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## Trial by Jury: Why it Works and Why it Matters

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## Trial by Jury: Why it Works and Why it Matters

## FOREWORD

### TRIAL BY JURY: WHY IT WORKS AND WHY IT MATTERS

THE HONORABLE KATHLEEN M. O'MALLEY\*

Many members of this court, me included, have written forewords for this issue of the *American University Law Review*. We should, given this issue's regular focus on the work of the U.S. Court of Appeals for the Federal Circuit and the consistently high quality of the issue's content. I applaud the *Law Review* for making publication of this journal issue an enduring priority, and I commend all who have had a hand in making it happen.

Previous forewords from my colleagues and I have focused on the history, formation, and mission of the Federal Circuit, on changes and challenges it has faced over the years, and on suggestions or concerns for its future. This year, I want to shift focus. I want to take this opportunity—this bully pulpit—to address a topic that is important to me: the fact that patent cases are being used as a vehicle to criticize and chip away at our Seventh Amendment right to a jury trial. I am troubled by this trend and believe we all should be concerned about it—gravely so.

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\* Circuit Judge, U.S. Court of Appeals for the Federal Circuit. These thoughts were first presented in the form of a speech delivered to the New York University Civil Jury Project and later revised for a presentation to the American Intellectual Property Law Association. This is an expanded—and more detailed—version of these earlier remarks. As with all work product coming from my chambers, I am grateful to my law clerks for their assistance in helping me to articulate my thoughts on this topic, and to garner support for them. Because this was a work that developed and changed over time, beginning as a speech and ending up as this Foreword, I need to thank law clerks from two different terms. They are Taylor W. King (2016–2017) and Eric D. Dunn (2018–2019).

## I. WHY WE SHOULD CARE

If recent events have taught us anything, it is that we are a deeply divided country. We have differing views about the direction our country should take and about what policies are needed to take us where we want to go. There is also an increasing distrust in the institutions of government and the ability of those institutions to protect the rights, liberties, and other values we hold dear. At times like this, we need reassurance that the judiciary remains an independent branch of government that stands apart from the two elected branches, and that the judiciary will protect each of us from the tyranny of the majority or the whims of the sovereign. While there are many ways the judiciary can and should provide this reassurance, one way it *must* do so is by protecting the sanctity of our right to trial by jury in all cases, both criminal and civil. This right is a part of what makes the third branch—the judiciary—independent and unique. And it is what protects all of us from overreach by the other two branches of government.

I am an unabashed believer in the jury system, an unabashed believer that juries take their obligations as jurors seriously, an unabashed believer that juries can sort out even complex issues when given the proper tools, and an unabashed believer that juries almost always arrive at conclusions that are rational, fair, and—even if not the conclusion I would reach in all cases—justified by the evidence presented to them and the legal principles they were charged to follow. I am also an unabashed believer that the right to trial by jury is critical to our system of justice and the protection of our liberties.

Our Founders were also unabashed believers in the right to trial by jury.<sup>1</sup> In fact, trial by jury was guaranteed by every colony even before the Constitution and Bill of Rights were adopted.<sup>2</sup> England's subversion of this right was a principal criticism of the English system in the colonies. Among other things, the British began to enforce their unpopular and excessive colonial taxes through courts of equity to avoid the scrutiny of colonial juries.<sup>3</sup> And they sought to exert control

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1. See Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 656 (1973) (“[T]he nascent American nation demonstrated at virtually every important step in its development that trial by jury was the form of trial in civil cases to which people and their politicians were strongly attached.”).

2. *Id.* at 653–54; Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 592 (1993).

3. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting) (discussing “[t]he extensive use of vice-admiralty courts by colonial

over colonial judges and their decision-making by handing control of judicial salaries to the Crown rather than the colonial legislatures.<sup>4</sup> These practices were expressly listed among the “long train of abuses” committed by the sovereign in the Declaration of Independence.<sup>5</sup> The Constitution’s silence on the right to trial by jury in civil cases triggered calls for a bill of rights: “[T]he entire issue of the absence of a bill of rights [from the Constitution] was precipitated at the Philadelphia Convention by an objection that the document under consideration lacked a specific guarantee of a jury trial in civil cases.”<sup>6</sup> When the call for a bill of rights was answered, no fewer than three amendments—the Fifth, the Sixth, and the Seventh—addressed the right to trial by jury.<sup>7</sup> And, two more limited the power of judges, but not juries, in deciding certain issues.<sup>8</sup>

Trial by jury played such an important role in debates on independence and ratification because, as Chief Justice Rehnquist wrote, “[t]he [F]ounders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary.”<sup>9</sup> Thomas Jefferson referred to trial by jury as “the only anchor, ever yet imagined by man, by which a

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administrators to eliminate the colonists’ right of jury trial”); *see also* Landsman, *supra* note 2, at 596; Wolfram, *supra* note 1, at 654.

4. *See* Landsman, *supra* note 2, at 595.

5. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see also* *Parklane Hosiery*, 439 U.S. at 340 (Rehnquist, J., dissenting) (“[T]he right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.”).

6. Wolfram, *supra* note 1, at 657; *see also* *Parsons v. Bedford*, Breedlove & Robeson, 28 U.S. 433, 446 (1830) (“One of the strongest objections originally taken against the [C]onstitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases.”); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 295 (1966) (explaining that the absence of language regarding civil juries “was a prominent part” of Anti-Federalists’ objections to the Constitution); Landsman, *supra* note 2, at 600 (explaining that seven states only ratified the Constitution on the condition that it be amended to include a right to trial by jury in civil cases).

7. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1992).

8. *Id.* (discussing the Fourth and Eighth amendments); *see also* *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) (Breyer, J., concurring) (“I concur in the judgment here based on my view that the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.” (internal quotation marks omitted)); Amar, *supra* note 7, at 1148–49 (explaining that James Madison originally proposed a “Fourteenth Amendment” that obligated *state governments* to provide trial by jury).

9. *Parklane Hosiery*, 439 U.S. at 343 (Rehnquist, J., dissenting).

government can be held to the principles of its [sic] constitution.”<sup>10</sup> And James Madison called trial by jury in civil cases “as essential to secur[ing] the liberty of the people as any one of the pre-existent rights of nature.”<sup>11</sup>

As the Founders understood, the right to trial by jury operates to check any temptation the judiciary might have to bend to the will of either the majority or the sovereign—rather than the law.<sup>12</sup> In turn, it operates to resist any temptation by the other branches of government to similarly disregard the law for their own ends.<sup>13</sup>

The Supreme Court has historically recognized the important role juries play in our system. For example, in *Parsons v. Bedford, Breedlove & Robeson*,<sup>14</sup> Justice Story observed—in 1830—that trial by jury “has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.”<sup>15</sup> In *Beacon Theatres, Inc. v. Westover*,<sup>16</sup> the Court repeated this point one hundred years later: “Maintenance of the jury as a fact-finding body is

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10. Letter from Thomas Jefferson to Thomas Paine, 11 July 1789, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/01-15-02-0259> (last visited May 20, 2019).

11. Mark W. Bennett, *Judges' Views on Vanishing Civil Trials*, 88 JUDICATURE 306, 307 (2005) (quoting 1 ANNALS OF CONG. 454 (Joseph Gales ed., 1789)).

12. See *Allelyne v. United States*, 570 U.S. 99, 127 (2013) (Roberts, C.J., dissenting) (“The Sixth Amendment therefore provided for trial by jury as a ‘double security, against the prejudices of judges, who may partake of the wishes and opinions of the government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy.” (quoting J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 924, p. 657 (Abr. 1833))); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (requiring jury trials for the imposition of contempt sentences longer than six months); FEDERAL FARMER: AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN, LETTER XV (1788), reprinted in 17 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION PUBLIC AND PRIVATE 265, 339 (John P. Kaminski et al. eds., 1995) (“If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases.”); Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 668–75 (2012) (discussing the history of jury nullification in colonial America).

13. See, e.g., *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 824 (1987) (Scalia, J., concurring) (“The power to acquit is as decisive as the power not to prosecute . . . .”); *Leary v. United States*, 395 U.S. 6, 55 (1969) (Black, J., concurring) (“Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn.”).

14. 28 U.S. 433 (1830).

15. *Id.* at 446.

16. 359 U.S. 500 (1959).

of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.”<sup>17</sup>

Indeed, respect for trial by jury is built into both the rules of civil and criminal procedure and into basic principles of appellate review. Rule 50 of the Federal Rules of Civil Procedure, for example, only permits a court to set aside a jury verdict where the court concludes that “a reasonable jury would not have a legally sufficient evidentiary basis” to reach the conclusion it did.<sup>18</sup> There is no “exception” to Rule 50 for complex civil cases, such as patent cases, just as there is no “exception” for patent law in other rules that direct appellate courts to respect factual findings by a district court judge.<sup>19</sup> Other principles of appellate review, while not spelled out by rule, also require respect for fact-finders like juries. Thus, appellate courts may not consider evidence not included in the record below,<sup>20</sup> may not address an issue raised for the first time on appeal,<sup>21</sup> may not make credibility determinations,<sup>22</sup> and may not reweigh the facts underlying express or implied factual determinations made in the trial court.<sup>23</sup> These restrictions on the appellate function, backed by years of precedent,

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17. *Id.* at 501 (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)).

18. FED. R. CIV. P. 50(a)(1).

19. *See, e.g.*, *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015) (explaining that an appellate court’s role is to “accept a district court’s findings unless clearly erroneous”).

20. *See, e.g.*, *Lowry v. Barnhart*, 329 F.3d 1019, 1024–25 (9th Cir. 2003) (noting the limited exceptions to this general principle); *Fassett v. Delta Kappa Epsilon* (New York), 807 F.2d 1150, 1165 (3d Cir. 1986) (“The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court.”).

21. *See, e.g.*, *Wood v. Milyard*, 566 U.S. 463, 473 (2012) (“For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.”); *McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 22 (1st Cir. 1991) (“It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal.”).

22. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (“Credibility determinations . . . are jury functions, not those of a judge . . . .”); *Ondato v. Standard Oil Co.*, 210 F.2d 233 (2d Cir. 1954) (“The books are full to repletion with declarations that the credibility of witnesses is for the jury; it would be idle to pile up citations, which in addition to those we have mentioned, have repeated the doctrine.”).

23. *See, e.g.*, *Anderson*, 477 U.S. at 255 (“[T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .”).

are predicated on the importance of respecting the trial court's role in the judicial process and particularly the role of the jury as factfinder.<sup>24</sup>

Despite our nation's long history of respect for the right to trial by jury, many now argue that it is time to do away with jury trials in patent cases. I have heard a number of arguments in support of this contention. I will focus here on only three: (1) the assertion that there should be a "complexity exception" to the Seventh Amendment right to a jury trial; (2) the claim that juries are incapable of understanding the factual and legal complexities in patent cases; and (3) the contention that the formation and existence of the Federal Circuit signaled a congressional desire to treat patent cases differently than other civil cases and to eschew jury findings in the interest of "uniformity" in patent law. I reject all three contentions without hesitation.

## II. A COMPLEXITY EXCEPTION

Some scholars have suggested that trial by jury is neither appropriate nor required in complex civil cases.<sup>25</sup> And some justices and judges have begun to suggest that they may be right.<sup>26</sup> Not only do I reject the notion that the Seventh Amendment's command is an optional one, I also see no need for a "complexity exception" and fear the implications for our system of justice if we were to adopt one.

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24. See, e.g., *United States v. Yellow Cab Co.*, 338 U.S. 338, 340–41 (1949) (Jackson, J.) ("The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others."); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) (Brandeis, J.) ("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.").

25. See Jay Tidmarsh, *The English Fire Courts and the American Right to Civil Jury Trial*, 83 U. CHI. L. REV. 1893, 1901 n.33 (2016) (collecting articles debating the issue); see also Joseph C. Wilkinson, Jr. et al., *A Bicentennial Transition: Modern Alternatives to Seventh Amendment Jury Trial in Complex Cases*, 37 U. KAN. L. REV. 61, 62 (1988) (suggesting juries be eliminated in complex cases).

26. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 545 n.5 (1970) (Stewart, J., dissenting) ("Certainly there is no consensus among commentators on the desirability of jury trials in civil actions generally. Particularly where the issues in the case are complex—as they are likely to be in a derivative suit—much can be said for allowing the court discretion to try the case itself."); *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1087–88 (3d Cir. 1980) (discussing benefits of denying jury trials in complex cases).



American jurors have historically been called upon to decide complex cases, including those involving detailed scientific inquiry.<sup>27</sup> The Federal Judicial Center's *Reference Manual on Scientific Evidence*, compiled along with the National Academies of Sciences, reflects the broad range of scientific issues presented in all manner of federal cases today—both criminal and civil.<sup>28</sup> There is little evidence the practice was much different in eighteenth-century England.<sup>29</sup> And, the Supreme Court has shown no willingness to find a “complexity exception” based on the text of the Seventh Amendment or its historical underpinnings.<sup>30</sup> For good reason.

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27. See, e.g., *Sartor v. Ark. Nat. Gas Corp.*, 321 U.S. 620, 628–29 (1944) (reversing the grant of summary judgment in a complex natural gas case since the credibility and weight of the evidence that should “be determined, after trial, in the regular manner”); *Travelers’ Indem. Co. v. Parkersburg Iron & Steel Co.*, 70 F.2d 63, 65 (4th Cir. 1934) (“Questions of fact are questions for the jury; and they do not become questions for the court merely because their solution may require scientific knowledge or expert opinion.”); *Casey v. Nat’l Union*, 3 App. D.C. 510, 520 (D.C. Cir. 1894) (“[T]he evidence offered to overcome [plaintiff’s] *prima facie* case was of a nature to be susceptible of much argument and scientific scrutiny. This defensive evidence was of a nature to be urged with more or less effect with the jury, as they should believe in the skill and accuracy of judgment of the physicians who had testified; and the jury could not be deprived of their right thus to weigh and scrutinize the testimony. Testimony of the nature and character of that given in this case, is especially required to be passed upon by the jury.”).

28. See generally FED. JUDICIAL CTR., *REFERENCE MANUAL ON SCIENTIFIC EVIDENCE* (3d ed. 2011).

29. See JAMES OLDHAM, *TRIAL BY JURY: THE SEVENTH AMENDMENT AND ANGLO-AMERICAN SPECIAL JURIES* 21 (2006) (“No case in late-eighteenth-century England is known where the plaintiff sued at common law for damages, . . . yet the common-law court decided the factual issues were beyond the jury’s capacity, causing the court to send the case to Chancery.”); Tidmarsh, *supra* note 25, at 1902 (noting that the historical record is, at best, “indeterminate” on the issue). But see Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 44–57 (1980) (examining how equity courts were used in the eighteenth-century to handle “issues . . . of such complexity that a jury at that time would have been unlikely to understand them”); James Oldham, *On the Question of a Complexity Exception to the Seventh Amendment Guarantee of Trial by Jury*, 71 OHIO ST. L.J. 1031, 1033–35 (2010) (noting that some complex litigation was sent to the English Court of Chancery with no trial by jury).

30. See, e.g., *Curriden v. Middleton*, 232 U.S. 633, 636 (1914) (“[M]ere complication of facts alone and difficulty of proof are not a basis of equity jurisdiction.”); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (explaining that “the practical abilities and limitations of juries” is not a factor in considering whether a claim must be tried to a jury or not (quoting *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970))).

In my years on the district bench, I presided over cases where juries deliberated on matters relating to diverse categories of scientific and complex financial evidence. After every jury trial over which I presided, I spoke to the jury at length—to thank the jurors, to answer questions they might have about the process, and, importantly, to help educate myself and the lawyers about jury dynamics and their deliberative processes. I was always impressed by how thoughtful and careful the jurors were, how objective and logical their analysis was, and by the level of detail at which they were willing to engage. In one highly complex case involving multiple experts and a large volume of exhibits, the jury told me that they agreed to spend the first two full days of deliberations silently going through every piece of evidence, their own notes, and the jury instructions I had given them to assure that, once an interactive dialogue began, it would be one that was fully informed.

While my sixteen years of experience presiding over jury trials is only anecdotal, it is consistent with studies showing that juries, on average, tend to reach reasoned conclusions.<sup>31</sup> If two minds are better than one, nine or twelve are better still. This sentiment—that jurors working collectively mostly get it right even in complex cases—is shared by most district court judges around the country.<sup>32</sup> As District Judge William Young recently recounted in a ruling rejecting the contention that juries are ill-equipped to decide whether to pierce the corporate veil: “It takes a special type of arrogance simply to conclude that American jurors cannot handle” complex issues involving patent

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31. See, e.g., Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 485–86 (2005) (noting that studies show judges and juries, on average, tend to reach similar outcomes); Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1166–67 (2001) (“Although jurors struggle and are occasionally misled, they generally make reasonable use of complex material, utilizing the expert testimony when it is presented in a form that they can use.”).

32. E.g., Shari Seidman Diamond & Francis Doorley, *What a (Very) Smart Trial Judge Knows About Juries*, 64 DEPAUL L. REV. 373, 374 (2015) (examining Judge Jack Weinstein’s “deep appreciation for the jury’s abilities and performance”); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1066–67 (1964) (“[A]lthough the trial judges polled gave a wide variety of explanations for the cases in which there was disagreement [between the judge and jury], they virtually never offered the jury’s inability to understand the case as a reason.”); see also Sonia Sotomayor, Remarks at New York University Law School (Feb. 8, 2016), <http://www.law.nyu.edu/news/sonia-sotomayor-supreme-court-annual-survey-american-law-civil-jury-project> (commenting that as a district court judge, she often reached the same conclusions as the juries in “technically difficult cases”).

rights, constitutional rights, or antitrust law.<sup>33</sup> There is no reason to abandon the Seventh Amendment because a case presents complex issues, nor—in my view—is there a better alternative available if we choose to do so.<sup>34</sup>

### III. JURIES IN PATENT CASES

Although juries often decide complex cases, patent lawyers still insist that juries do not understand their cases.<sup>35</sup> But patent cases are no more complex than those involving toxic torts, aviation disasters, securities fraud, Ponzi schemes, antitrust conspiracies, or even criminal matters with multiple defendants and complex forensic science. I place fault for a less-than-perfect experience with juries in patent cases not at the feet of jurors or the system for trials our Founders created, but at the feet of trial judges, advocates, our court, and, recently—and perhaps most disappointingly—the Supreme Court.

Trial judges and advocates together can improve juror decision-making in patent cases in a number of ways.<sup>36</sup> I will mention only a few. First, early and continued case management by trial courts, with willing input and cooperation from counsel, can narrow and clarify questions that must be put to the jury. Second, advocates can engage in targeted discovery with an eye toward what they or their opponent will

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33. *Marchan v. John Miller Farms, Inc.*, No. CV 3:16-00357-WGY, 2018 WL 6518660, at \*6–7 (D.N.D. Dec. 11, 2018) (“Four months ago, I watched a jury learn about the mechanics of 3-D printing and analyze a certain interface layer at the microscopic level to determine obviousness and infringement. More recently, I watched a jury determine probable cause to remove an obstreperous passenger from a campus shuttle bus. I asked another jury this question: ‘Did the anticompetitive effect of [a] settlement [between two pharmaceutical companies] outweigh any procompetitive justifications?’ Jurors have long been deciding all these issues and many more complex. It takes a special type of arrogance simply to conclude that American jurors cannot handle the veil-piercing issues presented here.” (alterations in original) (internal citations omitted)).

34. *Id.* at \*6 (rejecting the notion that judges are better equipped than juries to decide certain issues because “anything a judge can do a jury can do better”); see also Kimberly A. Moore, *Are District Court Judges Equipped to Resolve Patent Cases?*, 15 HARV. J.L. & TECH. 1, 38 (2001) (“[M]ost criticism focuses on the inability of lay juries to comprehend technically complex patent cases. Little attention and no empirical study has dissected or analyzed whether district court judges are the appropriate alternative.”).

35. Paul R. Michel & Dr. Michelle Rhyu, *Improving Patent Jury Trials*, 6 FED. CIRCUIT B.J. 89, 90–91 (1996).

36. See Tom M. Dees, III, *Juries: On the Verge of Extinction? A Discussion of Jury Reform*, 54 SMU L. REV. 1755, 1771 (2001) (commenting that judges and lawyers are responsible for educating the jurors to enable them to intelligently reach a decision).

*really* need to prove once trial arrives. That will cause counsel to narrow their focus early and not be tempted to take juries down rabbit holes.

Once trial does arrive, trial judges can employ jury questionnaires before in-person voir dire begins, allow jurors to take notes, guard against disjointed or repetitive presentations of proof, require counsel to clarify matters where the possibility for confusion seems obvious, and encourage the use of technology in trial presentations. Trial judges can also provide jury instructions in understandable prose rather than legalese, ensure that each juror has a copy of those instructions with them in the jury room, and insist on verdict forms that provide jurors with an understandable decision tree to protect against inconsistent or incomprehensible verdicts.

Finally, trial judges should avoid the use of arbitrary time limits that may make it impossible to explain matters adequately to the jury. While time limits are important to impose discipline on the process, what those will be in a given case should depend upon the issues to be decided, the nature of the technology involved, and other case-specific circumstances. Jurors cannot be expected to understand what advocates lack the time to explain. Of course, to do all this, judges need the tools and resources necessary to manage jury trials amid their ever-growing dockets. While critics are quick to complain about the way judicial officers handle complex cases, it remains true that trial court chambers are woefully understaffed—with only two law clerks each—and there are simply too few trial judges authorized for many judicial districts, and too many court vacancies allowed to languish unfilled.<sup>37</sup>

At trial, advocates can refrain from trying to prove—to the jury, judge, their clients, their opponents, or even themselves—that they know more about the relevant science than anyone in the room. They can do what litigators who try all manner of cases to juries do: convey to the jurors *just* that level of scientific information necessary to their decision-making. In my experience, when jurors get confused about science, technology, economics, or accounting, it is usually because the advocates create the cause for confusion. Patent lawyers tend to overthink and over-present their cases. They need to be tight and succinct in their presentations, use courtroom technology to their advantage, and cross-examine the opposing expert the way they would cross-examine a hostile witness in a car accident case, rather than

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37. See *Courts Need New Judgeships, Judicial Conference tells Congress*, U.S. COURTS (June 21, 2018), <http://www.uscourts.gov/news/2018/06/21/courts-need-new-judgeships-judicial-conference-tells-congress>.

engage in high-level debates over scientific theory. And, they need to make sure to proffer evidence on *every* fact or legal element they need to prove or disprove, and ensure the evidence gets admitted over the objections that are bound to come. Jurors should not be asked to fill gaps in counsel's presentations or be asked to find for a party on elements of a thin case that are left unproven. Advocates also need to couch their arguments in understandable terms; in ways that walk the jury through the jury instructions, and ultimately, lead the jury to the desired conclusions on the verdict form.

Rather than continue the mantra that patent cases are just too different from other cases to allow them to go to a jury, advocates need to stop treating patent cases as different and use good, solid trial-lawyering skills to educate and persuade the juries they encounter. If they do this, well-instructed jurors usually will reach the right result. As then-Chief Judge Howard Markey wrote in 1985: "There is no peculiar cachet which removes 'technical' subject matter from the competency of a jury when competent counsel have carefully marshalled and presented the evidence of that subject matter and a competent judge has supplied carefully prepared instructions."<sup>38</sup>

But responsibility for the problems arising in the use of juries in patent cases does not end with trial judges or trial lawyers, it includes appellate courts as well. When appellate courts show a lack of respect for jury verdicts and fail to give adequate deference to jury factual findings—and the implications of those factual findings—the ripple effect is devastating. Trial judges become incentivized to take questions *away* from juries whenever possible, fearing that the hard work in supervising a jury trial is a vain exercise. Advocates have less incentive to explain things clearly for the jury because they begin to believe they are playing to a different audience—one who believes it is the first-instance fact-finder because it somehow has a better ability to grasp or understand the issues at hand.<sup>39</sup> This undermines confidence in jury verdicts and multiplies appeals. As Judge Pauline Newman said

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38. *SRI Int'l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1130 (Fed. Cir. 1985) (en banc) (citations omitted).

39. See, e.g., Ted D. Lee and Michelle Evans, *The Charade: Trying a Patent Case to All "Three" Juries*, 8 TEX. INTELL. PROP. L.J. 1, 4 (1999) (explaining that lawyers for patent holders have to argue to three "juries," including the traditional jury, the trial judge, and the Federal Circuit); Gregory D. Leibold, Comment, *In Juries We Do Not Trust: Appellate Review of Patent-Infringement Litigation*, 67 U. COLO. L. REV. 623, 646 (1996) (arguing that de novo claim construction review means "a plaintiff will have to win two trials—one in district court and one in the CAFC").

in her dissent in *Malta v. Schulmerich Carillons, Inc.*<sup>40</sup>: “When the relationship between trial and appellate tribunals is distorted, the consequences disserve the public and the courts.”<sup>41</sup>

We on the Federal Circuit have been criticized for weakening the jury function and causing dysfunction in the system in the process. Rooklidge and Weil used the phrase “judicial hyperactivity” to describe our court’s alleged penchant for “usurp[ing] elements of the decision-making process that are supposed to be the province of the lower courts, administrative bodies, or even litigants.”<sup>42</sup> Writs of certiorari in patent cases now often contain, as one of the principle objections, complaints about our court’s supposed failure to recognize the limits of our appellate function and our willingness to usurp the province of the trial court, the jury, or both.<sup>43</sup>

Recent Supreme Court cases have also tended to sideline juries. Whether this means permitting district court judges to dismiss cases that do not seem “plausible”<sup>44</sup> or to resolve cases without “genuine”<sup>45</sup> factual disputes, in the words of one commentator: “Pretrial procedure has become nontrial procedure by making trial obsolete.”<sup>46</sup> And the Supreme Court has questioned the jury’s ability to decide certain complex

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40. 952 F.2d 1320 (Fed. Cir. 1991).

41. *Id.* at 1332 (Newman, J., dissenting).

42. William C. Rooklidge & Matthew F. Weil, *Judicial Hyperactivity: The Federal Circuit’s Discomfort with its Appellate Role*, 15 BERKELEY TECH. L.J. 725, 727 (2000).

43. *Id.* at 727–28.

44. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

45. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (“The inquiry performed is the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.”); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–86 (1986) (“To survive petitioners’ motion for summary judgment, respondents must establish that there is a genuine issue of material fact . . . .”); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“[S]ummary judgment is proper ‘if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’”).

46. John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012); see also Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333, 389–90 (2016) (showing that the Supreme Court cases most often cited by federal courts are *Anderson*, *Matsushita*, *Celotex*, *Twombly*, and *Iqbal*).

issues in patent cases.<sup>47</sup> Whatever the merits of these Supreme Court decisions, their effect—to downplay the jury function—is apparent.

I believe we *all* should strive to respect the role of juries in *all* cases, including patent cases. Where inefficiencies are perceived, we should exercise care in where we place the blame and with respect to “fixes” we propose. All participants in the process can do more to improve the quality of jury verdicts. In my view, neither the jurors themselves nor the jury system are the problem.

#### IV. THE FEDERAL CIRCUIT AND JURIES

Nothing about the existence or formation of the Federal Circuit alters my view that jury trials are an important aspect of the adversarial process in patent cases or that our court is obligated to treat those verdicts with the same deference that other circuits must afford verdicts in all cases.

The Federal Circuit was formed in 1982 to address a perceived lack of uniformity in the enforcement of patent rights.<sup>48</sup> Congress felt that a lack of consistency in how the patent law was interpreted and applied endangered innovation by making it difficult to rely predictably on the rights patents conveyed.<sup>49</sup> But the Federal Circuit is still an Article III court governed by the same rules and decisional paradigms that govern every other Article III court, populated by generalist judges, with a broad jurisdictional reach. Congress did not charge the Federal Circuit with deciding whether the patent system should promote innovation, or competition, or access to lower cost medical supplies; it charged the Federal Circuit with applying the law to the cases before it. And Congress did not free the Federal Circuit from the obligation to abide by the Federal Rules of Civil Procedure or those constitutional and common law principles that govern and guide all federal courts of

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47. *See, e.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388 (1996) (“So it turns out here, for judges, not juries, are the better suited to find the acquired meaning of patent terms.”).

48. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989) (“Congress conferred exclusive jurisdiction of all patent appeals on the Court of Appeals for the Federal Circuit, in order to ‘provide nationwide uniformity in patent law.’” (quoting H.R. REP. NO. 97-312, at 20 (1981))).

49. *See, e.g.*, Senator Robert J. Dole, Remarks at The Ninth Annual Judicial Conference of the United States Court of Customs and Patent Appeals (May 25, 1982), *reprinted in* 94 F.R.D. 347, 355 (1982) (“Patent litigation appeals take years and the average cost, according to some statistics, is around \$250,000. It seems to me that we must have a more predictable and more uniform judicial environment to enable inventors, investors, and businesses to feel secure with the exclusive property rights they supposedly obtain with a patent.”).

appeals. Indeed, the Supreme Court has made clear in numerous cases over the years that neither the character of patent law nor the unusual character of the Federal Circuit's jurisdiction frees the Federal Circuit from its Article III mantle.<sup>50</sup>

Moreover, the "uniformity" Congress hoped the Federal Circuit would ensure was not one Congress meant to foster by placing patent law in the hands of a narrow set of decision-makers.<sup>51</sup> Instead, Congress hoped uniformity would be borne of having a single appellate court review the decisions of all lower tribunal decision-makers with the same deference those decision-makers have always been due.<sup>52</sup> In other words, Congress hoped uniformity would grow out of the exercise of our traditional adjudicative function, applied to cases arising nationwide. Ultimately, we must accept the fact that patent cases are but one type of civil case arising in the federal system,

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50. See, e.g., *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016) (overruling the Federal Circuit's test for damages under the Patent Act because it "unduly confine[d] the ability of district courts to exercise the discretion conferred on them"); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836 (2015) (finding that Rule 52(a)(6) of the Federal Rules of Civil Procedure applies equally to patent cases); *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 560 (2014) (holding that all appellate courts are required to review district courts' 35 U.S.C. § 285 determinations under the abuse of discretion standard); *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (interpreting the district court's original jurisdiction as the same under for general jurisdiction cases and patent cases); *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006) (emphasizing that a district court's equitable discretion "must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards").

51. See, e.g., Pauline Newman, *The Federal Circuit—A Reminiscence*, 14 GEO. MASON U. L. REV. 513, 520 (1992) (explaining that Congress incorporated other areas of law into the Federal Circuit's jurisdiction to "avoid the risks of specialized courts").

52. Compare *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1276–77 (Fed. Cir. 2014) (en banc) (concluding that claim construction should be reviewed de novo in part because Federal Circuit was created to achieve uniformity), *judgment vacated sub nom.* *Lighting Ballast Control LLC v. Universal Lighting Techs., Inc.*, 135 S. Ct. 1173 (2015), with *Teva*, 135 S. Ct. at 837, 839–40 (stating that "[e]ven if exceptions to [Federal Rule of Civil Procedure 52(a)(6)] were permissible, we cannot find any convincing ground for creating an exception to that Rule here," and noting that the need to bring about uniformity does not overcome the clear text of Rule 52); see also S. REP. NO. 97-275, at 5 (1981), as reprinted in 1982 U.S.C.C.A.N. 11, 15 ("The establishment of the Court of Appeals for the Federal Circuit also provides a forum that will increase *doctrinal stability* in the field of patent law." (emphasis added)); H.R. REP. NO. 97-312, at 23 (1981) ("[T]he central purpose [of the Federal Circuit] is to reduce the widespread lack of uniformity and uncertainty of *legal doctrine* that exist in the administration of patent law." (emphasis added)).



with all its historical strengths and weaknesses, including resort to jury trials where appropriate.

#### V. FINAL THOUGHTS

In closing, there are two additional points I want to emphasize. First, virtually no other country employs jury trials in *any* civil context, and none afford jury verdicts the respect we do.<sup>53</sup> While international uniformity in patent law has some appeal, we cannot ignore that our Founders felt the right to a trial by jury in both criminal and civil cases should be enshrined in our Bill of Rights. This sets us apart from the rest of the world in what I believe are positive ways. It reflects perhaps the most important protection for individuals against the will of the sovereign and the whims of the majority who might elect that sovereign. Chipping away at the right to trial by jury in *any* context seems ill-advised, but it is particularly true in the context of intellectual property rights—rights recognized explicitly in the U.S. Constitution.<sup>54</sup>

Second, and finally, participation in the jury system is often the only contact with the justice system or the federal government that many citizens ever have. It is a rare opportunity for individuals—whatever the circumstance of their birth or their station in life—to participate in our democracy. It reinforces a fundamental belief in those called to serve that we are all created equal and assures citizens that in our society even the powerful and wealthy are subject to the scrutiny of average citizens. And, perhaps nearest and dearest to my heart, jury trials foster trust in, and respect for, the justice system. When I had the privilege of presiding over jury selections, I was disheartened by how many people felt it would be a waste of their time to participate in the process. But my faith in the citizens of our communities was always renewed when—without fail—even those who had tried to avoid jury duty, later told me it had been a valuable and educational experience.

We should avoid letting the temptation to streamline patent cases prompt the adoption of practices that harm our system of justice or further weaken citizens' faith in the judiciary. As Judge Young asked in *Marchan v. John Miller Farms, Inc.*: “Do you care about any of this? You should. Your rights depend on it.”<sup>55</sup> My sentiments exactly.

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53. Valerie P. Hans, *Jury Systems Around the World*, 4 ANN. REV. L. & SOC. SCI. 275, 280–84 (2008).

54. U.S. CONST. art. I, § 8, cl. 8.

55. No. CV 3:16-00357-WGY, 2018 WL 6518660, at \*8 (D.N.D. Dec. 11, 2018).