Justification and Doctrinal Evolution

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The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received.1

I. INTRODUCTION

Justification is central to the legal enterprise. Judges must justify their decisions. Legislators must justify the statutes they enact. And all legal actors play a role in justifying the basic doctrines and procedures of a particular legal system; indeed, all legal actors help to justify the legal system

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itself.\textsuperscript{2} Numerous commentators have observed that these justifications may change over time, sometimes, but not always, with corresponding changes in the legal system, doctrine, or procedure.\textsuperscript{3} No one, however, goes beyond merely making the observation. In this Article, I will take the analysis well beyond mere observation, and try to give it some structure. I will first analyze the various forms that we employ when we justify a procedure or doctrine, demonstrating the complexity of the enterprise of justification. I will then show how our use of justification is influenced by, and in turn influences, changes in the procedure or doctrine being justified. This will give us a much deeper understanding of how and why procedures and doctrines evolve, as my application of the analytical framework to three specific examples demonstrates.

Developing this deeper understanding of the role justification plays in the evolution of procedures and doctrines is more than a mere academic exercise. As I will show, more understanding begets more coherence and more control. Some forms of justification can constrain the development of doctrine in ways that have a significant impact on how the nation’s institutions—public and private—function. Some forms of justification are more open-ended, and may be in danger of the opposite problem—too few constraints on doctrinal development. When we are forced to articulate, analyze, and take seriously the reasons for our procedures and doctrines, they are likely to make more sense, and we are likely to be better able to control doctrinal development. The analysis presented here appears to be broadly applicable, though my examples are all from civil procedure.

Before beginning the analysis, I need to set the article against its background in legal evolution and justification more generally. Ever since the time of Darwin, theories of evolution have been predominant in the study not only of physical phenomena, but of social and cultural life as well. These theories have gone beyond the obvious fact that things change, and tried to impose some order on that change, with the elements of that order drawn, sometimes incorrectly, from Darwin.\textsuperscript{4} Social Darwinists, in par-

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\textsuperscript{2} When I say all legal actors, I mean not only judges and legislators, but litigants and their attorneys, and a range of commentators, but especially legal academics.

\textsuperscript{3} As the quotation that begins this Article shows, one person to make this observation was Oliver Wendell Holmes; the idea permeates his most famous work, \textit{The Common Law}. \textit{See HOLMES, supra note 1}. Perhaps this is not surprising, as Holmes was a central figure in the development of Pragmatism, a late nineteenth century philosophy that has close intellectual ties to theories of evolution. \textit{See LOUIS MENAND, THE METAPHYSICAL CLUB (2001); PHILIP P. WIENER, EVOLUTION AND THE FOUNDERS OF PRAGMATISM} ch. 8 (1949).

\textsuperscript{4} Darwin published his \textit{Origin of the Species} in 1859. \textit{CHARLES DARWIN, THE ORIGIN OF SPECIES} (The Modern Library 1936) (1859). It was obviously revolutionary, and not just for biology. But Darwin was just one of any number of theorists in the middle of the nineteenth century who were thinking about evolution. Indeed, Darwin beat Thomas H. Huxley in the race for publication, but Huxley’s theories were quite similar. \textit{Compare THOMAS H. HUXLEY, DARWINIANA} (1898), with DARWIN, supra. \textit{Compare EDWARD CLODD, PIONEERS OF EVOLUTION FROM THALES TO HUXLEY}
ticular, promoted a harsh and exacting survival-of-the-fittest doctrine within human society. Under Social Darwinism, people who could not compete in human society deserved no compassion and no help. On the other hand, Reform Darwinists believed that if we could understand the mechanisms of social, cultural, or economic evolution, we could control them, for the betterment of humankind. Other theorists, mistakenly thinking that Darwin postulated that evolution was a drive toward ever-better organisms, thought they saw a drive toward improvement, if not perfection, in human institutions. Marx, for example, saw an inexorable movement of the economic organization of society, from feudalism to capitalism to communism, with a clear moral sense that communism was the ideal toward which society marched.

Legal scholars have been attracted to the idea of evolution from the

126–34 (1897) (describing Darwin, with id. at 201–66 (describing Huxley). Theories of evolution were also common among social and legal thinkers of the era, including Herbert Spencer, Karl Marx, and Henry Sumner Maine. See, e.g., Karl Marx & Friedrich Engels, Manifesto of the Communist Party, in 1 KARL MARX SELECTED WORKS 204 (V. Adoratsky ed., 1936); HENRY SUMNER MAINE, ANCIENT LAW (University of Arizona Press 1986) (1864); HERBERT SPENCER, SOCIAL STATICS (1872). Evolution was in the air. For general discussions of the history of the idea of modern evolution, see RONALD W. CLARK, THE SURVIVAL OF CHARLES DARWIN: A BIOGRAPHY OF A MAN AND AN IDEA (1984); CLODD, supra, at 126–266; FORERUNNERS OF DARWIN: 1745-1859 (Hiram Bentley Glass et al. eds., 1959); HENRY FAIRFIELD OSBORN, FROM THE GREEKS TO DARWIN: AN OUTLINE OF THE DEVELOPMENT OF THE EVOLUTION IDEA (1924).

The most prominent Social Darwinist was Herbert Spencer. See, e.g., SPENCER, supra note 4. Spencer was writing at the same time as Darwin, but it was Spencer who coined the phrase “survival of the fittest.” See MENAND, supra note 3, at 143. For discussions of Social Darwinism, see, for example, ROBERT C. BANNISTER, SOCIAL DARWINISM: SCIENCE AND MYTH IN Anglo-AMERICAN SOCIAL THOUGHT (1979); RICHARD HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT (rev. ed. 1955); Herbert Hovenkamp, Evolutionary Models in Jurisprudence, 64 Tex. L. Rev. 645, 654–56 (1985). Social Darwinism seems particularly harsh in light of postmodern insights into the social construction of reality. We cannot create a society that favors us, and then condemn those who cannot compete. For discussions of the social construction of reality, see generally PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE ON THE SOCIOLOGY OF KNOWLEDGE (1966); JONATHAN POTTER, REPRESENTING REALITY: DISCOURSE, RHETORIC, AND SOCIAL CONSTRUCTION (1996); JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY (1995); PETER SEDERBERG, THE POLITICS OF MEANING: POWER AND EXPLANATION IN THE CONSTRUCTION OF SOCIAL REALITY (1984); James E. Robertson, The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules, 53 Okla. L. Rev. 161 (2000) (“This article argues that the Supreme Court has constructed as a social reality a set of assumptions about imprisonment that renders unworthy of meaning constitutional safeguards.”).

Prominent Reform Darwinists included Roscoe Pound. See id. at 654.

Darwin did not claim that plants and animals in any particular hierarchy, only that each plant or animal had evolved to be well-adapted to its environment. See DARWIN, supra note 4, at ch. 4. When a plant or animal could no longer adapt, it declined, eventually becoming extinct. See CHARLES DARWIN, EVOLUTION AND NATURAL SELECTION 163–66 (Bert James Loewenberg ed., 1959).

See Marx & Engels, supra note 4. Marx was developing his ideas around the same time as Darwin. Darwin’s Origin of the Species was published in 1859, and Marx’s Communist Manifesto was published in 1848. See DARWIN, supra note 4; Marx & Engels, supra note 4. But the idea of evolution was palpable at the time, and many thinkers propounded evolutionary theories. See supra note 4.
very beginning. A number of scholars have described the development of theories of legal evolution; see, e.g., Peter Stein, Legal Evolution (1980); E. Donald Elliott, The Evolutionary Tradition in Jurisprudence, 85 Colum. L. Rev. 38 (1985); Hovenkamp, supra note 5.

10 See Maine, supra note 4, at ch. 1; see also Evolution of Law: Select Readings on the Origin and Development of Legal Institutions (Albert Kocourek & John H. Wigmore comps., 1915) (discussing comparative legal evolution).

11 See Maine, supra note 4, at 14–17.

12 See Stein, supra note 9, at 46–50, 67–68 (1980) (discussing legal evolutionary theories that looked for a trend toward perfection). This was not true of the pragmatists such as Holmes, however. For them, legal evolution was a fact—it happened—but it reflected adaptation to social needs, not a march toward a pre-ordained ideal. See Weiner, supra note 3, at ch. 8.


rate taxation, or particular doctrines, such as jurisdiction, or particular legal institutions, such as dispute settlement institutions. Still others have shown how the path of common law evolution is dependent upon earlier decisions, or suggest how legal change may occur through the clash of opposing principles.

In this Article, I am doing something a little different. I am focusing not on the evolution of particular procedures or doctrines themselves, but on the changes in the justification for those procedures or doctrines. I present the thesis that the forms of justification can be important limitations on the ability of a procedure or doctrine to evolve, and that evolution in the justification affects how the procedure or doctrine itself evolves. This approach requires that I focus some attention on the forms and sources of justification. By forms of justification, I mean general genotypes by which we can sort and classify the justifications that are offered for procedures and doctrines. I have identified four, and develop them at some length: justice, pragmatism, theory, and history.

It is common, of course, to use just two broad characterizations of legal analysis: formalism and functionalism, though formalism and functionalism are usually described as theories or methodologies rather than types of justification. I believe that it makes sense to break justification down into more—and more descriptive—categories because doing so helps us to better understand the enterprise of justification. That said, it is also useful to note that in my categories of justification, theoretical justifications are formal in character, while pragmatic justifications are functional. Justifica-

21 Some readers might question the absence, in this list, of efficiency as a justification, especially in light of the importance that law and economics has come to have in legal analysis. I do not consider efficiency to be absent in this schema; rather, it is a form of pragmatic justification.
tions based on justice or history could be either formal or functional, depending on how one uses justice or history. When the justification for a procedure or doctrine is more formal in character, evolution of the procedure or doctrine is likely to be more constrained than when the justification has a more functional character. A shift in the justification from a formal to a functional one—say from a theoretical justification to a pragmatic one—will often portend some dramatic changes in the procedure or doctrine itself.

As for the sources of justification, there are many. Lawyers are most familiar with the judicial opinion, where a judge justifies the decision in a particular case. She is, however, constrained by statutes, precedent, and even the arguments of the parties. And because she is deciding a particular case, her opinion contributes to, but does not necessarily define, the justification for the broader procedure or doctrine that is being applied in the case. Legislatures also contribute to the justification. A legislature, however, does not need to be as careful in justifying its actions because it is setting policy with its legislation. Thus, assuming the legislation is constitutional, the legislature is constrained only by the possibility of a democratic check: the legislators could be voted out of office for actions that conflict with the wishes of a majority of the electorate. One result is that the reasons for a legislature’s actions can be buried in legislative history and difficult to uncover.23

Legal commentators also contribute to the development of legal justifications. They comment on judicial decisions, often focusing largely on the persuasiveness of the justification that the court offered. They comment on legislation, existing and proposed. They may propose legislation themselves. They explore the justifications for an existing procedure or doctrine, sometimes delving into the history of the procedure or doctrine, and sometimes offering new justifications for the procedure or doctrine. They even tackle the justification for law itself or for particular legal systems, through theories of law. As I explore the justifications offered for the three particular procedures or doctrines that I use as examples for my study, I will make use of justifications offered from all of these sources: judges, legislators, and commentators.

Part II of this Article outlines four major types of legal justification. These may be characterized as appeals to justice, pragmatics, theory, and history. There are subtypes of each, and there is some overlap among the various types. Justice, in particular, can be a component of each of the

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23 Some legislative justifications must be set out more clearly. The Supreme Court has recently begun requiring an exceptionally strong documentation of Congress’s justifications for abrogating state sovereign immunity under Section Five of the Fourteenth Amendment. See Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80–83 (2000).
other three types, which is why I begin with it. In Part III, I will explore the changes in justification—relying on the schemata developed in Part II—for three different procedures or doctrines relevant to civil adjudication: the special verdict; personal jurisdiction; and the jury. The origins of some of these are quite obscure, so the original justification may be a matter of some speculation, though speculation with a reasonable basis in history. Finally, in Part IV, I make some general observations, based on the examples discussed in Part III, about how justifications evolve in a common law system, about the direction of the evolution of justification among the four types of legal justifications described in Part II, and about the relationship between the evolution of justification and the evolution of the particular procedure or doctrine being justified.

II. FORMS OF LEGAL JUSTIFICATION

In this section, I describe four general forms of legal justification. The first is justice: it justifies a procedure or doctrine on the ground that it is fair. The second is the pragmatic: it justifies the procedure or doctrine on the ground that it works, though the details are considerably more complicated than this succinct statement suggests. The third is the theoretical: it justifies the procedure or doctrine on the ground that it comports with a particular political, legal, or moral theory. The fourth is the historical: it justifies the doctrine or procedure either on the ground that it has a long pedigree or on the ground that it is consistent with practice during some epochal period in our history.

A. *The Appeal to Justice*

Justice occupies a difficult place in the schema that I describe. Appeals to justice are often made in justifying procedures or doctrines, and we all have some sense of what that must mean. But justice is a complicated and controversial concept, and we need to be more specific about the basis for our claims that a procedure or doctrine is just. Furthermore, some concept of justice is behind each of the other three forms of legal justification: Justice can be defined pragmatically, theoretically, or historically. Thus, in

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24 It may well be that justice is not a distinct category of justification, but is merely a component of the other types. But because we often appeal to justice in justifying various procedures, I am treating it here as a separate type. In the discussion in the text, I will try to show how the other types of justification often incorporate a conception of justice.

25 I confess that I have had a difficult time coming up with a word that captures my meaning here. I wish to convey the idea of a theory, ideology, or philosophy that serves as a foundation on which our procedures or doctrines are built. In this sense, the theoretical justification is quite different from the pragmatic, which rejects the idea of foundational principles. A pragmatic justification is an end product of what is often considerable goal-oriented experimentation. A theoretical justification is a starting point. In this sense, a theoretical justification is formalistic or deductive rather than functionalistic or inductive.
this section I will introduce some of the basic issues relating to the appeal to justice as justification, but I will have more to say on the subject when I discuss the other three forms of justification.

1. The Form of the Appeal to Justice

Central to any scheme of legal justification is justice. A legal system generally exists to provide order and stability in a society, but it must at least purported to provide justice as well, or it will lose the respect and confidence of those who use it. A legal system is comprised of thousands of procedures or doctrines, each of which contributes (or fails to contribute) to the overall justice of the system. Thus, we can expect to find that many procedures or doctrines are justified on the ground that they are themselves just, or fair, or that they produce justice.

An appeal to justice or fairness as justification for a procedure or doctrine will need to include a definition of the term, however. Two major distinctions are generally made in defining justice. The first is the distinction between distributional justice and procedural justice. The second is the distinction between actual justice (however that is defined) and perceived justice. While the distinctions are important to make, they are not clean breaks. Procedural justice may well lead to distributional justice, and perceptions of justice may depend on actual justice being done at least a substantial part of the time. In addition, the two distinctions do not exhaust the conceptions of justice that humankind has developed; for example, some conceptions of justice are neither distributional nor procedural.

a. Distributional and Procedural Justice

Distributional justice refers to the ultimate distribution of goods and services within a society. There are many different theories about what is

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26 On the centrality of justice to law, see Thomas R. Kearns & Austin Sarat, Legal Justice and Injustice: Toward a Situated Perspective, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 1–5 (Austin Sarat & Thomas R. Kearns eds., 1996). A great deal has been written about justice, by philosophers, lawyers, political scientists and others, throughout the history of western civilization. I will make no attempt to contribute to that literature. My point here is the use of justice, however one defines it, as justification for specific procedures or doctrines. The starting point for most modern discussions of justice is JOHN RAWLS, A THEORY OF JUSTICE (1971), whose work has generated both praise and criticism. Other interesting treatments include RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); JUDITH N. SHKLAR, THE FACES OF INJUSTICE (1990); and IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

27 See Sarat & Kearns, supra note 26, at 5–6 (discussing arguments that conceptions of distributional justice are inadequate). Distributional theories of justice tend to focus on people as consumers of goods and services, and may have little to say about issues such as domination and oppression. See id. at 12 & n.64, (citing Iris Young, Toward a Critical Theory of Justice, 7 SOC. THEORY AND PRAC. 282 (1981)); see also YOUNG, supra note 26.

28 Aristotle distinguished between distributional and corrective justice, but corrective justice is a subset of distributional justice in that it refers to corrections to errors in the distribution, as when some-
the most just distribution of those goods and services, from distribution based on merit to distribution based on need. Some theories seek to base distribution on individual merit or need, and some on group merit or need, such as racial, gender, or age groups.29 All such theories are complicated by problems of definition: how to define merit or need, and how to identify the goods and services that are to be distributed.

Procedural justice refers to the manner by which decisions are made within a society. The idea is that the most important thing is to employ just procedures for a society’s decision-making. There are two important results of a society’s using just procedures: the substantive, or distributional, outcome itself should be better, and the people who disagree with the substantive or distributional outcome are more likely to accept it nonetheless. Once again, however, we have problems of definition: what are just procedures?30

While these two categories are the primary kinds of justice that philosophers have identified, they do not exhaust the concepts of justice.

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29 See, e.g., Justice Between Age Groups and Generations (Peter Laslett & James S. Fishkin eds., 1992); Young, supra note 26. Affirmative action is based on concepts of group justice, and the controversy surrounding it is ongoing. See Grutter v. Bollinger, 539 U.S. 306, 343-44 (2003) (holding that the University of Michigan School of Law’s race-conscious admissions policy did not violate the Equal Protection Clause because the state’s interest in a diverse student body was compelling and because the policy was narrowly tailored to serve that interest); Gratz v. Bollinger, 539 U.S. 275-76 (2003) (holding unconstitutional under the Equal Protection Clause the University of Michigan’s use of race in admission to undergraduate programs because the use was not narrowly tailored to serve Michigan’s asserted compelling interest in diversity); see also Symposium, On Grutter and Gratz: Examining “Diversity” in Education, 103 Colum. L. Rev. 1588 (2003) (discussing the impact of the Michigan decisions and whether those decisions are justified).

Some thinkers argue, for example, that justice means being free from domination or oppression.\textsuperscript{31} Of course, one could argue that such theories are distributional in nature if being free from domination or oppression is viewed as a good to be distributed. But such notions as domination and oppression seem to capture something beyond mere distribution of goods and services. Because there are such concepts of justice that are neither distributional nor procedural, it might be better to describe the categories of justice as substantive or procedural. Substantive concepts of justice can be distributional, but they may be something different from, or in addition to, distributional theories.

b. Actual and Perceived Justice

Actual justice is an outcome that comports with a society’s substantive conceptions of justice, whether those conceptions are distributional or non-distributional. A society could also achieve actual procedural justice, by having a set of procedures that comports with that society’s understanding of what procedural justice requires. Thus, there can be actual justice that is either substantive or procedural.

Perceived justice focuses not on the fairness of the actual substantive outcomes or the procedures that society uses, but on the public perception that they are fair.\textsuperscript{32} The substantive outcomes or the procedures may be fair or unfair in fact—that is, when measured against societal values—but if the public perceives them to be fair, the facts may be unquestioned and the legal system remains strong. By contrast, if the public perceives the substantive outcomes or the procedures to be unfair, the legal system is likely to be unstable. Public perceptions of justice are likely to be tied, to some extent, to the society’s ability to achieve actual justice: if the legal system fails to achieve actual justice in a significant number of cases, the public is likely to perceive the system as unjust.\textsuperscript{33}

\textsuperscript{31} See Young, \textit{supra} note 26, at 33–40.

\textsuperscript{32} There have been a number of studies of procedural justice, many of them done by psychologists. See generally \textit{The Impact of Social Psychology on Procedural Justice} (Martin F. Kaplan ed., 1986); Thibaut & Walker, \textit{supra} note 30; Thibaut & Walker, \textit{supra} note 30; John Thibaut et al., \textit{supra} note 30.

\textsuperscript{33} An example in current affairs is the death penalty. Because there have been several high-profile examples of death row inmates being found innocent, more people are questioning the justice of the death penalty, including some people who had been strong supporters. See Ky Henderson, \textit{How Many Innocent Inmates Are Exonerated? An Illinois Coalition Moves to Stop the Death Penalty in the Wake of Alarming Statistics}, HUM. RTS., Fall 1997, at 10 (telling the story of Illinois’s nine death row inmates recently freed due to findings that they were innocent); Edward Lazarus, \textit{Justice O’Connor’s Death Penalty Regrets and Responsibilities}, at http://writ.news.findlaw.com/lazarus/20010710.html (July 10, 2001) (on file with the Connecticut Law Review) (summarizing Justice O’Connor’s speech to a women’s group in which she expressed concern about the administration of the death penalty after ninety federal death row inmates were exonerated); Rick Pearson & Ray Long, \textit{Illinois’ Leadership Turns the Page}, CHI. TRIB., Jan. 13, 2003, at A-1, available at LEXIS, News Library, Chtrib File (describing former Illinois Governor George Ryan’s decision to commute 164 inmates’ death sentences.
2. Justice and Legal Justification

Legal procedures and doctrines can be justified as substantively just or as procedurally just. Furthermore, while legal procedures and doctrines are generally conscious efforts to achieve actual justice, however that is defined, they should at least leave the public with a perception of justice. Indeed, given the fact that the people in any given society are likely to disagree, sometimes strongly, about how to define substantive justice, procedural justice—actual or perceived—will often be the best we can hope for. If the procedures for making important societal decisions are fair, those whose views on substantive justice did not prevail can at least feel comfortable that they were heard, and they can have hope that their views might ultimately prevail.

This concept of legal justice is captured by the term “due process of law,” and the primary focus is on procedural justice,34 though there is also a doctrine of “substantive due process.”35 Thus, a justification for a proce-

to life in prison as “a dynamic turnaround” from his previous stance. Studies have also tended to show that the administration of capital punishment varies by the race of the defendant or by the region of the country, which may further undermine the public’s perception of the death penalty as just. See Glen L. Pierce & Michael L. Radelet, Race, Region, and Death Sentencing in Illinois, 1988-1997, 81 OR. L. REV. 39 (2002); Ronald J. Tabak, Racial Discrimination in Implementing the Death Penalty, HUM. RTS., Summer 1999, at 5. Nevertheless, polls show that roughly 70% of the American population still supports the death penalty, though some polls indicate that this support may be beginning to wane. See http://www.pollingreport.com/crime.htm (last visited Sept. 24, 2004) (on file with the Connecticut Law Review) (compiling data from The Harris Poll, Fox News/Opinion Dynamics Poll, The Gallup Poll, and News/Wall Street Journal Poll, among others).


35 Substantive due process refers to limitations on the power of government to interfere in various personal or economic relationships, and had its origins in Lochner v. New York, 198 U.S. 45, 48–49 (1905), which held that a New York law limiting the hours that bakery workers could work in a week violated the Due Process Clause of the Fourteenth Amendment. More recently, personal rights such as the right to privacy are thought to be linked to the Due Process Clause. See Griswold v. Connecticut, 381 U.S. 479, 481–83 (1965). Literature on substantive due process includes EDWARD KEYNES, LIBERTY, PROPERTY, AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS (1996); MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY: SUBSTANTIVE DUE PROCESS FROM THE 1890S TO THE 1930S (2001); FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE (1986); Erwin Chemerinsky, Substantive Due Process, 15 Touro L. Rev. 1501 (1999); James W. Ely, Jr., The Oxyoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process, 16 Const. Comment. 315 (1999); John Harrison, Substantive Due Process and the Constitutional Text, 83 Va. L. Rev. 493 (1997); Peter J. Rubin, Square Pegs and Round Holes:
dure or doctrine that asserts that the procedure or doctrine comports with due process is an appeal to justice, with all the complications and nuances that the term "justice" entails. Of course, one can also justify a procedure or doctrine on justice grounds without using the term "due process." One can simply assert that the procedure or doctrine is "fair" or "just." This more direct form of justification, however, may require more explanation, especially if the justice one is invoking is substantive justice. There is substantial agreement about the basics of procedural due process, and therefore about some forms of procedural justice, but substantive justice is more open to fundamental disagreement.

Justice may appear to be an independent justification for a procedure or doctrine, but is also an aspect of the other three forms of justification, discussed below: pragmatic, theoretical, and historical. Indeed, it is safe to say that our conceptions of justice are based in pragmatics, theory, or history. That is, (1) there are pragmatic reasons for our ideas about whether a procedure or doctrine is just;\textsuperscript{36} (2) we may have foundational theories about justice and its role in society; and (3) our sense of justice may be defined by history.\textsuperscript{37} In that sense, justice never stands alone as a justification.

An example of justice as justification is found in \textit{Erie Railroad Co. v.}


\textsuperscript{36} This is particularly true of procedural justice, which is inherently pragmatic. If we cannot agree on the substance of justice, we can at least agree on the procedures we use to arrive at our substantive decisions. Perceived justice is also quite pragmatic: it is important that the populace perceive that the system is doing justice so that they will continue to be comfortable with the system's substantive outcomes.

\textsuperscript{37} As to the historical definition of justice, the death penalty again provides an example. Some proponents of the death penalty argue that it cannot be cruel and unusual punishment in the constitutional sense because it was an accepted form of punishment at the time the Constitution was ratified, and is even mentioned without disapproval in the Constitution. \textit{See U.S. Const. amend. V} (stating that "[n]o person shall be held to answer for a capital, or otherwise infamous crime . . . nor shall any person . . . be deprived of life . . . without due process of law"); \textit{Stuart Banner, Death Penalty: An American History} 233-34 (2002); \textit{Raul Berger, Death Penalties: The Supreme Court's Obstacle Course} 46-47 (1982) (arguing that "special safeguards in application of the death penalty were provided by the Fifth Amendment precisely because the Framers postulated that the death penalty was unaffected by the Eighth Amendment," which prohibits cruel and unusual punishment); \textit{Rory K. Little, The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role,} 26 Fordham Urb. L.J. 347, 360-61 (1999) (explaining that the death penalty was an accepted form of punishment during the framing of the Constitution). In other words, the death penalty is a part of our history and as such does not violate our sense of justice. \textit{But see} Hugo Adam Bedau, \textit{Thinking of the Death Penalty as Cruel and Unusual Punishment,} 18 U.C. Davis L. Rev. 873, 895 (1984) (arguing that references to capital punishment in the Constitution do not prove that the death penalty is never cruel and unusual punishment). This argument will only take us so far, however. Even Justice Scalia, a strong advocate of originalism, concedes that he would likely find some forms of punishment to be unconstitutional even though they were in use at the time the Constitution was ratified, because they are too far beyond what modern mores accept. \textit{See Antonin Scalia, Originalism: The Lesser Evil,} 57 U. Cin. L. Rev. 849, 861 (1989).
Tompkins. The Supreme Court overruled a case that was nearly one hundred years old in part because the practice under that case was unfair. The earlier case, Swift v. Tyson, had interpreted the Rules of Decision Act to allow federal courts to develop a general federal common law governing contracts, torts, and other traditional common law areas. The Rules of Decision Act, which dates to the Judiciary Act of 1789, requires that federal courts sitting in diversity apply the laws of the states in which the federal courts sit as substantive rules of decision. The Court in Swift interpreted the Rules of Decision Act to apply to statutory law only, and not the common law of the state. This left the federal courts free to develop substantive common law that often differed significantly from the law of the state in which the federal court was located. Thus, litigants who could establish diversity of citizenship had a choice of which substantive law would be applied—state or federal—while non-diverse litigants had no such choice. This, the court thought, was unfair because it constituted "discrimination" and "rendered impossible equal protection of the law."

The Court in Erie did not further elaborate on the injustice of the Swift regime. It did not say, for example, whether the concept of justice behind its decision was substantive or procedural. Either is possible. An antidiscrimination or equal protection principle could be characterized as a principle of substantive justice because it reflects a basis for allocating the right to choose the substantive law to be applied in a case: that the choice should be allocated equally among those who use the system. But the

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38 304 U.S. 64 (1938).
39 See id. at 79–80 (overruling Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)).
41 28 U.S.C. § 1652 (2000). Swift v. Tyson was decided under the old version of the Rules of Decision Act that was enacted as section 34 of the Judiciary Act of 1789. See Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2000)). The current version is substantially the same as the original.
42 Swift, 41 U.S. at 10–11.
44 Id.
45 See Swift, 41 U.S. at 18–19.
47 See id. at 73–74, 76–77.
48 See id. at 77 (describing the Swift doctrine as producing "injustice and confusion"). The Court noted that a number of legislative proposals had been made for dealing with the problem, including abolition of diversity jurisdiction. Id. None of these proposals had been enacted when the Court decided Erie. Id.
49 Id. at 75.
50 In a country with multiple legal systems, the allocation can never be completely equal. We give deference to the plaintiff's choice of forum, and we can expect that when plaintiffs have a choice, they will choose a forum that will apply law that is favorable to the plaintiff. But the Court in Erie
Erie decision could also reflect a principle of procedural justice: that choice of law should be sufficiently limited and determine that those who use the system can reasonably assess their likely liability.\footnote{Of course, choice of law is not always clear, even when there is no discrimination among litigants. Every actor in a political, economic, or legal system takes some risks. Some risks are inherent in the fact of our inability to predict the future. But one commonly approved principle of procedural justice is that one should have access to the rules that apply so that one can better assess those risks. See Torres v. Immigration & Naturalization Serv., 144 F.3d 472, 474 (7th Cir. 1998) ("The idea of secret laws is repugnant. People cannot comply with laws the existence of which is concealed."); John M. Goodenow, Historical Sketches of the Principles and Maxims of American Jurisprudence 3 (William S. Hein Co. 1975) (1819) (saying that laws must be published in order to be obligatory); Joseph Raz, The Authority of Law: Essays on Law and Morality 51 n.9 (1979) (noting that even "secret" laws must be known by someone). Thus, secret laws are a violation of procedural due process, or procedural justice. It is procedural justice that is implicated because it would not matter how benevolent the secret laws were; in other words, the substance of the laws does not matter. All that matters is that those who are subject to secret laws cannot know what they are and so cannot conform their behavior to them. The Swift regimem did not create secret laws, but it did make it more difficult to determine what law would be applied.}\footnote{See Wells, supra note 28, at 2353–54 (1990) ("[T]he pragmatic conception of tort rules understands tort rules as flexible standards and evaluates their use by considering whether they are effective in helping decisionmakers sort out conflicting intuitions about the requirements of justice in particular cases."); id. at 2355 (saying that the Aristotelian approach to corrective justice is 'pragmatic' in the sense that it conceives of tort law as a collection of adjudicatory practices rather than as a set of substantive tort rules.")}

Furthermore, as I will show in subsequent sections, the concept of justice that is behind the Erie decision may be tied in important ways to the other forms of justification that I will describe in this article. Principles of procedural justice may be largely pragmatic in nature. Principles of substantive justice are often based on a theory, though the theory may be pragmatically derived. And history may color our sense of what justice requires. Justice seems to permeate legal justification, and with good reason: justice is an essential goal of any legitimate legal system.

B. Pragmatic Justifications

In this section, I will first describe the form that pragmatic justifications take, and the path of development such justifications are likely to follow. The ideas I describe will overlap somewhat with philosophical or legal pragmatism. Thus, some brief description of those theories is necessary, and I will try to show how pragmatic justifications relate to them. I do not mean to suggest, however, that pragmatic justifications are conscious invocations of philosophical or legal pragmatism as those concepts have developed. Indeed, it is the nature of pragmatic justifications that they may not be conscious at all: if a procedure appears to work, that is all the justification it needs. It is sometimes only when questions arise as to whether the procedure or doctrine works that we begin to develop con-
scious justifications.

1. The Form of Pragmatic Justification

Most of us have a good sense of what a pragmatic justification would be. At its most basic level, such a justification reduces to the idea that the procedure or doctrine “works.” A pragmatic justification takes a simple form: there is a need, and this procedure or doctrine meets that need. Thus, the procedure or doctrine is itself a practical response to perceived necessity. To the extent that it meets that necessity, the procedure or doctrine is justified.

This simple description masks a host of issues that must be resolved, however, if we are to understand the justification, and, thus, the procedure or doctrine itself. How did we come to perceive the necessity that gave rise to the procedure or doctrine? Why did we choose this particular procedure or doctrine rather than some other one that would also meet the perceived necessity? The answers to these questions are sometimes lost in the mists of time, so some examination of history may be necessary to reconstruct the original pragmatic justification for a doctrine or procedure.

It is also important to ask whether pragmatic justifications mask underlying political or philosophical positions. For whom, we might ask, does a procedure or doctrine work? The answer to that question may well say a lot about who has prevailed in the country’s political debates, but it may also say a lot about the country’s basic philosophy, which itself may be refined in political give and take. Thus, a pragmatic justification is more complicated than it might at first appear. The insights of pragmatism may help us to focus these issues.

2. Philosophical and Legal Pragmatism

Pragmatism developed in the late nineteenth century and was the most important theme in the work of such American thinkers as Charles Sanders Peirce, Chauncey Wright, William James, John Dewey, and Oliver Wendell Holmes.\(^{53}\) This does not mean that all of these thinkers agreed on the precise contours of the philosophy; indeed, pragmatism has taken many forms.\(^{54}\) Nevertheless, there are certain characteristics of pragmatism that are common to all, as I will show momentarily. Defining pragmatism is complicated by the fact that a “new pragmatism” has evolved more recently, which sees some of the basic pragmatic premises somewhat differ-

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\(^{53}\) See generally MENAND, supra note 3; WIENER, supra note 3. The various proponents of pragmatism did not always agree with each other, of course. MENAND, supra note 3, at x–xi; WIENER, supra note 3, at 185–86. Holmes once described William James’s pragmatism as “an amusing humbug.” Letter from Oliver Wendell Holmes to Frederick Pollock (June 17, 1908), in 1 HOLMES-POLLOCK LETTERS 138–39 (Mark DeWolfe Howe ed., 2d ed. 1961).

\(^{54}\) PRAGMATISM: FROM PROGRESSIVISM TO POSTMODERNISM xiii (Robert Hollinger & David Depew eds., 1995).
ently. 55 An important leader of the new pragmatism is Richard Rorty, 56 but many diverse people today call themselves pragmatists, from Richard Posner to Martha Minow. 57

The original philosophical pragmatism was characterized by anti-foundationalism, contextualism, and instrumentalism. 58 Anti-foundationalism is the rejection of the idea that there are any essential or foundational truths. 59 For a pragmatist, there is nothing metaphysical about truth; rather, truth is discovered through experience and is dependent on context. 60 Contextualism, which is closely related to anti-foundationalism, is the idea that the truth or value of an idea or practice is measured by the particular society in which it is proposed. 61 An idea or practice may be valuable, in the sense that it produces desirable consequences, in one society but not in another. Central to this contextualism, however, is the concept of a "critical community of inquiry," which entails open debate about the idea or practice that is under consideration. 62 The notion that context defines truth or value is related to instrumentalism, which is the idea that the truth or value of an idea or a practice is measured by its consequences. 63 There is no essential idea against which it is measured, but the idea or practice is true or valuable only if it produces valuable consequences. To bring these themes together, the truth or value of an idea or practice is measured by the truth or value of its consequences in the context of the society in which it is used, and not by its correspondence to some

57 See RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY (2003); Richard A. Posner, WHAT HAS PRAGMATISM TO OFFER LAW?, in PRAGMATISM IN LAW AND SOCIETY 29, 30 (Michael Brint & William Weaver eds., 1991) (noting the ideological diversity of modern pragmatists). Pragmatism is the root of a number of diverse twentieth century approaches to law, including Legal Realism, Critical Legal Studies, and Law and Economics. See generally MENAND, supra note 3, at 337–75, 438 (giving an overview of pragmatism's derivation).
58 This discussion is drawn, in part, from SIDNEY A. SHAPIRO & ROBERT L. GLICKSMAN, RISK REGULATION AT RISK: RESTORING A PRAGMATIC APPROACH 14–30 (2003).
59 See id. at 14.
60 See Posner, supra note 57, at 31 (describing various pragmatic definitions of "truth"). Perhaps the most succinct statement of this theme among legal pragmatists is Oliver Wendell Holmes's observation that "[t]he life of the law has not been logic: it has been experience." HOLMES, supra note 1, at 1.
61 See Thomas C. Grey, WHAT GOOD IS LEGAL PRAGMATISM?, in PRAGMATISM IN LAW AND SOCIETY, supra note 57, at 9, 12 (stating that pragmatic thought always comes "embodied in practices—culturally embedded habits and patterns of expectation, behavior, and response").
62 See Kloppenberg, supra note 55, at 84. See generally CLARENCE MORRIS, THE JUSTIFICATION OF THE LAW 26–41 (1971) (advancing a similar view and using the term "public aspirations").
essential metaphysical "truth."

These characteristics in turn suggest a number of others. Early pragmatists tended to hold strong democratic beliefs, as democracy was an important tool for debating the issues—it helped to define the critical community of inquiry. Democratic debate, among persons with a variety of perspectives and drawing on a wide range of philosophical traditions, helps a society to understand and evaluate the consequences of ideas or practices. Pragmatism also suggests a trial-and-error approach to the issues. With no essential or foundational philosophy to guide a society, experience is the key. Some ideas will work, and some will not, and we determine which is which through practice. Finally, pragmatism entails a view of the world as contingent. Events are essentially unforeseeable, and we cannot control the unforeseen; thus, pragmatism entails a reflexiveness and flexibility that come from the practice of living in such an unpredictable world.

Pragmatism does not focus solely on means; it is not merely instrumental. Rather, the original pragmatists, with their anti-foundationalist convictions, believed that ends as well as means were developed pragmatically, through the critical community of inquiry. There is no metaphysical truth; thus, the basic goals and philosophies of a society are just as subject to debate and pragmatic modification as are the means for reaching that society's goals. In other words, the goals and basic philosophy of a society are justified pragmatically: those goals and philosophies are good or true if their consequences are good or true for the society.

Philosophical pragmatism is evolutionary in nature. It emphasizes adaptation to contingencies, much as biological evolution emphasizes an

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65 This is reflected in Holmes's famous aphorism that "[t]he life of the law has not been logic, it has been experience." HOLMES, supra note 1, at 1.

66 See Bernstein, supra note 64, at 154.

67 See id.

68 See MENAND, supra note 3, at xi–xii. Menand states that the original pragmatists believed that: [I]deas are not "out there" waiting to be discovered, but are tools—like forks and knives and microchips—that people devise to cope with the world in which they find themselves. They believed that ideas are produced not by individuals, but by groups of individuals—that ideas are social. They believed that ideas do not develop according to some inner logic of their own, but are entirely dependent, like germs, on their human carriers and the environment. And they believed that since ideas are provisional responses to particular and unreproducible circumstances, their survival depends not on their immutability but on their adaptability.

ld.

69 See generally WIENER, supra note 3, at ix (describing the influence of evolutionary theory on philosophical pragmatism).
organism's adaptation to its environment.\textsuperscript{70} Indeed, it is probably no coincidence that philosophical pragmatism developed at the same time as evolutionary theories in the biological and social sciences.\textsuperscript{71} In law, pragmatism is particularly compatible with the common law, which itself is evolutionary and contingent.\textsuperscript{72}

In recent years, there has been a revival of pragmatic thought, with people holding a wide range of beliefs claiming to be pragmatists,\textsuperscript{73} or, in some cases, being branded as pragmatists over their strenuous objections.\textsuperscript{74} The new pragmatists share the anti-foundationalist, contextualist, and instrumentalist orientations of the original pragmatists, but they also share some of the insights of postmodern thinking.\textsuperscript{75} Thus, new pragmatists may think that experience is always mediated by language, which is inherently indeterminate, so experience cannot carry the weight it did for the original pragmatists;\textsuperscript{76} the linguistic focus helps to distinguish the original from the new pragmatists.

The distinction between the original and the new philosophical pragmatists may have less significance when we turn to legal pragmatism. Legal pragmatism shares the basic anti-foundationalist, contextualist, and instrumentalist principles of the philosophical pragmatists, though some legal pragmatists argue that they can do very well without philosophical pragmatism.\textsuperscript{77} This kinship is reflected in the thoroughly pragmatic and quite famous quotation from the first legal pragmatist, Oliver Wendell Holmes, Jr., who said that "[t]he life of the law has not been logic; it has been experience."\textsuperscript{78} For legal pragmatists, law is a tool; they do not look

\textsuperscript{70} Id.
\textsuperscript{71} See generally id.
\textsuperscript{73} See Posner, supra note 57, at 30 (describing the range of approaches taken by modern pragmatists).
\textsuperscript{74} Compare Richard Rorty, The Banality of Pragmatism and the Poetry of Justice, in PRAGMATISM IN LAW AND SOCIETY, supra note 57, at 90 (calling Dworkin a pragmatist), with Ronald Dworkin, Pragmatism, Right Answers, and True Banality, in PRAGMATISM IN LAW AND SOCIETY, supra note 57, at 359–88 (criticizing pragmatism).
\textsuperscript{75} See Rorty, supra note 74, at 91.
\textsuperscript{76} See id.; Kloppenberg, supra note 55, at 83, 84–100.
\textsuperscript{78} HOLMES, supra note 1, at 1. Holmes, like the other "pragmatists," did not like the term pragmatism and would not have called himself a pragmatist. See MENAND, supra note 3, at 350–51. Nevertheless, his approach was essentially pragmatic. He viewed law as simply a prediction of what judges would do, see id. at 341–43, and he was responsible for developing the notion of the reasonable person, see id. at 344–46. These are inherently pragmatic approaches. Holmes also said that judges decide first
for grand theories about what law "is," or try to fit particular legal doctrines within some overriding theoretical construct, though theories and constructs might be useful in some contexts.\textsuperscript{79} Rather, they use law, including legal theory, to achieve societal ends.\textsuperscript{80} Richard Posner, who describes himself as a legal pragmatist, said that:

All that a pragmatic jurisprudence really connotes—and it connoted it in 1897 or 1921 as much as it does today—is a rejection of a concept of law as grounded in permanent principles and realized in logical manipulations of those principles, and a determination to use law as an instrument for social ends. It signals an attitude, an orientation, at times a change in direction. It clears the underbrush; it does not plant the forest.\textsuperscript{81}

This quotation reflects the anti-foundationalism, contextualism, and instrumentalism that are inherent in pragmatism.

3. \textit{Pragmatic Justifications in Law}

The Anglo-American common law system is inherently pragmatic. The common law evolves in response to changed conditions and to experience under established doctrine.\textsuperscript{82} As the system itself is inherently pragmatic, we can expect to see pragmatic justifications for the doctrines that arise out of the system. Thus, doctrines announced in common law decisions are often justified explicitly by the predicted consequences of adopting the doctrine.\textsuperscript{83}

and then formulate a justification, implying that the decision is based on the practicalities of the situation. See \textit{Menand}, supra note 3, at 342–43; Oliver Wendell Holmes, \textit{The Path of the Law}, 10 \textit{Harv. L. Rev.} 457, 465–66 (1897).

\textsuperscript{79} \textit{Menand}, supra note 3, at 339.

\textsuperscript{80} See Posner, supra note 57, at 44.

\textsuperscript{81} See \textit{id.} The reference to 1897 is to the publication date of Oliver Wendell Holmes, \textit{The Path of the Law}, 10 \textit{Harv. L. Rev.} 457 (1897), an important statement of legal pragmatism; 1921 is the publication date of Benjamin Cardozo's \textit{The Nature of the Judicial Process}, which Posner describes as quintessentially pragmatist. See Posner, \textit{supra} note 57, at 44 (describing \textit{Benjamin Cardozo, The Nature of the Judicial Process} (1921)). Posner, best known for his law and economics focus, has said that he finds the economic approach to law useful, as it works well for contemporary America, at least in matters where there is "moderate agreement on ends." Posner, \textit{supra} note 57, at 42. Efficiency, the watchword of law and economics, is pragmatic in character.


\textsuperscript{82} See \textit{generally Holmes}, supra note 1.

\textsuperscript{83} See, e.g., Swift v. Tyson, 41 U.S. (16 Pet.) 1, 20 (1842), \textit{overruled by} Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); Freeman v. Puntown/Splashtown, USA, 828 A.2d 752, 755 (Me. 2003) (explaining that subsequent remedial measures are inadmissible as evidence of negligence because allow-
However, it is not just the common law that is pragmatically justified. Because we tend to think pragmatically given our grounding in the common law, statutory interpretation can have pragmatic characteristics as well.\(^{84}\) Thus, we may justify our interpretation of a statute on pragmatic grounds, but if our experience under that interpretation is not good—if the predicted consequences do not materialize—we may reinterpret the statute.\(^{85}\) Once again, I use the development of the *Erie* doctrine as an example. In 1842, when the Supreme Court interpreted the Rules of Decision Act as adopting only state statutory law, and not state common law as the rules of decision in diversity cases in the federal courts,\(^{86}\) the Court noted that determining the “true exposition” of commercial law required “general reasoning and legal analogies” of the sort that both federal and state courts performed.\(^{87}\) In other words, the federal courts were just as good as the state courts at reasoning out these general principles of law, and maybe better. The Court further noted that decisions of judicial tribunals “are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect,”\(^{88}\) suggesting that judicial statements of the law could only be contingent. This is a description of pragmatic legal development.\(^{89}\)

Implicit in the Court’s decision in *Swift* was the notion that allowing federal courts to develop their own common law, independent of state court decisions, would promote uniformity throughout the country, perhaps by pointing out to the states the “true exposition” of contracts and other commercial instruments under “general principles and doctrines of commercial

\(^{84}\) For a discussion of how the common law mindset affects our approach to statutes, see Strauss, *supra* note 72. For an argument that a common law approach should be used to abrogate statutes that have fallen into desuetude, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). See also F.A.R. BENNION, UNDERSTANDING COMMON LAW LEGISLATION (2001).


\(^{86}\) *Swift*, 41 U.S. at 18; *supra* notes 41–45 and accompanying text.

\(^{87}\) *Swift*, 41 U.S. at 19.

\(^{88}\) *Id.* at 18.

\(^{89}\) The *Swift* Court used even more clearly pragmatic language in resolving the substantive question before it, which was whether satisfaction of or providing security for a pre-existing debt constituted consideration for a negotiable instrument so as to bring the party within the bona fide purchaser rule. *Id.* at 15–16. The Court said that it “is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper” so that a creditor can “realize or . . . secure his debt, and thus may safely give a prolonged credit,” and so that the debtor “has the advantage of making his negotiable securities of equivalent value to cash.” *Id.* at 20. In other words, the substantive rule of commercial law that the Court recognized was justified pragmatically.
jurisprudence."90 Once the true exposition of the law is revealed, the states could be expected to fall in behind the federal exegesis, thus promoting national uniformity.91 Indeed, counsel for the plaintiff explicitly argued that such questions of commercial law are of interest to citizens of other states and foreign nations, and that maintaining uniformity throughout the United States was essential if the Court were to "preserve its control over the reason and affections of the people of the United States" as well as maintain the respect of foreign litigants.92 Uniformity, in turn, promotes and aids interstate and international commerce: such commerce can develop more easily if commercial law is uniform throughout the country.93

The actual consequences of the decision in Swift, however, were quite the contrary. States steadfastly refused to alter their own common law, so uniformity was never achieved.94 The effect on commerce—the intended beneficiary of the Swift doctrine—was so negative that there were calls for abolition of the diversity jurisdiction so as to avoid Swift.95 There was considerable uncertainty as to what law would apply.96 The law applied in a given state was often different depending on whether the parties were in state or federal court.97 Corporate parties had an incentive to manipulate

90 Id. at 19.
91 This goal was attributed to Swift in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74 (1938). See also Robert H. Jackson, The Rise and Fall of Swift v. Tyson, 24 A.B.A. J. 609, 610 (1938) (noting Swift's goal of achieving uniformity "through the persuasive example of Federal courts' decisions").
92 Swift, 41 U.S. at 9.
93 See MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860, at 245-52 (1977) (stating that the early American judiciary sought to promote commercial and industrial growth with the Swift decision). It could be argued that the reasoning of Swift, implicit or explicit, was limited to the commercial law context, but it was soon applied to all common law development. Holmes, a vociferous critic of Swift, said that the decision "did no great harm when confined to what Story dealt with [a narrow question of commercial law], but under the influence of Bradley, Harlan, et al. it now has assumed the form that upon questions of the general law the U.S. courts must decide for themselves." Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 17, 1928), in 2 HOLMES-POLLOCK LETTERS, supra note 53, at 215. In other words, it was later expansion of the doctrine that did the most harm. Holmes had dissented in several opinions in which the Court applied and expanded Swift. See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting); S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370 (1910) (Holmes, J., dissenting); see also JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 251-53 (The MacMillan Co. 1948) (1909); Jackson, supra note 91, at 611-13 (describing expansion of Swift doctrine).
94 See Erie, 304 U.S. at 74.
95 See id. at 77 (citing articles and proposed statutes).
96 See id. at 74.
their citizenship to take advantage of the rules in federal courts. With the state of the substantive common law in some disarray as a result of Swift, the Supreme Court in 1938, in Erie Railroad Co. v. Tompkins, overruled Swift, and the statutory term “laws of the several states” is now held to encompass common law as well as statutory law.

The pragmatic justifications for the decision in Erie were much more explicit than the pragmatic justifications for Swift. Some of the pragmatic justification for Swift has been articulated in later cases and commentary, including Erie itself. Erie’s pragmatic justification, however, is mostly negative. It is a demonstration, not that the Erie solution is pragmatically superior, but that the Swift doctrine did not work. Indeed, it did not take long for critics to identify some of the practical problems that the Erie doctrine itself presented. One commentator, writing just eight years after Erie, suggested that Erie created issues relating to the impact of federal substantive law on state law; the choice, in federal court, of which state’s laws to apply; the distinction between substance and procedure, as the Erie doctrine applied only to substantive law; and the problem of determining what a state’s law is. Most of these issues continue to vex us, and the Erie doctrine continues to generate more than its share of cases and commentary.

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98 See, e.g., Black & White Taxicab, 276 U.S. at 524.

99 See, e.g., Black & White Taxicab, 276 U.S. at 524.

99 Erie, 304 U.S. at 78. The Court did not simply say that the Swift decision did not produce the desired result. The Court went on to hold that Swift’s interpretation of the Rules of Decision Act was unconstitutional. Id. at 77–78. Justice Reed concurred in Erie on the ground that the constitutional rationale was unnecessary; according to Justice Reed, all the Court had to do was hold that the Swift decision had been an error in statutory interpretation. Id. at 90–91. While the precise reasons for the Court’s decision to rely on the Constitution as ground for its decision are not known, that decision may itself reflect a pragmatic choice: if the Swift interpretation was unconstitutional, Congress could not overrule Erie by amending the Rules of Decision Act.

100 See id. at 74; Jackson, supra note 91, at 610.

101 See Erie, 304 U.S. at 74.

102 Id.


104 It had been established even before Clark wrote that a federal court sitting in diversity must apply the choice of law rules of the state in which it sits. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941). Clark, however, argued that the issues are not so simple as Klaxon suggests, and that difficulties remain. See Clark, supra note 103, at 286–88 (citing, among others, Walter Wheeler Cook, The Logical and Legal Bases of the Conflict of Laws (1942)).

4. Justice and Pragmatism

It has been said that justice is the single most important characteristic of a legal or political system. But that statement suggests two issues: the first is why justice is so important; the second is how to define justice. While there are many ways to approach these issues, pragmatism will give us one important perspective on them.

Let us start with why justice is so important. There is at least one very good instrumental (pragmatic) reason for that: a legal or political system that does not comport with the community’s view of justice will be unstable, as the people strive to reform or overthrow it. Thus, the very survival of the system may depend on its ability to do justice. But if stability is the reason for striving to do justice in a legal or political system, a pragmatist might suggest that the most important issue is that the people perceive the system to be fair or just. To be sure, as I suggested earlier, a system normally will not be perceived as fair or just unless it achieves justice most of the time. But if one must choose between actual and perceived justice, a pragmatist might well choose perceived justice.

This brings us to the second issue: how to define justice. Pragmatism does not admit that there is any single substantive definition of justice that is always correct. Rather, pragmatism’s anti-foundationalism and contextualism would lead to the conclusion that justice is defined by the people in a given community of interest. It is entirely possible, of course, that a particular community of interest will have reached a broad consensus on the definition of substantive or distributional justice, especially if that community of interest has a long history. Such a consensus definition of justice may well appear to be foundational and universal, especially to the people within the community, but a pragmatist would insist that it is in fact contingent and contextual.

Furthermore, a pragmatist will recognize that perfect substantive justice, however defined, is elusive, because even within a community of interest that has achieved consensus, there will still be people who disagree


See RAWLS, supra note 26, at 3 (noting that justice is the “first virtue of social institutions”); Kearns & Sarat, supra note 26, at 1–2, 5.

This might be especially true in a democracy, where the people have the means of bringing about peaceful change. But the people in non-democratic countries are not without alternatives. They can produce a revolution, for example, and history is replete with instances of that.

See supra note 33 (discussing the strain on our concept of the criminal justice system when many people on death row are exonerated).

See supra text accompanying notes 59–60.

See supra text accompanying notes 61–62.

See supra text accompanying notes 61–62.
both about what substantive justice is and about how to achieve it, especially since events can cause our conception of justice to evolve.\textsuperscript{112} Thus, a pragmatist is likely to be attracted to procedural notions of justice: ensuring that the process of reaching decisions within the community of interest is fair, or at least perceived to be fair. Procedural justice is likely to entail such things as providing people an adequate opportunity to press their views or their cases, and ensuring impartial judging.\textsuperscript{113} If the people believe that the system is fair, they are more likely to accept its decisions, even if they lose on a given issue. Indeed, it may be easier to reach consensus on the basic characteristics of procedural justice than on the more difficult issue of substantive justice.

In short, pragmatism is likely to favor a focus on procedural justice so that the people within the community of interest perceive that they are being treated fairly. But justice is a tool for a pragmatist: it helps to keep the system working smoothly and keeps the people content. The ultimate definition of substantive justice is irrelevant, so long as there is some agreement about it.

5. Conclusion

Pragmatic justifications are anti-foundational, contextual, and instrumental.\textsuperscript{114} They look to what works in a particular society, and not to grand theories. But there are several important things to note about pragmatic justifications for a procedure or doctrine, all of which we should consider when we offer pragmatic justifications for a doctrine or procedure. First, even if the procedure or doctrine "works," in the sense that its consequences are something we value, something else might well work better.\textsuperscript{115} But if something appears to be working, there may be little incentive to look for something else that might work better.

Second, when we say that a procedure or doctrine works, we may be saying more than we think—or ignoring important pragmatic issues that underlie the procedure or doctrine. Who does the procedure or doctrine benefit—in other words, who does it work for? Is that someone we want to benefit? Why? What are we trying to accomplish with the doctrine or procedure, and why? These are important questions, and they need to be

\textsuperscript{112} See supra text accompanying note 69.

\textsuperscript{113} As I indicated in my discussion of justice, procedural justice has been well-studied and by now has a number of well-accepted characteristics. See supra notes 34–36 and accompanying text. Of course, I am now speaking of American, or perhaps more broadly western, notions of procedural justice. A pragmatist would acknowledge that other cultures may well have different ideas. Even within western culture, the differences between adversarial and inquisitorial systems are significant, and each has advocates who claim justice is better served using one rather than the other. See supra note 30.

\textsuperscript{114} See supra text accompanying note 58.

\textsuperscript{115} See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES (1994) (discussing institutional competence and the allocation of decision-making authority).
made explicit.

Third, pragmatic considerations may function not only to justify a procedure or doctrine, but to undermine it as well. We may think that a procedure or doctrine works well, but learn, through scientific investigation or experience, that it does not. The discussion of Swift and Erie illustrates this. Or the procedure or doctrine may work well when it is first devised, but not withstand the test of time. Such pragmatic pressure may then dictate a change.

B. Theoretical Justifications

Another class of justifications for a procedure or doctrine is the theoretical. By this I mean a justification that appeals to some principle or theory from which the justification is derived, deductively, through reason. I use the term “theoretical” to indicate an appeal to some principle that is much broader than the procedure or doctrine that is being justified—one that reflects a particular world view or system of politics, law, or morals.

1. The Form of a Theoretical Justification

A theoretical justification for a procedure or doctrine takes the form that the procedure or doctrine comports with or reflects a fundamental theory. It may even assert that the procedure or doctrine is somehow necessitated by the theory. The theory can be one of several varieties. It could be a political theory, such as the utilitarian theory that governments must strive to achieve the greatest good for the greatest number.\textsuperscript{116} It could be a moral theory, such as a theory about distributional justice.\textsuperscript{117} It could be a theory of law—one that posits the nature and source of law, for example.\textsuperscript{118}

Theories can be derived in one of two ways. First, they can be derived through reason. This would entail the application of logical methods to certain premises that may be taken as axiomatic or that may be based on some kind of faith, whether religious or political. The premises on which these theories ultimately rely are, of course, open to debate, though a given society may exhibit broad agreement about those premises. Indeed, the


\textsuperscript{117} The most influential theory of justice in the last half of the twentieth century was JOHN RAWLSS, A THEORY OF JUSTICE (1971). His theory, in a nutshell, says that distributional justice is achieved by distributing goods according to the distribution that would be achieved by people making decisions under a “veil of ignorance”—with no knowledge of who or what they will be in society. Id. at 11–12.

\textsuperscript{118} Some legal philosophers who have posited theories of law include John Austin and H.L.A. Hart. JOHN AUSTIN, THE PHILOSOPHY OF POSITIVE LAW (Robert Campbell ed., 5th ed. 1885) (describing a positivist theory of law); H.L.A. HART, THE CONCEPT OF LAW (2d ed. 1994) (examining issues underlying the question “what is law?”).
principles are often seen as universal—representing a Truth that applies in all times and places. In many cases, the basic decisions about these premises were made so long ago that no one remembers how they were made, and that may give them the feel of universality.

A second way of deriving theories is through experience—a pragmatic derivation. In my discussion of philosophical and legal pragmatism, I indicated that pragmatists may find that a unifying theory is useful to society, perhaps because it gives the people something to identify with, to believe in, and to fight for.\textsuperscript{119} This helps develop cohesion in the society. Or a general theory might help to unify a particular area of law, thus giving it some structure and, perhaps, ease of application.\textsuperscript{120} If the general theories are pragmatically derived, it does not matter whether they are “right” in some cosmic sense—only that they work. By contrast, theorists who rely on reason are likely to be seeking “truth.”

I should note that the derivation of theories—whether pragmatic or rational—may no longer be obvious, especially when the principle or theory has long and revered status in society. Thus, we could be mired in discussions about the “truth” of various theories when what we really mean to argue about is whether those theories are valuable to society—and vice versa. In any event, once the theory is in place, however it is derived, it forms a basis for reasoning from the theory to the practice. Thus, the theory functions as foundational even if it was, originally, pragmatically derived. We may then find people arguing that a given procedure or doctrine is (or is not) logically consistent with that theory.

2. Theoretical Justifications and the Law

To illustrate the use of theoretical justifications, I turn again to the development of the Erie\textsuperscript{121} doctrine. A particular theory about the nature of the common law lay behind the doctrine of Swift v. Tyson,\textsuperscript{122} which held that the phrase “laws of the several states” in the Rules of Decision Act\textsuperscript{123} encompassed only state legislation and not the state common law.\textsuperscript{124} That theory was that the common law exists apart from the particular jurisdiction in which it is manifested.\textsuperscript{125} The common law is not the law of a par-

\textsuperscript{119} \textit{See supra} Part II.B.2.

\textsuperscript{120} \textit{See} Wells, \textit{supra} note 28, at 2355–56 (1990) (describing Oliver Wendell Holmes, in \textit{The Common Law}, as abstracting tort rules to an “all encompassing principle of tort liability” which is then “justified by general considerations of policy”).

\textsuperscript{121} Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

\textsuperscript{122} 41 U.S. (16 Pet.) 1 (1842), overruled by Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).


\textsuperscript{124} \textit{Swift}, 41 U.S. at 18; \textit{see also supra} note 93 (discussing the scope of the \textit{Swift} decision).

\textsuperscript{125} Clark, \textit{supra} note 103, at 274–75. The phrase “brooding omnipresence” was apparently first used to describe this theory by Justice Holmes in his dissent in \textit{Southern Pacific Co. v. Jensen}, 244 U.S. 205 (1917), where he said, “[t]he common law is not a brooding omnipresence in the sky but the articu-
ticular state, but is a system of logical rules, as accessible to federal judges as it is to state judges. Judges do not create the common law, but merely declare it. Hence, a particular judicial opinion in a particular state cannot be "law," but is merely evidence of law. In interpreting the Rules of Decision Act, then, Justice Story and the Court thought that the phrase "laws of the several states" did not include the common law, and that federal judges were free to disregard state courts' declarations of the common law.

Justice Story's theory of the nature of the common law has not withstood the test of time. No one today would argue that law exists apart from the particular state in which it is manifested. Common law judges do not merely declare law—they make it. Thus, a state's judges are making law for that state when they render common law decisions. This new way of looking at the common law clearly underlies the Erie decision. If common law judges were making law, then the phrase "laws of the several states" in the Rules of Decision Act must encompass common law as well as statutory law, and federal courts sitting in diversity must follow that common law.

There are a number of theories or approaches that helped lead legal scholars to this way of thinking, though none of them enjoys universal adherence. Positivist legal theories that held that the law consisted of the authoritative pronouncements of the sovereign could challenge the Swift view if judges were seen as a part of or as representing the sovereign. Under legal pragmatism, there is nothing inherently true or false about a legal rule; it is simply useful or not useful for the society in which it is used. Thus, the law cannot exist apart from that society, and each state

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126 Clark, supra, at 274–75 (discussing theory behind Swift). The opinion in Swift was written by Justice Joseph Story, and he apparently traced the idea to Cicero. See James Mcclellan, Joseph Story and the American Constitution 182 (1971). More than one commentator has placed the blame for Swift (if blame it is) squarely on Justice Story's shoulders; see, e.g., John Chipman Gray, The Nature and Sources of the Law 238–39 (1909); Letter from Oliver Wendell Holmes to Frederick Pollock (Feb. 17, 1928), in 2 Holmes-Pollock Letters, supra note 53, at 215.

127 Id.

128 Swift, 41 U.S. at 18.

129 Id.

130 See Austin, supra note 118, at 34 (describing the concept of positive law); HART, supra note 118, at 244–54 (describing legal positivism).

131 Supporters of Swift might argue that the judiciary cannot be identical with or representative of the sovereign at least where the judiciary is unelected and unaccountable. H.L.A. Hart, writing in 1961, has an answer to this in the concept of the "rule of recognition," where the polity chooses, as one fundamental rule, how it will recognize law. See Hart, supra note 118, at 97–107 (discussing the concept of the "rule of recognition"). If a state chooses to so recognize the pronouncements of its judges, those pronouncements are law. Id. at 105.

132 See supra text accompanying notes 59–60.
must decide for itself what legal rules are useful. Legal realists argued that
law was inherently political, and reflected society's political give-and-take
as well as human frailty.133 These theories, which differed substantially
from the theory that underlay Swift, made it more difficult to continue to
justify the doctrine of Swift. Thus, changes in the underlying theory of the
law helped bring an end to the Swift era.

3. Justice and Theory

Theories of justice can be expected to play an especially significant
role in justifying legal institutions, procedures, and doctrines, because jus-
tice and law are closely associated in the public mind. We speak of crim-
nals being brought to "justice." We strive to do "justice" between two in-
dividuals who are locked in a civil dispute. In short, the law facilitates our
efforts to achieve a just society, both globally and individually.134 Thus,
law will always be functioning under whatever theory or theories of justice
the society as a whole subscribes to.135 If society accepts a theory of distribu-
tional justice that allocates goods based on need, for example, it could,
through reasoning from that basic theory, devise legal institutions, proce-
dures, and doctrines that can be expected to facilitate distribution based on
need. The society might use the language of rights to capture its theory: it
could assert that people have a right to adequate food and shelter, for ex-
ample, and devise legal institutions, procedures and doctrines that are
likely to promote those rights.136

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133 See, e.g., JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE vii, 2–3 (1950) (noting the inherent human fallibility in the judicial process); JEROME FRANK, LAW AND THE MODERN MIND x–xiii, 6 (Anchor Books 1963) (1930) (discussing the law's innate fallibility). Some legal realists cited Oliver Wendell Holmes, who was the first legal pragmatist, as a direct ances-
tor of their movement. See id. at 270–71. Later, Critical Legal Studies ("CLS") took a similar line, differ-
ing from legal realism largely in the use CLS makes of post-modern ideas such as the indetermi-
nacy of language. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 11–13 (1987) (noting
that some people argue that CLS is merely a continuation of the legal realist enterprise, but disputing
the idea); see also MENAND, supra note 3, at 370 (noting that pragmatism is a "variant of many strands
in nineteenth-century thought"); Robert Gordon, Critical Legal Histories, in CRITICAL LEGAL STUDIES

a system of social choice, one in which government provides for the allocation of resources, the legiti-
mate use of violence, and the structuring of social relationships").

135 See id. at 6 (saying that legal culture is "a manifestation of ideology").

136 One can believe that a person has rights independent of any particular society. Natural law
theorists would hold such a view, for example. Alternatively, one could have a particular right because
such a right is consistent with, or even mandated by, a broader theory that the society has adopted.
Thus, rights can be either foundational themselves or derivative. The language of rights is ubiquitous
in American legal and political culture, and much has been written about rights. See, e.g., RONALD
DWORKIN, A MATTER OF PRINCIPLE 355–97 (1985) (discussing rights in terms of censorship and
freedom of the press); RONALD DWORKIN, LAW’S EMPIRE 152–64 (1986) (discussing legal rights in
terms of pragmatism); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (emphasizing individual
human rights in his attempt to define and defend a liberal theory of law); MARY ANN GLENDON,
This use of a theory of justice as justification is different from the pragmatic justice described above. When a theory of justice forms the basis for a justification, the legal procedure or doctrine will be justified through reason. We start with a theory of justice, and we determine whether a procedure or doctrine is consistent with that theory. To continue with the example of the society that has chosen a theory of distributional justice based on need, such a society might reason that a progressive tax system is more consistent with its foundational theory of justice than a regressive tax system. The justification would end with that conclusion, and the pragmatic consequences would not enter into the picture. Again, I distinguish this form of justification from the pragmatic. It is, of course, possible to reach the conclusion that a progressive tax system is preferable without regard to a theory—the conclusion could be based solely on the desirability of the economic and social consequences of the alternatives. Theory would not enter into the picture.

The theories of justice that I have been describing so far relate to substantive justice, but procedural justice could be justified theoretically as well. For example, starting again with the theory that distributional justice requires that goods and services be distributed according to need, one could, through reason, justify a rule that requires the government to provide attorneys for people who cannot afford them. Such a justification

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137 Carried to its extreme, and untempered by pragmatism, a theory of distributional justice based on need leads to societies like the former Soviet Union, where theory drove the organization of government, the economy, and the law. That experiment in the application of theory to the real world was ultimately unsuccessful. There are failures at the opposite extreme as well. A capitalist theory of distributional justice, untempered by pragmatism, can lead to gross disparities in wealth, which is also an unstable situation. The United States, with its capitalist outlook, so far has been more successful at tempering theory with pragmatics than the former Soviet Union was.

138 Reason could well justify a rule that the government provide counsel for indigent people in both civil and criminal litigation. In the United States, the Supreme Court has required counsel in criminal cases, but not necessarily in civil cases. See Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 31–32 (1981) (applying the three-part balancing test from Mathews v. Eldridge, 424 U.S. 319 (1976) to determine when the Fourteenth Amendment’s Due Process Clause requires court-appointed counsel for an indigent civil litigant); Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (requiring counsel for indigent criminal defendants). Nevertheless, legal aid for the indigent is generally available throughout the country in civil matters as a matter of policy. See generally REGINALD HEBER SMITH, JUSTICE AND

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would not be concerned with consequences; rather, it would simply be that the theory of distributional justice requires that services be provided to those who need them but cannot afford them. Again, such a justification differs from the pragmatic, which would consider the benefits, in terms of such things as accuracy and acceptance, that comes from seeking to ensure that litigants have competent counsel.

C. Historical Justifications

Sometimes a procedure or doctrine is justified on historical grounds. In this section I will describe two forms of historical justification, and then describe the use of history as justification in _Swift_ and _Erie_. History is often the last refuge of justification for a procedure or doctrine, offered when pragmatism, theory, or even justice can no longer give it much support. But there may be more to historical justifications than meets the eye, which means that historical justifications sometimes have surprising life.

1. The Forms of Historical Justification

There are two forms of historical justification. The first is a straightforward appeal to the pedigree of the procedure or doctrine. It justifies a procedure or doctrine on the ground that society has been following the particular procedure or doctrine for so long that it should continue to do so. In essence, it puts the burden of proof on those who would seek to change the procedure or doctrine. The second form of historical justification is an explicit appeal to an epochal period in a society’s history. It justifies a procedure or doctrine on the ground that the procedure or doctrine is consistent with the way things were done during a relevant historical period. This second form of historical justification calls on us to make an investigation of the history of the period and to follow it, but there may be a non-historical justification for choosing that methodology or that historical period in the first place. Originalism as a method of constitutional interpretation is an example of this form of historical justification.

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THE POOR (3d ed. 1924) (noting that most cases that legal aid societies receive are claims for wages, domestic difficulties, and divorces); Richard L. Abel, _Law Without Politics: Legal Aid Under Advanced Capitalism_, 32 UCLA L. REV. 474, 475 (1985) (noting the phenomenal growth of civil legal aid in the United States and among other countries); Alan W. Houseman, _Political Lessons: Legal Services for the Poor—A Commentary_, 83 GEO. L.J. 1669 (1995) (discussing the early history of legal services and a basis for reinvigorating such programs); Chester L. Mirsky, _The Political Economy and Indigent Defense: New York City, 1917-1998_, 1997 ANN. SURV. AM. L. 891, 952 (discussing the conversion of New York City’s Legal Aid Society into a multi-service law firm for both criminal and civil representation of the poor). Law school-supported clinics also provide legal aid to indigents in both civil and criminal matters. See Barbara Bezdek, _Reconstructing a Pedagogy of Responsibility_, 43 HASTINGS L.J. 1159 (noting the pressure of the Legal Theory and Practice (“LTP”) courses); Suzanne Valdez Carey, _An Essay on the Evolution of Clinical Legal Education and Its Impact on Student Trial Practice_, 51 U. KAN. L. REV. 509, 524 (2003) (using the Legal Aid Clinic in Kansas as an example of how third year law students represent indigent clients in domestic relations, landlord-tenant, collections, and other civil actions).
While the first form of historical justification may appear to be a rather simplistic appeal to longevity, and thus somewhat formalistic, there are at least four reasons (other than the law's naturally conservative bent) why historical pedigree might counsel in favor of keeping a procedure or doctrine in place. First, many people may have come to rely on the procedure or doctrine, so that changing it would be unfair or would disrupt governmental, business, or social relationships. In other words, abandoning the historical procedure or doctrine has negative foreseeable consequences. Second, we might fear that if we abolish the procedure or doctrine now, we will find that we need it in the future, and it would be too difficult to revive it. In other words, we are concerned about extinction. Third, we may fear the unintended and unforeseen consequences of abandoning the procedure or doctrine. The procedure or doctrine, after all, must be replaced with something else, and that something else is untested. Furthermore, abolishing the procedure or doctrine and replacing it with something else could produce a chain reaction that would damage other procedures or doctrines that we wish to preserve. Finally, we may simply find that the procedure or doctrine helps define us as a people; there is a cultural attachment to it that is difficult to break. Thus, what appears to be a straightforward appeal to longevity may be much more complicated than that, with (often unacknowledged) functionalist or pragmatic aspects to it.

The second form of historical justification also has more to it than might appear at first. If we are to make an appeal to an epochal period in our history, there must be some further reason why we would do that. In other words, we must justify both the appeal to an epochal period and the particular epoch we choose. Those justifications may have nothing whatever to do with history. Indeed, they are likely to be either theoretical or pragmatic. Originalism in constitutional interpretation is an appeal to such an epochal period, but the choice of originalism needs further justification. A theoretical justification for using originalism is that we have adopted a governmental structure based on a theory of separation of powers, and that theory holds that making law is not a judicial function. Any constitutional interpretation that went beyond the original intent or understanding of the constitutional provision at issue would entail judges making law, and so would itself be unconstitutional. Hence, originalism is the proper

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139 See SAVIGNY, supra note 13, at 24–31.
140 ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 79–81 (2003); ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 145–47 (1990). Of course, originalism itself is quite a complex set of theories, doctrines, and procedures, and justifying its use, or arguing against such a justification, has occupied considerable time and attention from judges and legal commentators. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1997) (providing a more historical approach to how the Constitution was drafted and ratified for those seeking to ascertain its original meaning); Jack N.
method of constitutional interpretation.

One could also provide a pragmatic justification for using originalism. For example, we could argue that we need to restrain unelected, accountable judges in their decision-making, and originalism, while imperfect, works reasonably well at keeping judges from making law.\textsuperscript{141} The two kinds of justification are similar, as both focus on the need to keep judges from making law, but the theoretical justification appeals to the theory of separation of powers and reasons from that theory, while the pragmatic justification identifies a goal and seeks a way to meet that goal. In any event, once the task of justifying the appeal to an epochal period is complete, justifications for specific procedures or doctrines will take the form that the procedure or doctrine is like the one that existed in that epochal period.\textsuperscript{142}

2. Historical Justifications in Law

Once again, I use the \textit{Swift/Erie} cases to illustrate historical justifications. There is a historical justification of the first type offered in both \textit{Swift} and \textit{Erie}. In \textit{Swift}, Justice Story said that the Court had always, in “all the various cases which have hitherto come before us for decision,”\textsuperscript{143} assumed that the Rules of Decision Act, which mandated that the “laws of the several states” operate as rules of decision in diversity cases,\textsuperscript{144} applied only to statutory law and not to case law.\textsuperscript{145} Justice Story cited no authority

Rakove, \textit{The Original Intention of Original Understanding}, 13 \textit{CONST. COMMENT.} 159, 159 (1996); Scalia, supra note 37 (advocating an originalist approach to constitutional interpretation).

\textsuperscript{141} See, e.g., \textsc{Earl M. Maltz}, \textit{Rethinking Constitutional Law: Originalism, Intervention, and the Politics of Judicial Review} 18 (1994) (noting that originalist interpretations of the Tenth Amendment restrain the actions of federal judges); Scalia, supra note 37, at 861 (describing originalism in its “undiluted form” as a strict adherence to stare decisis even if “it got the meaning of the Constitution wrong”).

\textsuperscript{142} The appeal to an epochal period creates a number of problems for lawyers and judges, not the least of which is the need to engage in historical research and analysis—a task that many lawyers and judges are ill-equipped to do. See Martin S. Flaherty, \textit{History “Lite” in Modern American Constitutionalism}, 95 \textit{COLUM. L. REV.} 523, 526 & n.16 (1995); Martin S. Flaherty, \textit{The Practice of Faith}, 65 \textit{FORDHAM L. REV.} 1565, 1570–71 (1997); cf. Linda S. Mullenix, \textit{The Influence of History on Procedure: Volumes of Logic, Scant Pages of History}, 53 \textit{OHIO ST. L.J.} 803 (1989) (discussing the importance of teaching law students procedural history and the effort to address the paucity of research in this area). The question then becomes to what extent lawyers and judges will rely on the work of historians. In addition, historical knowledge is not set in stone. Canonical views of history may change, and our views of the law may have to change with them. See Neil M. Richards, \textit{Clio and the Court: A Reassessment of the Supreme Court’s Uses of History}, 13 \textit{J.L. & POL.} 809 (1997) (arguing against the creation of a “common law of history”); Emil A. Kleinhaus, Note, \textit{History as Precedent: The Post-Originalist Problem in Constitutional Law}, 110 \textit{YALE L.J.} 121 (2000).

\textsuperscript{143} \textit{Swift v. Tyson}, 41 U.S. (16 Pet.) 1, 18 (1842).

\textsuperscript{144} Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1652 (2000)).

\textsuperscript{145} \textit{Swift}, 41 U.S. at 18. Justice Story also invoked history to justify use of the bona fide purchaser rule, saying that the rule that a bona fide purchaser can recover even if the original purchaser could not is “so long and so well established, and so essential to the security of negotiable paper, that it
for this proposition, and it is of questionable accuracy.\footnote{See Jackson, supra note 91, at 610 (1938) (noting that the Supreme Court and Justice Bushrod Washington sitting as a circuit justice, both prior to Swift, applied state common law in federal courts). As Jackson notes, it may have been the force of Justice Story's personality that explains the Swift doctrine. See id. (quoting John Chipman Gray, Nature and Sources of the Law 253 (2d ed. 1927)).} By the time Erie was decided, however, the doctrine had nearly another hundred years of history, and Justice Story's assertion was quoted favorably in a dissenting opinion by Justice Butler, who said that the Swift doctrine had been followed uniformly in those hundred years.\footnote{See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 83–85 (1938) (Butler, J., dissenting).} Indeed, he asserted that the Swift doctrine was rarely even questioned.\footnote{See id. at 84 (Butler, J., dissenting). However, Swift had been questioned in Supreme Court dissents, many of them authored by Justice Holmes and joined by other justices. See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 535 (1928) (Holmes, J., dissenting); S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); Kuhn v. Fairmont Coal Co., 215 U.S. 349, 370–72 (1910) (Holmes, J., dissenting). In addition, the problems associated with the Swift doctrine led to numerous proposals in Congress, including proposals to do away with the diversity jurisdiction. See S. Rep. No. 72-530, at 1–2 (1932); Campbell, supra note 97, at 809–10; Jackson, supra note 91, at 613 & n.8. Swift's interpretation of the legislative intent behind the Rules of Decision Act was also questioned in Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 84–88 (1923).} Both Justice Story in Swift and Justice Butler in Erie thus used a historical justification of the first type to support their determination that the Judiciary Act of 1789 applied only to statutory law, and not to case law. In other words, the length of time the doctrine had been employed was sufficient to justify its continued use, or at the very least to require an extremely strong justification for abandoning it. Neither Justice explicitly invoked any of the concerns that usually underlie a historical justification, but it is worth considering them. First, if a procedure or doctrine really has been in place for a very long time, people may have come to rely on it—to have ordered their affairs around it. But reliance in this instance may not have the force it would have in other contexts. The Swift doctrine allowed people to order their affairs in such a way as to avoid the requirements of state law, with no apparent countervailing benefits.\footnote{See Erie, 304 U.S. at 73–74 (noting that in Black & White Taxicab & Transfer Co., 276 U.S. 518 (1928), a cab company reincorporated in another state in order to create diversity and thus have access to federal court, where the common law rules were more favorable to its position).} Second, the concurring opinion of Justice Reed in Erie may reflect a fear of extinction. He objected to calling the Swift doctrine unconstitutional, noting that the first Congress felt a need to legislate about the rule of decision to be followed in federal courts.\footnote{Id. at 90–91.} While Justice Reed was not explicit about this, he may have wanted to leave it open to Congress to decide whether to accept
Erie’s new interpretation of the Rules of Decision Act—a course that was eliminated by the majority’s holding that the Swift regime was unconstitutional.\textsuperscript{151} Third, there could easily be concern over the consequences of the new \textit{Erie} doctrine. Though none of the justices articulated such concerns, within eight years of the \textit{Erie} decision, one commentator had identified several unresolved issues that \textit{Erie} raised, including the impact of federal law on local law, the choice of state law in the federal courts, the difficulty of distinguishing substance from procedure, and the question of how federal courts are to determine state law when state law itself is unsettled.\textsuperscript{152} Finally, it is doubtful that one could successfully argue that the \textit{Swift} doctrine somehow defined us as a people. In short, the considerations underlying a historical justification of the first type seem to support the \textit{Erie} decision.

The majority in \textit{Erie}, which voted to overrule \textit{Swift},\textsuperscript{153} could not make use of a historical justification of the first type. One of the majority’s arguments, however, might be a variation on a historical justification of the second type, albeit a justification that supported abandoning the historical practice. The \textit{Erie} majority noted that a recent article by Charles Warren cast doubt on the \textit{Swift} interpretation of the Rules of Decision Act.\textsuperscript{154} Warren examined drafts and other documentation and concluded that Congress had not intended to define the term “laws” in the Rules of Decision Act as limited to statutory law.\textsuperscript{155} This is a form of originalism, which as I noted, is a historical justification of the second type. It invokes the original intent of the drafters.

3. \textit{Justice and History}

Just as justice can be defined pragmatically or theoretically, it can also be defined historically. We might, for example, assume that a particular procedure or doctrine is just because we have been using the procedure or doctrine for a long time. If we have thought of the procedure or doctrine as just for many decades, we may have little incentive to reconsider it. In-

\textsuperscript{151} \textit{Id.} at 79–80.
\textsuperscript{152} See Clark, \textit{supra} note 103, at 280–95 (1946); \textit{supra} note 104.
\textsuperscript{153} \textit{Erie}, 304 U.S. at 79–80.
\textsuperscript{155} See Warren, \textit{supra} note 148, at 51–52, 85–88. Quoting the original draft, Warren noted that it referred to the “Statute law of the several States in force for the time being and their unwritten or common law now in use,” and that that phrase was eliminated in favor of the phrase now in use: “laws of the several States.” \textit{Id.} at 86. Warren concluded that the phrase “laws of the several States” was intended to substitute for the longer and more cumbersome phrase that had included both statute law and common law as within the mandate of the Rules of Decision Act. \textit{Id.}
deed, the length of time that we have been using a procedure or doctrine may create a reliance interest that would make it unjust to abandon it, at least without accommodating those who have relied on it. To undermine people’s settled expectations might require a substantial pragmatic or theoretical justification.\textsuperscript{156} A negative example is \textit{Erie}, where the reliance interest in the \textit{Swift} doctrine was not strong, and the pragmatic and theoretical reasons for abandoning \textit{Swift} were compelling. It was hard to argue that the \textit{Swift} doctrine was just, despite its historical pedigree.

We might also attempt to define justice by appealing to an epochal period in our history, such as the founding or the ratification of the Civil War amendments. We sometimes hear arguments, for example, that the death penalty cannot be cruel and unusual punishment (and therefore unjust) because it was an accepted form of punishment at the time the Constitution was ratified, and the Constitution even refers to it.\textsuperscript{157} But our views of justice do change over time. At one time, the country’s official view of justice was that it permitted separate but equal facilities for whites and blacks.\textsuperscript{158} At one time, the country saw no injustice in denying women the right to vote or to serve on juries.\textsuperscript{159} The death penalty, too, is under attack as unjust, because it runs too great a risk of being imposed on the innocent\textsuperscript{160} or because its application seems to vary by geographical region or by the race of the perpetrator or the victim.\textsuperscript{161}

\textsuperscript{156} Of course, we do sometimes upset people’s settled expectations, and that often provokes arguments about the justice of the particular course of action. \textit{See, e.g.}, \textit{Rush v. City of Maple Heights}, 147 N.E.2d 599, 606–07 (Ohio 1958) (overruling precedent that had treated personal injury and property damage as separate causes of action for purposes of claim preclusion, with the result that the plaintiff lost her claim for personal injury because of her prior action for property damage). The decision in \textit{Rush} prompted a dissent in which the dissenting judge invoked reliance. \textit{See id.} at 608–09 (Zimmerman, J., dissenting). Courts have also upset settled expectations more recently. \textit{See Lampf v. Gilbertson}, 501 U.S. 350, 355–56 (1991) (applying, in a securities fraud case, a statute of limitations borrowed from federal law rather than state law, and resulting in the case being dismissed as time-barred); \textit{James M. Beam Distilling Co. v. Georgia}, 501 U.S. 529, 543–44 (1991) (holding that when a case that changes the law is applied to the case in which the new rule is announced, it must also be applied to all pending cases that raise the issue). The ramification of these two cases was that many securities fraud cases that had been timely under the old rule were dismissed under the new. Following these two cases, Congress attempted to protect the disappointed litigants by enacting a statute that allowed the old rule to apply to cases that had been timely when filed but were time-barred under the new rule, and allowing the dismissed cases to be reopened, but the Court held the statute an unconstitutional encroachment on judicial power. \textit{See Plaut v. Spendthrift Farm, Inc.}, 514 U.S. 211, 213, 240 (1995).

\textsuperscript{157} \textit{See supra} note 37.


\textsuperscript{159} While some states had granted female suffrage earlier, the nation as a whole did not guarantee women the right to vote until ratification of the Nineteenth Amendment in 1920. The Supreme Court did not guarantee women the right to serve on juries until 1975. \textit{Taylor v. Louisiana}, 419 U.S. 522, 535–36 (1975).

\textsuperscript{160} \textit{See supra} note 33.

\textsuperscript{161} \textit{See supra} note 33.
This discussion suggests that historical arguments, of whatever type, that a procedure or doctrine is just are particularly vulnerable to pragmatic or theoretical refutation. If our view of justice has changed, whether because of experience or changes in theory, history will be of little help in maintaining a procedure or doctrine that we now view as unjust. Nevertheless, historical pedigree for the old ideas may make it difficult for new ideas to penetrate the collective consciousness, and may make it difficult for us to abandon a procedure or doctrine that may be unjust under contemporary standards. The death penalty is a prime example: most of the western world and much of the non-western have abandoned the death penalty, but we cling to it.162 Once again, the burden of proof seems to be on those who would upset history.163

E. Summary and Conclusion

I have identified four categories of justifications for a procedure or doctrine: justice, pragmatism, theory, and history. Justice—an appeal to fairness—is an overarching kind of justification, sometimes standing alone

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162 There is undoubtedly more going on with the death penalty than a clash between history and justice, though that clash is important. The pragmatic debates over such matters as deterrence, cost, and closure for the victims are far from settled, though the evidence seems to favor the opponents of the death penalty on most, if not all, of the pragmatic issues. See Vik Kanwar, Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 244 (2001-2002) (discussing the inherent inconsistency in the individual victim requirements for closure in acts of mass violence); Michael L. Radelet & Ronald L. Akers, Deterrence and the Death Penalty: The Views of the Experts, 87 J. CRIM. L. & CRIMINOLOGY 1, 7-11 (1996) (demonstrating that top criminologists agree that the death penalty does not significantly reduce the rates of criminal violence). Bud Welch, who lost his daughter in the Oklahoma City bombing of the Alfred P. Murrah federal building, explained that “I’m not going to find any healing by taking Tim McVeigh out of his cage to kill him. It will not bring my little girl back.” Kanwar, supra, at 244. But the pragmatic arguments against the death penalty often fall on deaf ears, perhaps because some people feel a visceral need to exact revenge on perpetrators of heinous acts. This may suggest that some people see us as somehow defined by our willingness to demand the ultimate penalty. Or there may be a particularly strong theoretical stance, sometimes based on such Biblical exhortations as “eye for eye, tooth for tooth.” Exodus 21:24; Leviticus 24:20; Deuteronomy 19:21. A religious justification can be particularly intractable.

163 See supra note 156 (discussing James B. Beam Distilling Co. v. Georgia and Plaut v. Spendthrift Farm, Inc.). One of the justifications for upsetting settled expectations and applying the new rule to pending cases is that it is a violation of the constitutional doctrine of separation of powers for judges to proclaim rules that have only prospective effect: that is a legislative function. See James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 548-49 (1991) (Scalia, J., concurring); Bradley Scott Shannon, The Retroactive and Prospective Application of Judicial Decisions, 26 HARV. J. L. & PUB. POL’Y 811, 838-45 (2003). This is a theoretical justification. The theory goes to the heart of the American political structure. But the theory supports different views as to the degree of separation of function that is permitted. The term “separation of powers” connotes rigid lines. The alternative term “checks and balances” connotes some flexibility. Eskridge, supra note 22, at 22; see FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 258 (1985) (noting that separation of powers was abandoned by the framers of the Constitution in favor of checks and balances); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 387-88 (3d ed. 1996) (distinguishing between separation of powers and checks and balances). One thing that was happening in these cases, then, was a choosing of one view of the constitutional structure.
but more often a form of one of the other three kinds of justification. Pragmatic justifications are those that focus on the usefulness or practicality of the procedure or doctrine. Theoretical justifications invoke an underlying theory that is separate from the procedure or doctrine itself and functions as a starting point for a reasoned decision. Historical justifications invoke history, either in terms of longevity or as an appeal to an epochal period in that history.

I used the cases of *Swift v. Tyson*\(^\text{164}\) and *Erie Railroad Co. v. Tompkins*\(^\text{165}\) to illustrate these kinds of justification. As my analysis of these cases shows, a procedure or doctrine is often supported by more than one type of justification: all of the types of justification that I have identified are found in either *Swift* or *Erie*, or both. In addition, while I have, for the most part, presented the types of justification as if they are clearly delineated, they may not be. I have tried to illustrate this by showing that justice can be defined pragmatically, theoretically, or historically. But there may be similar overlaps among other kinds of justification. In particular, we might ask whether, in fact, all justification is really pragmatic. After all, theory can be derived pragmatically, and we rarely see a procedure or doctrine justified purely by reasoning from a fundamental theory, however the theory is derived. And historical justifications of the first type—the appeal to longevity—may well mask pragmatic considerations. Reliance, for example, is quite dependent on concerns about consequences and context: it considers the consequences for people who have relied on a procedure or doctrine that is being abandoned or changed, but also puts those consequences into the larger context of the society—whether concerns about justice, for example, outweigh reliance concerns.\(^\text{166}\) In short, justice, theory, and history can all have pragmatic uses, and a justification that sounds like an appeal to justice, theory, or history could really be quite pragmatic.

Even if pragmatism is lurking in the background of all of these kinds of justification, however, I think that it is useful—pragmatic, if you will—to identify the different types of justification. The form of justification that we choose may tell us something about the importance of the procedure or doctrine, or its health within our legal system—how likely it is to endure. In addition, the form that those evolving justifications take can help to drive the evolution of the procedure or doctrine itself; in other words, how we choose to justify a procedure or doctrine may affect the form that the procedure or doctrine itself takes.\(^\text{167}\) If a theoretical justification gives way

\(^{164}\) 41 U.S. (16 Pet.) 1 (1842).

\(^{165}\) 304 U.S. 64 (1938).

\(^{166}\) As I noted, in *Erie* the Court could have seen the pragmatic and theoretical concerns—including concerns about justice—as outweighing the relatively weak reliance interest. See supra text accompanying note 156.

\(^{167}\) The reverse could also be true, of course. As Holmes noted, a procedure or doctrine could evolve, and the changes may require that a new justification be formulated. See supra note 1 and
to a pragmatic one, for example, we are likely to see the procedure or doctrine become more flexible—more open to discretion and context. Thus, we can better understand both the procedure or doctrine and how it evolves by understanding the justification for the procedure or doctrine and how it evolves. In other words, it helps to understand what is really going on when we attempt to justify a procedure or doctrine.

While it is important to distinguish the different forms of justification, it is also important to recognize that pragmatism seems to have a particularly important role in the evolution of justification, and in the accompanying evolution in the procedure or doctrine itself, however the procedure or doctrine was initially justified. For example, the transformation from Swift to Erie seems to have been driven mostly by pragmatic considerations: the Swift doctrine was not working as expected, and was producing injustice. This should not be surprising. Once a procedure or doctrine is in place, however it came to be and however it was justified initially, we begin to have experience with it. Experience is the lifeblood of pragmatism.

III. EXAMPLES OF THE EVOLUTION OF JUSTIFICATION

In this section, I will use several particular procedural devices to illustrate the principles I developed in the preceding section, focusing especially on how justification evolves. I start with the special verdict, which provides a rather simple introduction to the problem. I then turn to personal jurisdiction, which is a much more complex matter. I finish with a discussion of the jury, a topic about which I have written extensively, and which is the most complex of the examples I discuss. With respect to each of these, I will describe how justifications for the procedural device has evolved, and tie these evolving justifications to my schema of justifications.

My examples are all drawn from civil procedure because I am more familiar with civil procedure than other areas of law. Thus, I can make no claim that my conclusions apply with equal force to more substantive legal doctrines. I think, however, that there will be much similarity between procedural and substantive areas of law in the manner and evolution of justification. There might be some variation in the details, but the overall schema should be broadly applicable.

accompanying text. If the procedure or doctrine evolves first, before the justification, it is pragmatism that is driving the change. The new justification then may well be a pragmatic one as well, but if the original justification was theoretical, it may be useful—pragmatic—to devise a new theory to cover the evolving procedure or doctrine. See infra Part III.B.2 (discussing justifications for doctrines related to personal jurisdiction).

A. The Special Verdict

I start with the special verdict because it is the simplest of the examples I am using, and so provides an easy entree into the problem. The special verdict is of ancient origin, having been provided for in the Statute of Westminster in 1285, though that statute was simply codifying a practice that had been in place for some time. Under this procedure, the jury does not return a general verdict for one party or the other, but merely states its findings of fact and leaves to the judge the application of the law to the facts. Under modern federal procedure, the judge can require either a special verdict in this sense, or a general verdict accompanied by answers to specific questions about the facts.

1. The Original Justification for the Special Verdict

The special verdict began as a defensive action on the part of the jurors themselves. When juries first began deciding cases in the decades after the Norman Conquest, they always returned general verdicts: that is, they simply found that one of the parties was to prevail on the matter before them. This is precisely the form of the judgment that was reached through other modes of proof, such as ordeal or battle: one side won, the other lost; there was no attempt to separate law from fact or to explain the outcome. The matters thus decided by early juries necessarily consisted of some mixture of fact and law.

The problem for jurors was that they were more witnesses than factfinders in those early days of the jury’s history. They were inhabitants of

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170 See George B. Clementson, A Manual Relating to Special Verdicts and Special Findings by Juries 1 (1905); Stephens, supra note 169, at 96. There are a number of general histories of the special verdict. E.g., Clementson, supra, at ch. 1; Edmund M. Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L.J. 575 (1923).


172 Fed. R. Civ. P. 49. Rule 49 is entirely permissive, not mandatory. Id.

173 Morgan, supra note 170, at 575.

174 Id. As English common law procedure developed, a law/fact distinction did evolve in that the pleadings could raise issues of either fact or law. John J. Cound et al., Civil Procedure: Cases and Materials 466 (8th ed. 2001) (discussing common law pleading). A demurrer, for example, which is the rough equivalent of the modern motion to dismiss for failure to state a claim, raised a question of law: did the plaintiff’s declaration (complaint) state a legally sufficient claim? Id. at 466–67. A traverse, which denied the factual allegations of the declaration, raised an issue of fact. See id. at 467 (noting that a traverse terminated the pleadings and the case proceeded to trial). Demurrers were decided by the judge, but a traverse raised an issue that was sent to the jury. See id. at 472–73.

175 Morgan, supra note 170, at 575.

the area where the dispute arose, and they were chosen because they were expected to have some knowledge of the matter. 177 When they returned their verdict, they swore to its truth. 178 If they returned an erroneous general verdict, they were considered perjurors and were subject to attainent, a procedure whereby a second jury, larger than the first and consisting of men of more prestige than the first, was empaneled to hear the matter de novo. 179 If the second jury disagreed with the first, the original verdict was overturned and the original jurors were punished by being imprisoned and having their chattels seized and their lands laid waste. 180 One commentator describes a jury being attainted in 1224 for “not knowing that a second husband was entitled to curtesy in his deceased wife’s estate inherited from her husband, a point upon which Segrave and Bracton differed and which Maitland says was in doubt.” 181 The jury’s error, in other words, was one of law, not fact.

It was in this climate that juries began to resist the obligation to return a general verdict, particularly in property cases where the facts and law could be quite complicated. By the thirteenth century, juries would simply tell the judge what they knew of the facts and leave it to the judge to determine which side prevailed under the facts as found. 182 This state of affairs was not always satisfactory to the judge, because judges, too, were subject to punishment for erroneous decisions. 183 Thus, judges sometimes tried to require juries to return a general verdict. 184 The Statute of Westminster in 1285 made it clear that juries had the right to avoid the general verdict in a limited class of cases, generally property cases. 185 By the sixteenth century, judicial decisions had extended this right to juries in all cases, both civil and criminal, though juries did not always take advantage of it. 186

177 CLEMENTSON, supra note 170, at 2; see also THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 127 (5th ed. 1956).
178 See 1 HOLDSWORTH, supra note 176, at 312.
179 See CLEMENTSON, supra note 170, at 1–2.
180 See 1 HOLDSWORTH, supra note 176, at 337–38; THAYER, supra note 171, at 150–51. Jurors could sometimes settle the attainant against them by paying a fine. See MORGAN, supra note 170, at 576.
181 See MORGAN, supra note 170, at 576–77 (discussing the 1224 case of Martin de Bella Fago v. Hugo de Rickinghale). Maitland was the editor of an 1887 edition of Bracton’s Note Book, the source from which Morgan obtained the case. Id. at 576 n.3, 577 n.6. Maitland’s summary of the Bella Fago case is in Latin. See 2 F. W. MAITLAND, BRACTON’S NOTE BOOK 704–05 (1887).
182 See CLEMENTSON, supra note 170, at 3; MORGAN, supra note 170, at 580, 585.
183 See MORGAN, supra note 170, at 586 & n.27.
184 See 2 FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 631 (2d ed. 1899); MORGAN, supra note 170, at 587–88 (noting two cases where the judge refused a special verdict and required a general verdict).
185 See MORGAN, supra note 170, at 587–88.
186 See id. at 588–89 & nn.37–38 (noting that in the wake of a pair of cases decided in 1553 and 1586, respectively, it became clear that the jury could return a special verdict in any case).
Once attaince ceased to be a threat, in about the sixteenth century,\textsuperscript{187} the
general verdict was more attractive to jurors, as it allowed them to decide
the law without threat of punishment.\textsuperscript{188} The question is whether the jury
had a right to return a general verdict; in other words, was the choice of
whether to return a general or a special verdict in the hands of the judge or
the jury? The early evidence is unclear as to whether a judge could compel
a jury to return a special verdict, but it seems likely that juries could insist
on their right to return a general verdict.\textsuperscript{189} One commentator notes that
this right was established in civil cases in England before it was established
in criminal cases.\textsuperscript{190} Today, in the United States, the situation is the re-
verse: criminal juries ordinarily cannot be required to return special ver-
dicts, but civil juries can.\textsuperscript{191} These changes may well be related to changes
in the justification for the special verdict.

The original justification for the special verdict was quite pragmatic:
juries felt threatened by attaince, and could avoid attaince by avoiding the
general verdict.\textsuperscript{192} The special verdict was an instrument—a tool that was
quite useful to jurors. It was unrelated to any theory, and there was no

\textsuperscript{187} See, e.g., 1 HOLDSWORTH, supra note 176, at 342; THAYER, supra note 171, at 150–53.
Members of the attaince jury generally were reluctant to punish the first jury, and the procedures were so
cumbersome that attaince was not a practical device. See 1 HOLDSWORTH, supra note 176, at 342 (not-
ing the attaince jury’s reluctance to punish the first jury); THAYER, supra note 171, at 150 (noting the
cumbersome nature of attaince procedures); David Millon, Positivism in the Historiography of the Com-
mon Law, 1989 WIS. L. REV. 669, 697–700 (noting the expense and delay that afflicted attaince actions);
John Marshall Mitnick, From Neighbor-Witness to Judge of Proofs: The Transformation of the English
Civil Juror, 32 AM. J. LEGAL HIST. 201, 211 (1988) (noting the cumbersome nature of attaince pro-
dedures). By the late seventeenth or early eighteenth century, the new trial entirely supplanted attaince as a
remedy for an allegedly incorrect verdict. See id. at 215. Attaince was abolished by statute in 1825. See
Juries Act, 1825, 6 Geo. 4, c. 50, § 60 (Eng.).

\textsuperscript{188} See THAYER, supra note 171, at 169 (explaining that jury control was impracticable after
the threat of punishment was eradicated); cf. Morgan, supra note 170, at 588 (explaining that special ver-
dicts arose during the attaince era so as to allow juries to avoid responsibility for determining questions of
law).

\textsuperscript{189} See Morgan, supra note 170, at 589–91; Stephens, supra note 169, at 97–98.

\textsuperscript{190} See Morgan, supra note 170, at 591.

\textsuperscript{191} The Federal Rules of Civil Procedure provide for special verdicts, FEDE. R. CIV. P. 49(a), but
there is no complementary provision in the Federal Rules of Criminal Procedure. For this and other
reasons, federal courts have not favored special verdicts in criminal cases. See United States v. Spock,
416 F.2d 165, 180 (1st Cir. 1969) (noting that special verdicts in criminal trials “face[] a formidable
array of objections”).

Developments with regard to special verdicts in the United States are part of a trend toward jury
control that originated in revolutionary times and took hold during the nineteenth century. See Edith
(explaining the use of the case reserved and special verdict to limit the power of juries around the time
of the American Revolution); Stephens, supra note 169, at 99–100 (explaining the distaste for the
general verdict in the nineteenth century); see generally Note, THE CHANGING ROLE OF THE JURY IN THE
NINETEENTH CENTURY, 74 YALE L.J. 170 (1964) (discussing the nineteenth century sentiment that juries
should only decide facts, not law).

\textsuperscript{192} See, e.g., Morgan, supra note 170, at 586 (describing the special verdict as furthering the
jury’s goal of “evasion of responsibility”).
history behind it. It is possible that there is some sense of justice behind the special verdict, as it seems unjust to punish people for something they could not be expected to know. But if so, it is a pragmatic kind of justice: ultimately, it is simply better to allocate decision-making to those best suited to it, and a judge was better suited to decide questions of law.\textsuperscript{193} The pragmatic justification for the special verdict vanished, however, as attain itself became less of a threat. The abolition of attain was wholly independent of the special verdict, but the abolition of attain seemingly removed the special verdict's reason for being.\textsuperscript{194} Nevertheless, the special verdict has survived, and even flourished. It was found in virtually all of the states at the time of the country's founding,\textsuperscript{195} was in use in more than half the states in the early twentieth century,\textsuperscript{196} and is now a part of the federal rules.\textsuperscript{197} Clearly, some new justification for the device was found.

2. Modern Justifications for the Special Verdict

These new justifications remain primarily pragmatic, though their character has changed dramatically. They take two forms: that the special verdict helps the jury to function better, and that the special verdict makes it possible for judges to exert better control over the jury's decision-making. As to the jury's improved function, it has been argued that a jury faced with a complicated factual scenario may become confused, and that the special verdict helps the jury reach a higher quality verdict by breaking down the question into discrete parts that are easier to understand and decide.\textsuperscript{198} Another argument is that the special verdict focuses the jury's attention and gives jurors a "keener sense of responsibility."\textsuperscript{199} It "lesser[s] the influence of emotion upon the verdict."\textsuperscript{200} The jury also works better, it is said, when it is relieved of its responsibility for applying law to fact—a

\textsuperscript{193} The law/fact distinction had not been drawn formally at this point in English legal history, but the special verdict procedure, and its approval in the Statute of Westminster, show the beginnings of the distinction.

\textsuperscript{194} See supra note 188 and accompanying text.

\textsuperscript{195} See Stephens, supra note 169, at 99.

\textsuperscript{196} See CLEMENTSON, supra note 170, at 9.

\textsuperscript{197} FED. R. CIV. P. 49(a).

\textsuperscript{198} See Edson R. Sunderland, Verdicts, General and Special, 29 YALE L.J. 253, 261 (1920) (noting that one advantage of special verdicts is that they segregate instead of aggregate the issues). This idea is at odds with the more modern notion that juries are searching the evidence for a coherent story, and that breaking the story down into discrete factual issues disrupts that search. See, e.g., ROBERT P. BURNS, A THEORY OF THE TRIAL 158–63 (1999) (describing the significance of the "narrative" approach); Ronald J. Allen, The Nature of Juridical Proof, 13 CARDOZO L. REV. 373, 402 (1991) (explaining that the "story" model enables juries to evaluate plausibility by comparing the evidence at trial to their own life experiences).

\textsuperscript{199} Samuel M. Driver, The Special Verdict—Theory and Practice, 26 WASH. L. REV. 21, 22–23 (1951); see also William H. Wicker, Special Interrogatories to Juries in Civil Cases, 35 YALE L.J. 296, 306 (1926) (explaining that interrogatories make a jury more "conscious of its responsibility").

\textsuperscript{200} Driver, supra note 199, at 23.
difficult task better left to the more experienced judge.\textsuperscript{201} The result is that the special verdict reduces the risk of error.\textsuperscript{202}

Control over the jury, rather than improvement of function, may be a more important reason for the special verdict.\textsuperscript{203} Control can take two forms, one of which is more intrusive than the other. In the more benign form of control, the special verdict can help to prevent jury error, either by leaving the ultimate decision entirely to the judge (based on the jury’s fact-finding)\textsuperscript{204} or by serving as a check on the jury.\textsuperscript{205} The checking function is especially apparent when the jury is required to return a general verdict with interrogatories: if the general verdict is inconsistent with the answers to the interrogatories, the judge can order a new trial or enter a judgment consistent with the interrogatories.\textsuperscript{206} The inconsistencies in the jury’s thinking would not be so apparent under a general verdict, so control is easier with the interrogatories.

But the control can also intrude on some of the jury’s traditional functions. Juries, for example, have the power, if not the right, to nullify the law when they return a general verdict; the special verdict makes it more difficult for the jury to nullify.\textsuperscript{207} Of course, jury nullification is a contro-

\textsuperscript{201} See Sunderland, supra note 198, at 259 (saying that juries are not capable of deciding the law); Note, supra note 191, at 185 (saying that the special verdict is one way to keep questions of law out of the jury’s hands).

\textsuperscript{202} Sunderland, supra note 198, at 258–59.

\textsuperscript{203} See Thayer, supra note 171, at 218.

\textsuperscript{204} See Wicker, supra note 199, at 300–01 (arguing that the special verdict makes “the division of functions of court and jury more effective by taking away from the jury some of its power to take the law into its own hand[s]”).

\textsuperscript{205} See id. at 305–06. This sounds much like making the jury function better, but it goes a bit beyond mere functionality. It is one thing to provide a procedure for helping the jury to function better; it is another thing to intervene when the jury’s functioning apparently goes awry. Control involves the latter.

\textsuperscript{206} See Fed. R. Civ. P. 49(b); see also Clementson, supra note 170, at 12.

\textsuperscript{207} See Thayer, supra note 171, at 218–19 (noting that special verdicts would give “more power to the king and less to the people”). Power is not the same thing as right. Jury nullification is widely condemned, but most commentators acknowledge that the jury nonetheless has the power to nullify. See, e.g., Jeffrey Abramson, We the Jury: The Jury System and the Ideal of Democracy 73–77 (1994) (discussing public and legislative recognition of nullification) [hereinafter Abramson, We the Jury]; Jeffrey Abramson, Two Ideals of Jury Deliberation, 1998 U.Chi. Legal F. 125, 145–52 (discussing prevailing theories, describing notable examples, and criticizing race-based nullification) [hereinafter Abramson, Two Ideals]; Steven M. Warshawsky, Note, Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy, 85 Geo. L.J. 191, 210 (1996) (discussing whether juries should be informed of their right to nullify). The power is more significant in criminal cases, however, where the accused’s right to be free from multiple prosecutions makes it impossible to order a new trial on the ground that the jury may have misperceived the evidence. See Lawrence W. Crespi et al., Jury Nullification: Law Versus Anarchy, 31 Loy. L.A. L. Rev. 1, 28 (1997). For broader discussions of jury nullification, see generally Clay S. Conrad, Jury Nullification: The Evolution of a Doctrine (1998) (discussing nullification in criminal trials); Darryl K. Brown, Jury Nullification Within the Rule of Law, 81 Minn. L. Rev. 1149 (1997) (arguing that jury nullification does not subvert the rule of law); Andrew D. Leipold, Rethinking Jury Nullification, 82 Va. L. Rev. 253 (1996) (arguing against jury
iversal subject, and we may not want juries nullifying laws, at least in civil cases. But nullification has helped to shape the law in civil cases, so it might be better to leave some room for it. Whatever we may think about the scope of the jury’s power over questions of law, however, we must also consider the prospect that the special verdict can help a judge control the jury’s fact-finding. When jurors are asked specific questions, it might be harder for them to put together a coherent story, which is what juries usually do. It may also be difficult to formulate the questions, which could result in jury confusion and difficulty in reaching agreement. The formulation might even leave out some important issues, or include matters that are not relevant to the decision, leaving more room for the judge to step into the fact-finding role with procedural devices such as the judgment as a matter of law. Of course, having the judge step in may have some positive effects: the judge might be able to correct errors without the expense of a new trial. But the special verdict does make it possible for the

nullification on the basis that the procedural rules established to protect it exact a high cost); Lars Noah, Civil Jury Nullification, 86 IOWA L. REV. 1601 (2001) (discussing the arguments for and against jury nullification in civil trials); Aaron T. Oliver, Jury Nullification: Should the Type of Case Matter?, 6 KAN. J.L. & PUB. POL’Y 49 (Winter 1997) (examining jury nullification in different types of cases). See Sunderland, supra note 198, at 260–61 (criticizing the use of nullification, the “political” function of the jury, in civil cases). Jury nullification is more accepted in criminal cases, where nullification is sometimes equated with a jury’s being merciful due to the circumstances of the crime. See CONRAD, supra note 207, at 153; Abramson, Two Ideals, supra note 207, at 149 (discussing juries’ refusal to convict Dr. Jack Kevorkian). Nullification in civil cases, however, could disrupt the ordinary workings of commerce and upset settled expectations. See Ballard v. Uribe, 715 P.2d 624, 648 (Cal. 1986) (Bird, C.J., concurring and dissenting) (quoting Abraham Lincoln for the proposition that even bad laws should be observed while they are in force).

For example, jury nullification was a factor in the shift in many states from contributory negligence to some form of comparative negligence. See Stephen C. Yeazell, The New Jury and the Ancient Jury Conflict, 1990 U. CHI. LEGAL F. 87, 113–14.

See generally BURNS, supra note 198, at 24–25 (explaining that empirical evidence must be placed into a narrative framework before conclusions can be fairly reached); Allen, supra note 198, at 396–406 (describing psychological research suggesting the same). See Driver, supra note 199, at 24–25 (noting that special verdicts may make it more difficult to reach a decision); Sunderland, supra note 198, at 261 (noting difficulty of formulating questions).

See Sunderland, supra note 198, at 261 (identifying these characteristics of the special verdict, while asserting that these problems are even more severe with the general verdict).

The judgment as a matter of law does not, supposedly, involve the judge in fact-finding. But when a set of facts is determined to be insufficient as a matter of law to support a claim, the judge is necessarily doing some weighing of the facts. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 265–68 (1986) (Brennan, J., dissenting) (discussing the weighing of facts that a judge must do when incorporating a heightened standard of proof in a summary judgment motion). For a discussion of how fact has been transformed into law—and is thus open to judicial determination—by various procedural devices, see Sward, Seventh Amendment, supra note 168, at 592–632.

See Wicker, supra note 199, at 306. Another way the special verdict might enhance efficiency is to make it clear what the basis for the judgment was, thus enabling courts in subsequent litigation to be able to apply preclusion principles fairly. If a jury returns a general verdict that could have been based on either of two findings of fact, later courts will not know which was the actual basis for the verdict. Many courts in this circumstance will refuse to apply preclusion, thus requiring relitigation of
judge to exert significant control over the fact-finding.

All of the considerations described so far are pragmatic, but it is possible to justify the special verdict using other types of justification. It would be difficult to argue that the special verdict is inherently just (or at least more inherently just than the general verdict), but a pragmatic justice might be achieved through the jury control that the special verdict allows: the control makes it more likely that like cases will be treated alike, and it makes it more likely that the decision will be in accord with legal principles. These are aspects of procedural justice, which I argued was pragmatic in nature.\textsuperscript{215} A theoretical justification might be offered relating to the nature of the jury's democratic participation in the trial.\textsuperscript{216} For example, one could theorize that a democracy requires that the law be determined by the elected representatives of the people.\textsuperscript{217} This would preclude juries from deciding the law. From that, it follows logically that procedural devices that help to enforce that limitation are justified.\textsuperscript{218} Finally, the special verdict certainly has a long history, and that history itself may suggest that we should not abandon it without an exceptionally good reason. We might well argue that abolishing the special verdict would leave us without an important tool for ensuring jury accuracy and compliance with the law. In other words, we might fear the consequences of abolition, both foreseeable and unintended.

matters that have already been decided. \textit{See}, e.g., Russell v. Place, 94 U.S. 606, 608 (1876). \textit{But see} Kelley v. Curtiss, 108 A.2d 431, 435 (N.J. 1954) (holding that when an earlier verdict could have been based on either of two grounds, "the general verdict is to be considered as determining both grounds in [defendant's] favor").

In considering the pragmatic justifications for the special verdict, it is also useful to consider what pragmatic justifications there might be for the general verdict. I have already mentioned jury nullification: the general verdict makes jury nullification easier. One's view of whether this supports the general verdict or the special verdict will depend on whether one finds such nullification to be a positive thing. As I have indicated, there are significant problems with jury nullification in the civil context, but it has had salutary effects as well. Perhaps the best way to put it is that jury nullification is problematic in the civil context, and generally should be avoided.

One commentator has suggested that the jury is a body that is convened for the purpose of deciding one case only, and is disbanded after it renders its decision. George L. Priest, \textit{The Role of the Civil Jury in a System of Private Litigation}, 1990 U. CHI. LEGAL F. 161, 168 (discussing Guido Calabresi & Philip Bobbitt, \textit{Tragic Choices} (1978)). It is unaccountable. \textit{See id.} (describing Calabresi and Bobbitt's characterization of the jury as "aresponsible"). These factors might make the jury a good body for deciding particularly difficult social issues, such as the allocation of scarce medical resources. \textit{See id.} at 168–69 (discussing Calabresi's hypothetical of allocating kidney dialysis machines). This kind of decision-making would only be possible with the general verdict.

\textsuperscript{215} \textit{See supra} note 52 and accompanying text.

\textsuperscript{216} For purposes of this discussion, I am assuming that the jury itself is a given. We are not trying to justify the jury, but only its role. We are looking, in other words, for a theory of the jury. \textit{See infra} notes 400–35 and accompanying text (discussing the justification for the jury).

\textsuperscript{217} Such a theory might well be pragmatically derived. To allow someone other than the elected representatives of the people to make law would be quite disruptive to the society.

\textsuperscript{218} \textit{See generally} Sward, \textit{supra} note 168, at ch. 1 (discussing modern justifications for the civil jury).
It is interesting that these other kinds of justification are not usually offered for the special verdict. Rather, we have continued to rely on pragmatic justifications, which seem quite up to the task. Indeed, the other kinds of justification that I have suggested for the special verdict are all themselves somewhat pragmatic in character: the justice argument is based on procedural justice, which is largely pragmatic; the theoretical argument seems to rely on a pragmatically-derived premise; and the historical argument appeals to the pragmatic notion of concern for the consequences of abolishing the special verdict. These two factors—the heavy reliance on pragmatic justifications and the fact that other kinds of justification take on a pragmatic character—demonstrate the strength of the pragmatic justification for the special verdict. For the most part, we are not even finding it necessary to raise other kinds of justification.

One last matter must be considered: the effect of the changing justification for the special verdict on the functioning of the device. As I demonstrated, the special verdict was originally a device that the jury itself invented to protect itself from attainant.\footnote{See supra notes 173–86 and accompanying text.} Parliament and the courts protected the jury’s right to return a special verdict, for the most part ensuring that the choice as to what kind of verdict to return was the jury’s alone.\footnote{See supra notes 182–90 and accompanying text.} But now the justifications for the special verdict are that it facilitates the jury’s functioning and makes it easier for the judge to control the jury’s decision-making.\footnote{See discussion supra pp. 430–34.} These reasons for the special verdict would be meaningless if the jury were in control of the form of the verdict. It is thus not surprising that the decision about whether to return a general or a special verdict is no longer the jury’s. Rather, the parties suggest the form of the verdict and the decision is made by the judge.\footnote{See Charles Alan Wright & Mary Kay Kane, Law of Federal Courts 678 (6th ed. 2002) (noting that the judge decides whether to require a special or general verdict). This is an illustration of the process described by Holmes in the quotation at the beginning of this article. See supra note 1 and accompanying text.}

3. **Summary and Conclusion**

While the specific justifications for the special verdict have changed over the several centuries of its existence, the justifications have all had a pragmatic character. Commentators have not so far found it necessary to rely on justice, theory, or history to support the special verdict, though such justifications could certainly be cogent. This suggests the strength of pragmatic arguments generally. But the different specific justifications for the special verdict have affected its functioning to some degree. When the special verdict was justified as a defensive tactic by the jury seeking to avoid attainant, it made sense to leave the decision as to the form of the ver-
dict to the jury. Now that the special verdict is justified as a device to facilitate the jury’s functioning or the judge’s control over the jury, the decision as to the form of the verdict is for the judge.

B. Personal Jurisdiction

The evolution of the justification for personal jurisdiction rules is more complicated. We must consider first the general justification for limiting courts in their exercise of jurisdiction over persons and things. But that justification can take any of the forms I have described, and the form it takes may shape the doctrine itself. Thus, we must consider the relationship between the form of justification and the scope of the doctrine. In other words, we must consider the justifications for the specific limits on personal jurisdiction that have developed. Finally, this analysis must be done in the context of a doctrine with a number of variations: the jurisdiction of the court over individuals and artificial entities; the jurisdiction of the court over real or personal property; and the jurisdiction of the court over persons who are merely passing through the state. The justification for all of these aspects of jurisdiction has changed dramatically over the course of the country’s history.

1. Justifying General Limits on the Exercise of Personal Jurisdiction

Discussions of personal jurisdiction tend to focus on the specific doctrine rather than the general idea of limits. Nevertheless, the starting point is the justification for having limits in the first place. The most obvious justifications for having such limits are quite pragmatic. For example, a

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224 Jurisdiction over things is more properly referred to as in rem or quasi in rem jurisdiction, whereas jurisdiction over the person is referred to as in personam. 1 ROBERT C. CASAD, JURISDICTION IN CIVIL ACTIONS § 1.01, at 1–2 (2d ed. 1991). The term “personal jurisdiction” is sometimes used to encompass all three, and the courts now apply the same rules to all three forms. See Shaffer v. Heitner, 433 U.S. 186, 212 (1977). The terms in personam, in rem, and quasi in rem should be familiar to anyone who completed a law school course in jurisdiction, but I define them here for readers who do not have that background. An in personam action is a personal action against an individual or an entity that adjudicates personal liability, such as the obligation to pay a debt, or to compensate someone for injuries the defendant has caused. See BLACK’S LAW DICTIONARY 30 (7th ed. 1999). An in rem action adjudicates the disposition of property. Id. The subject of the suit is generally a dispute over the ownership of a piece of property. 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1070, at 286 (3d ed. 2002). It might concern the validity of a deed or a mortgage, for example. A quasi in rem action adjudicates personal liability, but only up to the value of the defendant’s property that the court has seized. Id. at 287. It is used, for example, when a defendant who has breached a contract or committed a tort is no longer in the state, but has property in the state. The court will seize the property, and the defendant will then have to defend the contract or tort action in order to defend his claim on the property. Id.
judgment stemming from the exercise of jurisdiction over a person or property not present in the nation or state may be unenforceable if the nation or state in which the person or property is located is unwilling to accept the adjudicating nation’s or state’s judgment. A court would naturally be reluctant to expend its resources on a useless act. In addition, an attempt to adjudicate matters relating to persons or property in another nation or state could cause friction in the relationships between the two nations or states. Whatever the legal merits of the adjudicating court’s power to act, such action runs up against the political sense of sovereignty that each nation or state has and seeks to protect.

These pragmatic reasons for limiting the territorial reach of a nation’s or state’s courts do not, however, mandate a stark black-and-white rule. They surely allow for some play in the line. Indeed, many nations are signatories to treaties concerning the international recognition and enforcement of judgments, which is an acknowledgment of the pragmatic value in allowing a court in one country sometimes to adjudicate matters arising in another. And the states are subject to the Full Faith and Credit Clause of the Constitution, which requires them to recognize duly rendered judgments of sister states. Thus, while there are at least two very good pragmatic reasons for having general limits on a court’s exercise of personal jurisdiction, those reasons do not tell us what those limits should be.

2. Justifying Specific Limits on the Exercise of Personal Jurisdiction

In this section, I will first describe the origins of personal jurisdiction doctrine as it developed in the United States, focusing on the nature of the justification for that doctrine. I will then describe the evolution of that justification. Finally, I will discuss the changes in the doctrine itself and

227 See, e.g., id. at 20; MONSIEUR DE VATTEL, THE LAW OF NATIONS (Joseph Chitty trans., AMS Press 1982) (1863) (describing the threat to sovereignty of judicial action beyond the territory of the nation where the court sits).
229 See U.S. CONST. art. IV, § 1.
show how those changes relate to the changing justification.

a. Origins of the American Doctrine of Personal Jurisdiction

The concept of limits on the exercise of personal jurisdiction originated in relationships between nations.\(^{230}\) Perhaps for the pragmatic reasons outlined above, the conventional wisdom came to be that the territorial limits of a nation's sovereignty restricted the power of the nation's courts to persons and property within the nation's boundaries, or to the nation's subjects wherever they might be found, or to persons who consented to the court's jurisdiction.\(^{231}\) This is not a necessary consequence of sovereignty, but it is a reasonable one. In other words, this is not the only possible statement of a personal jurisdiction doctrine between nations. In the United States, the states retained many characteristics of sovereign territories, so one possible view is that the same principles that applied between nations also applied between the states.\(^{232}\) Again, this is not the only possible view, and the fact that the states are joined together by a Constitution into a single nation means that there are some significant differences. Nevertheless, the territorial view of jurisdiction that prevailed on the international scene came to be the basis for personal jurisdiction doctrine in the United States.\(^{233}\)

The process by which territorial jurisdiction rules became part of U.S. law has been the subject of an ongoing scholarly debate. One view is detailed in an influential article by Geoffrey Hazard.\(^{234}\) He lays the credit, or the blame, directly on Supreme Court Justice Joseph Story, who, in a treatise on conflicts of laws, propounded the theory that the states were bound by principles of international jurisdiction.\(^{235}\) Hazard's article canvassed the legal and theoretical background for Story's assertion, and found that it did not support Story's conclusion.\(^{236}\) He argued that Story seemed to conflate legal and theoretical principles, relying on political theory developed on

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\(^{230}\) 4 WRIGHT & MILLER, supra note 224, § 1064, at 336.


\(^{232}\) 4 WRIGHT & MILLER, supra note 224, § 1064, at 336.

\(^{233}\) See Weinstein, supra note 17, at 171–74 (arguing that the basic territorial framework of the limitations on state court jurisdiction developed to promote interstate federalism).

\(^{234}\) See Hazard, supra note 225. It should be noted that Hazard's article is not without its critics. See, e.g., Weinstein, supra note 17, at 189–204 (arguing that Hazard's thesis is wrong, and that there was substantial federal common law supporting the territoriality of jurisdiction prior to Pennoyer); James Weinstein, The Early American Origins of Territoriality in Judicial Jurisdiction, 37 ST. LOUIS U. L.J. 1, 6 (1992).

\(^{235}\) See Hazard, supra note 225, at 258; see also STORY, supra note 226, at 5, 34–38. Weinstein argues that Story's treatise was not as influential as Hazard and others have claimed. See Weinstein, supra note 17, at 189–90.

\(^{236}\) See Hazard, supra note 225, at 259–62.
the European continent as support for a profoundly important legal doctrine.237 But according to Hazard, Story also embellished the continental political theories so that in Story’s handling, they came to stand for a stark and unbendable territorial limit on a nation’s power—including its courts’ power—to act.238 But Hazard also argued that the English precedent was of little help in devising a legal theory of jurisdiction,239 largely because the English precedent was concerned almost entirely with “domestic jurisdiction and procedure,”240 and not with the relationships among nations. Hence, Story may have relied on the continental political theorists out of a dearth of legal precedent.241

More recently, it has been argued that territoriality was a part of the common law of federal jurisdictional rules from very early in the country’s history, and was not simply borrowed from international law principles.242 Thus, early federal cases required that a defendant be served personally while in the state in order for the court to have jurisdiction over her—the essence of a territorial approach to jurisdiction.243 But the primary reason for this, it is argued, was not theories of international law, but federalism.244

Whatever the history, however, it was Story’s theory about the nature of sovereignty and the powers of a sovereign nation that formed the basis for the American doctrine of personal jurisdiction. In the 1878 case of Pennoyer v. Neff245 the Supreme Court, in an opinion by Justice Field, articulated the territorial theory of jurisdiction, relying on Story’s treatise in doing so, thus solidifying its hold on American doctrine.246 The Court

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237 See id. at 258. Hazard notes that Story might have relied upon Dutch jurist Huberdon because there were few English sources, whether legal or political. Id. But Hazard notes that what English sources there were did not seem to support Story’s conclusion that nations could not act on persons or property beyond their boundaries. See id. at 260–61.

238 See id. at 259–60. Story did ease his stark rule somewhat by noting that a nation could not act “directly” on persons or property outside its boundaries, but he left the meaning of “directly” undefined. See id. at 260.

239 Id. at 253.

240 Id. at 258.

241 Such reliance is particularly misplaced in a country with a federal structure, where the component states are not truly independent. Indeed, Hazard suggests that because the Constitution requires states to give full faith and credit to the judgments of other states, see U.S. Const. art. IV, § 1, the reliance seems positively perverse. See Hazard, supra note 225, at 247. The states do have sovereignty as to some matters, however, so some limits are probably proper, though not necessarily the same limits we would employ with respect to nations.

242 See Weinstein, supra note 17, at 194–95.

243 See id. at 191–204.

244 See id. at 195–98.


246 See id. at 722–23 (showing Pennoyer’s reliance on Story). Pennoyer was not the first case to apply these principles, see Weinstein, supra note 17, at 189–204, but it has become the most famous. This may be, in part, because Pennoyer employed the Due Process Clause of the Fourteenth Amend-
noted that the states did not occupy exactly the same position as sovereign nations, but nevertheless found that “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.”\(^{247}\) Furthermore, “[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum . . . an illegitimate assumption of power . . . .”\(^{248}\) Thus, a state has exclusive authority to act within its boundaries, but cannot act beyond its territorial limits. The Court made it quite clear that, in an in personam action—an action seeking to hold an individual personally liable—a defendant had to appear voluntarily or be served with process within the state, and that process could not be served outside the state.\(^{249}\) In an in rem action—one that was against property—the property had to be seized within the state before the court could exercise jurisdiction.\(^{250}\) If the seizure occurred, the owner could then be served by publication in a newspaper where the property was situated.\(^{251}\) In Pennoyer itself, the Court held that a judgment was invalid because it had relied solely on the presence of the defendant’s property in the state—the defendant had not been served personally within the state—but the court had failed to seize the property before rendering a judgment.\(^{252}\) Thus, the service by publication was ineffective.\(^{253}\)

For the most part, Pennoyer reflects simply a justification based on a theory about the power of the sovereign. In other words, it employs a theoretical justification. The theory is that the power of the sovereign stops at the state’s borders; reasoning from that theory, we conclude that no state

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\(^{247}\) Pennoyer, 95 U.S. at 722.

\(^{248}\) Id. at 720; see also id. at 722 (citing STORY, supra note 226, for the proposition that “no State can exercise direct jurisdiction and authority over persons or property without its territory”).

\(^{249}\) See id. at 733–34 (quoting THOMAS COOLEY, TREATISE ON CONSTITUTIONAL LIMITATIONS 405 (1868) for the proposition that a non-resident must appear or be served to be subject to a court’s jurisdiction). The Oregon Code reflected these principles as well. See id. at 720. It should be noted that these rules apply to in personam jurisdiction; however, for in rem jurisdiction, it suffices that the court obtains jurisdiction over the property. See infra text accompanying note 250. The owner will then have to defend her interest in that property. See infra text accompanying note 305. For an explanation of the various types of jurisdiction, see supra note 224.

\(^{250}\) See Pennoyer, 95 U.S. at 727. This rule also applies to quasi in rem jurisdiction, where the action is not about the property per se, but the defendant must defend his interest in the property by defending what would otherwise be an in personam action. See generally supra note 224.

\(^{251}\) Pennoyer, 95 U.S. at 727. The Court made it clear that service on non-residents by publication was ineffective in in personam actions. Id. at 733.

\(^{252}\) Id. at 727–28.

\(^{253}\) See id. at 727.
court can exercise jurisdiction over persons or property outside the state.\textsuperscript{254} As a corollary to this, a state court could exercise jurisdiction over all persons and property found within its boundaries. Other forms of justification are almost, but not entirely, absent from the \textit{Pennoyer} opinion. There are some references to a pragmatic form of justice, as the Court said that allowing judgments \textit{in personam} to stand against non-residents who had been served only by publication would turn those judgments into "constant instruments of fraud and oppression."\textsuperscript{255} Such judgments might well be obtained "when the evidence of the transactions upon which they were founded, if they ever had any existence, had perished."\textsuperscript{256} In addition, the Court explicitly relied on the Due Process Clause of the Fourteenth Amendment,\textsuperscript{257} which had been in effect for only ten years at the time \textit{Pennoyer} was decided, and which I have said is an example of a pragmatic view of justice.\textsuperscript{258} Finally, the Court invoked history when it said, somewhat misleadingly, that the path it took had been followed consistently throughout the country's existence.\textsuperscript{259} These references to pragmatic justice and to history, however, are not the main theme of the opinion.

The \textit{Pennoyer} opinion itself suggested some exceptions to the territorial jurisdiction rule: that a state court can adjudicate the rights of its residents even if the adjudication necessarily affects a non-resident, as when the state adjudicates the marriage relationship;\textsuperscript{260} and a state's adjudicating cases involving non-residents who were required by the state's laws to appoint a resident for service of process, as when the state adjudicates matters involving corporations doing business in the state or persons entering into contracts with a state resident.\textsuperscript{261} These exceptions themselves suggested pragmatic problems with the territorial theory of jurisdiction, and over the next sixty-seven years, the theory would be battered by pragmatic

\textsuperscript{254} An exception has always been made for citizens of the state who are temporarily away from their domicile in the state. The state can continue to exercise jurisdiction over them. \textit{See} Milliken v. Meyer, 311 U.S. 457 (1940); Blackmer v. United States, 284 U.S. 421 (1932) (holding that notice served to consul for citizen living abroad satisfies the due process requirement for \textit{in personam} jurisdiction); \textit{STORY, supra} note 226, at 461.

\textsuperscript{255} \textit{Pennoyer}, 95 U.S. at 726.

\textsuperscript{256} \textit{Id.} at 726–27.

\textsuperscript{257} \textit{See id.} at 733.

\textsuperscript{258} \textit{See supra} note 52 and accompanying text.

\textsuperscript{259} \textit{See Pennoyer}, 95 U.S. at 729–32. If the practice was uniform at the time \textit{Pennoyer} was decided, it certainly had not been uniform before Story's treatment of the subject. \textit{See} Hazard, \textit{supra} note 225, at 261 (showing that American courts had not consistently followed the path Story had laid out). The Court is discussing precedent in these pages, and precedent is, to some degree, an invocation of history. But the Court is invoking this precedent largely to demonstrate that its territorial formulation of jurisdiction had been followed over a long period of time. That is different from a situation where a court is trying to fit the case before it into a complicated pattern of precedent. The former is much more an invocation of history than the latter.

\textsuperscript{260} \textit{See Pennoyer}, 95 U.S. at 734–35.

\textsuperscript{261} \textit{Id.} at 735.
concerns. The culmination came in 1945, when the Court finally abandoned the strict territorial theory as a justification for its doctrine of personal jurisdiction and, in *International Shoe v. Washington*, adopted what has come to be known as the "minimum contacts" test. This test, which is justified by due process considerations, allows a state to exercise jurisdiction over a person, whether natural or artificial, who has established "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Service of process within the state is not necessary to establish that jurisdiction. We must next consider how this change in doctrine came about, and the role of justification in that change.

b. The Modern Justification for Personal Jurisdiction

Between *Pennoyer* and *International Shoe* was a long and convoluted doctrinal development that tried to fit an increasingly mobile and nationally-oriented populace into the territorial theory behind *Pennoyer*. This development relied primarily on express or implied consent, which then allowed service within the state. But in basing the development on consent, the courts increasingly came to rely on legal fictions. A substantial part of the problem for the courts concerned corporations, the citizenship of which was the state of incorporation. But corporations could act in many states besides their states of incorporation. They might be able to escape liability altogether if they could be sued only in the state of their incorporation. Thus, one way the states asserted jurisdiction over out-of-state corporations was to enact statutes that required such corporations to appoint an agent in the state to accept service of process. The appointment served

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262 This is the second time I have identified a theory propounded by Justice Story that was subsequently incorporated into cases but that ultimately proved unworkable. The first was the theory behind *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), that the common law exists apart from the jurisdiction in which it is propounded. *Id.* at 18–20. Unlike personal jurisdiction, however, the *Swift* doctrine had other forms of justification behind it as well, though those other forms of justification ultimately did not succeed, either. See discussion supra pp. 401, 408–10, 414–15.

263 326 U.S. 310 (1945).

264 *Id.* at 316.

265 *Id.* (quoting Miliken v. Meyer, 311 U.S. 457, 463 (1940)).

266 See *id.* at 316–17.


270 See, e.g., CAL. CORP. CODE ANN. § 1701 (West 1990); DEL. CODE ANN. tit. 8, § 132(a) (Michie 2001); FLA. STAT. ANN. § 607.0501(3) (West 2002); 805 ILL. COMP. STAT. ANN. 5/5.05 (West 1993); 805 ILL. COMP. STAT. ANN. 5/5.25 (West 1993).
as formal consent to be sued in the state, and service of process could then take place in the state, on the corporation’s agent. But not all corporations complied with such laws, so states enacted other laws that deemed any corporation that was doing business in the state to have appointed a state official, such as the Secretary of State, as its agent for service of process. Service of process was still within the state on the corporation’s agent, but the consent was implied consent. The fictional basis for the exercise of such jurisdiction is evident.

There were also problems with obtaining jurisdiction over individuals, who, with the coming of the automobile, were becoming more mobile. A person from one state could easily drive his car in another state and cause an automobile accident; when the individual returned home, he could be impossible to reach in the state where the accident occurred. Thus, many states enacted laws that required out-of-state motorists, as a condition of their use of the state’s highways, to sign a document appointing an agent in the state for the purpose of accepting service of process. As with corporations, this fit the exercise of jurisdiction over an out-of-state defendant into the Pennoyer scheme by requiring formal consent to the jurisdiction of the state; the in-state agent could then receive service of process. Requiring motorists to stop at the border and sign such a document was a cumbersome process, however, so some states went further and enacted statutes that deemed such out-of-state motorists to have appointed the registrar of motor vehicles as their agent for service of process. As with similar statutes governing corporations, the consent in such cases is implied, though service of process formally takes place within the state. Of course, with the implied consent statutes, neither the out-of-state motorist nor the out-of-state corporation had actually appointed anyone, and they may not have known that they were deemed to have appointed someone. The appointment was a fiction.

Even in the absence of express or implied consent, the courts sometimes allowed a state to exercise jurisdiction over a corporation when “it is doing business within the State in such manner and to such extent as to

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272 See Kurland, The Supreme Court, supra note 231, at 578–80.
273 The problem was not new, of course. There have always been some people who traveled, so there would have been problematic situations under the Pennoyer rule even at the time that case was decided. Pennoyer itself demonstrates that.
274 This was approved in Kane v. New Jersey, 242 U.S. 160 (1916).
warrant the inference that it is present there.”

If the corporation was present in the state, then it could be served within the state, probably through an employee who worked in the state. This basis for exercising jurisdiction required a substantial amount of activity in the state, and the courts spent much energy on deciding when a corporation had enough activity in the state to be deemed “present” there. But the concept of presence was another legal fiction, which enabled the courts to say that service of process was being effected on an entity that was present within the state.

It is apparent that assertions of jurisdiction in the period between Pennoyer and International Shoe often involved legal fictions, but necessary ones if the states were to deal with increasingly common multi-state transactions under the Pennoyer scheme. Legal fictions can help for awhile, but eventually the system gets too complicated, much like the Ptolemaic model of the heavens. The solution, reached in International Shoe, is a more flexible model—one that allows courts to fit the exercise of jurisdiction to the circumstances of the case. Each case, after all, has a slightly different mix of the parties’ relationship to the state and to the cause of action. International Shoe, with its minimum contacts test, is pragmatic to the core, and that is certainly responsive to the very pragmatic reasons that gave rise to the new rule.

The International Shoe rule, however, could not exist without substantial modification, if not abandonment, of the justification for the specific limits we place on the exercise of personal jurisdiction. Under the territorial theory spelled out by Justice Story and in Pennoyer, a court had no power to act on persons and property beyond its boundaries. International Shoe permits courts to require out-of-state defendants to appear and defend, and those courts’ in personam judgments against out-of-state defendants are then valid in every state in accordance with the Full Faith and Credit Clause. While remnants of the territorial theory of jurisdiction are

276 Philadelphia & Reading Ry. Co. v. McKibbin, 243 U.S. 264, 265 (1917) (holding that jurisdiction over a railroad in New York was not proper in that case because the railroad merely passed through the state over independently owned connecting rail lines).

277 See, e.g., Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923) (finding that an Oklahoma clothing company’s purchase of clothes in New York was not sufficient to establish presence in New York); General Inv. Co. v. Lake Shore & M.S. Ry. Co., 250 F. 160 (6th Cir. 1918) (finding that a New York railway was not doing business in Ohio because it had no rail lines there and because its Ohio ticket agent was employed by the railway’s Ohio sister company and not the railway itself); Knapp v. Bullock Tractor Co., 242 F. 543 (S.D. Cal. 1917) (finding presence where Illinois corporation sold tractors in California and directly contracted with retailers there).

278 The history of these developments has been told several times. See, e.g., Hanson v. Denckla, 357 U.S. 235, 250–51 (1958); Patrick J. Borchers, The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again, 24 U.C. DAVIS L. REV. 19, 19–56 (1990); Kurland, The Supreme Court, supra note 231; Sawyer, supra note 223. On the use of legal fictions in law reform, see A.K.R. Kiralfy, Law Reform by Legal Fictions, Equity and Legislation in English Legal History, 10 AM. J. LEGAL HIST. 3 (1966).

279 See U.S. CONST. art. IV, § 1.
present in the *International Shoe* requirement of "minimum contacts" with the state, territorial boundaries are no longer the end of the analysis. The territorial theory can no longer justify specific limits on the exercise of personal jurisdiction.

The germ of the change was present in *Pennoyer* itself. There, the Court noted that with the adoption of the Fourteenth Amendment, it became possible to argue that judicial proceedings in a court that has no jurisdiction over the person "do not constitute due process of law."\(^{280}\) While *Pennoyer* had continued to determine the existence of jurisdiction by applying the territorial theory, the invocation of due process opened some analytic doors. By invoking due process, *Pennoyer* added a second analytic step: the first—the Story theory—is that jurisdiction is absent because there was neither service of process nor seizure of property within the territorial limits of the state; the second is that exercise of jurisdiction under such circumstances violates due process. By the time we get to *International Shoe*, we have dropped the first step, and are instead considering directly and simply whether due process is satisfied by a particular exercise of jurisdiction. If, as I have suggested, due process is a highly pragmatic kind of justification, then this is a shift from a theoretical justification to a pragmatic one. Indeed, the Court employs a highly pragmatic statement of the new approach when it says that "'[w]hether due process is satisfied must depend . . . upon the quality and nature of the activity [in the state] in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.'"\(^{281}\) The shift to pragmatism came about in part because of the pragmatic problems with *Pennoyer*’s theoretical justification—problems that were made evident by the extensive use of legal fictions that helped us to fit modern circumstances into the theoretical mold of *Pennoyer*.

The Court in *International Shoe* did not rely solely on pragmatism for its justification, however. It tried to show an orderly historical development in personal jurisdiction practice. For example, the Court noted that service of a summons had replaced seizure of the defendant by the sheriff.

\(^{280}\) Pennoyer v. Neff, 95 U.S. 714, 733 (1877). The Fourteenth Amendment imposed a due process requirement on the states for the first time. See U.S. Const. amend. XIV, § 1. Before that, it was difficult to challenge a state court’s lack of personal jurisdiction in the forum state itself. Rather, such challenges usually occurred when a judgment creditor sought to enforce the judgment in another state. The argument then was that the state in which enforcement was sought did not have to give full faith and credit to the judgment of another state when that state’s court did not have jurisdiction over the defendant. See Pennoyer, 95 U.S. at 729–33; Hazard, supra note 225, at 246–47. The Full Faith and Credit Clause reads “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. art. IV, § 1.

as a means of acquiring jurisdiction over a person.282 One can serve a summons anywhere, but the defendant must be present within the state if the sheriff is to seize him.283 The Court, then, was suggesting that the requirement that the defendant be present in the state for the exercise of in personam jurisdiction over him—an essential part of the territorial theory of jurisdiction—had been significantly undermined by this simple change in procedures. This, in itself, is a pragmatic approach to the problem. The Court also suggested that the minimum contacts test was in full accord with the precedent that developed under the territorial theory.284 “Presence” in the state, the Court said, is merely a way “to symbolize those activities of the corporation’s agent within the state which courts will deem to be sufficient to satisfy the demands of due process.”285 Indeed, the Court in International Shoe relied on precedent relating to presence in deciding that the exercise of jurisdiction over the out-of-state shoe manufacturer was consistent with due process.286 The Court, then, took pains to make it look as if it were merely restating existing law, but not changing it. In other words, the Court tried to make it look as if the new formulation was in full accord with history.

The fact remains, however, that the primary justification for the specific limits on the exercise of jurisdiction is no longer the territorial theory: it is, rather, due process, a pragmatic justification. And that change in justification has led to some significant changes in practice. We lived for several decades with a jurisdictional scheme that was based on theory, but that had little grounding in the practicality of the American experience. The nationalization of commerce that took place throughout the nineteenth century made the strict territorial view of jurisdiction a positive hindrance to commercial development, and we were forced to invent fictions to accommodate our needs to our theory. By contrast, International Shoe requires courts to consider context and consequences in deciding whether the exercise of jurisdiction would be constitutional, often with only the mildest obeisance to territory. This approach makes it easier for courts to require persons who have allegedly done injury in the state to defend there. And it seems fair to require them to do so, as people and artificial entities might

282 Id. at 316.
283 Serving process also makes use of the institutions of government, of course. Indeed, there was a time when the sheriff normally served process. But even at the time of Pennoyer, other methods of service, not involving the sheriff, were in use. One example is service by publication, which was attempted in Pennoyer itself. See Pennoyer, 95 U.S. at 716. Today, service can generally be made by any individual over the age of eighteen who is not a party to the action, see FED. R. CIV. P. 4(c)(2), or even by mail. See KAN. STAT. ANN. § 60-303(b) (1994). Under federal procedures, a defendant can be persuaded to waive service. See FED. R. CIV. P. 4(d).
284 Int'l Shoe, 326 U.S. at 316–17.
285 Id.
286 See id. at 317–19.
well escape liability for their actions if they are not answerable for the injures they cause others where they cause them.\textsuperscript{287} These are pragmatic justifications.\textsuperscript{288}

c. Consequences of the Modern Justification for Personal Jurisdiction

One result of the shift in justification from a theoretical one to a pragmatic one is that courts began to assert jurisdiction over out-of-state defendants in many more contexts than would have been possible under the theoretical justification. Another is that the courts had to consider whether to apply the new justification to some of the other traditional forms of jurisdiction that had been discussed in \textit{Pennoyer}, such as \textit{in rem} and transient jurisdiction. In this section, I will discuss these two classes of consequences in turn.

\textsuperscript{287} One pragmatic problem with the law of jurisdiction as it developed under \textit{Pennoyer} was that natural persons were treated differently from artificial persons. See Friedrich K. Juenger, \textit{The American Law of General Jurisdiction}, 2001 U. CHI. LEGAL F. 141, 148; Kurland, \textit{The Supreme Court}, supra note 231, at 576–86; Sawyer, supra note 223, at 70–71; Christine M. Wiseman, \textit{Reconstructing the Citadel: The Advent of Jurisdictional Privity}, 54 OHIO ST. L.J. 403, 410–17 (1993). The problem of out-of-state actors causing injury in a state was most acute with respect to corporations because they could operate in many states at once, but certainly natural persons can also travel around and do a great deal of damage on the way. The minimum contacts test treats natural and artificial entities essentially the same, and this both acknowledges reality and simplifies the test for jurisdiction. See discussion supra pp. 52–53.

\textsuperscript{288} Some commentators have offered theoretical explanations for changes in jurisdiction doctrine. See Sawyer, supra note 223, at 61–62 & n.11 (describing various theoretical explanations). Some say that \textit{International Shoe} reflected changes in the country's political philosophy that arose out of the Depression and the New Deal. See Joseph J. Kalo, \textit{Jurisdiction as an Evolutionary Process: The Development of Quasi In Rem and In Personam Principles}, 1978 DUKE L.J. 1147, 1182–84; Terry S. Kogan, \textit{A Neo-Federalist Tale of Personal Jurisdiction}, 63 S. CAL. L. REV. 257, 349 (1990). The new political philosophy, while not abandoning classical liberalism, relied more on governmental regulation, particularly of corporate activity, and on the national welfare. See Kalo, supra, at 1183. Other commentators looked to changes in legal philosophy, such as the shift from formalist legal theories, where legal doctrine is deduced from first principles, to legal realist or sociological approaches, which are more pragmatic in orientation in that they are more focused on context and consequences than on theory or principle. See, e.g., Hayward D. Reynolds, \textit{The Concept of Jurisdiction: Conflicting Legal Ideologies and Persistent Formalist Subversion}, 18 HASTINGS CONST. L.Q. 819, 824–25 (1991); Sawyer, supra note 223, at 60–62, 94–95. These discussions of theory, whether political or legal, are not always offered to justify the \textit{International Shoe} approach, though they may have that effect. Sometimes they are offered merely to explain the shift from \textit{Pennoyer} to \textit{International Shoe}. In that case the proffered explanation would be that \textit{International Shoe} was, if not driven by these theoretical shifts, at least in tune with them. See \textit{id}. at 94–96. Sawyer argues that the standard explanation for \textit{International Shoe}, that it was driven by the growth of corporations and the need for an efficient and effective way to hold them accountable wherever they may act, cannot fully explain the opinion, which he attributes more to the shift from Formalism to Sociological Jurisprudence. See \textit{id}. Sawyer has more faith in the effect that theory has on judges than I do. I am inclined to think that the opinion in \textit{International Shoe} was driven largely by the pragmatic concerns that developed in light of a nationalizing economy, and that the most the theory could have done was suggest the direction and scope of the change.
i. Expansion in the Exercise of Jurisdiction

Once the courts were freed from the strictures of territory, considerable expansion in the exercise of personal jurisdiction by the state courts was possible. While International Shoe involved facts that could easily fit within the "presence" fictions that had developed under Pennoyer,\textsuperscript{289} later cases are harder to see in those terms. For example, in McGee v. International Life Insurance Co.,\textsuperscript{290} the Court approved California's assertion of jurisdiction over a Texas insurance company based on a single insurance contract with a California resident.\textsuperscript{291} The company acquired that contract when it assumed the obligations of another insurance provider.\textsuperscript{292} The Court gave some thoroughly pragmatic reasons for this:

Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.\textsuperscript{293}

In short, jurisdiction can be premised on a single transaction conducted via the mail, without regard to the consent of the defendant.\textsuperscript{294} Neither the result nor the rationale of McGee would have been possible under the Pen-

\textsuperscript{289} In International Shoe, the state of Washington sought to collect an unemployment tax from International Shoe, a Delaware corporation with its principle place of business in St. Louis, Missouri. Int'l Shoe, 326 U.S. at 311–13. International Shoe employed several sales representatives in Washington, but they had no authority to enter into contracts, and all shoes sold to Washington customers were shipped from outside the state. Id. at 313–14. The sales representatives, who were paid commissions, did sometimes rent hotel rooms to display the shoes. Id.

\textsuperscript{290} 355 U.S. 220 (1957).

\textsuperscript{291} Id. at 221–23. Jurisdiction was asserted under a California statute, enacted four years after the decision in International Shoe, which subjected out-of-state insurers to suit in California on insurance policies written for California residents. See id. at 224; supra notes 263–66 and accompanying text.

\textsuperscript{292} McGee, 355 U.S. at 221.

\textsuperscript{293} Id. at 222–23.

\textsuperscript{294} The California Insurance Code provides that an unadmitted insurer is deemed to have appointed the Insurance Commissioner as its agent for service of process, though it does not use the word "consent." See CAL. INS. CODE § 1610 (West 1993). In this sense, it is similar to state statutes that deem an out-of-state corporation to have appointed a state official as agent for service of process, or to a non-resident motorist statute, and could thus be fit into the consent schema. See supra notes 269–75 and accompanying text. But the Court in McGee did not mention this aspect of the California Insurance Code, noting only that the California statute "subjects foreign corporations to suit in California on insurance contracts with residents of that State even though such corporations cannot be served with process within its borders." McGee, 355 U.S. at 221 (internal citation omitted). Thus, clearly, the Court did not rely on the insurer's implied consent to jurisdiction in considering the constitutional aspects of jurisdiction.
noyer regime.

Eventually, the Court began to phrase the test as whether the defendant had "'purposefully directed' [his activities] toward residents of another State." In *Burger King Corp. v. Rudzewicz*, the Court approved Florida's exercise of jurisdiction over a Michigan franchise holder because Burger King was headquartered in Florida, and the Michigan franchise holder had deliberately entered into a long-term arrangement with Burger King. The Michigan franchise holder, however, had never visited Florida in connection with the franchise, and had dealt primarily with the Michigan office of Burger King. Consistent with a due process justification, the analysis was highly contextual and focused on the consequences of permitting jurisdiction under such circumstances. In other words, it was pragmatic. As a result, the Florida court was able to assert jurisdiction over a defendant whose only contact with Florida was entering into a long-term contract with a Florida resident. It is hard to imagine a court permitting such an exercise of jurisdiction under the Pennoyer scheme.

More currently, *International Shoe*'s pragmatic due process justification also makes it possible for courts to assert jurisdiction over at least some defendants based on the operation of websites, even when the defendant operates the website outside of the forum state and does not actively reach out to the forum state through the website. This would not have been possible under the Pennoyer scheme. Indeed, technological developments would undoubtedly have strained the fiction-creating capacities of the courts beyond the breaking point. The change in the justification for our specific limits on personal jurisdiction—from territorial theory to

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296 *Id.* at 479–80.
297 *Id.*
298 *Id.* at 485–86. The Court acknowledged that there was some concern that its decision might mean that a corporate seller could sue consumers in its home state, taking advantage of the expected default, but the Court "reject[ed] any talismanic jurisdictional formulas," preferring to deal with each case individually. *Id.* Again, this is a pragmatic approach.
299 See Warren B. Chik, *U.S. Jurisdictional Rules of Adjudication Over Business Conducted Via the Internet—Guidelines and a Checklist for the E-Commerce Merchant*, 10 TUL. INT’L L & COMP. L. 243 (2002) (collecting cases). While the law on jurisdiction based on Internet contacts is in a state of flux, it does seem clear that courts are inclined to permit the exercise of jurisdiction based on a website if the website is interactive. See *Zippo Mfg. Co. v. Zippo Dot.Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997) (finding personal jurisdiction when defendant operated a website containing applications for news subscriptions in which subscribers paid via credit card and were assigned a personal password); Bensusan Rest. Corp. v. King, 937 F. Supp. 295 (S.D.N.Y. 1996) (finding no personal jurisdiction when defendant set up a website called "The Blue Note" simply to advertise his jazz club); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L.J. 1345 (2001) (advocating a targeting-based test to determine whether to assert jurisdiction). The courts had been basing jurisdiction on such communicative devices as telephone calls for some time. See *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.*, 624 N.E.2d 1048, 1052–54 (Ohio 1994). A telephone call, however, requires a purposeful act on the part of the caller, while the website contact is initiated by the customer.
pragmatic due process—has made this expansion possible.

ii. Application to in Rem and Transient Jurisdiction

The change in justification for the specific limits on personal jurisdiction also affected two other prongs of Pennoyer jurisdiction: in rem or quasi in rem jurisdiction, and transient jurisdiction.\(^{300}\) Following International Shoe, state and federal courts, relying on Pennoyer, had continued to exert jurisdiction over property by seizing it, and then requiring the owner to defend his interest in it, even if the underlying claim against him was in personam.\(^{301}\) In addition, the states, also relying on Pennoyer, continued to assert “transient” jurisdiction over a natural person who was served with process while in the state, regardless of the reason for the visit or its length.\(^{302}\) This began to change in 1977, when the Court decided Shaffer v. Heitner.\(^{303}\)

Shaffer effectively abolished quasi in rem jurisdiction, which allowed a state court to assert jurisdiction over a person’s property found within the state even though the property had nothing to do with the cause of action asserted in the suit.\(^{304}\) The Court, instead, required that quasi in rem jurisdiction (and possibly in rem jurisdiction as well) be evaluated according to the standards developed for in personam jurisdiction.\(^{305}\) Quasi in rem jurisdiction had often been used to force a citizen of another state to defend

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\(^{300}\) See Pennoyer v. Neff, 95 U.S. 714, 725–26 (1878).


\(^{302}\) See Burnham v. Superior Court of Cal., 495 U.S. 604, 612–13 (1990) (citing cases); Pennoyer, 95 U.S. at 724; BLACK’S LAW DICTIONARY 857 (7th ed. 1999) (defining “transient jurisdiction” as “personal jurisdiction over a defendant who is served with process while in the forum state only temporarily”). One of the most astonishing examples of this is Grace v. MacArthur, where the court allowed the exercise of jurisdiction in Arkansas when the defendant was served while flying in a commercial airplane over Arkansas. Grace v. MacArthur, 170 F. Supp. 442 (E.D. Ark. 1959).


\(^{304}\) Id. at 212.

\(^{305}\) See id. (stating that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny”). While the Court in Shaffer held that all assertions of jurisdiction were to be evaluated by the standards developed for in personam jurisdiction, two concurring opinions suggested that some forms of real property might alone be sufficient for jurisdiction. See id. at 217 (Powell, J., concurring); id. at 218–19 (Stevens, J., concurring).
his property in the state asserting jurisdiction by defending what was essentially an *in personam* claim; indeed, it had sometimes required the defendant to appear generally, which effectively transformed the *quasi in rem* action into an *in personam* action.\(^{306}\) Thus, as the Court in *Shaffer* noted, *quasi in rem* jurisdiction often masked what was really an *in personam* claim.\(^{307}\)

In *Shaffer*, the Court approached the problem as a justification problem: could it continue to find a justification for *quasi in rem* jurisdiction?\(^{308}\) The Court considered the possible justifications for asserting *quasi in rem* jurisdiction, and rejected all three justifications that it identified.\(^{309}\) The first two justifications it considered were pragmatic in nature; the first of these was that allowing such jurisdiction would prevent a wrongdoer from removing his property to another state in hopes of protecting it from creditors.\(^{310}\) But this rationale failed because of the Full Faith and Credit Clause, which requires states to recognize and enforce the judgments of other states, and because *quasi in rem* jurisdiction encompassed situations where the judgment debtor had not removed his property for the purpose of hiding it from creditors.\(^{311}\) Thus, *quasi in rem* jurisdiction did not work the way this pragmatic justification assumed it would. The second pragmatic argument in support of *quasi in rem* jurisdiction was that it was easier to administer than the more open-ended minimum contacts analysis.\(^{312}\) But the Court thought that the minimum contacts test would not be difficult in the vast majority of cases, and that the threat to fairness in those cases that are more difficult is too great a price to pay for the ease of analysis under *quasi in rem* jurisdiction.\(^{313}\) Thus, the Court rejected the premise of this pragmatic argument, and, further, decided that considerations of justice trumped it in any event.\(^{314}\)

That left history. As the Court put it, "We are left, then, to consider the significance of the long history of jurisdiction based solely on the presence of property in a State."\(^{315}\) In a single paragraph, the Court dismissed jurisdiction based on property as a "fiction," noting that "‘[t]raditional notions of fair play and substantial justice’ can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitu-

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\(^{306}\) This was the case in *Shaffer*. See *id.* at 209.

\(^{307}\) See *id.*

\(^{308}\) See *id.* at 208–09.

\(^{309}\) *Id.* at 210–12.

\(^{310}\) *Id.* at 210.

\(^{311}\) *Id.*

\(^{312}\) *Id.* at 211.

\(^{313}\) See *id.*

\(^{314}\) *Id.*

\(^{315}\) *Id.*
tional heritage.” The Court then found that \textit{quasi in rem} jurisdiction was “an ancient form without substantial modern justification.” In other words, history was the only remaining justification, and it was not enough.

The Court, however, did not discuss any of the considerations that so often underlie a historical justification: reliance, fear of extinction, fear of unintended consequences, or cultural attachment. Perhaps if it had considered these matters, it might have avoided the resistance that the \textit{Shaffer} decision has encountered, as some state courts continue to assert \textit{in rem} and \textit{quasi in rem} jurisdiction without doing the full analysis that \textit{Shaffer} seems to require. These courts evidently do find “substantial modern justification” for the device, so the Court may well have miscalculated the strength of the historical justifications. Indeed, there were concurring opinions in the case that questioned whether \textit{in rem} and \textit{quasi in rem} should be abandoned entirely, or whether, for example, such jurisdiction might still be acceptable when the property in the state was a large parcel of real property. This is an expression of concern about the foreseeable, or even the unforeseeable, consequences of abandoning the doctrine, which is one form of historical justification. In other words, the Court, having failed to look beyond mere historical pedigree, was too quick to dismiss the historical justifications.

A plurality of the Court made the same mistake—relying entirely on historical pedigree—in \textit{Burnham v. Superior Court of California}, which concerned transient jurisdiction. Interestingly, however, the plurality this time upheld this old form of jurisdiction. In \textit{Burnham}, transient jurisdiction was challenged as inconsistent with \textit{International Shoe} and

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 212 (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
\item \textit{Id.}
\item \textit{Id.} at 211–12. The Court, in its discussion of history, also noted that the theory that the presence of property in the state is a sufficient basis for the exercise of jurisdiction “has been undermined,” presumably by \textit{International Shoe} and its progeny. \textit{Id.}
\item See \textit{supra} text accompanying note 139. The first pragmatic justification that the Court discusses in \textit{Shaffer}—that \textit{quasi in rem} jurisdiction may prevent a debtor from removing his property to another state to avoid seizure by creditors—may imply some concern for extinction or for unintended consequences, but the Court did not acknowledge the issue and certainly did not discuss it in those terms. See \textit{supra} notes 310–11 and accompanying text.
\item \textit{Shaffer}, 433 U.S. at 217 (Powell, J., concurring); \textit{id.} at 217–19 (Stevens, J., concurring).
\item \textit{Id.} at 628.
\end{enumerate}
\end{footnotesize}
Indeed, the Court in Shaffer had flatly asserted that “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.” This seemed to encompass transient jurisdiction.

Unfortunately, the Court did not give us a clear answer as to whether International Shoe applies to transient jurisdiction, as the Court split 4-4 on that question, with one justice refusing to take sides. Four justices in Burnham thought that no minimum contacts analysis was needed, relying entirely on a historical justification. Justice Scalia, writing for this plurality, detailed the long history of transient jurisdiction, as well as the broad acceptance of the device, with virtually every state providing for it. Justice Scalia then went on to reject the application of Shaffer to transient jurisdiction on the further ground that it was one thing to require the use of the minimum contacts test for assertions of jurisdiction over absent defendants, as was the case in Shaffer, and another thing altogether to require it with respect to defendants who were present in the state when they were served. The plurality, then, was ostensibly distinguishing Burnham. But it was clearly drawing a line: we will abandon this much history and no more.

The plurality did this, however, without any discussion of the considerations that underlie a historical justification. Justice Scalia could have expressed concern about the consequences, whether foreseeable or unforeseeable, of abandoning such a long-standing and still-accepted practice, and he could have more clearly articulated the reliance interest of the states. Instead, he chose to rely entirely on the fact that the practice had a long historical pedigree. On the other hand, articulating the concerns underlying the historical justification may have exposed the weakness of the reliance on history. If quasi in rem jurisdiction—a long-standing and

\[\text{\[324 Id. at 616.}\]
\[\text{\[325 Shaffer, 433 U.S. at 212.}\]
\[\text{\[326 Lower courts and commentators had seemed to assume that transient jurisdiction was effectively abolished by Shaffer. See Burnham v. Superior Court of Cal., 495 U.S. 604, 631–32 & nn.4–5 (Brennan, J. concurring) (citing courts and commentators who assumed that transient jurisdiction “did not survive Shaffer”).}\]
\[\text{\[327 Justice Scalia wrote the opinion for the Court, in which Chief Justice Rehnquist and Justice Kennedy joined, with Justice White joining the portion of the opinion that invoked history in support of upholding transient jurisdiction without doing the International Shoe analysis. Id. at 607, 628. Justice Brennan wrote a concurring opinion, joined by Justices Marshall, Blackmun, and O’Connor. Id. at 628. He said that the International Shoe analysis was necessary, but thought the test was met in that case. Id. at 629, 639–40. It was Justice Stevens who refused to take sides. See id. at 640 (Stevens, J., concurring).}\]
\[\text{\[328 Id. at 610–15. Justice White agreed with this much of the opinion, but he did not sign on to Justice Scalia’s discussion of Shaffer or his rebuttal to Justice Brennan’s opinion. Id. at 628 (White, J., concurring).}\]
\[\text{\[329 Id. at 620–21.}\]
\[\text{\[330 Id. at 616–19.}\]
popular means of obtaining jurisdiction over a person’s interest in property—posed a threat to constitutional values by sacrificing due process to ease of application, transient jurisdiction seems to pose at least as much of a threat.\footnote{There may have been some unarticulated pragmatism behind the \textit{Burnham} plurality. It may have seen that compliance with \textit{Shaffer} was less than complete and enthusiastic in the states, and chosen to avoid a new opportunity for the states to challenge the Court’s authority. Given the wide acceptance of transient jurisdiction, the plurality may have thought that the history of transient jurisdiction was not yet played out. The same had been true, of course, of \textit{quasi in rem} jurisdiction at the time of \textit{Shaffer}, as most states provided for that form of jurisdiction. The lessons of \textit{Shaffer} may have been in the back of the justices’ minds.}

By contrast, Justice Brennan, in a concurring opinion for himself and three other justices, argued that history alone could not provide the justification for transient jurisdiction, especially after \textit{International Shoe} and \textit{Shaffer}.\footnote{\textit{Burnham}, 495 U.S. at 629 (Brennan, J., concurring).} Rather, he found the history relevant to the fairness issue under the minimum contacts analysis because the long history of transient jurisdiction in this country gave defendants fair notice that they could be subject to suit in states where they are voluntarily present.\footnote{\textit{Id.} at 635–37. Under modern jurisdiction analysis, the courts follow a two-step process, first analyzing whether the defendant had contacts with the forum state, and then analyzing whether the assertion of jurisdiction is fair. See, e.g., \textit{Asahi Metal Indus. Co. v. Superior Court of Cal.}, 480 U.S. 102, 108–09, 113 (1987); \textit{Burger King Corp. v. Rudzewicz}, 471 U.S. 462, 474, 476 (1985).} In other words, historical pedigree might bolster the justice of a particular assertion of jurisdiction, but it is not the only issue. Justice Brennan’s opinion, then, ties the history to modern behavior. It says that transient jurisdiction is fair—a part of the \textit{International Shoe} test—because we have been doing this for a long time, and people can adjust their behavior to accommodate the practice.\footnote{\textit{See Burnham}, 495 U.S. at 635–36 (Brennan, J., concurring).} But, unlike the plurality, it leaves open the possibility that a particular assertion of transient jurisdiction might be rejected. This is a more pragmatic position to take.

3. \textit{Summary and Conclusion}

The history of the justification for personal jurisdiction is particularly illuminating in that a theoretical justification had been inserted into the evolutionary process at a critical juncture. That justification was the theory of territorial sovereignty that limited the exercise of jurisdiction to persons and property found within the state’s boundaries. But the theory could not withstand the onslaught of pragmatic issues that accompanied the growing nationalization of commerce. While the theory has not been abandoned entirely—it is present in the requirement in \textit{International Shoe} that the defendant must have purposefully established minimum contacts with the forum state—it is considerably less important than it was. Theory, this suggests, is of little help if it is divorced from the pragmatic concerns of
everyday legal life. The pragmatic due process justification for the limits we place on the exercise of personal jurisdiction has made it possible for courts to adapt those limits to a world that is vastly different from when Justice Story—the author of the theory—was writing.

This discussion shows that historical justifications may be quite strong, but the courts do not always—or even often—get behind the mere historical pedigree to the reasons that might support our giving weight to that pedigree. Perhaps they should. Both quasi in rem and transient jurisdiction still had a lot of life in them when the Court took up their fates, at least judging by the number of states that provided for them. That means it is likely that one or more of the considerations behind historical justifications was operative. Of course, many laws remain on the books well past their useful life, but it is always risky for a court to relegate a widespread practice to the dustbin of history. A more thorough consideration of the issues would be in order if the Court is considering doing so. In that sense, it appears that both Shaffer and Burnham got the analysis wrong. The Shaffer court failed to recognize that history is more than just length of service, but reflects other values, such as reliance and even self-definition.\(^{335}\) The mistake in Burnham was to give too much weight to the unburnished length of service. Some balance between the two is necessary, and a more thorough analysis of the historical justification would help us to achieve that balance.

C. The Civil Jury

The evolution of the justification for the civil jury is even more complicated. Indeed, we seem to be in the midst of a search for the modern justification of the civil jury. In contrast to the modern struggle for justification, the justification for the jury was generally simple and straightforward at least through the American Revolution, though it did change over the course of the jury’s several centuries of existence. In this section, I will start with the justification for the jury in its first incarnation in Norman England, and trace the change in both the justification for and the operation of the jury over the next several centuries to its enshrinement in the Seventh Amendment to the United States Constitution. Changes in both the justification for the jury and the structure and operation of the jury have been much more significant since then, accelerating during the twentieth century.

1. The Jury and Its Justification: From Norman England Through Early American History

The jury arose in England shortly after the Norman Conquest, and is

\(^{335}\) See supra notes 317–19 and accompanying text.
generally thought to be a Norman import.  It derived from the Norman inquest, in which local people were summoned and required to swear to the facts about some matter.  The best-known Norman inquest is the Domesday Book, a record of land-holding compiled in the eleventh century by the king’s representatives, who summoned local citizens to give information about the value and ownership of land in the various English counties.  The purpose was to aid the king in the collection of taxes, but also to ensure that the tax burden was fairly distributed.  The Domesday Book was an administrative tool of the king, but the model soon came to be followed in the king’s courts, a move that served to bring business to the king’s courts.  The simplest reason for this is that the inquest was a better method for resolving disputes than the methods that had been in use in pre-Norman England.

Prior to the Norman Conquest, disputes were resolved in English courts by invoking God, whether through ordeal, wager of law, or battle.  Ordeals required the party seeking to prove his claim to take an oath, and then undergo a test such as wrapping his hand in leaves and then holding a hot iron for a prescribed period of time.  If the hand was unscathed, it indicated God’s judgment as to the truth of his oath; a burned hand was God’s judgment that the party had lied.  Wager of law required the party who had to prove his case to find a specified number of persons who would swear to the truth of his claim.  The oath was complicated, and if any of them missed any part of it, the party lost.  Battle, in which the parties took an oath and then fought each other, was usually reserved for criminal cases.

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336 See Sward, supra note 168, at 68, 72–74; Thayer, supra note 171, at 54–67.
337 See Sward, supra note 168, at 73.
338 See Frederic William Maitland, Domesday Book and Beyond 1–2 (Cambridge Univ. Press 1897).
339 Id. at 3–5.
341 Thayer, supra note 171, at 16.
342 Plucknett, supra note 177, at 114; Thayer, supra note 171, at 35 n.1.
343 Plucknett, supra note 177, at 114; Thayer, supra note 171, at 35 n.1.  There were other kinds of ordeals as well.  Another common one was to throw the accused into a pool of water.  If he floated, he was guilty; if he sank, he was innocent.  The idea was that the water, at God’s behest, would receive the innocent and reject the guilty.  Plucknett, supra note 177, at 114; Thayer, supra note 171, at 35 n.1.
344 Plucknett, supra note 177, at 115; Thayer, supra note 171, at 25.
345 See Plucknett, supra note 177, at 115–116 & 115 n.8.
346 See id. at 116–17.  See generally Thayer, supra note 171, at 39–44.
In all of these kinds of dispute resolution, the parties are asking God to make his judgment known.\textsuperscript{347} But these devices were generally unsatisfactory. Wager of law was relatively hard to win, for example, while the ordeal—especially the ordeal of the hot iron—was relatively easy.\textsuperscript{348} Thus, one’s prospects might depend upon the method of proof.\textsuperscript{349} Into this mix came the Norman inquest, or jury, which came to be the presumptive method of proof in the king’s courts.\textsuperscript{350} Like the Domesday inquest, jury procedure in the courts involved the sheriff summoning free men from the area where the dispute arose and requiring them to swear as to what had happened.\textsuperscript{351} If they did not know, they were required to find out.\textsuperscript{352} If they could not find out, or if the jurors disagreed about what had happened, the sheriff summoned more jurors until he had twelve who agreed about what had happened.\textsuperscript{353}

The origins of the jury, then, appear to be quite pragmatic. The judge who presided over the king’s court was not from the area where the controversy arose and had no way of knowing whose version of events was correct. As with the Domesday inquest, it was thought that the best way to discover the truth was to bring local citizens into court to inform the judge. It could be presumed that persons from the area would know what had happened or could easily find out. Thus, the jury was justified as a means to the end of discovering the truth.\textsuperscript{354}

Over the next several centuries, the structure and function of the civil jury changed.\textsuperscript{355} While the reasons for and the details of the transformation are unclear,\textsuperscript{356} the courts gradually ceased relying on the jury to know or find out the facts, and began presenting evidence to the jury, which then

\textsuperscript{347} See 2 Frederick Pollock & Frederic William Maitland, The History of English Law 600 (2d ed. 1923) (discussing the oath aspect of an ordeal, and how it exposes a party to the wrath of God).

\textsuperscript{348} Id. at 599 & n.2.

\textsuperscript{349} See id. The ordeal diminished in importance after 1215, when the church forbade its clergy to administer the oath. Plucknett, supra note 177, at 118–19; Thayer, supra note 171, at 36–37.

\textsuperscript{350} See generally Thayer, supra note 171, at 54–67.

\textsuperscript{351} See id. at 62–64.

\textsuperscript{352} Id. at 62–63.

\textsuperscript{353} Id.

\textsuperscript{354} I do not mean to suggest that there was any attempt to justify the jury formally; there is little evidence of that. Rather, by examining the circumstances of the jury’s origin, we can see pragmatic reasons for it. The Norman kings had the inquest as a model, and they incorporated it into their courts.

\textsuperscript{355} 1 Holdsworth, supra note 176, at 332–37; Mitnick, supra note 187, at 201–02.

\textsuperscript{356} One possible explanation for the transformation is the rise of the English legal profession, brought about by the increasing complexity of legal procedures. See generally Paul Brand, The Origins of the English Legal Profession 33–49 (1992) (describing the increased demand for lawyers from the twelfth to the fourteenth centuries). As the profession grew, it makes sense that lawyers would want to have some control over the information that the jury uses in its decision-making. This would certainly be a pragmatic reason for the shift in jury function.
determined the facts based on the evidence presented.\footnote{For a discussion of this transformation, see 1 HOLDSWORTH, supra note 176, at 332–37; Mitnick, supra note 187, at 203–05 (1988).} For awhile, reliance on evidence presented at trial coexisted with the jury’s right to bring its own knowledge of the matter to bear on the decision, but by the middle of the eighteenth century, evidence presented at trial became the exclusive basis for the jury’s decision.\footnote{Mitnick, supra note 187, at 207–09.}

With this transformation in the jury’s structure and function, the original justification ceased to have any meaning. Jurors no longer functioned as witnesses, and they did not have to be from the area where the controversy arose to hear evidence and decide cases based on that evidence.\footnote{Id. at 201–02, 204 n.22.} But the jury continued to exist, and even thrive.\footnote{See id. at 229–30.} Part of the reason may be that while the jury was being transformed from witnesses to fact-finders, a new justification was found for it in the turmoil that plagued England at the time.\footnote{See id. Of course, an institution like the jury that is well-established might continue to exist without any explicit justification if it is functioning well. Juries were hearing evidence presented at trial by late in the fifteenth century, but it was not until late in the seventeenth century that a new justification emerged. Id. at 204, 229–30. It may be that no one considered that there was any need to justify the jury during that interim.} In short, the jury began to take defiant stances toward the government’s positions, especially on politically sensitive matters, and so came to be seen as an important protection against government encroachment on civil liberties.\footnote{Id. at 207; see id. at 210–11.} This was especially true in criminal matters.\footnote{Id. at 210 n.53.}

The case that established the jury’s right to ignore the advice of the trial judge was Bushell’s Case, decided in 1670.\footnote{Bushell’s Case, 124 Eng. Rep. 1006, 1009 (1670).} Prior to that case, jurors had been expected to adhere to the guidance of the trial judge, and in criminal cases they could be fined if they did not.\footnote{THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 225, 239 (1985).} In Bushell’s Case, William Penn and others were charged under the Conventicles Act, which prohibited religious gatherings other than those associated with the Church of England.\footnote{Id. at 222; see 6 STATE TRIALS 953 (1661-1678) [hereinafter STATE TRIALS]; Conventicles Act, 1670, 22 Car. 2, c. 1 (Eng.). The Conventicles Act was originally enacted in 1664, see Conventicles Act, 1664, 16 Car. 2, c. 4 (Eng.), and amended in 1670, see Conventicles Act, 1670, 22 Car. 2, c. 1 (Eng.). For a thorough discussion of Bushell’s Case, see GREEN, supra note 365, at 200–64.} When the jury refused to find the defendants guilty, despite the strongest possible direction from the judge, the jurors were fined and those who refused to pay the fine were imprisoned.\footnote{STATE TRIALS, supra note 366, at 967–68; GREEN, supra note 365, at 225, 236.} The imprisoned jurors appealed their punishment, and the court held that jurors could ignore
the instruction of the court and decide the case according to their own consciences.\footnote{See Bushell’s Case, 124 Eng. Rep. at 1012–13.} Ironically, in a throwback to the origins of the jury, the rationale was that jurors could bring their own knowledge and evidence to the decision, and the court had no way of knowing the basis for the jury’s decision and so could not demand that the jurors decide the case as the judge saw it.\footnote{See \textit{id.} at 1009; GREEN, supra note 365, at 243.} Thus, \textit{Bushell’s Case} was decided during the phase of jury development when both courtroom evidence and jury knowledge could be the basis for the jury’s decision, though permission for jurors to rely on their own knowledge lasted only a century more.\footnote{Mitnick, \textit{supra} note 187, at 207–08.}

\textit{Bushell’s Case}, while relying on the old idea that the jurors brought their personal knowledge to bear on the decision, presaged a new justification for the jury—one that played a significant role in the development of the constitutional right to jury trial in the United States. That new justification was that the jury had a political role to play: the jury could resist governmental encroachments on individual liberties. The question is why the courts—an arm of the government—would go along with this.\footnote{The idea of separation of powers has never been as strong in England as in the United States. Indeed, there was no separation at all in the Middle Ages, when all of the functions of government resided in the king, who generally relied on advice from a council of noblemen. JAMES FOSDICK BALDWIN, THE KING’S COUNCIL IN ENGLAND DURING THE MIDDLE AGES 395–96 (1913). Indeed, judges could also be disciplined for decisions that the king thought erroneous. Morgan, \textit{supra} note 170, at 583 n.25.} There are at least two possible interrelated reasons for this. First, English constitutional history included the Magna Carta, which is often considered to contain the germ of a right to jury trial.\footnote{See WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 134–37 (2d ed. 1914) (discussing the Anglo-Saxon origins of trial by jury).} While the Magna Carta was a compact between the king and the lords and did not grant rights to the people generally, it did require that the king provide a jury of peers in the event of any charge against a lord.\footnote{MAGNA CARTA \S 39 (1215).} Thus, there was precedent in English constitutional history for some popular defiance of the sovereign. Second, \textit{Bushell’s Case} was decided in 1670, in the middle of a turbulent century in English history—a century that saw the seat of English sovereignty pass from the king to Parliament.\footnote{See \textit{generally} CHRISTOPHER HILL, THE CENTURY OF REVOLUTION 1603-1714 (1961) (providing a history of seventeenth century England). The transfer of power is generally thought to have occurred in the “Glorious Revolution” of 1688. See 1 ALFRED H. KELLY \& WINFRED A. HARBRISON, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT xx–xxi (7th ed. 1991).} In this climate, it is perhaps less surprising that the king’s courts would permit juries to defy the king. In \textit{Bushell’s Case}, however, the court was careful not to couch its reasoning in those
terms.\textsuperscript{375} Protection of individuals against abuse by the sovereign seems at first to be a pragmatic justification. The justification seems pragmatic because it posits the jury as a means to an end, with the end being the protection of individual liberty against governmental power. But the notions of individual liberty and limited government were themselves new, growing out of the English struggle during the seventeenth century.\textsuperscript{376} These notions are reflected in the political theory we now refer to as classic liberalism, which had its origins around the same time as \textit{Bushell’s Case}.\textsuperscript{377} Thus, an independent jury of ordinary citizens could be seen as logically derived from classic liberalism—that an ad hoc, unaccountable group of citizens, assembled for the purpose of deciding one case and then dispersed, can protect individual liberty better than a decision-maker who is in the employ of the government. In other words, the jury could be justified theoretically.\textsuperscript{378}

The notion that the jury is a guardian of individual liberty, whether viewed as a pragmatic or a theoretical justification, was an important factor in the drafting of the United States Constitution, especially the Bill of Rights.\textsuperscript{379} The jury had been a particularly important safeguard against British oppression during colonial times.\textsuperscript{380} As in England, the criminal jury was the most important, as criminal charges were often used to suppress opposition. One famous example is the trial of Peter Zenger, who had been charged with criminal libel for publishing tracts opposing British rule in the American colonies.\textsuperscript{381} But the civil jury also played an important role in colonial America, as civil juries regularly refused to enforce

\textsuperscript{375} See supra notes 366–69 and accompanying text.
\textsuperscript{376} KELLY & HARBISON, supra note 374, at xx–xxi.
\textsuperscript{377} The classic statement of liberalism is JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Thomas P. Peardon ed., 1952) (1690). Locke’s treatise was originally published anonymously in 1690, see id. at xxvii. For a description of classic liberalism, see ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 18–35 (1985).
\textsuperscript{378} Of course, most cases that came before juries even in such turbulent times as seventeenth-century England did not have overt political implications. Certainly few civil cases did. Thus, the jury’s role as a fact-finding body in ordinary legal matters continued to be important. In those cases, we must rely on the pragmatic justification that the jury, which consists of ordinary people familiar with the vagaries of human existence, is an effective means for finding the truth and doing justice. This pragmatic justification is different from the original pragmatic justification because the effectiveness of the jury must be measured differently. The early Norman jury’s effectiveness arises from the jurors’ intimate knowledge of local persons and events. The modern jury’s effectiveness depends first on the jurors’ understanding of ordinary human interactions, and second on jurors’ ability to evaluate evidence presented to them in the rarefied atmosphere of a courtroom.
\textsuperscript{379} Henderson, supra note 191, at 292.
\textsuperscript{381} VINCENT BURANELLI, THE TRIAL OF PETER ZENGER 53 (1957).
British laws, especially revenue laws.\textsuperscript{382} Indeed, the civil jury was probably more important in America than it had been in England in protecting individual liberty against government encroachment, especially as Americans generally held that juries had the power and the right to decide the law as well as the facts.\textsuperscript{383}

The original Constitution contained a guarantee of a jury trial in criminal cases,\textsuperscript{384} but not in civil cases. Moreover, the Constitution provided that the Supreme Court would have appellate jurisdiction “both as to Law and Fact.”\textsuperscript{385} This appellate power over fact-finding was quite inconsistent with the power of appellate courts that had existed in both England and the American colonies.\textsuperscript{386} These perceived failures of the new Constitution to protect the right to a jury trial in civil cases became a rallying cry for Anti-Federalists, who opposed the new Constitution.\textsuperscript{387} Proponents of the Constitution argued that a constitutional guarantee of a civil jury trial was unnecessary, primarily for two reasons: first, the British oppression that had made the civil jury so important in colonial America was no longer a threat;\textsuperscript{388} and, second, Congress could be trusted to protect the right to a civil jury trial through appropriate legislation.\textsuperscript{389} Opponents of the Constitution thought that keeping that protection was vitally important.\textsuperscript{390} The opponents of the Constitution ultimately prevailed on the jury trial issue, however, and the Constitution was ratified with the understanding that a Bill of Rights containing a right to a civil jury trial would be added to it promptly.\textsuperscript{391} The result was the first ten amendments to the Constitution, the seventh of which preserves the right to a jury trial in common law actions.\textsuperscript{392}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{382} William E. Nelson, The Americanization of the Common Law 30–31 (1975) (discussing jury nullification of the revenue-raising Navigation Act); Wolfram, supra note 380, at 703–08 (discussing colonial juries' refusal to enforce debts owed to British creditors).
\item\textsuperscript{383} See Abramson, We the Jury, supra note 207, at 73–77 (noting that several state constitutions “specifically provided that ‘the jury shall be judges of law, as well as fact’”). A similar power did not exist in England. Henderson, supra note 191, at 335–36.
\item\textsuperscript{384} U.S. Const. art. III, § 2, cl. 3.
\item\textsuperscript{385} U.S. Const. art. III, § 2, cl. 2.
\item\textsuperscript{386} Sward, The Seventh Amendment, supra note 168, at 579 n.34, 581–82.
\item\textsuperscript{387} Wolfram, supra note 380, at 667.
\item\textsuperscript{388} Sward, supra note 168, at 93.
\item\textsuperscript{389} See id.
\item\textsuperscript{390} See Kelly & HARBISON, supra note 374, at 174–75.
\item\textsuperscript{391} Wolfram, supra note 380, at 725. See generally Robert Allen Rutland, The Birth of the Bill of Rights, 1776-1791, at 159–89 (1955) (discussing the debate surrounding the adoption of the Bill of Rights and the Seventh Amendment).
\item\textsuperscript{392} The Seventh Amendment reads:
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.
\end{itemize}
\end{footnotesize}
It appears, then, that the most important justification for the civil jury at the country’s founding was the protection it offered to individuals against the government. As I noted, this political justification can be viewed as either pragmatic or theoretical. But it was not long before pragmatic considerations caused at least some people in the government to reconsider the jury. Indeed, the very traits that made juries important to colonial Americans proved to be quite pesky once the Americans had control of their own government. Juries continued to be defiant, and they did not always see things the way government officials did. Thus, for example, they were more protective of individual property rights against eminent domain claims than officials liked.\(^{393}\) While the people may well have relished their power as members of a jury,\(^{394}\) government officials felt stymied in their efforts to promote commercial development and trade.\(^{395}\) The jury’s defiance of authority—so useful when the British were in control—was now impeding progress. Thus, government officials borrowed some tricks from the British colonials to rein in the jury. One such trick was to define matters as equitable or maritime to avoid the jury;\(^{396}\) another—particularly favored when eminent domain issues were at stake—was to assign decision of the matter to an administrative body.\(^{397}\) In addition, the right of the jury to decide questions of law was whittled away, so that today there are only two states that have formal rules allowing the jury to decide questions of law, and even then only in criminal cases.\(^{398}\)

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U.S. CONST. amend. VII. The amendment resolves both of the issues raised by opponents of the Constitution. It guarantees the right to a civil jury, and it protects jury verdicts from appellate review as to the facts. \textit{Id.}\(^{393}\)

See \textit{Horwitz}, supra note 93, at 84 (discussing the “tendency of state legislatures to eliminate the role of the jury in assessing damages for the taking of land”).


See \textit{Horwitz}, supra note 93, at 28–29, 84–85, 140–43.


See \textit{Horwitz}, supra note 93, at 29, 67 (discussing how the rise in the amount of jury judgments prompted defendants to request court-appointed appraisers whose “decisions shall be conclusive”). Some of these developments took place in the states, where the Seventh Amendment did not apply. See Melancon v. McKeithen, 345 F. Supp. 1025, 1045 (E.D. La. 1972), \textit{aff’d sub nom.}, Davis v. Edwards, 409 U.S. 1098 (1973). The civil jury was usually provided for, however, in state constitutions or statutes. \textit{Sward, supra} note 168, at 207.

See \textit{Abramson, We the Jury, supra note 207,} at 62. The states that still allow juries to decide law in criminal cases are Maryland and Indiana. \textit{Id.} The state rules on the jury can differ from the federal rules, as there is no federal constitutional guarantee of civil jury trials in state courts—the Seventh Amendment has never been incorporated into the Fourteenth Amendment so as to apply it to the states. See \textit{Melancon, 345 F. Supp.} at 1044–45; 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREASURY ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §17.8, at 652 n.12 (2d ed. 1992). Federal civil juries have never been able to decide issues of law with impunity, because the Seventh
There were two related things going on here. First, the political justification for the jury—its value as a body that can control government encroachments on individual liberty—was being undermined by the practicalities of governing. In a sense, the jury no longer "worked" once we, and not the British, were in charge. Jury defiance was fine when we were trying to break free of the British yoke. But we needed the government to be able to encroach on individuals to some degree, or we would not be able to meet our collective goals. Second, the pragmatic problems with the jury led to changes in the operation of the jury, with limits being placed on it that had not been there before. As the jury had become a hindrance, we had to change how it worked. (We could not abolish the jury—at least not easily—because in our revolutionary fervor we constitutionalized our right to a civil jury trial.)

Today, we are still living with this breakdown in justification. First, the jury is being vigorously debated, with passionate argument and empirical data both supporting and refuting the value of the jury as a decision-making body. In other words, we are looking for justification for the jury itself. Second, changes in the structure and operation of the civil jury have continued, with a considerable acceleration since the promulgation of the Federal Rules of Civil Procedure in 1938. These changes need to be justified within the constitutional scheme. Much of the jurisprudence on the Seventh Amendment is devoted to these tasks of justification.

2. Justifying the Jury in Contemporary America

I start with the problem of justifying the jury itself. In performing this task of justification, we must begin with the fact that the Seventh Amendment requires a civil jury in "[s]uits at common law." In one sense, that constitutional requirement is all the justification we need. We cannot rely entirely on the constitutional requirement, however, especially as the nature of the justification for the jury itself may fuel some of the changes in the structure and operation of the jury. Thus, I then turn to the problem

Amendment allows appellate review of any decisions of law that the jury might make. See U.S. CONST. amend. VII (stating that facts tried by juries cannot be reexamined except in accordance with the common law, but otherwise allowing for full appellate review of jury trials). Of course, a jury could decide issues of law contrary to an instruction to the judge under the rubric of a general verdict, and no one would be sure that they had done so. This is jury nullification, and as I have suggested, the special verdict can today be justified on the ground that it helps prevent jury nullification. See supra notes 207 and accompanying text.

400 U.S. CONST. amend. VII.
401 Perhaps that is why the changes in the jury have been to its structure and function. We cannot abandon the jury, but we can redefine it and its tasks to the point where it is not as useful as it once was. See generally SWARD, supra note 168, at 18 (describing how changes in the civil jury have made it a less effective institution). I should acknowledge that a thousand years of history did not prevent England from all but abandoning the civil jury. In England today, civil litigants have a right to a civil
of justifying changes in the structure and operation of the jury, where I start with the fact that the Seventh Amendment seems to contemplate a historical justification of the second type when it provides that the right of trial by jury in common law actions shall be "preserved." Indeed, that language has been interpreted as requiring that the right to be preserved is the right as it existed in England in 1791, the year the Seventh Amendment was ratified. The scope of that requirement has been much debated, however, and the task of interpretation and justification is far from complete.

a. Justifying the Jury Itself

It has been suggested that if we were writing our Constitution today, we may well decide not to constitutionalize the right to a civil jury trial. In other words, the suggestion is that we are not as happy with the civil jury as we once were—we are unsure whether the civil jury can still be justified. Indeed, we have seen many attacks on the civil jury recently, most taking a pragmatic approach—arguing that the jury does not work. These range from complaints about the jury’s competence to handle the complex questions of modern litigation to allegations of jury bias against jury in only a handful of cases. See Lord Patrick Devlin, Trial by Jury 130–31 (1956); James Driscoll, The Decline of the English Jury, 17 Am. Bus. L.J. 99, 107 & n.58 (1979) (listing fraud, libel, slander, malicious prosecution, and false imprisonment as actions triable to a jury, but noting that English courts can deny a jury even in these cases). Thus, pragmatic justifications have overborne the ideological and the historical in England. England has no written Constitution, so this change was easier to accomplish there than it would be in the United States, where a constitutional amendment would be required.

402 U.S. CONST. amend. VII. A historical justification of the second type refers to an epochal period in the country's history—here, the founding era. See supra notes 140–42 and accompanying text. There is a difference, but only a small one, between using an epochal era to define the kinds of cases where a jury trial is required and using it to define the incidents of the right to jury trial. The Supreme Court itself has said that the Seventh Amendment preserves only the fundamental right to jury trial and not all of its incidental procedures. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336–37 (1979); Galloway v. United States, 319 U.S. 372, 392 (1943). But one can define the incidents of the right to jury trial in such a way that the fundamental right is undermined. See generally Sward, The Seventh Amendment, supra note 168, at 574–76 (demonstrating how changes in a number of jury trial procedures have undermined the historic distinction between fact and law).


405 See Peter W. Huber, Liability: The Legal Revolution and Its Consequences 11–12 (1988) (stating that "juries have often (and quite understandably) proved unskilled at distinguishing the various parties found at the scene of the crime"); Dan Drazan, The Case for Special Juries in Toxic Tort Litigation, 72 Judicature 292–94 (1989).
corporations.\textsuperscript{406} Much of the evidence of these alleged problems with the jury is anecdotal,\textsuperscript{407} and some of the studies that support the evidence are funded by insurance and other business interests that have been particularly unhappy with jury verdicts.\textsuperscript{408} In making complaints about the jury, the tendency is to focus on personal injury and other tort claims, and so the arguments are often put in terms of "tort reform," though the reform often involves curbing the jury.\textsuperscript{409}

There are also many strong proponents of the jury. Indeed, the work of the jury's detractors has prompted a flurry of empirical analyses of jury behavior that challenges the evidence against the jury.\textsuperscript{410} This work aims to show that the vast majority of jury verdicts either favor corporate tort defendants or are modest in size.\textsuperscript{411} One even showed that juries might be

\textsuperscript{406} See Huber, supra note 405, at 12 (stating that "[i]f the new tort system cannot find a careless defendant after an accident, it will often settle for merely a wealthy one"); Stephen Landsman, The History and Objectives of the Civil Jury System, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 22, 44-45 (Robert E. Litan ed., 1993) [hereinafter VERDICT] (reporting on long-standing allegations of bias against corporations). But see Audrey Chin & Mark A. Peterson, Deep Pockets, Empty Pockets 32 (1985) (finding no evidence that juries are more willing to find liability against institutions because they have "deep pockets").


\textsuperscript{408} See Jeffrey O'Connell & C. Brian Kelly, The Blame Game: Injuries, Insurance, and Injustice 57-61 (1987) (describing undercover investigation funded by various insurance companies seeking to show that many plaintiffs are defrauding the insurance industry).


\textsuperscript{411} See Daniels & Martin, supra note 407, at 51-57 (describing how tort reformers may have skewed the increase in damage awards by referring to the mean, rather than the median, award); Vidmar, supra note 411, at 11-23 (refuting allegations that juries have become increasingly pro-plaintiff).
favoring corporations less often than judges did.412 There are studies that show that judges agree with juries a substantial portion of the time,413 implying that the jury must be doing a competent job. Some of these studies show that jury competence is affected by such factors as the size of the jury414 or the instructions the jury is given.415 In short, there is substantial disagreement today about whether the jury does a good job.

The arguments I have been describing are generally about whether the jury is getting the verdict “right,” unaffected by bias and incompetence. They are pragmatic in nature, but they do not exhaust the kinds of pragmatic discussion we have seen regarding the jury. Some pragmatic justifications for (or against) the jury build on the basic competence arguments; some are more free-standing. The pragmatic arguments for the civil jury were summarized in a Report of a 1992 Symposium sponsored by the American Bar Association and the Brookings Institution.416 In addition to arguing that the jury does a competent job of deciding cases,417 the Report says that juries can protect “against the abuse of power by legislatures, judges, the government, business, or other powerful entities”418 that it “brings broadly based community values to dispute resolution”;419 that it “provides an important check on the bureaucratization and professionalization of the legal system”;420 and that it “provides a means for legitimizing the outcome of dispute resolution and facilitating public understanding and support for and confidence in our legal system.”421 Some elaboration of these justifications is warranted.

412 See Kevin M. Clermont & Theodore Eisenberg, Trial by Jury or Judge: Transcending Empiricism, 77 Cornell L. Rev. 1124 (1992).
414 One study found that the incidence of so-called outlier verdicts—verdicts that were extremely high or low—increased as the size of the jury shrank from twelve to six. See Michael J. Saks, The Smaller the Jury, the Greater the Unpredictability, 79 Judicature 263, 264 (1995).
415 See Kassin & Wrightsman, supra note 409, at 143–60; Saltzberg, supra note 409, at 355; Sarokin & Munsterman, supra note 409, at 380, 393–94.
416 See American Bar Association/Brookings Symposium, Charting a Future for the Civil Jury System 2–5 (1992) [hereinafter Charting a Future]; Wells, supra note 28, at 2411 (arguing that the jury is essential to fulfilling the corrective justice function of tort law “by allowing the jury to evaluate a wide range of issues and by requiring that it operate in a decisional context that produces locally objective judgments”).
417 The Report states that “jurors take their responsibilities very seriously and attempt to reach fair and just results.” Charting a Future, supra note 416, at 8. It also notes that judges and juries generally agree on verdicts. Id.
418 Id. at 9.
419 Id.
420 Id. at 10.
421 Id.
Protection against abuse of power is the traditional justification that was so important during the ratification debates over the Constitution.\textsuperscript{422} The modern twist, however, is that it is not just the government that can abuse power: corporations and "other powerful entities" can do so as well.\textsuperscript{423} Thus, part of the debate about whether the jury is doing a good job could involve different perspectives on the jury's role in protection against abuse. Is the jury protecting litigants against abuse by powerful institutions, or is it biased against those institutions? However one views it, this is primarily a pragmatic justification: the jury is an instrument for good or evil, and its value depends considerably on context and contingency.

Bringing community values to the resolution of disputes has long been a justification for the jury. It is said that the jury is the best institution for doing so, because it (ideally) brings a representative sample of the community together, achieving a melding of different perspectives that can reach a truer and fairer result.\textsuperscript{424} Of course, this depends on whether the jury is truly a representative sample of the community, and there are many factors that enter into that equation, including the size of the jury, the decision rule used by the jury, and the use of peremptory challenges to remove some potentially relevant viewpoints from the jury.\textsuperscript{425} Once again, this is a pragmatic justification: at least in cases where some sense of the community is important in the resolution of disputes, a representative sample of the community is judged the best means to determining that sense of the community.

Providing a check on the bureaucratization and professionalization of the legal system helps to keep the system grounded in the experience of the ordinary people who must use it to resolve their disputes.\textsuperscript{426} We help one another resolve disputes rather than rely on professionals. That in turn keeps us from overly-technical responses to human problems. Again, the jury is an instrument for achieving this end.

Finally, the jury has long been justified as an excellent educational tool. Thomas Jefferson noted that the jury is "the 'school by which [the] people learn the exercise of civic duties as well as rights.'"\textsuperscript{427} Similarly,

\textsuperscript{422} See Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting); Abramson, We the Jury, supra note 207, at 31.

\textsuperscript{423} Charting a Future, supra note 416, at 9. See also George L. Priest, Justifying the Civil Jury, in Verdict, supra note 406, at 103, 110, 117–20 (discussing the role of civil juries in "cases involving governmental power").

\textsuperscript{424} See Charting a Future, supra note 416, at 9–10 (stating that "juries provide the best mechanism for bringing broadly based community values to bear on the issues involved in private disputes . . . ").

\textsuperscript{425} See generally Sward, supra note 168, at 209–42 (discussing various characteristics of the jury that can affect the degree to which it accurately represents the community from which it is drawn).

\textsuperscript{426} See Charting a Future, supra note 416, at 9.

Alexis de Tocqueville said that "the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well." In other words, jury participation helps people become better citizens. Indeed, there is modern empirical evidence suggesting that people who have served on juries believe that they have benefited from that service and that they have more respect for the courts than people who have not served on juries.

All of these justifications for the jury are pragmatic in the sense that the jury is an instrument that helps us achieve the stated ends. But what of the ends themselves? How are they justified? We can certainly justify the goal of achieving true and fair outcomes pragmatically, as I have already shown. For the other goals, we may need to rely primarily on a theoretical justification, specifically, democratic theory. Bringing community values into the dispute resolution system, preventing the bureaucratization and professionalization of the legal system, and educating the citizenry are all important because they are consistent with democratic theory. For example, if our democratic theory is that sovereignty rests with the people, it follows logically that we would not want the legal system to become too technical and, therefore, too distant from the people as sovereign. Even more consistent with democratic theory is the goal of protection against abuse by powerful entities within society. Again, if sovereignty rests with the people, it follows that we would want to prevent any entity within soci-

88 (1990); see also 15 THOMAS JEFFERSON, THE PAPERS OF THOMAS JEFFERSON 283 (Julian Boyd ed., 1958) (stating that the jury is "very capable of judging questions of fact" and "gives still a better hope of right, than cross and pile does") (emphasis omitted).

428 I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 291 (Henry Reeve trans., The Colonial Press 1900); see JOHN STUART MILL, REPRESENTATIVE GOVERNMENT, in 43 GREAT BOOKS OF THE WESTERN WORLD 381 (Robert Maynard Hutchins ed., 1952) (stating that "among the foremost benefits of free government is that education of the intelligence and of the sentiments which is carried down to the very lowest ranks of the people when they are called to take a part in acts which directly affect the great interests of their country").


430 See supra Part II.B.4–5.

431 I do not mean to suggest that this is the only or even the most important element of democratic theory, or even that it is a necessary element of all democratic theory. I use it only as an example. There are many varieties of democratic theory. See generally ROBERT A. DAHL, ON DEMOCRACY (1998); DAVID HELD, MODELS OF DEMOCRACY (1987); JAMES L. HYLAND, DEMOCRATIC THEORY: THE PHILOSOPHICAL FOUNDATIONS (1995). For some specific theories of democracy, see, for example, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994); C.B. MACPHERSON, DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL (1973); JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1980); CAROLE PATeman, PARTICIPATION AND DEMOCRATIC THEORY (1975). Two forms of democracy that I will discuss in the text are participatory democracy and representative democracy.
ety, including governmental entities, from becoming so powerful that they could abuse the people. While these justifications have always existed in this country, they are being articulated and discussed more today than they have throughout most of our history.\footnote{See, e.g., ABRAMSON, WE THE JURY, supra note 207, at 8 (discussing the jury as an important deliberative body); SWARD, supra note 168, at 51–63 (discussing the role of juries in participatory democracy); Paul D. Carrington, The Civil Jury and American Democracy, 13 DUKE J. COMP. & INT’L L. 79 (2003) (discussing the jury’s indispensable role in the American constitutional scheme).}

Democratic theory may provide a more direct justification for the jury as well.\footnote{I made this argument in SWARD, supra note 168, at 52–56.} There were two strands of democratic ideals in the air at the time of the founding—participatory democracy, championed by Jefferson,\footnote{Jefferson believed that the people should rethink their governing structures and ideals every twenty years or so. See Letter from Thomas Jefferson to Samuel Kercheval, July 12, 1816, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 673, 675 (Adrienne Koch & William Peden eds., 1944). Jefferson did not take part in the drafting of the Constitution.} and representative democracy, which James Madison, the “father of the Constitution,” preferred.\footnote{IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800, at 155 (1950); see also FEDERALIST PAPER NO. 10 (James Madison) (discussing his vision of democracy); Jack N. Rakove, James Madison and the Creation of the American Republic 71 (Oscar Handlin ed., 2002) (examining the impact of Madison’s democratic theory on debates at the Constitutional Convention).} While Madisonian democracy was enshrined in the Constitution, Jeffersonian democracy was not left out entirely. Indeed, the jury is probably the strongest Jeffersonian element in the Constitution. Thus, the jury is justified as consistent with principles of participatory democracy found in the Constitution and in the theories of at least some of the country’s founders. It represents the direct participation of citizens in important governmental decisions.\footnote{DE TOCQUEVILLE, supra note 428, at 285–91; see also CABLE PERRY PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 56–58 (1953) (discussing Jefferson’s theory of representative government).}

These are the principal forms that justifying the jury has taken in modern America. These justifications are primarily pragmatic, though theoretical justifications have been offered as well. One other form of justification for the jury needs to be considered, and that is the historical form. While the historical justification is much more important in justifying changes in the structure and operation of the civil jury, one aspect of the historical justification may be salient. The jury has been a part of Anglo-American history for nearly a thousand years.\footnote{See SWARD, supra note 168, at 68, 72–73.} That longevity was not enough to keep the civil jury alive in England,\footnote{See supra note 401.} but the civil jury played a more important role in the years leading up to the American Revolution than it did in England.\footnote{See SWARD, supra note 168, at 90, 98.} Thus, the longevity coupled with its Revolution-era impor-
tance might well make us view the jury as an important part of our national identity. I know of no one who has articulated this directly, so, unlike the other justifications I have outlined, it may not be a conscious consideration in the debate. And, of course, our national psyche can change so that we no longer identify the civil jury with our form of government.\textsuperscript{440} In particular, if we came to think that the civil jury was no longer performing as competently as we need it to, that might constitute sufficient pragmatic justification for overriding any justification based on history.\textsuperscript{441}

b. Justifying Changes in Structure and Operation of the Civil Jury

Despite the variety of justifications offered for the jury itself, the most salient justification for the incidents of jury structure and operation is the historical justification of the second type: an appeal to an epochal period in our history. This is thought to be mandated by the Seventh Amendment, which “preserves” the right to jury trial.\textsuperscript{442} That language has been interpreted to require a jury in those cases that would have been tried to a jury in England in 1791, the date when the Seventh Amendment was ratified.\textsuperscript{443} England is the keystone because jury practice in the several states was so varied at the time that no uniform practice could be found in the United States.\textsuperscript{444} In this section, I will approach the justification for the structure and operation of the civil jury by addressing two issues: when the right to a civil jury trial applies; and how the civil jury is defined.

i. When Does the Right to a Civil Jury Trial Apply?

Determining when the civil jury applies requires that we consider two distinctions that are at the heart of the right to jury trial: the law/equity distinction and the law/fact distinction. The general rule is that the Seventh Amendment requires a jury trial in legal (as opposed to equitable) actions, but only as to questions of fact—not questions of law.\textsuperscript{445} The specific ap-

\begin{itemize}
  \item \textsuperscript{440} The criminal jury is another matter. The criminal jury has not been the subject of as much debate as the civil. See Valerie P. Hans & Neil Vidmar, Judging the Jury 250 (1986) (comparing the civil and criminal juries and concluding that “the criminal jury will probably survive” but “[t]he future of the civil jury is more questionable”); Christopher E. Smith, Imagery, Politics, and Jury Reform, 28 Akron L. Rev. 77, 85-86 (1994) (articulating the differences between civil and criminal juries and asserting that the civil jury may no longer be understood as “a necessary mechanism for bringing democracy into the judicial process”).
  \item \textsuperscript{441} The fact remains, of course, that the jury is mandated by the Constitution. U.S. Const. amend. VII.
  \item \textsuperscript{442} Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 738 (1999) (Souter, J., concurring).
  \item \textsuperscript{444} See Wolfram, supra note 380, at 712-18, 732-34 (reviewing models of state incorporation of the Seventh Amendment right of trial by jury).
  \item \textsuperscript{445} Monterey, 526 U.S. at 708, 731-32.
\end{itemize}
plication of this general rule has changed over the country's history, however. I will analyze the role of justification in those changes.

A. The Law/Equity Distinction

The Seventh Amendment clearly applies to common law actions only.\textsuperscript{446} It does not apply in equitable or maritime actions.\textsuperscript{447} But judicial history is not static, and that fact alone has raised many questions of interpretation. Most significantly, law and equity have been merged, and a single set of procedures now covers both.\textsuperscript{448} But other changes have occurred as well. New common law actions have been created that did not exist in 1791.\textsuperscript{449} Statutory causes of action have proliferated.\textsuperscript{450} New remedies—most notably the declaratory judgment\textsuperscript{451}—have been created. These changes must necessarily affect the historical approach.

There are at least two possible approaches to take to these issues. One is to treat them as if they had not occurred, and to treat the Seventh Amendment as requiring a jury trial in only those common law actions that actually existed in 1791. This would result in the right to jury trial in civil cases becoming more and more limited over time, particularly as so many causes of action today are statutory. Thus, as the law proliferates, the right to jury trial contracts. This is not, however, the approach the Court has taken.

Beginning with \textit{Beacon Theatres, Inc. v. Westover}\textsuperscript{452} in 1959, the Court made it clear that changes in legal structure and procedures could affect the analysis of the law/equity distinction.\textsuperscript{453} Thus, in \textit{Beacon Theatres} itself,
which involved both legal and equitable claims, the Court held that the merger of law and equity had eliminated the need for injunctions against multiple common law actions, an accepted equitable remedy prior to the merger. The Court thus overturned the trial judge’s decision to hear the equitable claims first and then empanel a jury for any remaining legal claims, equating that process to an injunction against the legal action. The result was that matters were heard by a jury that arguably would not have been in England in 1791.

The Court continued this approach in Dairy Queen, Inc. v. Wood, where it held that the provision for masters in the Federal Rules of Civil Procedure eliminated the need for the equitable remedy of accounting and allowed the Court to consider the nature of the underlying claim; if the underlying claim was legal, there was a right to a jury trial, regardless of the formal request for an accounting. Similarly, in Ross v. Bernhard, the Court held that the merger of law and equity meant that in a shareholders’ derivative suit, a jury was required to hear any legal claims being asserted on behalf of the corporation, though the judge would still have to decide if the shareholders’ derivative suit could proceed. The Court has also held that the Seventh Amendment applies to statutory actions “if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.” And it held that the new declaratory judgment remedy was a legal remedy when the issue raised by the declaratory judgment was legal. Except for the declaratory judgment matter, these decisions meant that a civil jury was required in the merged system in circumstances where there would have been no jury in 1791 in England.

The question is why the court took this approach: what is the justifica-

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174 U.S. 1, 22–30 (1899); Walker v. N.M. & S. Pac. R.R. Co., 165 U.S. 593, 596 (1897). Beacon Theatres was the first application of that principle to the law/equity distinction.

454 See Beacon Theatres, 359 U.S. at 508. The characterization of some of the claims in Beacon Theatres as equitable was somewhat problematic, but the Court ignored the difficulties in order to reach the fundamental question about the treatment of legal and equitable claims in a merged system. See id. at 504–07; SWARD, supra note 168, at 165 n.48. For a discussion of practice prior to the merger, see id. at 158–60.

455 See Beacon Theatres, 359 U.S. at 507–08.

456 For a full discussion of this issue, see SWARD, supra note 168, at 165–69.


458 See id. at 477–79.


460 See id. at 542–43.


462 See Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504 (1959). Determining whether a declaratory judgment action is legal or equitable requires that the judge determine how the issue would have been raised in the absence of the declaratory judgment remedy. See SWARD, supra note 168, at 164. If it would have been raised in a legal action, whether as a claim or a defense, the matter is legal. Id.

463 For a more detailed discussion of this, see SWARD, supra note 168, at 161–69.
tion for an interpretation of the historical mandate of the Seventh Amendment that expands the circumstances where a jury is required? The explanation that is most obvious in the cases is that the Court gave considerable deference to the historical limitations on equity jurisdiction, in particular the rule that equity could not act if there was an adequate legal remedy. The Court clearly thought that if changes in procedure make adequate legal remedies available where they were not available earlier, the operation of equity is contracted. There were dissents on this point, with some justices believing that the right to a jury trial depended entirely on how the matter would have been decided in 1791 in England, without regard to subsequent procedural changes. Indeed, the dissent in Beacon Theatres accused the Court of ignoring other traditional equitable rules, such as the rule that equity does not lose jurisdiction because of the subsequent availability of an adequate legal remedy.

Formally, then, the argument is about the interpretation and application of history. Indeed, much of the commentary is based on history as well. This is not surprising given that we must start with constitutional text that seems to invoke history. But the disagreement among justices and commentators about what the history means makes it clear that there is more than one way to interpret the historical mandate. How and why do we choose one interpretation over another? On that point, the cases are virtually devoid of justification. This lack of justification is also not surprising. If we tried to justify one interpretation over another, for example, on the pragmatic ground that the interpretation would help us to contain the jury, we would appear to be allowing our personal predilections to determine the meaning of constitutional text. Better to pretend that history itself can

466 Id. at 517.
468 Of course, accusations that justices have allowed their personal predilections to drive their interpretations of constitutional text are common. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 1000 (1992) (Scalia, J., concurring in part and dissenting in part) (describing the majority opinion as "a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls 'reasoned judgment,' ... which turns out to be nothing but philosophical predilection and moral intuition"); G. Edward White, The AntiJudge: William O. Douglas and the Ambiguities of Individuality, 74 VA. L. REV. 17, 61 (1988) (noting that Justice Douglas indicated that ninety percent of his decisions were based on personal ideology); William S. White, Russell
supply the answer.

B. The Law/Fact Distinction

So far, we have seen a struggle to define the right to jury trial that is grounded in history. But when we turn to the law/fact distinction, which also has deep historical roots, the story becomes more complicated. Indeed, it is in connection with the law/fact distinction that the debate over the justification for the civil jury itself comes into play. In particular, if the competence of the jury is in question—if it cannot be justified as an effective way to make judicial decisions—it may be possible to manipulate the definitions of law and fact so as to affect the allocation of decision-making between judge and jury. And that is exactly what has happened, beginning in the nineteenth century with the adoption of the “reasonable jury” or “substantial evidence” standard.469

The origins of the law/fact distinction are difficult to discern. When disputes were resolved through ordeal, battle, or wager of law, there was certainly no attempt to distinguish them. The ultimate decision was simply that one party won and the other lost. In the early days of the jury, much the same was true: the jury was asked to determine, often based on the jurors’ personal knowledge, who was right. The possibility of an attainant sometimes made juries hesitate, however, and the special verdict—which was employed by jurors to avoid attainant470—is an early example of the law/fact distinction being used. Thus, this distinction may well have its origins in the pragmatic desire of jurors to avoid attainant. Indeed, by the early seventeenth century Coke noted, especially in discussing the special verdict, that juries decide the facts and judges decide the law.471 The distinction was never exact, however, and is a difficult one to draw.472 Some commentators have observed that the law/fact distinction is simply short-

469 Sward, The Seventh Amendment, supra note 168, at 592–93.
470 See supra note 192 and accompanying text.
471 See THAYER, supra note 171, at 185. Thayer notes that Coke attributed the aphorism to Bracton, but says that that might be an error. Id. Thayer says that “[i]t seems likely that this formula took shape in England in the sixteenth century.” Id.; see also 1 HOLDsworth, supra note 176, at 298–99 (describing the origins of the law/fact distinction).
hand for the judge/jury allocation: if the matter is decided by the judge, it is
deemed a question of law, and if by the jury, it is a question of fact.\footnote{473}

In any event, a division of labor between judge and jury certainly ex-
isted in England in 1791, and had existed for some time.\footnote{474} But in the last
third of the nineteenth century, a change took place in the standard by
which we allocate questions to judge and jury, and the change led to more
issues being decided by the judge.\footnote{475} The change had to do with the suffi-
ciency of the evidence: at what point was the evidence on a particular issue
so insufficient that the matter did not need to be presented to the jury?
Sufficiency of the evidence had previously been measured by things like
admissibility: if the only evidence in support of a proposition was inadmis-
sible, then the evidence was insufficient and the matter could not go to the
jury.\footnote{476} The question of admissibility is a question of law—for the judge to
decide.\footnote{477} In the United States, it had generally been thought that the issue
must go to the jury if there was any admissible evidence to support it—a
mere "scintilla."\footnote{478}

In Improvement Co. v. Munson,\footnote{479} however, the Supreme Court held
that a preliminary question of law, to be decided by the judge, existed in
each case where a jury trial is being held, and that is whether the evidence
for one of the parties was insufficient to permit a reasonable jury to find for
that party.\footnote{480} This allowed the judge to take matters out of the jury’s hands
even if there was a “scintilla” of admissible evidence in support of the mat-
ter. Thus, some issues that would have gone to the jury in 1791 in England
would now be decided by the judge. In support of this change, the Court
cited no English authority from the late eighteenth century, but rather relied
on Jewell v. Parr, an English case decided in 1853.\footnote{481} Prior to Jewell, the
courts in both England and the United States had simply drawn the admis-
tedly imprecise law/fact distinction.\footnote{482} They had not, however, evaluated

\footnote{473} See Parker, supra note 472, at 486–87; Weiner, supra note 472, at 1868. There are also
“mixed questions” of law and fact, and they present particularly difficult issues of allocation. See
Francis H. Bohlen, Mixed Questions of Law and Fact, 72 U. PA. L. REV. 111 (1924); Frederick Green,
Mixed Questions of Law and Fact, 15 HARV. L. REV. 271 (1901-1902); Ellen E. Sward, Appellate

\footnote{474} See Sward, The Seventh Amendment, supra note 168, at 581.

\footnote{475} Id. at 575.

\footnote{476} See SWARD, supra note 168, at 83.

\footnote{477} FLEMMING JAMES JR. & GEOFFREY C. HAZARD JR., CIVIL PROCEDURE § 7.4 (3d ed. 1985).

\footnote{478} See Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871) (noting former rule);
Sward, The Seventh Amendment, supra note 168, at 593 (noting the Court in Munson applied the rule
that “a case should not be submitted to the jury where there is no evidence on the subject”).

\footnote{479} 81 U.S. (14 Wall.) 442 (1871).

\footnote{480} Id. at 448.

\footnote{481} Jewell v. Parr, 138 Eng. Rep. 1460 (1853) (holding that a court can take a case from the jury
even when there is some evidence on both sides).

\footnote{482} SWARD, supra note 168, at 271–72.
the strength of the evidence to determine if it was sufficient to send the case to the jury.\footnote{Id. at 82–83.}

A significant change like this would seem to require a strong justification, but \textit{Munson} offered only the cryptic comment that “recent decisions of high authority have established a more reasonable rule.”\footnote{\textit{Munson}, 81 U.S. at 448.} The Court then cited \textit{Jewell} and several English cases that followed it.\footnote{Id. at 448.} The Court did not mention the Seventh Amendment. The Court did, however, say that “it is settled law that it is error to submit a question to a jury in a case where there is no evidence upon the subject.”\footnote{Id. at 447.} This sounds vaguely like a historical justification, with the new rule being nothing more than a variation on the fundamental theme. It is simply deciding what we mean by “no evidence upon the subject.”\footnote{Id.} I have documented elsewhere that the effect on the assignment of issues to the jury was significant,\footnote{\textit{See Sward, The Seventh Amendment, supra note 168, at 575.}} and I will not repeat those arguments here. The question I want to address concerns the nature of the justification for this change.

The Court simply calls the new rule more reasonable than the old.\footnote{\textit{See Munson}, 81 U.S. at 448.} This is a pragmatic argument, though no specific justification as to why the rule is more reasonable is offered. Perhaps the Court was thinking that the new rule could save court time and avoid the risk of an unreasonable jury verdict by removing from the jury those issues that reasonable jurors could not disagree about. In other words, the new rule is more efficient. This seems to be the heart of the Supreme Court’s view, and while the specific contours of the rule are sometimes debated today,\footnote{\textit{See Sward, supra note 168, at 292–93; Charles Alan Wright, Law of Federal Courts 683–85 (5th ed. 1994); Edward H. Cooper, Directions for Directed Verdicts: A Compass for Federal Courts, 55 Minn. L. Rev. 903, 948–53 (1971); Jeffrey W. Stempel, A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process, 49 Ohio St. L.J. 95, 157–59 (1988).} the basic formulation of the rule generally is not. Thus, the reasonable jury standard has become the norm, apparently for pragmatic reasons.\footnote{A procedure or doctrine that is justified pragmatically can be undermined pragmatically as well. In most cases, for example, the problem of unreasonable jury verdicts can be solved by the common law remedy of a new trial, though that surely exacerbates the arguable misallocation of resources. In addition, practice under the \textit{Munson} rule has shown that judges themselves sometimes disagree about what a reasonable jury might decide. For example, in \textit{Baltimore & Carolina Line, Inc. v. Redman}, by the time the matter reached the Supreme Court, the sufficiency of the evidence had been considered by four judges, with two believing that the evidence was sufficient and two believing that it was insufficient. \textit{Balt. & Carolina Line, Inc. v. Redman}, 295 U.S. 654, 656 (1935); \textit{see Sward, The Seventh Amendment, supra note 168, at 615–16.} The Supreme Court did not grant certiorari on the
If the Court had considered other forms of justification for the new rule, it might have had a more difficult time. For example, if the Court had considered whether the rule was consistent with the Constitution—employing a historical justification of the second type as is common in Seventh Amendment jurisprudence—the new rule might not have been justifiable, because the English precedent on which it was based does not date to the epochal period—the late eighteenth century—but only to the middle of the nineteenth century. Thus, the Court would have had to argue that the new rule is not significantly different—that is, different in the ways that matter for purposes of the Seventh Amendment—from the old. But the Court avoided this difficulty by not mentioning the Seventh Amendment at all.

The *Munson* rule is at the root of two procedural devices that had their origins in the English common law but that matured in the Federal Rules of Civil Procedure: the directed verdict and the judgment notwithstanding the verdict, now collectively called judgment as a matter of law.\(^\text{492}\) Both of these procedures have changed significantly from their common law roots, but as currently practiced, both allow a judge to remove a case from the jury if no reasonable jury could find for one of the parties.\(^\text{493}\) Thus, justification for what is now called the judgment as a matter of law is in part derivative of the justification for the reasonable jury standard, though the Court today simply assumes the soundness of *Munson* and does not discuss it.

But unlike the discussion in *Munson*, when the Court considered the propriety of the former directed verdict in *Galloway v. United States*,\(^\text{494}\) the constitutionality of the procedure under the Seventh Amendment was the main issue. In other words, the Court had to ensure that the directed verdict was consistent with procedures in place during the epochal period.

\(^{492}\) *See* FED. R. CIV. P. 50. The change in name was designed, first, to demonstrate that the two motions were identical in nature, but simply made at different times in the litigation process; and, second, to make clear the link between the judgment as a matter of law and the summary judgment, where the term "judgment as a matter of law" also appears. *See* FED. R. CIV. P. 50 & advisory committee's note.

\(^{493}\) The directed verdict was sought before the jury retired to consider its verdict; the judgment notwithstanding the verdict was sought after the jury returned the verdict. The current rule provides that judgment as a matter of law must be sought before the matter is submitted to the jury, and that any motion filed after the verdict is deemed a renewal of the original motion. *FED. R. CIV. P. 50 & advisory committee's note.* The reasons for this have to do with the Reexamination Clause of the Seventh Amendment, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." *U.S. CONST.* amend. VII. *See infra* notes 497–509 and accompanying text for further discussion.

\(^{494}\) 319 U.S. 372 (1943).
The argument against that consistency was that the directed verdict provided for in the Federal Rules of Civil Procedure operated differently from the equivalent eighteenth century English device, the demurrer to the evidence. A demurrer to the evidence in eighteenth century England required the person seeking the demurrer to forgo putting on evidence if he lost; in other words, he admitted the truth of his opponent’s facts and inferences, but argued that his opponent could not win as a matter of law. If he lost the demurrer to the evidence, he lost the case, because he had admitted his opponent’s facts. By contrast, the directed verdict under the federal rules allowed the moving party to dispute her opponent’s factual evidence if she lost the directed verdict motion. In *Galloway*, the Court approved the procedure under the Federal Rules, justifying it on the ground that the Seventh Amendment did not require that procedures relating to the civil jury remain inviolate; the procedural incidents of the civil jury could change without threatening the basic right to the civil jury trial. The new directed verdict procedure did not, according to the Court, violate the historical mandate of the Seventh Amendment because the Seventh Amendment preserves only “the basic institution of jury trial in only its most fundamental elements.” Elimination of the risk associated with the eighteenth century procedure is a mere procedural incident and does not affect the fundamental right to a jury trial.

As with the reasonable jury standard, however, the real reason for allowing the directed verdict is probably quite pragmatic. It is a means to an end, and there could be several ends: making litigation more efficient by eliminating trials on issues where one party has no reasonable way to prevail and gaining some measure of control over the jury are just two of them. It is difficult to make these pragmatic justifications carry much weight, however. Pragmatic reasons could not overcome the historical mandate of the Seventh Amendment—at least not consciously—because the Seventh Amendment is part of our Constitution. Thus, Seventh Amendment justification tends to focus on the history even when the Court is abandoning that history. The constitutional status of the Seventh Amendment forces us to talk about history and masks the real reasons behind what we are doing.

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495 *Id.* at 399–400 (Black, J., dissenting); Henderson, *supra* note 191, at 304–05.
498 *See Galloway*, 319 U.S. at 392.
499 *Id.*
The same is true of the old judgment notwithstanding the verdict ("j.n.o.v."). The Court had earlier held that it is a violation of the reexamination clause of the Seventh Amendment for a court to enter a judgment inconsistent with a jury verdict—in other words, to grant a j.n.o.v. But the Supreme Court, in approving the precursor to the motion for j.n.o.v.—later written into the Federal Rules of Civil Procedure—found that a procedure where the trial judge reserved decision on a motion for directed verdict, deciding it after the jury returned a verdict, was sufficiently like the common law procedure called “case reserved” that it comported with the Seventh Amendment. Under the case reserved procedure, a judge would submit the case to the jury, reserving a question of law for later decision.

The constitutionality of the procedure, then, depends on two things: the classification of a decision about the sufficiency of the evidence as a question of law—a tactic made possible by the adoption of the reasonable jury standard in Munson; and the comparison of the procedure with a procedure that was in place during the epochal period. The latter was necessary to prevent the procedure from violating the Seventh Amendment’s reexamination clause, which prohibits reexamination of facts tried by a jury otherwise “than according to the rules of the common law.” As the “case reserved” is a common law procedural device, the Court quite neatly (but perhaps erroneously) fit the modern procedure into the common law procedure of the epochal period.

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502 See Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 423–24 (1913) (Hughes, J., dissenting) (describing prior Supreme Court decisions). The Reexamination Clause of the Seventh Amendment says that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII.
504 See Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659–60 (1935) (describing the common law practices of reserving questions of law and taking jury verdicts subject to the ultimate ruling on the questions reserved).
505 See Henderson, supra note 191, at 305–06.
506 See generally Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 447–48 (1871) (establishing the concept that judges must first decide if a question of fact goes to the jury).
507 See Sward, The Seventh Amendment, supra note 168, at 616 (describing the English common law practice of “case reserved”).
508 U.S. CONST. amend. VII.
509 I have argued elsewhere that the Court got the comparison to the common law case reserved wrong in deciding Redman. See Sward, The Seventh Amendment, supra note 168, at 613–24. Briefly, the Court treated a question of fact as a question of law. Id. at 619. In the precedent that the Court relied upon, the questions of law that were reserved were undoubtedly questions of law: issues of statutory construction in Carleton v. Griffin, 97 Eng. Rep. 443, 444 (1758) (holding that a will drawn by an illiterate man, and later reproduced with witnesses and a seal, is enforceable if it falls within the Statute of Frauds), of the application of a statute to undisputed facts in Coppendale v. Bridgen, 97 Eng. Rep. 576, 576–79 (1759) (holding nulla bona is a good return where the goods are affected by the defendant’s bankruptcy), or of the choice of common law rule to be applied to undisputed facts in Price v. Neaf, 97 Eng. Rep. 871, 871–72 (1763) (holding that an innocent endorsee cannot be compelled to
ii. Defining the Jury

In the previous section, I showed how the Court handled the question about what matters must be submitted to the jury. But there are also issues as to how to define a jury. Two aspects of the definition that the Court has considered are the size of the jury and the decision rule. In both cases, the Court has again looked to history and pragmatic considerations. But the outcomes in the two cases have diverged, with the Court approving of juries smaller than twelve in the federal courts, but maintaining the unanimity requirement.

The historical jury generally consisted of twelve persons. The Supreme Court had routinely held that twelve jurors were required in federal courts as well, in both civil and criminal cases, until Williams v. Florida in 1970. In that criminal case, the Court asserted that nothing in the history of the jury or the debate surrounding the adoption of the Constitution or the Sixth Amendment suggested that a jury of twelve was a fundamental aspect of the right to jury trial. Indeed, the Court noted that the primary purpose of the jury, at least at the time of the ratification, was to "prevent oppression by the Government," and the Court was convinced that a jury

510 Devlin, supra note 401, at 8–9; William Forsyth, History of Trial by Jury 197–99 (1875); 1 Holdsworth, supra note 176, at 324–25; Thayer, supra note 171, at 85–86.
512 Id. at 92–100. The right to a jury in criminal cases was guaranteed in the Constitution itself. See U.S. Const. art. III, § 2, cl. 3 (stating that "[t]he Trial of all Crimes . . . shall be by Jury"). Additional guarantees regarding the criminal jury were added in the Sixth Amendment. See U.S. Const. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").
of twelve persons was not required to fulfill that function.\textsuperscript{514} Then, relying on empirical studies, the Court concluded that there was no substantial difference in the functioning of a jury of twelve persons versus a jury of six persons.\textsuperscript{515} Because it was a criminal case, Williams was interpreting Article III and the Sixth Amendment of the Constitution. But three years later, in Colgrove v. Battin,\textsuperscript{516} the Court applied the same reasoning to the Seventh Amendment. With respect to the civil jury, the Court repeated its finding from earlier cases 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.'"\textsuperscript{517} In other words, twelve members was not an essential feature of the constitutional right to a civil jury, but was a mere matter of form.\textsuperscript{518} As there was no difference in function between a six-person jury and a twelve-person jury, there was nothing to prevent state and the federal courts from using the smaller jury.\textsuperscript{519}

Two kinds of justifications were offered in Williams and Colgrove. The Court starts, in each case, with a historical justification, albeit of a negative character: history does not require twelve persons on a jury.\textsuperscript{520} The Court appeals to the epochal period, but, despite the fact that juries had consisted of twelve persons since at least the fourteenth century, found nothing to suggest that the framers considered twelve persons an essential feature of the jury. This enabled the Court to rely on what it apparently views as the more important pragmatic argument: that smaller juries work just as well as larger juries.\textsuperscript{521}

The problem is that the Court most likely got the pragmatic aspects wrong. Subsequent studies have raised serious doubts about the accuracy of the Court's conclusion that smaller juries perform just as well as larger ones.\textsuperscript{522} One problem is that a six-person jury is not as broadly representa-

\textsuperscript{514} Id.
\textsuperscript{515} Id. at 101–03.
\textsuperscript{516} 413 U.S. 149 (1973).
\textsuperscript{517} Id. at 156–57 (quoting Galloway v. United States, 319 U.S. 372, 390 (1943)).
\textsuperscript{518} Id.
\textsuperscript{519} The Court reached this conclusion in Colgrove despite the fact that some contrary empirical evidence had started to emerge in the literature. See id. at 158–60.
\textsuperscript{520} See id. at 156 (quoting Williams v. Florida, 399 U.S. 78, 156 (1970)).
\textsuperscript{521} The Court in Colgrove apparently did not consider the prevention of governmental oppression to be a function of the civil jury, though it certainly was a function of the civil jury prior to the American Revolution. See id. at 157 (identifying the question if jury performance is a function of size). Instead, the Court thought that the function of the civil jury was simply "to assure a fair and equitable resolution of factual issues." Id.
tive of the community as a twelve-person jury.\textsuperscript{523} Another is that more of
the important evidence can be forgotten.\textsuperscript{524} Yet another is that smaller
juries are shown to be more likely to produce strange or extravagant
verdicts.\textsuperscript{525} I have discussed these points in more detail elsewhere;\textsuperscript{526} my goal
now is merely to point out that the Court relied on pragmatic justifications
to permit six-person juries, but that those justifications are not very reli-
able.

The Court's discussion of history is also problematic. It is true that
there is nothing on the face of the historic right to jury trial that suggests
twelve persons are essential to its proper functioning. It is also true that the
origins of the twelve-person jury are somewhat obscure. The original rea-
son for choosing twelve is probably somewhat mystical, as twelve was an
important number in the Bible.\textsuperscript{527} Nevertheless, the fact is that the practice
of having twelve jurors (at a minimum) was uniformly followed for centu-
ries.\textsuperscript{528} And unlike most historical justifications, this one seems to be man-
dered by the Constitution.\textsuperscript{529} This suggests, at a minimum, that those who
would overturn the rule must bear a heavy burden of persuasion. The deci-
sion about whether to abandon the twelve-person jury rule might have been
illuminated by some consideration of the concerns that a historical justifi-
cation sometimes masks.\textsuperscript{530} For example, we had little experience with the
model that replaced the twelve-person jury, so we could not be sure how it
would work. Indeed, as I have shown, subsequent experience with the six-
person jury suggests that it is not as effective as the twelve-person jury.\textsuperscript{531}
This problem is exacerbated by the fact that abolishing the six-person jury
could make it difficult to revive in the future, despite problems with the
smaller jury.

The story of the unanimity requirement is similar. For virtually all of

\begin{footnotes}
\textsuperscript{523} See Alice Patawer-Singer, Justice or Judgments?, in THE AMERICAN JURY SYSTEM, FINAL
REPORT OF THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED
STATES 45, 53 (1977) (providing empirical data comparing a six-person jury to a twelve-person jury);
Hans Zeisel, . . . And Then There Were None: The Diminution of the Federal Jury, 38 U. CHI. L. REV.
710, 716 (1971) [hereinafter Zeisel, And Then There Were None].
\textsuperscript{524} See Patawer-Singer, supra note 523, at 54; Michael J. Saks, The Smaller the Jury, the Greater
the Unpredictability, 79 JUDICATURE 263, 265 (1996).
\textsuperscript{525} Zeisel, And Then There Were None, supra note 523, at 717–18; Hans Zeisel, The Debate Over
\textsuperscript{526} See supra notes 522–25 and accompanying text (describing how empirical studies raise seri-
ous doubts that smaller juries perform as well as larger juries).
\textsuperscript{527} Williams v. Florida, 399 U.S. 78, 88 (1970); DEVLIN, supra note 401, at 8.
\textsuperscript{528} See Colgrove v. Battin, 413 U.S. 149, 177 (1973) (Marshall, J., dissenting) (quoting A. Scott,
FUNDAMENTALS OF PROCEDURE IN ACTIONS AT LAW 75–76 (1922)).
\textsuperscript{529} Of course the heart of the dispute is what the Constitution actually requires. I do not mean to
suggest that it is unreasonable to refer to the epochal period and still decide that twelve-person juries
are not required. I suggest only that caution should be exercised in coming to that conclusion.
\textsuperscript{530} See supra text accompanying note 139.
\textsuperscript{531} See supra notes 522–25 and accompanying text.
\end{footnotes}
the jury’s history, the decision rule has been that the jury must return a unanimous verdict.\textsuperscript{532} That is still the rule in the federal courts,\textsuperscript{533} but many states have adopted decision rules that allow less than a unanimous verdict, though still usually a super-majority.\textsuperscript{534} The states, of course, are not bound by the Seventh Amendment,\textsuperscript{535} so the history surrounding the Seventh Amendment is not important to them. By contrast, the history surrounding the Seventh Amendment has so far prevented the Court from allowing less than unanimous verdicts in the federal courts, despite the similar history surrounding the number of jurors.\textsuperscript{536} However the states interpret their own constitutional and statutory provisions governing the civil jury, the ultimate justifications for a non-unanimous decision rule are pragmatic. It is asserted, for example, that the jury can reach a verdict more quickly and has a smaller risk of not reaching a verdict if it is not required to reach a unanimous verdict.\textsuperscript{537} It is also asserted that if a super-majority favors a particular verdict, it is likely that the super-majority is correct.\textsuperscript{538}

The pragmatic considerations do not all favor a less-than-unanimous verdict. For example, proponents of a unanimous verdict rule argue that the quality of the deliberation is much higher if the jury must reach a unanimous verdict.\textsuperscript{539} One reason for this is that relevant perspectives may be shunted aside if they are offered by a minority of jurors that is too small to hang the jury.\textsuperscript{540} Another is that deliberation may stop prematurely if the jury reaches the required number, and the issues will not be as thoroughly

\textsuperscript{532} Apodaca v. Oregon, 406 U.S. 404, 407 n.2 (1972); THAYER, supra note 171, at 86–87.

\textsuperscript{533} The last time the Court considered the unanimity rule in civil cases was Andres v. United States, 333 U.S. 740 (1948), where the Court upheld the rule. The Court upheld the rule in a criminal case in Duncan v. Louisiana, 391 U.S. 145 (1967).

\textsuperscript{534} See SWARD, supra note 168, at 219 & n.67.

\textsuperscript{535} \textit{Id.}

\textsuperscript{536} \textit{Id.} at 222.


\textsuperscript{539} See REID HASTIE ET AL., INSIDE THE JURY 98 (1983).

considered as if the jury were required to reach a unanimous verdict.\textsuperscript{541} The problem is compounded if the jurisdiction uses both a smaller jury and a super-majority decision rule. Studies have shown, for example, that a minority viewpoint is more likely to receive consideration if the person holding it has an ally.\textsuperscript{542} Thus, for example, if the initial vote is 10-2, the minority viewpoint is more likely to receive consideration than if the initial vote was 11-1. But if the jurisdiction allows a 5/6 verdict, the vote could be 5-1—identical in allocation to the 10-2 verdict—and the absence of the ally would make it less likely that the minority viewpoint would be considered, regardless of how relevant that viewpoint was.\textsuperscript{543}

The rules regarding both the number of jurors and the decision rule have long histories, going far back into English history. The origins of both are obscure and difficult to reason out. For example, the number twelve may have been chosen as much for its mystical qualities as for any sense that twelve was the right number.\textsuperscript{544} And the unanimity rule may be an artifact of earlier forms of proof, where it was thought that God was guiding the proceedings. There can be no dissent from the judgment of God.\textsuperscript{545} Ironically, there may be more rational, pragmatic justifications today for maintaining the old rules. As detailed above, studies suggest that twelve-person juries are more representative of the community\textsuperscript{546} and less likely to reach extravagant verdicts.\textsuperscript{547} And a unanimity rule for jury decisions is more likely to promote full and fair deliberation, with a full airing of minority viewpoints. Abandoning either of these rules is problematic, but abandoning both together is a recipe for jury failure. The lesson seems to be this: that when a procedure, doctrine, or institution has been main-


\textsuperscript{542} See JOHN GUNTHER, THE JURY IN AMERICA 82 (1988); KALVEN & ZIESEL, supra note 413, at 463.

\textsuperscript{543} See S.E. Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in READINGS IN SOCIAL PSYCHOLOGY 2–11 (Guy E. Swanson et al. eds., 1952); Michael J. Saks, The Smaller the Jury the Greater the Unpredictability, 79 JUDICATURE 263, 265 (1996).

\textsuperscript{544} See supra note 527 and accompanying text.

\textsuperscript{545} The very earliest juries may not have used a unanimity rule, as the sheriff, whose job it was to round up the juror-witnesses, could continue rounding them up until he had twelve who agreed to one view of the facts. See WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 197–98 (The Lawbook Exchange 1994) (1875); THAYER, supra note 171, at 62–63.

\textsuperscript{546} See Lucy M. Keel, An Analysis of Six vs. Twelve-Person Juries, 27 TENN. B.J. 32, at 34–35 (Jan.–Feb. 1991); J. Clark Kelso, Final Report of the Blue Ribbon Commission on Jury System Improvement, 47 HASTINGS L.J. 1433, 1588–89 (1996); Ziesel, And Then There Were None, supra note 523, at 716.

tained through a long and revered history, we should be cautious about abandoning it. Pragmatic justifications for a change may well be quite strong, but it is important to be sure. The unintended consequences, the lack of experience with alternatives, and the difficulty of reviving an abandoned procedure all suggest the strength of the historical justification in such circumstances.

3. Summary and Conclusion

There have been a number of changes in the structure and operation of the jury over the course of the country’s history. It appears that pragmatic justifications drive most of these changes, even though history is formally a significant component of any Seventh Amendment justification because of the Amendment’s constitutional status and because the Seventh Amendment itself seems to invoke history. Thus, history must be invoked even when it appears that we are abandoning it—sometimes prematurely and problematically. In other words, whether we are invoking longevity or an epochal period in history, it appears easy to latch onto an apparent historical analogue, to dismiss a long history as insignificant, or to read the historical record to support a change that is really based on pragmatics. All too often, little thought is given to the considerations that underlie a historical justification, such as unintended consequences or the danger of extinction.

IV. The Evolution of Justification

I have described the evolving justifications for three doctrines or procedures in the civil procedure area. The question remains, however, whether there are any general lessons to be gleaned from this discussion. In this section, I will first suggest some general principles concerning the evolution of justification that might reasonably be inferred from the analysis. I will focus particularly on identifying how the various kinds of justification operate; what drives the evolution of justification; and what drives the evolution of doctrines and procedures. I believe that there are links among these topics that it is profitable to identify and to heed. I will then discuss the translatability of this analysis to areas of law other than civil procedure.

A. Lessons from the Examples

In this section, I begin with an analysis of how the various kinds of justification operate: their strengths, their weaknesses, and the constraints they might impose. I then discuss the factors that might cause us to seek new justifications for various procedures and doctrines. Finally, I discuss how justification—and especially changes in justification—drives the evolution of procedures and doctrines.
1. *How the Kinds of Justification Operate*

In all of the examples I have explored in this article, pragmatic justifications seem to play a prominent role. Sometimes pragmatic justifications are the heart of our reasons for a particular procedure or doctrine; other times, pragmatic reasons seem to drive changes in the procedure or doctrine. The former situation is well illustrated by the special verdict, where the only kinds of justification that have been offered have been pragmatic.\(^{548}\) Indeed, it does not appear that anyone has felt constrained to offer anything but a pragmatic justification for the special verdict, though the specific pragmatic justification has changed over the life of the procedure.\(^{549}\)

On the other hand, pragmatic reasons drove changes in personal jurisdiction doctrine, from the restrictive territorial theory of jurisdiction to the more pragmatic due process orientation.\(^{550}\) Because of changes in transportation and communication, the territorial theory no longer "worked": with corporations and individuals moving fluidly from state to state, the territorial theory was simply too constraining, at least in the sense that persons injured by the activities of these interstate actors had no convenient recourse if they had to chase down the actors where they lived. Eventually, these pragmatic concerns overrode the theory.\(^{551}\)

Pragmatics play a role, also, in justifications based on justice and on the first type of historical justification—longevity. I have suggested that justice can be either theoretical or pragmatic, but that due process reflects pragmatic considerations: we are concerned about the process that is due (in the context and under the circumstances). Thus, when due process is the justification for personal jurisdiction rules, we are really talking about the pragmatics of interstate jurisdiction. Similarly, while longevity is sometimes used as a justification in itself, longevity often masks pragmatic concerns that tend to constrain change: reliance, uncertainty about alternatives, and national identity, for example. All too often, however, these pragmatic concerns are never discussed, as we saw in the analysis of *Shaffer v. Heitner*\(^ {552}\) and *Burnham v. Superior Court*.\(^ {553}\)

Theoretical justifications can play one of two roles. The first, reflected in *Pennoyer v. Neff*,\(^ {554}\) is that a theory can form the basis for a set of rules, which are derived logically from the theory. In *Pennoyer*, the theory was that states had no power to act against persons or property beyond their

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\(^{548}\) *See supra* Part III.A.2.

\(^{549}\) *See supra* Part III.A.3.

\(^{550}\) *See supra* Part III.B.2.b.

\(^{551}\) *Id.*

\(^{552}\) 433 U.S. 186 (1977); *see supra* notes 303–21 and accompanying text.

\(^{553}\) 495 U.S. 604 (1990); *see supra* notes 322–31 and accompanying text.

\(^{554}\) 95 U.S. 714 (1878).
boundaries. In this sense, a theoretical justification might constrain the
development of a procedure or doctrine beyond what is logically entailed by the theory. The second role that theoretical justifications can play is
that theory can bolster other forms of justification. Thus, for example,
when pragmatic justifications have come into question regarding the civil
jury, one response has been to develop a theory that helps to bolster the
jury, such as a theory of democratic participation. In this sense, a theo-
retical justification can give renewed life to a procedure or doctrine that is
under pragmatic attack.

Like theoretical justifications, historical justifications can be constrain-
ing: they can inhibit change in a procedure or doctrine. Longevity alone
may do this, of course, especially if we fail to delve into the reasons why
we might honor longevity. But constraint is especially likely to result from
a historical justification of the second type: an appeal to a historical epoch.
We saw this in the discussion of the civil jury, for example, where the Con-
stitution itself seems to require that the modern jury be consistent, in some
fundamental sense, with the jury of 1791. This kind of constraint may
also be one of the things that attracts conservative jurists to originalism.

2. What Drives the Evolution of Justification?

It is one thing to identify how the various justifications may operate at
any given time in history. It is quite another to discern how justification
changes over time, as it clearly does. I will not attempt an exhaustive de-
scription of the kinds of things that can cause justification to change, as
that would likely be impossible. In this section, I will draw some lessons
about changing justifications from the specific examples I have used.

A procedure or doctrine may well outlive its justification. When that
happens, one would expect that another justification would have to develop
if the procedure or doctrine is to be retained. History—longevity—can
maintain a procedure or doctrine for awhile after the original justification
cesses to function, especially if there is no obvious reason to stop using the

\[555\] See supra text accompanying notes 245–54.

\[556\] See ABRAMSON, WE THE JURY, supra note 207, at 145–52 (critiquing jury nullification as a
means of political participation); SWARD, supra note 168, at 52–63 (demonstrating the importance of
juries in the history of democratic thought); Carrington, supra note 432, at 93 (suggesting that citizen
participation is a “critical element” of the American legal system). Some theorists advocate democratic
participation without focusing explicitly on the jury. See, e.g., PETER BARCHACH, THE THEORY OF
DEMOCRATIC ELITISM 95–99 (1980) (arguing in favor of greater democratic participation); CAROLE
PATMAN, PARTICIPATION AND DEMOCRATIC THEORY 1–44 (1970) (criticizing democratic theorists
that undervalue citizen participation); CABEL PERRY PATTON, THE CONSTITUTIONAL PRINCIPLES
OF THOMAS JEFFERSON 56–68 (1953) (describing Jefferson’s advocacy of citizen involvement in gov-
ernmental processes); EDWARD R. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC
NATURALISM AND THE PROBLEM OF VALUE 13–114 (1973) (tracing a history of anti-democratic
thought in America).

\[557\] See supra text accompanying notes 442–44.
procedure or doctrine. This may be what happened to both the special verdict and the civil jury: they had been in use for so long, with no clamor for abandoning them, that they continued to function even in the absence of the original justification. Eventually, however, it may be necessary to devise a new justification.

Any number of things can result in a need for a new justification. For example, if some pragmatic concerns are raised about the procedure or doctrine, those who support its continuance may be forced to find new reasons to support it. Then, supporters and opponents of the procedure or doctrine will both have to work at the justification enterprise, in hopes of convincing others of the utility or disutility of the procedure or doctrine. This may be happening today with respect to the civil jury: the jury has been under such unrelenting attack from some quarters, often business interests,\(^{558}\) that supporters of the jury have had to fight back. Much of the debate has centered on the pragmatics, pro and con, of the jury, but other kinds of justification have been offered as well, including theoretical justifications.\(^{559}\)

Another way of looking at this is that some threat to the procedure or doctrine develops, requiring a rethinking of the procedure or doctrine itself. In the case of the modern civil jury, the threat comes from attacks by persons opposed to the jury, perhaps because they perceive the jury as inimical to their interests. Whatever the underlying reason for the attack, however, the attack involves an effort at justification, as does the response. A similar threat to the civil jury occurred when the Constitution was presented to the people for consideration without a guarantee of a civil jury. Proponents of the jury perceived this as an attack on the jury, and, in justifying the need for the jury, pressed the argument that the civil jury was needed to protect against overreaching legislatures and judges.\(^{560}\) In response, proponents of the Constitution argued that such protection was no longer needed given that the British oppressors were gone.\(^{561}\)

\(^{558}\) See supra notes 407–09 and accompanying text.

\(^{559}\) See, e.g., SWARD, supra note 168, at 51–63 (offering a theoretical justification). Of course, because of the Seventh Amendment, this debate is unlikely to result in abolition of the civil jury, as that would require a constitutional amendment. As I will note in the next subsection, however, it may drive the evolution of the civil jury.

\(^{560}\) Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1183–84 (1991); Stephen Landsman, The Civil Jury in America: Scenes from an Unappreciated History, 44 HASTINGS L.J. 579, 599 (1993) [hereinafter Landsman, The Civil Jury in America]; Wolfram, supra note 380, at 664; see also Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343–44 (1979) (Rehnquist, J., dissenting) (noting that during the debate over the Seventh Amendment, "[t]hose who favored juries believed that a jury would reach a result that a judge either could not or would not reach").

\(^{561}\) See Landsman, The Civil Jury in America, supra note 560, at 598. The historical source of this justification was the tumultuous seventeenth century in England, when juries began to defy judges who tried to control their decision-making. See, e.g., Bushell’s Case, 124 Eng. Rep. 1006 (1670) (detailing an incident in which a jury acquitted a defendant, by ignoring instructions from the judge).
Sometimes the original justification does not actually disappear, but it is simply not working as well as it once did. One sign that this is happening is the development of legal fictions. We saw this in the analysis of personal jurisdiction, where the territorial theory did not function well when the country became more mobile. But the theory was quite constraining, requiring presence in the state or consent for the exercise of jurisdiction. The courts, to accommodate the changing needs, approved of fictions concerning implied consent and, for corporations, presence in the state based on activity there. But with a theory constraining development, even legal fictions may eventually be unable to keep up with change. At that point, the theory must be abandoned or severely cabined. In personal jurisdiction doctrine, that happened with the minimum contacts test of International Shoe Co. v. Washington. Thus, the development of legal fictions might well be an indicator that we should examine the justification for the procedure or doctrine that is generating the fictions.

Another kind of event that might generate changing justifications is a general revamping or rethinking of a particular area of law. We might see this, for example, when restatements of the law are compiled. In restating the law, we may search for the reasons for the rules, and we may well find that while there are good reasons for them, they are not the same as the original reasons. This kind of rethinking may have been important in the development of the special verdict. There was a great deal of interest in the special verdict in the years leading up to promulgation of the Federal Rules of Civil Procedure, and the discussions of special verdicts in the literature of the period may well have influenced the drafters of the Federal Rules. Much of that early discussion was an exploration of the justification for the modern special verdict. Modern pragmatic justifications for the special verdict tend to track that early discussion of the device.

most prominent English case was criminal, however, and it continued to rely on jurors’ personal knowledge as justification. See id. (holding that judges could not fine jurors in criminal cases for refusing the judge’s direction because jurors could rely on personal knowledge in reaching their verdict). Thus, Bushell’s Case was not justified on the ground that juries protected defendants from overreaching governmental officials or judges, nor did it involve the civil jury, but the example was there for the American colonists to borrow.

See supra notes 267–72 and accompanying text.

See supra notes 276–77 and accompanying text.

326 U.S. 310 (1945).

This appears to be one of the things that Holmes was doing in The Common Law. He was restating the common law rules, their history, and their justifications. See supra note 1.

See, e.g., Morgan, supra note 170 (documenting the history of the special verdict); Sunderland, supra note 198 (arguing the merits of the special verdict); Wicker, supra note 199 (advocating the use of special interrogatories).

See Morgan, supra note 170, at 585–86; Sunderland, supra note 198, at 261; Wicker, supra note 199, at 306.

See Fleming James, Jr., Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict, 47 VA. L. REV. 218, 244–46 (1961) (noting that special verdicts often avoid reversal on
3. *How Justification Drives the Evolution of Procedures and Doctrines*

The nature of a justification for a particular procedure or doctrine may also affect how the procedure or doctrine itself evolves. Some kinds of justification are more constraining than others, meaning that the procedure or doctrine may be slower to evolve. This was apparent, especially, with respect to personal jurisdiction. As long as the territorial theory of jurisdiction was the justification for personal jurisdiction doctrine, evolution of the doctrine was slow and, ultimately, limited. This is true even though the need for a more expansive view of jurisdiction was apparent from the increase in interstate commerce and travel. When the doctrine did evolve, it required legal fictions to accommodate the need to the theory. This is not surprising. Because a theoretical justification is formalistic and deductive, we might expect theoretical justifications to be somewhat constraining: the theory itself creates a channel in which development of the procedure or doctrine must flow. Eventually, however, the needs may overflow the banks, putting pressure on the theory itself. When that happened with respect to personal jurisdiction doctrine, the result was a more pragmatic justification—one that was more functionalistic and inductive. And the result of that was a flowering of personal jurisdiction doctrine, in the sense that much more expansive and creative uses of the doctrine became possible. Legal fictions are not necessary in such a regime.

History can also be a constraining kind of justification. A historical justification of the first type—based on longevity—can be constraining if we give it too much weight, or if we fail to consider the more pragmatic concerns that may underlie our respect for longevity. But perhaps a more significant constraint is a historical justification of the second type—an appeal to an epochal period in our history. The problem here is to accommodate our modern needs not to an overarching theory, but to the doctrines and procedures of another era. We saw this in connection with the civil jury, where history imposes constraints because of the Seventh Amendment’s preservation of the right to jury trial as it was in 1791 in England.569 This means that changes in the structure and operation of the jury must be tied to eighteenth century jury practices. We have not seen legal fictions develop here, but there have been some creative uses of history, to put it mildly. For example, the Court has transformed some questions of fact (for the jury) into questions of law (for the judge) through what can only be

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569 See *supra* text accompanying notes 442–43.
characterized as a misuse of precedent. The Court has also drawn a distinction between mere incidents of the jury and its more fundamental aspects, though it has failed to articulate the distinction. Rather, it has simply stated that a jury practice or structural element is or is not fundamental, and if it is not, the practice or structural element is discarded.

Pragmatic justifications tend to allow more experimentation in doctrinal development. With neither theory nor history to restrain the development, we might simply go where our needs take us. We must be cautious about this approach, however. Any society will have multiple needs, some competing and some complementary, and different elements of that society will identify different needs. Some thought to who benefits and who is burdened is desirable. Without constraints, it is too easy to take action without that careful thought. Thus, a doctrine like precedent is probably essential for any pragmatic approach to law, such as common law legal development, even apart from the justice-based need to treat like cases alike: precedent can constrain pragmatism. Precedent forces a continuing effort at justification.

This discussion suggests that we do need some constraints on legal development, but that they should be justification-forcing constraints. When we contemplate major changes in the direction our law is taking, we ought to proceed cautiously, as unforeseen consequences are potentially extremely damaging. But constraining justifications such as theory or history may well prevent us from discussing—or even recognizing—what is really at issue. Thus, events that cause us to think about the justification for various procedures or doctrines can have a salutary effect even if they are somewhat traumatic at the time. Perhaps we should get used to recognizing the more subtle signs of possible pressure on a procedure or doctrine—such as the proliferation of legal fictions—and begin to engage in an ongoing process of justification.

B. Translatability

My discussion of these issues has been in the context of civil procedure, because that is my area of specialization. Thus, the procedures and doctrines I have examined have all been related to civil procedure. The

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570 See supra text accompanying notes 469–509 (discussing the history of the law/fact distinction); Sward, The Seventh Amendment, supra note 168 (documenting the errors in the use of precedent that led to a redefinition of fact and law).


573 An example is the presentation of the United States Constitution for ratification without a guarantee of a civil jury. That event provoked some effort at justification. See Landsman, The Civil Jury in America, supra note 560, at 598 (discussing the reasons for drafting the Constitution without the guarantee of a civil jury).
question remains whether this discussion is translatable to other areas of law. I believe that it is, though the details of the analysis might well be different. For example, I have focused on procedural justice, particularly due process, because that seems to be most salient in civil procedure. It is possible, however, that other views of justice might be more important in other areas of law. In criminal law, for example—especially in capital cases—it is more important to achieve some kind of substantive justice, whether that is defined as getting it right, or as achieving some sense of the punishment fitting the crime, or as bringing closure to the victims. Thus, substantive justice as justification may play a larger role in criminal law than it does in civil procedure, where, while we certainly want to get it right, we are more concerned with resolving a dispute that has been defined by the parties themselves.\footnote{574} In addition, I suspect that pragmatic justifications will play a significant role in most areas of law, as they seem to in civil procedure. Ultimately, the procedure or doctrine must work for us, and pragmatic justifications focus us on that functionality. At the same time, however, there are some areas of law—as there are some areas of civil procedure—where other kinds of justification demand our attention. Appeals to an epochal period in our history, for example, are important in constitutional law, and will be prominent there.\footnote{575} But it is useful for us to consider—whatever the area of law—whether we are simply masking a pragmatic justification with a theoretical or historical one. One indication that we may be doing just that is the development of legal fictions, which are found throughout legal doctrine.

In short, I think that the basic outlines of my schema of justification will work in other areas of law, despite some differences in emphasis. Indeed, I think that the most important part of this schema is that it helps us to focus on the real nature of justification—on what we are really doing when we justify a particular procedure or doctrine.


\footnote{575} There are, of course, non-originalist theories of constitutional interpretation, but such theories often reflect merely a different degree of deference to the historical understanding of the Constitution. For discussions of various theories of constitutional interpretation, see Philip Bobbitt, Constitutional Interpretation (1991); Erwin Chemerinsky, Interpreting the Constitution (1987); Daniel A. Farber & Suzanna Sherry, Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations (2002); Sanford Levinson, Constitutional Faith (1988); Richard A. Posner, The Problems of Jurisprudence chs. 8–10 (1990); Harry H. Wellington, Interpreting the Constitution: The Supreme Court and the Process of Adjudication (1990). There are also several varieties of originalist theories, and they, too, could entail different degrees of deference, if only because some of them are more reflective of the disagreements in the founding generation itself. For discussions of various originalist theories, see Rakove, supra note 140.
V. CONCLUSION

In this Article, I have identified four general genotypes of justification for the various procedures and doctrines of the law: justice, pragmatism, theory, and history. These four types or forms of justification are more descriptive, and therefore more helpful, than simply dividing justification into such broad categories as "formalism" and "functionalism." There is overlap among the four types, however, and each type might be cast as a kind of formal or functional justification; indeed, some types could be either, depending on how they are used.

Using the four forms of justification, I have explored the evolution of certain procedures and doctrines, casting them as problems in the evolution of justification itself. In this enterprise, I showed how the justification for a procedure or doctrine changes over time, and showed how those changes in justification relate to changes in the procedure or doctrine itself. Thus, for example, a theoretical justification such as the territorial theory of jurisdiction may restrict development of the procedure or doctrine to the point where the procedure or doctrine is no longer functional. Legal fictions might maintain the underlying theory for awhile, but eventually it may be necessary to find a new justification for the procedure or doctrine—one that allows the procedure or doctrine to evolve in ways that are more useful to society. History—particularly the appeal to an epochal period in our history—can be similarly constraining, and we might well fictionalize history itself in an effort to show that modern procedures or doctrines are consistent with the historical ones.

I have also suggested at least one area where we sometimes fail to carry the enterprise of justification to its necessary conclusion. When we simply assert that a procedure or doctrine is justified because of its long history, we fail to consider why a long history might justify maintaining the procedure or doctrine. Failing to consider the reasons for deference to history—such as reliance, or a legitimate concern for unintended consequences—means we might well make mistakes in justifying a procedure or doctrine, and, thus, that we might well retain a procedure or doctrine beyond its useful life—or abandon it too soon.

With respect to the procedures and doctrines that I analyzed—all in the civil procedure area—pragmatic justifications seem particularly strong. But two cautionary notes must be sounded. First, it may well be that other types of justification are more important in other areas of law. I suggested, for example, that substantive justice might be more salient in criminal law and procedure than in civil procedure, where the more pragmatic procedural justice seems sufficient, especially as the parties themselves define their dispute. Second, open-ended pragmatic justifications, with no constraints, could result in change that is too fast and too untried. Thus, some constraint on such justifications seems warranted, and the primary method
of constraining pragmatism in common law doctrine is precedent.

This analysis—of the nature of the justification that we use for our procedures and doctrines, of how that justification evolves, and of how change in justification relates to change in the procedures and doctrines themselves—is preliminary. I have looked at only three procedures or doctrines, and those in only one area of law, though I think that the basic approach is translatable to other areas of law. Further analysis, however, may well lead to better, or at least different, insights. I do think, however, that it is useful to study the enterprise of justification. At the very least, it may help us to understand what we are doing and why. More importantly, the insight it provides might help us to make better choices.