A DIFFERENT TACK: THE CASE FOR A LEAST RESTRICTIVE MEANS REQUIREMENT FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Summary judgment has long been the bane in the Seventh Amendment's existence. From nearly the moment Federal Rule of Civil Procedure 56[2] was passed, controversy ensued over whether it intruded on the jury's role to determine issues of fact.[3] This controversy continued at more or less the same pitch for about fifty years. That summary judgment plausibly threatened the jury right was a legitimate concern. But this concern was tempered by the motion's limited use and the United States Supreme Court's own pronouncements cautioning that the motion should be granted with restraint.[4]

Things changed with the Summary Judgment Trilogy[5] of 1986, which was widely perceived to strengthen summary judgment.[6] A torrent of scholarship alleged that this invigorated version of summary judgment empowered judges to decide cases at the expense of the jury trial.[7] The Summary Judgment Trilogy was also perceived to strengthen judgment as a matter of law,[8] the less drastic of the motions.[9] Criticism of summary judgment and judgment as a matter of law culminated in the mid-2000s with scholarship that attacked the constitutional support for the motions

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[2] FED. R. CIV. P. 56(a). The current version of Fed. R. Civ. P. 56(a) provides, in pertinent part: (a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.*

[3] *See, e.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1019–21 (2003) (discussing Judge Jerome N. Frank's view in the 1940s, soon after Rule 56 was passed, that it threatened to undermine the jury's role as fact-finder).

[4] *See, e.g.*, *id.* at 1021–25 (discussing the limited role summary judgment was expected to play even by advocates of Rule 56 and the Court's modest conception of the motion).

[5] The "Summary Judgment Trilogy" refers to the Court's decisions in Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986), Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

[6] *See, e.g.*, Miller, *supra* note 3, at 1062–63 (discussing how the Summary Judgment Trilogy represented a major break with the Court's more restrained conception of summary judgment).

[7] *See infra* Part III.A.

[8] *See, e.g.*, Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 157 (1988) (arguing that the Summary Judgment Trilogy implicitly changed directed verdict doctrine to "permit judges more fact-weighing freedom than they formerly held."). "In federal practice, the term judgment *as a matter of law*" refers to both directed verdict and judgment notwithstanding the verdict. BLACK'S LAW DICTIONARY 919 (9th ed. 2009).

[9] *See infra* Part IV.C.1 (discussing how summary judgment is more restrictive of the jury right than judgment as a matter of law).

themselves.[10] These critiques received much attention, even in the national press.[11] But criticism of the motions' common law pedigree did not change them. It did not prompt the Court to reconsider its conclusions about whether the motions are constitutional or whether its reasoning was proper. Nor did it result in reforms to scale back the motions as presently constituted or to limit their use.[12] The motions continue as ubiquitous features of our litigation system.

That means the impact the motions have on the intended goals of the Seventh Amendment continues unabated. The Framers believed a civil jury deciding issues of fact instills in the litigation system the standards of common people.[13] It was designed to act as a check on the power of Article III judges, instill confidence that litigation would redress grievances, and ultimately, foster democratic participation.[14]

Overall, the Seventh Amendment is the only amendment from the Bill of Rights that could be said to attempt to directly address the enduring divide between the elite, both economic and political, and the masses. Summary judgment undermines these goals by ending litigation before the jury trial. Judgment as a matter of law does this as well, by either directing what the verdict should be or overturning the jury's verdict. Both motions also disproportionately benefit economic elites who use them against average plaintiffs with fewer resources or connections.

During the time the Court strengthened summary judgment and undermined the Seventh Amendment, the Seventh Amendment's counterparts in the Bill of Rights experienced a quite different treatment from the Court: the Court gradually deemed almost every other right from the first eight amendments of the Bill of Rights fundamental to our system of ordered liberty.[15] As a result, through the process of selective incorporation, these

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[10] *See* Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 575 (2003) (discussing the dubious support for directed verdict and judgment notwithstanding the verdict in the common law); *see* Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139, 158–60 (2007) (arguing summary judgment does not have support from common law procedures). *But see* Edward Brunet, *Procedural Justice: Perspectives on Summary Judgment, Preemptory Challenges, and the Exclusionary Rule: Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625, 1630–48 (2008) (arguing that common law-analogues support the constitutionality of summary judgment).

[11] For instance, the New York Times covered Suja Thomas's *Why Summary Judgment is Unconstitutional*. Adam Liptak*, Cases Keep Flowing In, but the Jury Pool is Idle*, N.Y. TIMES (Apr. 30, 2007), http://www.nytimes.com/2007/04/30/us/30bar.html?pagewanted=all&_r=1&; *see also* Thomas, *supra* note 10, at 158–60.

[12] Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014). Although the Court has recently proven its concern with blatant fact-finding masquerading as deciding a question of law. *See id.* at 1868 (vacating and remanding the Fifth Circuit for improperly weighing facts in affirming the district court's grant of summary judgment); *see also infra* notes 135–54 and accompanying text (discussing how the Fifth Circuit intruded on the jury's fact-finding role).

[13] *See infra* Part II.A (discussing the values protected by the Seventh Amendment).

[14] *See infra* Part II.A.

[15] *See* McDonald v. City of Chicago, 561 U.S. 742, 763 n.12 (2010) (observing that nearly every right from the first eight amendments of the Bill has been deemed fundamental and fully incorporated against the states).

rights from the Bill of Rights were held to apply against the states.[16] Of course, the Seventh Amendment remains on the outside looking in.[17] But the growth in the number of fundamental rights from the Bill of Rights also presents an opportunity. The chance that the Seventh Amendment will remain non-fundamental decreased with each additional right brought into the fold. Recent scholarship has argued that the civil jury right is fundamental,[18] and one court followed that lead, receiving national media attention.[19]

Finding that the Seventh Amendment is fundamental could lead to greater protection for the Seventh Amendment. The Court's approach to the Seventh Amendment is its most formalist approach to any right from the Bill of Rights. Unlike other rights from the Bill of Rights, the Court has never used a strict scrutiny balancing test for the Seventh Amendment. But a core belief of constitutional law is that restrictions of fundamental rights trigger strict scrutiny.[20] By now it is well known that this belief is more myth: fundamental rights are usually governed by categorical rules or less protective standards of scrutiny or balancing tests.[21] It is also true that balancing of any kind, even strict scrutiny, is currently not in vogue with the Court.[22] But even if strict scrutiny's application to fundamental rights is a myth, it is a myth that in some cases still happens to be true.[23]

Strict scrutiny still applies to some fundamental rights where a restriction directly impacts the core values the right was intended to protect.[24] So what would inspire the Court to abandon over two centuries' worth of

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[16] *See infra* Part V.A (discussing how through the process of selective incorporation fundamental rights are applied against the states).

[17] *McDonald*, 561 U.S. at 765 n.13 (noting that the Seventh Amendment remains one of the non-fundamental, fully unincorporated rights from the Bill).

[18] Suja A. Thomas, *Nonincorporation: The Bill of Rights After McDonald v. Chicago*, 88 NOTRE DAME L. REV. 159, 191–94 (2012) (applying the *McDonald* Court's factors to find the Seventh Amendment is fundamental from an American perspective and incorporated against the states).

[19] *See* Gonzalez-Oyarzun v. Caribbean City Builders, Inc., 27 F. Supp. 3d 265, 272–77 (D.P.R. 2014) (holding that the Seventh Amendment is fundamental and applies to the states); Eugene Volokh, *Does the Seventh Amendment Civil Jury Trial Right Apply to the States (and to Puerto Rico)?*, WASH. POST (Aug. 12, 2014), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/12/does-the-seventh-amendment-civil-jury-trial-right-apply-to-the-states-and-to-puerto-rico/.

[20] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (strict scrutiny applies to restrictions of fundamental rights); Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 227 (2006) (discussing the "well-worn adage" that fundamental rights trigger strict scrutiny).

[21] *See* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 872 (1994) (fundamental rights rarely trigger strict scrutiny to begin with; the Court usually applies an undue burden standard); Winkler, *supra* note 20, at 227–28 (noting the limited deployments of strict scrutiny to assess restrictions of fundamental rights).

[22] *See, e.g.*, Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment can Teach Us about the Second*, 122 YALE L.J. 852, 865 n.55 (2013) (discussing recent criticism of the traditional tiers of scrutiny by Justices Roberts and Scalia).

[23] This phrase is borrowed from C.S. Lewis after a meeting with J.R.R. Tolkien that helped convert Lewis to Christianity: "Now the story of Christ is simply a true myth: a myth working on us in the same way as the others, but with this tremendous difference that it *really happened*[] . . . ." 1 THE COLLECTED LETTERS OF C.S. LEWIS 977 (HarperCollins Publishers, Inc. ed., 2004).

[24] *See infra* note 215 and accompanying text.

formalism in favor of strict scrutiny for the Seventh Amendment? The answer is certainly not just the erosive impact of summary judgment on the civil jury trial. As will become clear in this Article, critiques of summary judgment have continued for decades without any changes by the Court to its formalist reasoning. So the most likely predicate for strict scrutiny is first, finding that the right is fundamental, and second, that the restrictions of the right directly impact its core values.

Summary judgment and judgment as a matter of law do just that when they usurp the jury's fact-finding role. Moreover, judicial procedures are supposed to satisfy the substance of the common law in order to be constitutional: that is, juries are supposed to decide questions of fact and judges are supposed to decide questions of law.[25] But the summary judgment and judgment as a matter of law sanctioned by the Court's formalist reasoning do not satisfy the substance of the common law. To the contrary, both motions accord the judge much more power to remove cases from the jury than at common law.[26] Strict scrutiny, as applied here, will limit that power. As a result, it will satisfy the substance of common law better than the procedures sanctioned by formalism.[27]

Part II briefly explains what interests the Seventh Amendment was intended to protect and why these are important to our democratic republic. It also shows how the Court has historically assessed whether the jury right has been violated compared with how it assesses other rights. Part III provides an overview of summary judgment, and judgment as a matter of law, explains how they have undermined the jury right and when they are most intrusive on the jury right. Part IV argues for a mixed category-plus-scrutiny approach to assess the constitutionality of these procedures. Part V offers justifications for requiring the least restrictive alternative means in the summary judgment and judgment as matter of law context. Finally, Part VI concludes by addressing potential arguments against the use of strict scrutiny and balancing in general to assess restrictions of the Seventh Amendment.

Summary judgment and, to a lesser extent, judgment as a matter of law, have eroded the civil jury trial. The Court's formalism is to blame for these motions. At the same time, the Court has steadily designated most of the other rights from the Bill of Rights fundamental to our scheme of ordered liberty. The Seventh Amendment is too, a fundamental right. As a fundamental right, strict scrutiny should apply, to defend it against direct restrictions such as summary judgment and judgment as a matter of law.

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[25] *See infra* notes 53–55 and accompanying text.
[26] *See infra* Part III.B.
[27] *See infra* Part V.B.

II. THE SEVENTH AMENDMENT'S IMPORTANCE

The first Section of this Part briefly describes what the Seventh Amendment protects and why it is important. Section B then describes the Court's approach to assess restrictions of the Seventh Amendment. Section C concludes with how this differs from the Court's approach to other rights from the Bill of Rights.

A. The Values It Protects

The civil jury right was revered by the founding generation. For both politicians and common people, the right was crucial to the development of the United States.[28] As Justice Story said, the Seventh Amendment was "a most important and valuable amendment[] . . . ."[29] The civil jury right traces back centuries in one form or another to England.[30] Blackstone, in his *Commentaries on the Laws of England*, called it "the most transcendent privilege which any subject can enjoy[;]"[31] and recognized it as a "principal bulwark" of liberty.[32]

The Framers believed a civil jury trial was necessary for several reasons. Perhaps most importantly, they viewed it as a check on the corrupting power of judges. A jury composed of twelve men assembled for just one case would be less susceptible to corruption or the influence of the sovereign, than a single, unelected Article III judge.[33] With a jury trial, private litigants would also know that their interests could be vindicated in litigation with the government.[34]

Moreover, with a jury composed of lay people determining questions of fact, the standards of the common people could be instilled in the litigation system.[35] Indeed, jury decisions were sought because it was believed they would affect a different result from judges.[36] The Supreme Court has echoed these sentiments, noting how valuable it is to have disputes of fact decided by the community at large.[37] Finally, a jury would also promote democratic

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[28] *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 656 (1973) (noting that both politicians and the public from the founding generation were "strongly attached" to the trial by jury in civil cases).

[29] 2 J. STORY & MELVILLE M. BIGELOW, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 544 (William S. Hein & Co., Inc. ed., 5th ed. 1994).

[30] Wolfram, *supra* note 28, at 653.

[31] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 379 (Dawsons of Pall Mall ed., 1966).

[32] *Id.* at 350 (noting with approval the multiple references to trial by jury in the Magna Carta).

[33] THE FEDERALIST NO. 83, at 484 (Alexander Hamilton) (Kathleen M. Sullivan ed., 2009).

[34] Wolfram, *supra* note 28, at 671–72.

[35] Stempel, *supra* note 8, at 166.

[36] Wolfram, *supra* note 28, at 653.

[37] *See*, *e.g.*, R.R. Co. v. Stout, 84 U.S. 657, 664 (1873) ("It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.").

values of participation and citizen access to the litigation system.[38]

There is plenty of debate over whether the jury actually does advance these values. Scholars marshal evidence that both supports and undermines the jury's ability to assess the evidence and arrive at rational decisions.[39] And whether jury participation actually instills confidence in the judicial system is unclear too.[40] But studies that may undermine what the Framers believed to be true about the civil jury are not reasons to undermine it. We owe our loyalty to the system we inherited, regardless of the empirical data.

B. The Court's Seventh Amendment Reasoning

The Framers codified their views on the importance of a civil jury right through the Seventh Amendment. It requires two things of the federal courts. First, the right to a jury trial must be "preserved."[41] Second, no court can reexamine a fact tried by a jury other than by the rules of common law.[42] The Court's approach to the Seventh Amendment has traditionally been the most formalist of its approaches to rights from the Bill of Rights. When courts use "formalist" reasoning to adjudicate a case, it is based on the belief that a legal system contains a few general principles that can settle legal questions through the rigid application of rules.[43] When formalist reasoning has been replaced by other adjudicative approaches, it is because it fails to ascertain the real-world impact or interests of the parties at stake.[44] Formalist reasoning acts on both parts of the Seventh Amendment: what claims the right covers, that is, what is "preserved," and, the kinds of judicial procedures it allows, which is usually thought of in terms of what can be "reexamined." But procedural devices are also thought of in terms of whether the jury right is "preserved" since devices like a six-person jury,[45] or whether to require unanimous verdicts[46] could deviate from what the civil jury was like at common law. Ultimately, for both parts, the Court's Seventh Amendment formalism is reflected in analogical reasoning.[47]

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[38] Stempel, *supra* note 8, at 166.

[39] *See* Miller, *supra* note 22, at 873 n.99 (citing studies that argue both sides).

[40] *See*, *e.g.*, George L. Priest, *The Role of the Civil Jury in a System of Private Litigation*, 1990 U. CHI. LEGAL F. 161, 186–90 (marshaling data to critique the view that the jury acts as a check on judicial power and aids democratic participation).

[41] U.S. CONST. amend. VII.

[42] *Id.*

[43] *See* Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 497 (1988) (defining formalism as the belief that a legal system contains only a few "general principles composed of rigidly defined concepts to generate specific legal conclusions by a logical, objective, and scientific process of deduction.").

[44] *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949–57 (1987) (discussing reasons why formalism is supplanted by balancing tests).

[45] *See* Colgrove v. Battin, 413 U.S. 149, 160–61 (1973) (using six person civil juries is permissible).

[46] *See* American Pub. Co. v. Fisher, 166 U.S. 464, 468 (1897) (requiring unanimous jury verdicts).

[47] *See* Miller, *supra* note 22, at 896 (observing that the Court's Seventh Amendment jurisprudence relies "primarily on analogical reasoning from history and common law in order to determine its applicability and scope.").

Through the "historical test," a claim recognized in an English common law court in 1791 (when the amendment was ratified) or its analog at United States common law, requires a jury trial for a plaintiff today.[48] The Court's approach here proceeds in two parts: first, the Court ascertains whether the type of action at issue is analogous to actions brought in 1791 English courts of law or courts of equity.[49] The second part, which is most important according to the Court assesses whether the remedy sought is legal or equitable.[50]

To determine whether judicial procedures like summary judgment and judgment as a matter of law are constitutional, the Court determines if the procedure satisfies the "substance" of English common law in 1791 as well.[51] By "substance" the Court does not mean that new procedures must mimic every little detail and form of the common law.[52] Rather, the Court has defined "substance" to mean that questions of law should be resolved by the court and questions of fact should be determined by the jury.[53] But, in reality, the Court just compares the new procedure to see if it is similar to the procedures used at common law.[54]

This analogical approach is formalist reasoning in its purest form: the Court confines its assessment of a new procedure to simply compare and contrast it with common law procedures. There is no consideration of the impact the Court's decision will have on litigants, the courts, or government in general. The Court has at least considered functional factors when determining whether the jury right applies in the first place, like whether the jury is capable of handling a particular question and the impact on courts.[55] But for judicial procedures, the Court has only mechanically assessed whether the procedure is sufficiently similar to common law procedures.

While the Court's touchstone for new judicial procedures may seem inadequate, we have a good idea of the power judges had at common law to prevent unnecessary trials. For one thing, common law pleading was so stringent that it kept many worthy plaintiffs from getting to trial.[56] The judge

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[48] *E.g.*, Markman v. Westview Instruments, 517 U.S. 370, 376 (1996).

[49] *E.g.*, Tull v. United States, 481 U.S. 412, 417 (1987).

[50] *Id.*; Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990) (citing Granfinanciera v. Nordberg, 492 U.S. 33, 42 (1989)).

[51] *E.g.*, Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

[52] Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

[53] *Redman*, 295 U.S. at 657 (citing Walker v. New Mexico & S. P. R. Co., 165 U.S. 593, 596 (1897)).

[54] Thomas, *supra* note 10, at 147.

[55] *See* Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970) (suggesting that the Court considers "the practical abilities and limitations of juries."); Markman v. Westview Instruments, 517 U.S. 370, 390–91 (1996) (deciding the first clause of the jury right by considering the importance of uniformity in the treatment of a given patent rather than just whether the litigant has a right to a jury at common law); *see also infra* Part VI.C (discussing the Court's limited forays into balancing).

[56] *See, e.g.*, Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 917 (1987) (discussing how the rigidity of common law pleading rules led to parties loosing on technicalities).

had the power to screen cases through trial procedures too.[57] Chief among these was the demurrer to the evidence.[58] Through this procedure, at the end of a trial, a defendant could obtain a decision on the law of the case by admitting any facts and inferences demonstrated by the plaintiff's evidence.[59]

Judges also exercised considerable control over juries by ordering new trials. The "new trial" eventually replaced the demurrer to the evidence as the main jury control device and was ordered where the "verdict was against the evidence at trial."[60] But taken together, the judge's power to decide cases through trial procedures like these was much weaker than it is today through summary judgment and judgment as a matter of law.[61]

C. The Reasoning for the Seventh Amendment's Counterparts

For other individual rights from the Bill of Rights, the Court assesses restrictions through a combination of the traditional tiers of scrutiny or other forms of balancing and categorical rules.[62] Balancing occurs when a constitutional issue is resolved by assigning values to the interests at stake and weighing them against one another.[63] Typically, this involves whether the "individual's interest in asserting a right [outweighs] the government's interest in regulating it[] . . . ."[64] The traditional tiers of scrutiny, even including strict scrutiny, are also balancing tests.[65] Strict scrutiny puts the burden on the government to prove that a restriction is both necessary and that the state's interest in the restriction is compelling.[66] The "necessity" prong requires that the law is the least restrictive method to accomplish the law's end.[67] If it is not the least restrictive means, then it is not necessary.[68] Those that argue that strict scrutiny is not a balancing test do so because they believe

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[57] Thomas, *supra* note 10, at 148–58 (discussing the variety of judicial procedures at common law).

[58] *See* Galloway v. United States, 319 U.S. 372, 399–400 (1943) (Black, J., dissenting) (describing the demurrer to the evidence as the most "prevalent" of the judicial devices at common law). *But see* Thomas, *supra* note 10, at 151–52 (arguing the demurrer to the evidence was rarely used).

[59] *Galloway*, 319 U.S. at 400 (Black, J., dissenting).

[60] *Id.* at 400 (discussing how the new trial replaced the demurrer to the evidence as the key jury control device); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 911 (1971) (describing when the new trial was ordered).

[61] *See infra* Part III.B (demonstrating how summary judgment and judgment as a matter of law result in more power for judges to take questions from juries than at common law).

[62] An exception is the Second Amendment, which the Court has thus far, banned balancing for. *See infra* note 283 and accompanying text.

[63] *See* Aleinikoff, *supra* note 44, at 945 (defining balancing).

[64] *E.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381 (2009).

[65] *See, e.g.*, Heller v. District of Columbia, 670 F.3d 1244, 1281 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("As in their original formulations, the successor strict and intermediate scrutiny tests applied today remain quintessential balancing inquiries that focus ultimately on whether a particular government interest is sufficiently compelling or important to justify an infringement on the individual right in question.").

[66] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 554 (4th. ed. 2011).

[67] *Id.*

[68] *Id.* at 556 n.17 (citing Simon & Schuster Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991)).

it results in automatic protection for the right and does not really involve an analysis.[69]

For category-based or "categorical reasoning," in contrast to balancing, the inquiry focuses only on whether the circumstances of a "case fall[] "inside certain predetermined, outcome-determinative lines."[70] In the Bill of Rights context, when the Court applies categorical rules instead of balancing, the Court classifies the facts of the case to see if they trigger or prevent the protection of a right. A declarant's statement may not be admitted against the accused without cross-examination if the statement is "testimonial."[71] A speaker may have an absolute right to speak if the speech falls within the political viewpoint category,[72] or no speech protection at all if they engage in obscenity.[73] For each example, the outcome depends on whether the features of the case fit within predetermined categories.

Still, categorical rules and balancing often work in tandem. In the free speech context, for instance, restrictions of speech categories with high First Amendment value like speech concerning matters of public concern, or self-governance, trigger strict scrutiny.[74] But for restrictions of more ordinary categories like commercial speech, the Court applies intermediate balancing because these restrictions are not as threatening to the First Amendment as restrictions of speech affecting matters of public concern.[75]

As noted in Section II.B, the Seventh Amendment is different. While it is governed by categorical rules like the law-fact distinction[76] or the public vs. private rights dichotomy,[77] the Court has never applied the traditional tiers

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[69] *See, e.g.*, Kathleen M. Sullivan, *Governmental Interests and Unconstitutional Conditions Law: A Case Study in Categorization and Balancing*, 55 ALB. L. REV. 605, 606 (1992) (contending that, in practice, strict scrutiny is a categorical rule, not a balancing test).

[70] Blocher, *supra* note 64, at 381.

[71] Crawford v. Washington, 541 U.S. 36, 68–69 (2004).

[72] *See* Blocher, *supra* note 64, at 395 (noting the categorical protection of viewpoints). *But see* Holder v. Humanitarian Law Project, 561 U.S. 1, 39 (2010) (noting an uncommon instance where a content-based restriction of political speech was upheld).

[73] Blocher, *supra* note 64, at 388–89.

[74] *See*, *e.g.*, James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 491–92 (2011) (discussing how restrictions of highly protected speech are subject to strict scrutiny, but most speech does not fall within this category); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 604 (1990) (showing the value animating First Amendment protection is the protection of public discourse). *But see* Eugene Volokh, *The Trouble With "Public Discourse" as a Limitation on Free Speech Rights*, 97 VA. L. REV. 567, 567–68 (2011) (arguing that the protection of public discourse fails to explain the Court's approach to speech restrictions).

[75] *See, e.g.*, Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 19 (2000) (arguing that commercial speech receives less rigorous protection because of its attenuation from public discourse, the animating value of the Court's First Amendment approach).

[76] *See infra* Part III.C (discussing the law-fact distinction's role in allocating decision-making between judge and jury).

[77] *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2613 (2011) (citing United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2323 (2011)). A right can be decided by Congressionally assigned legislative court, rather than by the Judicial Branch, if it is a public right, that is, if it "is integrally related to particular federal government action." *Id.* at 2610.

of scrutiny to assess the jury right. And balancing of any kind is deployed rarely.[78] And through this formalist approach, the Court has sanctioned every judicial procedure it has reviewed that takes cases from the jury including summary judgment, directed verdict, judgment notwithstanding the verdict, and a robust motion to dismiss.[79] But the most pervasive and damaging to the jury is summary judgment. Trailing closely behind it is judgment as a matter of law.

III. HOW BOTH MOTIONS UNDERMINE THE JURY RIGHT

The first Section of this Part describes the power judges have to take cases from the jury through summary judgment and judgment as a matter of law. Section B shows that judges had much less power at common law. Section C demonstrates how categories determine when the use of summary judgment is most threatening to the Seventh Amendment. Section D argues for considering the non-movant's interest in questions staying with the jury.

A. Overview of Summary Judgment and Judgment as a Matter of Law

Through Federal Rule of Civil Procedure 56, summary judgment is granted "if the movant shows that there is no genuine dispute as to any material fact and that the [moving party] is entitled to judgment as a matter of law."[80] The Court has interpreted this to mean that judgment should be granted if a reasonable jury could not return a verdict for the non-movant.[81] To raise a genuine issue of material fact, the non-movant must cite to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials[] . . . ."[82] To oppose summary judgment, the non-movant must present evidence that can be made admissible at trial.[83]

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[78] *See infra* Part VI.C (discussing the Court's limited forays into balancing for the Seventh Amendment).

[79] *See, e.g.*, Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319–21 (1902) (upholding the constitutionality of summary judgment); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1935) (upholding the constitutionality of judgment notwithstanding the verdict); Galloway v. United States, 319 U.S. 372, 396 (1943) (directed verdict does not violate Seventh Amendment); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007) (requiring that allegations must "plausibly suggest" the claim, not just be consistent with it to survive a motion to dismiss); Thomas, *supra* note 10, at 147 (arguing that the Court's approach to new procedures, that is, determining if they are like the procedures used at common law has led the Court to approve every new procedure by which a court "removes cases from [the determination of a jury] before, during, or after trials[] . . . ."); *see also* Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 261–71 (2002) (discussing how the Court has historically deemphasized the jury's role when it comes to deciding a particular trial issue and enabling judicial review of jury decisions).

[80] FED. R. CIV. P. 56(a).

[81] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

[82] FED. R. CIV. P. 56(c)(1)(A).

[83] *Id.* at (c)(2).

Early in Rule 56's history, summary judgment could be defeated even if there was the "slightest doubt as to the facts."[84] Moreover, as noted in the Introduction, the Court cautioned against using the motion for decades, and judges avoided granting it when issues of fact, such as credibility, remained.[85] But the Summary Judgment Trilogy added three new hurdles to defeating summary judgment: 1) it could be granted if "the moving party's evidence [was] sufficient to render the plaintiff's claim implausible[;]" 2) the heightened standard of proof required at trial by the substantive law would be considered when determining if there is sufficient evidence of a genuine issue of fact; and 3) a moving party could obtain summary judgment without affirmative evidence, just by showing that there was no evidence to support the nonmoving party's case.[86]

The motion for summary judgment is a pretrial motion. But the movant can renew the same arguments later in a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50, which is governed by the same standard as summary judgment; that is, the motion will be granted if a reasonable jury could not find for the non-movant.[87] The Summary Judgment Trilogy also strengthened the motion for judgment as a matter of law because it gave judges more power to weigh the facts.[88] This motion is raised in two different stages.

After the non-movant has been fully heard on an issue, but before the case is submitted to the jury, a party may bring a Rule 50(a) motion challenging whether a reasonable jury could find for the non-movant.[89] If the motion is denied, the movant can renew the same argument again in a Rule 50(b) motion after the jury verdict and entry of judgment.[90] In the Rule 50(b) motion, the movant may 1) renew its request for judgment as a matter of law; and 2) either request a new trial or join a motion for a new trial under Rule 59.[91]

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[84] *E.g.*, Arnstein v. Porter, 154 F.2d 464, 468 (2d Cir. 1946) (citing Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2d Cir. 1945)).

[85] *See* Sward, *supra* note 10, at 625–26; *see also supra* note 3 and accompanying text.

[86] *See, e.g.*, Miller, *supra* note 3, at 1041 (describing the impact of the Summary Judgment Trilogy); Suja A. Thomas, *25th Anniversary of the Summary Judgment Triology: Reflections on Summary Judgment Sponsored by Seattle University School of Law: Keynote: Before and After the Summary Judgment Trilogy*, 43 LOY. U. CHI. L.J. 499, 500–01 (2012).

[87] 11 JAMES WM. MOORE , MOORE'S FEDERAL PRACTICE § 56.04(2)(b) (Daniel R. Coquillette, et al. eds., 3d ed. 2014).

[88] *See* Stempel, *supra* note 8, at 157.

[89] FED. R. CIV. P. 50(a); MOORE, *supra* note 87, at § 56.04(2)(b).

[90] FED. R. CIV. P. 50(b). A party may only move for judgment as a matter of law under rule 50(b) if they made the same motion before submission to the jury under Rule 50(a). *E.g.*, JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES AND EXPLANATIONS 521 (6th ed. 2008). The pre-verdict motion is necessary so that the non-movant is alerted to possible defects in the case that the non-movant can correct with additional evidence. MOORE, *supra* note 87, at § 56.04(2)(b). If the movant was able to raise the motion for the first time post-verdict after the jury has already been discharged, the non-movant would have no chance to correct problems with the case. *Id.*

[91] FED. R. CIV. P. 50(b).

While summary judgment and judgment as a matter of law are governed by the same standard, the record available to the judge varies greatly between summary judgment and the motions under Rule 50.[92] At the summary judgment stage, there is only a paper record, including pleadings, depositions, and answers to interrogatories. As a result, "the full scope or subtle nuances of a case are [often] not apparent . . . ."[93]

But at the Rule 50 stage, the judge will have heard the live, public, cross-examined testimony of witnesses, and may press those witnesses for explanations to clear up any doubts.[94] That is why the judge's denial of a summary judgment motion is not considered the final word on the matter.[95] Instead, it is just a prediction at that early stage that "the evidence will be sufficient to support a verdict in favor of the nonmovant[] . . . ."[96] So while a court may deny a summary judgment motion based on the paper record, it may find ample reason to grant a judgment as a matter of law when it entertains the Rule 50 motion.

As noted in the Introduction, concerns that the motions do not respect the jury's fact-finding role were amplified after the Summary Judgment Trilogy. Critics feared that the new summary judgment and judgment as matter of law would undermine the values animating the Seventh Amendment discussed in Section II.A: preventing corruption, infusing the standards of the common people into litigation, and instilling confidence in the litigation system, unelected Article III judges, and democratic participation as a whole.

And many felt these concerns were justified by the behavior of judges following the Summary Judgment Trilogy. Commentators argued that this invigorated summary judgment led judges to grant it where issues of fact and creditability remained.[97] Others argued that judges more often "weighed" facts, the province of the jury, when granting summary judgment rather than determining whether there was insufficient evidence to raise a genuine issue of fact.[98] This seemed to confirm what the dissent in *Anderson v. Liberty* Lobby predicted would happen if the standard of proof at trial was applied at the summary judgment stage.[99] Similarly, hard data showed judges were more willing to grant summary judgment on fact-intensive inquiries that used

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[92] *See, e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250–52 (1986) (main difference between summary judgment and directed verdict is timing and record).

[93] MOORE, *supra* note 87, at § 56.04(2)(b).

[94] *Id.* at § 56.04(2)(c).

[95] Feld v. Feld, 688 F.3d 779, 781–82 (D.C. Cir. 2012) (citing Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011)).

[96] *Id.* (quoting Chemetall GMBH v. ZR Energy, Inc., 320 F.3d 714, 718 (7th Cir. 2003)).

[97] *E.g.*, Sward, *supra* note 10, at 625–26.

[98] *See, e.g.*, Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 198 n.310 (2000) (lamenting the tendency of courts to weigh evidence to decide contested fact issues).

[99] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 270–71 (1986) (Rehnquist, J., dissenting) (discussing the effect the Court's ruling will have on lower courts).

to make it to the jury.[100] Ultimately, commentators argued that cases went to the jury much less often than they did before the Summary Judgment Trilogy.[101] For many, it was difficult to escape the conclusion that the civil jury trial entered an era of decline.

B. How Things Differed at Common Law

This strengthened summary judgment is all the more striking when viewed in light of some of the judicial devices that existed at common law. As discussed in Section II.B, through the demurrer to the evidence, a party could obtain a decision on the law of the case by admitting any facts and inferences demonstrated by the opposing party's evidence. But because of the risk involved in demurring to the evidence, there was little incentive to withdraw the case from the jury before it reached a verdict. The demurring party could not present her own evidence, and would not only have to admit the truth of all the opposing party's testimony against them, "but also reasonable inferences [that] might be drawn from [the testimony] . . . ."[102]

Withdrawal of the case from the jury by the judge in this context meant the demurring party had to "stake all on the success of the motion."[103] There is no such risk involved for the party moving for summary judgment or judgment as a matter of law. If the motion for summary judgment is denied, the case proceeds to trial. And, if the motion for judgment as a matter of law is denied, the case either proceeds to the jury or the jury's verdict is undisturbed.[104] There was no danger that judges would weigh all the facts through the demurrer to the evidence either. After all, the judge only considered the opposing party's evidence and ultimately, the procedure was actually used for questions of law, not questions of fact.[105]

Moreover, as mentioned in Section II.B, if a judge found a jury verdict against the weight of the evidence, the judge would order a new trial with a new jury. The judge would never determine that the evidence was insufficient to support a jury verdict until *after* the jury actually returned a

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[100] Mollica, *supra* note 98, at 142 (using evidence from cases to show that prior to the Summary Judgment Trilogy, judges rarely adjudicated state of mind and reasonableness questions through summary judgment).

[101] *See, e.g.*, Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1945 (1998) (reviewing D.C. Circuit's summary judgment rulings over a six-month period and concluding that federal judges were more likely to grant summary judgment than earlier in the rule's history); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1330 (2005) (using evidence to show that the Summary Judgment Trilogy resulted in a decrease in trials). *But see* Joe S. Cecil, et al., *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 891 (2007) (showing evidence that summary judgment "activity" increased prior to the Summary Judgment Trilogy).

[102] *E.g.*, Galloway v. United States, 319 U.S. 372, 402–03 (1943).

[103] Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 45 n.48.

[104] FED. R. CIV. P. 50(b).

[105] Sward, *supra* note 10, at 600.

verdict.[106] And when the judge did, it was not because the judge found that the jury's verdict was unreasonable: at common law, the judge did not have the power to apply the reasonable jury test.[107] Instead, the standard applied made it much harder to find that the facts could not support a jury verdict.[108] And when the judge did so find, the remedy was still to order a new trial instead of deciding who won because that was thought to involve factual reevaluation by the court.[109] For years, the Court echoed this common law sentiment based on the belief that entering a judgment inconsistent with the jury's verdict would run afoul of the Reexamination Clause.[110] Only in rare cases would a common law judge reverse the jury's verdict for a plaintiff and enter judgment for the defendant.[111] And that was only on questions of law, not because the judge disagreed with the jury on the facts.[112] Judges simply had much less ability to decide pure questions of fact than they do today.[113]

Thus, summary judgment and judgment as a matter of law in their current incarnations undermine the civil jury trial on two different levels. First, the Summary Judgment Trilogy strengthened the motions to the point that they have more power to take cases from the jury than when they were codified through the Federal Rules. And second, judges had no such comparable power over the jury's fact-finding ability through judicial procedures at common law.

C. Some Categories Matter More

But a popular response from supporters of the motions to these charges is that actually, there is no danger that judges are intruding on the jury's fact-finding role: by definition, the motions are granted only where there is no genuine dispute of any material fact.[114] After all, as discussed in Section II.B, the Court has held that a judicial procedure satisfies the substance of the common law when the jury decides the issues of fact and the

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[106] Thomas, *supra* note 10, at 143.

[107] Sward, *supra* note 10, at 636 (observing that there was no reasonable jury standard in eighteenth century English cases).

[108] *See, e.g.*, *id.* at 579 n.34 (showing the limited ability of common law judges to order new trials when disagreeing with the jury on facts).

[109] Galloway v. United States, 319 U.S. 372, 400–01 (1943); *see also* Thomas, *supra* note 10, at 180 (noting, admiringly, the core principle of the common law that if the Court believed the evidence was insufficient, it would order only a new trial, never order judgment for the moving party upon a review of the sufficiency of the evidence).

[110] *See* Slocum v. New York Life Ins. Co., 228 U.S. 364, 423–24 (1913) (holding the Court was limited to ordering a new trial because entering a judgment inconsistent with the jury's verdict would violate the Reexamination Clause of the Seventh Amendment).

[111] Thomas, *supra* note 10, at 158.

[112] *See* Sward, *supra* note 10, at 624 (criticizing the court for finding that judgment notwithstanding the verdict was similar to procedures at common law because when jury verdicts were "subject to later decisions by the court on questions of law, the reserved questions . . . really were questions of law.").

[113] *Id.* at 636 (discussing how disputes over pure facts went to the jury at common law); *see also infra* notes 130–32 and accompanying text (defining pure fact questions); *see also infra* pp. 23–25 (discussing the *Tolan v. Cotton* case to show how much power judges have to decide pure fact questions today).

[114] Thomas, *supra* note 10, at 161.

judge decides the issues of law. Thus, if only legal questions are disposed of through summary judgment and judgment as a matter of law, there is no concern that the jury's role is usurped. The problem with this response is that there is not always a clear delineation between legal and factual questions to determine whether questions should be before the judge or the jury.[115]

But even if the Court has not perfectly demarcated legal from factual questions, courts still recognize questions as more factual or legal all the time. Judges know whether they are dealing with an abstract legal question as opposed to a mixed[116] or pure fact question.[117] Of course, the key summary judgment inquiry is whether there is an issue of fact for the jury to decide.[118] This in turn depends upon the evidence presented by the parties. The *nature* of the issue itself is not all that matters. There is a reason appellate courts review all summary judgment motions de novo:[119] once there is no genuine dispute of material fact, what remains is simply which party "is entitled to judgment as a matter of law."[120]

But the likelihood the judge is intruding on the jury's role by "weighing" facts to decide there is *no* issue of fact, increases with the "kind" of question at stake. The different kinds of questions of law and fact operate along a spectrum.[121] With a strengthened summary judgment, the location of the question determines how much the Seventh Amendment is threatened.[122]

Along the spectrum, there are three main categories of questions. The more factual a question, the more it implicates constitutional concerns if the judge, rather than the jury decides it. In contrast, the more legal a question, the less constitutional significance if the question is taken away from the jury. Furthest on the legal side of the spectrum is the "purely legal" question. If a

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[115] *See* Miller, *supra* note 3, at 1075 (discussing the lack of a clear delineation between the two categories); *see also* Pullman-Standard Div. of Pullman v. Swint, 456 U.S. 273, 288 (1982) (doubting whether the Court could fashion a rule that would "unerringly distinguish a factual finding from a legal conclusion."); Bose Corp. v. Consumers Union, 466 U.S. 485, 501 n.17 (1984) (acknowledging complexities with distinguishing between questions of law, questions of fact, and mixed questions of law and fact); Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2003) (arguing that conceptually, law and fact do not "denote distinct ontological categories[] . . . .").

[116] *See, e.g.*, Kay v. United of Omaha Life Ins. Co., 562 F. App'x. 380, 385 (6th Cir. 2014) (recognizing the questions at issue were not purely legal, "which can be asked and answered without reference to the facts of the case[,]" but instead required determining "whether a particular factual record does or does not present a genuine issue of material fact."); *see also infra* notes 125–30, 157–61 (defining purely legal and mixed questions).

[117] *See*, *e.g.*, Ortiz v. Jordan, 562 U.S. 180, 189–90 (noting that the appellate court granted summary judgment on a qualified immunity claim resolving disputed facts like the prison guard's knowledge of an assault, and of the identity of the assailant); *see also* i*nfra* notes 131–54 and accompanying text (defining pure fact questions).

[118] *E.g.*, *Kay*, 562 F. App'x at 385.

[119] *See, e.g.*, Childers v. Joseph, 842 F.2d 689, 693 (3d Cir. 1988).

[120] *E.g.*, FED. R. CIV. P. 56(a).

[121] *See* Miller, *supra* note 3, at 1082–83 (noting that there is a "spectrum" along which questions of law and fact reside and that the jury is the "master" of some).

[122] *Id.* at 1082.

judge grants either motion on this category of question, then the jury's fact-finding role is not undermined.[123] As shown in Section III.B, at common law, when questions were withdrawn from the jury or a judge reversed the jury's verdict for a plaintiff in favor of a defendant, the judge was deciding questions of law, not questions of fact. So, it could be said that this category of question has no "coverage" or protection from the Seventh Amendment.[124]

But there are few "purely" legal questions. These are abstract questions about the substance and clarity of pre-existing law.[125] The answer to the purely legal question will have general applicability to other disputes because it does not rely on the facts of the case for its resolution.[126] Examples include when the Court determined that a cabinet officer is entitled to qualified immunity instead of absolute immunity.[127] Another example is when the Court found that prisoners do not have a heightened burden of proof in alleging retaliation for protected speech.[128] In both examples, general principles of law have been expressed that will not vary with a new fact pattern.

On the opposite end of the spectrum, the gravest threat to the jury right occurs when the Court uses summary judgment to resolve disputes over historical or "pure" fact questions. Pure facts are the "who, what, when, where, and why" as it would have appeared to an "objective on-the-scene observer[;]"[129] non-physical findings, like what a person intended, knew or believed;[130] and, credibility determinations.[131] As noted above, the jury is supposed to be the master of these kinds of questions. But because summary judgment enables the judge to decide what a reasonable factual dispute is (a

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[123] *See* Thomas, *supra* note 10, at 147 n.32. Except in the sense that deciding the question on summary judgment or judgment as a matter of law removes an entire case that would ordinarily be before the jury. Craig M. Reiser, *The Unconstitutional Application of Summary Judgment in Factually Intensive Inquiries*, 12 U. PA. J. CONST. L. 195, 196–97 (2009) (arguing that the "wrongful application" of summary judgment could run afoul of the Seventh Amendment of the preservation requirement).

[124] *See* Blocher, *supra* note 64, at 387–88 (discussing how certain categories of speech-like activity do not result in First Amendment coverage or protection).

[125] Ortiz v. Jordan, 562 U.S. 180, 190 (2011).

[126] *See, e.g.*, *Stephen A. Weiner, The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1869 (1966) (defining a clear legal question as establishing the rules that apply to the dispute at hand and will also "have broad applicability to similar disputes.").

[127] *See* Mitchell v. Forsyth, 472 U.S. 511, 520–21 (1985) (holding cabinet officers are entitled only to qualified immunity).

[128] *See* Crawford-El v. Britton, 523 U.S. 574, 582–601 (1998) (determining that the appellate court erred when it "fashion[ed] a heightened burden of proof for unconstitutional-motive cases against public officials.").

[129] *See, e.g.*, Weiner, *supra* note 126, at 1870 (observing that the jury's "role is to evaluate the evidence and to reconstruct what took place, as it would have appeared to an objective on-the-scene observer.").

[130] *See, e.g.*, James B. Thayer, "*Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 152 (1890) ("[M]ere thoughts, intentions, fancies of the mind, propositions, when conceived of as existing or being true, are conceived of as facts.").

[131] *E.g.*, Elaine D. Ingulli, *Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation*, 20 VAL. U. L. REV. 145, 145 (1986).

power common law judges did not have), the jury is no master at all.[132]

Recently, in *Tolan v. Cotton*, the Fifth Circuit demonstrated just how judges use summary judgment to intrude on the jury's pure fact territory.[133] Robert Tolan claimed a police officer, Edward Cotton, used excessive force when Cotton shot Tolan.[134] When Cotton did, Tolan was unarmed and on the front porch of his parents' house.[135] Cotton arrived thinking that a car had been stolen and Tolan was behind the wheel.[136] But the officer who radioed Cotton for help incorrectly entered the car's license plate number, which matched a stolen car's plates.[137] When Cotton arrived, Tolan's parents attempted in vain to persuade both officers that both the car and the house belonged to them.[138]

Cotton ordered Tolan's mother to stand against the family's garage.[139] Tolan's mother questioned the order and the situation quickly escalated until Cotton fired three shots at Tolan, striking him three times.[140] Tolan filed suit claiming, among other things, that Cotton used excessive force against him in violation of the Fourth Amendment. The district court granted summary judgment for Cotton, holding that he did not use unreasonable force.[141] The Fifth Circuit affirmed, but on different grounds, holding that even if Cotton did violate the Fourth Amendment, he was entitled to qualified immunity.[142]

This violated the jury's fact-finding role for several reasons. To arrive at its conclusion, the court had to determine that Cotton did not violate a "clearly established right."[143] When courts assess whether force is unreasonable, the "clearly established" right is defined based on the "specific context of the case."[144] But if the context is made up of contested facts, the court cannot draw conclusions from those facts; that is up to the jury. However, the Fifth Circuit did. The court concluded that an objectively reasonable officer in Cotton's position could have believed Tolan presented an immediate threat to the officers.[145] The court reached this conclusion based on the following facts: the porch was poorly lit, Tolan's mother did not obey orders to remain calm, Tolan verbally threatened the officers, and most

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[132] *See* Sward, *supra* note 10, at 591–92 (recognizing that juries no longer decide the questions of fact juries decided at common law).
[133] Tolan v. Cotton, 713 F.3d 299 (5th Cir. 2013).
[134] *Id.* at 301.
[135] *Id.* at 303.
[136] *Id.* at 302.
[137] *Id.* at 301.
[138] *Id.* at 302.
[139] *Id.*
[140] *Id.* at 302–03.
[141] Tolan v. Cotton, 854 F. Supp. 2d 444, 477 (S.D. Tex. 2012).
[142] *Tolan*, 713 F.3d at 306.
[143] Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014).
[144] *Id.* (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).
[145] *Tolan,* 134 S. Ct. at 1865.

importantly, Tolan moved to intervene as Cotton put his hands on his mother.[146]

But each of these facts were in doubt. All of the evidence that began at the moment Cotton ordered Tolan's mother against the garage door, and ended with Cotton shooting Tolan, was in dispute. Even though the court concluded that the porch was dark, Tolan presented evidence the porch was well lit.[147] On whether Tolan's mother remained calm, Cotton presented evidence that Tolan's mother flipped her arm and told Cotton to take his hands off her after Cotton ordered her against the garage door.[148] But Tolan presented evidence that Cotton slammed his mother against the garage door when she questioned Cotton's order.[149] Also, Tolan's mother testified that she was not aggravated when Cotton ordered her against the garage door.[150]

Regarding Tolan's attempt to intervene between Cotton and Tolan's mother, the court credited Cotton's version too. Tolan, who was face down on the ground when Cotton attempted to restrain his mother, testified that he only rose to his knees, but the court seemed to accept testimony that Tolan rose to his feet and took a charging position towards Cotton.[151] Despite these conflicting facts, the court still concluded that no genuine dispute of material fact existed for whether Cotton's use of deadly force was objectively unreasonable in light of clearly-established law.[152]

This is exactly the kind of dispute over pure facts juries decided at common law.[153] As shown in Section III.B, through the demurrer to the evidence, the judge could only consider the evidence of the nonmoving party, in this case the victim, Tolan. The judge would not be able to weigh all the facts, including Cotton's side of the story. And if a jury had been allowed to return a verdict, and the judge thought it was against the evidence, all the judge could have done is order a new trial; the judge could not reverse judgment in favor of the movant. So today, when judges decide these pure questions of fact, their actions strike at a core value the Seventh Amendment was intended to protect, the fact-finding function of the jury. As a result, judges should be categorically proscribed from resolving pure questions of fact through summary judgment or judgment as a matter of law.[154]

The final category is the mixed question, which is located in the middle of the spectrum. It poses a similar, albeit less direct threat to the

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[146] *Id.*
[147] *Id.* at 1867.
[148] *Id.* at 1864.
[149] *Id.*
[150] *Id.* at 1867.
[151] *Id.*
[152] Tolan v. Cotton, 713 F.3d 299, 306–07 (5th Cir. 2013).
[153] *See* Sward, *supra* note 10, at 636.
[154] *See* Blocher, *supra* note 64, at 393–95 (discussing how restrictions of particular viewpoints are categorically banned because they strike at the core values the First Amendment protects).

Seventh Amendment than the pure fact question when adjudicated through summary judgment. What distinguishes a mixed question from the other categories is that it entails elements of both law and fact.[155] For example, the judge may determine that there is First Amendment protection when a public employee speaks as a private citizen and suffers adverse employment action. The jury may then determine what the employee said that led to the adverse employment action. But what remains is the determination that the employee spoke as a private citizen.

This is where mixed questions form. As opposed to pure legal questions that resolve general principles, mixed question findings are unique to the facts of each case: whether the speaker is speaking as a private citizen is a different assessment with each new speaker and the unique circumstances surrounding the speech. And, unlike pure fact-findings, the mixed question asks more than just what happened.

Since mixed questions blend legal interpretation with fact-finding, there is no uniform approach for the appellate review.[156] Nonetheless, many are traditionally jury questions.[157] And, the overlap between factual inference and legal interpretation makes it difficult to say with confidence that a mixed question ever truly presents a "purely legal question."[158] Resolving them rarely requires the skills unique to a lawyer either like fashioning rules that respect the separation of powers or assessing the state of constitutional law in decades past.[159]

For these reasons, as noted in Section III.A, before the Summary Judgment Trilogy, judges avoided granting summary judgment on mixed questions for fear of trampling on the jury's fact-finding role. Like pure questions of fact, if a mixed question is transformed by the judge into a legal one it is not because the question lacks factual content. It is either because

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[155] *See* BLACK'S LAW DICTIONARY 1094 (9th ed. 2009) (defining mixed questions as questions that involve elements of law and fact). Mixed questions are also referred to as "law application," "mixed questions of law and fact" or as questions of "ultimate fact." *See* MOORE, *supra* note 87, at § 56.24(5) (there is a great deal of overlap between the terms "mixed question of law and fact" and "ultimate fact"); Weiner, *supra* note 126, at 1874 (equating law application with mixed issues). Some argue that an ultimate fact is distinguishable from a classic mixed question because it "more clearly implies the application of standards of law[] . . . ." *E.g.*, MOORE, *supra* note 87, at § 56.24(5) (quoting Baumgartner v. United States, 332 U.S. 665, 671 (1944)); *see also* Sward, *supra* note 10, at 574 (distinguishing mixed questions as separate from questions of ultimate fact). An example of an ultimate fact under this definition would be a finding that defendant is negligent. MOORE, *supra* note 87, at § 56.24(5). But on the other hand, many categorize negligence as a mixed question. *See, e.g.*, Weiner, *supra* note 126, at 1878–79 (noting how courts characterize negligence); Thayer, *supra* note 130, at 169 (categorizing negligence as a mixed question).

[156] CHARLES WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 2589 (3d ed. 2008).

[157] *See* BLACK'S LAW DICTIONARY, 1094 (9th ed. 2009) (mixed questions are usually jury questions).

[158] *See, e.g.*, Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1236 (4th Cir. 1995) (observing that the appeal of a contract interpretation ruling inevitably involves important factual inquiries and is unlikely to present discrete legal issues).

[159] *See, e.g.*, Mitchell v. Forsyth, 472 U.S. 511, 530–35 (discussing the considerations of separation of powers in fashioning an immunity rule for attorney general and assessing state of constitutional law on wiretapping in 1970).

the judge has decided there is only one reasonable conclusion or because courts arbitrarily define it as a question of law.[160] Indeed, there are numerous examples of mixed questions, ranging from probable cause in malicious prosecution cases, to "citizen vs. employee speech[,]" or "fair use" in copyright cases, being treated as pure questions of law.[161] They are categorized this way even though they involve relating the law to the facts, not merely resolving general principles.

At common law, juries decided mixed questions as well. Judges had the same limited power to take mixed questions away from juries as they did pure facts: through the demurrer to the evidence, a mixed question could be withdrawn from the jury but only the opposing party's evidence would be considered by the judge. And if the judge disagreed with the jury's verdict, the most the judge could do is order a new trial.

Still, as discussed in Section II.B, to be faithful to the Court's test for whether a procedure satisfies the substance of common law, the jury is to decide facts, not facts mixed with law. The core protection of the Seventh Amendment is that juries decide questions of fact, not mixed questions. So when judges decide mixed questions through summary judgment, it threatens the Seventh Amendment. But, the threat is not as severe as when judges resolve pure questions of fact through summary judgment.

Thus, the mixed question should not result in categorical protection of the non-movant's Seventh Amendment jury interest. Nor should the mixed question trigger a categorical ban of adjudication through summary judgment or judgment as a matter of law. Instead, the judge's options should be limited when the judge determines the movant is entitled to judgment as a matter of law on a mixed question.[162]

D. Why Consider the Interests?

It goes without saying that judges do not observe these categorical boundaries. Summary judgment is granted on mixed and pure fact questions

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[160] *See* Sward, *supra* note 10, at 579 (observing that "classifying issues as fact or law is reflected in some rather arbitrary historical characterizations of adjudicatory tasks.").

[161] *See* Weiner, *supra* note 126, at 1913–14 (criticizing the treatment of probable cause in malicious prosecution cases as a legal question); Sarah L. Fabian, Comment, *Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee - Who Decides?*, 43 U.C. DAVIS L. REV. 1675, 1696–98 (2010) (criticizing circuit courts for treating the fact-intensive threshold inquiry of citizen speech versus employee speech as a question of law); Ned Snow, *Judges Playing Jury: Constitutional Conflicts in Deciding Fair Use on Summary Judgment*, 44 U.C. DAVIS L. REV. 483, 556 (2010) (criticizing modern judges' treatment of fair use in copyright cases as a pure issue of law, which used to be treated as an issue of fact).

[162] *See infra* Part IV.A (noting how restrictions of speech categories with high First Amendment value are permitted if they pass strict scrutiny, while restrictions with even stronger First Amendment value (political viewpoints) are categorically banned, and restrictions of speech-like activity with no First Amendment value (obscenity) are not covered by First Amendment protection at all).

all the time.[163] The Court does not recognize that the non-movant may have a stronger interest in a jury trial based on the question-category raised in the motion. This does not make sense. The non-movant's interest should not be ignored. As discussed in Section II.B, in other areas of the law, charges that formalist reasoning fails to grasp the impact on parties has led the Court to consider the interests at stake.

And here, there are two main critiques of the Court's formalist reasoning. First, that the Court's common law assessment of new judicial procedures has steadily undermined the jury, particularly through summary judgment and judgment as a matter of law. The second critique is the formalism underlying the Summary Judgment Trilogy. For the first critique, as discussed in Section II.B, the Court mechanically analogized to the common law to see whether summary judgment, the directed verdict, and judgment notwithstanding the verdict were similar to procedures used at common law. In this assessment of the common law, the Court failed to grasp just how much power juries held.[164] For the second critique, as shown in Section III.A, the Court erected hurdles to defeating summary judgment. In so doing, it undermined the right of many to try cases before the civil jury.

The common thread of both critiques is also the main criticism of formalist reasoning itself: the Court did not consider the impact it would have on the interest of litigants who want to try cases before the jury.[165] In upholding procedures based on the Court's assessment of the common law, it brushed aside suggestions that litigants would have less access to the jury than at common law.[166] In strengthening summary judgment, the Court dismissed the idea that many worthy plaintiffs would never see the jury.[167]

But there are two reasons why commentators likely have not advocated for balancing to replace formalism. First, because the text of the Seventh Amendment uniquely commands that the civil jury right be "preserved" as it was at common law, it would seem to preclude weighing opposing interests at stake to determine if the jury right should apply.[168] Second, and perhaps even more importantly, balancing's reputation is questionable, as some argue balancing downgrades even fundamental rights

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[163] The "*see, e.g.*," in this footnote could span the rest of this Article. For representative examples, I draw the reader's attention back to Tolan v. Cotton, 134 S. Ct. 1861 (2014) and *supra* notes 118–19.

[164] *See supra* Part III.B (discussing how summary judgment and judgment as a matter of law did not exist at common law); Sward, *supra* note 10 and accompanying text (noting arguments from Professors Thomas and Sward that summary judgment and judgment as a matter of law did not exist at common law).

[165] *See supra* notes 43–44 and accompanying text (defining formalism as rigidly applying rules without considering the real-world impact on the parties).

[166] Galloway v. United States, 319 U.S. 372, 389–90 (1943).

[167] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury.").

[168] *See* Miller, *supra* note 22, at 901 ("The Seventh Amendment textual command to 'preserve' drives the historical test[] . . . ."). *But see* pp. 61–62 (discussing reasons why the Seventh Amendment's text does *not* preclude balancing).

by evaluating restrictions with low levels of scrutiny.[169] Most commentators take the view that the Court's approach to the Seventh Amendment is more protective of the right than open-ended balancing or balancing under the traditional tiers of scrutiny would be.[170]

But balancing tests are not inherently flawed. They fail as right-protectors because the proper constraints are not worked into the test, allowing the personal values of judges to overwhelm the analysis. Thus, without the proper framework constraining judicial discretion, a balancing approach does empower courts to render the right a "nullity."[171]

To the extent the civil jury right has experienced erosion, blame cannot be placed at balancing's doorstep. After all, it is barely ever used.[172] At the same time, it cannot be said the Court's formalist approach to the Seventh Amendment has undermined the right wholesale. The historical test has actually resulted in more causes of action requiring the jury trial than were recognized at common law.[173] In view of the Court's approach to new judicial procedures, its formalist, analogical reasoning has upheld every one that takes cases out of the hands of the jury.[174]

Thus, what if instead of criticism of the reconstituted summary judgment and judgment as a matter of law on the Court's terms, summary judgment, and judgment as a matter of law were recast in terms of the litigants' Seventh Amendment interests? For other rights from the Bill of Rights, the Court recognizes that the right-holder's interest in exercising a right is greater in some cases than others. Should not the Seventh Amendment interest of a non-movant vary based on the kind of question raised in the motion?

IV. APPLICATION OF STRICT SCRUTINY

Section A of this Part explains how questions with high Seventh

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[169] *See, e.g.*, Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1185 (1988) (discussing the general problems with low level scrutiny balancing).

[170] *See* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 516–17 (1976) (arguing that an informal balancing test to determine whether a litigant has a right to jury trial constitutes "an effective judicial repeal of the seventh amendment."); Miller, *supra* note 22, at 856 (applauding the historical test as opposed to balancing under the traditional tiers of scrutiny: "[P]rocess of reasoning by historical analogy drives the Seventh Amendment inquiry in a way that far surpasses the Court's approach to other provisions in the Bill of Rights.").

[171] John S. Elson, *Balancing Costs in Constitutional Construction: The Burger Court's Expansive New Approach*, 17 AM. CRIM. L. REV. 160, 161 (1979).

[172] Miller, *supra* note 22, at 872.

[173] *Id.* ("[T]he Court's use of the historical test—and especially analogical reasoning from history—has stretched the Seventh Amendment's protections to cover far more legal controversies than a strict reading of history would permit."); *see also* Schaffner, *supra* note 79, at 256 (the Court has "safely guarded" the preservation of the right to a jury trial in cases determining legal rights).

[174] Schaffner, *supra* note 79.

Amendment value can be protected from summary judgment and judgment as a matter of law. Section B applies the first part of strict scrutiny, the compelling interest test, to both motions. Section C applies the "means" assessment to both motions. Section D concludes by summarizing how strict scrutiny will apply to both motions.

A. How Categories Can Determine the Seventh Amendment's Protection

As discussed in Section III.C, Seventh Amendment values dictate that certain categories of questions, be determined by the jury rather than the judge. Just as other rights from the Bill of Rights value certain categories covered by the right more than others.[175] As noted in Section II.C, in the First Amendment context, speech with the highest First Amendment value, such as political viewpoints, cannot be restricted. But, viewpoint neutral restrictions of speech that cover matters of public concern, are subject to strict scrutiny. Finally, speech-like activity with no First Amendment value is categorically excluded from First Amendment protection.

Likewise, the closer a question is to a pure fact, the more resolving it through summary judgment would trample on a core value of the Seventh Amendment.[176] If summary judgment is used to adjudicate disputed pure facts, then the Seventh Amendment interest of the non-movant is so high that no consideration of the government interest is warranted. As discussed in more detail in Section III.C, it should be categorically prohibited like a viewpoint restriction in the speech context. But, if the question is purely legal, then the protection of the Seventh Amendment is not triggered as the protection of the First Amendment is not for obscenity. Since there is no Seventh Amendment protection for purely legal questions for the reasons discussed in Section III.C, there is no need to scrutinize whether it is appropriate for the judge to grant summary judgment or judgment as a matter of law.

The means used by the government are scrutinized in the free speech context for the important speech categories. For instance, as noted above, a content-based restriction of speech affecting matters of public concern is subject to strict scrutiny. The analog to this speech category in the summary judgment context is the mixed question. The non-movant has a strong interest in a jury trial for these questions, so there is protection from the Seventh Amendment. But it is not as important to the Seventh Amendment that a mixed question be decided by a jury, (as discussed in Section III.C, it is diluted by the legal content) as it is with a pure fact question. Thus, the

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[175] *See, e.g.*, Jeffrey L. Fisher, Just Right?: Assessing the Rehnquist Court's Parting Words on Criminal Justice: *Categorical Requirements in Constitutional Criminal Procedure*, 94 GEO. L.J. 1493, 1496 (2006) (noting how the Court held that any "testimonial" statements requires confrontation).

[176] *See supra* pp. 347–48 (observing how the Seventh Amendment values the resolution of pure fact questions through the jury).

government may restrict it so long as the government's interest is strong enough and the means used are properly tailored.

Ordinarily, at this "sub-categorical" level,[177] the Court's approach to summary judgment diverges from the Court's approach to free speech. The individual's free speech interest increases based on the importance of the speech involved. But the non-movant's interest in a jury trial does not increase with the category of the question raised on summary judgment. As a corollary, there is no scrutiny of the "means" used by the judge to determine if they are proper. However, we have defined which questions trigger Seventh Amendment protection and for which questions it is most important that a jury decides them. As speech categories determine how restrictive the government's means used may be, this lays the path to scrutinize the means used under summary judgment and judgment as a matter of law.

B. Is there a Compelling Government Interest?

Of course, as discussed in Section II.C, the first step in assessing whether a restriction passes strict scrutiny is whether the government has a compelling interest. The political branches do not have to be the actor involved in order for a government interest to be promoted. Judicial action may advance state interests that are ultimately balanced against the individual right interest.[178] The government interest in judges granting summary judgment and judgment as a matter of law is in having autonomous federal judges who are able to efficiently dispose of cases and trim excess fat from the litigation system.[179] A related government interest is in having judges adjudicate complex questions as opposed to juries who may be prone to irrational decision-making. In other words, the government has an interest in having cases decided accurately.[180]

But a government interest in "efficiency" does not exactly rise to the level of interests one thinks of as "compelling" like combating international terrorism, or remedying specific acts of racial discrimination.[181] Still, it is conceivable that a government interest in efficiency could pass strict scrutiny.

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[177] Blocher, *supra* note 64, at 395 (discussing free speech analysis once it is determined speech is involved: "core values enables courts to accord lessened protection to covered subcategories that are not proximate to those values (a question of subcategorization) . . . .").

[178] *See, e.g.*, Ohio v. Roberts, 448 U.S. 56, 64 (1980) (acknowledging state interests served by judicial decisions interfering with confrontation rights of the accused); Morris v. Slappy, 461 U.S. 1, 14–15 (1983) (weighing the state interests served by judge's decision not to grant a continuance "in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources.").

[179] While the conventional wisdom is that summary judgment promotes efficiency, there are arguments that eliminating it could result in efficiencies as well. *See, e.g.*, Thomas, *supra* note 10, at 177–78 (arguing that eliminating summary judgment could induce parties to settle for fear of losing at trial).

[180] It is not necessarily true that judges decide questions more accurately than juries; both sides of the debate could point to studies that support or oppose that conclusion. *See* Priest, *supra* note 40.

[181] *See* United States v. Paradise, 480 U.S. 149, 167 (1987) (discussing the compelling interest in remedying past and present discrimination by a state actor); Holder v. Humanitarian Law Project, 561 U.S. 1, 29–32 (2010) (finding the U.S. government interest in combating international terrorism compelling).

For instance, the Court arguably recognized that developing rules of evidence tailored to a state's particular needs is compelling.[182] This is a state interest similar to the one motivating Rules 50 and 56.

What undermines the government's position is not necessarily the interest itself, but that the interest flouts the very purpose behind the Seventh Amendment. The Seventh Amendment was created to check judges and the sovereign, and to instill community standards into the litigation system. Ultimately, it exists to foster democratic participation. It may be true that it is more efficient to have non-jury civil trials, but the Framers did not care. Efficiency had nothing to do with enshrining a civil jury right. Both summary judgment and judgment as a matter of law promote a goal in the litigation context at odds with the goals of the Framers: the efficient disposition of cases was encouraged at the expense of the values a civil jury trial was intended to promote.

Contrast this with other compelling interests recognized by the Court and their relationship to the right is restricted. A restriction of speech to address a fleeting security interest is not necessarily the promotion of a value at odds with the values animating the First Amendment, such as the promotion of public discourse. Security is not necessarily incompatible with free speech. To the contrary, some measure of it is needed in order for people to line the streets and picket. However, the efficient disposition of issues of fact by a judge or adjudication through the civil jury, are completely contradictory aims.

One might counter then that another motivation for the Seventh Amendment was to instill confidence in the litigation system. The Court has noted time and again that a jury composed of twelve common people would more accurately decide issues of fact than just one judge.[183] But another concern is the fear of jury irrationality and bias when there may be insufficient evidence, especially in complex cases. One could argue then that new research shows judges are more likely to render accurate decisions through summary judgment than juries. But as noted earlier, the research is not conclusive on whether judges adjudicate issues more accurately than juries.[184] So this argument does not warrant judges deciding questions that juries should.

A related concern is who benefits from summary judgment? One purpose of the Seventh Amendment was to instill the standards of the

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[182] *See* Fisher, *supra* note 175, at 1507 (arguing that the balancing test crafted by the Court in *Ohio v. Roberts* used in the Confrontation Clause context was tantamount to strict scrutiny); *see also Roberts*, 448 U.S. at 64 (recognizing interests like developing the rules of evidence could justify restricting the right to confrontation).

[183] *See, e.g.*, *supra* note 37 and accompanying text.

[184] *See* Priest, *supra* note 40.

common people into the litigation system.[185] What does it say about the government interest here that summary judgment and the Federal Rules of Civil Procedure have grown to disproportionately benefit elites? As the Rules have grown more restrictive over the years, they have promoted the interests of the corporate defendants represented by multinational law firms.[186] Restrictive rules undermine the effectiveness of smaller plaintiffs' firms with less experience and resources far more than they do the large multinational law firms.[187] The Summary Judgment Trilogy continued this trend: summary judgment is more restrictive of the jury trial and less likely to be defeated when raised by corporate defendants.[188] This has serious implications for the common people who need litigation to redress injury at the hands of corporate elites.

Thus, the government's interest in summary judgment and judgment as a matter of law is dubious, not compelling. But one feature of both motions might convince the Court that the interest served by them is important enough to protect their longstanding use and the fear that invalidating them would have a chaotic impact on the federal courts. The Court has shown leeway towards longstanding traditions in other contexts even if there may have technically been a constitutional violation.[189]

One might also contend that the movant's interest in avoiding the burden of trial through summary judgment should somehow factor into the equation. As noted in Section II.B, avoiding unnecessary trials was reflected by stringent common law pleading and, by demurrer practice. By this reasoning, summary judgment serves more than just the government's interest in efficiency. It also serves the individual-movant's interest in avoiding an unnecessary trial. Typically, as noted in Section II.C, the Court balances government interests against individual interests to adjudicate constitutional disputes. But the Court has also recognized that important individual interests carried out by the government can justify restrictions of rights.[190] Indeed, on

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[185] *See supra* note 35 and accompanying text.

[186] *See* Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 505–09 (2012) (arguing that the approach towards rules of procedure has shifted from a "liberal ethos" to a "restrictive ethos"); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 51 ALA. L. REV. 529, 530 (2001) (examining activity surrounding the 2000 Amendments to the Federal Rules of Civil Procedure and finding the process substantially captured by defense interests, particularly those of product liability defendants); *see also* Jeffrey W. Stempel, *Not So Peaceful Coexistence: Inherent Tensions in Addressing Tort Reform*, 4 NEV. L.J. 337, 373 (2003) (discussing how tort reformers prefer a system emphasizing speed and cost reduction rather than accuracy and recovery for plaintiffs). Although, the small business owner could also argue that a strengthened summary judgment is an asset, since litigation is a greater financial threat than it is for large corporations. *Id.*

[187] Coleman, *supra* note 186, at 512 (arguing large corporate firms have much more "collective knowledge" and resources to boot to benefit them in litigation than small firms and solo practitioners do).

[188] *Id.* at 507 n.26.

[189] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 792 (1983) (holding that "[i]n light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.").

[190] *See* Aleinikoff, *supra* note 44, at 981 (discussing how public and individual interests are often on the same side).

rare occasions, courts have recognized that the due process interest of a litigant in avoiding a jury trial justifies restricting the Seventh Amendment interest of the opposing party.[191]

So assume for a moment that the Court grasps at enough straws to find that the government's interest served by summary judgment and judgment as a matter of law is compelling. That means both motions pass the first part of strict scrutiny. Whether the motions pass the test in full depends on how restrictive they are.

C. The Least Restrictive Alternative Means?

As discussed in Section IV.A, the kind of question raised on summary judgment determines the kind of Seventh Amendment protection. If it is a pure fact, the judge is categorically prohibited from adjudicating it through summary judgment or judgment as a matter of law. If it is a pure legal question, there is no Seventh Amendment protection. But if it is a mixed question, then there is a "means" assessment where the Court's action is assessed for its restrictiveness. Two forces contribute to the restrictiveness of the judge's action: 1) when the judgment is granted; and 2) what the judge actually orders.

1. The Record and Access to the Jury

As noted above, the record develops from just a paper record with each renewal under Rule 50 in the district court.[192] The later the decision is granted, the more the judge perceives the full scope and subtle nuances of the case based on the live, cross-examined testimony of witnesses. Thus, a trial judge's decision granting judgment as a matter of law stands a better chance of getting the decision right than a decision granting summary judgment.[193] A decision through a Rule 50 motion is superior to a pretrial decision because a "fully developed record available to a court considering a motion for judgment as a matter of law gives the court a greater opportunity to assess the matter . . . ."[194] Thus, a court is more restrictive of the non-movant's interest in having a jury decide the case when a judge grants summary judgment, as opposed to judgment as a matter of law. If the motion is granted prior to trial,

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[191] *See infra* notes 274–76 and accompanying text (discussing complexity exception to the Seventh Amendment).

[192] *See supra* notes 91–92 and accompanying text.

[193] *See, e.g.*, MOORE, *supra* note 87, at § 56.04(2)(e) (noting how a "more fully developed record available to a court considering a motion for judgment as a matter of law gives the court a greater opportunity to assess the matter.") (citation omitted). Of course, some cases have nothing but a paper record, and witnesses are just document custodians. So this "record-development" principle requires live witnesses and cross-examined testimony.

[194] *Id.*

the court's action is less justifiable than a motion granted after a jury trial.[195]

Moreover, from a purely objective standpoint, the non-movant has had the least amount of access to the jury at the summary judgment stage (none at all) as opposed to the Rule 50 stage. The less access to the jury, the less the jury's presence may impact the trial as a whole. For instance, the presence of the jury imposes on litigants a "fierce discipline" to break down complex cases and make them understandable.[196] Thus, a judge granting judgment as a matter of law later in the litigation may be indirectly affected by the jury. A summary judgment motion, granted prior to trial, has no chance of being influenced by the jury's presence.

Finally, that summary judgment is more restrictive is plain from the non-movant's perspective. Assume a plaintiff files suit against a corporation for asbestos exposure in a district with a significant history of asbestos exposure. The corporation moves for summary judgment. If you gave the non-movant-employee the choice between having a case decided by a jury or a judge, surely the non-movant would prefer the jury. But if instead the choice was between a judge who had seen only a paper record and a judge who observed the live, cross-examined testimony of company personnel, the non-movant would prefer the latter just the same.

2. The Effect of the Judge's Order

In addition to when the motion is granted, what the judge actually does with the motion determines how restrictive the court's action is. When ruling on a dispositive motion for summary judgment, the judge may either grant it, or allow the case to proceed to trial.[197] When ruling on the renewed motion under Rule 50(a), the judge may grant it or submit the case to the jury.[198] And when ruling on the renewal under Rule 50(b), the judge may: (1) uphold the jury's verdict; (2) "order a new trial; or, (3) direct the entry of judgment as a matter of law."[199]

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[195] *See* Thomas, *supra* note 10, at 176–77 (arguing that because it occurs prior to trial, summary judgment is the "least justifiable" among it, the directed verdict and judgment notwithstanding the verdict).

[196] Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 54 (1977).

[197] Both summary judgment and judgment as a matter of law may raise questions that, when granted, do not end the entire case. *See, e.g.*, Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 327 (1967) (distinguishing instances where Rule 50 motions raise non-dispositive issues and dispositive issues of law which, "must necessarily terminate the litigation."). This, of course, affects the restrictiveness calculus considerably since adjudication of a side issue does not preclude the non-movant's access to the jury for the case as a whole.

[198] FED. R. CIV. P. 50(a).

[199] FED. R. CIV. P. 50(b).

3. The Full "Means" Assessment

The timing of the motion, combined with the action the judge takes, results in different levels of restrictiveness on the non-movant's Seventh Amendment right:

> No restriction: *if the judge denies the summary judgment motion and allows the case to proceed to trial*. Then in that case, the non-movant's Seventh Amendment interest is not impacted. Nor is it if the judge entertains a renewed motion under Rule 50(a) and allows the case to go to the jury or allows the judgment on the verdict after a Rule 50(b) motion.
>
> Least restrictive*: in ruling on a Rule 50(b) motion, the judge orders a new trial*. While the jury verdict has been reversed, the court has not directed the entry of judgment against the non-movant. A new trial is a less drastic course of action because the non-movant will have another day in court with another jury and it does not run afoul of the Reexamination Clause.[200] This is also how judges dealt with jury verdicts against the weight of the evidence at common law. The judge also rendered the decision with access to the live, cross-examined testimony of the witnesses and will have a much better sense of the nuances of the case than if only the summary judgment record were available. The non-movant has had full access to the jury and the jury's presence plausibly impacted the presentation of the case to the judge.
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> Restrictive: *in ruling on a Rule 50(b) motion, the judge directs the entry of judgment against the non-movant*. The decision is based on a fully developed record, which increases the judge's grasp of the case, and the non-movant has had full access to the jury. But the judge has overturned the jury's verdict and the non-movant does not get another chance before a different jury.
>
> More restrictive: *in ruling on a Rule 50(a) motion, the judge directs the entry of judgment against the non-movant*. The non-movant never gets a decision from the jury and the difference in the record between a Rule 50(a) motion and a Rule 50(b) motion can still be substantial. While the record for both motions is superior to the summary judgment record, the judge granting a Rule 50(a) motion does not benefit from

[200] *See supra* notes 109–11 and accompanying text.

> the arguments raised in the post-verdict motion.[201] Nor will the judge benefit from the verdict itself, which can solve questions of fact against the post-verdict movant and emphasize the importance of legal issues.[202]
>
> Most restrictive: *the court grants a summary judgment motion*. The decision is based on only a paper record, and the court will not benefit from the live, cross-examined testimony at trial to heighten its grasp of the case. Most importantly, the non-movant never gets a chance to bring the case before the jury.

D. The Test in Full

To summarize, the constitutionality of summary judgment and judgment as a matter of law will depend on how restrictive of the non-movant's Seventh Amendment right, the court's action is. This depends first on the category of the question raised in the motion. Second, after it is determined, the category triggers Seventh Amendment protection, the "means" assessment ensues. The analysis would play out as follows:

1. Is the question a pure fact, pure law, or mixed question?
2. If it is a pure fact question, there is an absolute Seventh Amendment interest and there can be no judgment granted on the motion. If it is a core legal question there is no Seventh Amendment interest and the means used by the judge are not scrutinized.
3. If it is a mixed question, then the "means" assessment:
    a. Was summary judgment granted? That is most restrictive. It is also unconstitutional under strict scrutiny.
    b. In ruling on a Rule 50(a) motion, did the judge direct the entry of judgment against the non-movant? That is still restrictive, and it is unconstitutional.
    c. In ruling on a Rule 50(b) motion, did the judge direct the entry of judgment against the non-movant? Though less restrictive, it is still

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[201] *See* Unitherm Food Sys. v. Swift-Eckrich, Inc., 546 U.S. 394, 401 n.3 (2006) (discussing the benefits of post-verdict motion).

[202] *See* Johnson v. New York, N. H. & H. R. Co., 344 U.S. 48, 53 (1952) (discussing how the "verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues.").

unconstitutional.

d. In ruling on a Rule 50(b) motion, did the judge order a new trial? That is the least restrictive alternative based on the levels of restrictive action discussed above. Thus, it is the only time a Rule 50 motion is constitutional under strict scrutiny.

Requiring the least restrictive means does not simply replicate the summary judgment standard itself. It does not mean that the use of summary judgment to adjudicate pure fact disputes is unconstitutional only in some cases, as applied to some facts.[203] To the contrary, the judge no longer has the power to determine whether a reasonable jury could find for the non-movant. As noted in Section III.B, judges had no such power at common law. So judges will not under strict scrutiny. Instead, the judge's power at the summary judgment stage will be limited to recognizing what kind of question is raised in the motion. If it is purely factual, it goes to the jury. If it is purely legal, the judge has the power to grant summary judgment. If it is mixed, it likewise must proceed to the jury. As discussed above, the judge's assessment at the Rule 50(a) stage will be the same.

Finally, at the Rule 50(b) stage, as at the summary judgment stage, it is not as if the motion is only unconstitutional as applied to some facts.[204] Rather, the judge does not have the power to grant judgment as a matter of law on a question of pure fact. But unlike the other motions, the judge does have the power to overturn the jury on a mixed question. As discussed in Section III.B, if the jury's verdict is against the weight of the evidence, the judge may order a new trial as common law judges did.

One might argue that this balancing-categorical blend cannot work like it does for free speech because questions do not fit into the "fact" and "law" categories as neatly as speech fits into the "commercial" or "political viewpoint" category, as the case may be. After all, whether a question can be truly "factual" or "legal" has long vexed the Court and commentators alike.[205] But high valued speech is not always easy to disentangle from less valued speech either. Sometimes it is difficult to determine which category of speech is at stake.[206] Nonetheless, the Court still relies on speech categories to

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[203] As the plaintiff argued for the directed verdict in *Galloway*, that is, it was unconstitutional as applied only to the facts. Galloway v. United States, 319 U.S. 372, 373 (1943) ("The constitutional argument, as petitioner has made it, does not challenge generally the power of federal courts to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict."). *Id.* Galloway did not argue that the directed verdict was unconstitutional in all its applications. *Id.*

[204] *Id.*

[205] *See supra* note 116.

[206] *See, e.g.*, Blocher, *supra* note 64, at 390 (differentiating categories of speech is "rarely an easy task."); Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1180–81

determine how restrictive government action may be. More importantly, as discussed above, judges recognize whether questions are legal or factual in nature all the time, despite the academic doubts.[207] A response might be that just because judges recognize the difference between questions of law and fact that will not prevent judges from categorizing questions of fact as questions of law. But we trust judges to respond accordingly based on the category of speech restricted. By applying strict scrutiny to assess summary judgment and judgment as a matter of law, judges will incur the same obligation.

Under this approach, summary judgment would only be constitutional to adjudicate purely legal questions. And Rule 50 motions could still be raised to adjudicate a mixed question, but the most the judge can do is order a new trial.[208] This begs the question: why should the course of action described as "less restrictive" be unconstitutional? What justifies requiring the "least" restrictive means?

V. JUSTIFICATION FOR STRICT SCRUTINY

This Part offers justifications for strict scrutiny from the importance of the civil jury right, to the inability of formalist reasoning, to satisfy the substance of the common law and, finally, the danger that the Court could utilize other less protective balancing tests.

A. A Fundamental Right

What justifies disturbing the Court's entrenched formalism and applying strict scrutiny to assess restrictions of the Seventh Amendment? For

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(2012) (observing that "[i]t is often difficult to separate and identify expression that serves only individual development or only matters of societal interest, or that contributes to both.").

[207] *See, e.g.*, *supra* notes 118–19 and accompanying text (demonstrating examples of judges differentiating pure legal from mixed and factual questions).

[208] The language of Rules 56 & 50 would have to change substantially to remain constitutional under strict scrutiny. Rules 56 and 50(a) would have to reflect that the judge's power to grant the movant judgment as a matter of law is limited to purely legal questions. To comply, Rule 56(a)'s language must be changed as follows: instead of having the power to grant summary judgment when there is no issue of material fact, the language must reflect that judgment can be granted for purely legal questions only. This will require a workable definition of the purely legal category. *See supra* notes 127–30 and accompanying text (defining purely legal questions). Rule 56(c) must also be changed to the extent that citing to materials from the record is used to demonstrate there is no genuine issue of material fact. The record's use must be limited to support the movant's position on a purely legal question. Rule 50(a) likewise must represent the judge's categorical limits. Rule 50(a)(1)'s language empowering the judge to grant judgment as a matter of law when a reasonable jury would not have a sufficient basis to find for the party must be removed. As at the summary judgment stage, this power applies only on purely legal questions. Finally, subsection (3) would need to be removed from Rule 50(b) since the judge's only power is to order a new trial or allow the jury verdict to stand. Additionally, language would need to be included that acknowledges that at the 50(b) stage, judges have the power to order new trials on mixed questions only. *See supra* notes 157–61 and accompanying text (defining mixed questions). Because a movant may not bring a Rule 50(b) motion without first moving under Rule 50(a), the only instance where a judge could grant a new trial on a mixed question at the Rule 50(b) stage would be where the movant moves for judgment as a matter of law under Rule 50(a), the judge recognizes a mixed question is raised, and submits the action the jury, reserving the question for after the jury returns a verdict.

that matter, what justifies borrowing modestly from the Court's category-plus-scrutiny approach used to assess restrictions of speech? The Seventh Amendment is surely not animated by the same principles as the First. Other proposals for constitutional borrowing involve amendments that are arguably closely linked.[209] Moreover, few would argue that the civil jury right is among the "preferred rights" of our democracy like freedom of expression is.[210] Yet, more unconventional borrowing has been proposed as of late as well.[211] And, in general, borrowing from one constitutional area to help address a question in another is an essential part of constitutional decision making.[212] But the main reason this approach is justified is that the Seventh Amendment is fundamental. And restrictions that strike at the heart of a fundamental right's protection justify strict scrutiny.[213]

Fundamental rights are recognized by the Court for their role in assuring a system of ordered liberty.[214] Because of the role these rights play, they restrain not just the federal government, but the states as well. Most of the fundamental rights the Court has recognized were applied against the states through the Due Process Clause.[215] Other fundamental rights, like the implied rights to travel, and to vote, were recognized under the equal protection clause.[216] Beginning in the 1960s, the Court began to fully incorporate rights from the first eight amendments of the Bill of Rights against the states if they were fundamental from an American perspective.[217]

The Seventh Amendment has never been counted among this group.[218] It is true that the Court has recognized the importance of the Seventh

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[209] *See* Blocher, *supra* note 64, at 399–403 (addressing the textual and doctrinal links between the First and Second Amendments in a proposal to apply the Court's free speech balancing-categorical approach to Second Amendment questions).

[210] *See, e.g.*, Robert B. McKay, *The Preference for Freedom*, 34 N.Y.U. L. REV. 1182, 1184 (1959) ("[F]reedom of expression is so vital in its relationship to the objectives of the Constitution that inevitably it must stand in a preferred position.").

[211] *See, e.g.*, Miller, *supra* note 22, at 895–96 (arguing for the use of the Court's approach to the Seventh Amendment to analyze Second Amendment questions).

[212] Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 461–63 (2010).

[213] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (applying strict scrutiny to New Jersey's public accommodations law that directly and immediately affect the freedom of association); Holder v. Humanitarian Law Project, 561 U.S. 1, 25–28 (2010) (applying strict scrutiny to federal "material-support" statute); Blocher, *supra* note 64, at 395 (strict scrutiny applies to restrictions of high value speech); *See supra* note 20 (noting the central tenet of constitutional law that strict scrutiny applies to fundamental rights).

[214] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 324–25 (1937) (observing that fundamental rights are "implicit in the concept of ordered liberty[] . . . .").

[215] *See, e.g.*, Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1001 (2002) (articulating how through the doctrine of substantive due process, both rights from the Bill and un-enumerated rights deemed fundamental were applied against the states). *But see* Robert C. Farrell, *An Excess of Methods: Identifying Implied Fundamental Rights in the Supreme Court*, 26 ST. LOUIS U. PUB. L. REV. 203, 209 (2007) (arguing that implied fundamental rights are not recognized separately under the due process and equal protection clauses but based on interchangeable and equivalent reasoning).

[216] Dorf, *supra* note 215, at 962 n.35 (2002) (noting that the Supreme Court has recognized two fundamental rights for equal protection purposes: the right to vote and the right to travel).

[217] Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

[218] *See supra* note 17 and accompanying text.

Amendment in other contexts, as a "fundamental guarantee of the rights and liberties of the people[,]"[219] and for which any encroachment on it "should be scrutinized with the utmost care."[220]

But in the fundamental rights context, renowned Justices have belittled the Seventh Amendment compared with fundamental rights.[221] Justice Felix Frankfurter, for instance, did not believe any amendments from the Bill of Rights incorporated against the states.[222] But he still singled out the Seventh Amendment to illustrate the absurd results he thought "total incorporation" of the Bill the Rights would reap.[223] Justice Benjamin Cardozo emphasized the importance of the freedom of assembly, and the free exercise of religion by comparing them to the less important, civil jury right.[224] Justice Hugo Black was the leading proponent of total incorporation of the Bill of Rights against the states, which of course would include the Seventh Amendment.[225] But he believed that potential supporters of total incorporation would hesitate since it would mean the states would be bound by the Seventh Amendment.[226]

Of course, most scholars do not rank the Seventh Amendment among the fundamental either.[227] Far from considering it central to our system of ordered liberty, many scholars blame it for inefficiencies and incompetence in the litigation system.[228]

But after the Court's most recent elaboration in *McDonald v. Chicago*, on what a right needs to be fundamental, all the academic doubts

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[219] Parsons v. Bedford, 28 U.S. 433, 446 (1830).

[220] Dimick v. Schiedt, 293 U.S. 474, 486 (1935).

[221] *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 325 (1937) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)) (to abolish the Seventh Amendment is not to violate a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.").

[222] *See* Richard L. Aynes, *Constitutional Law: Charles Fairman, Felix Frankfurter, and the Fourteenth Amendment*, 70 CHI.-KENT L. REV. 1197, 1220 (1995) (discussing Justice Frankfurter's belief that the Bill of Rights did not apply to the states through the Fourteenth Amendment).

[223] *See* Adamson v. California, 332 U.S. 46, 64–65 (1947) (Frankfurter, J., concurring) ("Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars.").

[224] *See Palko*, 302 U.S. at 324–25 (comparing the jury right to more important rights like the freedom of expression).

[225] *See Adamson*, 332 U.S. at 70–72 (Black, J., dissenting) (articulating the theory of total incorporation of the Bill of Rights against the states).

[226] *See* HUGO LAFAYETTE BLACK, A CONSTITUTIONAL FAITH 36 (1968) (observing that most people "who object to complete incorporation of the Bill of Rights point to the Seventh Amendment" as objectionable).

[227] *See, e.g.*, Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74, 76 (1963) (touting selective incorporation as a method for avoiding applying the Seventh Amendment to the states); Gary S. Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479, 502 (1973) (finding it unlikely that anyone would contend the Seventh Amendment is a fundamental right).

[228] *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 184–99 (1970) (attacking the convention that lay jurors have unique fact-finding abilities since jurors are "notoriously gullible and impressionable."); Redish, *supra* note 170, at 488 (arguing that the "use of a jury in civil cases may present serious problems—most notably, delay, jury prejudice, and questionable jury competence in more complex cases.").

about the Seventh Amendment's importance are irrelevant. The *McDonald* Court laid out step by step the factors to consider, and the kinds of sources the Court would look to in order to gauge a right's importance. Applying these factors, the Court held that the Second Amendment right to keep and bear arms was fundamental to our scheme of ordered liberty, and incorporated it against the states.[229]

Applying these same factors, the Seventh Amendment passes as well.[230] For a right to be fundamental it must: 1) be a basic right that is recognized historically and by many legal systems today; 2) be a fundamental part of our nation's founding; and 3) continue to be considered fundamental at the time of the Fourteenth Amendment's ratification.[231]

Despite the *McDonald* Court's insistence that only the American perspective counts in assessing a right's importance, it looked to other traditions when it considered the right to keep and bear arms.[232] It supported its conclusion that self-defense is a basic right with two different observations. First, that it is an ancient right, recognized in the Jewish, Greek, and Roman legal systems.[233] And, second, it is recognized by many different systems in the present day.[234] The right to a civil jury trial's historical pedigree is just as strong. While its origins do not trace back as far as antiquity, it was in use in one form or another in England for centuries, as discussed in Section II.A. And, different legal systems protect a civil jury trial right today.[235]

To be a fundamental part of our nation's founding, the Court depended on a number of factors. These included: 1) its importance in the English common law and the pre-ratification colonies; 2) its importance to the ratification of the Constitution; and 3) how renowned commentators in the colonial period viewed the right.[236] To assess the first factor, the Court noted the praise Blackstone heaped on the right to bear arms when he asserted it was "one of the fundamental rights of Englishmen[] . . . ."[237] But as noted in Section II.A, Blackstone reserved grander praise for the right to a civil jury trial, calling it "the most transcendent privilege which any subject can enjoy" and recognized it as a "principal bulwark" of liberty. The right to a civil jury

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[229] McDonald v. Chicago, 561 U.S. 742, 778 (2010).

[230] For another argument applying the *McDonald* factors and finding that the Seventh Amendment is fundamental and incorporated against the states, *see* Thomas, *supra* note 18, at 184–85 (applying the *McDonald* Court's factors to the Seventh Amendment).

[231] *McDonald*, 561 U.S. at 767–79 (establishing a three-factor test for a fundamental right).

[232] *Id.* at 763–64 (discussing the effect on the Court's approach to incorporation after the Court in Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968) held that whether a right is fundamental depends on whether, it is necessary to "an Anglo-American regime of ordered liberty.").

[233] *McDonald*, 561 U.S. at 767 n.15 (citing the right to self-defense in the Jewish, Greek, and Roman legal systems).

[234] *Id.* at 767.

[235] *See* NEIL VIDMAR, WORLD JURY SYSTEMS 421 (2000) (discussing the presence of civil jury systems in foreign legal systems).

[236] McDonald v. Chicago, 561 U.S. 742, 767–69 (2010).

[237] *Id.* at 768 (citing District of Columbia v. Heller, 128 S. Ct. 2783, 2798 (2008)).

trial was widely supported among the colonists before ratification as well, protected in one way or another in each of the thirteen original states formed after the outbreak of hostilities with England.[238]

Inclusion of the jury trial right was also essential to the ratification of the constitution. As the fear that the federal government would disarm the people gripped the ratification debates,[239] the lack of a guarantee of the civil jury trial nearly derailed ratification.[240] Antifederalists argued that ratification of the original Constitution would abolish the civil jury trial.[241] Thus, they were just as vociferous in their support for its protection in the Constitution as they were the right to keep and bear arms. In fact, the Seventh Amendment as we know it was generated by the Antifederalists so that its inclusion was the lynchpin to ratification.[242] Moreover, despite arguments of the Antifederalists to the contrary, Federalists revered the civil jury trial too. The Federalist response to Antifederalists concern that the civil jury right would be stripped by the new government was similar to its response to Antifederalist concerns about the right to keep and bear arms. Federalists argued that the constitution protected the civil jury right,[243] not that "the right was insufficiently important to warrant protection . . . ."[244]

Alexander Hamilton claimed to hold the civil jury right in equal regard to the Antifederalists.[245] It is true that Hamilton did not recognize a causal link between the civil jury right and freedom, as the rhetoric of Antifederalists suggested they did.[246] But he still believed that a jury assembled for just one case was less susceptible to government influence than a single judge[247] and considered it an "excellent method of determining questions of property[] . . . ."[248]

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[238] *McDonald*, 561 U.S. at 769 (noting state support for the right to keep and bear arms before ratification); Wolfram, *supra* note 28, at 655 (assessing the protection of the civil jury right in the states after the outbreak of hostilities with Great Britain).

[239] *McDonald*, 561 U.S. at 768 (discussing Antifederalist concerns that the new government would disarm the people).

[240] *See, e.g.*, Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) (observing that the failure to include a provision for the protection of civil juries was a "prominent part of" opposition to ratification of the Constitution).

[241] Wolfram, *supra* note 28, at 672 n.89.

[242] *See* STORY & BIGELOW, *supra* note 29, at 544 (noting the Seventh Amendment weakened opposition to the Constitution by taking away one of the strongest points of attack on it).

[243] *See* Wolfram, *supra* note 28, at 670 n.85 (noting federalist arguments that the Constitution safeguarded the civil jury trial right).

[244] *See McDonald*, 561 U.S. at 769 (discussing the federalist response that the constitution protected the right to keep and bear arms).

[245] THE FEDERALIST NO. 83, *supra* note 33, at 379 (Alexander Hamilton) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury[] . . . .").

[246] *Id.* (observing that discussion of the link between the jury trial and freedom from oppression "would be more curious than beneficial[] . . . ."); Wolfram, *supra* note 28, at 670 n.85 (discussing Antifederalist Patrick Henry's view of the threat to liberty by the loss of the civil jury trial, but suggesting that arguments like these obscure the real substance of the arguments being made in favor of the civil jury trial).

[247] THE FEDERALIST NO. 83, *supra* note 33, at 486 (Alexander Hamilton).

[248] *Id.*

The states at large also supported the jury right as they did the right to keep and bear arms.[249] Near the time of ratification, "[e]leven of the fourteen states protected the . . . jury trial right."[250] Moreover, some of the same founding era legal commentators who strongly supported the right to keep and bear arms, supported the jury right.[251] For instance, as Justice Story deemed the right to keep and bear arms "the palladium of the liberties of a republic[,]"[252] he held the jury trial in similar regard, calling it "a most important and valuable amendment[] . . . ."[253]

Finally, the civil jury right was still considered fundamental when the Fourteenth Amendment was ratified. The *McDonald* Court devoted much of its analysis here to show that the protection of freed slaves, (the impetus behind the Fourteenth Amendment) was furthered by the right to keep and bear arms.[254] It must be conceded that the protection of the civil jury right was not the difference between life and death for freedmen enduring Southern terror as the *McDonald* Court portrayed the protection of the right to keep and bear arms to be.

But its importance to freedmen, albeit indirect, was critical nonetheless. The Framers of the Fourteenth Amendment intended to protect people freed from slavery. This included the protection of their property, which required the civil jury trial right.[255] Without the ability to bring a suit with a jury trial right for violation of their property rights, property rights for freed people could be "illusory."[256] The jury trial may also be the preferred method to enforce other fundamental rights because of the jury's stronger insulation from government influence than judges.[257] More direct evidence of the jury trial right's fundamental status is demonstrated by its protection in the states at the time of the Fourteenth Amendment's ratification. While the right to keep and bear arms was protected in twenty-two of the thirty-seven state constitutions,[258] the civil jury right was even more widely protected. The constitutions of thirty-six of thirty-seven states guaranteed civil juries.[259]

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[249] *McDonald*, 561 U.S. at 767 (discussing the thirteen states that had constitutional provisions protecting the right to keep and bear arms around the time of ratification).

[250] Thomas, *supra* note 18, at 192 (canvassing states around the time of ratification that protected the jury right).

[251] *See McDonald*, 561 U.S. at 769 (discussing founding era legal scholars' support for the right to keep and bear arms).

[252] *Id.* at 770 (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1890 (1833)).

[253] STORY & BIGELOW, *supra* note 29, at 544.

[254] *See McDonald*, 561 U.S. at 773–74 (discussing how the right to keep and bear arms protected freed slaves from southern violence).

[255] Thomas, *supra* note 18, at 193.

[256] *Id.*

[257] *Id.* at 193–94; *see also supra* note 33 and accompanying text.

[258] *McDonald*, 561 U.S. at 777.

[259] *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 77 (2008) (discussing civil jury provisions in state constitutions).

Thus, because the civil jury right is a basic right, fundamental to our nation's founding and when the Fourteenth Amendment was ratified, it is a fundamental right. But as noted in the Introduction, fundamental rights do not necessarily trigger strict scrutiny. What other reasons support its use then?

B. Strict Scrutiny Satisfies the Substance of Common Law Better than Formalism

One might also contend that strict scrutiny is not as protective of the right as this Article argues. It is still a balancing test, and as noted in Section III.D, balancing is alleged to be incapable of protecting even fundamental rights. The Court has echoed this sentiment in its recent decisions barring balancing for the Second Amendment.[260] Moreover, Seventh Amendment commentators have long believed that the Court's formalist analogical reasoning is more protective than a balancing test would be.[261]

But how could the protection resulting from the Court's formalist reasoning used to assess judicial procedures be stronger than strict scrutiny? The category-plus-scrutiny approach borrowed from free speech almost never upholds restrictions of core speech.[262] But the Court's formalist assessment is wrong, time and again, by upholding judicial procedures that undermine the civil jury trial. As discussed in Section II.B, under this approach the Court mechanically analogizes to the common law to see whether the motion is similar to judicial procedures at common law. In so doing, the Court has upheld every single motion that has taken cases out of the jury's hands.[263]

And for the motions at issue here in particular, there is strong evidence they do *not* satisfy the substance of common law at all. Each of the Court's twentieth-century decisions upholding summary judgment, directed verdict, and judgment notwithstanding the verdict, are deeply flawed.[264] As discussed in Section III.B, at common law, summary judgment did not exist. A judge would not consider whether all the evidence was sufficient to support a jury verdict until *after* a jury rendered a verdict. Nor could judges apply the reasonable jury test to take questions of fact from the jury. And, where questions were withdrawn from the jury, they were really questions of law. Judges could also not determine who won, if the judge thought the evidence was against the jury's verdict. Instead, a new trial would be ordered with a

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[260] *See infra* Part VI.A.

[261] *See supra* note 172 and accompanying text.

[262] *See* Weinstein, *supra* note 74, at 492 (restrictions of highly protected speech are subject to strict scrutiny, but most speech does not fall within this category). *But see* Holder v. Humanitarian Law Project, 561 U.S. 1, 25–28, 39 (2010) (uncommon instance where a content-based restriction of political speech was upheld).

[263] *See supra* note 81.

[264] *See supra* note 81 and accompanying text (listing each decision).

whole new jury.

As discussed in Section III.B, judgment as a matter of law motions do not have sound basis in the common law either. The Court deemed the directed verdict constitutional even though the procedure it analogized to at common law, the demurrer to the evidence,[265] only took truly legal questions from the jury. The procedure was not used to take pure questions of fact away from the jury. Likewise, the Court deemed judgment notwithstanding the verdict constitutional[266] even though when jury verdicts were subject to later decisions by common law courts on questions of law, the reserved questions really were questions of law as well. So that now, judges decide fact questions on judgment notwithstanding the verdict that juries would have at common law.[267] This willingness to ignore or misinterpret the common law is not simply a twentieth-century problem, either. For instance, throughout the nineteenth century, the Court approved expanding the use of directed verdict without ever considering the constitutional basis of the procedure in any depth.[268]

All this points to one of two conclusions: 1) the Justices have proven incapable of correctly analogizing to the common law;[269] or 2) formalist reasoning is the wrong doctrine to satisfy the substance of the common law. Either way, however paradoxical it may seem, the strict scrutiny advocated here to limit the judge's ability to grant summary judgment and judgment as a matter of law would actually satisfy the substance of common law *better* than the procedures formalism sanctioned.

That is because, as discussed in more detail in Section IV.D, a judge may grant summary judgment and judgment as a matter of law only on purely legal questions. A judge will not have the power to grant judgment on pure fact and mixed questions by applying the reasonable jury test. Second, under strict scrutiny, it is true that judges can overturn jury verdicts through a Rule 50 motion on mixed questions. This means that judges can still potentially weigh the facts involved. But as at common law, the most the judge can do is order a new trial if the judge believes the jury's verdict is against the evidence.

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[265] *See* Galloway v. United States, 319 U.S. 372, 390 (1943) (discussing the directed verdict's similarity to the demurrer to the evidence); Sward, *supra* note 10, at 599 (discussing the *Galloway* Court's comparison of the demurrer to the evidence to the directed verdict).

[266] *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1935) (upholding the constitutionality of judgment notwithstanding the verdict).

[267] Sward, *supra* note 10, at 624.

[268] Renée Lettow Lerner, *The Failure of Originalism in Preserving Constitutional Rights to Civil Jury Trial*, 22 WM. & MARY BILL RTS. J. 811, 866 (2014).

[269] Justice Brennan recognized the Court's shortcomings in analogical reasoning in determining whether the jury right is triggered. *See* Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry, 494 U.S. 558, 575–77 (1990) (Brennan, J., concurring) (discussing the difficulty the Court has in comparing "the substantive right at issue to forms of action used in English courts 200 years ago" in deciding whether the jury right applies).

C. Other Balancing Could Prove Fatal

Another argument for strict scrutiny is that it is a much better alternative than the kind of balancing that could be deployed in Seventh Amendment cases. The *Mathews* balancing test could be that test. It weighs: 1) the importance of the interest at stake; 2) the risk of a mistaken deprivation of the interest because of the procedures used; 3) the probable value of added safeguards; and 4) the government's interest.[270] But the test's use in civil cases involving private litigants[271] demonstrates that it could be used to assess whether the Seventh Amendment deprives litigants' procedural due process rights. Indeed, some courts have done just that. For instance, in *In re Japanese Electronic Products Antitrust Litigation* the court held that denial of the jury right might be necessary to minimize the risk of erroneous decisions in complex cases.[272] The court recognized that the historical test required the jury for the claims involved.[273] But the court still held that the competing due process interests resolved the balance against the Seventh Amendment.

It is true this was a rare, brazen departure from the historical test. The Supreme Court never adopted this approach.[274] But commentators have also argued for the consideration of modern social goals like efficiency to limit the jury trial right.[275] Views like these, and like that of the court in *In re Japanese Electronic Products Antitrust Litigation* demonstrate how the wrong kind of balancing could emasculate the Seventh Amendment. Indeed, one commentator applauded the heightened pleading standard fashioned by the Court in *Bell Atlantic Corp. v. Twombly*, as a logical extension of the *Mathews* balancing test.[276] But however strong a litigant's interest in avoiding discovery, there are compelling arguments that the *Twombly* standard violates the Seventh Amendment too.[277]

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[270] Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (delineating three-part test to assess whether procedural due process rights were violated).

[271] Andrew Blair-Stanek, *Twombly is the Logical Extension of the Mathews v. Eldridge Test to Discovery,* 62 FLA. L. REV. 1, 12 (2010) (discussing how the Court in Connecticut v. Doehr, 501 U.S. 1 (1991) applied the *Mathews* test to two private litigants).

[272] *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1084 (3d Cir. 1980); Joseph P. Musacchio, *Federal Courts—A Due Process Limitation on the Seventh Amendment Right to Jury Trial in Complex Civil Litigation—In re Japanese Electronic Products Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980)*, 3 W. NEW ENG. L. REV. 547, 549–50 (1981) (noting how the court articulated a complexity exception to the Seventh Amendment to protect due process values such as promoting rational decision-making).

[273] *In re* Japanese Elec. Prods. Antitrust Litig., 631 F.2d at 1079 (acknowledging the claims in the case for treble damages under antitrust and antidumping laws to be legal in nature).

[274] *See supra* notes 47–52 and accompanying text (discussing the Court's current formalist approach to the Seventh Amendment).

[275] *See* Redish, *supra* note 170, at 489 (advocating a strict historical test since the jury trial is inefficient and limiting it, would promote "modern social goals").

[276] *See* Blair-Stanek, *supra* note 271, at 17 (arguing the *Twombly* Court recognized that misused discovery can deprive litigants of property and liberty interests under the *Mathews*' test).

[277] *See* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1867–71 (2008) (analyzing the constitutional concerns caused by *Twombly*).

Of course, there is nothing to suggest that the Court is willing to recast the Seventh Amendment in terms of the due process rights of the litigants. But, it is possible. So, if the balancing void is to be filled, it should be with strict scrutiny, a test that protects the Seventh Amendment right. And here, strict scrutiny does not just result in automatic protection of the right as some argue strict scrutiny does in other contexts.[278] The non-movant's Seventh Amendment interest is not categorically protected when motions for summary judgment or judgment as a matter of law are raised. Through strict scrutiny, the non-movant's interest in a civil jury trial actually can be restricted. Thus, there really is a method of analysis that involves both assessing the category at stake and what means are appropriate given the category.

The Seventh Amendment's fundamental status, the failures of formalism, and the poor alternative balancing tests should convince the Court of the wisdom of strict scrutiny. Of course, it is no accident that the Court's approach to the Seventh Amendment is its most formalist and that the Court has eschewed balancing. Are there strong reasons why balancing cannot be used? Is the Seventh Amendment encoded with an aversion to balancing?

VI. ARGUMENTS AGAINST STRICT SCRUTINY

This Section addresses potential arguments against balancing for the Seventh Amendment and whether there is another explanation for why the Court does not ordinarily balance for Seventh Amendment cases.

A. The Second Amendment's Inoculation

A strong argument against balancing is based on the right the Court most recently designated fundamental, the right to keep and bear arms.[279] While declaring the right fundamental, the Court has rejected balancing of any kind to assess restrictions of the right.[280] Since this Article argues that the Seventh Amendment is fundamental, perhaps the Court has embarked on a new experiment where fundamental rights must preclude balancing of any kind. One might argue that important rights do not need balancing: the Court has demonstrated that categorical approaches will do. But despite the Court's proscription, circuit courts generated a mishmash of balancing approaches to assess state gun restrictions.[281] Leading commentators chalk this up to the incompatibility of the Court's test to assess restrictions of the Second Amendment. While on the one hand forbidding balancing in favor of an historical assessment, the Court accepted some existing gun regulations that

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[278] *See* Sullivan, *supra* note 69, at 605–07 (arguing strict scrutiny results in categorical protection of the right at stake).

[279] *See supra* note 231 and accompanying text.

[280] Miller, *supra* note 22, at 868 n.67 (discussing the Court's rejection of balancing for the Second Amendment).

[281] *Id.* at 866–71 (cataloguing the balancing tests produced by the circuit courts including, most frequently intermediate scrutiny, and a "mixed category-plus-scrutiny approach.").

did not exist when the Second Amendment was passed.[282] As a result, lower courts naturally drifted towards interest-based justifications for gun regulations.

But those courts did not *have* to balance. Other courts took purely categorical approaches to whether a gun restriction violated the Second Amendment.[283] Thus, balancing cannot be explained simply by the incompatible features of the test. Another commentator's assessment cuts directly to the heart of the matter: even though the Court forbade balancing, it "is inevitable as courts grapple with the scope of the right[] . . . ."[284] The common thread of all fundamental rights, including the right to keep and bear arms, is that courts grapple with the right's scope. And adjustments to the scope of the right are made through balancing. It is only a matter of time before the Court itself yields to the same pressure to weigh the interests at stake.[285] So the Court has not developed a new insight into the nature of important rights and balancing. Balancing is still used for important rights and can be for the Seventh Amendment, which as discussed, is fundamental.

B. The Government vs. Individual Paradigm is Missing from Seventh Amendment Cases

Another argument against balancing is that restrictions of the Seventh Amendment do not present the classic "government vs. individual" case. The Court's power of judicial review is used to assess acts of the political branches.[286] As a corollary, balancing tests often assess the government's interest in regulating a right vs. the individual's interest in exercising it.[287]

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[282] *See, e.g.*, Eugene Volokh, *The Second Amendment and the Right to Bear Arms After D.C. v. Heller: Implementing the Right To Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1482 (2009) (describing the difficulty of applying the *Heller* Court's test); Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 731 (2012) ("Although Justice Scalia's opinion in Heller characterized disarming felons as a longstanding tradition, federal law did not disqualify any felons from possessing firearms until 1938 and did not disqualify nonviolent felons until 1961."); Miller, *supra* note 22, at 866 (describing the difficulty of applying a "test that can simultaneously remain faithful to history, keep judges from balancing, and justify the existing set of presumptively lawful regulations.").

[283] *See* Miller, *supra* note 22, at 867 (discussing the categorical approach taken by the court in Nordyke v. King 563 F.3d 439 (9th Cir. 2009)).

[284] Blocher, *supra* note 64, at 407 n.142.

[285] Other courts have used balancing in the midst of transformative Second Amendment decisions. *See* United States v. Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (breaking with federal court precedent and construing the Second Amendment to protect an individual right to bear arms). With a newly christened individual right at stake, the *Emerson* court suggested it would use something like strict scrutiny to assess future gun restrictions. *See* Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 690 (2007) (discussing the *Emerson* Court's use of strict scrutiny rhetoric). And, of course fierce opposition to balancing in one case does not signal opposition to balancing in another. For instance, Justice Thomas joined the *Heller* majority's proscription against balancing, but has advocated balancing elsewhere. *See* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410 (2000) (Thomas, J., dissenting) (advocating application of strict scrutiny to regulations of campaign contributions).

[286] *E.g.*, Marbury v. Madison, 5 U.S. 137, 177–78 (1803).

[287] *See supra* note 64 and accompanying text.

But many of the restrictions of the Seventh Amendment are judge-made.[288] For instance, a judge decides whether to take a case out of the jury's hands if a reasonable jury could not find for the non-movant.[289] The issue then is not whether legislation infringed on the jury right, but whether the judge did. So by this logic, the reasonable jury standard, as with other Seventh Amendment restrictions, is a judicial device for which balancing is not appropriate.

This argument fails because there are plenty of balancing tests the Court applies to judicial action, not policies from the political branches. For instance, the procedural fairness prong of the personal jurisdiction test is just that kind of balancing test.[290] In the fundamental rights context, the Court has balanced to review judicial decisions on granting continuances, whether to allow hearsay or require that a criminal trial be open to the public, among other judicial action.[291]

As a constitutional matter, accepting the notion that judicial action is not really government action would permit courts to impact legal rights and hide behind the fact that it does not emanate from the political branches.[292] These arguments also ignore the fact that there are restrictions of the Seventh Amendment via the policy-making branches. While Congress has never admitted its intention to constrain the jury,[293] it has enacted statutes that have had just that effect.[294]

Finally, since the jury is a distinct entity within the judiciary, the Seventh Amendment arguably sets the stage for a kind of intra-branch balancing assessment between judge and jury, rather than an individual vs. government model. Suja Thomas has taken this view one step further, advocating that the jury be viewed as a separate branch all together.[295] So for the Seventh Amendment, that would mean that if there was to be any balancing, it would not be between the individual litigant and the state, but some construction of the jury itself and the judge. Indeed, as discussed above,

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[288] *See, e.g.*, Sward, *supra* note 10, at 575 (noting how a series of Supreme Court decisions reoriented power away from civil juries in favor of judges).

[289] *See supra* note 83 and accompanying text.

[290] *E.g.*, World-Wide Volkswagen v. Woodson, 444 U.S. 286, 292 (1980); Kulko v. Superior Court, 436 U.S. 84, 97 (1978).

[291] *E.g.*, Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984); *see supra* note 179 and accompanying text.

[292] *See generally* INS v. Chadha, 462 U.S. 919 (1983) (acts that impact legal rights must fulfill requirements of bicameralism and presentment).

[293] *See, e.g.*, JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 539 (4th ed. 2005) ("[T]he Supreme Court has not yet been faced with the situation in which Congress has expressed a strong preference for nonjury trial and has provided reasons supporting that preference. Read more narrowly, then, the cases do not foreclose the possibility that Congress can provide for a statutory cause of action that is not purely equitable to be enforced in the district courts without a jury trial.").

[294] *See* Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in NonArticle III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 417 (1995) (noting instances where congress assigned questions away from jury to non-article III proceedings).

[295] Thomas, *supra* note 86, at 513–15; Suja A. Thomas, *The Other Branch: Restoring the Jury's Role in the American Constitution* (forthcoming).

the Framers believed participation on juries would foster democratic participation. So members of a jury who would otherwise hear a case are denied the chance for civic engagement when no jury is impaneled. Thus, the jury's interest in democratic participation could be weighed against the judge's interest in determining whether trial is necessary.[296] But this "jury vs. judge" mode of analysis should not prevent balancing either. In other contexts, the Court has balanced the interests between different branches as well.[297] Either way you slice it, there is nothing unique about the restrictions of the Seventh Amendment, or the judge-jury arrangement, which precludes balancing.

C. The Seventh Amendment's Text is "Balancing-Averse"

Another argument against strict scrutiny is that the Seventh Amendment's text is averse to balancing. In this vein, some commentators argue that amendments with narrow, and unequivocal text are averse to balancing, while ambiguous and less absolute text predisposes the right to balancing.[298] This breakdown does not always lead commentators to consistently categorize a right as belonging to one group or the other.[299] And some even dispute the idea that one kind of right could be more predisposed to balancing than another.[300] Nonetheless, commentators often characterize the same rights as either "prone" or "averse" to balancing.[301]

Examples of balancing-prone text include the Fourth Amendment's reasonableness requirement, the Speedy Trial Clause, and the Cruel and Unusual Punishment Clause.[302] What links these together are the ambiguous adjectives that act as constraints on the government.[303] A search and seizure must be "reasonable," a criminal trial must be "speedy," and punishment may not be "cruel and unusual."[304] But it is not clear from the text what is

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[296] *See supra* Part IV.B (discussing government interests in summary judgment).

[297] *See, e.g.*, Nixon v. Adm'r of General Servs., 433 U.S 425, 443 (1977) (balancing between the President and Congress).

[298] *See, e.g.*, Elson, *supra* note 171, at 167–69 (assessing the predisposition to balancing of each right on a continuum, ranging from the most prone to balancing (vague and general rights) to the least (rights narrowly defined or linked to specific historical circumstances)); William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 116 (1982) (discussing how absolute text renders balancing of the interests "irrelevant").

[299] Elson, *supra* note 171, at 168 ("The vagueness, even more than the generality, of the first amendment's prohibition against abridging freedom of speech has required interest balancing . . . ."); Blocher, *supra* note 64, at 401 (the "exceptionally crisp and unambiguous[]" language of the First Amendment predisposes it to rule-based reasoning rather than balancing) (quoting Van Alstyne, *supra* note 298, at 110).

[300] *See, e.g.*, Aleinikoff, *supra* note 44, at 995–96 (arguing against the notion that certain text is more predisposed to balancing than other text).

[301] *See, e.g.*, Van Alstyne, *supra* note 298, at 116 (describing the First Amendment as averse to balancing); Blocher, *supra* note 64, at 401; Elson, *supra* note 171, at 168 (describing the reasonableness requirement in the search and seizure clause as prone to balancing); Fisher, *supra* note 175, at 1523.

[302] *E.g.*, Fischer, *supra* note 175, at 1523; Blocher, *supra* note 64, at 401 n.114.

[303] Van Alstyne, *supra* note 298, at 111; Fisher, *supra* note 175, at 1523.

[304] U.S. CONST. amends. IV, VI, VIII.

reasonable, speedy, or cruel and unusual.[305] Because these adjectives are not self-defined,[306] courts naturally balance the interests at stake to help fill in the gaps.

Examples of balancing-averse text, on the other hand, include the Free Speech Clause: Congress "shall make no law . . . abridging the freedom of speech."[307] Unlike searches and seizures, which may *reasonably* be carried out by the state, the freedom from government restrictions on speech is absolute.[308] No kind of abridgement is permitted, even if it is reasonable.[309] Rights like the right to keep and bear arms and to confront adverse witnesses are similarly unequivocal and narrow. The text protects a precise activity, rather than enshrining a general principle.[310]

The Seventh Amendment belongs to this group as well. While the terms "preserved" and "common law" may seem ambiguous, they are not susceptible to cost-benefit analysis or spectrums like the adjectives "reasonable" and "speedy" are. The text guarantees only that a particular mechanism, the jury, be preserved so there is no need for balancing to help fill in the gaps.[311] The civil jury right, being narrowly defined, applies in federal court only if the suit was recognized at common law.[312]

But we know that the Court still applies balancing tests to rights with absolute and narrowly defined text. The First Amendment contains absolutist language, yet balancing has continued in free speech cases for seventy-five years.[313] Balancing has also abounded in cases interpreting narrowly defined rights to a criminal trial, compulsory process, and confrontation.[314] While there is no evidence to suggest that the framers anticipated balancing to assess

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[305] *See, e.g.*, Fisher, *supra* note 175, at 1523 (deciding whether a search or seizure is "unreasonable" is a matter of gradation).

[306] *See* Blocher, *supra* note 64, at 401 n.114 (arguing adjectives in the constitution that are not "self-defining" lead to balancing) (quoting Van Alstyne, *supra* note 298, at 110). *But see* Laurent B. Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 732–34 (1963) (arguing that the lack of self-defining phrases in the Constitution does not necessitate balancing).

[307] U.S. CONST. amend. I.

[308] Van Alstyne, *supra* note 298, at 110–11.

[309] *Id.*

[310] *See* Blocher, *supra* note 64, at 401 (arguing the Second Amendment "at least arguably has language that is as precise and absolutist as the First."); Fisher, *supra* note 175, at 1523–24 (arguing balancing is not necessary since the text guarantees confrontation as the precise method to ensure reliability of testimony).

[311] *See* Fisher, *supra* note 175, at 1523 (arguing that when interpreting a noun in the Constitution, like the right to a "jury," categorical rules are necessary unlike when applying an adjective which requires balancing); *see also* s*upra* note 158 (arguing the Seventh Amendment preservation command "drives" analogical reasoning not balancing). *But see* Elson, *supra* note 171, at 169 (arguing the seventh amendment falls somewhere in the middle between narrowly defined text and text conveying broad principles).

[312] *See supra* notes 48–52 and accompanying text.

[313] *See* Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1425 (1962) (noting how balancing free speech first occurred in Schneider v. New Jersey, 308 U.S. 147 (1939)).

[314] John Stocker, *Sixth Amendment -- Preclusion of Defense Witnesses and the Sixth Amendment's Compulsory Process Clause Right to Present a Defense, Taylor v. Illinois, 108 S. Ct. 646 (1988)*, 79 J. CRIM. L. & CRIMINOLOGY 835, 854–55 (1988) (teasing out the factors to consider in the balancing test to determine whether compulsory process is infringed articulated in Taylor v. Illinois); *see supra* note 293 and accompanying text.

the Seventh Amendment,[315] the same can be said for all of the other amendments that are balanced, even the open-ended reasonableness test.[316]

Still, the greatest challenge to balancing for Seventh Amendment cases is that the text uniquely requires that the right to a jury be "preserved." As noted in Section III.D, this suggests that balancing is precluded because the text requires the jury trial as it existed at common law no matter the interests at stake. But there are two reasons why this argument fails. First, no one takes the preservation command literally; few would argue that the Seventh Amendment requires an exact replica of the right to the jury trial as it existed at common law.[317] The Court has agreed with this sentiment, so that more causes of action require the civil jury trial than a strict historical approach would require[318] and judicial procedures do not need to mimic every detail of the procedures at common law.[319] Thus, if the "preserved" language leaves room for these changes, there is no reason why it cannot also allow room for balancing.

Second, as noted in Section II.B, the Court has arguably balanced before. In *Markman v. Westview Instruments, Inc*., the Court determined that a question of patent claim construction should be decided by the judge rather than the jury, in part, because, "judges, not juries, are the better suited to find the acquired meaning of patent terms."[320] And, previously, the Court signaled that balancing is acceptable in *Ross v. Bernhard*, when it observed in a footnote that the jury right's applicability may depend in part, on "the practical abilities and limitations of juries[] . . . ."[321] While the Court later disavowed the *Ross* footnote,[322] the "preserved" language did stop the Court in its tracks and force a wholesale ban on balancing for fear of trampling on the text. Any argument that strict scrutiny cannot be used because of the preservation requirement is belied by the Court's prior forays into other kinds of balancing.

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[315] Redish & La Fave, *supra* note 294, at 411.

[316] *See, e.g.*, Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 237 n.140 (1993) (arguing that the Framers did not intend the Fourth Amendment to necessitate balancing).

[317] *See, e.g.*, Redish, *supra* note 170, at 511 (discussing that there is no evidence that the Framers intended the term "preserve" to result in "a photographic reproduction of the jury trial right as of 1791 . . . .").

[318] *See supra* note 175 and accompanying text.

[319] *See supra* note 54 and accompanying text.

[320] Markman v. Westview Instruments, 517 U.S. 370, 388 (1996); *see also* Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1138–39 (2003) (noting that the *Markman* Court applied functional considerations); Miller, *supra* note 22, at 886 (noting that *Markman* may be a rare example of open Seventh Amendment balancing).

[321] Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970); Miller, *supra* note 22, at 886 (noting that the *Ross* footnote was a rare instance of explicit balancing). *But see* Redish, *supra* note 170, at 524 (observing that the *Ross* footnote "may have indirectly adopted a balancing test[]" but ultimately finding that it did not).

[322] *See, e.g.*, Tull v. United States, 481 U.S. 412, 418 n.4 (1987) (observing that the Court has not considered the practical limitations of juries "as an independent basis for extending the right to a jury trial under the Seventh Amendment.").

D. The Lack of Balancing at Common Law Precludes Balancing Now

Closely related to the text-based argument, it could be said that because the Court takes a unique formalist approach through engagement with the common law, balancing cannot be used to determine if the jury right applies. After all, most commentators mark the beginning of balancing to the 1930s.[323] No court used strict scrutiny at common law England in 1791.[324] But the test for whether judicial procedures are constitutional is that they satisfy the substance of the common law, that is, that juries decide questions of fact, and judges decide questions of law. The test is not that formalist reasoning must be used. Formalist reasoning happens to be the means used by the Court to reach that end. As discussed in detail in Section V.B, formalist reasoning has led to the conclusion that these motions satisfy the substance of the common law even though they do not. But, strict scrutiny, as applied here, limits the judge's ability to take cases from the jury in a way that more closely resembles the common law. So while strict scrutiny may not have been used at common law, its application here embodies the judge-jury arrangement at common law better than formalist reasoning did.[325]

Moreover, despite the Seventh Amendment's preservation requirement, both the historical test and the "substance" of the common law constraint are still judge-made doctrines[326] and the staying power of these approaches does not mean the Court cannot change in favor of balancing. The Court may determine that the preservation of the right as it existed at common law is better served by balancing. After all, the Court's free speech jurisprudence was originally governed by formal or categorical reasoning, as was the Court's approach to the Fourth and Sixth Amendments, but balancing eventually swept across all three of these areas.[327] At the same time, the use of balancing in some contexts does not require the end of the "substance" at the common law requirement. There are plenty of instances where the Court blends adjudicative approaches like balancing and formal or categorical reasoning in the same case.[328] In fact, that is what is advocated here, by

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[323] *E.g.*, Aleinikoff, *supra* note 44, at 948.

[324] Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 355–56 (2006) (tracing the first appearance of strict scrutiny to the late 1950s and early 1960s).

[325] *See supra* Part V.B.

[326] *See* United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (establishing the historical test); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (discussing the Court's substance of common law assessment). *But see* Miller, *supra* note 22, at 901 ("The Seventh Amendment textual command to 'preserve' drives the historical test, not the other way around.").

[327] *See* Blocher, *supra* note 64, at 386 (observing that "balancing has largely displaced categorization as the preferred mode of First Amendment protection."); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 386–89 (1988) (discussing that Fourth Amendment jurisprudence used to be dominated by the warrant clause until it was displaced by the reasonableness balancing test); Fisher, *supra* note 175, at 1495–96 (chronicling the Court's shifts between balancing and categorical approaches to criminal procedure).

[328] *See, e.g.*, Blocher, *supra* note 64, at 397 (observing that the "blending of categorical and balancing approaches is representative of First Amendment doctrine . . . .").

requiring the least restrictive means for mixed questions that would have been decided by the jury at common law.

VIII. CONCLUSION

Summary judgment and judgment as a matter of law have singularly undermined the civil jury right. The Court's formalism has failed to address the impact these procedures have had on the Seventh Amendment. Indeed, it was the Court's formalist reasoning that upheld summary judgment and judgment as a matter of law, even though they did not exist at common law. Formalist reasoning also strengthened these motions through the Summary Judgment Trilogy. This is unjustified. The Seventh Amendment is a fundamental right and should not have to languish in only one adjudicative approach. Balancing is no cure-all and is even responsible for the undermining of some rights. But strict scrutiny, the most protective of balancing tests, is justified as an alternative to formalism because of the Seventh Amendment's importance, the way these judicial procedures have undermined the jury right, and the way judges have co-opted questions that were once for the jury.

Through a blended category-plus-scrutiny approach, certain questions will be assigned value based on their importance to the Seventh Amendment. Instead of permitting judges to grant summary judgment and judgment as a matter of law without any recognition of the non-movant's right interest, now the means available to the judge will depend on the category of the question raised in the motion. This is similar to the Court's approach to free speech: the level of scrutiny increases with the importance of the category of speech restricted and rarely upholds restrictions of speech with high First Amendment value. Rather than continuing to criticize the Court on the Court's terms, it makes sense to invite the Court to view the Seventh Amendment in a different way. That is, by recognizing the interests at stake. By offering an alternative view of the Seventh Amendment, summary judgment and judgment as a matter of law can finally be restrained. With that, a right the founders revered can be revived.