

Probability, Confidence, and the Constitutionality of Summary Judgment

by LUKE MEIER*

Introduction

Professor Suja Thomas has famously argued that federal summary judgment is unconstitutional under the provisions in the Seventh Amendment protecting a civil litigant’s right to a jury trial.¹ Employing the historical approach required under current Supreme Court jurisprudence interpreting the Seventh Amendment,² Professor Thomas concludes that “no procedure similar to summary judgment existed under the English common law” and that “summary judgment violates the core principles or ‘substance’ of the English common law.”³ Unfortunately, Professor Thomas has swept too broadly in reaching this conclusion; she fails to recognize that not all summary judgments are created equal.

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1. See Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007).

2. See *Markman v. Westview Instruments*, 517 U.S. 370, 376 (1996); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) (both stating that the parameters of the right to jury trial under the Seventh Amendment are determined by English common law practice as it existed in 1791 at the time of the Seventh Amendment’s adoption). But see Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 187–92 (2000) (questioning the validity of the current approach for determining the parameters of the Seventh Amendment).

3. Thomas, *supra* note 1, at 139–40; see generally, Suja Thomas, *Why Summary Judgment is Still Unconstitutional: A Reply to Professors Brunet and Nelson*, 93 IOWA L. REV. 1667 (2008); Suja A. Thomas, *The Unconstitutionality of Summary Judgment: A Status Report*, 93 IOWA L. REV. 1613 (2008); Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 WASH. U. L.Q. 687 (2004) (all discussing the constitutionality of summary judgment).

To appreciate this point, it is necessary to delineate between the concepts of probability and confidence as they pertain to disputed questions of fact in the context of litigation. In my article *Probability, Confidence, and the “Reasonable Jury” Standard*, I explore this issue in depth.⁴ Stated simply, the probability inquiry requires an estimate as to the *likelihood* of a given fact being true; the confidence inquiry asks *how sure* one can be about a probability estimate given the information available. Generally speaking, the more evidence one has regarding an unknown fact the more confident one can be in a probability estimate of a given fact from that evidence.⁵

In concluding that summary judgment is unconstitutional, Professor Thomas has assumed that courts *always* decide summary judgment by replicating the probability analysis performed by the jury at trial.⁶ To be sure, this is *sometimes* the basis for a court’s grant of summary judgment. When a trial court judge examines the summary judgment record and concludes that a party’s evidence on a necessary fact has so little probative value that a jury would not be reasonable in concluding that the party has met its burden of persuasion on this fact, the trial court has granted a summary judgment based on a probability analysis. For summary judgments that are based on this probability analysis, Professor Thomas’s historical research and conclusions regarding the constitutionality of summary judgment are well argued and cogent.

The problem with Professor’s Thomas’s ultimate conclusion regarding summary judgment, however, is that she fails to account for the reality that federal courts often grant summary judgment according to a confidence theory rather than a probability theory. In these instances, a court grants summary judgment because the state of the record is such that there would be insufficient confidence in *any* probability conclusion to be drawn from the record. The dearth of evidence is held against the party with the burden of production, which is usually on the plaintiff.⁷ Thus, when a plaintiff cannot produce a sufficient amount of evidence on a disputed question of

4. See Luke Meier, *Probability, Confidence, and the “Reasonable Jury” Standard* (forthcoming 2014).

5. See *id.*

6. See Thomas, *supra* note 1, at 158–59 (describing modern summary judgment practice as requiring the judge to make inferences from the evidence and as invading the province of the jury to determine the fact).

7. See 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5122 (2d ed. 2005) (stating that the burden of production is usually on the plaintiff).

fact, she has failed to satisfy her burden and is thus thrown out on summary judgment. This judgment against the plaintiff occurs *even if* the plaintiff's version of the disputed, material facts to the litigation appears more likely (based on the scant summary judgment record) than the defendant's version. Hence, when a court enters summary judgment pursuant to a confidence analysis, the judge has *not* engaged in the probability inquiry that raises the constitutional concerns addressed by Professor Thomas. Instead, the trial court judge has made a sophisticated legal and policy judgment about the state of the evidentiary record and the costs and benefits of asking the jury to assess probability without better information.

Professor Thomas is not alone in failing to distinguish between the concepts of probability and confidence. Legal doctrine, in general, has failed to adequately account for these two different theories of summary judgment, a phenomenon best explained by the "reasonable jury" gloss on the language of Rule 56 of the Federal Rules of Civil Procedure.⁸ Failing to distinguish between probability and confidence has dramatic consequences for the widespread conclusions offered by Professor Thomas regarding the constitutionality of summary judgment. Once one distinguishes between the concepts of probability and confidence, it becomes obvious that summary judgment is constitutional when it is entered according to a confidence theory.

This conclusion is confirmed, first, under an historical analysis. Under English common law, judges could enter an involuntary nonsuit against the plaintiff when the evidentiary record was lacking with regard to a material fact.⁹ The use of a confidence theory within this English common law procedure confirms the constitutionality of its use in a modern summary judgment setting.

Second, a confidence analysis is analytically similar to other functions performed by a trial court judge that do not raise Seventh Amendment concerns. A judge employing a confidence analysis is actually performing an analytical task that closely replicates that of an evidentiary presumption. More broadly speaking, a judge's analysis under a confidence theory somewhat equates to the law of evidence. Neither evidentiary presumptions nor the law of evidence raise serious Seventh Amendment concerns, however.

8. See Meier, *supra* note 4 (explaining how the reasonable jury standard makes it difficult to discern the distinct concepts of probability and confidence).

9. See *infra* Parts II.A-B.

Finally, the constitutionality of a confidence theory of summary judgment is confirmed by existing Supreme Court case law. In both *Fidelity & Deposit Co. v. United States*¹⁰ and *Galloway v. United States*,¹¹ the Supreme Court affirmed a pre-jury judgment that had been entered pursuant to a confidence theory.¹² Scholars have generally erred in supposing that these two opinions broadly resolve that summary judgment is always constitutional.¹³ That said, the *Fidelity* and *Galloway* opinions do support the more limited argument advanced herein, which is that summary judgment is constitutional when it is entered pursuant to a confidence theory.

The primary objective of this Article is to demonstrate that Professor Thomas has erred in broadly proclaiming summary judgment unconstitutional. Distinguishing between the concepts of confidence and probability compels this conclusion. Drawing this distinction between confidence and probability, however, also has the secondary effect of *supporting* Professor Thomas's arguments regarding summary judgment.¹⁴ Once one recognizes that Professor Thomas's constitutional argument is directed at *only* a probability theory of summary judgment, her arguments become more powerful. In particular, the popular notion that the Supreme Court has already confirmed the constitutionality of summary judgment entered under a probability theory is wrong.¹⁵ A careful inspection of the modern Supreme Court case law demonstrates that this conventional wisdom is inaccurate.

The organization of the Article is as follows: Part I considers the different theories a modern judge might use in entering summary judgment. Part II examines the constitutionality of a confidence

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

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

12. *See id.* at 373; *Fidelity*, 187 U.S. at 321–22.

13. *See infra* Section IV.

14. Professor Thomas has also asserted that the modern pleading standard of plausibility, articulated by the Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), is unconstitutional under the Seventh Amendment. *See generally* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008). Here again, Professor Thomas has failed to distinguish between the important concepts of probability and confidence. This error, however, has a more devastating effect on her conclusion regarding pleading than it does with regard to her conclusion regarding summary judgment. Here, her conclusion is not just partially wrong (as was the case with summary judgment); it is completely wrong. *See* Luke Meier, *Probability, Confidence, and Twombly's "Plausibility" Standard* (forthcoming 2015) (explaining why *Twombly's* plausibility standard does not violate the Seventh Amendment).

15. *See infra* note 25.

theory of summary judgment from a historical perspective. Part III shows how a confidence analysis is analytically similar to the law of presumptions and the law of evidence. Part IV demonstrates that the conventional wisdom regarding modern Supreme Court case law on the Seventh Amendment is incorrect. Part V concludes by calling for a more extensive academic and judicial consideration of Professor Thomas's (properly cabined) arguments.

I. The Divergent Uses of Summary Judgment

In a series of law review articles,¹⁶ Professor Thomas has advocated her broad thesis that modern summary judgment violates the Seventh Amendment right to a jury in civil litigation in federal court.¹⁷ Thomas's argument proceeds under the rubric of the historic analysis used by the Supreme Court in determining the parameters of this constitutional right. According to this historical approach, the right to a jury trial "preserved" by the Seventh Amendment is the right to a jury trial that existed under English common law in 1791.¹⁸ In a rather mechanical fashion, Professor Thomas compares summary judgment to various common law procedures that existed under English common law in 1791: the demurrer to the pleadings, the demurrer to the evidence, the nonsuit, the special case, and the motion for a new trial.¹⁹

Professor Thomas ultimately concludes that none of these English common law procedures replicate what occurs under modern summary judgment.²⁰ According to Thomas, any disputed questions of fact had to be resolved by the jury (or the parties²¹) under English common law in 1791.²² A judge's ability to inject himself into the fact-

16. See *supra* note 3.

17. Because the Seventh Amendment has not been incorporated against state action, the constitutional right to a jury trial does not apply to state court litigation. See Martin H. Redish & Daniel J. La Fave, *Seventh Amendment Right to Jury Trial in Non-Article III Proceedings: A Study in Dysfunctional Constitutional Theory*, 4 WM. & MARY BILL RTS. J. 407, 436 (1995) (explaining that the Seventh Amendment does not apply in state court proceedings).

18. See *Thompson v. Utah*, 170 U.S. 343, 350 (1898).

19. See Thomas, *supra* note 1, at 148–59.

20. See *id.* at 158–62.

21. Under a demurrer to the pleadings or a demurrer to the evidence, a defendant conceded the factual contentions asserted by the plaintiff and in this sense negated the need for a jury. See C. CLARK, *HANDBOOK OF THE LAW OF CODE PLEADING* 501 (2d ed. 1947) (“[A demurrer] added no new facts to the case, but in effect said: ‘Admitting all you have alleged, nevertheless you are in law not entitled to a judgment.’”).

22. See Thomas, *supra* note 1, at 159–60.

finding process was severely limited. If a judge thought the jury had reached a factual conclusion that was inconsistent with the evidence submitted at trial, a judge could only order that a new trial be conducted. Thus, according to Thomas, a judge had no ability to intervene in the fact-finding process before the jury had reached its decision.²³ The judge's ability to intervene only arose after a jury had determined the disputed questions of fact, and even at this point the judge could only order a new trial rather than enter a judgment for a particular party.²⁴

Professor Thomas's views have been noted by many²⁵ and sometimes applauded.²⁶ A few commentators have challenged Thomas's thesis, but in a somewhat gentle manner that presumes

23. *See id.*

24. *See generally id.* at 1–61.

25. As of October 16, 2014, Professor Thomas's *Virginia Law Review* article, in which she asserts her constitutional argument regarding summary judgment, has been cited in 102 law reviews.

26. *See, e.g.*, John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 526 (2007) (“Thomas’s paper deserves the attention it has received, and its arguments are convincing with respect to history and textual interpretation.”); Bradley Scott Shannon, 91 MARQ. L. REV. 815, 834 n.107 (2008) (citing Thomas favorably). It is somewhat surprising that most scholars have simply noted Thomas’s views but refused to weigh in on the debate. This reaction might be a product of the belief that, despite the merits of Thomas’s argument, the Supreme Court has resolved the issue. *See, e.g.*, Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 76 n.18 (1990); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1074–132 (2003) (both stating that the Supreme Court has affirmed the constitutionality of summary judgment); *see also* *McDaniel v. Kindred Healthcare, Inc.*, 311 Fed. App’x. 758 (6th Cir. 2009) (concluding that Thomas’s argument “lacks merit” because the Supreme Court had already determined that summary judgment is constitutional). The constitutionality of summary judgment was widely presumed by lower federal courts before Thomas’s article. *See* 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2714 n.7 (3d ed. 2012) (listing cases in which the constitutionality of summary judgment under Rule 56 is presumed). Professor Thomas acknowledges the “uniform acceptance” of summary judgment and that the procedure is “well-entrenched in our federal courts through its ubiquity and lengthy history.” *See* Thomas, *supra* note 1, at 140. Nevertheless, Professor Thomas argues that the Supreme Court precedent from which the constitutionality of summary judgment is presumed has been misread and interpreted too broadly. *See id.* at 163–77. On this point, I find myself in agreement with Professor Thomas. If the Supreme Court was convinced regarding the merits of Professor Thomas’s argument, I have no doubt that the Court would not feel constrained by *stare decisis* to nevertheless uphold the constitutionality of summary judgment. One way or another, considering what is at stake, the substance of Professor Thomas’s argument eventually deserves a thorough and complete disposition by the Supreme Court, and that clearly has not occurred up to this point.

many of the assumptions on which her overall argument is based.²⁷ For instance, Professor Edward Brunet²⁸ asserts that Professor Thomas should be “commended”²⁹ for her arguments and that summary judgment “raises serious constitutional questions.”³⁰ Moreover, Brunet’s arguments—like Thomas’s—are historically based, although Brunet rejects Thomas’s “static and inflexible reading of the historical test [required by the Seventh Amendment].”³¹ Despite this common ground, Brunet ultimately concludes that Thomas’s conclusion regarding summary judgment is wrong because modern summary judgment is functionally equivalent to the common law procedure of a trial by inspection, a procedure not considered by Professor Thomas.³² Under a trial by inspection, a trial judge was able to decide obvious factual issues without having to submit them to a jury.³³ Because this common law procedure is roughly equivalent to modern summary judgment practice, Brunet concludes that summary judgment is constitutional,³⁴ particularly under the flexible and pragmatic version of the historical test that Brunet advocates in his article.³⁵

27. There are exceptions. Professor William Nelson, for instance, has argued that modern summary judgment is constitutional by rejecting the historical approach to the Seventh Amendment on the view that constitutional law should not be “mired in the past.” See William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1653–54 (2008). Professor Brian Fitzpatrick has questioned whether Thomas’s mechanical historical analysis is truly sufficient to satisfy the “originalist methodology” on which her argument is based. See Brian Fitzpatrick, *Originalism and Summary Judgment*, 71 OHIO ST. L.J. 919, 925–26 (2010) (explaining that the inquiry should not be whether a jury decided factual issues in 1791, but rather the reason why this process existed and whether these reasons justify a conclusion that this process was constitutionally required).

28. Edward Brunet, *Summary Judgment is Constitutional*, 93 IOWA L. REV. 1625 (2008).

29. *Id.* at 1628.

30. *Id.* at 1627.

31. *Id.* at 1629–30.

32. Professor Brunet, in an almost off-hand comment, makes the more straightforward (but, in my opinion, more important) critique of Thomas when he states that “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 [J]udges may constitutionally grant summary judgment based upon [] legal principles . . . because they have been doing so for several centuries.” *Id.* at 1628. I will explore this point, in more detail, in Part III of this Article.

33. *Id.* at 1631.

34. *Id.* at 1640–41.

35. See generally *id.* at 1642–51. Professor Thomas has responded to Professor Brunet’s argument by noting the limited issues that could be resolved through a trial by inspection and by suggesting that the modern concept of judicial notice is the true analog

Professor Thomas's conclusion regarding summary judgment is susceptible to a more fundamental criticism than what has been offered to this point. In particular, Professor Thomas's constitutional argument against summary judgment is based on an inaccurate view as to the analysis a judge performs when considering a summary judgment motion. Professor Thomas assumes that judges *always* decide summary judgment by assessing the summary judgment record and then considering the probability (likelihood) of the material facts to the litigation.³⁶ In reality, this is only one of the three different types of analyses a judge might perform in determining whether summary judgment is appropriate. These analyses include: (A) Probability; (B) Legal; and (C) Confidence. Each of these analyses is discussed below.

A. Evidence to Facts: The Judge's Probability Analysis

To help demonstrate the different types of analyses a judge might use in considering a summary judgment motion, consider Figure A below:



Figure A

Figure A attempts to roughly depict the manner in which disputes are resolved through litigation. Obviously, the end result of any dispute resolution process must be the law, which is depicted by the box on the right side of Figure A. In order to apply the law to a dispute, however, the facts of the dispute must be determined. The middle box represents the facts, and the arrow linking the facts to the law represents the process of applying the law to the facts of a particular case. The facts of a particular case are often disputed, however. When this occurs, it is necessary to resolve which of the parties' contrasting views of the facts is correct. This, of course, will be done through evidence, which is represented by the box to the left of Figure A. The arrow linking the evidence box to the facts box

to the common law trial by inspection. See Thomas, *Why Summary Judgment is Still Unconstitutional*, *supra* note 3, at 1672–77.

36. See *supra* note 6.

represents the process of determining the facts of a particular case from the evidence.

Figure A shows the basic relationship between evidence, facts, and the law but reveals nothing about the particular process by which the facts are determined from the evidence and the law is applied to the facts. The basics of this process, however, are familiar enough. For the most part, it is the duty of the judge to determine the law and to apply the law to the facts of a particular case. Similarly, it is primarily the jury which is given the task of considering the evidence and making a determination as to the facts of a particular dispute. In most instances, the jury will not know with absolute certainty, from the evidence adduced at trial, what actually happened at the previous point in time that is the focus of the trial. In other words, the jury will often view both the plaintiff and the defendant's versions of the disputed facts to the litigation as being possible. In this situation, the legal system—through the judge's instruction to the jury on the burden of persuasion—tells the jury how to proceed. Normally, the governing burden of persuasion for civil litigation is the “preponderance of the evidence” standard. Under this standard, the jury is asked which of the competing versions of the facts is more *likely*. If the plaintiff's version is more likely, then the plaintiff should recover, even if the jury believes there is a 49% chance that the plaintiff's version of the facts is inaccurate. It is clear, then, that a jury's involvement in determining facts from the evidence involves a probability analysis. Under a probability analysis, the jury is to determine—from the evidence adduced at trial—the likelihood that the plaintiff's version of the facts is accurate.

In addition to the jury's probability analysis, federal judges are also expected³⁷ to perform a probability analysis in determining whether to grant summary judgment in a particular case. In *Anderson v. Liberty Lobby, Inc.*,³⁸ the Court held that a judge's decision regarding summary judgment is to be governed by the “reasonable jury” standard.³⁹ Under this standard, a judge

37. This probability analysis has been required since the Supreme Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and maybe even before that decision. See Meier, *Probability, Confidence, and the “Reasonable Jury” Standard*, *supra* note 4 (suggesting that courts employed a probability analysis as part of summary judgment well before the *Anderson* case).

38. *Anderson*, 477 U.S. 242.

39. The Supreme Court had arguably gravitated towards the reasonable jury interpretation of Rule 56 in prior cases. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984); *Bill Johnson's Rest., Inc. v. NLRB*, 461 U.S. 741 (1983); *TSC Indus., Inc.*

determines whether summary judgment is appropriate by determining whether a jury would be reasonable in resolving the facts in favor of either party from the evidence available on the record.⁴⁰ By defining a judge's analysis at summary judgment through reference to the jury's analysis at trial, the "reasonable jury" standard necessarily requires a judge to engage in a probability analysis. This is because a jury must engage in a probability analysis and a judge cannot be expected to know whether a jury would be reasonable in performing this probability analysis unless the judge considers the probability issue.

Even though a judge must consider the probability question in determining a summary judgment, a judge does not simply weigh the evidence and come to her own *specific* conclusion as to probability from the evidence. Although this type of precision is expected from the jury, the judge's analysis of probability at the summary judgment stage is different. In other words, the judge is not supposed to decide the probability question, but rather, determine simply whether a decision by the jury is necessary. Essentially, a judge's task with regard to probability is to determine the range of probability conclusions that constitute a "reasonable" probability conclusion from the record evidence. In this sense, the judge is not replicating the jury's analysis of probability, but rather, acting as a gatekeeper to eliminate the necessity of empanelling a jury when a reasonable jury could only decide the case in one way.

Any time a judge concludes that a jury could not reasonably find the facts in favor of one party to the litigation, and thus enters summary judgment, a judge has, in essence, preempted the fact-finding role usually reserved for the jury. And although the judge's role is—theoretically speaking—simply to act as a gatekeeper, the line between "gatekeeper" and "decider" is a slippery one. As

v. Northway, Inc., 426 U.S. 438 (1976); William Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 481 (1983) ("A [dispute over] an issue is genuine if reasonable persons could disagree.").

40. Technically, the standard a judge applies is to determine whether a jury would be reasonable in finding the facts in favor of the "nonmovant"—that is, the party resisting summary judgment. In many instances, of course, a judge will have to determine cross-motions for summary judgment, and in this instance the articulation of the test in the text is technically accurate. When only one party has moved for summary judgment, the test cited in the text is not technically accurate, but if only one party has elected not to move for summary judgment it is a safe assumption that it is because the opponent's version of the facts is reasonable, given the evidence. In any event, my decision to eliminate the somewhat confusing term "nonmovant" is done with an aim towards clarity, even if this clarity is achieved at the expense of the technicalities addressed in this footnote.

Professor Ellen Sward has aptly stated: “[W]hat is ‘reasonable’ is often in the eyes of the beholder, meaning that the [reasonable jury] test gives judges more power.”⁴¹

This power of a judge to consider the evidence and potentially resolve the case based on a probability analysis of the facts is clearly the basis of Professor Thomas’s constitutional attack on summary judgment. Under the common law, according to Thomas, a judge “never decided the case without such a [factual] determination by the jury or the parties, however improbable the evidence might be.”⁴² In any case in which the facts were disputed, according to Thomas, the jury would be required to assess the evidence and determine which party’s version of the facts was more probable: “Whether probable or not [was] for a jury to decide.”⁴³ A judge did have power to assert himself into the probability question after the jury had reached a conclusion that the court viewed as against the weight of the evidence, but the judge’s power was simply to order a new jury rather than to decide the case according to the judge’s own views of the evidence.⁴⁴ However, according to Thomas, a judge deciding a modern motion for summary judgment does engage in an inquiry as to the likelihood of the disputed facts from the record evidence: “Upon a motion for summary judgment . . . the parties disagree on what their evidence demonstrates. The court must resolve this difference and decide what the evidence could show.”⁴⁵ Because a judge deciding a modern summary judgment motion can engage in a probability analysis that, according to Thomas, was not permitted under the common law, the modern summary judgment runs afoul of the right to a jury trial protected by the Seventh Amendment.

I do not mean to quarrel with Professor Thomas’s conclusion with regard to the particular type of summary judgment motion she is considering. Other well-known and respected jurists have questioned the constitutionality of a judge deciding a case based on the judge’s own view of what facts are probable from a particular evidentiary

41. Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SET. HALL L. REV. 573, 575 (2003).

42. See Thomas, *supra* note 1, at 143.

43. *Cocksedge v. Fanshaw*, (1779) 99 Eng. Rep. 80 (K.B.) 88.

44. It appears that a judge’s ability to order a new trial could only be exercised twice. See JAMES OLDHAM, TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES 13 (2006) (“[A new trial] could occur when there had already been one or two new trials”).

45. See Thomas, *supra* note 1, at 161–62.

record.⁴⁶ In addition, Professor Thomas's historical research appears to be thorough.

The problem, though, is that Professor Thomas has failed to consider the two others analyses a judge might use in determining whether summary judgment is appropriate or not.

B. Facts to Law: The Judge's Legal Analysis

Although judges sometimes grant summary judgment according to the probability analysis assumed by Professor Thomas, judges frequently grant summary judgment under a completely different theory. This point can be made by returning to Figure A, which is reproduced below:

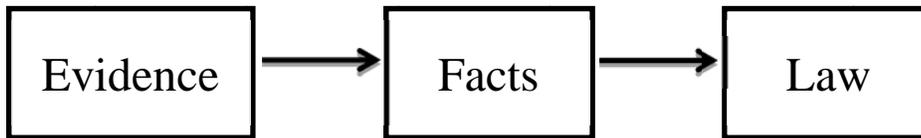


Figure A

Professor Thomas's constitutional arguments presume a summary judgment based on the judge's view as to whether certain facts can be deduced from particular evidence. In other words, the type of summary judgment motion that Professor Thomas attacks is one that occurs in the process of deducing facts from evidence, a process that is depicted by the arrow on the left side of the page between the evidence and facts boxes. This type of summary judgment motion ultimately rests on the determination of the factual dispute between the parties.

However, judges frequently use summary judgment as a mechanism for resolving a case based on legal conclusions rather than factual determinations: “[W]hen the only question is what legal conclusions are to be drawn from an established set of facts, the entry of summary judgment usually should be directed.”⁴⁷ In other words, summary judgment is frequently used as a mechanism for a judge to

46. See, e.g., EDWARD J. BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE 16 (3d ed. 2006) (stating that summary judgment rests on a “tenuous constitutional foundation”); Jack Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards*, 63 NOTRE DAME L. REV. 770, 771 (1988) (considering whether the Seventh Amendment imposes some limitations on a judge's ability to grant summary judgment).

47. WRIGHT ET AL., *supra* note 26, at § 2725.

resolve a case based on the right side of Figure A, in determining the relationship (represented by the arrow) between facts and law. Of course, if the parties are in complete agreement regarding the facts of a dispute at the outset of the litigation, this process of applying facts-to-law can occur at the pleadings stage through either a Motion to Dismiss or Motion for Judgment on the Pleadings.⁴⁸ Such clarity, however, is not always possible at the outset of a dispute and the parties might not agree on the facts at this early stage; thus, it is important that summary judgment be available not just as a mechanism for testing the evidentiary foundation of disputed facts (the left side of Figure A) but also as a way in which the law can be brought to bear on the facts to which the parties—after the benefit of discovery—now agree (the right side of Figure A).⁴⁹

While Professor Thomas has arguably demonstrated that the lack of historical precedent for the type of summary judgment she considers—one based on the probability of disputed facts from a particular evidentiary record—there is no question that there is historical precedent for summary judgments based on the application of law to a undisputed set of facts. Often, Judges under the English common law resolved cases without a jury when the only issue in the case was how the law applied to an agreed set of facts.⁵⁰

The notion that summary judgment can be used as a vehicle to resolve disputes over how the law applies to an agreed set of facts is not controversial; yet this obvious point reveals a fundamental defect

48. See FED. R. CIV. P. 12(b)(6), 12(e).

49. In addition to the parties agreeing on the facts of the case, a judge might reach the conclusion that the material facts are not in dispute and that a legal resolution is necessary based on the analysis emphasized by Professor Thomas. A judge might conclude that a certain factual record must be assumed because the evidence supports only one view of the facts. The parties might still disagree, however, as to how the law applies to the facts the judge believes should be assumed from this evidentiary record. Thus, a particular summary judgment motion might require a judge to engage in both types of analyses (evidence to facts (the left side of Figure A) and facts to law (the right side of Figure A)), depending on the context of the dispute and the arguments of the litigants. In the text of this Article, however, I have considered the scenario where the parties agree on the relevant facts so as to more clearly delineate the different types of analyses that a judge might have to engage in when ruling on a summary judgment motion.

50. Under both a demurrer to the pleadings and a demurrer to the evidence, a party could stipulate to the facts in dispute and request a judgment on these disputed facts. See generally Thomas, *supra* note 1, at 148–54 (discussing both). By making this stipulation the party gave up the ability to later contest the facts of the case. In this sense, then, both of these procedural mechanisms differed from the modern motion to dismiss or motion for judgment on the pleadings, which allow a party to seek a legal judgment on the opposing party's version of the facts but also preserves that party's right to contest the facts of the case.

in the broad conclusion that Professor Thomas asserts as her thesis, which is that modern summary judgment is *always* unconstitutional. Even if Professor Thomas's historical argument is valid, it only undermines a certain *type* of summary judgment.⁵¹ The constitutionality of a judge using summary judgment to resolve how the law should apply to an agreed set of facts is not unconstitutional, and this particular point cannot be seriously debated.

C. Evidence to Facts: The Judge's Confidence Analysis

The rather obvious critique of Thomas's thesis⁵² offered in the previous section provides an analytical roadmap for the less obvious and more nuanced criticism offered in this section. The depiction in Figure A is again helpful in making this point:

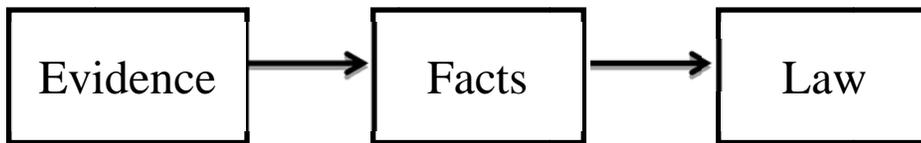


Figure A

In the previous section, it was demonstrated that a judge might grant summary judgment based upon a legal analysis of agreed-upon facts (represented by the arrow linking the fact box and the law box). Professor Thomas presumes, however, that a judge's grant of summary judgment is based on the process of linking the evidence to the facts (represented by the arrow linking the fact box to the law box). In reality, however, even the process of linking evidence to facts (the left side of the chart) is more complex than what is suggested by Professor Thomas. Professor Thomas assumes that a judge's involvement in the evidence-to-facts process is solely based on

51. There is an interesting issue as to whether the acceptance of Professor Thomas's constitutional thesis for the probability type of summary judgment requires that facial invalidity of the entire rule, thus eliminating the constitutional applications of the rule. See generally Luke Meier, *Facial Challenges and Separation of Powers*, 85 IND. L.J. 1557, 1557-72 (2010) (discussing the facial invalidity question in the context of constitutional challenges to congressional statutes). Before reaching this question, though, a court that was convinced by Professor Thomas's constitutional argument regarding a probability theory of summary judgment would have to resolve whether this unconstitutional procedure is even warranted under the language of Rule 56. I plan to address this question in future scholarship.

52. Professor Brunet has also offered this critique of Professor Thomas's thesis. See Brunet, *supra* note 28.

a probability analysis. In other words, a judge considers the probative value of the record evidence and then makes a decision concerning the likelihood of the disputed facts to the litigation. In reality, however, there is an *additional* analysis a judge must consider, at the summary judgment stage, as part of the process of linking evidence to facts. This analysis will be termed a confidence analysis. Figure B, below, depicts this additional analysis.

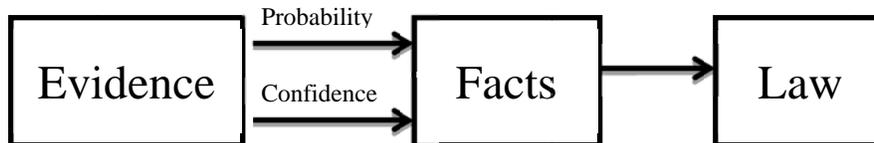


Figure B

The contours of a judge’s confidence analysis at summary judgment are fully explored in my article *Probability, Confidence, and the “Reasonable Jury” Standard*,⁵³ so I will engage in only a brief exposition of the principle here. The confidence analysis is best illustrated by Professor Laurence Tribe’s famous blue bus hypothetical:

Consider next the cases in which the identity of the responsible agent is in doubt. Plaintiff is negligently run down by a blue bus. The question is whether the bus belonged to the defendant. Plaintiff is prepared to prove that defendant operates four-fifths of all the blue buses in town. What effect, if any, should such proof be given?⁵⁴

Almost all who have considered the blue bus hypothetical agree that this case would—and should—result in a judgment for the defendant before the case reaches a jury.⁵⁵ Yet this result cannot be explained using either of the two analyses—probability and legal—considered above. In terms of the probability relationship between the evidence and the facts, the only evidence available in the case suggests that the

53. See Meier, *supra* note 4.

54. See Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1341 n.37 (1971) (calling the blue bus hypothetical a “famous chestnut”).

55. See Meier, *supra* note 4.

plaintiff's version of the facts (that it was the defendant's bus that negligently ran down the plaintiff) is, most likely, correct. So, under a probability analysis, the defendant is clearly not entitled to a summary judgment. Indeed, it is more likely that the *plaintiff* would be entitled to summary judgment under a probability analysis because a jury would be unreasonable—based on this scant record—in concluding other than that the plaintiff's version of the events is 80% likely. Moreover, a judgment for the defendant cannot be explained through the analysis of applying facts to substantive law: If the plaintiff's version of the facts is true, there is no doubt that the defendant's conduct in running down the plaintiff constituted legal negligence.⁵⁶

The confidence principle explains why the defendant is entitled to summary judgment in the blue bus hypothetical, even though the only available evidence on the disputed question of fact clearly favors the plaintiff. The real issue in the blue bus hypothetical is not the probability conclusions that can be drawn from the evidence; rather, the issue is the degree of confidence in that probability conclusion. There is so little evidence on the identity of the bus driver that there is an insufficient degree of confidence in the only probability conclusion that is reasonable from the record. Resolving the case based on the scant record amounts to nothing more than a guess. If a decision must be made under a probability analysis, the only reasonable conclusion is that the plaintiff must win because the evidence suggests that the plaintiff's version of events is more probable than the defendant's. In the blue bus hypothetical, the legal system concludes that this guess work will not be permitted. Thus, the plaintiff must lose. The plaintiff loses not because her evidence is not believable, but because the judge concludes (as a matter of policy) that the evidence is too scarce.⁵⁷

Of course, *any* case involving disputed questions of fact will require a guess—based on after-the-fact evidence—as to what really happened at that previous point in time. The blue bus hypothetical demonstrates, though, that not all “guesses” are the same. When there is a sufficient amount of evidence on a disputed question of fact, the legal system can tolerate the uncertainty that necessarily arises from trying to recreate any prior event that the litigants dispute. But, at a certain point, this uncertainty becomes too much.

56. That the defendant's conduct constituted a legal violation is assumed within the hypothetical.

57. See Meier, *supra* note 4.

Determining at what point there is adequate evidence such that a minimum degree of confidence can be had in the probability conclusion reached by the jury is a somewhat tricky issue. As I explain in *Probability, Confidence, and the “Reasonable Jury” Standard*, this analysis revolves primarily around a decision as to how much of the potentially available evidence has been presented and the potential costs of allowing a jury to engage in a probability analysis on a less-than-complete record.⁵⁸ The potential costs a judge must weigh include the need to preserve the integrity of the legal process and the harm from an erroneous jury decision in favor of the plaintiff. The substantive law at issue in a particular dispute can influence the weighing of these considerations.⁵⁹

For present purposes, it is sufficient to note that the confidence decision is a legal one decided on policy grounds. The nature of this inquiry distinguishes the confidence analysis from the probability analysis, even though both inquiries concern the relationship of the evidence to the ultimate facts of the case. Under a probability analysis, the judge considers the relationship between evidence and facts by examining the probative value of the evidence with regard to the disputed questions of fact in the litigation; this analysis is of a factual nature in that it relates to the ultimate factual question of “What happened?”⁶⁰ Under the confidence inquiry, the judge

58. *See id.*

59. *See id.*

60. Professor Thomas correctly rejects the notion that the nature of the judge’s probability inquiry at summary judgment involves a legal analysis rather than a factual analysis. *See* Thomas, *supra* note 1, at 163. Granted, the “reasonable jury” standard itself (which requires the judge’s consideration of probability) is a legal rule that informs a judge how to decide a motion for summary judgment. For instance, the legal rule governing summary judgment could flatly prohibit a judge from any weighing of the probative value of the evidence. The “reasonable jury” approach reflects a different legal approach, and in that sense the “reasonable jury” itself can be considered a legal rule. *See also* Meier, *supra* note 4 (describing how the manner in which the reasonable jury rule is applied—aggressively or liberally—is also a legal question about the legal standard for summary judgment). That said, the application of this legal standard necessarily requires a judge to make a decision about what the judge believes the record evidence shows about the likelihood of the material facts in dispute. There can be no question that the nature of this probability inquiry is factual. To say that the “reasonable jury” standard does not violate the Seventh Amendment because it is a legal question rather than a factual inquiry is to confuse the issue with a near-circular game of semantics. *Cf.* LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 81 (1872) (“‘When I use a word,’ Humpty Dumpty said in rather a scornful tone, ‘it means just what *I* choose it to mean—neither more nor less.’”). Thus, Professor Thomas is correct to reject this potential argument against her thesis. That said, it is not clear that this argument has been advanced against Professor Thomas’s thesis despite her anticipation that this would be a “popular response” to her constitutional argument. Thomas, *supra* note 1, at 163.

considers the relationship between evidence and facts from a different perspective, asking whether there is adequate evidence such that there will be a sufficient degree of confidence in any probability conclusion drawn from the record. The confidence analysis is a legal decision determined by policy considerations.

In comparing the three kinds of analyses for summary judgment, the nature of the confidence inquiry is actually more similar analytically to the judge's task of applying facts to law ("legal") than to the judge's responsibility to act as a gatekeeper on the issue of probability ("probability"). Obviously, the judge's task of determining how the law applies to agreed-upon facts is a "legal" issue. Similarly, the judge's task in determining whether there is a sufficient amount of evidence to permit the case to proceed to a jury for a probability analysis is a "legal" question in the sense that the judge is weighing the policy implications of allowing a jury to resolve the factual dispute on a sparse evidentiary record. On the other hand, the judge's task of examining the record evidence to determine whether a reasonable jury could find for either the plaintiff or the defendant requires a markedly distinct analysis from the judge. Here, the judge's inquiry will be controlled primarily by the probative value the judge assigns to the various pieces of evidence in the record. This type of analysis essentially replicates the analysis ultimately expected from the jury at trial, and in this sense the judge's analysis can be considered as "factual" in nature.

The relationship between the judge's analysis (1) in applying facts to law, (2) in performing a confidence analysis, and (3) in serving as a gatekeeper on the probability question, can be depicted in Figure C, below, which makes clear that the confidence analysis and the probability analysis are distinct. In Figure C, an analysis that requires a policy/legal analysis is represented by the dashed line, while an analysis that is primarily factual in nature is represented by the solid line. Figure C illustrates that although a judge's analysis of both confidence and probability at the summary judgment stage requires a judge to consider the relationship of the evidence produced to the facts disputed by the litigants, the nature of these two analyses is distinct. In actuality, the confidence inquiry is more akin to the judge's task of applying the law to the facts, even though these two inquiries require the judge to consider two different relationships (evidence-to-facts on one hand and facts-to-law on the other).

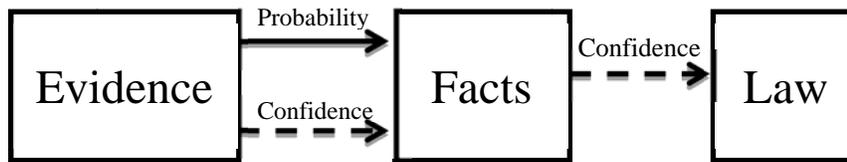


Figure C

Clearly distinguishing between the different types of analyses a judge might use at summary judgment is imperative to understanding why Professor Thomas's broad claim that summary judgment is unconstitutional cannot be justified. Professor Thomas's arguments attack only a specific type of analysis—probability analysis—that a judge might use in granting summary judgment. In reality, however, a judge might grant summary judgment for reasons other than that assumed by Professor Thomas. Based on a confidence analysis, a judge can grant summary judgment, not because she thinks the evidence is so one-sided, but because there is so little of it. As it turns out, there *is* historical support for *this* particular type of summary judgment; this issue is explored in the next section.

II. The Constitutionality of a Confidence Theory of Summary Judgment: Historical Perspective

This section will explore the constitutionality under the Seventh Amendment of summary judgment decided pursuant to a confidence theory. An analysis under the Seventh Amendment requires an historical analysis of English common law; the first two parts of this section are devoted to this historical analysis. This historical analysis confirms the constitutionality of this type of analysis. The conclusion reached in the first two parts of this section is buttressed in the third, which compares summary judgment under a confidence analysis to other types of legal rules—clearly constitutional under the Seventh Amendment—that govern the proof process. The final part of this section will consider the Supreme Court case law that is potentially relevant to the constitutionality of the confidence theory of summary judgment, concluding that this Supreme Court jurisprudence also confirms the constitutionality of summary judgment under a confidence analysis.

A. The Nonsuit

To appreciate that English common law judges could preclude a plaintiff's recovery⁶¹ (pursuant to a confidence theory) when the evidentiary record was simply too measly,⁶² it is important to consider the procedural device known as the nonsuit. A nonsuit could arise in two different situations: voluntary and compulsory. In a voluntary nonsuit, the plaintiff failed to appear in court when called and was thus nonsuited.⁶³ By failing to appear when called, a plaintiff could effectively withdraw from the case and preserve the ability to commence a new suit later.⁶⁴ The modern analog to the voluntary nonsuit under the Federal Rules of Civil Procedure is Rule 41(a),⁶⁵ which permits a plaintiff to withdraw a complaint—without prejudice—before the defendant has responded to the plaintiff's complaint.⁶⁶ For our purposes, the voluntary nonsuit is obviously is

61. To say the judge precluded (or, perhaps more accurately, forestalled) a plaintiff's recovery is not quite the same as saying that the judge entered judgment against the plaintiff, as occurs in a modern summary judgment. This difference (which, I believe, is telling in terms of the nature of the common law nonsuit) is explored *infra* in Part II.B.2.

62. The reader may have noticed that I have used a variety of adjectives to describe an evidentiary record that fails to satisfy a confidence analysis. One adjective I have attempted to avoid is "sufficient," although this is perhaps the best term to capture the concept involved in a confidence analysis. The term "sufficient" has been avoided because, although I believe it is often used to verbalize a confidence analysis, it has also clearly been used to reference a judge's analysis of probability at the summary judgment stage. Professor Thomas's research is a prime example of the use of the term "sufficient" to refer to a probability analysis. There is no doubt that Professor Thomas is concerned with a probability analysis, *see supra* text at notes 42–45, and she uses the term "sufficiency" to refer to this analysis. *See* Thomas, *supra* note 1, at 155 ("A compulsory nonsuit could not be ordered, however, upon general assertions regarding the insufficiency of the plaintiff's evidence.").

63. Although the voluntary nonsuit is sometimes described differently in terms of the timing and specific process involved, it appears that the best interpretation is that the plaintiff could achieve this voluntary withdraw at any time up until a verdict was rendered. *Compare* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 346 (1899) (suggesting that the plaintiff could achieve this "withdraw" at any time before the rendition of a verdict) *with* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 300 (1966) (stating that the process of calling the plaintiff could occur only at the close of the plaintiff's evidence or the close of all of the evidence) *and* Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 687 (1918) (stating that the "plaintiff might absent himself at the time of the rendition of the verdict").

64. *See* BLACKSTONE, *supra* note 63, at 376 ("[A]fter a nonsuit, which is only a default, he may commence the same suit again for the same cause of action"); Scott, *supra* note 63, at 687.

65. FED. R. CIV. P. 41(a).

66. *See id.* The wide latitude given the plaintiff under the common law to withdraw (through a nonsuit) must be considered in light of the fact that no pretrial discovery was

not relevant to the current discussion because a modern plaintiff does not consent to a summary judgment.

However, an analysis of the constitutionality of a compulsory nonsuit is relevant to our discussion about summary judgment. A nonsuit at common law could also occur without the plaintiff's consent, however, in the form of an "involuntary" or "compulsory" nonsuit.⁶⁷ The Supreme Court in *Coughran v. Bigelow*⁶⁸ generally

permitted under the common law, meaning that a party's perspective on the case would often be dramatically altered or shaped by what occurred at trial. See Robert W. Millar, *The Mechanism of Fact-Discovery: A Study in Comparative Civil Procedure*, 32 ILL. L. REV. 424, 437, 441 (1936) (discussing the absence of discovery techniques available under English common law and the effect this had on trials).

67. There appears to be some debate as to whether the compulsory nonsuit was firmly entrenched throughout English practice by 1791, the relevant date under the historical approach required under Supreme Court precedent interpreting the Seventh Amendment. See *Markman*, 517 U.S. at 376; *Dimick*, 293 U.S. at 476. The Supreme Court itself has acknowledged the use of the compulsory nonsuit under English common law but pegged the growth of this device to the "eighteenth and nineteenth" centuries. See *Galloway*, 319 U.S. at 391 n.23. Other sources might arguably be read to support the notion that the compulsory nonsuit was not available under the common law. See Scott, *supra* note 63, at 687 (stating that "[a]t common law nonsuits were wholly voluntary" and that "[s]tatutes have sometimes provided for compulsory nonsuits" but presumably referring to *American* statutes dealing with involuntary nonsuits). In any event, and as the discussion in the text will demonstrate, it seems clear that at least *some* English courts were using the involuntary nonsuit by 1791. See also *Bacon v. Parker*, 2 Tenn. 55, 56 (1809) ("The practice in England and this country differs on this ground. Here, as well as in North Carolina, in common cases, the Court never compels a nonsuit or gives judgment to that effect, but with the consent of the party nonsuited. In England, the practice is understood to be, that the Court will order a judgment of nonsuit to be entered, whenever it clearly perceives the plaintiff fails in proving his case, supposing his evidence to be true; or where no evidence is given on his part."); cf. *Oscanyan v. Arms Co.*, 103 U.S. 261 (1880) (stating that, in 1880, an English court could enter a compulsory nonsuit against a plaintiff). The use by at least some English common law courts of the involuntary nonsuit by 1791 would appear to make this device a permissible benchmark for determining the parameters of the Seventh Amendment. See *Galloway*, 319 U.S. at 390–91 ("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." (quotes in original)). Indeed, Professor Thomas seems to concede that the compulsory nonsuit was sufficiently established within English common law practice to make it relevant to a Seventh Amendment inquiry, as she analyzes the involuntary nonsuit in reaching her own conclusions regarding the constitutionality of summary judgment. See Thomas, *supra* note 1, at 155 n.66. Professors Henderson and Scott, in their respective (and respected) studies of English common law procedure, also both include a discussion of the compulsory nonsuit. See Henderson, *supra* note 63, at 300–01; Scott, *supra* note 63, at 687.

Although Professor Thomas does acknowledge the relevance of the compulsory nonsuit to her historical analysis (Professor Thomas compares the compulsory nonsuit to modern summary judgment), she seems to discount the importance of the compulsory nonsuit by stating the compulsory nonsuit was "rare" or "unusual." Thomas, *supra* note 1, at 155; Thomas, *The Seventh Amendment, Modern Procedure, and the English Common*

Law, *supra* note 3, at 724. Thomas's support for this conclusion, though, is puzzling. Thomas cites Professor James Oldham for the proposition that the compulsory nonsuit was rare. *See* Thomas, *supra* note 1, at 155 n.66. The citation to Oldham, however, is to a footnote containing nothing but a citation to Professor Henderson's Harvard Law Review article. *See* OLDHAM, *supra* note 44, at 231 n.35. Professor Henderson, in her article referenced by Oldham, does *not* state that a compulsory nonsuit was rare or infrequent but only that it could be obtained "by a slightly more circuitous route" than the voluntary nonsuit. *See* Henderson, *supra* note 63, at 300. Even more problematic for Professor Thomas, though, is that Professor Oldham—in the very book that Thomas cites as support for her conclusion that the nonsuit was rare—*directly contradicts* Thomas's statement: Oldham comments on the "frequent entry of nonsuit" in the trial notes of Lord Mansfield regardless of whether the plaintiff had consented to the nonsuit or not. *See* OLDHAM, *supra* note 44, at 10–12. This confusion is unfortunate, because Professor Thomas's ultimate conclusion regarding the constitutionality of the specific type of summary judgment she is concerned with is not affected by the frequency with which compulsory nonsuits were entered. As will be explained in the text, the compulsory nonsuit was clearly not a procedure by which judges regularly weighed the evidence, found the plaintiff's factual assertions to be unlikely, and entered judgment.

In any event, I disagree with Professor Thomas's assertion that the nonsuit was rare. I examined English Reports of the King's Bench and the Court of Common Pleas for the time period preceding (and including) the year 1791, and I came across the procedure frequently when doing so. I also skimmed Professor Oldham's collection of Lord Mansfield's trial notes. Recall that these notes formed the basis of Professor Oldham's statement regarding the "frequent entry of a nonsuit." *See* OLDHAM, *supra* note 44, at 10. I concur with Professor Oldham's assessment that the nonsuit was not rare.

There also appears to be some disagreement over the timing of a compulsory nonsuit. Professor Henderson, in the *Harvard Law Review* article referenced above, has stated that the compulsory nonsuit could only be entered after the jury had entered a verdict against a party. *See* Henderson, *supra* note 63, at 300–01 ("If the plaintiff should somehow obtain a verdict in a case proper for nonsuit, defendant could move, before the judges en banc, to have the verdict set aside and judgment of nonsuit entered."). Professor Thomas seems to have relied on Professor Henderson's conclusion, because Thomas uses the issue of timing as a mechanism for distinguishing the compulsory nonsuit from modern summary judgment. *See* Thomas, *supra* note 1, at 156 ("Also, summary judgment occurs before a jury trial, while the compulsory nonsuit occurred after a jury trial."). In support of her conclusion, Henderson cites a trio of cases (including *Abbot*, which I discuss in the text at notes *infra* 85–99) in which a post-verdict nonsuit was entered by the court en banc. The evidence seems clear, though, that trial court judges could enter a compulsory nonsuit against a plaintiff *before* the rendition of a verdict. *See, e.g.,* *Birt v. Barlow*, 1 Doug. 172, 172 (1779) (involving en banc considering whether the trial court judge's entry of a compulsory nonsuit against the plaintiff was correct); *Sadler v. Robbins*, 1 Campb. 254, 254 (1806); *Ward v. Mason*, 9 Price 291, 291 (1821); *see also* 2 William Tidd, *The Practice of the Court of King's Bench, in Personal Actions* 866–68 (R. H. Small 4th ed. 1856) ("And if it be clear that, in point of law, the action will not lie, the judge at *nisi prius* will nonsuit the plaintiff, although the objection appear on the record, and might be taken advantage of by motion is arrest of judgment, or on a writ of error." (emphasis in original)). Professor Oldham's exhaustive research of the trial notes of Lord Mansfield confirm that the nonsuit could be, and was, used in a manner other than the post-verdict manner suggested by Professor Henderson. *See* OLDHAM, *supra* note 44, at 10–12.

Regardless of these (somewhat inevitable) questions regarding the use of the compulsory nonsuit under English common law in 1791, the Supreme Court of the United States confirmed the 1791 existence of the pre-verdict compulsory nonsuit under English

confirmed the constitutionality of the compulsory nonsuit.⁶⁹ Thus, in determining whether the compulsory nonsuit supports the modern use of summary judgment, it is simply necessary to resolve the reasons why a compulsory nonsuit might have been entered against a plaintiff under English common law and compare those to the reasons that a modern summary judgment motion might be granted.⁷⁰

B. Case Law Under the Nonsuit

I. *Ellis v. Galindo*

To start, it seems clear that a judge would not enter a compulsory nonsuit against a plaintiff because the judge found the plaintiff's versions of the facts to be unlikely. This point is perhaps best illustrated in the 1783 case of *Ellis v. Galindo*.⁷¹ The *Ellis* case involved a suit by plaintiff James Ellis against defendant James Galindo seeking money damages.⁷² James Galindo, brother of the defendant, owed money to Ellis,⁷³ and drafted a bill of exchange directing the defendant Galindo to pay Ellis.⁷⁴ The defendant had

common law in *Coughran v. Bigelow*, 164 U.S. 301 (1896). In *Coughran*, the Court explained that its previous decision in *Elmore v. Grymes*, 26 U.S. 469 (1828), prohibiting compulsory nonsuits in federal court was not based on Seventh Amendment concerns but rather a perceived duty under Congressional statute requiring federal courts to apply any state prohibition to this effect. See *Coughran*, 164 U.S. at 307–08. In *Coughran*, the Court concluded that the use of a pre-verdict compulsory nonsuit did not violate the constitutional right to a trial by jury. See *id.* Thus, although I disagree with Professor Henderson's conclusion that a compulsory nonsuit under English common law could not be entered before a jury verdict had taken place, and although I also disagree with Professor Thomas's conclusion that the use of the compulsory nonsuit was rare, these arguments seem nevertheless to be foreclosed by the Supreme Court's decision in *Coughran*. By confirming the validity of a pre-verdict compulsory nonsuit, the Supreme Court implicitly declared that this procedural device was sufficiently well established under English common law in 1791 to be relevant to a historical analysis under the Seventh Amendment.

68. *Coughran*, 164 U.S. 301. This decision is described more fully in the preceding footnote.

69. *Id.*

70. In some instances, a Seventh Amendment analysis has mechanically proceeded by asking whether a certain procedure existed under the common law rather than inquiring in more depth as to the reasons or analysis required by that particular procedure. As explained in the text at notes 206-33, I believe this type of superficial analysis was at play in the Court's holding in *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 656–61 (1935), affirming the constitutionality of a judgment notwithstanding the verdict.

71. *Ellis v. Galindo*, 1 Doug. 250 n.71. (1783).

72. See *id.*

73. *Id.*

74. *Id.*

accepted the bill of exchange,⁷⁵ and by accepting the bill became liable to Ellis for James's debt to Ellis.⁷⁶ When the bill became due Ellis sought payment from James rather than from the defendant, at which time James made partial payment to Ellis.⁷⁷ In addition to this partial payment, James made an endorsement on Ellis's bill that (1) documented James's partial payment to Ellis and (2) promised to pay Ellis the remaining balance on the bill within three months.⁷⁸ James obviously did not fulfill this promise, as Ellis subsequently brought suit against the defendant on the bill of exchange accepted by the defendant.

Under established English case law, a payee could discharge an acceptor by express language to that effect (but not by silence or inaction).⁷⁹ Thus, the issue in the *Ellis* case was whether Ellis, by agreeing to the endorsement by James, had absolved the defendant of liability on the accepted bill. Lord Mansfield originally concluded that the acceptor had been discharged, and thus nonsuited the plaintiff.⁸⁰ Upon further consideration by the full court, the question of whether there had been a discharge was determined to be "a question of intention arising out of the circumstances."⁸¹ With the case hinging upon the resolution of this fact question, the court held that a nonsuit was inappropriate and that the case should have been decided by a jury rather than by a judge through a nonsuit.⁸²

75. *Id.*

76. This is true even if, as Judge Mansfield seemed to believe in the case, *see id.*, the defendant had not received consideration for pledging himself to Ellis for James's debt and did so only as an accommodation for his brother. *See* James Stevens Rogers, *The Myth of Negotiability*, 31 B.C. L. REV. 265, 292 (1990) ("[A] person who has accepted a bill as an accommodation to the drawer is bound by that acceptance.").

77. *Ellis*, 1 Doug. at 250 n.71.

78. *Id.*

79. *See* *Dingwall v. Dunster*, (1779) 99 Eng. Rep. 161 (K.B.); 1 Doug. 247. Also, the law was clear that the payee's acceptance of partial payment by the drawer did not constitute a discharge of the acceptor. *See id.* at 162–63.

80. *Ellis*, 1 Doug. at 250 n.71.

81. *Id.* at 250.

82. *Id.* at 250–51. Curiously, although the court concluded that the entry of nonsuit against the plaintiff was erroneous, the court did not order a new trial. *See id.* Although this result seems odd, English common law generally precluded a full court from granting a new trial when (1) the amount in controversy was relatively small and (2) the ultimate disposition was not necessarily inconsistent with the law. *See, e.g., Tindal v. Brown*, 1 T.R. 167 (1786). Both of these elements were applicable in *Ellis*. The amount in controversy was only 26 pounds. *Ellis*, 1 Doug. at 250 n.71. Moreover, the ultimate disposition by the court was not necessarily legally wrong. The court had concluded that Judge Mansfield's initial grant of a nonsuit was erroneous, but this did not necessarily mean that the judgment for the defendant was erroneous, as the defendant might also have won if the

The *Ellis* case nicely demonstrates that a compulsory nonsuit could not be used as a mechanism for determining the existence of a material fact.⁸³ This proposition supports Professor Thomas's

case had been properly submitted to a jury for a determination on the factual question of whether Ellis had intended to discharge the Defendant Galindo. In fact, the *Ellis* court noted that the endorsement promise of James to Ellis to pay in three months was probably made with the express purpose of discharging the Defendant. *See id.* The analysis the court used in *Ellis* to conclude that the victory for the defendant was not necessarily wrong and thus deserving of a new trial is simply a very aggressive application of the modern rule that an appellant must show that a trial court's error was harmful in order for the appellate court to reverse. *See generally* Rory Ryan et al., *Interlocutory Review of Orders Denying Remand Motions*, 63 BAYLOR L. REV. 734, 762–63 (2011) (explaining the harmless error rule).

83. There are a few outlier cases I have come across which might be read to suggest that a nonsuit could be entered when the judges' viewed the evidence as making a particular fact either very probable or improbable. In *Oakapple v. Corpus*, (1791) 100 Eng. Rep. 1064 (K.B.); 4 T.R. 361, the plaintiff-landlord sought to eject the defendant-tenant before the termination of the lease. *See id.* The question in the case was whether, upon receiving the landlord's notice of termination, the tenant had consented to this early termination and thus waived this defense to the landlord's ejectment. *See id.* The evidence on this point consisted of the tenant's verbal reaction to having received the notice of early termination, which was "I pay rent enough already; and it is hard to use me thus." *Id.* The court acknowledged that whether the tenant had assented to the earlier termination date was "a question of fact for the jury" but concluded that the evidence did not support this view. *See id.* at 1064–65. The tenant's reaction, rather than consenting to the earlier date, was "the answer of an angry man." *Id.* at 1065. Thus, the court reversed the plaintiff's verdict and entered a nonsuit against the plaintiff. *See id.* at 1064–65.

Another case arguably along these same lines is *Sproat v. Matthews*, (1786) 99 Eng. Rep 1041 (K.B.); 1 T.R. 182. The *Sproat* case involved a suit by the plaintiff (an endorsee of the payee on a bill of exchange) against the drawee of the bill. *See id.* The question in the case was whether the defendant-drawee had made an absolute or conditional acceptance of the bill. *Id.* at 1042. After presenting the bill to the defendant (twice), the plaintiff-endorsee had taken the bill to a notary public, where it was noted for nonacceptance. *See id.* If the defendant's acceptance was conditional, the plaintiff's act of noting it for nonacceptance could constitute a rejection of the defendant's acceptance and a waiver of the plaintiff's right to recover against the defendant. If, however, the defendant's acceptance had been absolute, the plaintiff's subsequent conduct could not relieve the defendant from liability and the plaintiff was entitled to recovery against the defendant. *See id.* The plaintiff had been involuntarily nonsuited, and the en banc court in *Sproat* was considering the propriety of this nonsuit. *See id.*

The facts on which the question of the defendant's acceptance would be determined were contested by the parties. *See id.* at 1043 (stating that "the defendant's counsel admitted this evidence to be true"). These facts were supplied by the testimony of the plaintiff's clerk who had presented the bill to the defendant for acceptance. *See id.* ("This case was proved by one witness on the part of the plaintiff"). That the court references the testimony of the plaintiff's witness suggests that the nonsuit against the plaintiff was entered after the plaintiff had presented testimony at trial. The first time the defendant was presented with the bill, he clearly refused to accept the bill; the drawer of the bill had consigned a ship and cargo to the defendant, but it was not clear whether this ship would arrive at Bristol or London and the defendant would only accept the bill if the ship arrived in London. *See id.* at 1042. The second time the defendant was presented with the bill, the

arguments regarding summary judgment—once her arguments are appropriately confined. Recall that Professor Thomas has broadly

defendant stated that “the bill was a good one, and that it would be paid even if the ship were lost.” *Id.* The question was whether the defendant, by these words, had unconditionally accepted the bill regardless of whether the ship ultimately arrived in Bristol or London, which was the condition that had prevented the defendant from accepting in the first instance.

The en banc court affirmed the nonsuit by a two-to-one vote, but unraveling the separate analysis of each of the judges requires some care. *Id.* at 1042–44. To Judge Willes, the question of whether the defendant had absolutely or conditionally accepted the bill turned on the defendant’s intent and, as such, should have been sent to the jury: “Therefore if there was a doubt whether this was a conditional or an absolute acceptance . . . the whole of the facts should have been left to the jury.” *Id.* at 1043. Thus, as this case required a jury determination, Judge Willes would have overturned the nonsuit. *See id.*

Both Judges Buller and Ashhurt were of the opinion that the nonsuit was correct, but their analysis arguably proceeds along different paths. Judge Buller clearly indicates that he believes that the case turns “on a point of law” and that “it should not have been left to the jury.” *Id.* Judge Buller seems to base this conclusion on the premise that the spoken words of the defendant (the existence of which were not contested) were to be given operative legal effect by the court regardless of the defendant’s actual intent in uttering them. *See id.* at 1043–44. This mode of analysis is familiar enough, and is the type of analysis that results in certain terms within legal documents acquiring status as a legal term of art. Under this mode of analysis, of course, the legal effect of a term of art is a question of law that must be answered by the judge. *See* 12 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 34:5 (4th ed. 2012) (“However, usage cannot control words having a definite legal meaning, and, at common law, it was said that usage could not be used to interpret a contract unless there was an uncertainty on the face of the instrument.”).

Judge Ashhurt, however, arguably views the dispositive legal question as turning on the actual intent of the parties. *See Sproat*, 99 Eng. Rep. at 1043 (distinguishing a written acceptance, which “speaks for itself,” from an oral acceptance, which turns on “the *evidentia rei*”). In this respect, Judge Ashhurt’s view of the law governing the dispositive question before the court seems to mirror that of Judge Willes. Whereas Judge Willes thought that this factual question of intent had to be submitted to the jury, Judge Ashhurt thought that “there could be nothing to leave to a jury.” *Id.* Judge Ashhurt reached this conclusion, apparently, on the view that the defendant’s language was best viewed as a conditional acceptance. If true, Judge’s Ashhurt had determined that the defendant’s intent was so likely to be conditional that a nonsuit was granted. This probability analysis, of course, is the very type of probability analysis that concerns Judge Thomas.

Despite the existence of a few outlier cases, I continue to believe that Judge Thomas is largely accurate in positing that judges did not decide cases based on their view of the probability of the underlying facts to the litigation. The *Sproat* case (with the possible exception of Judge Ashhurt’s analysis) illustrates that whether a dispute involves a question of fact or question of law can depend on how the underlying substantive law is interpreted. *See* OLDHAM, *supra* note 44, at 35–43 (discussing the slipperiness of the law-fact distinction). For Judge Willes, the substantive law required an analysis of intent (a factual question), while Judge Buller seems to believe that the judges were responsible for giving operative legal effect to the words spoken by the defendant. And a case like *Oakapple* does not, in my view, undermine the scores of cases (like the *Ellis*) which comport with Professor Thomas’s views.

asserted that summary judgment is *always* unconstitutional; in reality, her analysis presumes only a particular type of summary judgment analysis—probability theory. The *Ellis* case supports Professor Thomas’s conclusion with regard to summary judgments granted under a probability analysis because *Ellis* demonstrates that the compulsory nonsuit was not used as a mechanism by which the judge could resolve a case based on the likelihood or probability of disputed questions of fact.⁸⁴

However, there *is* historical support for the different types of analyses on which a modern summary judgment can be based. As the cases below demonstrate, a judge could enter a compulsory nonsuit if the judge concluded that the evidentiary record was—as a matter of law or policy, rather than probability—not adequate. In other words, a judge could enter a compulsory nonsuit based on a confidence analysis.

2. *Abbot v. Plumbe*

Consider first the familiar⁸⁵ case of *Abbot v. Plumbe*.⁸⁶ *Abbot* involved an attempt to collect on a debt owed pursuant to a bond.⁸⁷ There was testimony that the defendant/obligor had acknowledged the bond, but the subscribing witness to the bond had not been produced.⁸⁸ The case initially proceeded to a jury, which resulted in a

84. This conclusion is made even more apparent in *Ellis* when one considers that the judges in *Ellis* strongly believed, from the evidence adduced, that the defendant’s version of the facts was much more likely than *Ellis*’s. See *supra* notes 81–82. Despite their own views of the probable facts from this record evidence, the judges did not consider that the nonsuit might have been justified pursuant to their own views on this factual question.

85. The *Abbot* case has been considered by many of the academics interested in the English common law compulsory nonsuit. See OLDHAM, *supra* note 44, at 11; Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, *supra* note 3, at 723–24; Henderson, *supra* note 63, at 301 n.21.

86. *Abbot v. Plumbe*, (1779) 99 Eng. Rep. 141 (K.B.); 1 Doug. 216.

87. *Id.* The *Abbot* case is somewhat complicated by the fact that the obligor (Farr) was a bankrupt who had made an assignment to *Abbot*. See *id.* Thus, it was *Abbot* who was defending against the debt claimed by *Plumbe*. Further complicating matters is the fact that, although the litigation was technically initiated by *Abbot*, the court uses the term “plaintiff” to refer to the creditor (*Plumbe*) and “defendant” to refer to the third-party bankrupt (*Farr*). See *id.* Despite these technicalities, the court’s terminology is sound on a common-sense level, as *Farr* is clearly the “real” defendant while *Plumbe* is clearly the “real” plaintiff. I will follow the court’s lead and employ the same terminology; others have done the same in describing *Abbot*. See OLDHAM, *supra* note 44, at 11; Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, *supra* note 3, at 723–24.

88. *Abbot*, 1 Doug. at 216.

verdict for the plaintiff.⁸⁹ The issue in *Abbot* was whether the plaintiff should have been nonsuited; the court ultimately concluded that a nonsuit was warranted and entered one against the plaintiff, negating the plaintiff's jury verdict.⁹⁰

What type of analysis did the court use in concluding that a nonsuit was warranted? In answering this question, it will be helpful to again consider Figure C:

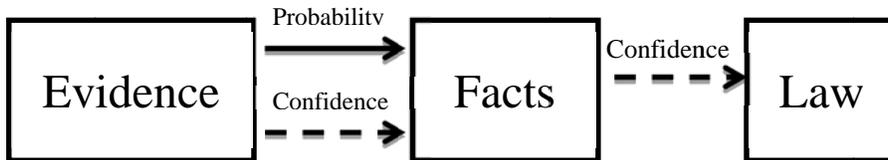


Figure C

All legal commentators who have considered *Abbot* agree that the case revolved around a question of law,⁹¹ and I concur with that conclusion.⁹² But, as Figure C demonstrates, a judge might be asked to perform a legal analysis (represented by the dashed line) and decide a question of law as part of the process of applying assumed facts to the law (right side of the chart) or in determining whether a particular evidentiary record is an adequate basis from which to permit an analysis of whether the facts actually occurred (the left side of the chart, a confidence analysis). The *Abbot* case is a clear example of an application of a confidence analysis. The critical question in *Abbot* involved the evidentiary record and whether a certain fact could be assumed (the defendant's execution of the bond) from a particular evidentiary record. The evidentiary record did not include the testimony of the subscribing witness and did not include testimony that the subscribing witness could not be produced.⁹³ The

89. *Id.*

90. *Id.* at 216–17.

91. See OLDHAM, *supra* note 44, at 11 (describing *Abbot* as having been decided on a “question of law”); Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, *supra* note 3, at 724 (discussing *Abbot* as support for her conclusion that a compulsory nonsuit could only be granted on “a matter of law”).

92. Indeed, Lord Mansfield seems to acknowledge that there is little dispute regarding the factual question of whether the defendant had executed the bond in question. Mansfield describes the legal rule applied by the court as a “technical rule” based on a “captious objection.” *Abbot*, 1 Doug. at 216.

93. See *id.*

court concluded that this evidentiary record was inadequate to permit a determination on the factual question as to whether the bond had been executed. Importantly, though, the court's decision was clearly *not* based on the judges' own views as to the probability that the defendant had, in fact, executed the bond.⁹⁴ Indeed, the court seemed to acknowledge that the defendant's execution of the bond was probable.⁹⁵ The crux in *Abbot* was not that the court thought this fact was unlikely or disagreed with the jury's conclusion, but that the court resolved—as a matter of law—that the determination of this factual question should not even be allowed based on what existed in the evidentiary record.⁹⁶

In this sense, then, the *Abbot* case is a real-life application of Professor Tribe's blue bus hypothetical.⁹⁷ The evidentiary record in each suggests that the plaintiff's version of the disputed facts is more likely to recover than the defendant's version, but nevertheless the plaintiff cannot recover because the evidentiary record is lacking. There are, of course, differences between the two. The blue bus hypothetical is useful because it eliminates a probability analysis as an explanation for the defendant's judgment by *specifically* determining that the plaintiff's version of the disputed facts is 80% probable. The *Abbot* case is similar to the blue bus hypothetical in that the court did

94. It goes without saying that there was no dispute in *Abbot* regarding the substantive law involved. If the defendant had executed the bond, he was liable on it.

95. See *supra* note 92. I generally agree with Professor Thomas's conclusion that when a court believed the jury had come to an erroneous conclusion regarding the existence of a disputed fact, the court's only remedy was to order a new trial. See Thomas, *supra* note 1, at 143.

96. Professor Thomas recognizes that *Abbot* is not damaging to her thesis, at least once her broad thesis is confined to the constitutionality of a judge engaging in a probability analysis. Indeed, Professor Thomas comes close to articulating the confidence principle in her discussion of *Abbot*: "Under a compulsory nonsuit, the court would enter judgment for the defendant only if the jury's verdict was unsupported as to a particular matter of law. For example, the plaintiff may not have presented certain specific, required evidence. . . . A compulsory nonsuit could not be ordered, however, upon general assertions regarding the insufficiency of the plaintiff's evidence." Thomas, *supra* note 1, at 155. Of course, to acknowledge this distinction is to acknowledge the overbreadth of her thesis that summary judgment is always unconstitutional, assuming the existence of modern summary judgments based on the same type of analysis involved in *Abbot*. Perhaps this is why Professor Thomas seems eager to quickly dismiss the nonsuit as a relevant comparison to modern summary judgment; the other common law procedures considered by Professor Thomas are more easily distinguished from modern summary judgment and support her broad claim that modern summary judgment is completely unconstitutional.

97. See *supra* notes 54–57. A more complete discussion of the blue bus hypothetical can be found in Meier, *supra* note 4.

not doubt the probability of the plaintiff's version of the disputed fact (whether the defendant had executed the bond). In fact, the judges, similar to the blue bus hypothetical, seemed to think it extremely likely that the defendant had, in fact, executed the bond. Of course, the probability that the defendant had executed the bond in *Abbot* could not be reduced to a precise percentage. This is true of most real world—as opposed to hypothetical—disputes. In this sense, then, the *Abbot* case is not as explicit as the blue bus hypothetical in eliminating probability as an explanation for the decision against the plaintiff. On the other hand, it is easier to identify the nature of the dispositive legal analysis in *Abbot* as opposed to the blue bus hypothetical. The legal nature of the analysis in *Abbot* was made more explicit by the application of a specific legal rule: A subscribing witness had to testify to the execution of the bond or there needed to be evidence that the subscribing witness could not be produced. In the blue bus hypothetical, the policy considerations that inform the confidence analysis cannot be reduced to a specific rule easily applied to a discrete factual setting. Of course, in a jurisdiction in which the blue bus hypothetical has been resolved according to summary judgment, in subsequent litigation involving a similar incident and a similar evidentiary record, the legal nature of the blue bus “rule” would be more apparent (as in *Abbot*) because that preexisting rule would be applied to a particular setting. Thus, it is perhaps easier to retroactively recognize the legal nature of a confidence analysis once that analysis has been reduced to a rule. In a case of first impression, though, it might be more challenging to recognize that the summary judgment is based on a conclusion regarding the state of the record rather than the conclusions that might be drawn from the record.

One additional point is worth mentioning regarding the *Abbot* case. The nature of the decision in *Abbot* is perhaps best appreciated by considering the fact that a nonsuit “left the plaintiff free to try again.”⁹⁸ When a nonsuit was entered in a case like *Abbot*, *nothing had been decided about the merits of the plaintiff's underlying claim*. This means that the court in *Abbot* had not determined that the defendant had, in reality, failed to execute the bond. If this factual conclusion had been the basis of the nonsuit in *Abbot*, it would be odd to give the plaintiff another crack at getting this factual question decided in his favor. But this is not what occurred in *Abbot*. Rather, the court's decision was simply a decision about the evidence the plaintiff had assembled on that question at the time of the trial. Of

98. *Galloway*, 319 U.S. at 391 n.23.

course, a legal system could choose to prohibit a plaintiff from trying again when that plaintiff has failed to assemble an evidentiary record that can satisfy a confidence analysis, but the common law took a more forgiving approach to plaintiffs who had failed to assemble the necessary evidence at trial.⁹⁹ As such, *Abbot* was free to get the subscribing witness to the bond and to file suit again.

3. *Birt v. Barlow*

The decision in *Birt v. Barlow*¹⁰⁰ provides another fine example of a compulsory nonsuit based on a confidence analysis. The case involved a civil suit by Birt against Barlow for Barlow's "criminal conversion" of Birt's wife.¹⁰¹ Recovery for a criminal conversion existed if the defendant had slept with the plaintiff's wife.¹⁰² Obviously, it was necessary to show that Birt was married to the woman who had slept with Barlow.¹⁰³ One way in which a marriage

99. Current federal law is not as forgiving to the plaintiff who loses a case on summary judgment based on a confidence analysis. The entry of summary judgment against a plaintiff—including a summary judgment based on a confidence analysis—precludes that plaintiff from bringing the suit again. See 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4444 (2d ed. 2002) (explaining that summary judgment is considered as a decision on the merits and results in preclusion, subject to a few minor exceptions). The reason that a modern summary judgment motion decided pursuant to a confidence analysis results in preclusion, while a common law nonsuit entered pursuant to a confidence analysis did not result in preclusion, can be understood in terms of the opportunity provided a modern plaintiff to assemble an evidentiary record through discovery. The common law plaintiff had no such luxury, and thus the forgiving approach afforded to the common law plaintiff who had failed to assemble an adequate record makes complete sense.

This same issue arises in the context of a modern motion to dismiss that is granted according to a confidence analysis. Should a plaintiff who has failed to allege adequate facts and thus fails a confidence analysis at this early stage be precluded from filing a new lawsuit or, at least, amending the complaint to allege the necessary facts? See Meier, *supra* note 4.

100. *Birt v. Barlow*, (1779) 99 Eng. Rep. 113 (K.B.); 1 Doug. 171. The *Birt* case is distinct from *Abbot* in that *Abbot* involved the initial denial of a nonsuit while *Birt* involves the initial entry of a nonsuit. See *id.* In both cases, the initial decision was held incorrect by the entire court, sitting en banc. In addition, in both instances, the decision to enter a nonsuit (the full court en banc in *Abbot* and Justice Blackstone in *Birt*) was based on a confidence analysis, as explained above in the text.

101. *Id.*

102. See Margaret Valentine Turano, *Jane Austen, Charlotte Bronte, and the Marital Property Law*, 21 HARV. WOMEN'S L.J. 179, 185 (1998) ("If a wife slept with another man, her husband could collect damages from him in an action ironically known as "criminal conversation."").

103. *Birt*, 1 Doug. at 171–72. It would be necessary as well "to prove the fact of adultery." *Id.* at 172.

might occur is as the result of a formal wedding ceremony.¹⁰⁴ This is how Birt sought to prove a marriage between Birt and the woman who slept with Barlow. In this regard, Birt introduced a copy of a church registry listing a 1767 marriage between “John Birt” and “Harriot Champneys.”¹⁰⁵ Justice Blackstone nonsuited the plaintiff, however, concluding that the entry of the registry alone was not adequate and that testimony from a witness to the ceremony was needed, at least in cases (such as the Birt case) where there were witnesses to the ceremony and no explanation had been offered as to why this testimony could not be produced.¹⁰⁶

As in *Abbot*, the entry of a compulsory nonsuit by Justice Blackstone in *Birt* is clearly based on a confidence analysis. The problem for Birt, according to Blackstone, was the state of the record from which Birt sought to prove the existence of a marriage. This is clear from Justice Blackstone’s reasoning: “this was not sufficient evidence of the marriage”;¹⁰⁷ “I still thought that the evidence . . . would be insufficient”;¹⁰⁸ “the best proof that could be given of an actual marriage was by the solemnity of a person”;¹⁰⁹ “I could not admit less proof than that of some person present.”¹¹⁰ As in *Abbot*, the *Birt* Court was not concerned with the probability that the marriage ceremony had, in fact, occurred. Indeed, if an opinion was based on a probability analysis, it would have read dramatically different, and would have included a discussion of the judge’s own views from the evidence as to whether the wedding ceremony had, in fact, occurred. However, the opinions in *Birt* do not contain this probability analysis. For instance, Lord Mansfield’s opinion includes a technical analysis of the effect of the Marriage Act on the case at bar.¹¹¹ Obviously, Lord Mansfield’s legal analysis would be completely misplaced if the question was whether the wedding ceremony had, in fact, occurred. The consideration of the effect of a statute, however, makes complete sense if the question before the

104. There were other ways in which a man and woman might achieve the legal status of “married,” as noted by Lord Mansfield in *Birt*. See *id.* at 174.

105. *Id.* at 171.

106. *Id.* at 171–72.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 174.

court is limited to the confidence question of whether additional specific evidence is needed before the case can proceed to a jury.

The discussion in *Birt* is informative of the types of policy or legal questions that might be relevant in a confidence analysis.¹¹² First, in determining whether more evidence will be required, the availability of additional evidence must be considered.¹¹³ This aspect of the confidence inquiry is clearly present in Justice Blackstone's analysis when he considers the other types of "collateral proof" which might be adequate in instances in which the witnesses to the ceremony are dead or in which the ceremony took place without any witnesses at all.¹¹⁴ Second, the consequences of allowing a case to proceed to a factual determination from a skimpy evidentiary record must be considered.¹¹⁵ This policy consideration is evident in *Birt* as well; Lord Mansfield notes the "penal" character of a criminal conversation cause of action,¹¹⁶ meaning that the risk of an erroneous jury verdict is perhaps higher in this quasi-criminal setting than it is in a standard civil suit.¹¹⁷

In *Birt*, the court ultimately held that the conclusion Justice Blackstone had reached on the confidence question was erroneous and that the entry of nonsuit was erroneous.¹¹⁸ Upon reaching this conclusion, the legal issues in the case had been resolved. Notably, the court conceded that the factual question of whether the ceremony had, in fact, occurred was out of its hands: The occurrence of the ceremony could be "proved in a thousand different ways" in "whatever is sufficient to satisfy the jury."¹¹⁹

112. This issue is explored in more depth in Meier, *supra* note 4.

113. *See id.* at 39. ("The other question to be resolved as part of the confidence analysis requires a determination of how much of the available evidence has been presented and the likelihood that more information might change the best-guess point estimate of probability.")

114. *Birt*, 1 Doug. at 172.

115. Meier, *supra* note 4, at 38 ("The acceptable margin of error question requires a determination as to the legal system's tolerance of the possibility that further evidence might change the probability assessment of a material fact.")

116. *Birt*, 1 Doug. at 174.

117. *See* Meier, *supra* note 4 (explaining that the consequences of an erroneous criminal conviction are more grave than an erroneous verdict for a plaintiff in a civil suit, and that a confidence analysis will therefore usually require a more complete evidentiary record in a criminal case, and also suggesting that the jury might consider the confidence question in reaching a verdict).

118. *See Birt*, 1 Doug. at 175 (ordering a new trial).

119. *Id.* at 174-75.

4. *Berryman v. Wise*

The case of *Berryman v. Wise*¹²⁰ (decided in the benchmark year of 1791¹²¹) constitutes another example of a case in which a compulsory nonsuit is entertained on the basis of a confidence argument. The *Berryman* case involved a slander suit against a defendant who accused the plaintiff of “swindling.”¹²² As part of his claim, the plaintiff sought to prove that he was an attorney¹²³ and had introduced evidence of his profession.¹²⁴ The defendant, however, sought a nonsuit on the ground that the plaintiff’s evidence needed to include evidence of either the plaintiff’s admission as an attorney to a particular court or “a copy of the roll of attornies [sic].”¹²⁵

The defendant’s argument in favor of a nonsuit in *Berryman* is clearly based on a confidence analysis. The argument addresses the relationship between the ultimate fact that needed to be determined by the jury (whether the plaintiff was an attorney) and the evidence the plaintiff had assembled on that question. Importantly, though, the relationship between evidence and ultimate fact was not considered from the perspective of probability. The defendant was not asking the court to make a judgment as to the probability that the plaintiff was, in fact, an attorney; there is nothing in the *Berryman* opinion that even remotely could be viewed as addressing whether the judges actually believed the plaintiff was an attorney. Rather, the court’s analysis strictly considers the adequacy of the evidence assembled on that question.

The court in *Berryman* ultimately rejected the confidence argument that was asserted by the defendant. The court concluded that the plaintiff had assembled “sufficient proof.”¹²⁶ The court noted that in other cases in which a party’s status as an attorney was material, “the proof now insisted on has never been required.”¹²⁷

The ultimate conclusion rejecting the defendant’s confidence argument is irrelevant; what is important is that the argument was

120. *Berryman v. Wise*, (1791) 100 Eng. Rep. 1067 (K.B.).

121. See *Markman*, 517 U.S. at 376; *Dimick*, 293 U.S. 474, 476 (1935).

122. See *Berryman*, 100 Eng. Rep. at 1067.

123. *Id.* Proof of his profession as an attorney would entitle the plaintiff to different rules regarding damages. See William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 841 (1960).

124. See *Berryman*, 100 Eng. Rep. at 1067.

125. *Id.*

126. *Id.*

127. *Id.* at 1068.

made in the context of a compulsory nonsuit. The court's analysis in *Berryman* engages in the confidence analysis asserted by the defendant. Reading *Berryman*, one does not get the sense that the court considered the nature of the defendant's argument as unusual or that it was inappropriate for a nonsuit. Rather, the court simply engages the confidence argument on its merits.¹²⁸

128. Another English common law case involving a compulsory nonsuit and a confidence analysis is *Syeds v. Hay*, (1791) 100 Eng. Rep. 1008 (K.B.); 4 T.R. 260, 260–61. The *Syeds* case involves a conversion suit by the owner of goods against the captain of the vessel in which the goods had been shipped. *See id.* The plaintiff had instructed the defendant, upon reaching the destination, not to unload the goods on the wharf. *Id.* Despite promising not to do so, the defendant did unload the goods upon reaching the wharf, where they were then in the possession of a third party who refused to deliver them to the owner without the payment of a fee. *Id.* As a defense to the plaintiff's conversion claim, the defendant attempted to prove a trade usage under which he was essentially required to unload the goods on the dock into the possession of the third-party "wharfinger." *Id.* The case proceeded to trial and a jury verdict for the plaintiff. *See id.* Before the en banc court, however, the defendant argued that he was entitled to a nonsuit based on the existence of this trade usage. *See id.*

The court rejected the defendant's argument in favor of a nonsuit. *See id.* at 1009–10. Notably, however, the court did not reach this conclusion based on a rejection of the merits of the legal argument put forward by the defendant. Thus, the court seemed to accept that if a trade usage required the defendant to unload into the possession of the third-party wharfinger, the plaintiff could not maintain a conversion action against the defendant. Rather, the court concluded that the defendant had not put forward "satisfactory evidence" of the trade usage. *Id.* at 1009.

The defendant's evidence of the factual existence of the trade usage consisted of the trial testimony "from several witnesses." *Id.* at 1008. The attorneys for the plaintiffs had argued to the court that this evidence was not adequate: "[T]he evidence of usage offered did not support the right of the wharfinger. The mere opinion of the witnesses is of no weight. Usage must be established, either by reputation or by the actual exaction of the demand." *Id.* The defendant's attorney made the unfortunate mistake of misconstruing the nature of the plaintiff's attorney's argument; the defendant's attorney responded as if the question before the court was the factual existence of the trade usage rather than the type of evidence that the defendant had assembled on that particular question: "[A]ll the evidence given [on the trade usage] was in support of such a right; and, however slight, it must be taken to be true, as none was opposed to it." *Id.* at 1009.

The defendant's argument can be compared to an argument that the plaintiff in Professor Tribe's blue bus hypothetical might make: "Judge, there is admittedly not much evidence on the question of who owned the bus that ran over my client, but the evidence we do have—which is undisputed—suggests that it was the defendant, and for this reason the plaintiff must be victorious in this case." In both situations, the argument advanced has failed to appreciate the difference between probability and confidence and thus assumed that the point in contention is probability when, in reality, the dispositive question is related to confidence. Of course, this probability argument is misplaced in the blue bus hypothetical, and the court in *Syeds* correctly recognized that the defendant's argument was also misplaced; Chief Justice Kenyon reasoned that the defendant's evidence of trade usage was not "satisfactory" and Judge Buller similarly concluded that the trial testimony on this point was "no evidence." *Id.* at 1009–10. Having failed to

III. The Constitutionality of a Confidence Theory of Summary Judgment: Analogy to Other Procedures

To buttress the conclusion that a confidence theory of summary judgment is constitutional under the Seventh Amendment, it is also worthwhile to consider the analytical similarities between a confidence analysis and other legal rules that shape the litigation process. Upon close inspection, a judge's summary judgment analysis under a confidence analysis is a sibling of the law governing presumptions and a close cousin of the law governing evidence. When a judge applies an evidentiary presumption or excludes evidence under the law of evidence, the judge is making a legal

provide adequate evidence on the question of trade usage, the defendant's nonsuit was rejected and the plaintiff's jury verdict was preserved. *See id.* at 1010.

An interesting question in *Syeds* is why the defendant suffered the consequences of the incomplete evidentiary record. Usually, the plaintiff has the burden of producing an evidentiary record that is adequate to satisfy a confidence analysis. Thus, in the cases discussed in this section, or in the blue bus hypothetical, the incomplete record is the plaintiff's problem. In other situations, however, such as with an affirmative defense, the burden of producing an adequate evidentiary record (including the burden of satisfying a confidence analysis) can be shifted to the defendant. *See* Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on Hopkins and Wards Cove*, 64 TUL. L. REV. 1359, 1385 (1990) (stating that an affirmative defense usually means that the burden of producing evidence on this point falls on the defendant). The result in *Syeds*, in which the skimpy evidentiary record was held against the defendant, can be viewed in terms of the modern approach for issues recognized as an affirmative defense. The court viewed the plaintiff as having the burden of producing evidence related to the conversion claim, while the defendant had the burden of producing evidence on the trade usage theory. Like a modern affirmative defense, the trade usage theory did not undermine the plaintiff's prima facie claim of a conversion but rather offered an additional consideration which precluded recovery on that theory. *See Syeds*, 100 Eng. Rep. at 1008 ("The defendant, by way of justification . . . attempted to set up a usage . . ."); *id.* at 1009 (including the arguments of the defendant's attorneys, which "admitted" the "prima facie evidence of a conversion" but "justif[ied] his denial under the [trade usage]"); *id.* at 1010 (Buller, J.) ("[I]f the wharfage-duty be due, that will be an answer to the present action."); *see also* 5 WRIGHT ET AL., *supra* note 26, § 1270 (comparing an affirmative defense to the common law plea (which was not involved in *Syeds*) of a confession and avoidance, in that both involve an instance where the defendant wants to rely on additional material or information to preclude the plaintiff from recovery on a prima facie claim).

In my article *Probability, Confidence, and Twombly's Plausibility Standard*, I explain that the modern "plausibility" standard from the Supreme Court's decision in *Twombly*, 550 U.S. 544, is simply an application of the confidence analysis at the pleadings stage of litigation. *See* Meier, *supra* note 14. Once this is appreciated, the *Syeds* opinion sheds some light on the modern-day question of whether the plausibility standard should be applied to other pleadings such as a defendant's affirmative defense. *See* Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987, 991-92 (2012) (arguing that the plausibility analysis should be applied to affirmative defenses raised by the defendant).

decision that might inform or shape the jury's decision with regard to probability. None of these legal decisions, however, implicate the Seventh Amendment.

A. The Law of Presumptions

As Professors Charles Alan Wright and Kenneth Graham have aptly stated, "'presumption' is a word of many meanings."¹²⁹ Fortunately, the ambiguities associated with this term, and the complexity of the doctrine surrounding presumptions, need not be resolved (or even addressed) here. Rather, the objective is to demonstrate that, at a basic level, a judge entering summary judgment pursuant to a confidence analysis has employed a legal analysis that closely resembles the analytical process involved with a presumption. To appreciate this point, it is only necessary to consider presumptions at a very basic level.

The law of presumptions concerns the relationship between two facts; these two facts are usually deemed the "basic fact" and the "presumed fact."¹³⁰ The presumed fact is a fact that is relevant to a litigation dispute; the basic fact is used to show that the presumed fact exists. In this sense, then, the law governing presumptions exists within the broader context of circumstantial evidence. Circumstantial evidence is evidence of one fact that is intended to prove the existence of a different fact.¹³¹ The law of presumptions provides specific legal rules that, when applicable, provide guidance as to the use of circumstantial evidence.¹³²

While many of the legal rules regarding presumptions are complex and, in some ways, convoluted,¹³³ all jurisdictions are in

129. WRIGHT & GRAHAM, *supra* note 7, §5122.1.

130. See, e.g., G. Michael Fenner, *Presumptions: 350 Years of Confusion and It Has Come to This*, 25 CREIGHTON L. REV. 383, 389–90 (1992) (using terms).

131. See Meier, *supra* note 4.

132. See ADOLFO GIULIANI, *Civilian Treatises on Presumptions 1580-1620*, THE LAW OF PRESUMPTIONS: ESSAYS IN COMPARATIVE LEGAL HISTORY 23 (R. H. Helmholz & W. David H. Sellar eds., 2009) ("[With presumptions] a conclusion may be reached independently or even in absence of direct proof (testimony and documents). This is indeed the typical working scenario of presumptions: a decision to be taken in absence of information. Hence they are relevant in all those situations which deny access to direct evidence."). This is not to say that a presumption can exist only when a party lacks direct evidence. See WRIGHT & GRAHAM, *supra* note 7, § 5125.1, at 539 (discussing Ohio rules which precludes consideration of a presumption when a party has direct evidence of a presumed fact, but calling this a "peculiar [] rule" and citing case law to the contrary).

133. See Edmund M. Morgan, *Presumptions*, 12 WASH. L. REV. & ST. B. J. 255 (1937) ("Every writer of sufficient intelligence to appreciate the difficulties of the subject-matter

agreement on at least one principle: When a party provides evidence to prove the existence of a basic fact and there is a presumption linking the basic fact to the presumed fact, the party has met its burden of production with the presumed fact.¹³⁴ In other words, a party is benefited by a presumption when she introduces evidence of the basic fact, because this entitles her to a jury determination regarding the existence of the presumed fact. For example, if a plaintiff needs to prove Fact B to recover from the defendant, and if the plaintiff introduces evidence of Fact A, and if there is an applicable presumption regarding Fact A and Fact B,¹³⁵ then the plaintiff is—at the very least¹³⁶—entitled to a jury determination as to the existence of Fact B.

Notice the similarity between what occurs under a presumption and what occurs when a judge grants summary judgment under a confidence analysis. To start with, consider that when a party has *direct* evidence of a material fact, that party has met her burden of production with regard to that fact.¹³⁷ Thus, as with presumptions, the confidence theory of summary judgment applies only when a party seeks to prove a material fact by circumstantial evidence. Under a confidence analysis, a judge determines that a party's circumstantial evidence is not adequate. As explained previously, this conclusion is not a determination as to the probability of the material fact, but rather is a legal or policy decision. With a presumption, the analysis is the same but the law's conclusion is simply different: When a presumption applies, the circumstantial evidence *is* adequate to allow

has approached the topic of presumptions with a sense of hopelessness and has left it with a feeling of despair.”).

134. See WRIGHT & GRAHAM, *supra* note 7, § 5126, at 544–45 (describing that this result occurs under each of the main, competing theories regarding presumptions).

135. This assumes, of course, that the presumption concerns the extrapolation of Fact B from Fact A (a presumption from A to B) and not the extrapolation of Fact A from Fact B (B triggers A).

136. There might be additional benefits stemming from the existence of the presumption. For instance, the existence of the presumption might shift the burden of production to the opposing party, such that the party resisting the presumed fact must introduce evidence contradicting the presumed fact or lose the ability to challenge the relationship between the basic fact and the presumed fact. See *Id.* at 546–49 (describing how a presumption shifts the burden of production to an opponent under the Morgan-McCormick and Thayer-Wigmore theories of presumptions but not under Federal Rule of Evidence 301). Additionally, a presumption might shift the burden of persuasion to the opponent of the presumption. See *id.*; WRIGHT & GRAHAM, *supra* note 7, § 5122.1, at 430–31 (describing how, under the Morgan-McCormick theory, a presumption shifts the burden of persuasion to the opponent).

137. See Meier, *supra* note 4.

the issue to proceed to a jury for a probability determination. Here again, though, no decision has been made as to whether the presumed fact actually occurred: The case must proceed to a fact-finder for a resolution of the probability question.¹³⁸

In reality, then, a confidence analysis and a presumption are just opposite sides of the same coin. Another way to conceive of a presumption is that the law has resolved the confidence question for a very particular situation involving circumstantial evidence *in favor* of the proponent of that evidence. Thus, the issue is resolved in favor of proceeding to a fact finder for determination rather than premature termination.

To demonstrate, consider a case in which the plaintiff wishes to prove that the defendants entered into a conspiracy in violation of antitrust law. The plaintiff has no *direct* evidence as to the defendants entering into this conspiracy. However, the plaintiff can show that these defendants have coordinated their behavior before, and that the defendants all acted in a similar way in this instance.¹³⁹ If a court concludes—based on legal and policy concerns—that this evidence is *not* adequate so as to allow the case to proceed to a jury determination of probability on the question of conspiracy, this will be done through the entry of judgment for the defendant. On the other hand, the law might reach the opposite conclusion on this question, and a presumption is one way in which this legal conclusion might be framed or characterized. Thus, if the law resolved that the plaintiff's evidence of parallel conduct was sufficient to satisfy the plaintiff's burden of production, it might be said that there is a "presumption of conspiracy" from parallel conduct. This presumption, at the very least, would allow the plaintiff to proceed

138. Although all presumptions satisfy the proponent's burden of production, some presumptions might have additional implications, such as imposing a production burden on the opponent of the presumption or imposing a burden of persuasion on the opponent of the presumption. See *supra* note 136. When a presumption has this effect, it admittedly differs from a summary judgment confidence analysis and, in some cases, might actually be a determination as to the probability of the material fact in question. As stated in the text, however, the aspect of presumptions which is important to the analogy being advocated herein is only the aspect of all presumptions that they satisfy the proponent's burden of production.

139. This "hypothetical" is, obviously, based on the fact patterns in *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Twombly*, 550 U.S. 544, both of which are relevant to the issue of a confidence analysis. See Meier, *supra* note 4 (demonstrating that the *Matsushita* case was decided under a confidence analysis); Meier, *supra* note 14 (demonstrating that the *Twombly* case was decided under a confidence analysis).

past summary judgment and to a jury trial on the factual question of whether a conspiracy existed.

Others have recognized this relationship between the law of presumptions and a judge's confidence analysis. Professors Ronald Allen and Craig Callen use the term "isomorphic" to express the analytical similarity between the two:¹⁴⁰ "The critical point for analyzing and teaching presumptions is that, with respect to the allocations of burdens of production and persuasion, presumptions allocating the burden of production replicate the effects of the more general standard for judgments [entered by the judge] as a matter of law."¹⁴¹ The operative difference is that a presumption works in *favor* of the proponent of the evidence while a confidence inquiry is most apparent when it is resolved *against* the proponent of the evidence.¹⁴²

Of course, to the extent that a presumption satisfies the burden of production, and a confidence inquiry can result in a conclusion that a party has failed the burden of production, a relevant distinction might be drawn in terms of the effect on the constitutional right to a jury under the Seventh Amendment. After all, a presumption—by

140. See Ronald J. Allen & Craig R. Callen, *Teaching "Bloody Instructions": Civil Presumptions and the Lessons of Isomorphism*, 21 QUINNIPIAC L. REV. 933, 934 (2003) ("Additionally, [presumptions] are isomorphic with other evidentiary devices.").

141. *Id.* at 940.

142. As illustrated in the previous section, however, the result of a confidence analysis need not be against the proponent of the evidence, and this result need not be based on the existence of a presumption. In both the *Birt* and *Berryman* cases, the defendant argued for a compulsory nonsuit based on a confidence theory, but in each case the court ultimately rejected the defendant's argument. See *supra* notes 100–128. The conclusion that the plaintiff had presented adequate evidence to satisfy a confidence inquiry was not justified by reference to a presumption in either *Birt* or *Berryman*. See *id.* Consider, however, how the conclusion in each case could have been justified or characterized as resulting from a presumption. For instance, the court in *Birt* could have said that evidence of the marriage registry established a presumption of marriage. Either way, the court would be saying the same thing, which is that the evidence is legally adequate to allow the plaintiff to argue the probability question to the jury.

The fact that a presumption satisfies a party's burden of production explains why presumptions are not thought to be particularly helpful to a party on whom there is no burden of production. In one vivacious articulation of the concept, Judge Lummus said that a party seeking to take advantage of a presumption when that party does not have a burden of production is "like a handkerchief thrown over something covered by a blanket." *Brown v. Henderson*, 189 N.E. 41, 43 (1934) (Lummus, J., concurring). For this reason, then, presumptions are usually applied in favor of a plaintiff, as a plaintiff usually has the burden of production in standard civil litigation. See Jason R. Bent, *The Telltale Sign of Discrimination: Probabilities, Information Asymmetries, and the System Disparate Treatment Theory*, 44 U. MICH. J.L. REFORM 797, 816 (2011) (stating that a plaintiff usually has the burden of production but that a presumption on behalf of the plaintiff might satisfy, and in some cases shift, the burden of production).

satisfying a party's burden of production—compels jury consideration; a confidence inquiry—when it is used as the basis for a pre-verdict judgment—precludes jury consideration. In this sense, the very mild form of presumption considered here (allowing the proponent to satisfy a burden of production) could never really violate the Seventh Amendment because the result of the presumption is to ensure jury consideration.¹⁴³

Nevertheless, the importance of the analogy made here is more basic: Courts must make¹⁴⁴ legal and policy decisions about whether to send a case to a jury for a determination as to probability. In this sense, and although the analogy is not perfect, the jury can be compared to a computer designed to process raw data and, from this raw data, to calculate the probability of certain events. When a court employs a confidence analysis as the basis for a summary judgment, the court has decided to unplug the computer so as to preclude the calculations from being computed. This decision is based on the undesirability of allowing these computations to be calculated; it is not premised on the view that the calculations performed by the computer are inaccurate or that the judge can more accurately perform the calculation. When a court employs a presumption, however, the law has engaged in the exact same inquiry, but has reached a different conclusion as to the desirability of allowing the calculations to be performed. The nature of this legal inquiry does not violate the Seventh Amendment,¹⁴⁵ regardless of the ultimate conclusion reached under this analysis.

143. Cf. WRIGHT & GRAHAM, *supra* note 7, § 5129 at 590 n.30 (explaining that a presumption that gives the jury more, rather than less, power is less likely to violate the Seventh Amendment).

144. And, as the discussion in the previous section of this article demonstrates, judges have always had to make these types of decisions. See also *infra* note 146 (discussing the historical use of presumptions under English and American law).

145. The analogy made in the text between a confidence analysis and a presumption relies on the mildest form of presumption. As explained in *supra* note 136, most presumptions have some additional legal effect besides simply allowing the proponent to satisfy its burden of production with regard to the presumed fact. The constitutionality of these stronger types of evidentiary presumptions is not without doubt, particularly to the extent that a presumption might impair the ability of the opponent of the presumption to contest the probability of the presumed fact. See generally WRIGHT & GRAHAM, *supra* note 7, § 5129. Thus far, the Supreme Court has mostly considered this question under the rubric of the Due Process Clause rather than the Seventh Amendment. See *id.* at 589–603. Of course, the Seventh Amendment has not been incorporated against the states and thus does not apply to state trial court proceedings. See *Hawkins v. Bleakly*, 243 U.S. 210 (1916). Thus, the cases in which the Court has considered the constitutionality of presumptions have mostly been state cases, meaning that review under the Seventh Amendment was not available. See, e.g., *W. & Atl. R.R. Co. v. Henderson*, 279 U.S. 639

B. The Law of Evidence

The point made above with regard to presumptions is perhaps better made by considering the law of evidence. Although the law of evidence is not as close of an analytical analogy to a confidence analysis as is the law of presumptions, evidence law provides a vivid example of how a judge can make legal decisions regarding the proof process while nevertheless preserving for the jury the ultimate determination regarding the actual existence of the disputed facts to the litigation.

In the course of federal civil litigation, the judge is expected to constrain the introduction of evidence to the rules contained in the Federal Rules of Evidence. To the extent there is a dispute on the admissibility of evidence, it is because one attorney thinks that her prospects of success before a jury are improved if the jury hears the evidence. A decision to exclude this evidence, then, restricts the information available to the jury from which to make a decision regarding the disputed facts of case. In the mind of the attorney who wished to present this excluded evidence, the jury's decision-making process might be impaired by this lack of information.

Even though an evidentiary rule might exclude information that one attorney thinks is important to the jury's decision-making process, this process by which the law restricts the information given

(1929); *Mobile, Jackson & K.C. R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910). To complicate matters, the Court has intimated that the constitutionality of a presumption might be affected by the source of the presumption. See MCCORMICK ON EVIDENCE 811 (Edward W. Cleary et al. eds., 1972) (suggesting that presumptions created by legislation might be scrutinized more closely than presumptions created by courts). The source of presumptions is a thoroughly complicated topic, of which this article has stayed clear. See FED. R. EVID. 301 (demarcating the effect of federal presumptions, but only those "not otherwise provided for by Act of Congress or by these rules"); FED. R. EVID. 302 (directing federal courts to apply the state law regarding presumptions "respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision").

In any event, to the extent that a presumption (stronger than the mild version considered in this article) might be considered to raise a constitutional question under the Seventh Amendment, the resolution to this question would seem to require an analysis of English common law as it existed in 1791. See *Markman*, 517 U.S. at 376 (stating that the parameters of the right to jury trial under the Seventh Amendment are determined by English common law practice as it existed in 1791 at the time of the Seventh Amendment's adoption). On this front, it seems presumptions were frequently used under English common law. See Mark Moller, *Class Action Defendants' New Lochnerism*, 2012 UTAH L. REV. 319, 343–48, 350–55 (2012) (discussing, with ample citation to authority, the use of presumptions by English common law and American courts at the time of the adoption of the Constitution, including the frequent use of the strongest type of presumption—a conclusive presumption—and noting that the conclusive presumption was viewed as a product of evidence law rather than the modern view of conclusive presumptions as products of the substantive law).

to the jury is not thought to impair the Seventh Amendment right to a jury trial.¹⁴⁶ The Supreme Court has even acknowledged that deviations from the rules of evidence, as they existed under English common law in 1791, are not constitutionally problematic.¹⁴⁷ The reason that properly restricting information under the rules of evidence is not problematic under the Seventh Amendment is because they clearly involve questions of law and policy rather than the question of what occurred in a particular case (a probability analysis). To be sure, a jury's decision might sometimes be determined based on the information that it is given, but deciding what information to give the jury is different than the ultimate jury question of what to make of that information. This distinction is what the Supreme Court had in mind in describing the contours of the Seventh Amendment as follows: "The limitation imposed by the amendment is merely that . . . the ultimate determination of issues of fact by the jury be not interfered with."¹⁴⁸

In the preceding part of this article, I used the analogy of a jury to a computer to emphasize the legal nature of both a confidence inquiry under summary judgment and a probability inquiry. Under the analogy, the jury is like a computer that processes information and, from that information, calculates the probability of certain events. Under a confidence analysis at summary judgment or an evidentiary presumption, the question is whether to allow the computer—the jury—to perform this calculation—a probability analysis—at all. Under a confidence analysis, a judge might decide—for legal and policy reasons—that the jury should not be allowed to calculate probability from a particular evidentiary record. Thus, in this instance, the judge pulls the plug on the computer. This analogy also works in considering the law of evidence. Here, though, the question is not whether the computer will be allowed to crunch the numbers, but the slightly different question as to what to enter into the computer. In either instance, though, the operative question involves legal and policy decisions rather than factual determinations

146. See *Ex parte Peterson*, 253 U.S. 300, 309 (1920) ("The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' does not . . . prohibit the introduction of new rules of evidence."); but see Kenneth S. Klein, *Why Federal Rule of Evidence 403 is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077 (2013) (arguing that Rule 403 violates the Seventh Amendment).

147. See *Ex parte Peterson*, 253 U.S. at 309 ("It does not prohibit the introduction of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made.").

148. *Id.* at 310.

as to whether certain events did, or did not, occur in the real world. To the extent this type of determination is necessary, it is a decision that the jury must ultimately make. A judge can decide what information to enter into the computer, and even whether the computer should be turned on or off, but he cannot substitute his calculations for those of the computer.¹⁴⁹

149. To be clear, I am *not* making the simplistic argument—anticipated and rebutted by Professor Thomas—that summary judgment is constitutional because it always involves a question of law. See Thomas, *supra* note 1, at 161–63; see also *supra* note 60. This argument suffers from the fundamental deficiency that I am attempting to redress in this article, namely, that not all summary judgments are the same. When a judge grants summary judgment based on a view of what facts can be reasonably inferred from a particular evidentiary record (the type of summary judgment with which Professor Thomas is concerned), the judge is engaging in a factual inquiry. Giving this power to the judge, and applying a legalistic term such as “reasonable” to the judge’s inquiry, does not change the reality that a judge—in performing this analysis—is making an assessment as to what facts occurred in the real world. To pretend otherwise—by labeling this inquiry as a “question of law”—is to deprive the terms “question of fact” and “question of law” of almost all analytical meaning; pursuant to this view, questions of law are simply those decided by a judge and questions of fact are those decided by a jury. Under this definition of the terms “question of fact” and “question of law,” the terms merely have a descriptive function in describing the respective allocation of decision-making authority at the trial court level. This descriptive definition, however, ignores the normative sense in which these terms are sometimes used: a question of fact is something that *should be* decided by a jury, while a question of law is something that *should be* decided by a judge.

Unfortunately, Professor Thomas, in some respects, falls into the same analytical trap of those whose arguments she anticipates and refutes. Professor Thomas states that “[s]cholars emphasize and overstate the importance of this law-fact distinction. The focus, instead, should be on the common law.” See Thomas, *supra* note 1, at 161. Thus, according to Thomas, the Seventh Amendment reserves to the jury those questions that would have been decided by the jury under English common law in 1791. In this sense, then, Thomas has employed a variation of the descriptive definition of “fact” and “law” discussed above: a question of fact is something that a jury would have resolved under English common law in 1791, while a question of law is a question that a judge would have decided in 1791. Here again, the analysis of what is law and what is fact is descriptive—what decisions are given to the judge and what decisions are given to the jury?—albeit with an historical twist.

Of course, Professor Thomas’s historical approach for delineating the scope of jury power under the Seventh Amendment is supported by Supreme Court jurisprudence. See *Thompson*, 170 U.S. at 350 (applying this historical approach to determine the parameters of the Seventh Amendment). This historical approach makes the most sense, however, when the Court is considering whether a *particular issue* must be decided by the jury. Thus, for instance, in *Markman*, the Court used the historical approach to specifically consider the question of whether the interpretation of a patent claim must be decided by a jury. *Markman*, 517 U.S. 370.

Professor Thomas’s arguments, though, do not consider how the Seventh Amendment applies to a particular question. Instead, her arguments are much broader: she is considering the constitutionality of the *procedural device* known as summary judgment. More accurately, as this article has attempted to demonstrate, Professor

Thomas is concerned with a particular analysis (a judge's use of a probability analysis) that is sometimes used to enter summary judgment.

As Professor Thomas's argument involves the broader question of the constitutionality of a particular type of procedure, I believe her arguments might have more persuasive force if they are divorced from the rather mechanical, historical approach she uses. In other words, the unconstitutionality of the type of summary judgment with which Professor Thomas is concerned might be better understood from the "bird's eye" perspective rather than the down-in-the-trenches perspective she provides. This argument would proceed as follows: "The Seventh Amendment stands for the basic proposition that the 'ultimate determination of issues of fact by the jury be not interfered with.' *Ex parte Peterson*, 253 U.S. at 310. Broadly speaking, this means that the jury was the ultimate arbiter in deciding what had actually transpired between the parties in the real world. When a modern judge enters summary judgment on the premise that a 'reasonable jury' could only come to one conclusion as to what had transpired between the parties, the judge is making a decision that the common law assumed would be decided by the jury. When this occurs, the Seventh Amendment is violated."

This bird's eye view of the issue resolves what I perceive as part of the resistance to Professor Thomas's argument, which is that there is a disconnect between the history-intense nature of her argument and broad, wide-reaching conclusions that she is drawing. In other words, although the historical approach to the Seventh Amendment makes sense in a case like *Markman*, which involved the demarcation between judge and jury with respect to a discreet litigation issue, this sort of technical, history-based approach is misplaced when the issue is the more fundamental question of the constitutionality of a procedure that might be employed in a variety of scenarios. This, of course, is not to say that there is no value in Professor Thomas's historical research. But the primary value from this historical research, as I see it, is that it confirms the more fundamental (and, I believe, intuitive) notion that the Seventh Amendment requires that juries, as opposed to judges, decide what actually happened between the parties. Under this bird's eye perspective on the issue, then, the unconstitutionality of the type of summary judgment analysis that Professor Thomas is concerned with depends on an appreciation for the different types of decisions that must be resolved in the litigation context rather than an understanding of the procedural devices that were used by English judges in 1791. In addition, by resting her constitutional argument on these more fundamental concepts, Professor Thomas could have avoided the mistake which forms the premise of this article, which is that not all summary judgments are the same. Thus, although I am somewhat inclined to agree with Professor Thomas that a judge cannot constitutionally enter summary judgment based on the judge's own views of the likelihood of the underlying facts from the record assembled by the parties, I cannot agree with her that summary judgment—as a procedure—is unconstitutional. The issue is more nuanced than her broad conclusion suggests because the entry of summary judgments can be based on any one of three different types of analyses.

In any event, my objective in this article is not to lend my support to Professor Thomas on the issues with which she and I are probably in agreement; rather, my aim is to express my disagreement with her broad conclusions regarding the unconstitutionality of summary judgment in all instances. And, the astute reader will notice that I have taken both the bird's eye view and the down-in-the-trenches approach to advancing this argument. In Parts III.A-B, I engage Professor Thomas in the trenches, describing actual common law cases in which a court precluded a plaintiff from getting to a jury on a confidence analysis. In Part III.C, I take the bird's eye view of the issue and make the rather straight-forward point that a confidence analysis (similar to an evidentiary presumption or the laws of evidence) does not intrude upon the jury's ability to act as the ultimate decision-maker with regard to what happened between the parties. I lead with

IV. The Constitutionality of a Confidence Theory of Summary Judgment: Supreme Court Case Law

In considering the constitutionality of the confidence theory of summary judgment, it is (of course) also important to consider existing Supreme Court caselaw. The Supreme Court has decided four “modern”¹⁵⁰ cases that are generally perceived as relevant to the constitutionality of summary judgment: *Fidelity*,¹⁵¹ *Slocum v. New York Life Insurance Co.*,¹⁵² *Baltimore & Carolina Line, Inc. v. Redman*,¹⁵³ and *Galloway*.¹⁵⁴ The conventional wisdom is that these four cases, along with the Supreme Court’s subsequent characterization of the *Fidelity* holding in *Parklane Hosiery Co. v. Shore*,¹⁵⁵ establish that summary judgment is constitutional.¹⁵⁶

This conventional wisdom supports my argument: If summary judgment, *in toto*, has been determined constitutional, the confidence

the historical only because that style of argument responds most directly to the style of argument advanced by Professor Thomas.

150. Supreme Court case law regarding the scope of the Seventh Amendment does not begin with the twentieth-century cases discussed in this paper. In many instances this older case law is difficult to digest because of the different procedures and terminology involved. *See, e.g.*, *Barney v. Schneider*, 76 U.S. 248 (1869) (discussing the constitutionality under the Seventh Amendment of a judge’s “directed verdict,” which involved instructing the jury on what their conclusion should be, rather than the modern use of the same term that involves a judge’s entry of judgment without a jury). In any event, the twentieth-century case law examined in this article is sufficient to support my thesis, which is that the use of a confidence analysis at the summary judgment stage is consistent with the Seventh Amendment. Moreover, the twentieth-century case law is also sufficient to support a secondary aim of this article, which is to lend support to Professor Thomas’s argument (properly cabined) that the current justifications for the constitutionality of a probability theory of summary judgment are inadequate. These inadequate justifications for the constitutionality of a probability theory of summary judgment are based on the twentieth-century Supreme Court case law, *see* Thomas, *supra* note 1, at n.96 (providing examples of those who conclude, from the twentieth-century case law, that summary judgment is always constitutional), so refuting this case law undermines the current justifications for the probability theory of summary judgment.

151. *Fidelity*, 187 U.S. 315.

152. *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364 (1913).

153. *Redman*, 295 U.S. 654.

154. *Galloway*, 319 U.S. 372.

155. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

156. *See, e.g.*, WRIGHT ET AL., *supra* note 26, § 2714 (“[T]here have been few cases under Rule 56 that have questioned its constitutionality. Rather, most courts simply have stated that the rule was not intended to deprive a party of a jury trial.”); EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE 20 (3d ed. 2006) (“[T]he Supreme Court unequivocally upheld the constitutional validity of summary judgment.”); Miller, *supra* note 26, at 1019 n.204 (2002) (stating that the constitutionality of summary judgment has been “well-accepted” after the Court’s *Fidelity* opinion).

theory of summary judgment with which I am concerned here would also, *de facto*, be constitutional. I will *not* rely on this conventional wisdom, however. Professor Thomas has, in my view, advanced a persuasive attack on the conventional wisdom that presumes summary judgment is constitutional in all instances. As will be evident below, I agree with some of Professor Thomas's arguments.

Despite my agreement with *some* of what Professor Thomas says regarding the existing Supreme Court caselaw, both her analysis and the conventional wisdom that Thomas attacks are impaired by a defect: The presumption that all summary judgments are created equal and decided under the same rationale. This assumption is incorrect, as discussed previously in this article: A court might enter summary judgment based on any of three different rationales or theories. Each of these three different types of analyses must be considered separately when evaluating the Seventh Amendment issue.

By appreciating that not every summary judgment is created the same, the existing Supreme Court case law can be read from a completely different perspective. This new perspective confirms that summary judgments based on a confidence analysis are constitutional. Most surprisingly, though, this fresh perspective *also* supports Professor Thomas's (properly narrowed) thesis: The Supreme Court has never considered—let alone confirmed—the constitutionality of summary judgments made under a probability analysis.

A. *Fidelity & Deposit Co. v. United States*

The starting point in considering Supreme Court case law on the constitutionality of summary judgment is *Fidelity*. The *Fidelity* case supports the constitutionality of a confidence theory of summary judgment. It does not, however, provide support for the constitutionality of summary judgment in all its applications, as the Court's subsequent citation to *Fidelity* in *Parklane Hosiery* would suggest. To unravel all this from the *Fidelity* case requires some careful attention and also a "page of history."¹⁵⁷

The *Fidelity* case involved a claim¹⁵⁸ against Fidelity as a surety on bonds.¹⁵⁹ The bonds were to ensure the performance of Peyton

157. N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) ("A page of history is worth a volume of logic.").

158. A claim had also been asserted directly against Peyton Vinson in the lower court proceedings, but the claim against Vinson was not part of the proceedings in the United States Supreme Court. See *Fidelity*, 187 U.S. at 316.

Vinson in his contract to construct some public works on behalf of the District of Columbia.¹⁶⁰ In addition to securing Vinson's performance to the District of Columbia, the bond also protected third parties subcontracted to work under Vinson by covenanting that Vinson would "promptly make payments to all persons supplying him with labor or materials in the prosecution of the work provided for."¹⁶¹ The bond was required, by Congressional statute, as a precondition to working with the District of Columbia.¹⁶² According to the complaint filed in *Fidelity*, Lewis Smoot had furnished Vinson with certain materials used in the construction of the public works but had not been paid for these materials.¹⁶³ Smoot sought recovery from Fidelity under the bond it had issued.

In addition to merely alleging these facts, however, Smoot also filed an affidavit that swore to the facts contained in the complaint.¹⁶⁴ This was done to take advantage of Rule 73,¹⁶⁵ which had been adopted by the Supreme Court of the District of Columbia.¹⁶⁶ Rule 73 provided:

In any action rising ex contractu, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action . . . he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part.¹⁶⁷

159. *See id.*

160. *See id.*; *see also* *The Fidelity & Deposit Co. v. United States*, 20 App. D.C. 376, 376 (1902).

161. *Fidelity*, 187 U.S. at 316.

162. *See Fidelity*, 20 App. D.C. at 376.

163. *See Fidelity*, 187 U.S. at 316.

164. *See id.* at 316–17.

165. D.C. Super. Ct. Civ. R. 73.

166. *See id.* at 318–19.

167. *Id.* at 318 (quoting the Civ. R. 73).

In response to the plaintiff's complaint and affidavit, the defendant filed a general denial.¹⁶⁸ In addition, pursuant to Rule 73, the defendant also filed an affidavit. The affidavit stated, in relevant part, that:

[T]he said defendant, its officers and agents, has no personal knowledge of the contracts alleged in said declaration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson to said Smoot under said alleged contracts; that the said defendant, its officers and agents, has not sufficient information, in the opinion of the affiant and of the counsel of said defendants . . . to be safe in admitting or denying under oath the allegations of said declaration in regard to said contracts.¹⁶⁹

Smoot then filed for "judgment"¹⁷⁰ on the grounds that Fidelity's affidavit was insufficient in not "specifically stating also, in precise and distinct terms, the grounds of his defense."¹⁷¹ This motion was granted and judgment was entered for Smoot.¹⁷² Fidelity appealed, arguing, *inter alia*, that he had been denied his right to a jury trial under the Seventh Amendment.¹⁷³

The United States Supreme Court rejected Smoot's argument and affirmed the judgment of the trial court.¹⁷⁴ The Court stated:

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

168. *See id.* at 317.

169. *Id.*

170. *Id.* at 318.

171. *Id.* at 317 (citing Civ. R. 73).

172. *See id.*

173. *See id.* Although the Seventh Amendment does not apply to state court proceedings, the Amendment does apply to lower court proceedings (like those in *Fidelity*) initiated in District of Columbia courts. *See Kudon v. f.m.e. Corp.*, 547 A.2d 976, 978 (D.C. 1988) ("Although not incorporated to the states through the Fourteenth Amendment, the Seventh Amendment is, like other provisions of the Bill of Rights, fully applicable to courts established by Congress in the District of Columbia.").

174. *See Fidelity*, 187 U.S. at 123.

accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands 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, even to the enactment of rule 73.¹⁷⁵

To fully appreciate what occurred in *Fidelity*, it is important to understand the historical development of the procedure known as “summary judgment.”¹⁷⁶ As the 1937 Advisory Committee Notes on Rule 56 make clear, the procedure known as “summary judgment” can be traced to English practice in the nineteenth century.¹⁷⁷ As this procedure developed, both in England and in America, it assumed certain characteristics. First, it was a procedure that was designed to be used by plaintiffs;¹⁷⁸ the perceived problem necessitating the development of this particular procedure was that defendants were manipulating the system so as to delay the satisfaction of meritorious claims.¹⁷⁹ Second, the procedure was usually limited to certain types of claims. Broadly speaking, the claims for which a summary

175. *Id.* at 320–21.

176. For reasons that will become apparent to the reader, the development of the procedure known as “summary judgment” should be distinguished from the discussion of the English common law as it existed in 1791. For an impressive—and helpful—student note discussing the development of the procedure known as summary judgment, see generally Ilani Haramati, Note, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 N.Y.U. J.L. & LIBERTY 173 (2005).

177. See FED. R. CIV. P. 56, Advisory Committee’s Notes (1937) (“[The procedure known as summary judgment] has been extensively used in England for more than 50 years and has been adopted in a number of American states.”); see also Charles E. Clark & Charles U. Samenow, *The Summary Judgment*, 38 YALE L.J. 423, 424 (1929) (“1855 marks the introduction into England of a summary judgment provision restricted in its application to actions upon bills of exchange and promissory notes.”).

178. See Clark, *supra* note 177, at 423 (“Under this procedure judgment may be entered summarily for the plaintiff . . .” (emphasis added)); D. Michael Risinger, *Honesty in Pleading and its Enforcement: Some “Striking” Problems with FRCP 11*, 61 MINN. L. REV. 1, 28 (1976) (stating the early use of the procedure formally known as summary judgment was for the plaintiff only).

179. See Clark, *supra* note 177, at 423 (“The reform is usually advocated because of its effectiveness in preventing delays by defendants, and in securing speedy justice for creditors.”); J. Palmer Lockard, *Summary Judgment in Pennsylvania: Time for Another Look at Credibility Issues*, 35 DUQ. L. REV. 625, 634 (1997) (“The early summary judgment procedures were justified as a means for allowing creditors to obtain judgments against recalcitrant debtors without enduring the delays associated with the normal common law pleading process.”).

judgment was available to the plaintiff consisted of “actions for recovery of debts or liquidated demands in money.”¹⁸⁰

In *Fidelity*, the judgment that Smoot sought against Fidelity, under the District of Columbia’s Rule 73, was consonant with the typical use of the procedure known as summary judgment that had developed under English law and in various American states.¹⁸¹ The suit was for recovery on a bond issued by the defendant, which was generally the type of claim for which a summary judgment was permitted. In addition, the plaintiff sought the pre-jury judgment against the defendant.

But what does this claim-specific, plaintiff-only form of pre-jury judgment have to do with modern summary judgment, which is not claim-specific and which is used overwhelmingly by defendants rather than plaintiffs?¹⁸² Much, as it turns out, at least for the particular type of summary judgment with which this article is concerned—the confidence theory of summary judgment.¹⁸³ In order to appreciate this point, though, it is best to momentarily suspend the effort to compare the procedure in *Fidelity* to modern summary judgment and, instead, to note the similarity of the procedure in *Fidelity* to another modern procedure: the affirmative defense.

Federal Rule of Civil Procedure 8(c)¹⁸⁴ provides a non-exhaustive list of legal arguments known as affirmative defenses.¹⁸⁵ A defendant has the obligation to plead an affirmative defense and thus introduce the issue into the litigation.¹⁸⁶ Technically, the defendant’s burden of pleading an affirmative defense and introducing the issue into the case does not necessary mean that the defendant has the burden of production on that issue.¹⁸⁷ As a practical matter, though, the burden

180. Clark, *supra* note 177, at 424–25 (describing the English procedure of summary judgment under the Supreme Court of Judicature Act, 1873).

181. *See generally id.* at 440–71 (tracing the development of the procedure known as summary judgment in American state-law practice).

182. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 92 (1990) (describing modern summary judgment as a “defendant’s motion,” and offering empirical evidence of this claim).

183. *But see* Thomas, *supra* note 1, at 166 n.113 (noting, as part of her effort to distinguish *Fidelity* and undermine the importance of the case, the differences between the procedure in *Fidelity* and modern summary judgment).

184. *See* FED. R. CIV. P. 8(c).

185. *See id.*; *Jones v. Block*, 549 U.S. 199, 212 (2007) (stating that the list of affirmative defenses in Rule 8(c) is not exhaustive).

186. *See* FED. R. CIV. P. 8(c).

187. *See, e.g., Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (“Rule 8(c) covers only the manner of pleading. The question of the burden of establishing contributory negligence is

of producing evidence usually follows the burden of pleading, meaning that if a party is obligated to raise a particular issue (under the burden of pleading) that party will likely have the burden of producing evidence to support what was pled (under the burden of production).¹⁸⁸ A party on whom there is a burden of production is the party who suffers the consequences of failing to build an adequate evidentiary record.

Usually, of course, a plaintiff has the burden of production. But the procedural devices known as summary judgment that had first arisen under English common law, and then eventually spread to American common law (as in the *Fidelity* case), flipped this burden of production. Thus, in the *Fidelity* case, because of the application of Rule 73, *Fidelity* needed to do more than offer a general denial of the plaintiff's claim: The defendant needed to introduce a defense into the case and, moreover, offer proof in support of that defense in the form of an affidavit "specifically stating also, in precise and distinct terms, the grounds of his defense."¹⁸⁹

By shifting the burden of both pleading and production in *Fidelity*, Rule 73—which was very typical of the early procedures known as "summary judgment"—shared much in common with the modern notion of an affirmative defense. This analogy becomes even more obvious when one considers the types of cases in which this common law procedure known as summary judgment was available. As alluded to above, the pre-Federal Rules form of summary judgment was usually limited to "actions for recovery of debts or liquidated demands in money."¹⁹⁰ These types of claims usually involved actions on negotiable instruments, whose value depended upon the sanctity and integrity of the note itself.¹⁹¹ Litigation in which

a question of local law which federal courts in diversity of citizenship cases must apply" (citation omitted)).

188. See Ronald J. Allen, *Presumptions, Inferences, and Burden of Proof in Federal Civil Actions—An Anatomy of Unnecessary Ambiguity and a Proposal for Reform*, 76 NW. U. L. REV. 892, 895 (1982) ("In the absence of a controlling statute, burdens of production normally follow the rules of pleading."); cf. *Jones*, 549 U.S. at 204 ("The first question presented centers on a conflict over whether exhaustion under the PLRA is a pleading requirement the prisoner must satisfy in his complaint or an affirmative defense the defendant must plead and prove.")

189. CIV. R. 73.

190. Clark, *supra* note 177, at 425 (describing the English procedure of summary judgment under the Supreme Court of Judicature Act, 1873).

191. See, e.g., Grant Gilmore, *Formalism and the Law of Negotiable Instruments*, 13 CREIGHTON L. REV. 441, 449 (1979) (discussing the concept of merger, under which "the piece of paper on which the bill was written or printed should be treated as if it—the piece of paper—was itself the claim or debt which it evidenced").

the sanctity of the note was challenged, particularly by off-the-record defenses, undermined the workings of this system. As stated in the preamble to the English Summary Procedure on Bills of Exchange Act (1855): “Whereas bona fide holders of dishonored Bills of Exchange and Promissory Notes are often unjustly delayed and put to unnecessary Expense in recovering the Amount thereof by reason of frivolous or fictitious Defences [sic] to Actions thereon, and it is expedient that greater facilities than now exist should be given for the Recovery of Money due on such Bills and Notes”¹⁹²

The reason that the early procedures known as summary judgment shifted the burden of pleading and production to the defendant in suits on negotiable instruments is strikingly similar to the modern justifications for treating certain issues as affirmative defenses that the defendant must plead and prove. Consider the following from Charles Clark: “[J]ust as certain disfavored allegations made by the plaintiff . . . must be set forward with the greatest particularity, so like disfavored defenses must be particularly alleged by the defendant Again it may be an issue which may be generally used for dilatory tactics”¹⁹³ Similarly, Professors Charles Alan Wright and Arthur Miller state: “[T]he burden of pleading should be put on the party who will be benefitted by establishing a departure from the supposed legal or behavioral norm.”¹⁹⁴ Although Professors Wright and Miller are discussing the modern procedure of affirmative defenses, they just as well could have been discussing the early procedures known as summary judgment; as stated above, the common law concerning negotiable instruments depended upon the validity and integrity of the written document, so refusing a holder in due course of the benefits of that written document was very much “a departure from the supposed legal or behavioral norm.”¹⁹⁵

192. English Summary Procedure on Bills of Exchange Act (1855).

193. CLARK, *supra* note 21, at 609–10.

194. WRIGHT ET AL., *supra* note 26, § 1271, at 604.

195. *Id.*; see also Miller v. Race, (1758) 97 Eng. Rep. 398 (K.B.) 401, 402A; 1 Burr. 452, 457, 459 (“[Negotiable instruments] are treated as money, as cash, in the ordinary course and transaction of business, by the general consent of mankind; which gives them the credit and currency of money, to all intents and purposes. . . . A bank-note is constantly and universally, both at home and abroad, treated as money, as cash; and paid and received, as cash; and it is necessary, for the purposes of commerce, that their currency should be established and secured.”). The importance of protecting the integrity of written negotiable instrument is perhaps best understood by considering that England did not have an official paper currency in the eighteenth century. See WILLIAM H. LAWRENCE, UNDERSTANDING NEGOTIABLE INSTRUMENTS AND PAYMENT SYSTEMS 7

Once one recognizes the similarity between the early procedures known as summary judgment and the modern affirmative defense, the importance of the *Fidelity* case to the constitutionality of modern summary judgment can be recognized. The reason that summary

(2002) (“Throughout all of the eighteenth century, England did not have any official paper currency, and several denominations of gold and silver coins were in short supply. Increasing mercantile activities forced merchants to adopt money substitutes. Consequently, drafts and notes came to be circulated widely through several hands before ultimately being presented for payment or acceptance.”).

Another justification sometimes given under modern law for treating a certain legal issue as an affirmative defense is that the burden of introducing an issue and producing evidence on the issue should fall on the party who is most likely to have access to the pertinent information to that issue. See WRIGHT ET AL., *supra* note 26, § 1271, at 603 (“[A]ll or most of the relevant information on a particular element of a claim is within the control of one party . . . and therefore that party should bear the burden of affirmatively raising the matter.”). This factor was clearly not present in *Fidelity*, as there is little reason to doubt Fidelity’s affidavit assertion that it had “no personal knowledge of the contracts alleged in said declaration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson.” *Fidelity*, 187 U.S. at 317. This explains one of the alternative arguments which was asserted by Fidelity in the Supreme Court, that Smoot’s claims were not within “the spirit of [Rule 73], and that, it is urged, [Rule 73] intends only ‘money demands, pure and simple,’ not contracts of suretyship or conditional obligations.” *Id.* In other words, the claim asserted by Smoot was not a straightforward demand on a negotiable instrument (the integrity of which the law assumed), so the information needed to determine the validity of Smoot’s claim was clearly not in the possession of Fidelity. Fidelity’s argument becomes even more persuasive when one considers that the underlying contract between Smoot and Vinson was oral rather than written. See *Fidelity*, 20 App. D.C. at 3. A case like *Fidelity* is a long way from the typical cases (a straightforward claim under a negotiable instrument) under which the burden of proof and production was originally shifted to the defendant. This is consistent with the historical trend, though, which expanded the types of suits subject to the burden shifting of the common law “summary judgment.” See Haramati, *supra* note 176, at 176–84 (discussing this trend). This expansion occurred primarily as the result of statutory direction, so political motivations cannot be discounted as an explanation for this pro-plaintiff expansion, particularly given the historical era (late nineteenth century and early twentieth century) in which this statutory expansion occurred. Cf. Roscoe Pound, *Administration of Justice in the Modern City*, 26 HARV. L. REV. 308, 310–15 (1913) (discussing the litigation process from a political—and pro-plaintiff—perspective). In any event, by reading the transcript of the official meeting of the Advisory Committee concerning the approach the Federal Rules would take with regard to summary judgment, one is left with the unsettling impression that the Committee did not entirely appreciate or understand why that burden shifting had been initially limited to only certain types of claims. This issue will be explored in a future article.

Regardless of whether *Fidelity* was correct to argue—as a normative matter—that the burden shifting of Rule 73 should not be applied to its claims, as a descriptive matter it was settled that the rule applied to Smoot’s claim against Fidelity. See *Deane v. Echols*, 2 App. D.C. 522, 526 (D.C. Cir. 1894) (holding that an action *ex contractu* was a suit “upon money demands pure and simple—actions for a liquidated and specific amount of money . . . not actions for breach of contract, when that contract is for something else than money.”). Indeed, Fidelity conceded at the Supreme Court that Smoot’s claims were “within the letter of the law.” *Fidelity*, 187 U.S. at 321.

judgment was granted in favor of the plaintiff in *Fidelity* was not because the Court believed that the plaintiff's version of the facts was highly probable, but that the defendant had not offered the necessary evidence (an affidavit) to rebut the plaintiff's story. And, because Rule 73 shifted this burden of production to the defendant, the defendant had to suffer a summary judgment because of this lack of evidence. *Fidelity*, then, was a straightforward application of the confidence principle of summary judgment. This conclusion becomes obvious once the burden shifting effect of Rule 73 is identified.

The Supreme Court in *Fidelity*, then, was on solid ground in denying the defendant's Seventh Amendment argument. As demonstrated previously in this Article, under English common law in 1791 a judge could enter a pre-jury judgment (in the form of a compulsory nonsuit) based on a conclusion that a party had not assembled an adequate evidentiary record.¹⁹⁶ Usually, of course, this determination went against the plaintiff,¹⁹⁷ as the plaintiff usually had the burden of production. But, in *Fidelity*, because the burden of production had been shifted to the defendant, the plaintiff was the party who benefitted from the dearth of evidence. In *Fidelity*, and in other cases decided under early procedure known as summary judgment, the Court was not applying an analysis that was foreign to the common law. Rather, the Court was simply applying the analysis on behalf of a plaintiff rather than against a plaintiff. This is the true legacy of the early procedures known as "summary judgment": The real import of these early procedures is that—like a modern affirmative defense—they shifted the burden of pleading and production to the defendant; after this burden shifting, though, the analysis expected of a judge in determining whether this burden of production had been met was an analysis that was employed by English judges under the common law as it existed in 1791.

The *Fidelity* case establishes the constitutionality of the type of summary judgment (a confidence theory) with which this article is concerned. That said, the citation to the *Fidelity* case by the Supreme Court in *Parklane Hosiery* is misleading. In *Parklane*, the Court cited *Fidelity* for the broad proposition that "summary judgment does not

196. See *supra* Part II.

197. The discussion of *Syeds*, 100 Eng. Rep. 1008, *supra* note 128, involves an English common law case in which the burden of production had been shifted to the defendant and, thus, the defendant suffered from the skimpy evidentiary record on a material fact to the litigation.

violate the Seventh Amendment.”¹⁹⁸ Here, the Court is making the same mistake for which I have criticized Professor Thomas, namely, assuming that all summary judgments are the same. Although Professor Thomas has broadly declared that summary judgment is unconstitutional, her real focus is on the type of summary judgment in which a judge determines from the record evidence that one party’s assertion of facts is highly unlikely; I have referred to this type of analysis as a probability analysis. Once Thomas’s arguments are appropriately cabined, though, I agree with her that the *Fidelity* case does not support the type of summary judgment with which she is concerned.¹⁹⁹ The Court in *Fidelity* did not engage in a probability analysis, and thus the *Fidelity* decision does not determine the constitutionality of this theory of summary judgment.

B. Slocum v. New York Life Insurance Co. and Baltimore & Carolina Line, Inc. v. Redman

The Supreme Court’s decisions in *Slocum* and *Redman* might also be considered relevant to the constitutionality of a confidence theory of summary judgment. Granted, neither decision involved a summary judgment; each decision involved an entry of judgment *after*—and in contradiction to—a jury verdict (under existing nomenclature, this would be termed a “judgment as a matter of law”²⁰⁰). That said, one of the guiding principles of this article is that the Seventh Amendment requires consideration of the type of analysis used by a judge rather than the name of the procedure under which that analysis was conducted; substance, rather than form, is paramount. In *Slocum* and *Redman*, however, it turns out that this difference in procedure *is* important to the constitutional inquiry. Because both *Slocum* and *Redman* involved post-jury verdicts, the *second* clause of the Seventh Amendment—usually referred to as the

198. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 336 (1979). The Court’s citation to—and description of—the *Fidelity* decision in *Parklane* can be understood by realizing that the Court in *Parklane* was merely attempting to make a broader point about the flexibility provided under the Seventh Amendment to experiment and deviate from the exact procedural tools existing under English common law. On this broad issue, the *Fidelity* decision was directly on point, as it involved a procedure—foreign to the common law in 1791—that shifted the burden of pleading and production to the defendant.

199. See Thomas, *supra* note 1, at 164–66 (arguing that the Court in *Fidelity* did not engage in an analysis of the probability of the material facts in dispute).

200. See FED. R. CIV. P. 50 (providing for judgment as a matter of law before submission to a jury, and also providing for judgment as a matter of law after a jury verdict so long as the motion was made before submission to the jury).

Re-Examination Clause²⁰¹—was triggered. Because the Court's decision in *Redman* was based solely on the Re-Examination Clause of the Seventh Amendment, and because the *Redman* Court characterized the *Slocum* decision as being based solely on the Re-Examination Clause, these decisions have no relevance to summary judgment. Because summary judgment occurs in advance of a jury verdict, summary judgment is not subject to the Re-Examination Clause of the Seventh Amendment and is instead controlled only by the first clause of the Seventh Amendment (sometimes referred to as the Preservation Clause²⁰²).

The *Slocum* litigation involved a suit to recover on a life insurance policy.²⁰³ The plaintiff was the wife of the insured.²⁰⁴ The question in the case was whether the policy had lapsed before the death of the insured.²⁰⁵ The insurance company moved for a directed verdict before the case was submitted to the jury, which was denied by the trial court.²⁰⁶ The jury returned a verdict for the plaintiff, and the insurance company moved for a judgment notwithstanding the verdict, which was denied by the trial court.²⁰⁷ The insurance company then appealed to the Third Circuit,²⁰⁸ which determined that it was error for the district court to deny the insurance company's motions for directed verdict and judgment notwithstanding the verdict.²⁰⁹ The Third Circuit then ordered that judgment be entered on behalf of the defendant.²¹⁰ The Supreme Court determined that the Third Circuit's conclusion that the defendant was entitled to judgment violated the Seventh Amendment, and that the appropriate remedy was to order a new trial in the case.²¹¹

The *Redman* litigation involved a negligence claim by a cook for injuries sustained while working on defendant's ship.²¹² At the conclusion of the plaintiff's evidence, the defendant moved for a

201. See Sward, *supra* note 41, at 584.

202. See *id.*

203. *Slocum*, 228 U.S. at 366–368.

204. *Id.* at 367.

205. *Id.* at 367–368.

206. *Id.* at 368.

207. *Id.* at 368–69.

208. *Id.* at 369. The initial suit had been filed in federal court in the Western District of Pennsylvania. *Id.* at 366.

209. *Id.* at 369.

210. *Id.*

211. *Id.* at 376–400.

212. See *Redman v. Baltimore & Carolina Line, Inc.*, 70 F.2d 635, 636 (2d Cir. 1934).

directed verdict, but the trial court reserved its decision on this motion and submitted the case to the jury.²¹³ The jury returned a verdict for the plaintiff; at this point the trial court denied the defendant's motion and entered judgment for the plaintiff.²¹⁴ The defendant appealed to the Second Circuit.²¹⁵ The Second Circuit determined that the defendant's motion should have been granted initially.²¹⁶ Because the case had been submitted to the jury, however, the Second Circuit concluded that it was precluded, under the Supreme Court's decision in *Slocum*, from granting any relief other than awarding the defendant a new trial.²¹⁷

The Supreme Court in *Redman* reversed the Second Circuit on this point, distinguishing *Slocum*. In *Slocum*, the Court noted, the defendant's request for a directed verdict had been denied, and no attempt was made to reserve or preserve this question pending the jury's decision.²¹⁸ The *Redman* Court's characterization of the *Slocum* decision is critical in the sense that it restricts the scope of the *Slocum* decision: According to the *Redman* court, the problem in *Slocum* was not the *type* of analysis used by the lower court in reversing the jury verdict. Rather, the constitutional problem was that this analysis had occurred after the jury had reached a verdict and that the consideration of this question had not been explicitly reserved by the judge before sending the case to the jury. In *Redman*, the trial court judge *had* reserved this question and thus—according to the *Redman* court—the constitutional defect involved in *Slocum* had been cured. Under this reading of the cases, then, the only Seventh Amendment issue that was resolved in *Slocum* related to the timing of the judge's decisions. The timing issue only comes up under the second clause (the Re-Examination Clause) of the Seventh Amendment, italicized below:

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*

213. See *Redman*, 295 U.S. at 656.

214. See *id.*

215. See *id.* at 656. The original suit had been filed in federal district court in New York. See *id.*

216. See *id.*

217. See *id.*

218. See *id.* at 658.

*United States, than according to the rules of the common law.*²¹⁹

To further illustrate this point, one can consider the two clauses of the Seventh Amendment across a timeline, which is provided below in Figure D. The Preservation Clause protects the basic right to a trial by jury and applies to any judge-made determination—either before or after the rendition of a jury’s verdict—that intrudes upon this right. The Re-Examination Clause does not duplicate the rights guaranteed under the Preservation Clause, but rather offers additional rights that accrue only *after* a jury’s verdict.

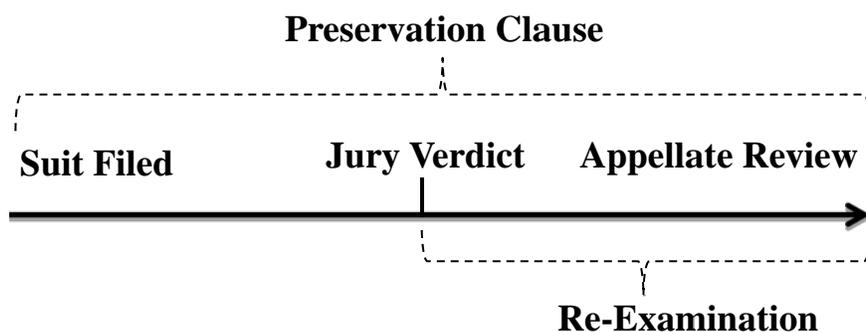


Figure D

The narrow interpretation of *Slocum* in *Redman* not only defined the contours of the *Slocum* decision, but also determined the parameters of the *Redman* decision. In *Redman*, the Court did not determine whether the Preservation Clause allowed the Third Circuit to conclude that “the evidence was insufficient to support the verdict for the plaintiff.”²²⁰ The Court’s constitutional analysis was centered

219. U.S. CONST. amend. VII.

220. *Redman*, 295 U.S. at 659. The *Redman* Court does note that the Third Circuit’s decision on this question “was right,” *id.*, but this conclusion should not be understood to have a constitutional dimension. The *Redman* decision preceded the Federal Rules of Civil Procedure, and thus the procedural rules applied in the lower court were those of the state of New York, which was the state in which the federal district court sat. *See id.* at 661. Thus, the Court’s conclusion that the defendant was entitled to a directed verdict should be viewed as simply a finding that the lower court’s conclusion regarding the “sufficiency of the evidence” was a correct application of New York procedural rules. Furthermore, the *Redman* Court had granted certiorari only on the question of whether the Third Circuit could enter judgment for the defendant or was limited to relief in the form of a new trial; the Court had explicitly denied certiorari on the question of whether the evidence in that particular case required a determination. *See id.* at 656. In this sense,

only on the effect of the jury's verdict rather than the analysis used by the lower court in determining that the jury's decision was wrong. In other words, the *Redman* Court defined the *Slocum* decision narrowly as being based only on the Re-Examination Clause, and then proceeded to distinguish *Slocum* as to the narrow grounds on which the *Slocum* decision was based.

By defining *Slocum* in such a narrow manner, and then distinguishing *Slocum* on the technical basis of whether the defendant's motion had been reserved by the trial court before submission to the jury, the *Redman* Court determined that the only Seventh Amendment issue that was resolved in these two cases concerned the Re-Examination Clause. The manner in which the *Redman* Court distinguished the *Slocum* decision effectively eviscerates the independent relevance of the Re-Examination Clause. Because a trial court judge can make any decision—and give any relief—after a jury verdict that could be done before a jury verdict, as long as the decision has been “reserved” by the court, the Re-Examination Clause can be avoided so long as this technicality is complied with.²²¹ That said, what is most important for present purposes (the constitutionality of summary judgment) is what these two decisions do *not* resolve: the general relationship between judge and jury required under the Preservation Clause.

Another way in which to consider the limited scope of the *Redman* and *Slocum* decisions is by considering a hypothetical procedural rule that allows a trial court judge to enter judgment against a party if the judge believes that the party's witnesses are probably lying. Obviously, this procedural rule—by explicitly

then, the Court's conclusion that the Third Circuit “was right” might be understood as simply denoting that this issue was *not* before the court.

If the *Redman* decision was viewed as determining both the constitutionality of the type of analysis used by the lower court (Preservation Clause) and the timing of that decision (Re-Examination Clause), the *Redman* decision would completely undermine the arguments advanced by Professor Thomas, because it is abundantly clear in *Redman* (as opposed to *Slocum*) that the circuit court was engaged in a probability analysis. The majority opinion for the Second Circuit discussed the plethora of evidence that undermines the believability of the “uncorroborated story of the plaintiff.” See *Redman*, 70 F.2d at 637. Both the majority opinion and dissenting opinions of the Second Circuit in *Redman* read like a lawyer's summations to the jury rather than a court's legal analysis.

221. Numerous commentators have noted this consequence of the *Slocum* and *Redman* decisions. See, e.g., Roger Kirst, *Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective*, 48 SMU. L. REV. 63, 70 (1994) (“The holding of *Slocum* has little effect on modern procedure, because it was circumvented later in *Redman*, 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.”).

allowing a judge to weigh the credibility of witnesses—would violate the Seventh Amendment. Merely requiring the judge to reserve a decision on this basis until after a jury verdict could not cure this constitutional deficiency. Of course, requiring the judge to reserve the decision would negate any problems under the Re-Examination Clause, as that Clause was interpreted in *Slocum* and *Redman*. Nevertheless, this hypothetical rule would still be a violation of the Preservation Clause because of the *nature* of the analysis it permits rather than the *timing* of that analysis. The *Redman* court ignored the serious constitutional question under the Preservation Clause by focusing solely on the Re-Examination Clause and then proceeding to distinguish the *Slocum* decision in a way that effectively gutted this Clause.

Of course, the *Redman* Court's characterization of the *Slocum* decision as occurring solely under the Re-Examination Clause is not necessarily accurate. The *Slocum* Court, as part of its analysis, did note that the court's entry of judgment had not occurred until after the jury verdict.²²² But the *Slocum* opinion also contains passages that

222. See, e.g., *Slocum*, 228 U.S. at 377 (“[T]he circuit court of appeals directed a judgment for one party when the [jury] verdict was for the other”); *id.* at 377 (“[A]ccording to the rules of the common law the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is pending” (quoting *United States v. Wonson*, 1 Gall. 5, 20 (1812)); *Slocum*, 228 U.S. at 399 (“[T]he 7th Amendment . . . not only preserves the common-law right of trial by jury . . . but expressly forbids that issues of fact settled by such a trial shall be re-examined”). The *Slocum* Court was not as conspicuous, however, in noting that the trial court judge had not reserved the right to reconsider the defendant's motion after the jury had returned a verdict, which, of course, was the basis of the ultimate distinction drawn by the *Redman* Court. The *Slocum* Court mentions that the defendant had made a motion for a directed verdict, which was denied, and then made a motion for judgment notwithstanding the verdict, which was also denied. See *id.* at 368–69. Considering the importance assigned to this procedural nicety by the *Redman* Court, one would expect a discussion of this issue to figure more prominently in the *Slocum* opinion if the *Slocum* Court really believed that the Seventh Amendment violation in that case depended solely on the timing of the analysis that the lower court had used in entering judgment. In other words, if the Seventh Amendment violation in *Slocum* was based solely on the Re-Examination Clause, and if the problem could be cured—as the *Redman* Court later held—merely by reserving the decision on the defendant's directed verdict, it is extremely odd that the *Slocum* Court did not focus on this procedural aspect of the trial court proceedings in *Slocum*.

Of course, one explanation for the *Slocum*'s avoidance of this issue is that the *Slocum* Court did not anticipate—or agree with—the distinction made by *Redman* Court, which effectively gutted much of the import of the Re-Examination Clause as a separate clause in the Seventh Amendment. Cf. 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, § 2522 (3d ed. 2008) (describing current Federal Rule of Procedure 50(b), which makes automatic the reservation that served as the distinguishing factor in *Redman* and *Slocum*, as a “fiction”); but see *Parsons v. Bedford*, 28 U.S. 433, 477 (1830) (Story, J.)

can be read to suggest that the constitutional infirmity in *Slocum* was the type of analysis used by the lower courts (an issue under the Preservation Clause) rather than the fact that this analysis occurred after the rendition of a jury verdict (an issue solely under the Re-Examination Clause). For instance, the *Slocum* opinion states:

[I]t is the province of the jury to hear the evidence and by their verdict to settle the issues of fact, no matter what the state of the evidence . . . the court cannot dispense with a verdict, or disregard one when given, and itself pass on the issues of fact. . . . It is not a question of whether the facts are difficult or easy of ascertainment, but of the tribunal charged with their ascertainment²²³

(“[T]he [Re-Examination Clause] of the amendment is still more important [than the Preservation Clause]; and we read it as a substantial and independent clause.”). The Court will occasionally acknowledge that a Seventh Amendment argument made in a case in which a jury verdict has already been rendered invokes the Re-Examination Clause. *See, e.g.,* *Moses, supra* note 2, at 188 (The Supreme Court has, on a number of occasions, asserted that the two clauses are distinct and independent, yet the interpretive history of one clause has sometimes been indiscriminately applied to the other.”). Despite this lip-service to the distinction, if the Re-Examination Clause can be neutered by the simple act of reserving a decision that might be made before the rendition of a jury verdict, the practical import of the Re-Examination Clause is destroyed.

Another explanation for the *Slocum*'s Court failure to mention the procedural nicety which formed the basis of the *Redman* decision, however, is that the *Slocum* decision was based on the type of analysis performed by the lower court rather than the fact that this analysis had occurred after the rendition of a jury verdict. In other words, the *Slocum* Court might have perceived of the Seventh Amendment problem in *Slocum* as occurring under the Preservation Clause rather than the Re-Examination Clause. As discussed in the text, there are other reasons to believe that, in reality, the *Slocum* Court was concerned with the type of analysis performed by the lower court rather than the fact that this analysis had occurred after a jury verdict.

223. *Slocum*, 228 U.S. at 387–88; *see also id.* at 376 (stating that the lower court “assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly”). Adding to the difficulty in pinpointing the precise holding in the somewhat verbose *Slocum* opinion is that the nature of the lower court's analysis in entering judgment for the defendant is not entirely clear. Recall, in Part II of this article, the three different types of analysis on which a summary judgment might be based. The Third Circuit's judgment notwithstanding the verdict did not seem to be based on a confidence analysis, but could be viewed as turning on either a probability analysis or an application of law to settled facts. The dispositive question in *Slocum* was whether the decedent's insurance policy had lapsed. *See id.* at 366–67. This question turned on whether the defendant had waived the right to terminate the policy by accepting a partial payment. *See id.* at 375. This resolution of this question, though, might be viewed as turning on a question of fact or a question of law. For instance, according to the dissenting judge in the Third Circuit, the legal analysis in the case necessarily required a factual determination as to whether the plaintiff had been subjectively misled by the defendant's

In any event, regardless of the actual, original basis of the *Slocum* decision, the effect to be given the *Slocum* decision was clearly resolved in *Redman*. The *Redman* Court characterized the *Slocum* decision as being dependent on the fact that the court had not reserved decision on the defendant's motion for a directed verdict.²²⁴ Because the trial court, in *Redman*, had reserved its decision on the defendant's motion for a directed verdict before sending the case to the jury, the *Redman* litigation was outside the narrowly defined scope of the *Slocum* decision.²²⁵ The *Redman* Court admitted that the *Slocum* decision could be read in broader terms, but resolved that the *Slocum* decision must be read in the narrow way in which it had been interpreted in *Redman*:

But it is true that some parts of the opinion in that case give color to the interpretation put on it by the court of appeals. In this they go beyond the case then under consideration and are not controlling. Not only

agent with regard to the legal effect of her partial payment. See *N.Y. Life Ins. Co. v. Slocum*, 177 F. 842, 851–52 (3d Cir. 1910) (Buffington, C.J., dissenting) (“[W]hether the agent had exercised [his delegated power] in a way to mislead the insured was not a question of law for the court, but purely of fact, and therefore for the jury.”). On the other hand, the majority opinion for the Third Circuit seemed to believe that a legal victory for the defendant was required on the basis of the facts that were not disputed. See *id.* at 848 (“[W]e cannot hold the insurance company to have waived a provision of its contract, by reason of an act of one of its agents, when that contract expressly declared that the agent had no authority to do the thing he has done.”). Thus, *Slocum* might be a case in which the real dispute at the Circuit Court was simply over the nature of the inquiry required by the substantive law, with the dissent believing that the substantive law required consideration of a historical fact while the majority believing that the case could be resolved by applying law to undisputed facts.

In any event, the Supreme Court's description of the litigation in *Slocum* definitely adds to the confusion. The Court's opinion oscillates between describing the litigation as requiring either a legal analysis or a factual inquiry. See, e.g., *Slocum*, 228 U.S. at 380 (describing the trial court's refusal to grant the defendant's motion as an “error[] of law”); *id.* at 376 (stating that the Third Circuit “assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly.”). Perhaps the only thing that can be stated with confidence regarding the *Slocum* litigation is that there is substantial uncertainty as to the underlying reason or reasons supporting the defendant's motion.

224. *Redman*, 295 U.S. at 658.

225. See *id.* at 658–59 (“The trial court expressly reserved its ruling on the defendant's motions to dismiss and for a directed verdict, both of which were based on the asserted insufficiency of the evidence to support a verdict for the plaintiff.”).

so, but they must be regarded as qualified by what is said in this opinion.²²⁶

The *Redman* Court's characterization of *Slocum*, and the *Redman* Court's limited Seventh Amendment analysis, which consisted only of distinguishing the *Slocum* case on the Re-Examination Clause issue, necessarily means that these two cases are irrelevant in considering the constitutionality of summary judgment. Both *Slocum* and *Redman* were decided under the Re-Examination Clause; because summary judgment involves a decision by a trial court judge *before* the rendition of a jury verdict, the Re-Examination Clause is inapplicable to it.²²⁷

226. *Id.* at 661.

227. The conclusion reached in this section supports Professor Thomas's argument (properly cabined) that the constitutionality of a probability theory of summary judgment had not been decided. Professor Thomas, however, deals with *Slocum* and *Redman* in an entirely different way than how these two cases are treated in this paper. Professor Thomas does not distinguish between the Re-Examination Clause and the Preservation Clause. Rather, Professor Thomas seeks to undermine the holding of *Redman* by describing it as contradictory to the decision in *Slocum*. See Thomas, *supra* note 1, at 176 (stating that the decision in *Slocum* was "correct" and that the *Redman* Court's "reversal" of *Slocum* "do[es] not support the constitutionality of summary judgment"). On one level, I am sympathetic to the argument that the *Slocum* Court's determination that there was a Seventh Amendment violation was based on broader principles than the narrow interpretation given to *Slocum* by *Redman*. That said, the narrow construction given to *Slocum* by *Redman*—even if this narrow construction is not faithful to the *Slocum* opinion—does not undermine Professor Thomas's arguments regarding the constitutionality of the probability theory of summary judgment, if one distinguishes between the Preservation Clause and the Re-Examination Clause. Thus, I believe the arguments advanced in this section are more persuasive than the ones asserted by Professor Thomas. Professor Thomas's argument depends on these two cases being irreconcilable and *Slocum* being "right" and *Redman* being "wrong." And, concededly, most commentators view these two cases as being irreconcilable. See, e.g., Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1086 n.167 (2010) ("*Redman* was an abrupt break with the *Slocum* decision discussed above, which only twenty years before had held precisely the opposite."); Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 264 (2002) (saying that, in *Redman*, the Court "virtually overruled" *Slocum*). These interpretations, though, ignore the analytical effect of the manner in which the *Redman* Court distinguished the *Slocum* decision. In reality, according to the Court's analysis in *Redman*, both *Slocum* and *Redman* are irrelevant to the constitutionality of summary judgment. I believe the Court probably erred in reducing the Re-Examination Clause to a mere technicality, but in any event the necessary consequence of the actual holding in *Redman* is to leave open the broader question regarding the constitutionality of the type of analysis a judge engages in when he grants summary judgment before a jury verdict.

For an excellent examination of the case law precedent cited in *Redman*, see Sward, *supra* note 41, at 613–24. Although Professor Sward does not distinguish, as this article

C. *Galloway v. United States*

The *Galloway* case is directly on point for the specific issue considered in this article, which is the constitutionality of a confidence theory of summary judgment.²²⁸ In *Galloway*, the Court considered a Seventh Amendment challenge to a district court's directed verdict in favor of the defendant. Like the *Fidelity* case considered previously, but unlike *Slocum* and *Redman*, the dispositive judge-made decision in the *Galloway* litigation occurred before the rendition of a jury verdict, and thus the Court's constitutional analysis in *Galloway* was necessarily under the Preservation Clause rather than the Re-Examination Clause. Moreover, the directed verdict in *Galloway* was granted pursuant to a confidence analysis: The critical defect in the plaintiff's case was not that the trial court doubted the probability of the facts alleged by the plaintiff, but rather that there was a lack of adequate information from which to determine this question. Thus, because *Galloway* affirmed the constitutional validity of a confidence analysis at the directed-verdict stage, and there is no constitutional reason to distinguish a confidence analysis in a directed verdict from a confidence analysis in a summary judgment, *Galloway* supports the constitutionality of a summary judgment based on a confidence analysis. Because *Galloway* was decided under a confidence analysis, though, it does not resolve—or even address—the constitutionality of a probability theory of summary judgment, which is the type of summary judgment that concerns Professor Thomas.

The *Galloway* litigation involved a suit by Galloway, a war veteran, seeking benefits under the War Risk Insurance Act.²²⁹ The

has done, between the Re-Examination Clause and the Preservation Clause in discussing *Redman*, her primary thesis does support the one advanced by myself and by Professor Thomas, which is that the *Redman* case should not be read to support the notion that there is no Seventh Amendment prohibition against a judge entering judgment based on the judge's own views of the evidence. Professor Sward approaches this question from a slightly different angle, in that she criticizes the case law cited by the Court as not supporting the broad interpretation that has been assigned to the *Redman* decision. *See id.* at 623–24 (“This survey of cases reveals that *Redman*, like *Munson*, read far too much into the cases upon which it relied. While English common law practice had a procedure whereby jury verdicts could be taken subject to later decisions by the court on questions of law, the reserved questions in the English cases really were questions of law. Eighteenth century English judges surely would be surprised to see *Redman* decided by the court as if no dispute of fact existed.”). Of course, under my view, the Court in *Redman* was not considering this broader question under the Preservation Clause, so it is not surprising that the case law cited in *Redman* does not address this broader issue.

228. *Galloway*, 319 U.S. 372.

229. *Id.* at 373 n.1.

suit was not filed until June 15, 1938, when Galloway was conceded to be insane.²³⁰ The question, however, was whether Galloway was totally and permanently disabled on May 31, 1919, when his policy lapsed for nonpayment of premiums.²³¹ The suit was filed in federal district court in California,²³² and at the close of evidence the Government (the defendant-insurer) moved for a directed verdict.²³³ The trial court granted the directed verdict, and Galloway appealed.²³⁴ The Ninth Circuit affirmed.²³⁵ The Supreme Court considered whether these decisions “deprived [Galloway] of trial by jury, contrary to the Seventh Amendment.”²³⁶

The Court determined that Galloway’s Seventh Amendment rights had not been violated by the district court’s directed verdict. The deficiency in Galloway’s case, according to the Court, was that there was inadequate evidence as to Galloway’s behavior between the years of 1925 and 1930.²³⁷ Although Galloway had produced evidence as to Galloway’s condition before 1925 and after 1930,²³⁸ all that was

230. *Id.* at 373–74.

231. *Id.* at 372.

232. *See Galloway v. United States*, 130 F.2d 467 (9th Cir. 1942).

233. *See Galloway*, 319 U.S. at 373. Because the Federal Rules of Civil Procedure did not go into effect until September 16, 1938 (three months after the suit was filed), the trial court proceedings were presumably not conducted under the modern Rules. *See McCrone v. United States*, 307 U.S. 61, 65 (1939) (stating that the Federal Rules of Civil Procedure became effective on September 16, 1938). In the Supreme Court’s *Galloway* opinion, the Court mentions the recent promulgation of Rule 50 (allowing for directed verdicts) but does not indicate that this Rule was applied in the lower court proceedings. *See Galloway*, 319 U.S. at 389.

234. *See id.* at 373.

235. *See id.*

236. *Id.*

237. *See id.* at 385–87 (discussing the absence of evidence regarding the years 1925 to 1930). There is an interesting question, under the substantive law, as to whether Galloway’s behavior *after* the year 1919 (when the policy expired) should be considered in determining whether Galloway was “totally and permanently disabled” in 1919. Under one view of this tricky question, the task in 1938 was to try to recreate whether, in the year 1919, Galloway would have been considered totally and permanently disabled at that time, with Galloway’s subsequent behavior being irrelevant to the issue. The other view is that, because the statute required a “permanent” disability, the time period between the lapse of the policy and the initiation of the lawsuit should be used as a potential source of additional information as to whether the claimant was really permanently disabled on that prior date. In *Galloway*, the Supreme Court took the latter view by, in essence, slightly morphing the inquiry to ask whether Galloway had a “continuous disability.” *Id.* at 386; *see also id.* at 383–84 (stating that Galloway must show that his disability “continuously existed or progressed” from the lapse of the policy to the clear evidence demonstrating his insanity after 1930).

238. *See id.* at 373–86 (discussing the evidentiary record in the case).

known of Galloway's behavior and condition between 1925 and 1930 was that he had been married during this time period.²³⁹ Because the Court believed that Galloway was required to demonstrate a "continuous"²⁴⁰ disability after the year 1919,²⁴¹ this absence of evidence was critical to Galloway's suit: "His was the burden to show continuous disability. What he did in this time, or did not do, was vital to his case. Apart from the mere fact of his marriage, the record is blank for five years and almost blank for eight."²⁴²

It is clear that the Supreme Court was applying a confidence analysis in the *Galloway* case. It is not that the Court doubted Galloway's claim that he was continuously disabled in the years 1925 to 1930, it was that there simply was not any information from which to make this determination: "For all that appears, he may have worked full time and continuously for five and perhaps for eight [years.]"²⁴³ That Galloway should suffer from this lack of evidence was further supported by the fact that Galloway was in the best position to supply this evidence: "Knowledge of [Galloway's] activities and behavior from [] 1925 to 1930 was peculiarly within his ken"²⁴⁴

The *Galloway* Court then proceeded to consider the constitutionality, under the Seventh Amendment, of the directed verdict it had affirmed. On this point, the opinion in *Galloway* is somewhat muddled. The Court first engages in an analysis comparing the directed verdict to the common law procedures of a demurrer to the evidence and a motion for a new trial.²⁴⁵ The Court acknowledges that neither of these procedures is an exact replica of the modern directed verdict,²⁴⁶ but concludes that the Seventh Amendment does

239. The Court noted, with perhaps a touch of humor, that Galloway's marriage was "an act from which in the legal sense no inference of insanity can be drawn." *Id.* at 385.

240. *Id.* at 386.

241. *Id.* at 382–83.

242. *Id.* at 386.

243. *Id.*

244. *Id.*; see also Meier, *supra* note 4 (discussing how a confidence inquiry might be informed by considering which party has the best access to the missing evidence). In their briefs to the Supreme Court, Galloway's attorneys relied on a presumption to argue that the lack of evidence as to the years 1925 to 1930 was the Government's problem. See Reply Brief for Petitioner at 8m, *Galloway v. United States*, 319 U.S. 372 (1943) (No. 553) (citing cases for the presumption that "[i]nsanity, being proved, is presumed to continue."). Recall the discussion in this Article comparing an evidentiary presumption to a confidence analysis. See *supra* Part III.B.

245. *Galloway*, 319 U.S. at 389–94.

246. *Id.* at 392–94.

“not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791.”²⁴⁷ In addition, the Court briefly considers its prior caselaw, which it apparently believes forecloses the constitutional argument being advanced.²⁴⁸ What is missing from the Court’s analysis in *Galloway*,

247. *Id.* at 390. In addition to concluding that the lack of a direct procedural antecedent for the directed verdict is unimportant, the Court also engaged in a somewhat confusing analysis that attempts to deduce the constitutionality of the directed verdict from the collective attributes of the demurrer to the evidence and the motion for a new trial. *See id.* at 392–95. This analysis is effectively critiqued by Professor Thomas. *See* Thomas, *supra* note 1, at 169–71. To be fair to the Court in *Galloway*, the Court’s analysis on this point was in response to an argument asserted by Galloway. *Galloway*, 319 U.S. at 392 (“This difficulty, no doubt, accounts for the amorphous character of the objection now advanced . . .”).

248. *See id.* at 389 & n.19 (citing prior Supreme Court case law and concluding that Galloway’s “objection therefore comes too late”). For an excellent and thorough review of the case law cited by the Supreme Court in *Galloway*, *see* Sward, *supra* note 41, at 599–613. Sward’s conclusion with regard to the case law cited by the Court is that it does not support the conclusion that Sward (like Thomas) attributed to the *Galloway* decision, which is that the Court concluded that a directed verdict was appropriate because there was only one reasonable inference from the evidence that could be made on the critical fact questions implicated by the suit. *See id.* at 600 (“First, unlike the cases discussed earlier, *Galloway* approved a procedure that took a disputed question of fact out of the hands of the jury.”); *id.* at 603 (“The issue in *Galloway* could not be classified as anything other than a question of fact[.] Yet the Court treated it as a question of law, holding that there was only one ‘reasonable’ inference from the facts”). Sward’s interpretation of the *Galloway* decision results from a failure to distinguish between probability and confidence; this is most pointedly demonstrated in the following statement by Sward: “The Court found that the plaintiff should have been able to produce evidence as to his condition between 1925 and 1930, and his failure to do so could lead only to the conclusion that he was sane during those years.” *Id.* at 601. Sward is correct to note that the problem was the lack of evidence, but the mistake is in assuming that the lack of evidence meant that the plaintiff was, as a matter of probability, sane during those years. Rather, the analysis of the Court in *Galloway* was premised on the lack of evidence and legal consequences from this lack of evidence. Recall that, under the common law, when a judge entered a nonsuit against a plaintiff based on a confidence analysis, the plaintiff was free to bring suit again because nothing about the merits of the plaintiff’s case had been decided. *See supra* note 66 (explaining this aspect of the common law nonsuit and also explaining why, under modern law with abundant opportunities for discovery, a confidence analysis does result in a judgment that has prejudicial effect). Because Professor Sward fails to distinguish between probability and confidence, she errs in concluding that “[a]fter *Galloway*, fact has become law.” *See* Sward, *supra* note 41, at 603.

In any event, once the true basis of *Galloway*’s decision is sorted out, Professor Sward’s meticulous analysis of the case law cited by the Court in *Galloway* does show that the Court had, on some occasions, used a confidence analysis as the basis for court-ordered judgment in lieu of a jury verdict. *See id.* at 604 (discussing *Parks v. Ross* and concluding that, in *Parks*, “there was no evidence to weigh.”); *id.* at 605 (analyzing *Improvement Co. v. Munson*, 81 U.S. 442 (1872), and concluding that *Munson* “was primarily a ruling on evidence: whether the court should allow the jury to infer a fact when to do so would be inconsistent with the court’s ruling on an evidentiary presumption”).

of course, is a review of English common law cases in which a judge, pursuant to a confidence analysis, prevented a case from proceeding to a jury for a verdict; the Court would have been well served in *Galloway* to analyze the cases included in Part IV of this Article.

Despite the somewhat muddled analysis in *Galloway*, the holding clearly confirms the result the Court had previously reached in *Fidelity*: The Seventh Amendment does not prohibit a judge from determining that there is not a sufficient quantity of evidence to allow the case to proceed to a jury for resolution of a disputed fact. As the Court stated in *Galloway*, the “essential requirement” of a confidence analysis “is that mere speculation be not allowed to do duty for probative facts.”²⁴⁹ The Seventh Amendment permits judges to engage in this confidence inquiry:

[W]e are unable to conclude that one whose burden, by the nature of his claim, is to show continuing and total disability for nearly twenty years supplies the essential proof of continuity when he wholly omits to show his whereabouts, activities or condition for five years, although the record discloses evidence must have been available, and, further, throws no light upon three additional years, except for one vaguely described and dated visit to his former home. Nothing in the Seventh Amendment requires it should be allowed to join forces with the jury system to bring about such a result. That guaranty requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. It permits expert opinion to have the force of fact when based on facts which sustain it. But it does not require that experts or the jury be permitted to make inferences from the withholding of crucial facts.²⁵⁰

For Seventh Amendment purposes, there is no reason to distinguish between a case terminated, pursuant to a confidence analysis, at the summary judgment stage or the directed verdict stage. Thus, the Court’s decision in *Galloway* confirming the use of a

249. See *Galloway*, 319 U.S. at 395.

250. *Id.* at 396.

confidence theory at the directed verdict stage also supports the constitutionality of this same analysis at the summary judgment stage.

Notice, however, that recognizing *Galloway* as a case upholding the confidence theory of summary judgment *also* supports Professor Thomas's thesis (properly cabined) that the Seventh Amendment prevents a court from using a probability theory to resolve a case on summary judgment. The *Galloway* opinion, like the *Fidelity* opinion before it, did not resolve that issue because a probability analysis was not involved in the case.

Conclusion

In applying the historical test required under current Seventh Amendment jurisprudence, it is imperative to remember that the Seventh Amendment does "not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791."²⁵¹ Instead, it is necessary to consider the type of analysis a judge has used in resolving a particular case.

Along these lines, it is inaccurate to speak broadly of "the constitutionality of summary judgment." Modern courts enter summary judgment according to three different types of analyses, and each of these three types of analysis require a different Seventh Amendment inquiry. One such analysis is a confidence analysis. Under this analysis, a court determines that there is not an adequate amount of evidence to allow the jury to determine the probability of the material facts to the litigation.

When a judge enters summary judgment according to a confidence analysis, there is no constitutional deprivation of the Seventh Amendment right to a jury trial. English common law courts sometimes used a confidence analysis as the basis of a compulsory nonsuit against the plaintiff. When this occurred, the plaintiff's claim was terminated before a jury verdict could be rendered, although the plaintiff was free to bring his case against if additional evidence was located.

Moreover, the modern Supreme Court jurisprudence confirms the constitutionality of a summary judgment entered on a confidence theory. In *Fidelity*, the Court entered a summary judgment based on a confidence theory, although this conclusion is somewhat obscured by the fact that the burden of production in that case was on the defendant rather than the plaintiff. Similarly, in *Galloway*, the Court

251. *Id.* at 390.

confirmed the use of a confidence theory at the directed verdict stage, which further supports the constitutionality of this analysis at the summary judgment stage. A similar analogy, however, cannot be drawn between summary judgment and the Court's conclusions in *Slocum* and *Redman*, both of which involved a judgment notwithstanding the verdict. Each of these cases involved the second clause of the Seventh Amendment, the Re-Examination Clause, which is inapplicable to a summary judgment entered in advance of a jury verdict.

It is important, however, to delineate what is *not* being asserted in this Article, which is that summary judgment is *always* constitutional in all of its application. This has been a common mistake in the jurisprudence. Both the Supreme Court and commentators have often assumed that summary judgment is constitutional in all of its application. On the other hand, Professor Thomas has famously asserted that summary judgment is always unconstitutional. This Article rejects both of these broad assertions while demonstrating that there is some merit to each of these conflicting views. Summary judgment is constitutional when a court engages in a confidence analysis. That said, when a judge enters summary judgment based on a probability analysis, serious Seventh Amendment concerns arise, and those concerns have yet to be resolved by the Supreme Court. As such, these arguments are worth serious consideration.