within the federal courts. That seems not to have happened, however, perhaps in part because of the relatively small size of the federal bench and the practice of Supreme Court Justices’ conducting trials on circuit throughout much of the nineteenth century.249

4. New Trials

Finally, the discretionary power of the federal courts to award new trials when verdicts were against the law or the evidence also helped to reinforce other jury controls—instructions of law, directed verdicts for factual insufficiency, and commentary on the evidence. Before the advent of modern practices permitting the judge to enter a judgment notwithstanding the jury’s verdict, the ability to grant a new trial when the verdict was against the law was the primary mechanism by which courts could enforce their direc-

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249 For example, strong showings of defendant negligence prompted commentary favorable to finding liability. See, e.g., St. Louis, Iron Mountain & S. Ry. v. Vickers, 122 U.S. 360, 361–63 (1887) (holding that the federal trial judge’s commentary that he thought the railroad had been negligent could not be prohibited by a state constitution); Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291, 295, 298 (1876) (indicating that the Court thought the verdict for the plaintiff was well justified, where the conductor told a passenger to stand on top of the train during uncoupling); cf. Schwartz, supra note 50, at 1770–71 (noting from a study of New Hampshire and California courts that negligence law was an “abundant” source of liability, but that employee and government-defendant suits were exceptions). In addition, where liability or fault under the common law was relatively clear (as in the many cases of suits on negotiable instruments and trespass actions against officers, as well as many negligence cases), judicial protection of traditional common law interests would prompt comment recommending (or directing) a verdict for a plaintiff. See, e.g., Del., Lackawanna & W. R.R. v. Converse, 139 U.S. 469 (1897) (holding that the trial court correctly instructed that the railroad was negligent as a matter of law; the issue of contributory negligence properly went to jury on contested facts); Union Pac. Ry. Co. v. McDonald, 152 U.S. 262, 282–84 (1894) (approving a directed verdict to the effect that the railroad was negligent and that a child who fell into an unfenced and not obviously smoldering slack pit was not contributorily negligent).

248 See Hart & Wechsler, supra note 33, at 36–37 & n.66 (noting that the circuit-riding requirement became an imperfect obligation by the century’s end, but was not formally abolished until 1911).
tions of verdicts in the event a jury ignored them. New trials for verdicts against the evidence could be granted not only for the failure to follow the federal judge’s direction of a verdict for factual insufficiency (which also could be considered a new trial for a verdict against the law), but also for the jury’s failure to agree with the judge’s nonbinding commentary on the evidence. New trials seem to have been understood as peacefully coexisting with the Seventh Amendment, and the first Judiciary Act expressly provided for them in language that referenced common law practice. Indeed, as in England, new trials in the early federal courts were sometimes viewed as a necessary feature of the civil jury trial right and as legitimating and tempering the jury’s otherwise exclusive power over fact finding.

250 English practice at the time of the Constitution clearly recognized the power to grant new trials for such reasons. See Renée B. Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America, 71 Notre Dame L. Rev. 505, 508–15 (1996); see also 3 William Blackstone, Commentaries *387–88 (noting that new trials might be granted when the jury’s verdict is “without or contrary to evidence,” for “exorbitant damages,” or more generally “where justice is not done”). Professor Lettow notes, however, that American courts during the colonial period did not quickly introduce English new trial practice. See Lettow, supra, at 515. Nevertheless, such practices seemed to have taken hold in the federal courts early on. See, e.g., Kohne v. Ins. Co. of N. Am., 14 F. Cas. 838, 838–39 (C.C.D. Pa. 1804) (No. 7921) (ordering a new trial for a verdict against the law); see also Galloway, 319 U.S. at 400–01 & nn.9–10 (Black, J., dissenting) (gathering authorities for the early availability of a new trial for a variety of reasons); Horwitz, supra note 4, at 142 (noting that new trials for verdicts against the weight of the evidence triumphed in some American courts at the beginning of the nineteenth century).

251 See supra Section II.B.3.

252 Despite Revolutionary sentiment that the jury could be the judge of law as well as fact, the ability of common law courts to order a new trial to correct jury errors of law or fact was familiar to those who framed and ratified the Constitution and the Seventh Amendment. See, e.g., The Federalist No. 83, supra note 27, at 564 (“[W]here the jury have gone evidently wrong, the court will generally grant a new trial.”); see also Lettow, supra note 250, at 515–18 (describing colonial practices as to new trials); Murphy, supra note 150, at 746, 749 (stating that the Founders were familiar with checking jury fact finding by way of new trial grants).

253 Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (“That all the said courts of the United States shall have power to grant new trials . . . for reasons for which new trials have usually been granted in the courts of law.”).

254 See, e.g., Lloyd v. Scott, 15 F. Cas. 720, 726 (C.C.D.C. 1832) (No. 8434) (quoting Lord Mansfield as stating, “[t]rials by jury, in civil causes, could not subsist now without a power, somewhere, to grant new trials”). As with many other aspects of judge-jury relations, the availability of a new trial was treated independently of state law, and state law restrictions were ignored. See, e.g., Indianapolis & St. Louis R.R. v.
The control that could be exercised by the grant of a new trial for a verdict that was against the weight of the evidence was considerable, and it was unreviewable. It allowed the federal trial judge to engage in an explicit weighing of evidence because new trials were permissible even when there was evidence on both sides of the case. Awarding a new trial on these grounds tended to dovetail with the practice of commenting on the evidence, because a court would likely recommend a verdict for a particular party when the evidence weighed substantially in his favor, and order a new trial if the jury disagreed. One of the more frequent uses of new trials on evidentiary grounds involved jury awards of excessive damages.

Horst, 93 U.S. 291, 301 (1876) (stating that new trial practice was “not a mere matter of proceeding or practice” covered by the Conformity Act); Carr v. Gale, 5 F. Cas. 123, 130 (C.C.D. Me. 1847) (No. 2435) (Woodbury, Circuit Justice) (distinguishing federal new trial standards from state standards).

Lloyd, 15 F. Cas. at 726 (noting that there have been “many” new trials granted on the grounds that the verdict was against the weight of the evidence).


See, e.g., Lloyd, 15 F. Cas. at 725 (favoring the grant of a motion for a new trial on the ground that the verdict was against the weight of the evidence, where the verdict, “if not absolutely against evidence, was against an irresistible weight of evidence”); see also Mary K. Bonsteel Tachau, Federal Courts in the Early Republic: Kentucky, 1789-1816, at 88 (1978) (discussing a particular judge’s control of juries, including the setting aside of their fact findings). Although federal courts did not ordinarily substitute their own assessment of the facts for the jury’s, they would do so when the evidence against the verdict was “palpable.” See, e.g., United States v. Five Cases of Cloth, 25 F. Cas. 1093, 1094 (S.D.N.Y. 1842) (No. 15,110).

See, e.g., Consequa v. Willings, 6 F. Cas. 336, 337 (C.C.D. Pa. 1816) (No. 3128) (Washington, Circuit Justice) (“I have always thought, that the court may give an opinion upon the weight of the evidence, if it be believed by the jury; because upon a motion for a new trial, upon the ground of the verdict being against evidence, the court must decide whether it be so or not; and it would seem to follow, that the same opinion might have been expressed to the jury on the trial.”)

Apparently there were many such cases at common law in England. See Lettow, supra note 250, at 511–12; see also Farley, supra note 145, at 200 (noting that the first new trial under English law was granted for excessive damages); Ezra R. Thayer, Judicial Legislation: Its Legitimate Function in the Development of the Common Law, 5 Harv. L. Rev. 172, 193 (1891) (noting the increased judicial policing of jury damages determinations). Federal courts got into the habit of entertaining new trial motions for excessive damages verdicts early on. See, e.g., Estill v. Blakemore, 8 F. Cas. 798, 798 (C.C.D. Tenn. 1808) (No. 4538) (denying motion on the merits, but based upon a valuation different from that which would have been applied by state courts). Although hardly reluctant to grant new trials on grounds of excessive
The federal courts' instructions on law were generally successful at controlling juries, thus pretermittting the need for new trials as contrary to law. In granting a new trial for a jury verdict that was contrary to his instructions on a question of law, Justice Bushrod Washington remarked that he took “great satisfaction” that in his seventeen years on the bench, he had only encountered two juries that had ignored him. Even if the jury “no doubt thought they disregarded the law, or was guided by some improper motive. See, e.g., Smith v. Memphis & Little Rock R.R., 18 F. 304, 311 (C.C.W.D. Tenn. 1883); Wiggins v. Coffin, 29 F. Cas. 1157, 1160 (C.C.D. Me. 1836) (No. 17,624) (Story, Circuit Justice); Swann v. Bowie, 23 F. Case. 504, 505 (C.C.D.C. 1820) (No. 13,672) (“In cases of tort, courts have seldom granted new trials unless the damages are so excessive as to imply gross partiality or corruption on the part of the jury.”). In Wiggins, however, Justice Story added: “But then in many cases the court is driven to such a conclusion from the actual circumstances in evidence, and the facts of the case.” Wiggins, 29 F. Cas. at 1160.

Alongside new trials for damages was the practice of remittitur, by which a court permitted the prevailing party to forego the excessive part of a damages award as a means of avoiding a new trial. The practice, whose constitutionality was once questioned by the Supreme Court, see Dimick v. Schiedt, 293 U.S. 474, 484 (1935) (dicta), seems to have taken hold in the federal courts early in the nineteenth century. The “first” such case is usually said to be Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578), written by Justice Story on Circuit. See Dimick, 293 U.S. at 482 (dating authorization of remittitur “as early as 1822” and citing Blunt). Even before Blunt, however, Justice Story had ordered remittitur in Pope v. Barrett, 19 F. Cas. 1018, 1021 (C.C.D. Mass. 1816) (No. 11,273) (Story, Circuit Justice). The practice was limited, however, to the provision of a new trial in the event the prevailing party did not accept the remittitur; the court could not set the damages on its own. See Kennon v. Gilmer, 131 U.S. 22, 29–30 (1889).

It gives us great satisfaction, that, during the sixteen or seventeen years, in which we have presided in this court, this is the second case, where, upon a dry point of law, a jury has given a verdict against the opinion of the court. It is not on the ground of dissatisfaction at the conduct of the jury, who are respectable men, and no doubt thought they were doing right, that the court will set this verdict aside. It is important that the law should be adhered to, and that the rights of courts should be preserved. We should sit here for a very poor purpose indeed, and should disregard our duty and our oath, if we should submit to verdicts against law. The safety, and happiness, and prosperity of every one, are deeply interested, that if a jury undertake to decide, and does decide against the law of the land, their verdict should be corrected; for if they err, and the court has no control over their decision, where is the remedy for any injury or wrong an individual may sustain by their verdict? But if we make a mistake, the court above will correct our errors.
were doing right,” said Justice Washington, still “[i]t is important that the law should be adhered to, and that the rights of courts should be preserved.”

Justice Washington’s observation shows that judicial instructions could help prevent legal nullification by civil juries—a particular problem that arose in the context of fugitive slave litigation—and that new trials provided a backstop when that usual control failed.

III. JUDICIAL POLICING OF JURY RATIONALITY

A. The Article III Jury

The Court’s federalization of the availability of jury trials, as well as their incidents, through elaborations of law, directed ver-

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261 Id.; see also United States v. Duval, 25 F. Cas. 953, 965 (E.D. Pa. 1833) (No. 15,015) (awarding a new trial where the jury may have ignored legal instructions, and noting that a portion of the verdict was “against the plain principles of law,” and adding: “The court must never suffer its controlling power over a verdict to be prostrated, nor the particular circumstances or even the justice of any case, to overthrow the general principles established for the administration of the law, and the security of the rights of all.”); cf. Stettinius v. United States, 22 F. Cas. 1322, 1329 (C.C.D.C. 1839) (No. 13,387) (observing that “courts have long exercised the power of granting new trials in civil cases where the jury find against that which the judge trying the cause, or the court at large, holds to be law”). Of course, when juries rendered general verdicts, it might have been hard to know if a problematic verdict was based on evidentiary or legal grounds, and sometimes courts concluded that the jury must have either ignored its legal instructions, or, if not, had ignored the evidence. See, e.g., Lloyd, 15 F. Cas. at 730 (“If the jury understood the law of this case as the court understood it, then it seems to me that the verdict was against evidence. If they understood the evidence as the court understood it, then I think the verdict was against law.”); see also Thomas v. Hatch, 23 F. Cas. 946, 952 (C.C.D. Me. 1838) (No. 13,899) (Story, Circuit Justice) (stating that the jury either disregarded the instructions of the court on a point of law, “or [gave] an effect to the evidence, which, in a just and legal sense, was not justified by it”).

262 Civil actions for damages brought in the federal courts of a non-slave state by out-of-state slave owners to recover for the loss of slaves who had been liberated by persons from the free state presented serious risks of civil jury nullification in the antebellum period. See Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 190–91, 243–49 (1975) (discussing Justice McLean’s approach to the moral-formal conflict presented by these cases). In such cases, federal court juries were regularly admonished to follow the law as laid down by the federal judge and not to judge based on their consciences. See, e.g., Giltner v. Gorham, 10 F. Cas. 424, 432–33 (C.C.D. Mich. 1848) (No. 5453); Jones v. Vanzandt, 13 F. Cas. 1040, 1045–46 (C.C.D. Ohio 1843) (No. 7501).
dicts, and commentary on the evidence, manifested a concept of Seventh Amendment rights in which the supervising Article III judge was a central part. As the Court eventually put it, the constitutional right to jury trial, was "a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts." Although this judge-centered version of the jury trial may have originally manifested a Federalist conception of the jury, the centrality of the Article III judge as part of the right to trial by jury did not alter significantly with changing personnel on the Court. Under Chief Justice Taney, Marshall's successor, the Court fostered the growth of equity and admiralty where jury trials were unavailable, and it promoted the use of jury control devices such as directed verdicts in actions at law. Despite the Jacksonian tenor of some of its decisions, the Taney Court shared with earlier and later Courts the view that the federal courts' role was to protect property and the interstate flow of capital and that the federal judge was central to that role. It therefore maintained an overall robust Contracts Clause jurisprudence and deployed the general com-


264 See, e.g., Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837) (indicating that monopolies would not be implied in state-granted charters); Horwitz, supra note 4, at 130-39 (discussing Charles River Bridge); Hovenkamp, supra note 63, at 2319 (characterizing the Jacksonian agenda as elimination of state-created privileges for entrepreneurial enterprises such as tax relief and monopolies).


266 That is, apart from the Charles River Bridge line of cases, referred to supra note 264. See Wright, supra note 42, at 62-63 (characterizing the Taney period as one of consolidation rather than retrenchment under the Contracts Clause); cf. Hovenkamp, supra note 42, at 24-25 (noting that the Taney Court strictly construed grants of privileges in corporate charters, but had a high regard for the sanctity of private contracts); Stephen A. Siegel, Understanding the Nineteenth Century Contracts Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence, 60 S. Cal. L. Rev. 1. 22-24 (1986) (observing that Jacksonian appointees did not undermine Federalist jurisprudence protecting ordinary contracts from debtor relief laws).
mon law for commercial transactions and suits against officers, in addition to maintaining firm control of juries. Even beyond the Taney era, enhanced jury control continued to distinguish the federal courts from state courts well into the twentieth century. In short, there was substantial continuity until the modern era in the federal courts' treatment of judge-jury relations.

The centrality of the Article III judge to federal jury trial rights carried with it connotations of the role of the federal courts in reigning in a host of alternative decisionmakers. Protections of common-law interests in contract and property against unfair abrogation or confiscation—whether at the instance of state or federal legislatures, juries or state judges—inhered in this concept of the Article III judge. Rather than flowing from an explicit due process jurisprudence, these protections initially derived from the grant of a diversity forum, with its concomitant federal court determinations of federal law and the general common law, as well as

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267 See, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (applying "the general principles and doctrines of commercial jurisprudence" rather than decisions of the state tribunal in a case involving a negotiable instrument).

268 See, e.g., Deshler v. Dodge, 57 U.S. (16 How.) 622, 634 (1853) (Catron, J., dissenting) (complaining that the majority, in allowing a suit against a state officer, had ignored state law requirements for replevin).

269 See Leon Green, Judge and Jury 379–80 (1930).

With few exceptions, practically every change in trial procedure in America during the nineteenth century meant more and more domination by the jury and less and less control by the trial judge; and in so far as trial courts in most states are concerned it probably is still true that juries exercise a dominant power in those cases in which they participate except in so far as trial judges exercise power by the grace of appellate courts. The contrast between state and federal courts in dealing with juries is so marked that attempts are constantly being made to reduce the trial judges of our federal courts to the same low state as the trial judges of our state courts, and this although federal trial judges themselves are by no means as unrestricted as were English common law judges.

Id. Green, however, believed that appellate judges had absorbed a great deal of power over jury trials. See id. at 390–91; see also Max Radin, Handbook of Anglo-American Legal History 217 (1936) (contrasting the federal courts to the state courts, where the position of judge vis a vis jury declined); Wigmore, supra note 172, at 473 (noting the abolition of comment on evidence except in a few states and in federal courts). Obviously, some states exceeded the federal judiciary in jury control devices, as indicated by the fact that the federal courts sometimes rejected state jury control devices. See, e.g., Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 376–77 (1913), discussed supra Section II.B.2.c; see also supra note 106.

use of federal procedures and the federal jury. Indeed, Article III’s provision for diversity jurisdiction was occasionally referred to as a “constitutional right” of nonresidents to a forum for the protection of common law and related constitutional interests.

Throughout the nineteenth century and well into the twentieth, juries without supervision were seen as a threat to this protection of common-law interests in property and contract. Rather than offering encomiums to the abilities of juries, the Court alluded to their tendency toward irrationality. It was less inclined to extol the virtues of juries than of jury control. Justice Samuel Miller observed in an 1887 article that without sufficient judicial instructions of law, the jury trial “is but little better than a popular trial before a town meeting,” and that jury evaluation of fact as well as law was in need of guidance. The Court itself had noted that judicial comment on the evidence, including on credibility, was necessary to enable juries to discharge their function and to avoid “chance, mistake, or caprice.” The analogy to a town meeting implied that

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21 See, e.g., Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 122 (1868).
22 See, e.g., Reagan v. Farmers Loan & Trust Co., 154 U.S. 362, 391–92 (1894) (indicating that a diverse bond trustee had a federally protected right to file suit in federal court to contest the reasonableness of rates (which was not yet clearly a federal question) despite an attempt by the state to restrict review actions to courts of the state, and observing that “[a] State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts”); Dodge v. Woolsey, 59 U.S. (18 How.) 331, 356 (1855) (recognizing diversity jurisdiction in a shareholder action to challenge a state tax as violative of the Contracts Clause, reasoning that the case was appropriate for federal jurisdiction because it was brought by “[a] citizen of the United States, residing in Connecticut, having a large pecuniary interest in a bank in Ohio”); see also Smyth v. Ames, 169 U.S. 466, 516–17 (1898) (citing Reagan in rejecting an argument that a state could limit rate regulation challenges to its own courts).
23 See, e.g., Samuel F. Miller, The System of Trial by Jury, 21 Am. L. Rev. 859, 862–63 (1887) (indicating the necessity of judicial supervision of juries); cf. Holmes, supra note 247, at 88–89 (noting that different results in jury cases owing to different feelings of juries merely show that the law did not perfectly accomplish its ends of providing standards of general application).
24 Miller, supra note 273, at 862.
25 Miller thought that “the judge should clearly and decisively state the law, which is his peculiar province, and point out to the jury with equal precision the disputed questions of fact arising upon the evidence.” Id. at 863. The judge should grant a new trial if the jury disregarded the law or in cases of gross disregard of the weight of the evidence. Id.
that juries were bodies whose decisions partook more of the "will" of the legislature as opposed to the "reason" of the judiciary—at least when they operated without sufficient judicial guidance.\textsuperscript{277} And while some scholars have doubted whether functional considerations as to whether judges or juries were better at deciding certain fact issues played much of a role in determining the scope of jury trial rights,\textsuperscript{278} the inherent limitations of juries were sometimes cited as reasons for extensions of equity.\textsuperscript{279}

Under this conception of the jury, rationality was thought to inhere not in the jury, but in the judge,\textsuperscript{280} and particularly in the federal judge.\textsuperscript{281} The federal judge supplied a law of reason by way

\textsuperscript{277} Analogizing juries to political branches in a sense comported with the Anti-Federalist view of juries as democratizing institutions of self-government. See supra note 39.

\textsuperscript{278} See Moses, supra note 2, at 239 (stating that functional considerations have never been a part of Seventh Amendment jurisprudence); see also Arnold, supra note 1, at 838 (claiming that no case of the early American period indicated that the chancellor was willing to assume jurisdiction due to a matter’s being unsuitable for a jury); James, supra note 1, at 661 (stating that the line between law and equity had not been “altogether—or even largely—the product of a rational choice” of issues best suited to either). But cf. Arnold, supra note 1, at 838 (noting that nineteenth century courts sometimes said accountings were impracticable for juries); James, supra note 1, at 663 (noting that it would be a mistake “to suppose that chancellors were never concerned with the jury trial problem in taking or refusing jurisdiction”).

\textsuperscript{279} See, e.g., Ex parte Young, 209 U.S. 123, 164 (1908) (justifying the exercise of equity jurisdiction in part because a jury “could not intelligently pass upon the matter”); James S. Campbell & Nicholas Le Poidevin, Complex Cases and Jury Trials: A Reply to Professor Arnold, 128 U. Pa. L. Rev. 965 (1980) (arguing that there was historical support for an exception to jury trial rights in complex cases); cf. John Choon Yoo, Who Measures the Chancellor’s Foot? The Inherent Remedial Authority of the Federal Courts, 84 Cal. L. Rev. 1121, 1158 (1996) (noting Federalist writings to the effect that equity jurisdiction was necessary for matters too difficult for the jury); Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176, 1190 (1961) (suggesting that many order-of-trial problems in mixed law and equity cases should be resolved based on relative competency).

\textsuperscript{280} See Thayer, supra note 172, at 212, 249 (indicating that judges, not juries, had the responsibility for securing the observance of law and of “the rule of right reason”); cf. Holmes, supra note 247, at 95–96 (noting that the distinction between gross and mere negligence was meaningful when applied by a judge, but for a jury, “the word ‘gross’ is only a vituperative epithet”).

\textsuperscript{281} See White, supra note 47 at 87, 145 (describing how commentators such as Peter DePonceau and Justice Joseph Story saw a rational or scientific approach to law as requiring familiarity with general jurisprudence and a nationalist orientation); Miller, supra note 273, at 862 (noting that due to popular and frequent elections and insufficient salaries, state judges in the courts in which he had practiced “were neither very competent as to their learning, nor sufficiently assured of their position,” to
of the general common law, and later, by way of substantive due process. This law reflected a notion of rationality that did not look to a balancing of competing interests or some vaguer, more common sense notion within the knowledge of lay persons. Instead, it was one that took as its baseline the protection of property from transfer without fault, from regulation without public purpose, and from official invasions unjustified by statutory and constitutional authority.

It was the understood duty of the federal judiciary, moreover, to expand the realm of reason by expanding the realm of law, specifying its particular applications, and narrowing the more chaotic realm of fact. In the latter part of the century, for example, Oliver Wendell Holmes and others stated that it was the business of the courts to make law ever more specific. Otherwise, the courts would have to "confess their inability to state a very large part of the law which they required the defendant to know" and would leave the jury "without rudder or compass."

The sphere in which exercise sufficient control over juries); cf. Wigmore, supra note 172, at 473–74 (arguing for the restoration of the practice of comment on the evidence, but noting that opposition to such commentary arose "partly because of the Bar's frequent lack of respect for the opinion of a Bench that is too often occupied by the crude or mediocre nominees of local political committees").

See White, supra note 17, at 100–01 & n.35 (noting that the review of legislation for reasonableness in Justice Peckham's opinion in *Lochner v. New York*, 198 U.S. 45 (1905), did not involve balancing, but rather application of the anticlass principle, informed by the "free labor" theory); see also T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 949 (1987) (noting that Justices Marshall, Story, and Taney recognized clashes of interest but resolved them in a categorical fashion); Kennedy, supra note 17, at 7 (noting that the judiciary had a concept of policeable boundaries).

See *Holmes*, supra note 247, at 89 (referring to tort law).

See Thayer, supra note 172, at 207–08 ("In the exercise of their never-questioned jurisdiction of declaring the common law... there has arisen constant occasion for specifying the reach of definite legal rules, and so of covering more and more the domain of hitherto unregulated fact."); see also id. at 208 n.3 (noting judicial development of new doctrines of law to keep the jury within the bounds of reason); Thayer, supra note 259, at 172 (arguing that the growth of law at the hands of judges is a desirable and necessary feature of our judicial system).

Holmes, supra note 247, at 89; see also Balt. & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 70 (1927) (Holmes, J.) (holding that there was contributory negligence as a matter of law where the injured party did not get out and check to assure that there was no train coming when the view was obstructed); S. Pac. Co. v. Berkshire, 254 U.S. 415, 417 (1921) (Holmes, J.) (stating that the court should determine whether there was negligence as a matter of law where the conduct concerned a permanent condition at various places); G. Edward White, *Tort Law in America: An Intellectual*
a judge should be able to rule without taking the opinion of the jury, therefore, "should be continually growing."286 Judicial duties not only extended to providing ever-increasing guidance as to the law, but also to questions of fact through commentary on the evidence. Such guidance of juries in the interpretation of evidence to prevent capricious findings was, said the Court, among "certain powers inherent in the judicial office"—powers with which it was unclear that Congress could interfere.287

2. Legal Formalism: Policing the Limits of the Jury's Sphere

Employing a tight rein on juries was thus a consistent aspect of older federal practice. This judicial supervision also fit easily within the framework of legal formalism that scholars have described as crystallizing in the period from 1850 to 1885.288 Professor Duncan Kennedy has characterized legal formalism as a system that saw many jural relations as fundamentally similar, representing examples of delegation of legal powers absolute within their respective spheres.289 Under this classical system, moreover, arguments from one set of legal relationships would be appropriate for another. Consequently, the relations of "private citizen to private citizen, private citizen to state, legislature to judiciary, and federal to state government" were once seen as part of a single whole.290 According to Professor Kennedy, "the role of the judiciary ... was the application of a single, distinctively legal, analytic apparatus to the job of policing the boundaries of these spheres."292

This judicially policed boundary of governmental action was often defined by a formalistic concept of "reasonableness."293 In an

History 58 & n.239 (1980) (noting that Holmes as a judge "enjoyed taking negligence cases away from juries," and citing Goodman).

286 Holmes, supra note 247, at 99; see Horwitz, supra note 191, at 129–30 (observing that Holmes, in The Common Law, manifested the view that law proceeded according to functional rationality, but that he later saw law as the product of social struggle).


288 See, e.g., Kennedy, supra note 17, at 3–5.

289 Id. at 4–5.

290 Id. at 4–5, 21 (noting as characteristic of classical thought the sense that abstract propositions were operative and could be objectively applied in many areas).

291 Id. at 4–5.

292 Id. at 5.

293 See, e.g., ICC v. Ill. Cent. R.R., 215 U.S. 452, 470 (1910) (outlining judicial review of agency decisionmaking, including whether the agency acted within the scope of
example explored by Professor Kennedy, the propriety of the wage and hour legislation in *Lochner v. New York* was a judicial question that turned on whether the legislation was a "fair, reasonable and appropriate exercise of the police power," or an "arbitrary interference with the right of the individual." For the Court, this boundary was seen as relatively determinate, given what the Court perceived to be the limited number of permissible health and safety ends that government could legitimately pursue as part of the police power.

Although not addressed by Professor Kennedy, the relationship of the federal judge to the jury provided a special manifestation of the formalism Professor Kennedy describes. The relationship between the federal judge and the jury ran, almost necessarily, on a parallel course with the relationship of the federal courts to the state courts, to the political branches, and to the regulatory agencies, because maintaining the special judicial role of policing these other entities required the federal judiciary to keep the jury within its sphere as well.

For example, it was a feature of both the general common law and later substantive due process that "reasonableness" was the delegated power or in an unreasonable manner, and stating that "the powers just stated are of the essence of judicial authority, and...therefore, may not be curtailed").

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294 198 U.S. 45 (1905).

295 See Kennedy, supra note 17, at 12 (quoting *Lochner*, 198 U.S. at 56).

296 Id. (quoting *Lochner*, 198 U.S. at 56). Professors Kennedy and White see Justice Harlan's *Lochner* dissent, 198 U.S. at 69, as employing the same conceptual framework as the majority in *Lochner*. See Kennedy, supra note 17, at 12-14 (comparing Justice Harlan's *Lochner* dissent to Justice Peckham's majority opinion); White, supra note 17, at 103; see also Cass R. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873, 874 (1987) (seeing the *Lochner* Court as requiring neutrality by way of not allowing government to alter the common law distribution of entitlements). Rather, it was Justice Holmes's analysis that was out of the mainstream. See Cushman, supra note 57, at 56 (noting that all of the justices excepting Justice Holmes shared common ideological commitments); Gillman, supra note 57, at 131 (finding Holmes's dissent in *Lochner* "unacceptable" even in its day); White, supra note 17, at 87 (stating that Justice Holmes's approach to due process was not taken seriously in orthodox legal circles at the time).

297 See White, supra note 17, at 117 (noting that in marking out boundaries between the police power and the sphere of private autonomy, judges merely recognized the obvious and were not exercising "judgment" in the modern sense).

298 Perhaps, however, the judiciary did not treat the jury's power as absolute even within the sphere of facts. Cf. Thayer, supra note 259, at 191 (noting the judicial duty to keep the jury within reason, even though this involved issues of fact).
touchstone for assessing the validity of ratemaking for public utilities. In these settings, reasonableness was infused with a specific meaning based on an analogy to jurisprudence that surrounded takings of property without just compensation; rates therefore had to provide a fair return on the current value of invested capital. It was the special role of the judiciary to police this limitation as against legislative or agency overreaching, and the Court concluded that it was a denial of due process not to provide a judicial determination of this issue. Not only was judicial review of the largely factual determination of current value of the rate base constitutionally required, but—the Court eventually held—judicial review had to be de novo when a utility raised an issue of confiscation.

This special judicial role of preventing confiscation by legislatures or agencies, moreover, entailed the exclusion of the jury from assessing the reasonableness of rate regulation and the determination of current value. When consolidating the role of federal equity courts in reviewing railroad rates in Ex parte Young, the Court had to respond to arguments that a defense to a state court enforcement action would provide an adequate remedy at law. It stated that a trial of rate reasonableness "would require a long and difficult examination of quite complicated facts upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter." The exclusion of the jury was

29 See Siegel, supra note 63, at 224–32 (discussing the present value formulation in the context of Smyth v. Ames, 169 U.S. 466 (1898)); id. at 231–32 (stating that the determination of reproduction value involved in the current value formulation was not a discretionary reweighing of fairness but a factual determination of competitive return on the present market value).

30 See, e.g., Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287 (1920) (holding that a state court, as a matter of due process, must supply a de novo judicial determination as to both law and fact when an issue of confiscation is raised by a utility); St. Joseph Stock Yards v. United States, 298 U.S. 38, 49–53 (1936) (reaffirming Ben Avon, although suggesting more deference to administrative findings).


32 Id. at 164. But cf. Louis L. Jaffe, Judicial Control of Administrative Action 393 (1965) (citing United States v. Vacuum Oil Co., 158 F. 536 (W.D.N.Y. 1908) and noting that the reasonableness of the rate order is not put to the jury in a criminal enforcement action for violation of a rate order).
implemented by way of the exercise of federal equity jurisdiction, which allowed utilities and common carriers not only to avoid decisions by juries, but by state judges as well.\(^\text{303}\)

A judicially defined rationality not only governed the judicial review of utility rates; it also governed federal judicial control of juries in ordinary civil cases. For example, in providing jury guidance in negligence cases by way of elaborate instructions and directed verdicts, the federal courts defined the reasonable or prudent man in a way that preserved a line between common law negligence on the one hand and social insurance on the other, and that kept the law from straying from principles of corrective justice.\(^\text{304}\) In directing verdicts for evidentiary insufficiency, the Court

\(^{303}\) *In re Debs* saw a similar combination of arguments against federal equity and in favor of jury trial rights. 158 U.S. 564 (1895). In *Debs*, the petitioner argued that there was no equity jurisdiction for the United States to seek to enjoin an obstruction of interstate commerce in the form of a strike, and that the improper exercise of equity jurisdiction deprived defendant Debs of a criminal jury trial. Id. at 575–76 (argument of counsel). As grounds for invoking equity, the Court relied not only on the federal government’s property interest in the mail, but also on the federal government’s duty to protect interstate commerce. See id. at 588–92. The Court noted that “vast interests [are] involved” in the confusion of interstate commerce through forcible interference with commerce—“a condition of affairs which called for the fullest exercise of all the powers of the courts.” Id. at 592. In addressing the jury trial claim, the court noted that “[t]o submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency.” Id. at 595. In the case of labor injunction cases brought by private corporations, criticisms included arguments against the use of diversity, the general common law, and the absence of juries. See Frankfurter & Greene, supra note 119, at 13–15 (expressing concerns about employers trying to obtain federal jurisdiction through diversity, the use of the general common law, and the absence of jury trial).

\(^{304}\) See S. Pac. Co. v. Berkshire, 254 U.S. 415 (1921) (holding that it was not common law negligence to have a mail hook fourteen inches from the side of a train). Justice Holmes stated, “On the common-law principles of tort the adoption of an improvement in the public interest does not throw the risk of all incidental damage upon those who adopted it, however fair it may be to put the expenses of insurance upon those who use it.” Id. at 418; see also Holmes, supra note 247, at 76–78 (arguing against strict liability as partaking of an insurance scheme and as offending a sense of justice); cf. Horwitz, supra note 191, at 51 (noting that if tort law was to be private law, according to late nineteenth century legal thinkers, its central legitimating function had to be corrective justice); White, supra note 285, at 45 (noting a 1906 comment by Professor Francis Bohlen that allowing assumption of risk to go to the jury in every case would be the equivalent of a compulsory pension to employees); Francis H. Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 254–55 (1908) (defending the doctrine of contributory negligence, and arguing that it would be unfair to make those engaged in enterprise “the guardians of those apt to be affected by their operation,” and to “emasculate . . . the latter by accustoming them to look to
saw itself as providing a determinate line and "scientific certainty" between fault-based liability and a naked transfer of wealth from the defendant.\footnote{305}{Pa. R.R. v. Chamberlain, 288 U.S. 333, 343 (1933); see also Merchants' Bank v. State Bank, 77 U.S. (10 Wall.) 604, 637 (1870) (reversing the grant of a directed verdict, but praising direction of verdicts at the close of the plaintiff's case, for "it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court"); Holmes, supra note 247, at 101 (noting that the tendency of law must always be to narrow the field of uncertainty, and describing a process by which two widely distinct cases suggest a general distinction, and that determinations are made one way or another "and at last a mathematical line is arrived at by the contact of contrary decisions, which is so far arbitrary that it might equally well have been drawn a little farther to the one side or to the other, but which must have been drawn somewhere in the neighborhood"); White, supra note 285, at 13, 38, 40-41, 50, 61 (discussing the unifying principle of fault in tort liability in the late nineteenth century); cf. Horwitz, supra note 191, at 52 (describing the idea from natural sciences that there were objective chains of causation from which judges could determine which acts in a complicated series of events caused injury); White, supra note 285, at 28 (noting that Justice Holmes remained enthusiastic about law as science at least until the end of the nineteenth century). Justice Holmes, however, did not see legal rules as deriving from deductive logic. See Oliver Wendell Holmes, Jr., Law in Science and Science in Law, in Collected Legal Papers 239 (1920) ("Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice."); Aleinikoff, supra note 282, at 955 (discussing Holmes).} A similar notion of judicially-defined rationality embodying traditional fault principles infused a number of decisions striking down the use of legislatively-created presumptions in judicial proceedings. The Court conceded that legislatures could make a particular fact prima facie evidence of another fact if "there is a rational connection between what is to be proved and what is to be inferred."\footnote{307}{W. & Atl. R.R v. Henderson, 279 U.S. 639, 642 (1929).} But it found no such rational connection when state legislation employed a presumption of railroad negligence whenever there had been a collision—a presumption which the jury could weigh as evidence even if the railroad had come forward with others for protection}). Despite some changes in his views of law, see generally Horwitz, supra note 191, at 109-43, Holmes apparently continued to believe it appropriate to apply common law fault principles in negligence cases. See Berkshire, 254 U.S. at 418.

\footnote{305}{The idea of law as science, at least in the sense that it could be systematic, was present in American jurisprudence from the beginning of the republic and was frequently characteristic of commentators with a nationalist perspective. See White, supra note 47, at 81, 87, 143, 145.}
The Court noted that a collision furnished no inference as to whether the accident was caused by the negligence of the railroad. A rational connection in this context seemed to suggest that a party was obliged to meet traditional standards of proof of fault; the Court noted that "[l]egislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property." Similarly, in striking down presumptions of criminality in other statutes, the Court's test for rationality had teeth because it implicitly incorporated the traditional standards of judicial proof beyond a reasonable doubt in criminal cases.

B. The Jury-Agency Analogy

The parallelism among juries and other rival decisionmakers to the federal judge was apparent not only in the area of rate regulation, but in agency decisionmaking more generally. It is common to think of agency adjudication as antithetical to jury trial rights as well as to judicial power, because both judge and jury lose decisional power when judicial business is moved to agencies. The "public rights" doctrine that allows some judicial business to be heard in the first instance in an agency rather than a court also al-

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308 Id. at 641–42. The presumption was thus rebuttable, but not vanishing. The Court in Henderson distinguished Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35, 43 (1910), where the Court approved a presumption of railroad negligence that only cast some duty on the railroad to produce evidence, at which point the inference was at an end. Henderson, 279 U.S. at 643. The plaintiff in Henderson had presented some evidence of negligence, although not as to all of her allegations. Id. at 640–41. 309 Id. at 642–43 ("Reasoning does not lead from the occurrence back to its cause."). 310 Id. at 642. 311 See, e.g., Manley v. Georgia, 279 U.S. 1 (1929) (striking down as lacking a rational connection between the proved and ultimate fact a presumption of fraud of directors of insolvent banks); McFarland v. Am. Sugar Ref. Co., 241 U.S. 79 (1916) (striking down as irrational various legislative presumptions against a sugar company). In both Manley and McFarland, the Court read rationality as not allowing the legislature to make a finding of guilt or presumptive guilt of crime, thus reading traditional separation of powers into rationality. See Manley, 279 U.S. at 6; McFarland, 241 U.S. at 86; see also Jones v. SEC, 298 U.S. 1, 19 (1936) (holding that it was arbitrary for the agency to deny permission to withdraw a registration after the agency had begun proceedings against the registrant, based on an analogy to the right to dismiss in court proceedings). By contrast, judicially created presumptions would help to expand the role of reason. See Thayer, supra note 172, at 212 (stating that judges in their presiding function have to lay down rules of presumption, thus narrowing the range of questions under the jury's control).
allows for non-jury trials of such matters. From the point of view of the early regulatory era, however, agencies and juries made common cause against the federal judge.

In *Crowell v. Benson*, for example, the Court approved agency rather than federal court adjudication of a maritime worker's compensation claim by explicitly analogizing the agency's work to that of juries. In response to the argument that Article III prohibited agency adjudication in the case, the Court stated:

> [This is a matter] of private right... [b]ut... there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself.314

Likening the agency to a jury thus supported the delegation of certain federal adjudicative authority to agencies. The same analogy, however, also supported arguments for judicial control of agency decisionmaking, particularly the federal courts' de novo judicial review of jurisdictional facts as a condition of agency adjudication of private rights. Given that the jury's special sphere of power was fact finding, it might seem difficult to justify the judiciary's de novo review of facts found by agencies by analogy to the judge-jury relationship. But the prominent judicial role in policing the jury, including its fact finding, by way of judicial comment and the direction of verdicts, supported the policing role of the courts:

Even where issues of fact are tried by juries in Federal courts, such trials are under the constant superintendence of the trial judge. In a trial by jury in a Federal court the judge is "not a

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312 See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977) (authorizing agency determination of a civil fine under the public rights doctrine); *Baird*, supra note 31, at 279 (noting linkage between Article III and Seventh Amendment doctrine such that when statutorily-created "public right" litigation is adjudicated in a non-Article III forum, there may not be a Seventh Amendment right to trial by jury); *Sward*, supra note 39, at 1041–42 (noting that discussions of jury trial rights in legislative courts often are derivative of discussions of Article III issues).

313 285 U.S. 22 (1932).

314 Id. at 51. The Court additionally analogized to the use of masters and commissioners or assessors in equity and admiralty, and the ancient use of juries in admiralty. Id. at 51–52.
mere moderator" but "is the governor of the trial" for the purpose of assuring its proper conduct as well as of determining questions of law.\textsuperscript{315}

The \textit{Crowell} majority's de novo determination of the factual issues involved in that case (whether there existed "employment" and "navigable waters" within the Longshore and Harbor Workers' Compensation Act) extended the constitutional fact doctrine that the Court had previously applied to the determination of current value in constitutional challenges to rate regulation.\textsuperscript{316} In both cases, the doctrine reflected the judiciary's special role in determining institutional boundaries and its belief that those boundaries were—or could be made—determinate as a matter of both law and fact.

In a separate opinion, Justice Louis Brandeis criticized the Court's de novo factual review for "constitutional" facts, complaining that other factual determinations may be just as critical to liability,\textsuperscript{317} and yet would not obtain heightened review—a proposition that continues to have currency.\textsuperscript{318} Heightened fact review,

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\textsuperscript{315}Id. at 61 (citing \textit{Herron v. Southern Pacific Co.}, 283 U.S. 91, 95 (1931)); \textit{Capital Traction Co. v. Hof}, 174 U.S. 1, 13-14 (1899). Expertise was an additional justification for allowing agency adjudication. See \textit{Crowell}, 285 U.S. at 46 (noting that failure to accord deference to most agency factual determinations would defeat the legislative purpose of providing a prompt and expert determination).
\textsuperscript{316}See supra note 299; cf. \textit{Horwitz}, supra note 191, at 214 (noting that James Landis in the late 1930s saw jurisdictional fact review as the most disputed area of judicial review over administrative action).
\textsuperscript{317}\textit{Crowell}, 285 U.S. at 73-74.
\textsuperscript{318}See, e.g., Stephen G. Breyer et al., Administrative Law and Regulatory Policy 139 (4th ed. 1999) (stating that "\textit{a}ttempts to distinguish which factual situations may be subjected to trial de novo will ultimately collapse, as Justice Brandeis pointed out"); \textit{Henry P. Monaghan, Constitutional Fact Review, 85 Colum. L. Rev. 229, 244-45 (1985) (noting the difficulty of distinguishing which issues should receive de novo review)}; see also id. at 260 & n.170 (citing commentary indicating that no workable line could be drawn).

In addition, Justice Brandeis argued against de novo fact review by urging that Article III should not be seen as a source of protections beyond those provided by the due process clause. See \textit{Crowell}, 285 U.S. at 87-88 (Brandeis, J., dissenting) (stating that Article III properly had no bearing on the case). Justice Brandeis thereby seemed to undermine the traditional approach of the federal courts, particularly manifest in nineteenth century diversity cases, of seeing the constitutional grants of jurisdiction as giving rise to extra measures of procedural and substantive fairness independent of the due process clause. The implications of this idea would be brought
however, makes some sense when the judiciary conceptualizes itself as policing a boundary, and knows on which side of the boundary it wants to bias its determination—as illustrated by Justice Brandeis's own willingness to employ the constitutional fact doctrine where a colorful issue of citizenship was raised in a deportation proceeding. In that context, he adverted to the "security of judicial over administrative action"—words echoed by the Crowell majority. Similar constitutional fact review still exists in First Amendment areas. The principal difference between old and new constitutional fact review is that the old Court had a different view of the constitutional values that merited such solicitude and the contexts in which they were imperiled. The judges who made de novo determinations of a rate base knew they wanted out most clearly in one of Justice Brandeis's last opinions, *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938).

319 Cf. Monaghan, supra note 318, at 249 (noting that constitutional fact review had its antecedents in the doctrine of jurisdictional fact review, which the English superior courts developed to keep agencies and inferior courts within their delegated authority, and that the distinction between ordinary and jurisdictional fact as developed by the English courts was not empty, although it could not be expressed with logical precision). While generally critical of the constitutional fact doctrine, Professor Monaghan looked favorably on constitutional fact review in administrative cases, as distinguished from review of lower courts, based on the "legitimacy deficit" of agencies. Id. at 262; see also id. at 273 (stating that the perceived need for case by case development of constitutional norms is likely the most important trigger for constitutional fact review).

320 Ng Fung Ho v. White, 259 U.S. 276, 284–85 (1922). But cf. Monaghan, supra note 318, at 267–68 (rejecting the argument that concern for an intolerable level of claims decided against constitutional rights justifies a duty to engage in constitutional fact review, due to the fact that we have no clear idea of what an intolerable level is).

311 Ng Fung Ho, 259 U.S. at 285.

322 Crowell, 285 U.S. at 61.

323 See, e.g., Harte-Hanks Communications v. Connaughton, 491 U.S. 657, 688–93 (1989) (applying *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), to jury decisionmaking regarding actual malice); *Bose*, 491 U.S. at 485–86 (holding that federal appellate courts should determine de novo whether actual malice in a public figure defamation case has been established with convincing clarity); Breyer et al., supra note 318, at 139–40 (discussing continued unwillingness of the Court to defer to other decisionmakers on certain issues). The proof beyond a reasonable doubt standard in criminal law ends up translating into a kind of heightened review of fact, although not de novo review. See Jackson v. Virginia, 443 U.S. 307, 318 (1979) (holding that a federal habeas court must consider whether there was sufficient evidence to justify a rational trier of fact in finding proof beyond a reasonable doubt).
to bias the decision against too little return on invested capital.\textsuperscript{324} The de novo judicial determination of "employment" in \textit{Crowell} was justified by a similar belief that the no-fault regime of the Longshore and Harbor Workers' Compensation Act could not properly extend beyond the employer-employee relationship\textsuperscript{325}—a proposition with which Justice Brandeis disagreed.\textsuperscript{326} This general bias against no-fault wealth transfers, moreover, informed areas not involving de novo fact review (such as the judicial control of juries) as the Court itself seemed to suggest by its agency-jury analogies in \textit{Crowell}. This bias helped to give content to the concept of rationality by which the judiciary policed the boundaries of appropriate action of legislatures, agencies, and juries.

The affinity between agencies and juries as more democratic alternatives to Article III judges may help to explain why jury trial rights were rather casually discarded with the rise of the regulatory state. Neither the regulated nor the regulators had any sincere interest in arguing for jury trial rights. Those suspicious of regulation were interested in preserving judicial power in the teeth of agency adjudication,\textsuperscript{327} just as they were interested in preserving judicial power vis à vis juries. In discussing "the difference in security of judicial over administrative action,"\textsuperscript{328} for the protection of rights in \textit{Crowell}, the Court had in mind the federal judge, not the judge-jury combination.\textsuperscript{329} Although regulated entities sometimes raised Seventh Amendment arguments to challenge the constitutionality

\textsuperscript{324} In addition, the Court may have concluded from experience that legislatures and agencies tended to undervalue investors' interests in a fair return when engaged in utility regulation.

\textsuperscript{325} In determining the question of navigable waters de novo, the Court was biasing the system against expansion of limited federal powers. In addition, the Court may have considered the agency likely to bias its decisions in favor of coverage.

\textsuperscript{326} \textit{Crowell}, 285 U.S. at 82–83 (Brandeis, J., dissenting).

\textsuperscript{327} Cf. Guthrie Nat'l Bank v. Guthrie, 173 U.S. 528, 534–35, 537–38 (1899) (Peckham, J.) (finding no violation of the Seventh Amendment by a territorial practice in which a commission made an unenforceable determination of the amount of debt owed by the provisional government of a town, followed by court fact findings to approve or disapprove the report without a jury).

\textsuperscript{328} \textit{Crowell}, 285 U.S. at 61 (quoting \textit{Ng Fung Ho v. White}, 259 U.S. 276, 285 (1922)) (internal quotations omitted).

\textsuperscript{329} Indeed, the dispute in \textit{Crowell}, because it involved admiralty, would not have been triable before a jury even in the absence of agency adjudication. See \textit{Crowell}, 285 U.S. at 45 (rejecting respondent's objection to the lack of jury trial because the claims were within the admiralty jurisdiction).
of agency adjudication, it was the judge and not the jury that provided the attractive feature of avoiding agency decisionmaking.

Champions of agency decisionmaking, on the other hand, had no interest in arguing for jury trial rights because jury trials implied traditional court-based adjudication, which administrative justice was meant to displace. Nevertheless, their preference for agencies over courts (with or without juries) could coexist with a preference for juries over judges when court-based litigation of negligence or contract was at issue. Thus, neither the pro- nor anti-agency forces had much interest in pressing jury trial arguments in the context of agency adjudication. The Court quickly disposed of the Seventh Amendment argument in Crowell because the case was in admiralty. Soon thereafter, the Court indicated that an agency enforcement action that resulted in an assessment of back wages was in the nature of an equity case to which the Seventh Amendment was inapplicable. Thus, the federal courts' ability to define the scope of admiralty and equity aided in circumscribing jury trial rights even in the administrative setting.

30 See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937); see also id. at 19-20 (argument of counsel); cf. Ives v. S. Buffalo Ry., 201 N.Y. 271 (1911) (noting but not deciding issue of whether worker's compensation act violated the state jury trial guaranty).

31 Experience in ICC reparations cases where review could be had before a jury, but where ICC orders were treated as prima facie valid, did not suggest that juries would be of much assistance. See Meeker v. Lehigh Valley R.R., 236 U.S. 412 (1915) (affirming a judgment in which the jury had awarded basically the same amount as the ICC); Mills v. Lehigh Valley R.R., 238 U.S. 473, 476 (1915) (same). In both cases the Court approved treating the ICC findings as prima facie evidence. See Meeker, 238 U.S. at 428; Mills, 238 U.S. at 476 (noting that the case was submitted to the jury with instructions that the commission's findings were prima facie evidence of validity of its order). In Meeker, partly in response to a claim that jury trial rights were violated by treating the ICC report as prima facie evidence, the Court stated that the presumption created by the ICC findings was rebuttable and no defense was cut off. Id. at 429-30. The party contesting the ICC orders did not attempt much of a showing before the jury. See id.

32 Horwitz, supra note 191, at 241 (stating that one's position on agencies was a defining issue for liberals and conservatives).

33 Id. at 60 (noting that Progressives sought to take workers' injury cases out of the legal system entirely, but also wished to subvert doctrines that enabled judges to withdraw them from juries). But cf. infra text accompanying notes 392-98 (indicating that Realists and Progressives were not universally enamored of juries).

34 Crowell, 285 U.S. at 45.

IV. DECONCEPTUALIZING RATIONALITY

A. Democratizing Reasonableness

Because the Court viewed its roles in policing the rationality of legislatures, agencies, and juries as comparable to each other, a change in judicial role as to one predictably accompanied a change as to the others. Building on the Progressive and Realist attacks on traditional legal thought, the New Deal ushered in fundamental alterations in the relationship of the federal judiciary to other nonjudicial decisionmakers, including the jury.

The central target of this attack was legal conceptualism, which was characterized by treating law as a deductive enterprise yielding objective answers. According to the Progressive-Realist argument, seemingly neutral deductions masked judicial policymaking. In addition, the assumptions behind this judicial policymaking—particularly federal judicial policymaking—of a limited and non-redistributive government were called into question in favor of an activist state that could address social problems unfettered by a limited notion of the police power. Objectivity, if it existed, would be derived from close attention to facts and social realities, rather than deductions from allegedly objective legal principles.

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326 See White, supra note 285, at 104 (noting three tenets of Realism: heightened interest in behavioral sciences, impatience with judicial fictions, and conception of tort law as policymaking); White, supra note 17, at 87-88 (noting that Justice Holmes's Lochner dissent only became famous when his idea that judges were giving normative content to the Due Process Clause began to resonate with jurists and commentators). Viewing judge-made law as policy also reflected a more positivist view of law. See Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for Erie and Klaxon, 72 Tex. L. Rev. 79, 115-16 (1993) (characterizing the move from general law to positivism as "a revolution in legal philosophy").

337 See Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law lviii & n.24 (William N. Eskridge, Jr. & E. Philip P. Frickey eds., 1994) (editors' introduction) (discussing Dean Roscoe Pound's view of Supreme Court decisions as "illegitimate and stupid policymaking"); Horwitz, supra note 191, at 36 (indicating that the reaction to the Lochner concept of freedom of contract caused changes in contracts jurisprudence).

338 Horwitz, supra note 191, at 51 (seeing objective causation as central to efforts to construct a private law free of redistribution); id. at 59-63 (tracing a decline in the notion of objective causation).

339 Some strands of this attack sought a new objectivism to be derived from facts through social science. See White, supra note 285, at 67 (noting that reformist thinkers believed objectivity might be obtained by direct observation by social
There were many aspects to the change in legal thought, and these changes had their impact well beyond the federal system. Nevertheless, one manifestation of these changes that profoundly affected the federal judiciary in its relations with other decisionmakers was its retreat from employing rationality as a term of art. Older ideas of limited government, liability based only on fault, and non-redistribution were minimized, if not removed, as aspects of judicially administered rationality. Substituting for the formalistic, legally infused notion of rationality was a more informal notion of reasonableness, derived from facts rather than from deductive reasoning. This substitution portended a lesser role for the judiciary as compared to other decisionmakers.

The change was perhaps most observable in the relationship between the federal judiciary and the legislative branch, where substantive due process and the power to regulate interstate commerce ceased to pose significant limits to legislation. The New Deal Court largely gave up on the core substantive due process idea that it could police the rationality of legislation by reference to a limited set of ends that government could legitimately pursue without running up against the anti-confiscation norm. Rather, once the
Court countenanced the expansion of permissible governmental ends to include even redistributive ones, review of legislative rationality lost much of its critical bite. With New Deal constitutionalism, the rationality of legislation came to be seen as largely a matter of fact to be determined by the legislature, with judicial intervention appropriate only when no state of facts could be imagined that might support the decision. In a comparable move, the Court began to treat the issue of whether congressional legislation had a substantial relationship to commerce as largely a factual issue for Congress rather than a legal issue for the Court, thus substituting a determination by Congress for a judicially determined boundary. As a result of such jurisprudential changes, the very parties who were to be kept within constitutional bounds had a larger role in defining the outer limits of their own sphere of action. Only in areas of a few reprobated ends that called for stricter scrutiny did the Court reserve its older

reasonableness of means); cf. Gardbaum, supra note 342, at 486 (characterizing the New Deal as less a nationalist revolution, and “more a revolution in the power and permissible ends of government at all levels,” state and federal).

See Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1701 (1984) (noting the expansion of permissible governmental ends or public values to include redistribution).

Id. at 1729 (noting that the decline in the centrality of private property brought weaker judicial review). To be sure, the wisdom of legislation had been seen even by the old Court as generally within the legislative domain. But legislation was subject to a judicially defined standard of rationality based on a notion of limited police powers that excluded the possibility of legislation that benefited one group at the expense of another. See White, supra note 17, at 101 (stating that the anticlass principle was part of a constitutional regime in which judges were not to defer to the legislature except where legislation was obviously within the police power).

See Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955); Gillman, supra note 57, at 181-88 (observing that some of the arguments regarding the extent of the police power turned on whether to treat matters more as a question of law or fact, with a factual characterization favoring a legislative determination).

See Wickard v. Filburn, 317 U.S. 111 (1942). See generally Cushman, supra note 57, at 141-225 (discussing Commerce Clause doctrine as manifesting broader jurisprudential changes); Gardbaum, supra note 342, at 495 (noting that the Commerce Clause and substantive due process had complemented each other by keeping both federal and state government from regulating private economic activity).

See Gillman, supra note 57, at 192 (noting that the old Court would consider the question of reasonableness on its own); cf. Gunther & Sullivan, supra note 343 at 482-83 (noting, in 1997, that no economic regulatory statute has been invalidated on substantive due process grounds since 1937).
role of providing more definite limits on legislatures and other decisionmakers.349

A comparable move from judicially defined rationality occurred in the field of rate regulation. In the past, as noted in Part III, the Court had prescribed a present-value formula to insure reasonable, non-confiscatory rates. In FPC v. Hope Natural Gas,350 however, the New Deal Court saw the current value of the rate base as inherently indeterminate because “the value of the going enterprise depends on earnings under whatever rates may be anticipated.”351

The Court therefore rejected any specific formula for determining a rate base. In keeping with the abandonment of conceptualism in favor of pragmatic effects, Justice Douglas stated that “[i]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end.”352

The decline of substantive due process because of the loss of a judicially-defined notion of rationality was accompanied by a similar retreat of the general common law. Both substantive due process and the general common law had been based on a common core of property-protective, anti-redistributive ideas.353 Justice Brandeis’s opinion in Erie Railroad v. Tompkins354 evinced a view of the common law as malleable policymaking, and of federal judi-

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349 See United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938).
351 Id. at 601.
352 Id. at 602; see also id. at 626 (Frankfurter, J., dissenting) (“But obedience of the requirement of Congress that rates be ‘just and reasonable’ is not an issue of fact of which the Commission’s own determination is conclusive.”). The Court did not go so far as to require only mere rationality, however, since it did require a return similar to investments with comparable risk. Nevertheless, it did indicate that it would accept most Commission determinations. See Market St. Ry. v. R.R. Comm’n, 324 U.S. 548, 567–68 (1945) (allowing salvage value for rate base); Breyer et al., supra note 318, at 232–34 (discussing Hope and Market Street Railway).
353 See Purcell, supra note 74, at 62 (noting that “federal common law and substantive due process were obverse sides of the same coin of federal judicial activism and centralization”); cf. 1 Bruce Ackerman, We the People—Foundations 47–50, 103–04, 119 (1991) (arguing that, with the New Deal, the people and the Court rejected limited federal power and strong constitutional protection for property and contract).
354 304 U.S. 64 (1938); see also Freyer, supra note 265, at 143–44 (seeing Erie as part of the Court’s giving up on substantive due process and sanctioning the growing authority of state and federal agencies at the expense of the federal judiciary).
cial policymaking in diversity actions as constitutionally illegitimate on both federalism and separation of powers grounds as compared to state judicial policymaking. The decreased role of the federal courts under substantive due process and the general common law was reinforced by congressionally and judicially imposed restrictions on federal court jurisdiction in economic regulatory cases, by way of the Tax and Rate Injunction Acts and the development of various judge-made abstention doctrines. This reduction of federal jurisdiction in the area of state economic regulation contrasted with the old Court’s expansive interpretations of diversity designed to extend the reach of federal judicial decisionmaking on matters of constitutional and general common law.

B. The New Rationality’s Impact on Judge-Jury Relations

1. Deference to Juries

This new approach to governmental rationality predictably spilled over into federal judge-jury relations—most dramatically in cases under the Federal Employers’ Liability Act ("FELA"). Railroad employee accident cases had once been marked by a robust directed verdict practice often favoring the defendants.

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356 In the Tax and Rate Injunction Acts, 28 U.S.C. §§ 1341–42 (1994), Congress withdrew most federal jurisdiction over two important areas of state and local regulation. When enacted, these statutes were designed not only to remove economic due process issues from federal equity courts, but also to stanch the application of general law. See Ann Woolhandler & Michael G. Collins, Judicial Federalism and the Administrative States, 87 Cal. L. Rev. 613, 642 (1999).
357 See Woolhandler & Collins, supra note 356, at 642–46. Professor Gardbaum has pointed out that, although the New Deal is seen as an era of increased federal power due to the Court’s allowance of expanded congressional regulation under the Commerce Clause, the defining issues of the era often involved increases in state regulatory power. Gardbaum, supra note 342, at 486–89 (arguing that states were the beneficiaries of much of the New Deal revolution in constitutionalism, and discussing, inter alia, abstention doctrines and the demise of general common law); see also id. at 490 (arguing that changes resulted less from considerations of state versus national legislatures and more from a change in thinking about the relationship of courts and legislatures).
359 Both the fellow-servant doctrine, which federal courts applied under the general common law (state law to the contrary notwithstanding), and the contributory negligence doctrine, made direction of verdicts easier. See Malone, supra note 50, at 165, 169 (discussing contributory negligence). The courts, however, may have treated
Decisions such as *Pennsylvania Railroad v. Chamberlain*\(^{360}\) had claimed to bring "scientific certainty"\(^{360}\) to cases premised on circumstantial evidence by directing verdicts against the party on whom the burden of persuasion rested where, in the Court's estimation, evidence pointed "equally" to two conflicting inferences.

By the late 1930s, however, the Court started to treat the determination of negligence by juries in FELA cases comparably to the determination of the rationality of economic legislation.\(^{362}\) The Court was no longer concerned with using rationality as a way to police the line between redistribution on the one hand and liability for fault on the other. The textbook contrast of *Chamberlain* with the later decision in *Lavender v. Kurn*\(^{363}\) manifested this shift in approach. *Chamberlain* treated the plaintiff's burden of persuasion as providing a discernible limit to the ability of the jury to impose liability; a verdict that "rested upon mere speculation and conjecture" was "inadmissible."\(^{364}\) *Lavender*, by contrast, indicated that speculation on weak circumstantial evidence was appropriate for the jury—that "a measure of speculation and conjecture is required."\(^{365}\) In addition, by allowing a verdict on slight evidence and by sidelining the role of the burden of persuasion in the direction of verdicts,\(^{366}\) the Court may have implicitly equated the plaintiff's employment cases somewhat more stringently than other tort cases. See generally Schwartz, supra note 50, at 1772–75 (studying California and New Hampshire state courts and noting the special rules for workers' injuries that were developed at common law). Even under the FELA, where such defenses were unavailable, the Court had policed the sufficiency of evidence of negligence and causation favorably to defendants. See Note, Supreme Court Certiorari Policy in Cases Arising Under the FELA, 69 Harv. L. Rev. 1441, 1448 (1956).

\(^{360}\) 288 U.S. 333 (1933).

\(^{361}\) Id. at 343.

\(^{362}\) See Note, supra note 359, at 1445–47 (indicating that certiorari policy began to favor employees in 1939). Review of judicial decisions, however, differed from review of legislation, partly because review was on the record. See infra text accompanying notes 420–24 (discussing Court's decisions in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) and *Galloway v. United States*, 319 U.S. 377 (1943)).

\(^{363}\) 327 U.S. 645 (1946).

\(^{364}\) *Chamberlain*, 288 U.S. at 344.

\(^{365}\) *Lavender*, 327 U.S. at 653; see also id. at 651 (noting that the court below had reasoned that "all reasonable minds would agree that it would be mere speculation and conjecture to say that [the decedent] was struck by the mail hook") (internal quotations and citation omitted).

\(^{366}\) Professor Jaffe concluded as to *Lavender*: "[T]here was no more reason for attributing the accident to the defendant railroad's negligence, than to the deceased man's negligence, or the vicious act of a third person, or a combination of
interest in recovery under the statute with the defendant's interest in avoiding a forced governmental transfer of property through the court system. This contrasted with the general bias of earlier negligence actions in favor of letting losses lie where they fell, absent sufficient contrary evidence.367

Commentators at the time attributed the Court's active pro-jury FELA stance to judicial discomfort with the negligence requirement of the FELA368 and to a preference for strict liability for work-related injuries. This willingness to countenance such a loss-spreading rationale in the teeth of the FELA's statutorily-prescribed negligence standard contrasted with earlier decisions where the Court directed verdicts against plaintiffs explicitly to avoid providing social insurance when a common law negligence standard applied.370 The willingness to embrace something like a strict liability regime under the FELA underscores the fact that the Court's expansion of the jury's role grew from the judicial abandonment of the concept that circumstances involving no fault on anyone's part." Louis L. Jaffe, Res Ipsa Loquitur Vindicated, 1 Buff. L. Rev. 1, 14 (1951).

367 See Holmes, supra note 247, at 76 (noting the general principle of tort law that loss from an accident must lie where it falls); Note, supra note 359, at 1446-47 & n.32 (contrasting the Court's granting of employee certiorari petitions with its refusal to grant employer petitions, contrary to the practice in the 1920s when the Court frequently reversed cases on the grounds that the plaintiff's case should not have been submitted to the jury); cf. White, supra note 285, at 102-03 (discussing the move away from seeing emotional injuries unaccompanied by physical injury as too speculative for compensation). In areas where the judicial system has greater certainty as to which way it wants to bias the system (or who should bear the burdens of uncertainty)—such as in First Amendment and criminal cases—the Court over time has allowed the burden of persuasion a bigger role in sufficiency of the evidence determinations. See, e.g., Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986) (holding that in a public figure libel case, summary judgment should be granted if a reasonable trier of fact could not find actual malice by clear and convincing evidence).

368 See, e.g., Alfred Hill, Substance v. Procedure in State F.E.L.A. Actions—The Converse of the Erie Problem?, 17 Ohio St. L.J. 384, 397 (1956) (noting the charge that some members of the Court were converting the standard to strict liability by giving maximum leeway to juries); Jaffe, supra note 63, at 370 (noting Frankfurter's insistence that so long as Congress has retained a negligence standard, negligence should be proved according to accepted standards of relevancy and sufficiency); Jaffe, supra note 366, at 14–15 (noting that the FELA operates as a "glorified workmen's compensation" act); Note, supra note 359, at 1449–50 (discussing the Court's possible preference for strict liability in worker injury context).

369 See White, supra note 285, at 148–50 (discussing the replacement of the concept of tort as admonition of blameworthy conduct with one of loss-spreading, with liability insurance playing a role in this reconceptualization).

370 See supra note 304.
liability had to be based on fault or some other limited set of governmental police power objectives, paralleling the Court's abandonment of similar limitations on economic regulation. Thus, just as the Court's policing of juries had gone hand in hand with its Contracts Clause, Due Process Clause, and general common law protections of traditional property interests, the Court's abandonment of stringent protection of contract and property as matters of constitutional and common law also signaled the end of stringent jury controls.

Lavender was no isolated decision. The Court disproportionately granted certiorari in FELA cases, primarily to the benefit of employees who claimed that verdicts should not have been directed against them by state courts. The federal judiciary, once a bastion of judicial supervision in opposition to looser jury-control practices of many state courts, appeared to reverse its role. In the FELA cases, the Court seemed intent on increasing the realm of jury rather than judge decisionmaking, and not merely by reversing verdicts that had been directed for evidentiary insufficiency. In an about-face from former practice, the Court required state courts to send fact issues in FELA actions to the jury that would have ordinarily gone to the judge under customary state practice.


See Note, supra note 359, at 1445-46.

See Green, supra note 269, at 379-80 (noting in 1930 that there was much more control of juries by trial courts in the federal system than in the state systems); cf. Wigmore, supra note 172, at 473-74 (applauding federal courts' continuation of the practice of the commentary on evidence, in contrast to the states).

Or rather, at least with respect to some state courts that reflected a more traditional outlook, the federal judiciary appeared to reverse its role.

See Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 363 (1952) (finding a jury trial right as to all issues ""part and parcel' of the remedy under the [FELA]") (quoting Bailey, 319 U.S. at 354); see also Hill, supra note 368, at 393 (noting that in early FELA cases the states had been left to follow their own procedures). The later case of Byrd v. Blue Ridge Electric Cooperative, 356 U.S. 525 (1958), used the independence of federal court judge-jury relations as a reason to allow the jury rather than the judge to decide a state-law jurisdictional issue of coverage by a workers' compensation statute in a diversity case—an issue that would have been decided by the judge in state court, as it likely would have under earlier federal practice. See id. at 551 (Whittaker, J., concurring in part) (expressing the
Commentators sometimes suggest that the FELA cases were sui generis, and no doubt these cases provided the most extreme manifestation of the Court's deference to civil juries. The Court's latitudinarian treatment of juries in the FELA cases, however, manifested a broad ranging shift in the view of the judicial role (and not merely the federal judicial role) in relation to other decisionmakers. For example, in common law areas, there was a general trend to leave more issues of negligence and contract in-

opinion that the Court had departed from prior decisions in holding that a jurisdictional issue must go to the jury).

See, e.g., Hill, supra note 368, at 401–03 (suggesting that merely looking to the nonmoving party's evidence on motion for directed verdict may have only been the rule for FELA cases). But cf. David P. Currie, Thoughts on Directed Verdicts and Summary Judgments, 45 U. Chi. L. Rev. 72, 73–74 (1977) (noting that the Court had not indicated that there were different standards for FELA cases).

See, e.g., Mercer v. Theriot, 377 U.S. 152 (1964) (reversing Court of Appeals' determination that evidence was insufficient in a diversity wrongful death action); Dick v. N.Y. Life Ins., 359 U.S. 437 (1959) (reversing Court of Appeals' holding that the issue of accidental death versus suicide should not have gone to the jury); Halliday v. United States, 315 U.S. 94 (1942) (reversing Court of Appeals' determination that evidence was insufficient to show complete disability during the period the plaintiff's War Risk Insurance was in force); Conway v. O'Brien, 312 U.S. 492 (1941) (reversing Court of Appeals' determination that evidence was insufficient to show gross negligence of the driver in a diversity personal injury case); Berry v. United States, 312 U.S. 450 (1941) (reversing Court of Appeals' determination that evidence was insufficient to show complete disability during the period the plaintiff's War Risk Insurance was in force); see also Martin B. Louis, Post-Verdict Rulings on the Sufficiency of the Evidence: Neely v. Martin K. Eby Construction Co. Revisited, 1975 Wis. L. Rev. 503, 503 (stating that between 1947 and 1967, the Supreme Court wrote seven opinions reviewing a Court of Appeals order directing entry of a judgment notwithstanding the verdict and, with one exception, found the order improper).


[The "scope of foreseeable risk" is on its way to ultimate victory as the criterion of what is "proximate...." One very possible explanation for the triumph of the concept is that it so completely lacks all clarity and precision that it amounts to nothing more than a convenient formula for disposing of the case—usually by leaving it to the jury under instructions calling for "foreseeable," or "natural and probable" consequences.

Id. See also White, supra note 285, at 148–50 (discussing the change from an admonitory to a compensatory purpose in tort law); Note, State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts under the Erie Doctrine, 66 Harv. L. Rev. 1516, 1523–25 (1953) (noting that some lower courts had interpreted Stoner v. New York Life Insurance Co., 311 U.S. 464 (1940), as directing the use of state directed verdict practice contrary to the rule of Herron v. Southern Pacific Co., 283 U.S. 91 (1931)).
terpretation to juries. This partly resulted from the increasing acceptance of the absence of an objectively knowable law. In the federal courts, an additional impetus for declining to elaborate on legal standards was their loss of general common law authority under Erie. In the shuffle, the Article III jury moved somewhat closer to the Anti-Federalist ideal, with a larger role in the application of law to fact.

2. Deference to Agencies

The extension of the realm of fact—or allowing an alternative decisionmaker to decide issues of law as if they were issues of fact—and the retreat of the general common law was also manifest in judicial review of agency decisionmaking. For example, the Court interpreted federal regulatory statutes governing the employer-employee relationship as not embodying limited common law definitions, noting that no single common law existed. The rejection of a common law meaning suggested to the Court a reduced judicial role in giving meaning to these statutes. Under the Longshore and Harbor Workers' Compensation Act, for example, the Court upheld an agency's determination that an employee's injuries could be compensable even though they were incurred during leisure time while stationed abroad. It did so first by re-

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379 According to Professor Horwitz, the attack on conceptualism in contracts law took the form of an attack on the objective "will theory," and was particularly manifest in the works of Professor Corbin in the second decade of twentieth century. Horwitz, supra note 191, at 49. The Realist claim was that decisions under the objective will theory were not approximations of the parties' intentions but were rather the policy determinations of judges. Id. at 50. Determining that a matter was one of policy rather than objective legal science did not have to imply a greater role for the jury. Nevertheless, Professor Corbin argued that the meaning of words, and matters of construction of contracts, were largely factual issues for the jury. See 3 Arthur Linton Corbin, Corbin on Contracts § 554, at 218–23 (1960). His belief that words had no certain meaning, see 3 id. § 542, at 101–12, seemed to suggest to him that their construction was more appropriate for a jury and under general instructions. See 3 id. § 554, at 223; see also Restatement (Second) of Contracts § 212(2) (1979) (stating that interpretation of a written agreement is for the trier of fact if it depends on the credibility of extrinsic evidence or the choice among reasonable inferences to be drawn from extrinsic evidence).


381 Id. at 120–25.

jecting a common law definition of the scope of employment, and then by treating the legal issue of the agency's application of the statutory term to the uncontested facts as if it were a factual question and therefore due judicial deference. The result was consistent with allowing increasing jury latitude in FELA and tort cases by way of reduced judicial scrutiny of factual determinations and reduced elaboration of law. It contrasted starkly, however, with *Crowell v. Benson*, where the Court had policed the line of the employment relationship through the jurisdictional fact doctrine to keep strict liability within the narrow bounds then allowed.

**C. Justice Black and the Decline of Federal Equity**

If Justice Story stands as a primary architect of nineteenth century federal judge-jury relations given his concern that federal jurisdiction promote national commerce, Justice Black, with his concern for eliminating federal court oversight of economic regulation, stands as Justice Story's antithesis. A southern populist and skilled plaintiff's lawyer, Justice Black sought reduction in the role of the federal judge on virtually every front. This was especially true with regard to the protection of economic interests—whether the question involved substantive due process, the general common law, federal equity as an alternative to juries and state courts, or judicial control of juries in common law actions.

Justice Black played an instrumental role in enhancing the role of the jury in the FELA decisions discussed above and sought to
limit federal court use of directed verdicts. He campaigned relentlessly to reduce the role of federal equity in the area of economic regulation and elsewhere by developing abstention doctrines that required federal courts to dismiss suits that were clearly within their equitable jurisdiction. For those remaining equitable matters that the federal courts could still hear, Justice Black’s decision for the Court in *Beacon Theatres v. Westover* radically reduced the role of federal judges and increased that of the jury by requiring jury-found facts to control the court’s fact finding on any overlapping equitable and legal claims.

(holding that state courts had erred in applying local pleading rules to dismiss the plaintiff’s complaint).

387 See Order Amending the Federal Rules of Civil Procedure, 374 U.S. 865, 866–67 (1963) (containing Justices Black and Douglas’s objections to allowing a directed verdict without the formality of submission to the jury, and to amendments to the summary judgment rule); Galloway v. United States, 319 U.S. 372, 407 (1943) (Black, J., dissenting); Reich, supra note 384, at 678.

388 See Burford v. Sun Oil Co., 319 U.S. 315 (1943) (Black, J.). *Burford* abstention removed federal courts from review of state regulation that might, in the past, have evoked general common law or substantive due process protections. See Woolhandler & Collins, supra note 356, at 647–48.

389 See *Beacon Theatres v. Westover*, 362 U.S. 199 (1960), and *Thompson v. City of Louisville*, 362 U.S. 199 (1960), for a discussion of when a federal court could review the sufficiency of evidence to support criminal liability.

390 See *Beacon Theatres v. Westover*, 362 U.S. 199 (1960), for a discussion of when a federal court could review the sufficiency of evidence to support criminal liability.

391 See *James*, supra note 1, at 685–89 & n.189 (suggesting fairly close adherence to historical tests for dividing issues between law and equity, and discussing changes...
Although hostility to federal judicial power was a fairly consistent strand of New Deal thought, enthusiasm for juries was not universal. Of course for some, such as Justice Black, less formalist notions of rationality suggested an enhanced jury role in many areas. For some Progressives and Realists, however, seeing the law as involving the balancing of competing interests and the predicting of the effects of particular rules did not suggest the superior institutional competencies of juries over judges. In addition, efficiency concerns often seemed to disfavor jury trials. This lack of enthusiasm for juries characterized the work of Judge Charles Clark, a Realist who was instrumental in the adoption of the Federal Rules of Civil Procedure in 1938. It is clear, moreover, that Judge Clark and other drafters of the Federal Rules did not intend them to alter the pre-merger division of authority between law and equity; indeed, maintaining the status quo probably was necessary to avoid significant opposition to the new Rules. Justice Black's opinion in

from prior practice wrought by Beacon and Dairy Queen). See generally Pease v. Rathbun-Jones Eng'g Co., 243 U.S. 273, 278-79 (1917) (rejecting a Seventh Amendment and adequate-remedy-at-law challenge to summary judgment against a surety and noting that an equity court having jurisdiction over the principal case would completely dispose of its incidents); Clark v. Wooster, 119 U.S. 322, 324-25 (1886) (holding that the trial court had discretion to retain equity jurisdiction in an invention patent case, even though the patent expired fifteen days after the action was filed, thus ending the chief ground for injunctive relief); Shields v. Thomas, 59 U.S. (18 How.) 253, 261-62 (1855) (rejecting a Seventh Amendment challenge to the plaintiff's electing to proceed in equity rather than law); A. Leo Levin, Equitable Clean-Up and the Jury: A Suggested Orientation, 100 U. Pa. L. Rev. 320, 320 (1951) (describing a fairly broad practice of equity's deciding damages issues); Shapiro & Coquillette, supra note 1, at 442 (noting a tendency to resolve cases in favor of jury trial without serious analysis of history, precedent, or policy).

See Gardbaum, supra note 342, at 565 (noting that hostility to the federal judiciary was a unifying theme of the New Deal constitutional revolution).

See, e.g., 3 Corbin, supra note 379, § 554, at 218-27.

See White, supra note 285, at 94 (noting Professor Leon Green's belief that issues of legal duty should be decided by the judge).

See Green, supra note 269, at 410-12 (1930) (indicating that juries were inefficient and that jury trial had little to recommend it); Laura Kalman, Legal Realism at Yale, 1927-60, at 21, 31 (1986); Landsman, supra note 4, at 47-50 (discussing scholarly criticisms of jury inefficiency in the early twentieth century).

See Charles E. Clark & Harry Shulman, Jury Trial in Civil Cases—A Study in Judicial Administration, 43 Yale L.J. 867, 869, 880-84 (1934) (concluding in a study of the Superior Court of New Haven that jury trials did not have an impressive record); Landsman, supra note 4, at 49-50.

See Fleming James, Jr., Trial by Jury and the New Federal Rules of Civil Procedure, 45 Yale L.J. 1022, 1025-26 (1936) (noting that one objective of unified procedure was
Beacon Theatres and other decisions, however, helped to institutionalize the jury-enhancing side of Progressive and Realist thinking, despite the division of opinion within the ranks.398

In summary, despite a general belief that the opposite occurred,399 federal juries had significantly gained power by the mid-twentieth century in many important respects, at the expense of judicial control. To the extent that generalization is possible, judges probably became more reluctant to provide highly specific content to law in traditional common law areas than they once were,400 directed verdict standards probably had less bite then they once did,401 and the judicial role in commenting on the evidence had become a shadow of its former self.402 Underlying this judicial retreat

that "[t]he right of jury trial should not be expanded"); Levin, supra note 391, at 325 & n.24 ("Abandoning understatement in the interest of accuracy, one is obliged to report that a prime objective of the united procedure has been to prevent extension of the province of the jury."); Note, supra note 279, at 1184 (noting the universal claim that the right to a nonjury trial was unaffected by merger).

399 Justice Black redefined the inadequacy of remedies at law as no longer looking to the highly developed jurisprudence of when it was appropriate to seek equitable remedies at all, in favor of a simplistic inquiry into whether an issue could be raised in a related legal action. See Beacon, 359 U.S. at 507–08; cf. James, supra note 1, at 660 (noting that the rubric precluding equitable relief when the remedy at law was adequate had ceased to have general validity in premerger practice).

398 See supra note 12 and accompanying text.

400 See supra notes 377–79; see also City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 707–11 (1999) (holding that it was appropriate to leave to a jury the issue of whether the city's zoning proposal was consistent with a legitimate public purpose). But cf. Markman v. Westview Instruments, 517 U.S. 370, 388–89 (1996) (holding that issues of patent construction go to the judge, and noting that judges are likely to be better than juries at construction of written instruments); E. Allan Farnsworth, Contracts § 714, at 490–94 & nn. 5–9 (3d ed. 1999) (indicating that contract interpretation often goes to the court and citing federal cases taking different views).

401 See Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 558–59 (1958) (Frankfurter & Harlan, JJ., dissenting) (objecting that even if the issue of statutory employment was for the jury, there was no conflict in the relevant evidence); see also supra note 386; cf. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 151, 154 (2000) (reversing the Court of Appeals' decision that the plaintiff had produced insufficient evidence of age discrimination when he presented a prima facie case and evidence tending to undermine the defendant's legitimate nondiscriminatory reason); id. at 150 (noting but disapproving of Court of Appeals' decisions that had looked only to evidence favorable to the nonmoving party based on Wilkerson v. McCarthy, 336 U.S. 53 (1949)).

was the general collapse of a meaningful and judicially enforceable notion of limited governmental powers, of public-purpose limitations, and of restrictions on civil liability by reference to common law fault principles. The loss of these anti-redistributive ideas undermined a sense of judicially defined rationality that had reference to protections of property, contract, and commerce. The indeterminacy of the new concept of rationality (and law more generally), along with the implication that policymaking was necessarily involved in such determinations, seemed to suggest a wide-ranging reduction in the judicial role of policing other decision-makers.

V. DIMINISHED JUDICIAL SUPERVISION AND DISCONTENT

A. Counter-Trends in Legal Thought

It was characteristic of the old regime to treat the judge-jury relationship as analogous to the court-legislature relationship. The new regime had similar parallels. In many ways, it offered an inversion of classical legal thought, in which judicial self-abnegation as to one decisionmaker (such as the legislature) suggested a similar stance with regard to others (such as juries). This approach, however, at least as manifested in the FELA cases, may have over-analogized from the court-legislative role to the judge-jury role. The fact that legislatures might now be constitutionally permitted to achieve certain redistributive results based on a wide range of permissible ends did not necessarily mean that the jury should be given similar latitude to pursue redistributive or other ends without authorization in statute or common law. The insight that law is in-

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history of commentary on the evidence in the federal courts and describing movements to abolish judicial comment in the early nineteenth century).

403 This connection between indeterminacy and illegitimacy is highlighted in the area of agency statutory interpretation, where the Court in recent years has given even more power to agencies than it did under the New Deal divestiture. In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court indicated that when a matter of statutory interpretation could not be answered by reference to a clear congressional intent, it was a matter of policy, not law, and therefore more legitimately decided by the agency than the courts. Id. at 842–45. In the area of officer suits and most fundamental rights constitutional litigation, however, the judge has overall remained dominant over the jury. Cf. *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding that rejection of qualified immunity was immediately appealable, and that the defendant was entitled to such immunity).
determinate and involves policymaking may have signaled a reduced role of the federal courts in reviewing legislation because of concerns for legitimacy and institutional competencies, but it did not have to translate into a similarly reduced role for judges in reviewing jury decisionmaking. And to the extent that consistency and predictability remained values in the law, despite the Realist emphasis on case by case results on particular facts, judges rather than juries could still be the preferred decisionmakers.

In addition, postwar scholars and jurists revived their interest in legal doctrine and in the integration of particular cases into more generalized frameworks, largely in reaction to the Realists' failure to provide workable analytical structures for legal analysis. With roots in Progressive thought in the thirties and then blossom-

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404 Francis H. Bohlen, Book Review, 80 U. Pa. L. Rev. 781, 787 (1932) (reviewing Leon Green, Judge and Jury (1930)) (taking the position that when a court believes that considerations of public policy should determine a legal question, it will see to it that its judgment is conclusive, and stating that it would be futile to instruct the jury to give consideration "to the economic expediency of imposing too heavy a burden on productive industry"). Professor Bohlen was considered to be a somewhat conceptualist scholar. See White, supra note 285, at 78; cf. Green, supra note 269, at 416 (commenting unfavorably on juries' abilities to decide difficult cases). Professor Green, the most influential Realist tort scholar, recommended separating concepts of physical causation and legal duty, leaving the former for the jury and the latter for the judge. See White, supra note 285, at 94–95.

405 See White, supra note 285, at 105–06.

406 See Hart & Sacks, supra note 337, at 354 (discussing considerations that might go into determining whether a matter was for judge or jury); see also Schkade et al., supra note 6, at 1170 (raising question of comparative institutional competence of juries to decide punitive damages issues).

407 See Horwitz, supra note 191, at 230 (noting a postwar resurgence in legalistic mentality); White, supra note 285, at 146 (noting revived interest in doctrine).

408 White, supra note 285, at 143 (stating that postwar legal scholars searched for more effective integration of generality and particularity); Jaffe, supra note 63, at 359–60 (criticizing the rejection of the force of general propositions in the name of realism).

409 See White, supra note 285, at 139 (stating that the Realists talked of a functional perspective, but seemed incapable of formulating a comprehensive analytical perspective); see also Neil Duxbury, Patterns of American Jurisprudence 205 (1995) (arguing that it is incorrect to see process jurisprudence as a postwar response to legal realism, because the process approach parallels and perhaps precedes realism); Gary Minda, Postmodern Legal Movements: Law and Jurisprudence at Century's End 31–32 (1995) (describing progressive and radical strands of legal realism); White, supra note 285, at 151 (noting critiques that policymaking and functionalism did not provide useful professional techniques).
Legal Process theorists undertook to make rationality a defining value in the legal system. They did so partly by analyzing processes that helped to ensure that governmental decisionmaking did not veer too much from consensus views of rationality.

Some elements of Legal Process analysis, particularly its emphasis on “comparative institutional competency,” suggested deference to nonjudicial decisionmakers consistent with strains of Progressive and Realist thought. For example, Felix Frankfurter and James Landis (who could fairly be characterized both as Progressives and Legal Process thinkers) had used the concept of comparative institutional competencies to justify broad delegations of lawmaking authority to agencies. But the judiciary too had its special institutional competency—bringing to bear reasoned elaboration from judicial precedent and from the purposes that underlay statutes and the common law, as part of a multilayered decisional process designed to avoid arbitrariness. In addition, the judiciary had a greater ability than did juries to bring consistency and predictability to the law—both of which remained important values in decisionmaking even if flexibility to changing social circumstances was also a value.

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410 Reaction to fascism encouraged the enhanced interest in rationality in law. See White, supra note 285, at 139–42.
411 See Hart & Sacks, supra note 337, at 147 (noting that it was fashionable to deprecate rationality in favor of fiat or institutional settlement but arguing against that idea).
412 See Henry M. Hart, Jr., Notes on Some Essentials of a Working Theory of Law (no date), in Papers of Henry M. Hart, Jr. (Revised), Harvard University Law Library, Box 17, Folder 1; Hart & Sacks, supra note 337, at lxxxiv (editors’ introduction) (“And the first recourse of law, in dealing with intractable questions, is to seek not final answers but an agreeable procedure for getting acceptable answers.”) (quoting Hart); White, supra note 285, at 141–42 (discussing the view that professional and political processes would help to ensure rationality).
414 See Hart & Sacks, supra note 337, at lxi (editors’ introduction) (stating that Frankfurter and Landis used the institutional competence idea to justify delegation of lawmaking power to agencies).
415 See, e.g. id. at 146–48 (discussing reasoned elaboration).
416 See id. at 153 (discussing powers of review and redetermination).
417 See id. at 151–52 (discussing the problem of how far requirements of reasoned elaboration versus discretion should extend themselves into the executive and
Perhaps reflecting some of these movements in thought, the Court at times (although not always consistently) has reasserted a more active role in policing rationality of agencies and juries. There was, however, no time when this enhanced legalism decisively took over; cases reflecting the two tendencies sometimes appeared side by side. In the agency context, Professor Morton Horwitz has traced how disillusionment among Progressives with the idea of objective expertise was accompanied by concern that too much deference to agencies had allowed for the arbitrary exercise of governmental power. The result was Justice Frankfurter's famous decision in *Universal Camera Corp. v. NLRB,* in which the Court reclaimed a more active judicial role in policing agency fact finding, effectively holding that statutorily prescribed judicial review for the presence of "substantial evidence" on the record meant something more than the presence of vaguely possible inferences bolstered by claims of agency expertise.

In the judge-jury context, a comparable (if tentative) illustration of the hold of legalism had arguably occurred somewhat earlier in *Galloway v. United States.* In *Galloway,* the decision that spurred Justice Black's famous jury-trial rights dissent, the Court indicated that some factual inferences, although not necessarily inconceiv-
able, nevertheless lacked sufficient support in the record to sustain a verdict.\textsuperscript{423} \textit{Galloway} (like \textit{Universal Camera}) thus reflected a sense that rationality of fact finding in an on-the-record proceeding had some content beyond that required of the legislature. Both decisions reflected a continued sense of the importance of the error-corrective function of the courts. Consequently, \textit{Galloway} may have been an early indication that the federal courts would not altogether abandon their former role of policing juries more closely than did many state courts\textsuperscript{424} and concomitantly providing greater protection of property interests from potentially lawless transfers.

What is more, enhancements in formal controls of juries, such as the use of judgments notwithstanding the verdict (as in \textit{Galloway}) and the more recently invigorated practice of summary judgment,\textsuperscript{425} may have fed the perception of ever-increasing federal judicial control of juries over time.\textsuperscript{426} The enhancement of formal controls, however, was accompanied by ambivalence as to when to use them. This was reflected, for example, in \textit{Galloway}'s finding that the plaintiff's evidence was insufficient on the one hand and the contemporaneous \textit{FELA} decisions' requiring weak cases to go to

\textsuperscript{423}Id. at 385–87; see also id. at 395 (stating that "the essential requirement is that mere speculation be not allowed to do duty for probative facts").

\textsuperscript{424}See Baldus et al., supra note 5, at 1134–35 (noting that the comparative approach to remittitur review, a check on the amount of compensatory damages awarded by juries, was used primarily in New York state courts and in federal diversity actions); cf. Kevin M. Clermont & Theodore Eisenberg, Appeal from Jury or Judge Trial: Defendants' Advantage, 3 Am. L. & Econ. Rev. 125, 127 (2001) (concluding, based on study of federal appeals, that defendants succeed surprisingly more than plaintiffs on appeal from civil trials).


\textsuperscript{426}See \textit{Galloway}, 319 U.S. at 397 (Black, J, dissenting); Dooley, supra note 12, at 326; cf. Murphy, supra note 150, at 763 (characterizing the allowance of summary judgment for evidentiary insufficiency in \textit{Fidelity & Deposit Co. v. United States}, 187 U.S. 315 (1902), as a retreat "from the common law tradition that the jury determines questions of fact," although finding such a deviation justified by the principle that juries have no prerogative to decide a case contrary to applicable law). See generally id. at 762–67 (describing and approving of modern enhancements in formal judicial controls of juries). One could characterize these mixed results as reflecting a synthesis involving somewhat better formal mechanisms for removing matters from the jury combined with policing of juries only for extreme results.
juries on the other. Thus, while the full potential for judicial abdication suggested by events of the New Deal may not have been realized, it is something of an illusion to believe that overall federal judicial power over juries is stronger now than it was in the early Republic and well into the modern era.

B. Current Dissatisfaction with the Civil Jury

The mounting scholarly literature criticizing juries suggests that the current level of judicial control of jury decisionmaking—both in state courts and federal courts—is not altogether satisfactory. Modern social scientists and jurists echo the complaints of nineteenth-century formalists that juries without sufficient judicial control often act irrationally—reaching results that fail to comport with legal standards and that are arbitrary. For example, Pro-

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427 See Note, supra note 359, at 1441-45 (discussing a generous certiorari policy in FELA cases during the period from 1939 to 1954 and attributing generosity chiefly to the Court’s willingness to decide cases involving questions of whether negligence and causation issues should have been submitted to the jury).

428 Reid Hastie et al., A Study of Juror and Jury Judgments in Civil Cases: Deciding Liability for Punitive Damages, 22 Law & Hum. Behav. 287, 304 (1998) (finding a low level of comprehension of legal instructions by juries and a failure to apply relevant factors); cf. Yeazell, supra note 211, at 104-05 (noting long term conflict between community views and strict legal requirements in jury-judge relations, and noting that awards against deep-pocket defendants in the tort system often reflect this conflict).

429 Schkade et al., supra note 6, at 1145 (finding arbitrariness in the unpredictability and variance of punitive damages awards, in that similarly situated persons are treated differently); Sunstein et al., supra note 6, at 2105, 2113 (discussing the problem of juries’ use of improper factors, such as size of firm); see also David W. Leebron, Final Moments: Damages for Pain and Suffering Prior to Death, 64 N.Y.U. L. Rev. 256, 259, 310-11 (1989) (finding that awards for pain and suffering prior to death vary in ways that cannot be explained by objective factors, and arguing for increased judicial supervision); Michael J. Saks et al., Reducing Variability in Civil Jury Awards, 21 Law & Hum. Behav. 243, 245 (1997) (concluding that unpredictability results from unwanted random variation in noneconomic damages awards); cf. BMW of N. Am. v. Gore, 517 U.S. 559, 568, 585 (1996) (holding that due process requires judicial review for excessiveness of punitive damages awards, and expressing concern for impact on interstate commerce).

A counterliterature has developed to the effect that the problems with juries are greatly exaggerated. See, e.g., Saks et al., supra, at 244-45 (collecting authorities). For example, some studies show that juries overall award damages within reasonable ranges. See, e.g., Theodore Eisenberg et al., The Predictability of Punitive Damages, 26 J. Legal Stud. 623, 624 (1997) (claiming punitive damages awards are less unpredictable than commonly believed, and that there is a significant correlation between compensatory and punitive awards). But cf. A. Mitchell Polinsky, Are
Professor Reid Hastie has found that juries fail to consider factors they are instructed to use when imposing punitive damages liability. Professor Kip Viscusi's work suggests that juries impose liability for punitive damages and enhance awards based on defendants' having performed cost-benefit analyses—behavior that would not be considered negligent at all by widely accepted jurisprudential standards. And Professor Cass Sunstein has found that jury awards of punitive and other types of damages are arbitrary, partly due to the legal system's failure to provide an adequate scale for damages.

The complaints of jury irrationality are often accompanied by suggestions for additional controls and guidance of juries (or for

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Punitive Damages Really Insignificant, Predictable, and Rational? A Comment on Eisenberg et al., 26 J. Legal Stud. 663 (1997) (taking issue with Eisenberg et al.'s conclusions). But the threat of excessive verdicts that might not be policed by the judiciary casts a long shadow over the entire legal system and settlement process, and even one punitive award in the billions can significantly impact society as well as the defendant. See Thomas Koenig, The Shadow Effect of Punitive Damages on Settlements, 1998 Wis. L. Rev. 169, 172 (concluding that although fears of punitive damages may be unfounded, they produce settlement leverage); Polinsky, supra, at 665–66 (noting the effects of punitive awards on settlement). In addition, the combination of the equitable class action device with jury trial rights via the Beacon line of cases has added a potential for magnification of jury results, with concomitant pressures for settlement. See In re Rhone-Poulenc Rorer, 51 F.3d 1293, 1298 (7th Cir. 1995) (decertifying a class partly based on settlement pressures created by the class action); Mark C. Weber, Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues, 48 DePaul L. Rev. 463, 470–71 (1998) (noting settlement pressures from jury trials in consolidated cases, but concluding that neither individual nor consolidated cases have a superior claim as a baseline); Developments, supra note 6, at 1787 (noting the pressures that punitive damages place on defendants to settle class actions).

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428 Hastie et al., supra note 428, at 307.
429 Viscusi, supra note 6, at 550–52.
433 See Sunstein et al., supra note 6, at 2074 (discussing the difficulty of mapping judgments onto an unbounded scale of dollars); id. at 2131–38 (discussing problems with other types of damages besides punitive damages); see also Baldus et al., supra note 5, at 1115 (noting that “[t]he problem of outlying, or inconsistent, damages awards is inherent in a system” that has jurors “make individualized damage assessments without reference to any external standards defining the appropriate award level”). The Schkade studies also found that deliberation contributed to more extreme results. Schkade et al., supra note 6, at 1160–65. See generally Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71 (2000) (discussing group polarization and its implications for deliberative democracy).
434 See, e.g., Baldus et al., supra note 5, at 1123–25, 1127 (discussing scaling instructions for damages and damages schedules, although recommending that judges engage in comparative additur and remittitur); Hastie, supra note 428, at 289 (noting
removal of some decisions from juries altogether). Although at first glance some of these proposals might seem inconsistent with traditional notions of the judge-jury relationship in federal court, the historical control of federal juries discussed in earlier parts of this article tends to reinforce these efforts at reform. From the early Republic and at least until the New Deal, a variety of judicial controls to ensure jury rationality—arguably stronger than those now in place—peacefully coexisted with the Seventh Amendment. Indeed, it is arguable that the Seventh Amendment jury trial not only permits strong judicial control, but that such control is part and parcel of the constitutional jury trial right that enables the federal courts to operate according to their historic purpose of providing an unimpeachably fair forum for those who can invoke its jurisdiction.

Admittedly, the focus of the critiques and suggested jury reforms may implicitly be aimed more at state than federal courts. But large federal court settlements in cases where liability is doubtful also suggest a lack of confidence in federal courts to patrol juries. the problem of lack of adequate instructions for juries); Saks et al., supra note 429, at 254 (having tested various means of jury guidance for pain and suffering awards and concluding that giving juries examples of awards in similar cases, median awards, intervals, and averages plus intervals, decreased overall variability except for low-severity injury); cf. Sunstein et al., supra note 6, at 2142 (proposing that juries produce punishment rankings that would be translated into dollar amounts, and suggesting that the solution does not lie in clearer jury instructions).

434 See, e.g., Paul Mogin, Why Judges, Not Juries, Should Set Punitive Damages, 65 U. Chi. L. Rev. 179, 182 (1998) (arguing that, at least in federal courts, asking juries to set punitive damages is neither sound policy nor constitutionally required); Schkade et al., supra note 6, at 1170 & n.102 (considering removal of punitive damages determinations from juries, and citing other proposals to remove damages judgments from juries); Developments, supra note 6, at 1787 (noting the pressures that punitive damages place on defendants to settle class actions). See generally Murphy, supra note 150, at 799 (concluding that the Seventh Amendment does not require that the jury calculate the amount of punitive damages if that determination involves wide-ranging discretion); Murphy, Judicial Assessment, supra note 2, at 176–86 (discussing the extent to which judges may be able to assess monetary remedies consistent with the Seventh Amendment); W. Kip Viscusi, The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts, 87 Geo. L.J. 285, 285–86 (1998) (noting general belief that juries lack sufficient guidelines and expertise to set punitive damages awards, and questioning whether punitive damages serve a constructive purpose based on a societal cost-benefit approach).

435 See Deborah R. Hensler et al., Class Action Dilemmas: Pursuing Public Goals for Private Gain 107–08 (2000) (discussing cases in which class actions with weak liability claims nevertheless evoked significant settlement offers).
Further, a role exists under Article III for the federal courts to continue to provide an especially fair forum—in diversity as well as federal question cases—even if states cannot be brought along. What is more, given the due process underpinnings of federal judicial control of juries (as discussed below), state courts may be under some similar obligations to police civil jury decisionmaking as a requirement of the Fourteenth Amendment, as the Court has already recognized in the area of policing for excessive punitive damages awards. Moreover, the history of federal judicial control of juries in the federal courts indicates that the Seventh Amendment should not serve as a roadblock to requiring such additional controls.

C. Bolstering Existing Practices: The Example of Directed Verdicts

Even in the absence of legislatively approved reforms, federal courts could exercise renewed vigor in applying the traditional tools of judicial control at their disposal. This approach could include a greater willingness to police sufficiency of evidence, to provide specificity to the law through directed verdicts and educational instructions, to comment on evidence including the assessment of damages, and to grant new trials, including new trials on damages issues. Such a shift in direction, however, could only

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436 Congress would likely have power to implement reforms under the Commerce Clause—for example, in the products liability area. State courts have struck down damages limits in several states. See Note, 113 Harv. L. Rev. 804, 807 & n.31 (2000) (noting that Ohio and Illinois courts have struck down in their entirety state tort reform measures).

437 The Court has required not only that there be meaningful procedures for the judicial review of jury-assessed punitive damages awards in state court, but also that unreasonably excessive awards be overturned as a matter of substantive due process. See BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (holding that a grossly excessive punitive damages award can violate due process); Honda Motor Co. v. Oberg, 512 U.S. 415, 427 n.5, 430-32 (1994) (finding violative of due process a state constitutional provision limiting review of jury's punitive damages award).

438 The Reexamination Clause is the relevant provision that might limit the Supreme Court's ability to insist upon imposing additional requirements on the states for judicial review of jury decisionmaking.

439 See, e.g., Baldus et al., supra note 5, at 1120, 1179 (noting a consensus that, in many jurisdictions, additur and remittitur are underutilized and recommending the use of comparative data based on awards approved in other cases); Sunstein et al., supra note 6, at 2143 (recommending at a minimum that appellate and district courts continue practices of rejecting jury awards that are out of line with general practice
be implemented if the Supreme Court were to overcome its unwillingness to take fact-specific cases, by which it could provide examples of appropriate judicial supervision of juries. For example, even in diversity cases, federal courts currently police evidentiary sufficiency more rigorously than many state courts.\textsuperscript{440} They tend to follow a uniform approach by requiring that a reasonable jury be able to find for the nonmoving party based on the whole record\textsuperscript{441} (unlike some state courts), and they also likely apply their standard more rigorously than state courts that do articulate a similar standard. The Supreme Court could easily lend further support to this aspect of jury control just as it has in connection with summary judgment practice in recent years.\textsuperscript{442} In addition, to the extent that federal standards of review for evidentiary sufficiency and jury rationality may themselves be propelled by due process concerns, similar standards may be applicable to the state courts.\textsuperscript{443}

In diversity cases, the use of federal directed verdict standards that are more stringent than those applied by the states has generally been justified by characterizing the practice as procedural.\textsuperscript{444}
The federal courts' use of more demanding evidentiary sufficiency standards than state courts, however, surely has substantive effects on state law by defining the minimum proof necessary for liability—just as independent federal directed verdict standards did in the past. Indeed, the Supreme Court once characterized federal directed verdict standards as substantive and as deriving from the general common law.\textsuperscript{45} The toleration of such predictable substantive effects suggests that there are not only Article III underpinnings to federal directed verdict practice, but due process underpinnings as well.

\textit{1. The Article III Justification for Substantive Effects}

Even assuming that the federal courts' role is merely to provide a "neutral" forum, "neutrality" must be measured against some presumptive problems of the state courts. Neutrality, therefore, will tend to benefit the interests that are supposedly disadvantaged in the state courts. In federal question cases, the interests benefited by a federal forum (both overall and relative to how they are treated in state courts) are those of federal rights claimants. Article III and Congress's jurisdictional implementing statutes presuppose that the federal courts may be preferable for the vindication of federal rights, and antimajoritarian rights in particular. In diversity, those generally benefited are out-of-state parties, particularly interstate commercial actors. Here, the relevant provisions presuppose that federal courts may be preferable for protecting those parties from the possibility that local courts and juries might favor the local litigant (and perhaps the less wealthy, as noted below). In relation to local courts and juries, the interests of out-of-state parties in preserving their property from illicit transfer as defendants, or in unjustly failing to obtain judgments in their favor as plaintiffs (as in the case of early concerns for out-of-state creditors) are, as they were in the past, antimajoritarian.\textsuperscript{46}

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\textsuperscript{45} See supra notes 217–19 and accompanying text. The Supreme Court has imposed federal directed verdict standards on the states when federal causes of action were at issue. See supra text accompanying notes 362–75.

\textsuperscript{46} See supra note 38 and accompanying text.
Obviously, federal courts can no longer police against such unjust wealth transfers by displacing state substantive law or by enforcing a limited set of general law fault principles, as they did in the past. After *Erie*, the unjust wealth transfers that federal courts are permitted to prevent in diversity cases must refer to transfers from one party to another that are not authorized by some valid legislative act or common law rule of the concerned state. Part of this protection therefore takes the form of federal directed verdict standards for sufficiency of the evidence that help to ensure that the announced and applied state-law legal standards remain in fairly close proximity to one another. Such a requirement allows less room for the possibility that bias against out-of-state parties, as well as other unauthorized factors (such as relative wealth), will motivate a verdict. While a potential for unfair wealth transfer could, of course, be present in any case—even in a lawsuit between co-citizens—the provision for diversity jurisdiction specifies an area where the framers and Congress have perceived a greater risk of such possibility than in ordinary suits between co-citizens. Thus, providing for safeguards for the enforcement of state law in the federal courts beyond those that might be required in the state courts may be justifiable in light of Article III’s historic function of supplying an alternative and neutral forum for those entitled to invoke federal jurisdiction.

In the wake of *Erie*, however, it might be argued that the state courts’ willingness to allow cases involving particularly weak evidence to go to the jury merely reflects the fact that state law really imposes—or at least allows the imposition of—liability based on a loss-spreading, or even a naked wealth redistribution, rationale. If so, then the federal courts arguably ought to follow the states’ substantive law and uphold liability. 447 Federal courts, however, would have a difficult time policing the use of reprobated reasons such as out-of-stateness without being able to insist on fairly close confor-

447 See Charles E. Clark, State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins, 55 Yale L.J. 267, 289–90 (1946) (noting that if the burden of proof and presumptions are governed by state law in diversity cases, then it would seem to follow that the rules as to direction of verdicts would also be governed by state law); Note, supra note 378, at 1524–25 (noting that a state decision that a jury reasonably could find for the plaintiff “defines the cause of action with reference to that particular evidence”).
mity between announced and applied standards. As a consequence, their ability to perform their intended jurisdictional function would be greatly compromised. State courts and legislatures, moreover, remain free to change their announced standards, so long as such standards meet constitutional requirements.

2. Due Process Justification for Federal Directed Verdict Standards

Quite apart from these special concerns of Article III for federal rights claimants and out-of-state parties, the coherence between announced and applied standards is also a pervasive aspect of judicial due process. In the area of criminal law, for example, the Court in *Jackson v. Virginia* recognized that due process required that a determination of guilt must be based on evidence sufficient for a rational jury to find that the prosecution has proved the elements of a crime prescribed by state law, beyond a reasonable doubt. Requiring strict conformity between announced state law and its application in criminal trials avoids problems of unpredictable and inconsistent applications of state law, as well as criminal lawmaking by juries. The special concerns of due process for the deprivation of liberty associated with criminal liability indicate that the legislature should determine the standards in a transparent public process; neither the criminal judge nor the jury are allowed broadly to expand criminal liability in the process of applying the law.

These concerns for notice, consistency, and nondelegation are obviously greater in criminal than in civil cases. In civil litigation, liability is often based on common law rules that are not fully pre-

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448 Federalism concerns, however, might weigh against such an extension.
449 Cf. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994) (concluding that due process requires inquiry into whether a rational factfinder could have reached the verdict it did in the punitive damages context); Developments, supra note 6, at 1791-92 (noting the problem of lack of notice in the punitive damages context, despite availability of standards).
451 Id. at 316.
452 Jury nullification of law in favor of a defendant's liberty may present no due process problem, but nullification in favor of guilt clearly does. See id. at 324, 326 (holding that due process requires a guilty verdict in criminal case to be grounded in sufficient evidence for a rational fact finder to find guilt beyond a reasonable doubt); cf. *Sparf v. United States*, 156 U.S. 51, 106 (1895) (concluding that criminal jury lacked power to declare the law when rendering a verdict of guilt).
announced, slippage between announced and applied standards is more common, and juries enjoy more delegated lawmaking power than in criminal cases by virtue of their acknowledged role in law application. Perhaps state courts should be allowed to delegate to juries the power to determine liability based on reasons that diverge somewhat from announced standards. Such a delegation itself may mean that juries are not deciding cases "contrary to law," for the process by which the law is decided might be deemed part of the law. 453

The problems of predictability, consistency, and legitimacy, however, do not fully dissipate even in civil cases. 454 Additionally, the danger of reprobated reasons for a decision can remain even when litigation does not happen to involve out-of-state citizens or a federal rights claimant. Not the least of the reasons that a jury might be inclined to transfer wealth is simple "Robin Hood-ism." 455

Perhaps it could be argued that the Due Process Clause should have no special concern for wealth-motivated transfers by the state. Common-law property interests are no longer fundamental, and the jury-control mechanisms that once assisted in protecting them perhaps have no special claim (at this late date) to being constitutionalized as part of Fourteenth Amendment due process. Yet the risk to traditional property interests continues to have a special place in the jurisprudence of judicial due process. 456 Specifically,

453 Cf. Scheiner, supra note 39, at 182 (arguing that if "a state legislature has made juries the source of regulatory norms, the courts have little authority to replace jurors' economic morality with their own").

454 See Hart & Sacks, supra note 337, at 145 ("Exactly when and why the evenhandedness of law as opposed to the individualization of treatment which comes from discretion is felt to be an ingredient of justice no single or simple formula can tell."); see also Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359 (1998) (holding that too much disparity between announced and applied standards in agency adjudicative proceedings is arbitrary under the Administrative Procedure Act, despite the agency's enjoying delegated lawmaking power).

455 See Scheiner, supra note 39, at 167 n.133 (citing sources for the proposition that juries award higher damages against deep pocket defendants).

456 See Kenneth S. Abraham & John C. Jeffries, Jr., Punitive Damages and the Rule of Law: The Role of Defendant's Wealth, 18 J. Legal Stud. 415, 416 (1989) (noting that "evidence of... wealth threatens norms linked to the rule of law"); Bohlen, supra note 404, at 794 (stating that our system tries to shield the jury from consideration of comparative ability to bear loss); cf. White, supra note 17, at 111 (noting Justice Holmes's view that the judiciary should not police legislation by attempting to distinguish general from partial legislation, but rather should determine whether the
while distributive justice is now a permissible end of government, it is difficult to argue that either juries or judges should be able to accomplish such ends by way of lax judicial supervision of evidentiary sufficiency. Analogously to decisions about the rules of criminal liability, the accomplishment of wealth redistribution should be authorized, if at all, through the transparent and generalized process of legislation.  

CONCLUSION

Current dissatisfaction with the civil jury is often coupled with fatalism as to the judicial system's ability to do anything about it. Yet the whimsical nature of jury verdicts is to a large extent a wound that the judiciary has inflicted upon itself and litigants. Viewing the jury in terms of traditional Federal Courts scholarship—as an alternative decision-maker to the Article III judge—shows both the long and consistent history of extensive judicial involvement in jury decisionmaking from the early Republic up through the Lochner era, and the later movement of the New Deal Court effectively to abandon it.

Contrary to the belief of scholars and jurists, the Seventh Amendment should not present an obstacle to enhanced judicial control of juries, such as those in which federal courts once engaged. While the Amendment will obviously present limitations on certain kinds of reform, the greater obstacle may prove to be a judicial unwillingness to engage in the difficult task of immersion into and elaboration of the facts and law of quotidian cases. To be sure, deference to other decisional institutions may enhance legitimacy, as when the courts defer to legislative judgments about the rationality of economic legislation. But excessive deference to ju-

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legislature reasonably could have believed that legislation accomplished something other than the naked transfer of resources from A to B). Stringent federal directed verdict standards also help plaintiffs when their cases are overwhelming.

457 The first steps in such a direction may be visible in the Court's punitive damages determination that failure to make a judicial inquiry that is the "rough equivalent[]" of whether "no rational trier of fact could have" reached its conclusion would amount to an "arbitrary deprivation of property." Honda Motor Co. v. Oberg, 512 U.S. 415, 432 & n.10 (1994); see also Horwitz, supra note 4, at 100-01 (indicating that subsidization of economic development through the legal system rather than the tax system in the nineteenth century disguised the political choice of throwing a disproportionate share of the burdens of growth on the weakest elements of society).
ries may undermine legitimacy by delegating the primary judicial responsibility of ensuring the quality of justice.