

Summary Judgment Is Constitutional

Edward Brunet*

ABSTRACT: This Article demonstrates that summary judgment is constitutional and does not violate the Seventh Amendment. Two historical antecedents, used by common-law courts, justify modern summary judgment, trial by inspection and demurrer to the evidence. Trial by inspection, as explained by Blackstone, Coke, and Maitland, allowed a common-law judge to inspect evidence visually and then decide “obvious” cases without ever impaneling a jury. In contrast, a jury would be used if pretrial inspection demonstrated legitimate “doubt” about the relevant issue. Demurrer to the evidence, while not identical to summary judgment, is similar because it allowed a judge to take a case away from a jury where the nonmovant’s evidence failed to prove a claim or defense. The Article criticizes a rigid interpretation of the right to jury trial and, in its place, contends that courts should use a more pragmatic, modern construction of the Seventh Amendment. This pragmatic interpretation of the right to jury trial, which has been used by Justices Rehnquist, Brennan, Rutledge, Stone, and McKenna, is consistent with the flexibility of the English common law. English courts were constantly competing for business and continually changing procedures in an effort to compete effectively. It is this utilitarian and pragmatic common-law history that justifies use of a more pragmatic and flexible construction of the Seventh Amendment.

I. INTRODUCTION.....	1627
II. PRE-1791 PROCEDURES INCLUDED A SUMMARY-JUDGMENT ANALOG: JUDICIAL FACT FINDING BY TRIAL BY INSPECTION.....	1630
A. THE CLASSIC COMMENTATORS: BLACKSTONE’S AND COKE’S VERSIONS OF TRIAL BY INSPECTION DEMONSTRATE A CLEAR LINEAGE TO MODERN SUMMARY JUDGMENT.....	1631
1. Blackstone’s Treatment of Trial by Inspection.....	1631
2. Coke’s Treatment of Trial by Inspection.....	1635

* Henry J. Casey Professor of Law, Lewis & Clark Law School. I thank Stephen Raher and Wendy Hitchcock for valuable research assistance and Al Alschuler, Tomas Gomez-Arostegui, Alexi Lahav, Bill Nelson, Peter Nycum, James Oldham, Marty Redish, Steve Subrin, and Suja Thomas for comments. Any errors are my own.

B.	<i>OTHER COMMENTATORS DESCRIBE TRIAL BY INSPECTION AS AN EARLY VERSION OF SUMMARY JUDGMENT</i>	1636
C.	<i>AMERICAN CASE LAW SUPPORTS TRIAL BY INSPECTION AS A FORERUNNER TO TODAY'S SUMMARY JUDGMENT</i>	1639
D.	<i>TRIAL BY INSPECTION, VIEWED IN A FLEXIBLE MANNER, IS A REASONABLE ANTECEDENT FOR SUMMARY JUDGMENT</i>	1640
III.	TRADITIONAL ARGUMENTS SUPPORT SUMMARY JUDGMENT'S CONSTITUTIONALITY	1642
A.	<i>THE DEMURRER TO THE EVIDENCE IS A CONSTITUTIONAL ANTECEDENT UNDER A LESS RIGID, PRAGMATIC HISTORICAL TEST</i> ...	1642
B.	<i>THE EVOLVING AND COMPETITIVE COMMON LAW SUPPORTS A MODERN INTERPRETATION OF THE SEVENTH AMENDMENT</i>	1648
IV.	CONCLUSION	1651

I. INTRODUCTION

While no device precisely like summary judgment existed at common law, pre-1791 judges used a pretrial procedure to decide obvious facts in a manner analogous to a Federal Rule of Civil Procedure 56 motion for summary judgment. First, this Article will analyze this common-law procedure, trial by inspection, and find it a comfortable antecedent to modern summary judgment. Second, it will contend that the argument that summary judgment is unconstitutional depends on a rigid, erroneous interpretation of the Seventh Amendment. Courts should use a modern, more “pragmatic,” Seventh Amendment approach that eschews a mirror image between a common-law procedure and its descendant. Instead, the proper interpretation is consistent with summary judgment as long as it differs from its historical antecedent in incidental ways. This less rigid, pragmatic approach to the Seventh Amendment is itself rooted in the common law, which was flexible and utilitarian in nature; pre-1791 English courts were overtaxed and strained for resources and thus constantly tinkered with procedural changes.¹ The expansion of special merchant juries, the development of evidence rules to bar confusing evidence from the jury, and the common-law courts’ borrowing procedures used by equity courts each demonstrate that common-law courts modified their procedures for utilitarian reasons. The common law’s flexibility justifies use of a more liberal interpretation of the Seventh Amendment. Although summary judgment is different from trial by inspection or demurrer to the evidence, it differs in only incidental ways and, therefore, is constitutional.

This Article will not quarrel with the notion that improper application of summary judgment raises serious constitutional questions. My co-author Martin Redish and I have said that summary judgment rests on a “tenuous constitutional foundation.”² At common law, judges usually did not decide issues of historical fact. Modern constructions of Rule 56 likewise continue this allocation of function.³ Whenever an appellate court reverses a grant of summary judgment on the basis that the trial court decided a genuine issue

1. See, e.g., J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 40 (4th ed. 2002) (referring to a “struggle for business between the common-law courts”); Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179 (2007) (concluding that the common-law courts competed for business and changed procedures to make them less expensive and more efficient); Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1581, 1621–30 (2003) (noting that innovative changes led to competition among courts and ultimately changes to legal rules).

2. EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 16 (3d ed. 2006).

3. See *infra* notes 116–18 and accompanying text (discussing the proper interpretation of Rule 56).

of material fact—a common occurrence—the appellate court essentially finds the work of the trial court unconstitutional.

Professor Thomas should be commended for making the argument that summary judgment is unconstitutional and for properly placing her argument in a historical interpretation.⁴ The plain meaning of the text of the Seventh Amendment requires some sort of historical connection to the common law that existed in 1791 at the time of the Seventh Amendment's adoption.⁵ Moreover, the constitutional question posed by Professor Thomas is especially timely. Summary judgment is under attack.⁶ Professor Burbank has rightly underscored the need to base arguments regarding summary judgment upon empirical data⁷ and recent empirical studies paint a mixed picture of both increased use of summary judgment and a summary-judgment-filing rate of 17 to 21 per 100 cases terminated—hardly a number to invoke a crisis mentality⁸

Nonetheless, it is overly broad for Professor Thomas to suggest boldly that summary judgment is always unconstitutional; there are many instances where summary judgment passes constitutional muster. Whenever judges improperly decide factual issues, summary judgment is unconstitutional. In contrast, judges may constitutionally grant summary judgment based upon either legal principles or obvious facts because they have been doing so for several centuries.

4. See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 119 (2007) (arguing that summary judgment violates the Seventh Amendment).

5. See Martin Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 486 (1975) (discussing the historical interpretation of the Seventh Amendment); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640–41 (1973) (citation omitted) (asserting that a link to a procedure used in 1791 is necessary under historical test to “preserve” a right to a jury).

6. See, e.g., John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522 (2007) (summarizing and agreeing with Thomas' arguments that summary judgment is unconstitutional); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (questioning increased use of summary judgment); Patricia Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897 (1998) (emphasizing the impact of the wide use of summary judgment).

7. Stephen Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591 (2004) (stressing the need to base arguments on empirical evidence).

8. See Joe S. Cecil, *A Quarter-Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861, 887, 896 (2007) (showing that the rate of summary judgment motion filings and case terminations by summary judgment have increased but detailing a filing rate in a six-district twenty-five-year study of twenty-one percent in 2000); Joe Cecil & George Cort, *Estimates of Summary Judgment Activity in Fiscal Year 2006* (June 15, 2007) (unpublished study, Federal Judicial Center) (on file with author) (indicating that in 2006, approximately 17 motions for summary judgment were filed for every 100 cases that were terminated).

Several thoughts about methodology should be aired at the outset. Like Professor Thomas, I am both a researcher of history and an advocate. I concede that these two roles are conflicting and can cause a reader to doubt the many judgment calls made in this Article. I have tried to quote extensively, even in text, to provide the reader a genuine opportunity to form an independent judgment about the language used by old cases and commentary. The severity of this problem of dual roles and admitted author bias is mitigated, hopefully, by the lengthy quotations themselves.

Part of this Article assumes the legitimacy of some type of historical test of the Seventh Amendment right to jury trial.⁹ Under this textual approach, the Seventh Amendment “preserves” a right to jury trial as it existed at common law. To make my case that summary judgment is constitutional, I need to demonstrate that a procedural device like summary judgment existed at common law. In order to clarify my approach, I consider these to be the basic indicia of summary judgment¹⁰:

- a pretrial device;
- allocating a decisional task to the judge in a case otherwise tried by a jury;
- confining the judicial task to decide questions of fact that are obvious and could lead to but one answer;
- allocating a decision to the jury where the determination of the issue is uncertain or doubtful; and
- articulating a policy goal of judicial efficiency.

Any common-law procedure that meets these criteria is a blueprint for modern summary judgment and an appropriate historical antecedent for summary judgment.

My willingness to insist on use of some variety of historical test is driven by textualism and the Seventh Amendment’s command that the right to jury be “preserved.”¹¹ My concurrence with Professor Thomas does not mean that I concede the use of her static and inflexible reading of the historical

9. See, e.g., Wolfram, *supra* note 5, at 747 (affirming the legitimacy of an historical interpretation of the Seventh Amendment); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 291–98 (1966) (discussing the history of the Seventh Amendment’s adoption).

10. See, e.g., 11 MOORE’S FEDERAL PRACTICE 56.01 et. seq. (3d ed., 1997)

11. See, e.g., Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588–89 (1989) (referring to “textually faithful” interpretations).

test.¹² The weight of scholarly authority has rightly criticized a narrow, inflexible application of the historical approach.¹³ As I will set forth in Part III, I read the case law landscape as properly evolving into a modern interpretation of “preserved,” which will uphold any new procedure that has a reasonable historical antecedent; exact mirror images between old and new procedures are unnecessary¹⁴ and not required in this more pragmatic, constitutional interpretation.¹⁵

II PRE-1791 PROCEDURES INCLUDED A SUMMARY-JUDGMENT ANALOG: JUDICIAL FACT FINDING BY TRIAL BY INSPECTION

Although the common law lacked a transsubstantive¹⁶ procedure exactly like summary judgment, one established procedure, trial by inspection, bears a remarkably close resemblance to summary judgment and

12. See Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 754 (2003) (urging a “static reading” of the Seventh Amendment).

13. See, e.g., Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 148–51 (2001) (arguing that the text of the Seventh Amendment was “precatory” in nature and designed primarily out of economic motivation and not to define types of cases to be decided by the jury); John McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover*, 116 U. PA. L. REV. 1, 11 (1967) (concluding that case law using a modern historical test “fits well with the conception of the Constitution as a durable document providing continuingly useful standards for an evolving society”); Redish, *supra* note 5, at 487 (asserting that “blind adherence to history would seem to place modern judicial administration in an historical strait jacket, controlled by the policies of a society of 200 years ago”).

14. *Supra* note 13.

15. See generally William Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653 (2008). See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 153–54 (2002) (rejecting a “grand theory” of constitutional interpretation and praising legal pragmatists who use common-law reasoning that varies from case to case); JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* 6 (2006) (describing the survival of the historical test “despite unrelenting criticism from those who favor flexibility in constitutional interpretation”); William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL’Y 21, 27 (1998) (noting that “proper constitutionalism includes with it elements of stability and continuity in the core rules and principles contained in the foundational document but also contains escape hatches of flexibility to adapt to inevitably new and changed circumstances”).

16. Transsubstantive rules of procedure apply generally to any type of case. See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718, 718 (1975) (describing a system of transsubstantive rules as “generalized across substantive lines”). Judge Charles Clark strongly argued that one set of generalized rules should apply for all types of civil cases and vigorously opposed creating special rules for special cases. See, e.g., Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: I. The Background*, 44 YALE L.J. 387, 387–89 (1935) (discussing how “the act conferring upon the United States Supreme Court the power to make rules of procedure for federal civil actions” passed and celebrating the “promise” of uniformity in civil cases); Charles E. Clark, *Special Pleading in the “Big Case,”* 21 F.R.D. 45, 47 (1958) (“I assert dogmatically that strict special pleading has never been found workable or even useful in English and American law.”).

justifies the conclusion that a summary-judgment procedure existed historically in or around 1791.

A. *THE CLASSIC COMMENTATORS: BLACKSTONE'S AND COKE'S VERSIONS OF TRIAL BY INSPECTION DEMONSTRATE A CLEAR LINEAGE TO MODERN SUMMARY JUDGMENT*

1. Blackstone's Treatment of Trial by Inspection

Trial by inspection or examination was a common-law procedure that allowed the trial judge to decide obvious factual issues rather than submitting them to a jury. Under this essentially pretrial procedure, a judge would summon a party to the courtroom, take evidence, and adjudicate a critical issue without the assistance of a civil jury. Blackstone, writing in the eighteenth century, describes trial by inspection in this way:

[W]hen for the greater expedition of a cause, in some point or issue being either the principal question or arising collaterally out of it, but being evidently the object of sense, the judges of the court, upon the testimony of their own senses, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it; who are properly called in to inform the conscience of the court in respect of *dubious* facts; and therefore when the fact, from its nature must be evident to the court either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone.¹⁷

The essence of the described procedure is pretrial judicial fact finding of key issues presented where the result was likely to be obvious. Blackstone's description of trial by inspection closely approximates summary-judgment procedure. Under the trial by inspection process set forth by Blackstone, the judge clearly was permitted to usurp the fact-finding function normally allocated to a civil jury.

Though Blackstone is referring to trial by inspection, he is clearly describing an ancient¹⁸ procedure that smacks of summary judgment. Three summary-judgment-like policies animate Blackstone's characterization of trial by inspection. First, it appears that judicial economy motivates the trial-by-inspection device.¹⁹ Efficient courtroom management was critical to common-law courts and is demonstrated by the development of trial by

17. WILLIAM BLACKSTONE, 3 COMMENTARIES *331–32.

18. See Robert D. Brain & Daniel J. Broderick, *The Derivative Relevance of Demonstrative Evidence: Charting Its Proper Evidentiary Status*, 25 U.C. DAVIS L. REV. 959, 986–87 (1992) (asserting that “[t]his type of trial [by inspection] originated centuries before Blackstone’s *Commentaries*”).

19. Blackstone refers to “expedition” as a policy consideration justifying trial by inspection. 3 BLACKSTONE, *supra* note 17, at *331.

inspection that allowed the courts to decide easy issues summarily. Second, the use of trial by inspection appears designed to save the judge the task of impaneling a jury. Therefore, such a task was pre-jury trial in nature; this time savings or “jury economy” reason rests on a familiar efficiency theme of avoiding the allocation of unnecessary tasks to the jury. As subsequent segments of this Article demonstrate, the common law was resourceful in expenditures and would not impanel a jury unless necessary.²⁰ Third, trial by inspection seems to have decided easy questions, issues so clearly determined that Blackstone describes them twice as obvious.²¹ This procedure advanced both judicial economy and jury economy by efficiently deciding a dispute and doing so swiftly through the courts’ exercise of unilateral and discretionary powers. It is significant that the task of selecting and impaneling a jury was entirely bypassed by trial by inspection. Like summary judgment, trial by inspection sped up the adjudication process and advanced jury-economy policies by permitting the judge to decide factual questions that would otherwise be determined by the jury.

Blackstone proffered several illustrations to aid his detailed description of trial by inspection. The first was a suit by an alleged minor to reverse a fine because of his age. Using trial by inspection, the court could summon the plaintiff and visually examine him. At a time well before widely held drivers’ licenses, trial by inspection proved efficacious in contract disputes where age was at issue. Alternatively, if the visual examination was inconclusive, the judge “may proceed to take proofs of the fact; and particularly, may examine the infant himself upon an oath of *voire dire, veritatem decire*, that is, to make true answer to such questions as the court shall demand of him.”²²

The above illustration of trial by inspection bears a remarkable likeness to summary judgment. The court decided an issue of fact that is central to the case²³ and did so by examining admissible evidence. Indeed, this illustration of judicial power might aptly describe a typical modern summary judgment since both trial by inspection and summary judgment permit judicial consideration of live testimony rather than reliance upon a written record. Yet, although modern judges occasionally call live witnesses when considering a Rule 56 motion under their general powers granted by Rule

20. See *infra* notes 47–81 & accompanying text.

21. 3 BLACKSTONE, *supra* note 17, at *331–32.

22. *Id.* at 332.

23. See Brain & Broderick, *supra* note 18, at 987 (concluding that trial by inspection involved “proof of a primary, material issue and not as a secondary illustration of other evidence”).

43(e),²⁴ this authority is generally thought to be restrained by Judge Easterbrook's sensible theory that "one trial per case is enough."²⁵

Blackstone offered a second example of trial by inspection—that of a suit for mayhem.²⁶ The central issue in such cases was whether the plaintiff had suffered a serious injury by fighting.²⁷ Trial by inspection allowed for a quick and determinative decision as to the severity of the plaintiff's injury.²⁸ In Blackstone's terms, "the issue joined is whether it be [mayhem] or no [mayhem]; this shall be decided by the court upon inspection, for which purpose they may call in the assistance of surgeons."²⁹

This second example also looks like today's summary judgment: a key issue of a case was selected for early consideration with the potential for concluding the case. The judge decided the issue of requisite physical injury without ever impaneling the jury. The reference to possibly enlisting a physician to provide expert input is consistent with summary-judgment procedure. The use of experts to decide whether the issue is worthy of jury determination is common in summary judgment and should not be considered an aberration to the summary-adjudication process.³⁰ Use of expert affidavits to support and oppose modern summary judgment has become routine and, in turn, has created a set of rules to assimilate expert opinion into the summary-judgment process.³¹

Trial by inspection was used not only in cases involving age and mayhem, but also to decide other types of issues. The trial court could make critical decisions of identity and sanity using this process.³² In deciding personal identity or purported idiocy, the judge "determined the question

24. FED. R. CIV. P. 43(e) (granting a court the authority to call live witnesses to decide any motion).

25. *Stewart v. RCA Corp.*, 790 F.2d 624, 629 (7th Cir. 1986). *See generally* BRUNET & REDISH, *supra* note 2, at 210–15 (describing the occasional use of Rule 43(e) hearings in deciding summary-judgment motions and calling for restraint in their use).

26. 3 BLACKSTONE, *supra* note 17, at *332.

27. *Id.*

28. *Id.*

29. *Id.*

30. *See, e.g.*, *Maffei v. N. Ins. Co. of N.Y.*, 12 F.3d 892, 895–97 (9th Cir. 1993) (reversing the trial-court exclusion of the nonmoving party's expert testimony); *Whetstine v. Gates Rubber Co.*, 895 F.2d 388, 394 (7th Cir. 1990) (considering a defense-expert affidavit on the issue of product defect). The use of experts in summary judgment is growing, but has its critics. *See, e.g.*, *Mid-State Fertilizer Co. v. Exch. Nat'l Bank of Chi.*, 877 F.2d 1333, 1340 (7th Cir. 1989) (Easterbrook, J.) (criticizing the expert affiant as providing "ukase in the guise of expertise" and becoming "a skill for [the plaintiff]").

31. *See* BRUNET & REDISH, *supra* note 2, at 257–72 (discussing the growing use of expert affidavits in summary judgment).

32. *See* Note, *Power of Court to Order Physical Examinations in Personal Injury Cases*, 25 VA. L. REV. 73, 77 (1938) (asserting that "[i]n former times, when the issue of a person's infancy, identity or sanity was raised, the English courts might in their discretion decide it by an actual inspection or examination of the person in court, without calling upon a jury").

by an inspection of the person of the alleged idiot.”³³ The inspection process in such cases would be the same as in mayhem or age cases: the court would engage in what Blackstone termed an “ocular examination” of the alleged idiot and decide the critical issue in a manner similar to summary judgment by determining whether the result was obvious.³⁴ The judicial task was akin to applying today’s summary-judgment standard: the court removed the decisional task from the jury and decided the case itself as if there were no way a reasonable jury could find for a party. Generally, the judge would visually “inspect” a party to determine if an issue such as age, identity, or physical injury could be so obvious that no jury was necessary. However, it was also possible to take testimony from physicians to aid in the determination of the issue.

Within these examples, Blackstone articulated an important homily that was both illustrative of the power and respect for the common-law jury and useful to summary-judgment evolution. In any trial by inspection, the “judges, if they conceive a doubt, may order it to be tried by jury.”³⁵ This statement might have been describing summary-judgment mechanics—if there is doubt about whether the proof eliminates an issue of fact, the motion must be denied. This quote presaged Jerome Frank’s famous *Arnstein v. Porter* decision, which called for rejection of summary judgment if there existed the “slightest doubt” about an issue of fact.³⁶ The Blackstone quotation regarding doubt also contemplates a clear allocation of function between the common law judge and jury. Cases raising uncertain factual inferences are the task of the jury; disputes where the factual issues are obvious are the province of the court.

The significance of this Blackstone quotation concerning doubt cannot be overstated. Summary judgment not only resembles trial by inspection, it is constrained and cabined by the very same considerations. In trial by inspection, clear, obvious cases can be removed from jury consideration; doubtful cases must go to the civil jury. Scarce jury resources may be

33. See Seymour D. Thompson, *Trial by Inspection*, 25 CENT. L.J. 3, 3–4 (1887) (referring to the use of trial by inspection in deciding issues of age, idiocy, mayhem, atrocious battery, and personal identity).

34. See 3 BLACKSTONE, *supra* note 17, at *331–32 (noting that juries are not used to decide “obvious” questions).

35. *Id.* at *325, *333.

36. *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946) (citing *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945)). During the 1940s, the Second Circuit used a summary-judgment standard that would deny a Rule 56 motion if the “slightest doubt” existed concerning a genuine issue of material fact. See *Doehler*, 149 F.2d at 135 (noting that a “litigant has a right to a trial where there is the slightest doubt as to the facts”). For a detailed discussion and criticism of the slightest-doubt test, see BRUNET & REDISH, *supra* note 2, § 6:3. The slightest-doubt test was rejected in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), in which the court asserted that the task of the nonmovant is “more than simply show[ing] that there is some metaphysical doubt as to the material facts.”

conserved through routine use of this procedure. While Blackstone was describing the dynamics of trial by inspection, he might as well have been explaining summary-judgment mechanics. The fact that Blackstone wrote such a detailed and positive description of trial by inspection is particularly noteworthy. Blackstone was writing in the mid eighteenth century, not long before 1791, and, in Professor Thomas's words, Blackstone had written "of the importance of the jury."³⁷

2. Coke's Treatment of Trial by Inspection

Coke, writing at the time of Elizabeth I, discusses trial by inspection and confirms its importance as an efficient pretrial technique in which the judge used his senses to decide an issue that otherwise may have been determined by a jury.³⁸ It is useful to consider Coke's explanations of trial by inspection and to compare this procedure to summary judgment. In *The Case of the Abbot of Strata Mercella*, Lord Coke explained trial by inspection by setting forth several illustrations of its use by judges.³⁹ Coke states that:

[I]f the plaintiff makes⁴⁰ attorney in court, and the defendant pleads that the plaintiff is dead, and one appears and says, he is the plaintiff, which is denied by the other party, the Justices shall adjudge if he who now appears be the same person who made an attorney in court.⁴¹

This example is similar to Blackstone's conception of trial by inspection as it relies on the judge's observation of live evidence in the courtroom. Coke's second example sets forth a property dispute in which the age of a party was at issue.⁴² Coke asserted that "it shall not be tried by the country for the great delay to the demandant but a writ shall be awarded to the Sheriff,

37. Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) (quoting 3 BLACKSTONE, *supra* note 17, at *379–80, who warned that allocating decisions to magistrates would "frequently have an involuntary bias towards those of their own rank and dignity" and praised juries as "sensible and upright . . . [and] the best investigators of truth and the surest guardians of public justice").

38. *The Case of the Abbot of Strata Mercella*, (1591) 9 Co. Rep. *24a, *30b, 77 Eng. Rep. 765, 776 (K.B.).

39. *Id.* Coke's case reports can read more like summations of the law than a taut reporting of the facts and law applied to a dispute. See 5 SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 462–63 (3d ed. 1945) (noting that "[t]o a certain extent Coke was guided by the nature of the cases which he was reporting" but explaining that sometimes Coke "ma[de] the case a mere text for a summary of the law on the subject").

40. As used here, the word "makes" probably means "appears." In context, Lord Coke stated that the plaintiff appears as attorney in court, thereby allowing the judge to see and identify the plaintiff and to later assess whether the person who claims to be the plaintiff is really the same person. See, e.g., I T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY *passim* (1764) (using the phrase "makes attorney" as "appears as attorney"). An alternative possible meaning of "makes attorney" is simply the act of hiring an attorney.

41. *Abbot of Strata Mercella*, 9 Co. Rep. at *30b, 77 Eng. Rep. at 775–76.

42. *Id.* at *31a.

commanding him” to bring the party in question to the court for examination.⁴³ Coke’s description of this process, like Blackstone’s, involved using the sense of sight to allow a judge to decide a critical issue without impaneling a jury. Coke’s articulation of efficiency as a justification for the inspection process illustrates the sixteenth-century common law’s reliance on utilitarian reasoning when allocating function between judge and jury. It is also noteworthy that Coke clearly understood that trial by inspection involved the trial judge taking an issue from a jury. Trial by inspection to Coke, like Blackstone, was not a procedure that operated in a vacuum, but one that clearly allocated a task to the court rather than to the civil jury.

*B. OTHER COMMENTATORS DESCRIBE TRIAL BY INSPECTION AS AN EARLY
VERSION OF SUMMARY JUDGMENT*

Pollock and Maitland’s detailing of English legal history also explains what appears to be trial by inspection as a separate mode of trial distinguished from trial by jury. In their chapter on pleading and proof, they describe a procedure that resembles trial by inspection: “If it was asserted that a litigant was not of full age, the justices would sometimes trust their own eyes; if they doubted, he made his proof by a suit of twelve witnesses.”⁴⁴ This quote addresses judicial uncertainty regarding whether the question at issue required the judge to impanel a jury. The quotation also confirms the judge’s use of the senses in a manner identical to Blackstone’s reference to a court’s ocular examination.⁴⁵

The edited version of Bracton appears to describe trial by inspection without using the term.⁴⁶ In his description of proving age, Bracton clearly distinguishes between using a jury or, alternatively, allocating the decision to a judge “if age has been proved by the look of the body.”⁴⁷ Bracton also writes that “neighbors and . . . relatives” decide proof of age where “the judges have doubted” following a judicial “view” of the person whose age is at issue.⁴⁸ This early articulation of “doubt”⁴⁹ as a triggering mechanism for

43. *Id.* at *53a–*54a. The phrase “by the country” means “tried by a jury.”

44. II SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 639–40* (2d ed. 1898) (citing HENRY OF BRATTON, *BRACON’S NOTE BOOK: A COLLECTION OF CASES DECIDED IN THE KING’S COURT DURING THE REIGN OF HENRY THE THIRD* 46, 687, 1131, 1362 (F.W. Maitland ed., C.J. & Sons, Cambridge Univ. Press Warehouse 1887)).

45. *Cf.* 3 BLACKSTONE, *supra* note 17, at *331–32.

46. 6 HENRICI DE BRACON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLÆ* 353 (Sir Travers Twiss, ed., London, Longman & Co. 1883). The original notes of Bracton date from 1250.

47. *Id.*

48. *Id.* (providing editor’s marginal notes “concerning the proof of age by the look of the body” and asserting, in text, that the person “shall be held to be of majority as regards all persons, and no further dispute is to be raised” when “the justiciaries have adjudged such a person to be of majority”).

allocation to the jury is significant. It illustrates a summary-judgment-like approach to assigning functions to judge and jury.

Coke's and Bracton's selection of cases involving age to illustrate trial by inspection should not be taken lightly. During the common-law period, proof that a plaintiff was underage was one of just a few available defenses in a contract case.⁵⁰ The availability of an efficient procedure such as trial by inspection meant that proof of incapacity could lead to a quick dismissal. It is also noteworthy that proof of insanity, one of the other few available defenses to breach of contract claims, also made use of trial by inspection.⁵¹

Other commentators describe the process of trial by inspection similarly and in a manner consistent with modern summary judgment. James Glassford's treatise on evidence sets forth trial-court ocular evaluation of alleged forgeries as analogous to what "the English law denominates Trial by Inspection or Examination; and which, if no other proof be requisite, is, on account of the simple and direct nature of the evidence, taken by the Judge, without intervention of a jury."⁵² George Custance's constitutional law treatise describes using trial by inspection "when the point or issue is the object of sense; so that the judges upon the testimony of their own senses may decide the question."⁵³ Nathan Dane's *Digest of American Law* explains trial by inspection as though the procedure was a major feature of common-law trials. He lists trial by inspection as one of seven different English modes of trial⁵⁴ and cites Blackstone's explanation of trial by inspection as "being evidently the object of sense, the judges deciding on their own view."⁵⁵ Dane also emphasized that "if the judges doubt, they may call a jury."⁵⁶ This need for an obvious result stemming from a summary inspection was a constant

49. *Id.* at 355 (providing editor's marginal notes referring to doubt of age in the notation "if the justiciaries have doubted . . .").

50. See D.J. IBBETSON, *HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 71 (1999) (asserting that both an infant and a lunatic lacked capacity to sue); Klerman, *supra* note 1, at 1190 (noting that the "defendant had practically no defenses at common law" because of limitations of the fraud concept and asserting that the "only other defense was incapacity, usually that the contracting party was underage or insane").

51. *Supra* note 50.

52. JAMES GLASSFORD, *AN ESSAY ON THE PRINCIPLES OF EVIDENCE AND THEIR APPLICATION TO SUBJECTS OF JUDICIAL INQUIRY* 323 (1820).

53. GEORGE CUSTANCE, *A CONCISE VIEW OF THE CONSTITUTION OF ENGLAND* 334 (2d ed. 1808) (stating that trial by inspection was used "in cases of nonage, idiotism, and the like" and also in cases involving determining a proper date).

54. 6 NATHAN DANE, *A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW: WITH OCCASIONAL NOTES AND COMMENTS* 231 (1824) (setting forth seven different modes of trial: "1. [B]y record; 2. By inspection[;] 3. By certificate[;] 4. By witnesses[;] 5. By Jury[;] and 6. [B]y oath of the party, as in usury . . . and in England, a seventh may be added, [B]y battle and wager of law"); see also JOHN P. GRANT, *A SUMMARY OF THE LAW RELATING TO THE GRANTING OF NEW TRIALS IN CIVIL SUITS BY COURTS OF JUSTICE IN ENGLAND* 9 (1817) (providing a similar list of these seven ways to resolve disputes at common law).

55. 6 DANE, *supra* note 54, at 231 (citing 3 BLACKSTONE, *supra* note 17, at *331-33).

56. *Id.*

theme in all descriptions of civil use of this common-law procedure. Highmore's treatment of the law relating to idiocy refers to trial by inspection as the ordinary manner of trial,⁵⁷ as compared to determinations of lunacy, which merits a full trial on the merits because of the presence of "lucid intervals."⁵⁸

Prominent American evidence scholars questioned the traditional divide between judge and jury function and confirmed that trial by inspection was a regular fixture in common-law pretrial adjudication. Wigmore attacked the often-stated notion that questions of fact are for the jury as a "conventional brocard [that] cannot be taken as a trustworthy guide" and emphasized that judge-jury functions were part of "the general powers of the judge in supervising and controlling the jury."⁵⁹ Wigmore also explained trial by inspection as a trial "by the judge's own observation of the fact in court."⁶⁰ Thayer's 1898 evidence treatise downplayed the role of the common-law jury by asserting that "there is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury," and, in contrast, he upgraded the role of the court by asserting that "judges have always answered a multitude of questions of ultimate fact, of fact which forms part of the issue."⁶¹

While English common-law judges certainly used trial by inspection for centuries, at some point—probably in the nineteenth century—trial by inspection "as a formal and distinct mode of trial . . . ha[d] fallen into disuse."⁶² Writing in 1832, Starkie asserts that "non-age was formerly tried by a jury of eight men" and that "the fact of infancy must, in this country, be tried *per pais* and not by inspection."⁶³ Writing in 1824, Stephen describes trial by inspection and its use in age and dower cases, but suggests that it is "not now known in practice" and "seems to be not a mode so exclusively

57. ANTHONY HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 25 (1st American ed. 1822) (noting that trial by inspection is used to "discern" idiocy).

58. *Id.* at 123–24.

59. 9 JOHN HENRY WIGMORE, WIGMORE ON EVIDENCE § 2549 (3d ed. 1940).

60. *Id.* § 2555 (citing 3 BLACKSTONE, *supra* note 17, at *331). Wigmore noted that "no recognition would probably be given it to-day, except in the ensuing instance." *Id.* Wigmore continued by providing an example of using trial by inspection to interpret a judicial record. *Id.* (quoting SIR EDWARD COKE, COMMENTARIES UPON LITTLETON 260*a* (1628) ("If such a record be alleged, and it be pleaded that there is no such record, it shall be tried only by itself.")).

61. JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 185, 202 (1898).

62. *See, e.g.*, 3 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE 323 (16th ed. 1899) (noting that "trial by inspection, or personal examination of the subject of controversy, by the judge, was anciently familiar in the courts of common law" (citing 3 BLACKSTONE, *supra* note 17, at *331)).

63. THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE 723 (1826) (citing 3 BLACKSTONE, *supra* note 17, at *332; *Sliver v. Shelback*, 1 U.S. (1 Dall.) 165, 166 (1786)). Starkie also notes inconsistently that the "trial of the non-age of a party is either by *inspection* or in the ordinary way by a Jury." *Id.*

appropriate.”⁶⁴ Gresley, while acknowledging that “there was an ancient form of trial called Trial by Inspection or Examination, in which the Judges determined a point in question, upon the direct testimony of their own senses,” added that “[t]his mode of decision may now be considered obsolete at common law, but an equity judge exercises in certain cases a very similar power.”⁶⁵

The eventual demise of trial by inspection in the United States may have been caused by the strong preference to try questions of fact and even law to the jury. Professor Nelson has chronicled the strong support during the colonial era for trial by jury, including the jury’s decisions on legal and factual issues.⁶⁶ He has emphasized that few English devices to control jury findings were used in colonial Massachusetts, thereby giving the jury “vast power to find both the law and the facts.”⁶⁷ This development appears consistent with colonial hostility to chancery courts, which were “closely associated with executive power.”⁶⁸

C. AMERICAN CASE LAW SUPPORTS TRIAL BY INSPECTION AS A FORERUNNER
TO TODAY’S SUMMARY JUDGMENT

Nineteenth- and twentieth-century American cases confirm the common law’s use of trial by inspection and prove that some American states continued to utilize this common-law procedure. Though it is clear that the historical test points back to English common law and not to American colonial usage,⁶⁹ there is much to be learned from the available U.S. case law dealing with trial by inspection.

In *Davison v. Tipton*,⁷⁰ the Ohio district court affirmed the trial court’s determination of lunacy through trial by inspection. The court asserted, “At common law in cases of infancy, lunacy, and other cases, the court might

64. HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 131–32 (Chi., Callaghan & Co. 1824).

65. RICHARD NEWCOMBE GRESLEY, A TREATISE ON THE LAW OF EVIDENCE IN THE COURTS OF EQUITY 342–43 (Phila., P.H. Nicklin & T. Johnson 1837).

66. WILLIAM NELSON, DISPUTE AND CONFLICT RESOLUTION IN PLYMOUTH COUNTY, MASSACHUSETTS, 1725–1825, 25–26 (1981) (noting that “[o]nce juries were assembled in court, they exerted immense power over the outcome of cases” and “had effective power to determine the law involved in the cases before them as well as the facts”).

67. WILLIAM NELSON, THE AMERICANIZATION OF THE COMMON LAW 21 (1975).

68. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 21 (3d ed. 2005). Friedman emphasizes that “[h]ostility to chancery courts was fairly widespread” in the eighteenth century. *Id.*

69. See, e.g., Wolfram, *supra* note 5, at 641 (stating that the right to jury trial “is defined through reference by incorporation to the law of England, not to the law of the United States”). Professor Wolfram relies on Justice Story’s opinion in *United States v. Wonson*, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750), which referred to “the common law of England” as not justifying a second jury trial. *Id.*

70. *Davison v. Tipton*, 9 Ohio Dec. Reprint 60 (Ohio Dist. Ct. 1883), available at 1883 WL 5048, at *1 (Ohio Dist. Ct. 1883).

proceed to try the case by inspection and also by the testimony of witnesses.”⁷¹ The court of appeals emphasized that the trial judge’s observation that the lunatic did not answer questions posed to him and it was impossible for the court to report possible answers the lunatic would give and, instead concluded that “[p]erhaps the court decided this case altogether upon the appearance and conduct of [alleged lunatic] Davison in their presence, . . . which they had a right to do.”⁷²

*Stewart v. Sholl*⁷³ illustrates that older courts understood the constitutional significance of trial by inspection. In *Stewart*, the Georgia Supreme Court upheld the trial court’s use of trial by inspection and rejected the argument that a jury was constitutionally mandated.⁷⁴ The issue the lower court decided by inspection dealt with the validity of a sister-state judgment and the effect of a clerk’s failure to enter a prior judgment order.⁷⁵ In upholding the use of trial by inspection, the Georgia Supreme Court may as well had been justifying summary judgment when it reasoned that “[t]he office of a jury is to determine disputed matters of fact, and, if there be no matter of fact in dispute, there is nothing upon which the court is at liberty to invoke the finding of the jury.”⁷⁶

*DeHaven’s Estate*⁷⁷ demonstrates a clear use of trial by inspection in a dispute concerning an alleged alteration of a contested will. The Pennsylvania decision approved the trial court’s hands-on review of the will and a copy and concluded that “[i]t would appear to be a matter properly to be tried by the inspection of the court, by what Blackstone calls ocular demonstration.”⁷⁸

D. TRIAL BY INSPECTION, VIEWED IN A FLEXIBLE MANNER, IS A REASONABLE
ANTECEDENT FOR SUMMARY JUDGMENT

Summary judgment opponents might argue that trial by inspection is the “exception that proves the rule.” Put simply, this argument characterizes trial by inspection as an odd exception to the norm that the broad universe of cases would be tried to a jury.

71. *Id.* at *2 (citing *Gray v. State*, 4 Ohio 353 (1831) (deciding the color of a man’s skin through the use of trial by inspection)).

72. *Id.*

73. *Stewart v. Sholl*, 26 S.E. 757 (Ga. 1896).

74. *Id.* at 758.

75. *Id.* at 757–58.

76. *Id.* at 758. *Accord* *Armstrong v. Lewis*, 61 Ga. 680, 687–88, 1878 WL 2969 (1878) (authorizing trial by inspection rather than by jury as the proper procedure to interpret the validity of a court’s docket records).

77. *De Haven’s Estate*, 23 Pa. D. 383, 1914 WL 4439, at *3 (Pa. Orph.).

78. *Id.* (citing 3 BLACKSTONE, *supra* note 17, at *331); *see also* *Snodgrass v. Bradley*, 2 Grant 43, 43 (Pa. 1852) (citing 3 BLACKSTONE, *supra* note 17, at *332 and describing the “ancient practice” of trial-court inspection of a party to determine age and noting that “any doubt of the age of the party” may be decided by further proof decided by a jury).

This argument ignores the diverse and significant use of trial by inspection. Trial by inspection was used in cases involving incapacity due to age (infancy), insanity, mayhem (the tort of severe beating), personal identity, and impotency. This laundry list of diverse claims share one trait: the ability to visually examine evidence and quickly decide the entire case or a critical issue within a case. Neither the list itself nor the theory of using a visual or ocular examination to save scarce jury resources is implausible. Indeed, trial by inspection makes sense.

A summary-judgment-like procedure existed in the historic period that we term “the common law.” The fascinating research implication of using trial by inspection to justify summary judgment’s constitutionality is that prior scholarship dealing with the Seventh Amendment largely ignores this important procedure. It is interesting to speculate upon reasons for this glaring omission. I suspect the reason scholars ignore trial by inspection lies in its possible classification as a procedure of evidence law and therefore a mode of *trial* procedure, rather than a *pretrial* procedure like summary judgment. Evidence law lies in a different subject matter than pretrial procedure; scholars appear to have focused on procedures other than evidence when researching the implications of the Seventh Amendment.⁷⁹

Some may contend that trial by inspection is a mere rule of evidence bearing resemblance to judicial notice. Although judicial notice and trial by inspection share similar traits—after all, each is decided by a judge—the two procedures are very different. Trial by inspection involves the judge deciding an issue that may or may not end a case. Consider a breach of contract case where *A* pleads that *B* has breached the contract, and *B*’s answer asserts that *A* lacked capacity to sue because he was under the legal age and that *B* is not in breach. Using trial by inspection, the trial judge looks at the plaintiff, decides that he is obviously over the legal age, and strikes the affirmative defense of incapacity. This ruling by the court, however, fails to end the case because the breach issue must still be tried to the jury. Such interplay between judge and jury, the hallmark of trial by inspection and summary judgment, is completely missing from judicial notice, a practice involving a judge acknowledging the general truth of a particular fact, often on common knowledge.⁸⁰

79. See sources cited *supra* note 5.

80. See FED. R. EVID. 201 (stating that a “judicially noticed fact must be . . . generally known”).

III. TRADITIONAL ARGUMENTS SUPPORT SUMMARY JUDGMENT'S CONSTITUTIONALITY

A. *THE DEMURRER TO THE EVIDENCE IS A CONSTITUTIONAL ANTECEDENT UNDER A LESS RIGID, PRAGMATIC HISTORICAL TEST*

In *Parklane Hosiery Co. v. Shore*, Justice Rehnquist's dissent extended beyond the confines of the case at hand to justify outright the constitutionality of summary judgment and to set forth a more pragmatic and flexible interpretation of the historical test.⁸¹ The tone of Justice Rehnquist's constitutional approval of summary judgment is confident and terse. Speaking of the analogous constitutional approval of directed verdict in *Galloway v. United States*,⁸² Rehnquist gratuitously justified summary judgment, a procedure not at issue in *Galloway*,⁸³ because "demurrer to the evidence, a procedural device substantially similar to summary judgment, was a common practice [at common law]."⁸⁴ The *Parklane* dissent then logically connected both summary judgment and directed verdict to demurrer to the evidence by labeling them "direct descendants of their common law antecedents" that "accomplish nothing more than could have been done at common law, albeit by a more cumbersome procedure."⁸⁵

Justice Rehnquist's gratuitous summary-judgment defense is telling and cannot be dismissed summarily. His pragmatic reformulation of the historical test bears emphasis. Modern new procedures need not mirror common-law procedures; it is constitutionally sufficient that new procedures are "direct descendants" of a procedure that was used at common law. His dissent went on to attack the constitutionality of nonmutual collateral estoppel, which he labeled as a "substantial departure from the common law."⁸⁶

Justice Rehnquist's reasoning merits careful consideration as a major reformulation of the historical test. He argues that because the Seventh Amendment does not "create" but "preserves" the right to jury, the Seventh Amendment requires some type of historical justification.⁸⁷ The strong, pro-jury economic history of the Seventh Amendment's passage supports use of a variety of historical tests. Yet, the type of historical approach set forth in the *Parklane* dissent is neither rigid nor inflexible. There is no clear textualist rule as to what the Framers meant when they wrote that the right to jury shall "be preserved." Courts should approve a new procedure that

81. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 337 (1979) (Rehnquist, J., dissenting).

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

83. *Id.* at 373.

84. *Parklane*, 439 U.S. at 348.

85. *Id.* at 350.

86. *Id.*

87. *Id.* (arguing that the text of the Seventh Amendment "preserved" the right to jury trial "from incursions by the government or the judiciary").

bears a “direct” relationship to a device that existed at common law and is not a “substantial departure” from the analogous common-law antecedent.⁸⁸

We can only speculate why Justice Rehnquist reached out to defend the constitutionality of summary judgment, a device not even at issue in *Parklane*. Perhaps, he felt the need to cabin his ultimate goal in dissenting: to attack the constitutionality of the use of federal nonmutual collateral estoppel. Alternatively, stretching to justify summary judgment may represent Rehnquist’s best effort to recast a more flexible historical test—one that would attract other justices to his pro-jury position. Throughout his career at the Supreme Court, Rehnquist appeared to be a supporter of the jury.⁸⁹

A traditional defense of summary judgment relies substantially upon *Galloway*’s holding justifying the constitutionality of directed verdict. Justice Rutledge selected the demurrer to the evidence as a reasonable common-law analog to directed verdict.⁹⁰ The demurrer to the evidence allowed the trial court to dismiss a claim or defense because of insufficient evidence and allowed the trial court to consider this evidence, which was assumed to be true. Unlike directed verdict, however, the moving party for demurrer to the evidence could not present trial evidence if its motion were denied; if the court ruled for the nonmovant, the case terminated.

There is no doubt that demurrer to the evidence differed in major ways to both directed verdict and summary judgment. A major difference is diminished risk to a summary-judgment and directed-verdict movant because modern practice permits a losing movant of either motion to offer additional evidence if the motion is denied. Other important differences exist. The demurrer to the evidence was a trial motion; summary judgment motions are normally made well before trial.

To dwell upon the clear differences between directed verdict and demurrer to the evidence is to miss the message of *Galloway*. Justice Rutledge’s opinion does not demand a mirror image between a common-law and allegedly analogous modern procedure. *Galloway*’s interpretation of the Seventh Amendment requires only the preservation of “jury trial in only its

88. *Id.*

89. This reputation may be due more to the Rehnquist Court’s Sixth Amendment jurisprudence, particularly *Appendi v. New Jersey*, 530 U.S. 466 (2000). See, e.g., John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 559–65 (2002). It is noteworthy that Rehnquist voted with the majority in several pro-Seventh Amendment decisions explicitly dealing with right-to-jury methodology but wrote only the *Parklane* dissent. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 694 (1999) (establishing the right to jury in § 1983 actions); *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 518 U.S. 558, 563 (1990) (upholding the union’s right to a civil jury); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (reinforcing the right to jury in a bankruptcy context).

90. The *Galloway* decision also rested on the common-law use of the motion for new trial as an analogy to the directed verdict. *Galloway v. United States*, 319 U.S. 372, 390 (1943).

most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.”⁹¹ The Rutledge view of common-law procedure was one “constantly changing and developing during the late eighteenth and early nineteenth centuries”⁹²—an interpretation that allowed flexibility and latitude when applying his version of the historical approach.⁹³

This view of the textual reference to the common law is more flexible, less rigid, and allows the new procedure the opportunity to change with the pragmatic needs of modern time. As aptly put by Justice McKenna in *Fidelity & Deposit Co. v. United States*, there is an unambiguous power to change procedural rules used in court, and there can be no “constitutional right to old forms of procedure.”⁹⁴ Justice Stone stressed a similar point in his *Dimick v. Schiedt* dissent when asserting that “I cannot agree that we are circumscribed by so narrow and rigid a conception of the common law.”⁹⁵ Stone’s view of the text and purpose of the right to trial by jury is noteworthy. According to Justice Stone, “[T]here is nothing in its history or language to suggest that the amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution.”⁹⁶

The teachings of both *Markman v. Westview Instruments, Inc.*⁹⁷ and Justice Brennan’s concurrence in *Teamsters v. Terry*⁹⁸ support a flexible and utilitarian reading of the historical test. After failing to find a precise common-law analogy under the historical test, *Markman* allocated decisional authority to the judge regarding the important issue of patent-claim construction on the basis of “functional considerations.”⁹⁹ Rather than being tied to a rigid formulaic version of the historical test, the *Markman* decision was based on whether or not “one judicial actor is better positioned than another to decide the issue in question.”¹⁰⁰ The judge was seen functionally as competent and experienced in the interpretation of written documents

91. *Id.* at 392. For an example of such evolutionary change, issues “such as duress, fraud, and illegality, which had once been cognizable only in equity, were familiar defenses to a legal action by the end of the eighteenth century.” FLEMING F. JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN J. LEUBSDORF, *CIVIL PROCEDURE* 495 (5th ed. 2001) (citing Walter Wheeler Cook, *Equitable Defenses*, 32 *YALE L.J.* 645 (1923)), and emphasizing the overlap between law and equity).

92. *Galloway*, 319 U.S. at 391.

93. *Accord* George C. Christie, *Judicial Review of Findings of Fact*, 87 *NW. U. L. REV.* 14, 15 (1992) (describing that the “rules of the common law have always been in a state of evolution”).

94. *Fid. & Deposit Co. v. United States*, 187 U.S. 315, 320–21 (1902).

95. *Dimick v. Schiedt*, 293 U.S. 474, 495 (1935) (Stone, J., dissenting). Stone went on to emphasize the common law’s “capacity for growth and development.” *Id.* at 496.

96. *Id.* at 490.

97. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

98. *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558 (1990).

99. *Markman*, 517 U.S. at 388.

100. *Id.* (focusing on the “relative interpretive skills of judges and juries”).

such as patent claims. Similarly Justice Brennan's concurrence in *Terry* backed away from a complicated reading of the historical test, instead emphasizing the remedy sought and avoiding a literal reliance on the pre-merger nature of the type of action presented. Brennan characterized the search for a pre-1791 historical antecedent as "rattling through dusty attics of ancient writs" and a task "better left to legal historians."¹⁰¹

The pragmatic construction of the historical test appeared to be adopted in *Gasperini v. Center for Humanities, Inc.*¹⁰² There, the Court upheld the constitutionality of judicial review of the district-court denial of motions for a new trial based upon excessive damages.¹⁰³ The majority opinion of Justice Ginsberg appeared to adopt the flexible and pragmatic interpretation of the historical test. Rather than use a static, time-dictated limitation, the *Gasperini* majority expressly asserted that the common law was not "fixed at 1791."¹⁰⁴ The procedure at issue was deemed constitutional even though it did not exist in 1791 because the interpretation given the Seventh Amendment was neither static nor fixed.¹⁰⁵ Under this type of analysis the historical test could consider utilitarian policies supporting the procedure in question, an interpretive twist that eschewed the static approach advocated by Professor Thomas and other critics of summary judgment's constitutionality.¹⁰⁶ This functional version of the historical test embraces the full and commanding set of summary-judgment efficiency policies that, under *Gasperini*, are highly relevant to a constitutional analysis.¹⁰⁷

101. *Teamsters*, 494 U.S. at 576 (stressing that judges have "neither the training nor time necessary for reputable historical scholarship"). Cf. *Tull v. United States*, 481 U.S. 412, 421 (1987) (rejecting an "abstruse historical" search for the nearest 18th-century analogue (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970))).

102. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

103. *Id.* at 435–36.

104. *Id.* at 436 n.20.

105. *Accord Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 335–56 (1979) (upholding the constitutionality of issue preclusion without a need for mutuality of parties).

106. See *Gasperini*, 518 U.S. at 436 (noting that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice").

107. See, e.g., *Sheets v. Butera*, 389 F.3d 772, 776 (8th Cir. 2004) (explaining that "a principal purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses"); *Schact v. Wis. Dept. of Corr.*, 175 F.3d 497, 504 (7th Cir. 1999) (noting that "roughly speaking, [summary judgment] is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events"); Richard Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) (explaining the role of notice pleading that has shifted the task of pretrial disposition to discovery and beyond); Kent Sinclair & Patrick Haynes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1667–68 (1995) (describing summary judgment as having a "gatekeeping function" to "screen doomed claims").

In short, the prevailing style of interpretation of the Seventh Amendment set forth by a diverse set of justices over decades—Ginsberg, Brennan, Rehnquist, Rutledge, McKenna, and Stone—calls for a more pragmatic reading, and one that permits procedural innovations that may have significant distinctions from the historical antecedents used for constitutional justification.¹⁰⁸ Viewed from this flexible perspective, trial by inspection's lack of transsubstantivity appears immaterial. Trial by inspection was used in multiple types of cases—proof of age or incapacity, insanity, mayhem, and personal identity.¹⁰⁹ These cases present a diverse set of claims, including both tort and contract claims. While these causes of action are not transsubstantive, they are just one step removed from modern summary judgment and should survive constitutional scrutiny under the more flexible modern approach. The issues resolved by trial by inspection were neither insignificant nor trivial; they were recurring questions of an important and varied nature, as are the questions resolved today by summary judgment.

A more pragmatic interpretation of the Seventh Amendment should embrace the collateral-effects doctrine. Under this approach, a court would uphold a modern procedure not used in 1791 if it varies its historical antecedent only in collateral or incidental ways.¹¹⁰ In *Galloway*, the Court held that the methods of jury regulation that did exist in 1791—new trial and demurrer to the evidence—were different from directed verdict in only a collateral manner.¹¹¹

The main distinction between directed verdict and summary judgment is that of timing, or when the motion is made. Demurrer to the evidence and directed verdict are trial procedures, and summary judgment is a pretrial mechanism. Nonetheless, summary judgment should pass constitutional muster provided the differences between the summary judgment and its historical antecedents are collateral. The timing distinction, while certainly not trivial, is incidental to the basic idea of allowing the trial judge to decide obvious facts.

108. See generally William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653 (2008) (calling for a progressive interpretation of the Constitution). See also Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1738 (2007) (explaining the history of the living, flexible Constitution); William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (cataloging materials expressing a variety of opinions on a "living Constitution"); Rachael E. Schwartz, *Everything Depends on How You Draw the Lines: An Alternative Interpretation of the Seventh Amendment*, 6 SETON HALL CONST. L.J. 599, 603 (1996) (explaining that "when the Seventh Amendment dictated that the right to civil jury trial was preserved, it meant that it was not abolished").

109. See *supra* Part II.A.

110. See *Galloway v. United States*, 319 U.S. 372, 390 (1943) (stating that directed verdict may differ from its historical antecedents in "incidental or collateral effects").

111. *Id.* at 395.

The historic validity of the motion for new trial, which allows the judge to decide the sufficiency of the evidence and permits the successful movant to introduce new evidence at a new trial, supplements the appropriateness of the demurer to the evidence as a historical antecedent. The availability of a new trial proves that the common law used a procedure that, like summary judgment, did not always assume that the nonmovant's evidence was true.¹¹² Accordingly, the legality of the motion for new trial, which clearly existed in 1791, facilitates the conclusion that summary judgment differed only in incidental ways.

The timing distinction between summary judgment and demurrer to the evidence is mitigated by proper judicial construction of Rule 56(f),¹¹³ which constitutes an important safeguard against early and erroneous grants of summary judgment. Courts, motivated by Justice Rehnquist's *Celotex Corp. v. Catrett*¹¹⁴ opinion, have taken great care to prevent the nonmovant from unfairly timed summary-judgment motions. The *Celotex* opinion noted that no claim could be made that the nonmovant had been "railroaded" by a "premature" Rule 56 motion and approved of the use of Rule 56(f) time-outs to deal with early summary-judgment requests.¹¹⁵ Proper interpretations of Rule 56(f) make the timing distinction between summary judgment and demurrer to the evidence less severe and softened.¹¹⁶ The nonmovant who is faced with an early summary-judgment motion is entitled to extra time and reactive discovery if needed.

Appellate review of motions granting summary judgment provides a second safeguard to check overly zealous district judges who erroneously find no genuine issues of material fact. All circuits use a robust *de novo* scope of review when reviewing a grant of summary judgment.¹¹⁷ This broad scope of review casts a large shadow over trial court summary-judgment

112. *Id.* at 393–94 (stating that the "admitted validity of the practice on the motion for new trial goes far" and serves to "negative any idea that the challenge must be made at such a risk as the demurrer imposed"). In the common-law use of the motion for new trial, the trial judge would determine the sufficiency of the evidence. Thomas, *supra* note 4, at 172 (admitting that summary judgment "is not significantly different").

113. FED. R. CIV. P. 56(f) (detailing the requirements for delaying summary-judgment consideration).

114. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

115. *Id.* at 318.

116. *See, e.g.*, *Miller v. Beneficial Mgmt. Corp.*, 977 F.2d 834, 845 (3d Cir. 1992) (allowing a Rule 56(f) continuance as a matter of course when the moving party holds the evidence); *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991) (granting the nonmovant additional time under Rule 56(f) because "the district court should be generous in its allowance of discovery requests aimed at uncovering . . . state of mind").

117. *See, e.g.*, *Disraeli v. Rotunda*, 489 F.3d 628, 631 (5th Cir. 2007) (stating that "we review a district court's grant or denial of summary judgment *de novo*, applying the same standard as the district court"); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 787 (7th Cir. 2007) (explaining that the appellate "[c]ourt reviews a district court's entry of summary judgment *de novo*").

consideration—some district judges are deterred from granting summary judgment because of the fear of reversal. Most federal circuits have decided lengthy “affirmed in part, reversed in part” opinions that (a) exhibit hands on, detailed appellate review and (b) deter trial courts from overly enthusiastically embracing a motion for summary judgment in today’s typical multi-claim suit.¹¹⁸ Although elimination of district-court error is impossible to avoid, diligent de novo appellate review serves to safeguard and minimize improper grants of summary judgment.

B. THE EVOLVING AND COMPETITIVE COMMON LAW SUPPORTS A MODERN INTERPRETATION OF THE SEVENTH AMENDMENT

The more pragmatic interpretation of the historical test is itself a descendent of the evolving common law. Examination of the common law’s changes reveals a link to using a less rigid reading of the Seventh Amendment. Justice Stone rightly emphasized the common law’s “capacity for growth and development, and its adaptability to every new situation to which it might be needful to apply it.”¹¹⁹ The pre-1791 period saw consistent tinkering with procedures to make the courts more efficient.

The modern emphasis on developing efficient procedures such as summary judgment is a direct descendent of the attitude demonstrated before 1791.¹²⁰ The common law’s development of the writ system was designed to establish an efficient set of legal rules. The goal was to set forth predictable patterns that provided transparent results.¹²¹

Pre-1791 English courts consistently modified procedures based upon a utilitarian rationale of need. Milsom chronicles “a need for quicker and cheaper justice”¹²² and emphasizes need to adjust to the increase in court filings.¹²³ Common-law courts constantly tinkered with procedural changes

118. See, e.g., *Skop v. City of Atlanta*, 485 F.3d 1130 (11th Cir. 2007) (affirming in part and reversing in part a 1983 false-arrest case involving qualified immunity); *Vincent v. City Colleges of Chi.*, 485 F.3d 919 (7th Cir. 2007) (affirming in part and reversing in part a copyright and trademark-infringement claim); *Jordan v. Mosley*, 487 F.3d 1350 (11th Cir. 2007) (affirming denial of summary judgment in a 1983 claim, but reversing denial of summary judgment on plaintiff’s Fourth Amendment claim).

119. *Dimick v. Schiedt*, 293 U.S. 474, 495–96 (1935) (dissenting from majority’s holding that additur violates the Seventh Amendment). Stone considered the common law’s “flexibility and capacity for growth and adaption” to be “the peculiar boast and excellence of the common law.” *Id.* (quoting *Hurtado v. California*, 110 U.S. 516, 530 (1903)). Even the *Dimick* majority, which held additur unconstitutional, described the common law as “not immutable, but flexible,” and capable of adapting to “varying conditions.” *Id.* at 487 (citation omitted).

120. See *supra* notes 18–22 and accompanying text.

121. See, e.g., Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 921 (1989) (asserting that “a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences”).

122. S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 61 (1969).

123. *Id.* at 58–61.

to improve their case administration.¹²⁴ For example, Milsom emphasizes the common law's evolution to ascertain the facts early in a dispute.¹²⁵ This development permitted a dispute to be analyzed more effectively with the factual details depicted in one single package. Baker chronicles the passage by King's Bench of a cost-saving Chancery-like bill not tying the plaintiff to any particular cause of action.¹²⁶

Some common-law efficiency procedures took away power from the jury and allocated decisional authority to experts. Consider the common-law development of the special jury. Professor Oldham describes the extensive use of common-law "special juries—specially formed juries usually comprised of merchants, available to either litigant as a 'matter of right.'"¹²⁷ The judge's appointment of a special jury instantly transformed a case from one tried to a jury to one decided by an expert panel. The growth of the special jury, developed by Lord Mansfield,¹²⁸ essentially removed the case from the jury and placed key decisional power in the hands of merchant experts appointed by the trial court. Professor Oldham notes that the merchant jury was used effectively by Lord Mansfield in the "second half of the eighteenth century," a critical time for any English procedure that removed or reduced jury decisional powers.

Justice Rutledge emphasized this evolutionary theme in his *Galloway* opinion, in which he described procedure as "constantly changing and developing during the late eighteenth and nineteenth centuries."¹²⁹ Some of these changes, namely the development of rules of evidence and new trial, also took decisional power away from the jury and reallocated it to the trial court.¹³⁰ Such changes support the need for efficacious procedures, such as summary judgment, and create a common-law evolutionary trend for new procedures that improve and streamline fact finding.

The common law's development of evidence rules shows a climate of change that could substitute judicial decisions for jury determination. *Galloway* asserted that the "jury was not absolute master of fact in 1791" and offered the "exclu[sion of] evidence for irrelevancy and . . . for other

124. See, e.g., *id.* at 73 (detailing that sixteenth-century procedures were "gradually to be replaced by new devices already coming into use").

125. *Id.* at 80.

126. BAKER, *supra* note 1, at 42–43 (describing the adoption of the *latitat* and noting its similarity to Chancery procedure).

127. See OLDHAM, *supra* note 15, at 22; see also JAMES OLDHAM, *THE VARIED LIFE OF THE SELF-INFORMING JURY* 25 (2004) [hereinafter OLDHAM, *THE VARIED LIFE*] (clarifying that there "was no entitlement to a jury of merchants").

128. OLDHAM, *THE VARIED LIFE*, *supra* note 127, at 23–28 (noting that merchant juries were "used so effectively by Lord Mansfield").

129. *Galloway v. United States*, 319 U.S. 372, 391 (1943).

130. *Id.* at 390 (explaining that "the jury as not absolute master of fact in 1791" and supporting this assertion by noting that "then as now courts excluded evidence for irrelevancy").

reasons”¹³¹ as an example of 1791 procedure that clearly diminished the power of the jury. The rule granting the trial judge discretion to bar evidence that would confuse the trier of fact illustrates that point.¹³² Before the adoption of this centuries-old norm, the jury would hear potentially unhelpful evidence. In developing this rule, the court itself reduced jury powers by prohibiting evidence that a judge determined to be unhelpful.

The history of the common law tells a story of competition among courts and of competitive rivalry based on procedural innovation. Todd Zywicki paints a picture of the common-law courts as part of a “competitive legal order” competing for business and fees.¹³³ Theodore Plucknett describes “competition between the King’s Bench, Common Pleas and Exchequer.”¹³⁴ English courts adjusted procedurally when confronted with falling demand.¹³⁵ In this culture of evolution, it seems illogical to interpret the Seventh Amendment narrowly.

The story of both the innovation and the evolution of the common law appears to be ongoing and far from finished. New books and articles about the common-law jury and courts continue to be published.¹³⁶ One reason this centuries-old history is still incomplete and continues to unfold is due to the lack of reporting of common-law decisions. Printing costs were considerable and “only a small fraction” of cases were reported.¹³⁷ The history of the common law cannot reliably be told using only reported cases, which constituted a rarity in the grand scheme of common-law evolution.¹³⁸

131. *Id.*

132. *See* FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

133. Zywicki, *supra* note 1, at 1581–91 (describing the overlapping jurisdiction of courts and dependence on fees for cases, and explaining a market for law that includes multiple suppliers).

134. THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 210 (5th ed. 1956).

135. *See, e.g.*, BAKER, *supra* note 1, at 43 (describing the falling share of market for writs).

136. *See, e.g.*, H. Tomas Gomez-Arostegui, *What History Teaches Us About Copyright Injunctions and the Inadequate-Remedy-at-Law Requirement*, 81 S. CAL. L. REV. (forthcoming 2008) (questioning the need to show an inadequate remedy at law after review of Court of Chancery records from 1660 to 1800); Klerman, *supra* note 1 (tracing competition between and among common-law courts); OLDHAM, *supra* note 15 (tracing the innovations of Lord Mansfield and others); Zywicki, *supra* note 1 (describing innovation by common-law courts leading to competitive rivalry).

137. Gomez-Arostegui, *supra* note 136, at 25 (noting that only fifteen percent of the Court of Chancery’s copyright-infringement cases were reported).

138. *See* J.H. Baker, *Why the History of English Law Has Not Been Finished*, 59 CAMBRIDGE L.J. 62, 76 (2000).

IV. CONCLUSION

Summary judgment is constitutional. First, trial by inspection is a common-law procedure analogous to summary judgment. Each procedure permits the court to decide a determinative factual issue without impaneling a jury where the correct result is obvious. Each device would reject its use where there was judicial doubt after a careful inspection or review of the evidence. Each procedure is pretrial in nature and involves the trial judge's decision to take away an easily decided issue from the jury.

The historical support for the common law's use of trial by inspection appears strong. Blackstone describes trial by inspection in a way that appears to confirm its use in the eighteenth century. Coke's earlier explanation of trial by inspection sets forth a procedure similar to that delineated by Blackstone. Case law paints a largely consistent picture of pretrial use of this device that empowered the court to take away issues that otherwise would be allocated to the jury for decision.

The history of trial by inspection alone makes summary judgment constitutional. However, a more enlightened, modern interpretation of the historical test also facilitates the constitutionality of summary judgment. Common-law history supports the use of the doctrine of collateral or incidental effects. Viewed in a broader context, demurrer to the evidence, while admittedly varying in major ways from summary judgment, is an analogous and incidental fit to justify summary judgment under a more flexible "pragmatic" interpretation of the Seventh Amendment. The lens through which the historical test is applied should shift to one characterized by the utilitarian, instrumental analysis adapted "at common law" by busy judges unable and unwilling to send every sort of issue to the jury. Trial by inspection, concern for efficiency and expertise in the growth of legal procedure, and the development of evidence rules each reduced the power of the jury without substantially damaging the institution of the jury itself. Accordingly, summary judgment *is* constitutional under a proper, more practical "incidental effects" version of the historical test. Modern cases—*Gasperini*, *Markman*, and Brennan's concurrence in *Terry*—appropriately lend support to a more utilitarian and pragmatic version of the historical test that underpins the constitutionality of summary judgment.