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Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective

Roger W. Kirst

JUDICIAL CONTROL OF PUNITIVE DAMAGE VERDICTS: A SEVENTH AMENDMENT PERSPECTIVE

*Roger W. Kirst**

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THREE times in three years the United States Supreme Court has tried to decide whether due process requires any limits on a jury's power to assess the amount of punitive damages. In its first two decisions, *Pacific Mutual Insurance Company v. Haslip*[1] and *TXO Production Corp. v. Alliance Resources Corp.*,[2] the Court declared that due process would not permit "unlimited jury discretion"[3] or a "grossly exces-

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1. 499 U.S. 1 (1991).
2. 113 S. Ct. 2711 (1993).
3. *Haslip*, 499 U.S. at 18.

sive"[4] verdict, but each time held that the particular punitive damage award did not violate due process. Neither decision announced a test that would identify a punitive damage award that did violate due process. In 1994 the Court has provided a partial answer by focusing on only one issue. In *Honda Motor Company v. Oberg*[5] the Court held that Oregon violated due process by refusing to provide judicial review of the amount of a punitive damage verdict, thereby establishing that there must be some judicial supervision of the jury's power to assess punitive damages.[6] The Court did not, however, establish how much judicial control is required.

There is a marked contrast between the widely divergent positions of the Justices in 1993 in *TXO*, where the lead opinion presented the views of only three Justices, and the solid 7-2 vote in 1994 in *Honda* supporting the majority opinion. The *Honda* opinion makes clear that the Court's division in *TXO* was temporarily set aside rather than resolved. The Court described Oregon's refusal to provide any judicial review of the verdict amount as a "departure" or "deviation"[7] from traditional practice, making Oregon the sole exception from the practice of review in "[e]very other State in the Union."[8] Oregon's stance was easy for the Court to distinguish from Alabama's procedure in *Haslip* and West Virginia's procedure in *TXO*, because those states did provide judicial review of the amount of the verdict. At the same time the Court emphasized it was not providing a test to identify unconstitutionally excessive awards; in fact it was not even deciding whether due process required any standard for the judicial review.[9] With so little settled after three major opinions, now is the time to step back and re-examine the course of the debate.

There is a marked similarity among all three cases in the extensive discussion of historical practice. Unfortunately, that similarity includes a consistent failure to ask whether the Court has been reading the historical record correctly. The Court has always assumed that it should determine the jury's proper role in assessing punitive damages by examining the details of historical procedure. From that starting point, the Court has asked whether due process requires or permits changes from historical practice. The leading advocate for defining due process by the historical record is Justice Scalia, who argued in his concurrence in *Haslip* that there could be no due process standard for excessiveness, because "traditional practice" left the amount of punitive damages "to the discretion of the jury."[10] Justice Kennedy's concurrence in *Haslip* seconded this deference to the historical record, with only slightly less confidence.[11] Justice

4. *TXO*, 113 S. Ct. at 2720.
5. 114 S. Ct. 2331 (1994).
6. *Id.* at 2341.
7. *Id.* at 2335.
8. *Id.* at 2338.
9. *Id.* at 2335.
10. *Haslip*, 499 U.S. at 24-25.
11. *Id.* at 40.

Blackmun's majority opinion in *Haslip* declared that it would take "a strong case" to show that historical practice was so inherently unfair as to deny due process.[12] Justice Stevens's lead opinion in *TXO* reaffirmed the hope for history, declaring there were "persuasive reasons" behind the reliance on historical practice by Justices Scalia and Kennedy.[13] Justice Stevens's majority opinion in *Honda* declared a presumption that state procedure was invalid when it differed from the common law.[14]

The Court's method of constitutional interpretation in these three due process cases stands in marked contrast to its own Seventh Amendment doctrine. The Seventh Amendment and Fourteenth Amendment Due Process Clause have different origins and applications and even appear to raise opposite issues. The Seventh Amendment is violated when a federal jury has too little power and judicial control is too strong, while the due process attack asserts that a state jury has too much power and judicial control is too weak. Constitutional doctrine under each amendment, however, shares common ground, as the application of each must begin with a standard for defining the proper role of the jury and the proper extent of judicial control. The due process attack on punitive damage verdicts may be a new context for asking whether the jury's role can be correctly defined by the details of historical practice, but similar issues have been debated for two centuries under the Seventh Amendment.

Seventh Amendment doctrine provides three valuable lessons that provide a different perspective for evaluating the Court's method of constitutional interpretation in the due process cases. First, the Court itself had earlier abandoned a similar effort to define the jury's role by the details of historical practice; it concluded a major debate over fifty years ago by holding that the Seventh Amendment preserved the substance of civil jury trial but not the details of historical practice.[15] In that debate the Court rejected exactly the same method of constitutional interpretation the current Justices assume will suffice to define the jury's role for due process purposes. Second, preserving the substance of civil jury trial but not the historical detail allows evolution of the jury's role and changes in the judicial control of a federal jury's power to assess damages. Third, the strong theme of jury nullification in the ratification debates that preceded the Seventh Amendment has not prevented this evolution of the jury's role. That theme is a reminder that judicial control of the jury's power can affect the outcome of litigation, but jury nullification does not provide an accurate description of the jury's proper role.

All three Seventh Amendment lessons should be familiar, as they provide the foundation for current federal practice, but all have been ignored in the due process cases. That is not wholly surprising, as the first two lessons have started to fade from memory, while the third is often

12. *Id.* at 17.
13. *TXO*, 113 S. Ct. at 2720.
14. *Honda*, 114 S. Ct. at 2339.
15. Galloway v. United States, 319 U.S. 372 (1943).

doubted or remembered backwards. Still, they provide an essential reminder that the jury's role in American civil procedure has always been evolving, not static. The conclusion that "the common-law method for assessing punitive damages does not in itself violate due process"[16] is correct only because the right to due process has been an integral part of the evolution of the jury's role. That evolution has been too easily overlooked in the Court's reading of the historical record in its due process cases.

This article will discuss what the three lessons from Seventh Amendment doctrine can contribute to the Court's effort to decide whether due process requires any further judicial control of the jury's power to assess punitive damages. Part I will review the Seventh Amendment debate in which the Court rejected comparison with the details of historical practice as a method of constitutional interpretation. Part II will review the Seventh Amendment doctrine that permits evolution of judicial control of the jury's role in assessing damages. Part III will examine the jury nullification theme that creates the appearance each jury must be able to play a political role free from judicial control; it will describe how it is possible to accommodate both judicial control and a political role for the jury. In conclusion, Part IV will examine how the Court's focus on the details of historical practice could complicate its development of due process doctrine and even undercut Seventh Amendment doctrine long after this challenge to punitive damage verdicts is over.

I. DEBATING THE METHOD OF CONSTITUTIONAL INTERPRETATION

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[17]

Fifty years ago the Supreme Court decided the last of eight cases[18] in which it debated the proper method of interpreting the Seventh Amendment. The Court reaffirmed that the Seventh Amendment preserved the right to have a jury decide factual disputes, but rejected the argument that the jury's role should be defined by historical matching of procedural detail. In recent years both the importance of the debate and the foundation it provides for maintaining the constitutional right have been slowly forgotten. Most of the cases themselves are not obscure; the opinions in *Slocum*, *Gasoline Products*, *Redman*, *Dimick*, and *Galloway* are still found in civil procedure casebooks. What has become obscure is what

16. *Haslip*, 499 U.S. at 18.

17. U.S. CONST. amend. VII.

18. Galloway v. United States, 319 U.S. 372 (1943); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 474 (1935); Dimick v. Schiedt, 293 U.S. 474 (1935); Gasoline Prod. Co. v. Champlin Ref., 283 U.S. 494 (1931); *Ex parte* Peterson, 253 U.S. 300 (1920); Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913); Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902); Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593 (1897).

those cases established about the method of interpreting the Seventh Amendment. Part of the problem is that the cases discussed a lot of detailed procedural history while determining that historical detail was not controlling. The heavy dose of history is readily recalled when there is a new constitutional question about civil jury trial such as the due process challenge to punitive damage verdicts, while the actual outcome of the Seventh Amendment debate is easily forgotten.

The debate over the method of interpretation can be hard to follow if the opinions are read individually because there are two different issues in each case. The obvious issue in each case is the constitutionality of a specific procedure—judgment notwithstanding the verdict (JNOV), partial new trial, use of a master, additur and remittitur, or directed verdict. An equally important issue is the method used to interpret the Seventh Amendment, an issue common to all procedures. In the course of the debate the Court started with the JNOV and special verdict, then went to summary judgment, to JNOV, to use of a master, to partial new trials, to additur and remittitur, back to JNOV, and finally to the directed verdict. When the cases are read in the order the procedures follow during litigation, from summary judgment to JNOV, the debate over the method of constitutional interpretation is less obvious. As a result, it is easy to read a decision from the middle of the debate as requiring fidelity to historical practice, even though the Court finally concluded that was not required. For decades commentators and treatises have given so little attention to this debate over the method of constitutional interpretation that there is no current account. Therefore this section must start at the beginning by describing the debate that established the method of interpreting the Seventh Amendment.

A. THE EARLY HISTORY

A heavy dose of history in many Seventh Amendment cases has created an appearance that constitutional interpretation for every jury issue must begin with increasingly detailed research into long forgotten practice. In fact, for most issues it is sufficient to treat the birth and early development of civil jury trial in England as a fortuitous accident. It may be an essential condition to be sure, for otherwise we might never have developed this form of citizen participation, but answers about where, when, or why it developed do not matter. What does matter is that the English courts developed and the colonists brought over the basic concept of using both professional judges and nonprofessional jurors to resolve disputes. That concept was carried out by a body of procedure that allowed the jury to play a significant role in deciding factual disputes, while the judge controlled whether the jury would be required to do so.[19]

19. *See* Roger W. Kirst, *The Jury's Historic Domain in Complex Cases*, 58 WASH. L. REV. 1, 13-20 (1982).

As the jury evolved from a group of witnesses to a unit of disinterested factfinders the judicial control of the jury likewise evolved from the attaint to the fine and then to a whole set of procedures.[20] As early as 1655 English judges granted a new trial on the ground the verdict was against the weight of the evidence.[21] The English judges also developed the practice that eventually became the directed verdict, at first by guiding the jury with instructions on the law and comments on the evidence, and then by directing the proper verdict when the evidence did not create a factual dispute. The first Congress instructed the federal courts to use the local procedure of each state.[22] That meant the federal courts used the same common law procedures as state courts to control whether there was any issue to be tried, whether a jury would decide the case, whether the judge would direct a verdict, or whether the verdict would be upset by the grant of a new trial.

The Seventh Amendment drew only slight attention from the Supreme Court as federal civil procedure developed in the 19th century. The early cases reflect the Court's hesitance to allow innovations in trial procedure, but the Court did not have to decide how to interpret the Seventh Amendment. For example, the Court refused to allow an involuntary nonsuit because past practice required a plaintiff's consent, but the brief discussions did not mention the Seventh Amendment.[23] Similarly, the Court refused to permit appellate factfinding to upset a jury's verdict in *Parsons v. Bedford*,[24] a well-known opinion by Justice Story that interpreted a procedural statute and not the Seventh Amendment. The Court did allow the directed verdict without reaching the constitutional issue,[25] and recognized that a trial judge could grant a new trial on grounds known at common law.[26]

It took more than a century before the Court discussed the method of Seventh Amendment interpretation, in *Walker v. New Mexico & Southern Pacific Railroad*.[27] Even then the Court could have avoided the issue because the case came from a territorial court not subject to the Seventh Amendment, but the Court applied the Seventh Amendment because a statute conferred the same right. The issue before the Court was narrow—whether a trial judge could enter judgment in accordance with a jury's special findings, if the findings were inconsistent with the general verdict. The plaintiff, who won the general verdict but not all the critical

20. *See generally* 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 298-350 (7th ed. 1956); FLEMING JAMES, CIVIL PROCEDURE 237-48 (1965); JANE BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 137-262 (1898).

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

22. Act of Sept. 29, 1789, c. 21, § 2, 1 Stat. 93.

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

24. 28 U.S. (3 Pet.) 433 (1830).

25. Parks v. Ross, 52 U.S. 362 (1850); McLanahan v. Universal Ins. Co., 26 U.S. (1 Pet.) 170, 182 (1828).

26. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 448-49 (1830).

27. 165 U.S. 593 (1897).

special findings, argued that the trial judge could only award a new trial. The Court held that the trial judge could enter a judgment contrary to the general verdict instead of awarding a new trial, even though the Seventh Amendment forbids judicial factfinding.

The Court recognized that the specific procedure used in *Walker* was an innovation, but explained why the Seventh Amendment did not restrict procedure to the details of common law practice:

> The Seventh Amendment, indeed, does not attempt to regulate matters of pleading or practice, or to determine in what way issues shall be framed by which questions of fact are to be submitted to a jury. Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative.[28]

The entry of judgment on the basis of the special findings did not infringe on the "substance of right", because the jury's special findings on the disputed issues were controlling.

At the turn of the century the Court upheld another innovation in *Fidelity & Deposit Co. v. United States*.[29] This time the appellant was arguing that an early version of summary judgment procedure was a deprivation of the right to trial by jury. The procedural rule required that a defendant in a contract action file an affidavit stating the grounds of defense. The defendant filed an affidavit that stated no grounds, but instead demanded that plaintiff be required to submit strict proof in a trial by jury. The Supreme Court affirmed the judgment for plaintiff on the ground the affidavit was not sufficient, and held the procedure was constitutional even though defendant did not receive a jury trial. The method of interpretation continued the trend begun in *Walker*:

> If it were true that the rule deprived the plaintiff in error of the right of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues.
>
> It would seem a logical result of the argument of plaintiff in error that there was a constitutional right to old forms of procedure, and yet it seems to be conceded that Congress has power to change them .... The concession of that power destroys the argument based on the Constitution ....[30]

Fidelity & Deposit kept the Court on the path of requiring that the federal courts provide a jury trial for factual disputes, while not tying jury trials to the details of past procedure.

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28. *Id.* at 596.
29. 187 U.S. 315 (1902).
30. *Id.* at 320.

B. Framing the Interpretation Debate in *Slocum*

The first debate about the proper way to interpret the Seventh Amendment came in *Slocum*,[31] where the Court temporarily set aside its earlier method of interpretation and substituted historical comparison. The holding of *Slocum* has little effect on modern procedure, because it was circumvented later in *Redman*,[32] but an occasional litigant is reminded of it when they forget to make a timely motion for a directed verdict or the renamed judgment as a matter of law.[33] The method of historical comparison used in *Slocum*, or its ghost, still haunts us.

Slocum was an action on a life insurance policy. The insurer asserted the policy had lapsed because the premium was not paid. At trial the defendant's motion for a directed verdict was denied and the case was submitted to the jury; it returned a verdict for the plaintiff. The trial court denied the defense motion for judgment notwithstanding the verdict and entered judgment for the plaintiff. On appeal the circuit court held that as a matter of law there was no evidence the policy was valid on the day of death. Therefore they reversed the judgment for plaintiff and directed the trial court to enter the JNOV for defendant. In the Supreme Court the plaintiff argued both that the evidence was sufficient and that, if not, the required procedure was a new trial and not a JNOV.

The Supreme Court upheld the finding that the evidence of payment was insufficient to create an issue for the jury. A unanimous Court agreed that the trial judge had erred in denying the defense motion for a directed verdict, and agreed that the judgment of the trial court had to be reversed.[34] The Court split 5-4 on the proper corrective step. The majority held that the appellate court's remand for entry of a JNOV violated the Seventh Amendment. The majority concluded that there had to be a new trial, because any other result would allow an appellate court to determine the facts. The majority gave special emphasis to the Seventh Amendment language forbidding re-examination of a fact tried by a jury otherwise than "according to the rules of the common law."[35] Therefore the majority compared the JNOV procedure with each of four common law procedures, and found the JNOV unconstitutional because it did not match the common law motion for judgment non obstante veredicto, motion to arrest judgment, demurrer to the evidence, or motion for a nonsuit.[36]

A dissenting opinion by Justice Hughes for the four Justices in the minority argued that the JNOV was constitutional.[37] He argued that the historical comparison with the common law procedures raised form and detail to constitutional right, and that the JNOV did not violate the sub-

31. Slocum v. New York Life Ins. Co., 228 U.S. 364 (1912).
32. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).
33. Fed. R. Civ. P. 50(b).
34. *Slocum*, 228 U.S. at 385, 400.
35. *Id.* at 379.
36. *Id.* at 381-98.
37. *Id.* at 400.

stance of the right. He concluded that there was no invasion of the province of the jury, because the Court was unanimous that the evidence at trial did not create a factual dispute. Since there was no factual dispute the appellate court was not re-examining the facts; thus the JNOV did not violate the substance of the Seventh Amendment. He suggested there was no reason to permit a plaintiff to present additional evidence; had the trial court correctly granted the directed verdict the plaintiff would not have had a second chance to do better.

The plaintiff in *Slocum* won only a hollow victory. What could plaintiff do at the new trial? If plaintiff presented the same evidence, the trial court would grant the defense motion for a directed verdict. The Supreme Court made clear that the evidence in the first trial was not sufficient to go to the jury. The majority opinion suggested that plaintiff might offer "further evidence rightly conducing to a solution of the issues"[38] at the second trial, but where was plaintiff supposed to find such evidence? In the first trial plaintiff presented a specific theory of the case and sworn testimony about the transaction. Having sworn in the first trial to one set of facts that did not prove the premium had been paid, could plaintiff avoid a directed verdict by swearing to a completely different story? In fact, if federal courts in 1913 had modern summary judgment procedure, it is clear that on remand the trial court would have been required to grant a defense motion for summary judgment. A party cannot create a disputed factual issue by changing sworn testimony as necessary to create a viable claim.[39]

For litigants, the apparent effect of *Slocum* was a promise of a second chance at a new trial if the trial judge erroneously denied a motion for a directed verdict. The only real effect for the litigants was to postpone the inevitable, a delay that may be inefficient but not crippling. For procedural reform, the effect of *Slocum* was far more serious. The majority's historical comparison of a new procedure against each common law procedure is a method of constitutional interpretation that could freeze the development of civil procedure.

C. The Middle Years

After *Slocum* the Court returned to its earlier method of interpreting the Seventh Amendment with little mention of *Slocum* or historical comparison. In *Ex parte Peterson*[40] the Court held that a trial judge could appoint an auditor to examine the accounts between the parties and prepare a report to be introduced at trial. The opinion noted that there was no common law precedent for the procedure, but relied on *Walker* to conclude that changes in old forms of procedure were permitted, as long as they did not interfere with the jury's task of determining issues of fact.

38. *Id.* at 380.
39. *See, e.g.*, Hackman v. Valley Fair, 932 F.2d 239 (3d Cir. 1991).
40. 253 U.S. 300 (1920).

In *Gasoline Products*[41] the Court held that an appellate court could order a partial new trial where the trial court's error did not affect all the issues. There was no common law precedent that allowed a court to set aside part of a verdict; at common law an error on any issue required a new trial on every issue. Again the Court declared the Seventh Amendment did not require old forms of procedure, and allowed a partial new trial if the issues were clearly separable. If the jury performed its function correctly for some issues, there did not have to be a complete new trial because other distinct issues were affected by error. *Slocum* was distinguished on its result without mentioning historical comparison.

Historical comparison returned in *Dimick*,[42] another 5-4 decision that held that additur was unconstitutional. The majority opinion began with historical comparison, with no mention of *Slocum* and no discussion of the proper method of interpreting the Seventh Amendment. The majority concluded that historical practice included no instances of additur so it could not be constitutional. The suggestion that additur could be upheld as analogous to remittitur was rejected because there was only weak evidence of historical use of remittitur. In fact, the history of remittitur was so weak that it too was suspect; the majority gave it grudging acceptance only because Justice Story had announced it acceptable.[43] A dissenting opinion in *Dimick* by Justice Stone argued that the Court had rejected historical comparison and required only that the jury's function be safeguarded.[44] The combination of this unsuccessful argument in the dissent and the majority's method of interpretation gave the appearance that historical comparison was always required.

The contrast between the two methods of interpretation was clouded later in the same term when the Court returned to the issue of the constitutionality of the JNOV in *Redman*[45] and approved a procedural path around *Slocum*'s holding that the JNOV violated the Seventh Amendment. The Court permitted the JNOV, because the trial judge had reserved ruling on an earlier motion for a directed verdict at the close of the evidence. The Court held that a decision after the verdict was not an intrusion on the jury's function, but rather a delayed ruling on a motion made before the jury was asked to perform its function. The opinion of a unanimous Court blended both methods of interpretation but did not endorse either. First, the opinion declared that the Seventh Amendment preserved the substance of jury trial and not mere matters of form or procedure.[46] Then the opinion reduced the effect of *Slocum* by a narrow explanation of its facts.[47] Finally the opinion recounted historical practice, but did not compare each common law procedure with the new

41. Gasoline Prod. Co. v. Champlin Ref., 283 U.S. 494 (1931).
42. Dimick v. Schiedt, 293 U.S. 474 (1935).
43. Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).
44. *Dimick*, 293 U.S. at 492.
45. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).
46. *Id.* at 657.
47. *Id.* at 657-58.

JNOV procedure. Instead the opinion concluded that the other procedures showed that delayed rulings were permissible, even though they had the effect of negating a jury verdict.[48] As a result, *Redman* has the appearance of historical comparison but not the effect.

The Court's opinions had not rejected historical comparison by the time the Federal Rules of Civil Procedure took effect in 1938, but the new Rules did not preserve historical forms. They provided for summary judgment,[49] even though the Court had not held it was constitutional. They allowed a directed verdict,[50] even though no decision directly upheld its constitutionality. They incorporated the result of *Redman* by providing that a motion for a directed verdict at the close of the evidence would be deemed reserved if not granted.[51] They allowed a new trial for any reason previously used in law actions, with no specific mention of the standard for a new trial, the use of a partial new trial, or the use of remittitur or additur.[52] At the same time the new Rules expressly preserved the right to trial by jury under the Seventh Amendment.[53] What remained unsettled was the proper method of interpreting the Seventh Amendment.

D. Settling the Debate in Galloway

The debate about the method of interpreting the Seventh Amendment ended fifty years ago in *Galloway*.[54] The narrow issue was whether the plaintiff had enough evidence to overcome a defense motion for a directed verdict. The two broader issues were whether the directed verdict was constitutional, and the proper method of interpreting the Seventh Amendment to decide the issue of constitutionality. The majority opinion by Justice Rutledge resolved the narrow issue by holding that plaintiff had insufficient evidence, and resolved the broader issues by holding that the directed verdict was constitutional because it did not violate the substance of the right to a jury trial. A well known dissent by Justice Black argued that the plaintiff had sufficient evidence, that the directed verdict was unconstitutional, and that historical comparison was the only method faithful to the constitutional guarantee. The eloquence of Justice Black's dissent and the way the issues are interwoven make it easy to misunderstand the procedural issues in *Galloway* without careful attention to its facts.

Galloway was an action filed in 1938 to recover under a World War I soldier's insurance policy that provided benefits if the insured died or suffered "total and permanent disability." The government denied Galloway's claim on the ground the policy lapsed for nonpayment of premium

48. *Id.* at 659-61.
49. Fed. R. Civ. P. 56.
50. Fed. R. Civ. P. 50(a).
51. Fed. R. Civ. P. 50(b).
52. Fed. R. Civ. P. 59.
53. Fed. R. Civ. P. 38(a).
54. Galloway v. United States, 319 U.S. 372 (1943).

on May 31, 1919. Galloway alleged he suffered from total and permanent disability before the policy lapsed. The medical records showed that Galloway suffered from some form of mental disability by 1930, and that total and permanent disability was present by 1934, but the medical records did not document his mental condition between 1919 and 1930. Instead, Galloway offered evidence of incidents that occurred during his service in France in 1918-1919, witnesses who described his conduct during 1919-1922, and some weak evidence of his conduct from 1922-1925. His key witness was a doctor who testified that Galloway suffered from schizophrenia, that the incidents showed that this mental disability began during his service in France in 1918, and that it continued up to the trial.

The majority and dissenting opinions disagreed about the sufficiency of Galloway's evidence, because they used different definitions of the substantive issue. The majority opinion concluded that plaintiff's evidence could not be sufficient with an unexplained gap of five or eight years, because the disability could not be total unless it was continuous.[55] Under the majority definition, someone who was schizophrenic for the entire eleven years would not be totally disabled if the illness was in remission for part of the time; during that time the insured could have been regularly employed. Justice Black, in dissent, used a different definition of disability that could be satisfied by evidence of mental illness. He argued that the insured did not have to be totally unable to work for the whole time; under his definition Galloway could qualify if he suffered from schizophrenia during the whole time, even if the illness had been in remission and he had been employed for part of that time.[56]

Justice Black bolstered his argument that the evidence was sufficient with an argument against the constitutionality of the directed verdict.[57] His opinion employed the method of historical comparison the Court had used in *Slocum*, and concluded that the directed verdict was not permitted because there was no comparable procedure in 1791. He buttressed his reliance on historical form with a reminder of the jury's nullification history, and made clear that he advocated historical comparison in order to make it easier for a party to get to the jury. At the same time, he did not fully adopt the implications of his historical comparison and invocation of jury nullification. His nullification argument would leave no room for any sort of directed verdict on any set of facts, but even Justice Black conceded that a verdict could be directed in some cases: "As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy."[58]

55. *Galloway*, 319 U.S. at 386.
56. *Id.* at 410-11.
57. *Id.* at 397-407.
58. *Id.* at 407.

Justice Black's concession that a directed verdict could be constitutional if there is "no room whatever" for a factual dispute makes clear why comparison of historical detail cannot preserve a right to a jury trial. *Galloway* is a perfect illustration that the power to define the substantive law controls whether the evidence can create a factual dispute for the jury to decide. Justice Black did not assert that plaintiff's evidence was sufficient under the majority test for total and permanent disability; he argued only that there was credible evidence that met his own test. The majority did not discuss whether the evidence met Justice Black's test; they concluded only that the evidence did not suffice under their test for total and permanent disability. The Justices simply passed without signaling, as each opinion evaluated the evidence against its own definition of the substantive law.

Galloway ended the debate over the method of interpretation by clearly establishing that the Seventh Amendment preserved the substance of the right to a jury trial. The majority opinion did not compare the directed verdict with the details of historical practice. The historical detail was important only because it established the jury's common law function as factfinding where there is a disputed factual issue.

> The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing. Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late 18th and early 19th centuries. . . .
>
> . . . The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements . . . .[59]

The method of historical comparison that had been adopted thirty years earlier in *Slocum* and followed intermittently during the intervening years was finally rejected, a point nicely confirmed by the citation of Justice Hughes's *Slocum* dissent in the final footnote in *Galloway*.[60] Rejection of fidelity to historical detail did not mean disappearance of the idea, because even the Court's clear holding could not eliminate the persistent hope that history can simplify Seventh Amendment interpretation or define a different role for the jury.

E. The Fading Memory of *Galloway*

After *Galloway*, the Supreme Court did not have to give as much attention to defining the constitutional requirements for the jury's role. At the

59. *Id.* at 390-92.
60. *Id.* at 395 n.33.

same time, the 1938 merger of law and equity under the Federal Rules of Civil Procedure raised a new set of issues that required a different use of the historical record. In more recent cases a common Seventh Amendment issue has been whether a party can demand a jury trial on a claim that did not exist in 1791.[61] The Court has held that the constitutional right extends to all actions seeking legal remedies to enforce legal rights in the ordinary courts.[62] Determining whether an action is legal requires examination of the jurisdictional rules and substantive reach of the various courts in 1791 to find which provides the closest analogue for the modern claim. Most often the comparison is between courts of law and courts of equity, so the law-equity distinction has become a staple ingredient of Seventh Amendment interpretation. Application of this test can require historical research into unfamiliar procedure and forgotten distinctions, but the law-equity test can only establish that a party has a right to jury trial on a legal claim if the evidence and substantive law create a factual dispute.

The historical research required for the Seventh Amendment law-equity test has made it easy to expect that similar research will answer all constitutional questions about the civil jury. The Court already started in that direction even before it considered the due process attack on punitive damages. In *Browning-Ferris Industries v. Kelco Disposal, Inc.*[63] the Court rejected an Eighth Amendment challenge to a punitive damage verdict with a concluding note that suggested the Seventh Amendment made the Court reluctant to make any change in the jury's role in assessing punitive damages that would "stray too far from traditional common-law standards."[64] With historical research prominent in other due process cases as well, such as Justice Scalia's plurality opinion permitting transient personal jurisdiction,[65] it was easy for the Court to hope that history would simplify the debate about the jury's role in assessing punitive damages. A similar hope in *Slocum* took the Court thirty years to correct.

II. JUDICIAL REVIEW OF VERDICT AMOUNTS

Even if historical detail provides inaccurate guidance, the Court still must decide whether there should be any due process standard for excessiveness. The last time the Court addressed the issue in *TXO*, the Justices divided into three equal blocs. Justice Scalia, the leader of one bloc of three Justices, argued that there is no due process standard of excessiveness. In *Haslip* Justice Scalia declared that the traditional practice of leaving assessment of punitive damages to the jury's discretion necessar-

61. *E.g.*, Wooddell v. International Bhd. Elec. Workers, 502 U.S. 93 (1991); Teamsters v. Terry, 494 U.S. 558 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989); Tull v. United States, 481 U.S. 412 (1987); Curtis v. Loether, 415 U.S. 189 (1974).

62. Teamsters v. Terry, 494 U.S. 558 (1990).

63. 492 U.S. 257 (1989).

64. *Id.* at 280 n.26.

65. Burnham v. Superior Court, 495 U.S. 604 (1990).

ily constitutes due process.[66] He was joined in *Haslip* by Justice Kennedy, who concurred on the ground that the history of jury determination of punitive damages meant the Court needed "no further evidence of its essential fairness."[67] This bloc gained a third vote in *TXO*, when Justice Thomas joined Justice Scalia's concurrence reaffirming his historical argument from *Haslip*.[68] In *Honda* Justice Scalia made clear he has not abandoned his position; he joined the majority but also concurred separately to note his view that the judicial review would enforce "state-prescribed limits" on punitive damages.[69]

Justice O'Connor gave a different reading to the historical record in her dissent in *TXO*, concluding that historical practice permitted judicial intervention to set aside excessive verdicts.[70] Justice White joined this dissent, as did Justice Souter in substantial part, making Justices O'Connor and Scalia's positions equally supported. Between them, a center bloc suggested that the Court could define due process limits if the states took no action to limit "punitive damages that 'run wild'"[71] because verdicts were "grossly excessive,"[72] but both times voted to affirm the particular judgment. In *Haslip* the center was a majority, but in *TXO* it slipped to three votes as only Chief Justice Rehnquist and Justice Blackmun joined the lead opinion by Justice Stevens. Still, the center bloc was controlling because the three blocs could form two different majorities. The center bloc and Justice O'Connor's bloc agreed that the Court could impose due process standards if the states did not, disagreeing only on whether the states should be allowed more time. The center bloc and Justice Scalia's bloc agreed not to impose due process standards in each case, disagreeing on what the Court would do if the states continued to allow excessive verdicts to stand.

Justice Stevens's majority opinion in *Honda* continued to seek a compromise by holding that the states cannot leave the assessment of punitive damages to the "unreviewable discretion of a jury"[73] but not defining how much judicial control is required. Instead, his opinion described judicial review of verdict amounts, declared such review well-established at common law, and portrayed Oregon as holding a "unique position" by straying from the American consensus on the proper role of the jury and the proper extent of judicial review.[74] In the absence of a holding that due process requires the same extent of judicial review, however, it is possible some states will provide a more limited scope of judicial control than Justice Stevens described. In fact, even as he wrote, part of his de-

66. *Haslip*, 499 U.S. at 24-25.
67. *Id.* at 40.
68. *TXO*, 113 S. Ct. at 2726 (Scalia, J., joined by Thomas, J.).
69. 114 S. Ct. at 2342-43.
70. *TXO*, 113 S. Ct. at 2729-31.
71. *Haslip*, 499 U.S. at 18.
72. 113 S. Ct. at 2720.
73. 114 S. Ct. at 2342.
74. *Id.* at 2338.

scription of the proper extent of judicial review was being challenged by one state in a case that the Court would later see in 1993.

Justice Stevens did not differentiate between a verdict that is too high because of the jury's error and a verdict that is too high even though the jury performed its task correctly. His opinion merged both grounds:

> In the 19th century, both before and after the ratification of the Fourteenth Amendment, many American courts reviewed damages for "partiality" or "passion and prejudice." Nevertheless, because of the difficulty of probing juror reasoning, passion and prejudice review was, in fact, review of the amount of awards. Judges would infer passion, prejudice, or partiality from the size of the award. . . .
>
> . . . .
>
> Modern practice is consistent with these earlier authorities. In the federal courts and in every state, except Oregon, judges review the size of damage awards. . . .[75]

A recent case from Kentucky illustrates how differently the states can read the same historical record. In *Hanson v. American National Bank & Trust Co.* the jury awarded a former customer punitive damages of $5,775,000 against the bank. On appeal the Kentucky Court of Appeals reviewed the verdict for excessiveness in order to insure that the amount "have some reasonable relation to the injury and its cause, and not be disproportionate when compared to them."[76] After that review it ordered a remittitur of $2 1/2 million. On further review the Kentucky Supreme Court refused to conduct its own review of the amount of the verdict and vacated the remittitur ordered by the intermediate court.[77] The United States Supreme Court vacated the state decision and remanded the case to the Kentucky Supreme Court for reconsideration in light of *TXO*.[78] On remand the Kentucky Supreme Court declared "obedience" to the Supreme Court's remand, but did not retreat from its earlier holding that it would not review the amount of the punitive damage verdict.[79]

The state court concluded that Kentucky trial and appellate judges should not permit a punitive damage verdict to stand unless it was supported by competent evidence, based on proper instructions, and free of passion and prejudice.[80] Those specific errors exhausted the grounds for judicial review of the verdict amount; the state court rejected the possibility of any other review of the amount assessed by the jury:

> It is with equal caution that this Court does not substitute its opinion as to the amount of exemplary damages for that of the jury. It was the trial jury and trial judge who heard all the evidence and had the

75. *Id.* at 2338.

76. American Nat'l Bank & Trust Co. v. Hanson Constr. Co., No. 89-CA-639-MR, slip opinion at 16 (Ky. Ct. App. 1991) (opinion withdrawn by Kentucky Supreme Court, 1991 Ky. App. LEXIS 35).

77. Hanson v. American Nat'l Bank & Trust Co., 844 S.W.2d 408 (Ky. 1992).

78. 113 S. Ct. 3029 (1993).

79. *Hanson*, 865 S.W.2d 302, 305 (Ky. 1993).

80. *Id.* at 310.

opportunity to see and hear the witnesses during the lengthy trial. The sanctity of the jury verdict is at the heart of our judicial system.[81]

The reference to the better ability of the trial judge to evaluate the verdict could reconcile Kentucky law with the requirements of *Honda*, because judicial review does not have to mean appellate review. However, the tenor of the opinion, the failure to articulate any standard of excessiveness for the trial court's review, and the reference to the "sanctity" of the verdict strongly suggests that Kentucky is not committed to *Honda*'s description of the jury's role and scope of judicial review. Instead, the Kentucky approach accords more closely with Justice Scalia's position in *Haslip* that it has been the "traditional practice of American courts to leave punitive damages (where the evidence satisfies the legal requirements for imposing them) to the discretion of the jury."[82] The essential question is whether comparative review of jury verdicts is an infringement on the jury's power that undercuts the right to jury trial.

Kentucky's position presents a major challenge to *Honda*'s description of the proper extent of judicial control of the jury's power, but that is only because Justice Stevens tried too hard to present a uniform picture of judicial review. Seventh Amendment doctrine provides a different perspective, because judicial control of verdict amounts in federal court has always been evolving. That does not mean that due process doctrine must be identical, but it does provide a valuable baseline for analyzing why comparative review of verdict amounts is consistent with preservation of the right to jury trial. Once again, it will be necessary to review Seventh Amendment doctrine that is only dimly remembered, even though it is at the heart of current federal practice.

A. The History of Remittitur Practice

Judicial review of the jury's verdict on a motion for new trial has never been considered a violation of the right to trial by jury. Common law judges exercised the power to set aside a verdict and grant a new trial because of excessive damages before either the Seventh or Fourteenth Amendments were adopted, so the practice would be permitted under the most rigid historical benchmark.[83] Even Justice Scalia has not disputed the legitimacy of judicial review of a verdict, but he has made the related argument that the extent of review by modern judges is limited to the grounds that were used when the Fourteenth Amendment was adopted. In *Haslip* he argued that 19th century judges did no more than set aside verdicts based on passion or prejudice, concluding therefore that no other judicial review should be required.[84] The method of his argument makes the same subtle mistake the Court made long ago in *Slocum*, assuming that the role of the jury can be defined statically by examining

81. *Id.* at 311.
82. *Haslip*, 499 U.S. at 24-25.
83. James, *supra* note 20, at 314-15.
84. *Haslip*, 499 U.S. at 27.

the procedure at a particular time. His method rejects the Court's resolution in *Galloway*, that the procedures for jury trial have been constantly evolving to maintain the role of the jury.

Seventh Amendment doctrine does not limit the extent of judicial review of verdict amounts by historical practice. That principle was established in the first and most prominent landmark in the caselaw on the extent of this power, which happens not to be a Supreme Court opinion. That honor belongs to Justice Story's opinion as a Circuit Justice in *Blunt v. Little*,[85] the case that brought the remittitur to federal practice. Justice Story's standing as an authority on the Seventh Amendment is so strong that his opinion became an important part of Seventh Amendment doctrine even though it did not interpret the Amendment. It is particularly relevant here because he addressed an issue remarkably similar to issues in the dispute over punitive damages. In examining Justice Story's opinion it is important to recognize that the primary goal is not to learn what the practice was in 1822, but rather to determine whether the method of interpretation limited the power of federal judges by historical practice.

Blunt involved an action for malicious prosecution where the jury instructions did not provide any objective measure for assessing damages. The jury returned a verdict of $2,000, an amount the defendant argued was so excessive that there should be a new trial. Justice Story accepted the jury's decision on liability, but he concluded that $2,000 was an excessive verdict because the damages should have been more moderate.[86] Justice Story's opinion makes clear that judicial power to control the jury's assessment of damages was unquestioned.

> As to the question of excessive damages, I agree, that the court may grant a new trial for excessive damages. So far as the contrary doctrine may be supposed to be maintained by *Duberley v. Gunning*, 4 Term R. 651, it has been qualified or overturned in *Chambers v. Caulfield*, 6 East, 244, and *Hewlett v. Cruchley*, 5 Taunt. 277. It is indeed an exercise of discretion full of delicacy and difficulty.[87]

The brief report of this opinion does not explain how a judge could determine a verdict was excessive when the substantive law did not provide a standard for the jury's verdict. That explanation must be derived from the three English cases cited by Justice Story, a task that also demonstrates how the role of the jury in assessing damages evolved as the courts faced new issues.

Duberley v. Gunning[88] was a 1792 case in which King's Bench declined to set aside a verdict of 5000 pounds on a claim for criminal conversation, even though the Chief Judge thought the damages were "a great deal too much."[89] Justice Story did not describe *Duberley* as a case that negated the court's power to set aside an excessive verdict; his words suggest only

85. 3 F. Cas. 760 (C.C.D. Mass. 1822) (No. 1578).
86. *Id.* at 762.
87. *Id.* at 761.
88. 100 Eng. Rep. 1226 (K.B. 1792).
89. *Id.* at 1228.

that it may have created some question. The report of the case shows that *Duberley* was a 3-1 decision in which every opinion made clear that none of the judges questioned the earlier precedent that had established the power of the court to set aside an excessive verdict. The majority refused to set aside the verdict on a narrower ground, because they believed the substantive law provided no standard or rule for judging whether the verdict was excessive in the particular case. The nature of the case and the jury's role in assessing damages was most clearly expressed by Judge Ashhurst in explaining why he would not grant a new trial.

> Where damages depend in any wise, upon calculation, the Court have some medium to direct them, by which they are enabled to correct any mistake of the jury. But where there is no such light to guide them, where the damages depend upon mere sentiment and opinion, the Court have no line to go by; and therefore it would be very dangerous for us to interfere.[90]

The second case cited in *Blunt*, *Chambers v. Caulfield*,[91] shows that the hesitation of 1792 had been overcome by the same court by 1805. This was another case for criminal conversation, with a verdict for 2000 pounds. The court declared it did have the power to order a new trial if the excessive damages were due to "undue motives, or some gross error or misconception"[92] by the jury, but it refused to set aside the verdict because the evidence showed the verdict was not excessive. The same result, and the same assertion of power to set aside an excessive verdict, was made in the third case cited in *Blunt*, *Hewlett v. Cruchley*.[93] In that case Chief Judge Mansfield declared: "[I]t is now well acknowledged in all the courts of Westminster-hall, that whether in actions for criminal conversation, malicious prosecutions, words, or any other matter, if the damages are clearly too large, the Courts will send the inquiry to another jury."[94]

The discussion in the three English cases has a modern ring because punitive damages also are not determined by "calculation" but rather by the jury's discretion or "sentiment and opinion." The common law judges recognized the evolution of the power to reject an excessive verdict, but they hesitated to exercise the control when they had no basis for comparison. They continued the evolution only after they decided that they had to assert some control over verdicts, by at least establishing an upper limit. The common law judges left the jury with more discretion in cases where there was no objective measure in the substantive law, but even in those areas the judges would intervene after the verdict if the jury's assessment was too far out of line. With this precedent Justice Story concluded that he likewise had the power to grant a new trial on the ground

90. *Id.*
91. 102 Eng. Rep. 1280 (K.B. 1805).
92. *Id.* at 1285.
93. 128 Eng. Rep. 696 (C.P. 1806).
94. *Id.* at 698.

of excessive damages for malicious prosecution, even while he acknowledged that the absence of any standard made the task delicate and difficult. After Justice Story decided the verdict was excessive he gave the plaintiff an option to remit the excess to avoid a new trial. When the plaintiff accepted the option and remitted the $500 excess, Justice Story entered judgment for the plaintiff for $1,500 instead of the $2,000 amount found by the jury.

From this start remittitur evolved as a procedure that gave the trial judge limited power to review verdict amounts in cases where the measure of damages was not precisely defined.[95] After *Blunt* the use of remittitur was recognized by the Supreme Court in 1886,[96] and upheld in the face of a Seventh Amendment challenge in 1889.[97] If a defendant moved for new trial on the ground the verdict was excessive, the trial judge could try to avoid the need for a second trial. If the verdict was excessive but otherwise proper, the judge could conditionally deny the new trial motion and give the plaintiff an option. If the plaintiff remitted the excessive portion of the verdict, the court would enter judgment for the reduced amount and there would be no need for a new trial. If the plaintiff refused to remit the excessive portion, the judge would grant the motion for new trial. The judge's power is limited because a plaintiff can reject the judge's calculation of the excessive portion and obtain a new verdict from a second jury, but the judge's power is real because the expense and risk of a second trial pushes many plaintiffs to agree to the remittitur.

B. Remittitur and Comparative Review

Remittitur procedure has been under a cloud of suspicion since the Court decided *Dimick*. That appearance may have been inevitable in 1935 when the Court had not yet resolved its debate over the method of interpreting the Seventh Amendment. The majority still expected that all procedure would match historical detail, so it gave an unsympathetic reading to Justice Story's conclusion. After *Galloway* established that federal practice was not bound by the details of historical practice the Court could have provided a better explanation for the constitutionality of remittitur, but it never again addressed the issue. As a result of this accident of timing, modern commentators describe the constitutionality of remittitur as a "settled question"[98] that can not be reversed without a major "judicial uprooting,"[99] while at the same time they suggest it rests on a "shaky foundation"[100] that "has been criticized . . . with some justifi-

95. James, *supra* note 20, at 315-17.
96. Northern Pac. R.R. Co. v. Herbert, 116 U.S. 642 (1886).
97. Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69 (1889).
98. 11 Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure 103 (1973).
99. 6A James William Moore, Moore's Federal Practice § 59.08[7] at 59-189 (1993).
100. 11 Wright & Miller, *supra* note 98, at 102.

cation."[101] Justice Story deserves better than this lukewarm endorsement that destroys the importance of remittitur practice with the implicit message that cautious adherence to historical landmarks is the only safe course.

The most important part of Justice Story's opinion was his conclusion that judicial review of the jury's assessment of damages was not limited to either the specific actions or particular grounds where review had been previously used. His opinion anticipated the debate over the method of constitutional interpretation by almost a century and his conclusion is directly confirmed by the result in *Galloway*. Interpreting the Seventh Amendment requires more than searching the historical record to discover what judges used to do about excessive verdicts in a particular kind of case. Such a search provides no more than a static measure of the jury's role at one time. That may help understand current options but it cannot be dispositive because the jury's role is always evolving. There was no debate that could establish that the sponsors of the Fourteenth Amendment even thought about the jury's role in 1868, so there is nothing that could establish what they intended as the measure of the jury's role in the definition of due process. However, given the common history of jury trial in state and federal court and some shared consensus about the value and role of the civil jury, Seventh Amendment doctrine can at least provide a foundation for considering whether judicial review of the amount of a verdict should be part of due process.

Remittitur practice preserves the substance of jury trial by allowing juries to play a greater role in assessing general damages than they would if judges had no way to control excessive verdicts. This apparently counterintuitive conclusion depends on recognition that the jury has no power to define the measure of damages if they have already been defined by judges or statutes as part of the substantive law. This key lesson is often forgotten because the jury's power in many cases is defined so narrowly that the jury may have no role at all. For example, in a contract action under the Uniform Commercial Code a seller may be entitled to the contract price,[102] or the buyer may be entitled to the difference between the contract price and the cost of cover.[103] If liability is not disputed and there is no factual dispute about the relevant numbers, summary judgment is proper because there is no factual dispute for the jury to resolve. The case would not go to the jury on the chance they might craft their own measure of damages to reward an innocent victim of a breach with a bonus or punish an unrepentant contract breaker with a penalty. If a jury did return a verdict outside the amount dictated by the substantive law it would clearly be set aside.[104]

101. MOORE, *supra* note 99, at 59-188.
102. U.C.C. § 2-709 (1990).
103. U.C.C. § 2-712 (1990).
104. JAMES, *supra* note 20, at 315.

The idea that the jury should have unlimited discretion to assess damages has derived its current strength from a persistent failure to recognize how much the jury's power over many other issues is controlled by the substantive law. The Supreme Court has never had to consider whether a party would be denied due process if there were no substantive law and a jury decided a contract case without instructions or a tort case with no standard of liability or measure of compensatory damages. That issue does not arise because the jury's role has changed over the centuries as the substantive law has evolved through legislation and judicial decisions. For most of that time punitive damage verdicts were relatively uncommon so they got little sustained attention. A key issue dividing the Court in *Haslip* and *TXO* is whether state substantive law on punitive damages is evolving at an acceptable pace now that they are more common and larger. In the short time between *Haslip* and *TXO* many state courts interpreted or adopted state law on punitive damages in response to the majority's discussion in *Haslip*,[105] but the Kentucky opinion shows that some state courts dispute the need to control the jury's discretion.

Defining the jury's role according to historical practice will skew the result in the punitive damage debate by obscuring certain steps in the argument. The observation that punitive damages were not reviewed in the 19th century may appear to compel two conclusions: that they would not have been reviewed at that time even if substantially larger or more frequent, and that they can not be reviewed in the 20th century even if conditions have substantially changed. Justice Story's method of interpretation in *Blunt* provides a contrast; neither conclusion is inevitable and neither is part of Seventh Amendment doctrine. Even if judges could use remittitur practice to review punitive damage verdicts, however, that does not mean that each state should do so, or that the Court should force every state to do so.

Justice Kennedy has argued that the states should not be forced to review punitive damage verdicts for a reason that goes beyond his endorsement of Justice Scalia's reliance on historical practice. In *TXO* he argued that there would be no standard to measure when a verdict is grossly excessive:

> A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. Furthermore, it might give the illusion of judicial certainty where none in fact exists, and, in so doing, discourage legislative intervention that might prevent unjust pu-

105. *See, e.g.*, MGW, Inc. v. Fredricks Dev. Corp., 6 Cal. Rptr. 2d 2888 (4th Dist. 1992); Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 473 (Md. App. 1992); Herman v. Sunshine Chem. Specialties, Inc., 608 A.2d 978, 983-86 (N.J. Super. Ct. App. Div. 1992); Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991); Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991).

nitive awards.[106]

Justice Kennedy's position in *TXO* follows directly from his observation in *Haslip* that "inconsistency of jury results can be expected"[107] because a jury is not a permanent body and jury instructions can be abstract and general. In *TXO* he argued that the Court should not be concerned about the "quirks of juries" as long as verdicts were not the result of bias, passion, or prejudice.

The argument of Justice Kennedy provides an alternative explanation for the position of the Kentucky Supreme Court that does not depend on a static interpretation of the historical record. His argument assumes that other procedural controls are available to determine if the jury heard sufficient evidence, if it was properly instructed, or if the jurors were influenced by bias, prejudice, or passion. He thereby concludes that nothing is left except the jury's exercise of discretion, so judicial review of the verdict for excessiveness must infringe on the role of the jury. The logic does not support the conclusion, because judge and jury are not looking at exactly the same body of information and not answering exactly the same question. The differences are an essential part of jury trial that has been almost completely overlooked in recent years because there has been little examination of the role of the jury.

Remittitur has evolved as a procedural method of handling a problem inherent to any system that uses nonprofessionals in the role of a factfinder. Each jury is supposed to decide only the specific case, so the jury is not told how similar cases have been decided. The jury's lack of exposure to the facts or verdicts in other cases is very important because it promotes careful attention to the specific evidence in the case on trial. It is also the source of a serious problem because it isolates the jury from comparative information. Generally the elements of damage are more precisely defined when there is an available measure, so the jury is given the greatest discretion in assessing the damages that are hardest to measure. That has long been true for damages for pain, and is now even more true for punitive damages.

In the calculation of compensatory damages it seems unlikely that each and every jury will assess injury, pain, disability, or the value of money on exactly the same scale, even if each juror and every jury deliberates correctly. Extreme variations can be made less likely by group deliberations, but there is still a risk that some verdicts will deviate markedly from the range in comparable cases. The deviation may be caused by the jury's different conclusion about the amount of pain or the extent of disability. The deviation may be caused solely by the jurors' subjective valuation of adequate compensation for certain pain or disability. A verdict may appear surprising only because the jurors have a different value for money. Jurors cannot know if their verdict is the product of strongly atypical views without the comparative information that would allow them to cor-

106. *TXO*, 113 S. Ct. at 2725.
107. 111 S. Ct. 1055.

rect for the deviation. Giving the jurors comparative information, however, would distract them from their focus on the unique features of the particular case. Remittitur has served as a valuable procedure to achieve both goals in awarding damages. The jury's discretion is not distracted by concerns about comparability, but the judges can exercise sufficient control by reviewing the verdict after it is returned.

The Supreme Court recognized that a verdict could be both excessive but otherwise proper in the first case in which it considered a constitutional challenge to remittitur practice. In *Arkansas Valley Land & Cattle Co. v. Mann*[108] the trial court found that less than half of a $40,000 verdict for converting cattle was proper; it conditioned the denial of defendant's motion for a new trial on remission of $23,000. On appeal the defendant argued that the amount remitted was so large that it showed the jury was governed by passion or that it had deliberately disregarded the evidence. The Court agreed that a verdict could not be saved by remittitur if the excessive amount was the product of prejudice or a reckless disregard of the instructions. The Court still affirmed the trial judge's remittitur, however, because there was no other evidence of any defects in the verdict.

For almost two centuries federal judges have been correcting the jury's lack of comparative information on compensatory damages in similar cases through remittitur for verdicts that are too high, or by granting a new trial for verdicts that are either too high or too low. Both are fairly crude tools because the judge must work with only the jury verdict. However, both provide a check on a verdict that is very far out of line. Judges do not have to set exact limits on the amount of allowable damages in every case; it is most often sufficient to find that the verdict falls within an approximate range. Similarly, judges do not decide which party has the most persuasive evidence on liability in every jury trial; it is sufficient in most cases to find that there is a factual dispute for the jury to decide. In closer cases the judge's decision about whether to grant a directed verdict or submit the case to the jury requires evaluation of the actual evidence against a standard. That standard depends on more than the evidence heard by the jury; the standard also depends on the purposes of the substantive law, the need for certainty in the primary activity governed by the substantive law, and how well juries in general can understand the substantive law and the evidence.

Similarly, in making the decision about whether a verdict is comparable to other verdicts the trial judge must consider all the evidence in the case about the extent of the damage, and then compare that evidence against a standard.[109] The standard is the judge's evaluation of what an average or typical jury would award as damages in the case. The standard will be a range of possible verdicts and not a precise number; a range is all that can be set when the variables can not be precisely measured and each jury is a

108. 130 U.S. 69 (1889).
109. Morgan v. Woessner, 997 F.2d 1244, 1257 (9th Cir. 1993).

unique group of nonprofessional citizens exercising their best judgment about an unfamiliar question. For damages as well as for liability, the judge must consider both the evidence that the jury heard during the trial and information about other jury verdicts that the jury never heard. The effect can be just as dramatic with a verdict for compensatory damages as it has been in some of the punitive damage cases, as in the recent decision of a federal trial judge that a defense motion for a new trial would be granted if plaintiffs did not remit $106 million of the $107 million the jury had awarded for pain.[110]

The current debate has shown that comparability of punitive damage verdicts is far more complex than comparability of compensatory damage verdicts. The Court has lamented that intrajurisdictional and interjurisdictional comparisons will not be a straightforward task.[111] Many of the factors the trial judge and appellate courts could use to review punitive damage present novel issues. Mitigating factors, such as other penalties or inability to pay damages, are not considered by judge or jury in assessing compensatory damages. Broader issues, such as the deterrent effect on the defendant or others, have no place in compensatory damages. This article will not examine whether punitive damage verdicts are too rare or too frequent, nor whether they are too large or too small. Perhaps they are just right, or not so far wrong that the Court must overcome its reluctance to interfere in state civil procedure. These issues can be addressed by the Court once it is free from the assumption that judicial review is an intrusion on the role of the jury and examines how the states could employ the creativity Justice Story made possible long ago.

III. TAMING THE JURY NULLIFICATION HISTORY

Jury nullification is a familiar theme in many disputes about civil jury trial. The central idea is that the jury should decide what the law should be, so judicial control may not reduce or defeat the jury's power to ignore or nullify the substantive law. Variations on the theme form a natural part of the arguments for matching historical detail when interpreting constitutional provisions affecting the jury. Opponents of procedural change or judicial control can argue that the Constitution does not permit or require any deviation from past practice. This method of constitutional interpretation is sometimes reinforced by a reminder that the jury's power to nullify the substantive law was an important theme in the ratification debates. Justice Black's dissent in *Galloway* is a prominent example of this use of the nullification history to support an argument about the jury's role.[112] While *Galloway* confirmed that the jury nullification theme had no place in federal civil procedure, there is no line of cases in which the Supreme Court explicitly debated and buried it. Consequently,

110. Datskow v. Teledyne Continental Motors Aircraft Prod., 826 F. Supp. 677 (W.D.N.Y. 1993).
111. *TXO*, 113 S. Ct. at 2720.
112. *Galloway*, 319 U.S. at 397-407.

the theme continues to appear in the Court's opinions; for example, in Justice Rehnquist's argument in *Parklane* that historical practice should limit the effect of preclusion rules on the right to jury trial,[113] and more subtly in the suggestion of Justices Scalia and Stevens that the "Founding Fathers" wanted the jury to determine the amount of a civil penalty because the government should "take the bitter with the sweet."[114]

The jury nullification theme has not been addressed by name in any of the Court's three due process cases, but it has not been completely absent either. An amicus brief in *TXO* for the Association of Trial Lawyers of America (ATLA) sketched part of its argument under a heading declaring "Substantive Limits Conflict with the Seventh Amendment Right to Trial by Jury."[115] ATLA reminded the Court that "there is at least some historical indication that part of the 'specific intent' of the Anti-federalist proponents of the provision was to preserve the type of broad jury discretion approved in the original punitive damage cases. . . ."[116] In *Honda* the amicus brief for ATLA repeated the same argument, with citations to Justice Rehnquist's opinion in *Parklane*, and concluded that the "history of the jury in America . . . is a chronicle of resistance to judicial control of jury verdicts."[117] In her dissent in *Honda* Justice Ginsburg objected that "the Court barely acknowledges the large authority exercised by American juries in the 18th and 19th centuries. In the early years of our nation, juries 'usually possessed the power to determine both law and fact.'"[118] Her opinion cited some of the same materials as the ATLA brief in support of her reading of the historical record of judicial control.[119]

The majority took note of the jury nullification theme in *Honda*, but only by a cryptic and tentative response in the last footnote of the majority opinion that was primarily a plea in confession and avoidance:

> Judicial deference to jury verdicts may have been stronger in 18th century America than in England, and judges' power to order new trials for excessive damages more contested. . . . Nevertheless, because this case concerns the Due Process Clause of the Fourteenth Amendment, 19th century American practice is the "crucial time for present purposes." . . . [B]y the time the Fourteenth Amendment was ratified in 1868, the power of judges to order new trials for excessive damages was well established in American courts. In addition, the idea that jurors can find law as well as fact is not

113. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340-44 (1979) (Rehnquist, J., dissenting).

114. Tull v. United States, 481 U.S. 412, 428 (1987) (concurring opinion of Justices Scalia and Stevens).

115. Brief of Amicus Curiae Association of Trial Lawyers of America in Support of Respondents, LEXIS, GENFED Library, BRIEFS File, Case No. 92-479.

116. *Id.* at *21.

117. Brief of Amicus Curiae Association of Trial Lawyers of America in Support of Respondent Karl Oberg, LEXIS, GENFED Library, BRIEFS File, Case No. 93-644, section II.C.

118. *Honda*, 114 S. Ct. at 2348.

119. *E.g.*, Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages. The Seventh Amendment and the Politics of Jury Power*, 1991 COLUM. L. REV. 142 (1991).

inconsistent with judicial review for excessive damages.[120]

The juxtaposition of "the idea that jurors can find the law" and "judicial review" as "not inconsistent" is surprising. The heart of the argument for jurors finding the law is the nullification theme that jurors should be free from judicial review that would override the jury's refusal to follow the substantive law.

The Court's tentative response to the jury nullification theme in the due process context is a natural result of its persistence in Seventh Amendment doctrine. The prominence of the nullification theme in the ratification debates creates the appearance that the constitutional definition of the jury's role in federal court includes some freedom from judicial control. It has survived for two centuries at the fringes of federal practice, never part of the formal rules of civil procedure but never explicitly banished as an outlaw theory. Its shadowy existence has actually increased both its longevity and its persistent appeal. It can be easily praised because it does not have to be precisely defined; its flaws can be ignored because rhetorical flourish does not require examination of how it might work in practice. Its persistence alone is proof it cannot be extirpated, but it needs to be tamed because the due process attacks on punitive damage verdicts is evidence the Court must find a way to combine both a political role for the jury and judicial control of the jury's decisions.

A. The History That Will Not Die

The historical record clearly shows that the Revolutionary experience with jury nullification became an ingredient of the debates over ratification of the Constitution.[121] The colonists had learned first hand that a colonial jury could defeat the enforcement of unpopular British laws. The British response had also provided an immediate reminder that the absence of a jury in admiralty and equity prevented jury nullification in those courts. That knowledge about civil procedure was used in the ratification debates by the Anti-Federalists, who objected to the fact that the proposed Constitution did not guarantee civil jury trial. Their argument played on fears about the effect of the new system, suggesting a guarantee was needed so local debtors could count on civil juries to defeat the British creditors who would use the new federal courts to collect old debts. They also suggested the guarantee would insure that federal officials could be found liable by local juries if they oppressed local citizens. The arguments did not defeat ratification, but they did precede adoption of the Bill of Rights as promised by the Federalists.

The ratification debates give the Seventh Amendment an unusual legislative history that is inherently contradictory and inconsistent if taken at face value. There is a basic divergence of goals between the Anti-Feder-

120. *Honda*, 114 S. Ct. at 2342.

121. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639 (1973).

alist advocacy of occasional jury nullification and the Federalist effort to establish equal justice and due process. It is important to remember, however, that the nullification theme was an ingredient of political speeches against the Constitution;[122] and as such, contains political rhetoric, overstatement, and ambiguity. The speakers could not be too specific, because the same jury nullification that would defeat British creditors could also defeat the claims of local creditors who could vote. That was no obstacle to the rhetoric, because the purpose was not instruction on civil procedure but rather a political effort to convince voters to vote against the new Constitution. The Federalists were content to argue that Congress could be trusted to provide trial by jury and later to promise the Bill of Rights. No one challenged the nullification issue directly or explained how to integrate the relatively short history of nullification with the much longer development of due process and equal justice. History cannot show how to preserve both nullification and due process, because that combination has never been part of actual practice in a mature and coherent system of civil procedure.

The ratification rhetoric has long served as evidence that jury nullification was part of the original intent, but its value has been inflated due to its one-sidedness. There was no opposition that forced the advocates of jury nullification to explain how it would work in practice nor was there any analysis of how jury nullification would be consistent with due process. The Anti-Federalists did not have to justify the idea that certain litigants would be treated unequally in the new courts. That bias would completely contradict the effort to establish a new form of constitutional government, but the Anti-Federalists were arguing for rejection of the Constitution.[123] The desire to reject the Constitution may excuse the Anti-Federalists' unexplained rhetoric, but it does not justify the current uncritical acceptance of the ratification debates as legitimate legislative history.

The nullification described in the ratification debates was a caricature of civil procedure, not the practice in ordinary litigation. Soon after adoption of the Seventh Amendment the jury in *Georgia v. Brailsford* was instructed that they had the right "to determine the law as well as the fact in controversy."[124] Was this an endorsement of the legitimacy of the broad nullification position? Was it instead a reflection of the looser procedure of a simpler system that had served the colonies? Many colonial judges had little legal education or experience, they presided in groups, and they each instructed the jury on the law. Under those conditions the jury might know as much law as the judge, and in any event a jury would have to select which instructions to follow.[125] That system served the col-

122. *See* Roger W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court's Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1320-28 (1978).

123. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941.

124. 3 U.S. (1 Dall.) 1, 4 (1794).

125. THAYER, *supra* note 20, at 254-55; WILLFRED J. RITZ, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789 30 (1990).

onists well enough, but that does not mean the same system would serve in a more complex society.

The change in the jury's role as the country and legal system matured has been described as judicial usurpation,[126] a label that assumes that the early practice was a coherent system that could have been preserved. It also assumes that jury nullification of creditor claims was more than ratification rhetoric and that it became part of federal practice. In fact, the early federal courts were apparently not constrained by the nullification arguments.[127] The federal courts entered judgments on debts owed British creditors without an outbreak of nullification.[128] That does not mean the ratification history can be ignored; repeatedly, the image of jury power brings it back. It does call, however, for attention to the logic of jury nullification as a working principle for ordinary litigation.

B. The Empty Logic of Civil Jury Nullification

The idea of jury nullification has a surface appeal because it is advocated at only a few obvious points. The core idea is that a jury should be able to return a verdict contrary to the substantive law. That position is usually advanced in opposition to a motion for a summary judgment or a directed verdict; on occasion it might be raised in an effort to convince the judge to instruct the jury that it has the power to ignore the instructions. The theme of jury power could be advanced after an otherwise unexplainable verdict, as a ground for opposing a motion for judgment notwithstanding the verdict or a new trial. In the punitive damage debate it has been implicit in arguments that the jury's power to assess punitive damages should be uncontrolled. The obvious points all focus on the trial itself, a fact that makes it appear jury nullification can be tacked on to the rest of civil procedure. Any apparent logic of jury nullification falls apart when civil procedure is viewed as a series of screening steps that apply the substantive law to a set of facts.

A complaint asserts the plaintiff has a right to relief under the substantive law, as applied to the factual situation described. If the defendant challenges the sufficiency of the claim by a motion to dismiss, the judge must decide if the complaint is sufficient. Most motions to dismiss raise issues of procedure, about whether plaintiff described enough facts or included all the elements of a recognized claim. Sometimes a motion to dismiss raises a different kind of issue, because the plaintiff asserts that the substantive law should include a claim not previously recognized. The logic of true jury nullification would negate the judge's power to decide such a substantive issue, because the dismissal of a complaint for

126. *See* Morton J. Horwitz, The Transformation of American Law 28-29, 140-59 (1977); William E. Nelson, Americanization of the Common Law 165-74 (1975).

127. Edith G. Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (1966); Kirst, *supra* note 19, at 19.

128. Dwight F. Henderson, Courts for a New Nation 77-82, 89 (1971).

failure to state a claim eliminates the chance that a jury might decide the defendant should be liable for the offending conduct.

If the Seventh Amendment preserved jury nullification as described in the ratification debates, it negated any judicial or legislative power to define the substantive law. Nullification would reduce the substantive law to a single claim for a civil wrong, a claim with no elements. To illustrate with an example from the ratification debates, an aggrieved citizen might sue a federal official for an alleged injury, even though the conduct violated none of the recognized forms of action. The citizens on the jury could not return a verdict reflecting local sentiment about the official's conduct if the judge sustained a common law demurrer or modern motion to dismiss. If the plaintiff could invoke the jury's power to prevent such a judicial ruling, the substantive law would be whatever any jury might decide.

Although no one ever seems to advocate abolishing all substantive law, jury nullification is rarely defined. Instead, the praise or reliance on jury nullification assumes only that the jury should have unrestrained power over those cases that survive the initial judicial screening, with an implicit concession that the Seventh Amendment permits judges to do some initial substantive screening. Since the Seventh Amendment does not affect pleading decisions, judges control whether the jury will ever have a chance to exercise their power. That result is directly contrary to the argument that the Seventh Amendment preserved the jury's power to act free of judicial control.

The judicial screening also means that a defendant cannot always rely on jury nullification. Using the other prime example from the ratification debates, a defendant sued on a debt might want to defend on the ground that the plaintiff was an unworthy person or a social outcast. The defense that the creditor was a British merchant was supposed to be enough for a jury to exercise its nullification power. How does a defendant who pleads only that defense survive a motion to strike or a motion for judgment on the pleadings? Of course, in practice a general denial might serve when the trial strategy will be a plea for local prejudice, but that pleading style simply masks the underlying issue. If the courts restrict the defenses that can be raised under a general denial, adopt rules that restrict its use, or sanction insufficient defenses, the case may never get as far as the jury. Again, no one seems to argue that the Seventh Amendment freezes the procedure or substantive law for defenses, so the judges control whether the jury gets an opportunity to exercise its power.

Nullification appears similar in both civil and criminal cases if the pretrial stages are ignored. A criminal jury has uncontrolled power to ignore the substantive law and acquit a defendant, because a criminal defendant is the only party whose plea is unconstrained. An attempt to charge a defendant with a nonexistent crime will be blocked by a judge's ruling on a motion to dismiss, so one side of the jury's power is limited. On the other side its power is basically not controlled. The defendant can plead

not guilty for a good reason, a bad reason, or without any reason at all. The defendant can refuse to testify, present no evidence, and still demand a jury verdict. The judge can exclude irrelevant evidence and keep the final argument within some bounds, but on the whole the criminal defendant can come close to asking for the jury nullification described in the ratification debates—civil litigants never can.

If the substantive law controls whether there is a need for a trial to determine if certain facts support a claim, then it is illogical to assert that the Seventh Amendment gave the jury a power of nullification that is independent of judicial control. Summary judgment practice illustrates how control of the substantive law can negate the jury's ability to nullify by making a factual issue disappear. An example of this control is provided by *Harlow v. Fitzgerald*.[129] The facts of *Harlow* provide a modern example of a federal official's abuse of power, one of the very evils the Anti-Federalists warned against. The opinion by Justice Powell is notable for the way it explicitly changed the substantive law to achieve a different result with the same procedure.

Prior to *Harlow* the Court had held that an official sued for violating constitutional rights could assert the defense of qualified immunity, a defense that included both a subjective component of intent and an objective component of the legality of the conduct.[130] In *Harlow* the Court concluded that its previous opinions had not given officials enough protection. The subjective element of the official's intent created a difficult fact issue. A defendant could assert the absence of evil intent in an affidavit in support of a motion for summary judgment, but a plaintiff could still demand discovery in order to uncover evidence on the factual issue of intent. A plaintiff could also avoid summary judgment with circumstantial evidence of intent. The Court therefore changed the substantive law by eliminating intent as a part of the defense, leaving only the objective element.[131] An official who could show that the alleged conduct was not clearly unconstitutional at the time of the conduct would have a defense that would allow summary judgment. The subjective element of intent created a possible role for the jury when certain facts were in dispute, but that role disappeared when the substantive law changed. Later decisions requiring specific allegations of fact to support a claim of unconstitutional intent further illustrate that an apparently procedural decision about pleading can restrict a jury's power to hear a case.[132]

C. A Political Role—The Jury on Two Levels

The political role of the civil jury cannot be ignored even if nullification is an illogical description. The ratification debates and the Seventh Amendment confirm that civil jury trial had enough political importance

129. 457 U.S. 800 (1982).
130. Wood v. Strickland, 420 U.S. 308 (1975).
131. *Harlow*, 457 U.S. at 815-19.
132. *See* Elliott v. Thomas, 937 F.2d 338, 344-46 (7th Cir. 1991).

to receive constitutional protection. A political role is inherent in the concept of citizen participation. In each particular trial the judge and jury share power to decide the case in a complex relation of power and responsibility. The jury's verdict is part of the government function of dispute resolution. The verdict of each jury reflects how citizens understand the substantive law and how they think it should be applied to particular facts. The verdicts of juries can affect the political and economic power of groups and individuals. The use of juries affects the power, prestige, and legitimacy of the judicial branch.

Why does Seventh Amendment theory regularly slide into the nullification quagmire as the only way to describe a political role for the jury? The primary cause is the assumption that there are only two polar options. At one extreme is the view that each jury must play a political role in each case, an overtly political description captured by the image of each jury as a "little parliament."[133] At the other extreme is the view that the jury should find the facts, apply a community standard, or decide what is reasonable with no concern about the effect of litigation on primary conduct. The two options appear to create a stark choice, and neither choice can be satisfactory if the jury is supposed to evaluate disputed evidence and apply a community standard. The overtly political role ignores the need for due process and consistency. The insistence that the jury decide only sterile factual issues assumes that application of the substantive law is not a political issue, an assumption that brings out the ratification history in refutation.

A coherent description of the jury's political role must consider the jury system at two levels. The individual jury and the institution of the jury system are not the same thing. In each individual trial the emphasis must be on due process and fair procedure for all litigants. In each individual trial a jury should not have unlimited discretion to play a political role because a verdict is an integral part of the government function of dispute resolution. The significant political role must be recognized at the institutional level that aggregates all jury verdicts. The verdicts of all the juries reflect how citizens understand the substantive law and how they think it should be applied to various facts. The verdicts of the jury system affect the political and economic power of groups and individuals. The use of the jury system affects the power, prestige, and legitimacy of the courts. We must have individual jury verdicts to achieve the political role of the jury system. We must have individual jury verdicts in order to aggregate them, but that does not mean each jury has to carry the whole burden. The verdicts of a large number of juries will both reflect and establish a community standard, but that does mean that each jury verdict alone does so correctly.

Voting is also a part of the political system, but we do not focus on the individual and expect every voter to be an ideal elector. The value of

133. PATRICK DEVLIN, TRIAL BY JURY 164 (1956).

voting depends on the election system as a whole. Of course, with juries we never focus on the individual juror, but even the small group on each jury is a narrow focus. The need to provide due process requires more consistency from courts than we do from voters. Any political benefits of jury trial accrue to all society, while the costs and burdens are more specific. The effect of a jury verdict is immediate for the parties, while the entire unit feels the effect of an election. A verdict in a $100,000 dispute affects the plaintiff and defendant directly, both of whom have a right to a fair verdict and a rational procedure. An election may deny a $100,000 salary to a competent candidate, give it to an incompetent one, and do so for irrational reasons. The loser has no way to challenge the voters' illogic. The eventual damage of poor government or wasted resources will be shared by all. Eventually there will be another election to allow the voters and candidates to repeat the exercise. The litigants get only the one chance at trial.

The ratification history describes an incoherent model of civil jury trial if the nullification rhetoric is accepted at face value. If read more broadly, the model reflects another example of a system of checks and balances. No single jury should be expected to do everything, because the legislative and judicial definition of the substantive law controls whether there will be a jury at all. It is the jury system as a whole that balances the legislative and judicial development of the substantive law. The image of each jury as a little parliament demands too much of each jury. A better image is that the jury system as a whole is an ongoing referendum, with each individual jury verdict providing one opinion about the application of the substantive law to a particular set of facts.

The primary task of each jury is to decide one dispute according to the substantive law. As a small group that is required to reach a unanimous decision, the jury may evaluate the evidence with more care than a single judge. If selected from a representative panel, the jury may evaluate the evidence from a broader perspective than a judge. As a group of nonprofessionals they may see the case as more unique than a judge would, and may probe the issues in much greater depth. As a group of citizen nonprofessionals they may also question the substantive law they hear in the instructions. A general verdict can mask a host of possible scenarios for the jury's deliberations, but that does not mean the jury is free to ignore the substantive law. When it is clear that the jury did not follow the substantive law or very likely did not do so, the verdict will be set aside by judgment notwithstanding the verdict or the grant of a new trial.

Judicial power to control the jury verdict and to ignore a jury's opinion about the effect of the law does not negate the civil jury as a balancing force. Even if the jury has no power to insist on its view, the trial and appellate judges have a duty to consider each verdict seriously. The judges and legislatures have a duty to consider all the verdicts of the jury system seriously. That is not the raw power of nullification doctrine, but it is still a significant political role for the jury system. In that form the

political power of the civil jury has been respected by judges for centuries. It is the stuff of deciding motions for summary judgment, directed verdict, judgment notwithstanding the verdict, and new trials. It is inherent in deciding whether the evidence and substantive law frame a factual dispute for the jury to decide. Most judges can do it most of the time, and do it quite well, with a rough model of the jury's role for most issues. However, the rough model can break down when the courts face a difficult issue if they assume there is no way to accommodate both a political role for the jury and control of the jury's power.

IV. THE FUTURE FOR STATE AND FEDERAL JURY TRIAL

The Court can still avoid repeating the same kind of mistake it made in *Slocum*. A majority of the Court has not yet held that modern trials should conform to 19th century practice, nor has a majority held that the role of the jury in assessing punitive damages is frozen by a static and concrete reading of the historical record. The Court, however, has done enough with the express statements of Justices Scalia and Kennedy and the tacit concurrence of the other Justices to create doubt about the proper method of interpreting the constitutional provisions that affect the role of the jury. Two developments have shown how much more complicated the punitive damage debate can become, how little progress the Court has made, and how the punitive damage debate could undercut settled Seventh Amendment doctrine.

A. SEVENTH AMENDMENT DOCTRINE IN THE FOURTH CIRCUIT

The Court cannot keep the due process requirements for state court jury trials completely separate from Seventh Amendment doctrine. Seventh and Fourteenth Amendment doctrine will intersect when a federal court holds a jury trial on a punitive damage claim in a diversity action. The roles of the federal judge and jury will be defined by the Seventh Amendment,[134] while the claim for punitive damages will be defined by state law.[135] The task of applying state substantive law with federal procedure could become complicated. A state could respond to *Haslip* and *TXO* by changing state procedure in a way that would restrict the role of a state court jury in a way not permitted under the Seventh Amendment. So far that has not been a serious problem, as several federal courts have been able to accommodate both state substantive law and federal jury trial doctrine with little difficulty.[136] However, the Fourth Circuit has twice concluded that changes in state procedure created a conflict with

134. Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958).

135. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

136. *E.g.*, Doe v. B.P.S. Guard Servs., 5 F.3d 347 (8th Cir. 1993); Dunn v. Hovic, 1 F.3d 1371, 1381 (3d Cir. 1993); Morgan v. Woessner, 997 F.2d 1244 (9th Cir. 1993); Mason v. Texaco, Inc., 948 F.2d 1546 (10th Cir. 1991); Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991).

the Seventh Amendment in a diversity case.[137] The troubling portent of the Fourth Circuit opinions is not its conclusion, but its method of constitutional interpretation.

In *Mattison v. Dallas Carrier Corp.*[138] the Fourth Circuit reversed a punitive damage award because the jury instructions did not provide sufficient guidance. The plaintiffs in this diversity case sued a trucking company for injuries they suffered when their car collided during a rainstorm with a truck that had been parked on a highway while the driver made a telephone call. At trial the district judge followed South Carolina law, instructing the jury that it could award punitive damages for willful, wanton, or reckless conduct, and that it could assess punitive damages in "such sum as you believe will serve to punish" the defendant.[139] The jury awarded punitive damages of $100,000 in addition to the compensatory damages of $125,000.

The Fourth Circuit affirmed the compensatory damage portion of the judgment, but ordered a new trial of the punitive damage claim because the jury instructions provided no meaningful standard. In an intervening decision the South Carolina Supreme Court had also concluded that state law did not satisfy the due process test of *Haslip*; it responded by requiring a "more elaborate post-trial review" by state trial judges.[140] Therefore the Fourth Circuit opinion discussed whether the federal court on remand would be able to use the new state law on punitive damages in exactly the same manner as a state court would. The court concluded that South Carolina procedure could not be adopted because the federal judge's review of a punitive damage verdict would be "subject to the limitations of the Seventh Amendment."[141] The court reached that conclusion after comparing the new South Carolina procedure with 1791 common law practice on the demurrer to the evidence and the motion for a new trial, and finding that the state post-trial review did not match either.[142]

The Fourth Circuit's review of the constitutionality of a change in the roles of judge and jury, by comparison to historical practice, brought back exactly the method of constitutional interpretation the Supreme Court abandoned in *Galloway*. The result is a prime example of the confusion that can be caused by the introduction of historical comparison into the punitive damage debate. After making a historical comparison, the Fourth Circuit declared that state procedure could not be used because it would allow a federal judge to evaluate a verdict on the basis of "evidence that the jury was not permitted to consider at trial or on a legal

137. Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 107-09 (4th Cir. 1991).

138. 947 F.2d 95 (4th Cir. 1991).

139. *Id.* at 100.

140. Gamble v. Stevenson, 406 S.E.2d 350, 354 (S.C. 1991).

141. *Mattison*, 947 F.2d at 107.

142. *Id.* at 107-08.

standard not given to the jury."[143] The court made clear that the power of the federal trial judge was limited by its broad description of the jury's role: "When a factual issue is committed to the jury, as punitive damages are under federal law, . . . the court cannot substitute its judgment for that of the jury. Rather it can only grant a new trial, and then only under the standards permitted by federal law."[144]

The opinion only touched on important issues that were obscured by the search for historical answers. Current federal procedure allows a federal judge to determine if a verdict is excessive by comparing it with other cases which the jury did not hear. In doing so, the trial judge is necessarily reviewing the judgment of the jury. On its face the language of the Fourth Circuit declares that comparison is not permitted with a punitive damage verdict. Current federal procedure allows the trial judge to employ the remittitur option instead of granting an unconditional new trial, but the Fourth Circuit did not mention remittitur and used language that would permit only a new trial. That may have been simply an oversight or the remittitur option may have been implicit in its discussion, but the structure of the opinion suggests it was neither. The court discussed the standard for a new trial at some length and even quoted from Justice Story's opinion in *Blunt*,[145] with no mention at all of the remittitur procedure he introduced. That left trial judges to wonder about the extent of their power to review a punitive damage verdict.

One year later, in *Johnson v. Hugo's Skateway*,[146] an en banc Fourth Circuit reaffirmed the holding in *Mattison*, with the same judge writing the majority opinion. The court was reviewing a judgment from a diversity case in which plaintiff had sued a Virginia roller skating rink for racially motivated harassment and intimidation. The jury was instructed under Virginia law that it could award punitive damages in "such amount as you shall unanimously agree to be proper."[147] The jury's verdict held the rink liable for compensatory damages of $25,000 and punitive damages of $175,000. On appeal the Fourth Circuit held that the instructions gave the jury no standard for assessing punitive damages, and reversed for a new trial of the punitive damage claim.[148] The court again held that the federal judge could not follow state procedure in the retrial; it held that all the factors considered by state trial judges in reviewing a verdict had to be applied by the federal jury as the fact finder.[149] The en banc Fourth Circuit was divided on this issue by an eight to five vote, but the objection in the dissenting opinions was that the earlier opinion in *Mattison* had misinterpreted *Haslip*.[150] None of the dissenting judges men-

143. *Id.* at 108.
144. *Id.*
145. *Id.*
146. 974 F.2d 1408 (4th Cir. 1992).
147. *Id.* at 1415.
148. *Id.* at 1419.
149. *Id.*
150. *Id.* at 1442.

tioned the historical comparison that was used as the method of constitutional interpretation in *Mattison*.

Mattison and *Johnson* may mark the first step in what could eventually become a growing divergence between the roles of state and federal juries in assessing punitive damages. By itself this divergence would be neither unique nor necessarily bad. State and federal jury trial shares a common history, but the Court has left the states free to pursue a different course even if it might require an awkward accommodation in a diversity case. However, that does not mean such divergence is actually required by the Seventh Amendment. The Fourth Circuit's reintroduction of historical comparison to Seventh Amendment interpretation artificially narrowed the range of options. Once the comparison found no 1791 analogue for state law practice, the court assumed that it faced an all-or-nothing choice. On that assumption the trial judge had to be limited to evidence and factors the jury considered. That could give the jury too much information and a task that is too complex; avoiding that problem would give the judge too little comparative information and a role that is too limited. Other circuits have declined to follow *Mattison*,[151] but that fact is not very reassuring when one-third of the Supreme Court is strongly arguing for similar reliance on historical detail.

B. The Jury's Political Role in Assessing Punitive Damages

A very clear example of how historical comparison can further complicate the punitive damage debate came in a state court opinion dated the same day as *TXO*. The decision of the Alabama Supreme Court in *Henderson v. Alabama Power Co.*[152] highlights the conflict between the assumption in *Haslip* that historical practice will suffice to define the jury's role and its optimistic hope that statutory caps will eliminate the problem of excessive verdicts. The Alabama court held that statutory caps violate the state constitution, because they are a modern response that has no historical roots. The facts of the case were straightforward; a jury verdict for $500,000 in punitive damages and a statutory cap of $250,000. The majority's analysis was straightforward as well; the state legislature could abrogate the cause of action but could not establish any limits on the jury's power to assess damages. After reviewing the historical record to establish that juries had been allowed to assess punitive damages when the state constitution was adopted, the majority explained why the jury's assessment of punitive damages could not be limited by the legislature: "In performing this function, the jury is an institution of the body politic. In a jury, citizens exercise direct democracy, whereas the legislature consists of representatives of the people, exercising the people's power and

151. Dunn v. Hovic, 1 F.3d 1371, 1381 (3d Cir. 1993); Robertson Oil Co. v. Phillips Petroleum Co., 14 F.3d 373, 379 n.8 (8th Cir. 1993); Morgan v. Woessner, 997 F.2d 1244, 1264 n.3 (9th Cir. 1993) (Nelson, J., dissenting); Benny M. Estes & Assocs. v. Time Ins. Co., 980 F.2d 1228, 1235 (8th Cir. 1992).

152. 627 So.2d 878 (Ala. 1993).

doing their will only indirectly. The jury serves as the conscience of the community."[153]

In combination the reasoning of the Alabama court and the historical comparison of the Fourth Circuit could lead to the conclusion that a federal jury must be allowed to assess punitive damages in any amount, even if state law establishes a limit on them. So far even the Fourth Circuit has not gone that far; it had earlier rejected a similar Seventh Amendment challenge and held that a state statutory lid on compensatory damages would be followed in a federal jury trial.[154] That illustrates the slipperiness of its later reliance on historical detail. In *Mattison* the jury awarded $100,000 in punitive damages because of a motor vehicle collision. There is no evidence from 1791 that a statute limited punitive damages to a lesser amount, that any jury had awarded $100,000 for punitive damages, or that anyone sought punitive damages for a motor vehicle collision. Historical fidelity can equally prove that there can be no statutory limit, that no jury can assess punitive damages that large, or that no one can claim punitive damages because of a traffic collision. Seventh Amendment doctrine has rejected all three conclusions because the jury does not have a role unless there is a factual dispute, on the issues framed by the substantive law.

The federal courts have not gone as far as the Alabama court, but the opinion is still a very good reminder that historical comparison can bring forth variations on the jury nullification theme. It is also a reminder that there has been too little examination of that theme. In each new debate about the jury's role the jury nullification theme creates the appearance that either the jury must have complete discretion or the jury's role must be completely subordinate to judicial and legislative control. The punitive damage debate will not reach a stable resolution if those stark choices provide the only options. Seventh Amendment doctrine suggests the alternative of considering the jury's role on both levels. That perspective makes it possible to accommodate both legislative control of each punitive damage verdict and a political role for the verdicts returned by the whole jury system. Then the rules of procedure do not have to allow each individual jury to play a complete political role. Judges and legislatures can define when punitive damages are possible and any limits on the amount of punitive damages, while each jury verdict provides one more piece of information from the jury system on the wisdom of the substantive rules.

The viability of civil jury trial always requires a balance between powerful forces. In the due process cases one side has hoped to abolish punitive damage verdicts entirely while the other has dreamed of eliminating judicial control of the jury's power. It is just as well the Court has moved slowly and avoided either of these stark choices. In future cases the Court should use its own Seventh Amendment doctrine as a model of a

153. *Id.* at 893.
154. Boyd v. Bulala, 877 F.2d 1191, 1195-96 (4th Cir. 1989).

mature procedural system that preserves a role for the jury while providing judicial control to ensure due process to all parties. The states do not have to be limited to that model, but it does provide a coherent interpretation of the common history of jury trial shared by state and federal courts. As a model that has been well tested over two centuries of debate about civil jury trial, it will provide a firm foundation for deciding whether any particular state has deviated so far from the common consensus about the role of the jury that its courts no longer provide due process. By consulting its Seventh Amendment doctrine the Court can make clear there is no conflict between due process and the right to jury trial, and reaffirm that constitutional interpretation can preserve the substance of civil jury trial without hobbling modern procedure by the need to match historical detail.