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Annexation of the Jury's Role in Res Judicata Disputes: The Silent Migration from Question of Fact to Question of Law

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NOTE

ANNEXATION OF THE JURY'S ROLE IN RES JUDICATA DISPUTES: THE SILENT MIGRATION FROM QUESTION OF FACT TO QUESTION OF LAW

Steven J. Madrid[†]

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INTRODUCTION

The doctrine of *res judicata* sets forth rules that determine the preclusive effect former judgments have on subsequent litigation.¹ This doctrine dates back to at least thirteenth-century Europe, and its name has roots in the Latin phrase “*res judicata pro veritate accipitur*,” which translates to “a matter adjudged is taken for truth.”² The primary aim of *res judicata* is to prevent parties from relitigating matters already decided in previous adjudications.³ This serves to preserve judicial resources, prevent repetitive litigation, and, most importantly, ensure the finality of previous judgments.⁴ “Finality is an important goal in litigation. Piecemeal and seemingly endless litigation imposes a financial burden which people can ill afford. Voltaire, for instance, remarked that he was financially ruined but twice. Once when he lost a lawsuit. Once when he won one.”⁵ Therefore, determining the applicability of *res judicata*, and thus finality, is an important question in the American judicial system.

Res judicata encompasses both issue preclusion—also known as collateral estoppel—and claim preclusion. Claim preclusion prevents “multiple suits on identical disagreements between the same parties, which would lead to courts determining the same controversy twice.”⁶ Issue preclusion, by contrast, is narrower in scope and requires “later courts [to] honor the first [court’s] holding regarding an issue that has actually been litigated.”⁷ Today, it is almost universally held in both federal and state courts that the application of *res judicata* is a question of law for the court (i.e., the judge).⁸ When determining whether *res judicata* applies to a given case, the judge will resolve matters such as whether the current suit involves the same parties or parties in privity with the original parties and whether the person against whom preclusion is sought had a full and fair opportunity to litigate the issue in the first action.⁹ Having the court answer such questions, however, should alarm litigants as the court is usurping questions that are inherently fact-bound and should instead reach a jury.

¹ See Walter W. Heiser, *California’s Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 509 (1998).

² See ALLAN D. VESTAL, *RES JUDICATA/PRECLUSION* 19 (1969); Barbara Andersen Gimbel, *The Res Judicata Doctrine Under Illinois and Federal Law*, 88 ILL. B.J. 404, 404 (2000).

³ See VESTAL, *supra* note 2, at 16.

⁴ See Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. COMP. & INT’L L. 353, 361–62 (2011).

⁵ Gimbel, *supra* note 2, at 404 (quoting *Torcasso v. Standard Outdoor Sales, Inc.*, 626 N.E.2d 225, 230 (1993)).

⁶ Monica Renee Brownnewell, Note, *Rethinking the Restatement View (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 37 VAL. U. L. REV. 878, 883 (2003).

⁷ *Id.*

⁸ See *infra* note 14.

⁹ See *infra* Part I.A–B.

For centuries, federal and state courts have adhered to the sixteenth-century mantra of Lord Coke: “[j]udges decide questions of law; juries decide questions of fact.”¹⁰ A question of fact involves the determination of whether acts or events actually occurred or whether certain conditions existed, whereas a question of law applies legal principles to a particular set of facts.¹¹ Given this fact-law distinction, it seems puzzling to deem *res judicata* as a question of law for the judge. When determining the applicability of *res judicata*, what happens when a litigant alleges that she was not given a full and fair opportunity to litigate in the first action? If the other party refutes this allegation, is this not a disputed issue of fact that needs to be resolved by the jury? Yet judges make these determinations every day by classifying them under *res judicata*’s “question of law” umbrella.¹² However, this was not always the case.

Examination of *res judicata* cases from the nineteenth century reveals that courts required the jury to determine whether *res judicata* applied to a given case.¹³ But in the twentieth century, the jury’s role began to diminish as the duty to determine the application of *res judicata* migrated from juries to judges. By the second half of the twentieth century, it was almost universally accepted that *res judicata* was a question of law for the judge.¹⁴ Without thoughtful analysis or reasoned discussion, courts moved a factual inquiry that was once well established within the jury’s duties to a purely legal decision for the judge. In fact, this migration was so slow and subtle that the courts never even saw the need to overrule the cases holding *res judicata* as a question of fact.

This Note asserts that there was no legal justification for *res judicata*’s migration from a question of fact to a question of law. Accounting for state and federal jurisprudence on the role of judge and jury, this Note proposes that there is a right to have a jury hear factual disputes regarding the application of *res judicata* and that the courts’ modern-day practice of giving these matters to the judge is unconstitutional.

The significance of preserving the jury’s role in civil trials is paramount in the American judicial system. The Supreme Court once

¹⁰ See J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 485 & n.7 (1985) (quoting *Townsend’s Case*, 75 Eng. Rep. 173, 178–79 (K.B. 1554)).

¹¹ See Nichole Biglin, Note, *Enablement: For the Judge or the Jury?* *Markman v. Westview Instruments, Inc.’s Analysis Applied*, 52 DRAKE L. REV. 145, 146 (2003).

¹² See *infra* note 14 and accompanying text.

¹³ See *infra* note 75.

¹⁴ See, e.g., *McKinney v. City of East St. Louis*, 188 N.E.2d 341, 343 (Ill. App. Ct. 1963) (“The defense that the prior judgment was not binding on the city raised a question of law, not submissible to a jury.”); *Agnew v. Union Constr. Co.*, 291 S.W.2d 106, 109 (Mo. 1956) (“Ordinarily the issue of *res judicata* is a question of law.”).

summarized the jury's importance by stating that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."¹⁵ The lack of a legal justification for the evisceration of the jury's role in *res judicata* disputes certainly does not demonstrate the level of scrutiny the Court envisioned. Curiously, virtually nothing has been written on this issue. This void might exist because scholars, in their focus on whether or not *res judicata* as a whole violates the right to a jury trial,¹⁶ overlooked whether the *process* for determining *res judicata*'s applicability impermissibly bypasses the jury.

Part I of this Note outlines the procedure for how modern judges determine whether *res judicata* applies to a given case. Part II examines American jurisprudence regarding the right to a jury trial and the fact-law distinction. Part III contrasts how courts conducted the application of *res judicata* in the nineteenth and twentieth centuries and shows that there was no proffered legal justification for moving *res judicata* from a question of fact to a question of law. Part IV analyzes the possibility of *res judicata* being part of the judicial screening function. Finally, Part V proposes a procedure by which courts may dispose of *res judicata* disputes while still preserving judicial economy and complying with the constitutional right to a jury.

I

THE PROCEDURES FOR DETERMINING THE APPLICABILITY OF RES JUDICATA

Nearly every state and federal court treats the application of *res judicata* as a question of law.¹⁷ Because the application of *res judicata*

¹⁵ *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959) (quoting *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935)) (internal quotation marks omitted).

¹⁶ See, e.g., David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442, 454 (1971) ("[I]t . . . seems appropriate to consider more broadly whether the courts and commentators of [the Framers'] day perceived a link between the existing limitations on *res judicata* and the jury trial right.").

¹⁷ See, e.g., *In re Margaret Mastny Revocable Trust*, 794 N.W.2d 700, 708 (Neb. 2011) (stating that the application of *res judicata* is a question of law); *Mullins v. State*, 294 S.W.3d 529, 535 (Tenn. 2009) (same); *Lemond v. State*, 180 P.3d 829, 832 (Wash. Ct. App. 2008) (same); see also 50 C.J.S. *Judgments* § 1258 (2009) ("The application of the doctrines of *res judicata* and collateral estoppel is a question of law." (footnotes omitted)). Additionally, a minority of courts view *res judicata* as a mixed question of law and fact but still choose to give the matter to the judge. See, e.g., *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 254 P.3d 641, 647 (Nev. 2011) (holding that the application of *res judicata* is a mixed question of law and fact for the tribunal); *Okl. Natural Gas, Inc. v. Messer*, 249 P.3d 99, 104 (Okla. Civ. App. Ct. 2010) (same); *In re P.D.D.*, 256 S.W.3d 834, 842 (Tex. App. Ct. 2008) (same); see also 47 AM. JUR. 2D *Judgments* § 641 (2006) ("[S]ome courts have decided that the availability of collateral estoppel judgment presents a mixed question of law and fact.").

has the ability to drastically alter the course of litigation, and may sometimes result in the dismissal of a case entirely, courts have established detailed procedures for determining when judges may apply this doctrine in order to ensure that it is not executed indiscriminately. Although courts have the power to raise *res judicata sua sponte*, they rarely do so.¹⁸ Instead, it is typically left to the interested party to invoke *res judicata*.¹⁹ While there are small variations between different courts regarding the requirements for applying *res judicata*, most courts have developed substantively similar doctrines that mirror those found in the *Restatement (Second) of Judgments*.²⁰

A. Claim Preclusion

For claim preclusion to apply, three elements must be found: (1) the claim in the second action must be identical to the claim in the first action; (2) the claim in the first action must have been a final judgment on the merits rendered by a court of competent jurisdiction; and (3) the parties in the second action must be the same as, or in privity with, the parties in the first action.²¹ Although the application of claim preclusion might appear simple based on these three requirements, there are a number of exceptions that complicate the doctrine.²²

One such exception involves litigants splitting their claims. Generally, the claim preclusion doctrine prevents a party from splitting a single claim into two separate actions; however, courts permit parties to circumvent this prohibition if there was an agreement in the initial

¹⁸ See ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 237 (2001).

¹⁹ *Id.* While the requirements for applying *res judicata* are mostly uniform, the method by which it is invoked still varies. Courts throughout the country employ a variety of methods to invoke *res judicata* such as by motion to dismiss for failure to state a claim, judgment on the pleadings, summary judgment, or specially pleaded affirmative defense. See *id.* at 238–41. Some courts even allow parties to invoke issue preclusion, without special pleadings or a motion, by asserting it as they would assert evidence at a trial. See *id.* at 241–42.

²⁰ See, e.g., *Elia v. Pifer*, 977 P.2d 796, 803 (Ariz. Ct. App. 1998) (deciding to follow the *Restatement (Second) of Judgments* “[b]ecause no Arizona case law holding defines ‘final judgment[]’ for collateral estoppel purposes”); *Danner v. Zainebe, Inc.*, No. Cv040104390S, 2005 WL 469171, at *1 (Conn. Super. Ct. Jan. 19, 2005) (“Connecticut generally follows the principles of *res judicata* as stated in the *Restatement (Second) of Judgments*.”); *Kesterson v. State Farm Fire & Cas. Co.*, 242 S.W.3d 712, 717 (Mo. 2008) (“Missouri cases discussing claim preclusion generally follow the *Restatement [(Second)] of Judgments*.”).

²¹ See, e.g., *Ross ex rel. Ross v. Bd. of Educ. of Twp. High Sch. Dist. 211*, 486 F.3d 279, 283 (7th Cir. 2007); *Richards v. Graham*, 801 N.W.2d 821, 824 n.2 (Wis. Ct. App. 2011); see also *Brownwell*, *supra* note 6, at 882–83.

²² Examples of claim preclusion exceptions include: when an adjudication is not on the merits, when granting claim preclusion would conflict with substantive policy, or when a jurisdictional or procedural limitation prevented the barred party from asserting a particular legal argument in the first action. See CASAD & CLERMONT, *supra* note 18, at 85–105.

action through which both parties consented to splitting the claim.²³ Another exception states that if a defendant misled a plaintiff by false representation or concealment, which caused the plaintiff to sue on less than the entire claim in the first action, the court will not permit the defendant to rely on claim preclusion should the plaintiff sue on the remainder of the claim in a second action.²⁴ Determining whether parties had a prior agreement or whether a defendant made a misrepresentation are fact-bound inquiries concerning disputed issues of fact; yet, judges are given the reigns to decide these questions because they fall under *res judicata*'s "question of law" umbrella.

B. Issue Preclusion

A party invoking issue preclusion must meet the following requirements: (1) the issue in the second action must be identical to an issue in the first action; (2) the issue in the first action must have been actually litigated and determined by a valid and final judgment; (3) the issue in the first action must have been essential to the judgment; and (4) the party against whom preclusion is sought must have had a full and fair opportunity to litigate in the first action.²⁵ In addition to these basic requirements, there are a number of exceptions, similar to claim preclusion, that prevent courts from precluding an issue.²⁶

One of issue preclusion's more recent exceptions pertains to the problem of unforeseeability. This exception states that, in extraordinary circumstances, a court will not apply issue preclusion against a party if: (1) the application of such preclusion was unforeseeable at the time of the first action, and (2) such unforeseeability affected the level of effort expended in the first action.²⁷ This exception becomes especially relevant in the following paradigm situation: a party litigates an issue in an initial action that has very small stakes, devoting little effort to the litigation; but later, in a second action with extremely high stakes, the opposing party attempts to use the issue litigated and resolved in the first action against the party from the first action.²⁸

²³ See RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982).

²⁴ See CASAD & CLERMONT, *supra* note 18, at 104.

²⁵ See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); see also Brownwell, *supra* note 6, at 883–84.

²⁶ Examples of issue preclusion exceptions include: lack of ability to appeal the first judgment, difference in burden of persuasion between trials, and judgment from an inferior court in the prior trial. See RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

²⁷ See *id.* § 28(5)(b); CASAD & CLERMONT, *supra* note 18, at 139.

²⁸ Judge Learned Hand foresaw such a problem in *Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944). There, Judge Hand wrote:

What jural relevance facts may acquire in the future it is often impossible even remotely to anticipate. Were the law to be recast, it would . . . be a pertinent inquiry whether the conclusiveness . . . of facts decided in the first [suit] might not properly be limited to future controversies which could be thought reasonably in prospect when the first suit was tried. . . . Logical

Some courts have sought to protect the first party in the paradigm scenario by explicitly stating that it must have been foreseeable that the issue sought to be precluded would be of significance in future litigation.²⁹ But how is the court to determine what was foreseeably important in the first action? The court will most likely have to examine evidence independent of the first action's record and possibly question witnesses in order to determine the outlook of the party and what could have been foreseeable. This is yet another example of a factual inquiry falling to the court as a question of law.

Perhaps the most "factual" of all *res judicata*'s requirements is that the party against whom preclusion is sought must have had a full and fair opportunity to litigate the issue or claim in the first action.³⁰ The *Restatement (Second) of Judgments* provides several examples where a party may not have had a full and fair opportunity to litigate: "[O]ne party may conceal from the other information that would materially affect the outcome of the case. . . . Or one of the parties may have been laboring under a mental or physical disability that impeded effective litigation and that has since been removed."³¹ These examples display the inherently factual element of this inquiry. If the plaintiff alleges that the defendant concealed information in the first trial, and the defendant claims that the information was not concealed but rather only recently became available, the result is a disputed issue of fact that should go to the jury. However, despite the factual nature of the full and fair opportunity requirement, present law dictates that a judge will be the final adjudicator of any factual disputes that arise under this inquiry.³²

When deciding whether to apply *res judicata*, judges rely on the formal record of judgment from the first action; however, it is often the case that judges will use extrinsic evidence beyond the record as well.³³ Such evidence is broadly admissible under the rules of evidence in most jurisdictions.³⁴ When analyzing the parties' extrinsic

relevance is of infinite possibility; there is no conceivable limit which can be put to it. Defeat in one suit might entail results beyond all calculation by either party; a trivial controversy might bring utter disaster in its train.

Id. at 929.

²⁹ See *e.g.*, *Hyman v. Regenstein*, 258 F.2d 502, 511 (5th Cir. 1958) ("[C]ollateral estoppel by judgment is applicable only when . . . it was foreseeable that the fact would be of importance in possible future litigation." (footnote omitted)).

³⁰ See RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(c) (1982) (identifying the lack of "an adequate opportunity or incentive to obtain a full and fair adjudication" as a circumstance that qualifies for an exception to the general rule of issue preclusion).

³¹ *Id.* § 28 cmt. j (1982).

³² See, *e.g.*, *Colonial Ins. Co. of Cal. v. Anderson*, 588 N.W.2d 531, 533 (Minn. Ct. App. 1999) (ruling that a party cannot invoke *res judicata* when a litigant's brain injury "likely" prevented him from having a full and fair opportunity to litigate in the first action).

³³ See *CASAD & CLERMONT*, *supra* note 18, at 243.

³⁴ See RESTATEMENT (SECOND) JUDGMENTS §§ 19 cmt. h, 27 cmt. f, 77 (1982).

evidence, which often supports opposing conclusions, the judge must decide whose evidence is more persuasive. Thus, when determining the applicability of *res judicata*, *judges* examine evidence in order to ascertain the truth in the parties' factual dispute—a strange result, as resolution of these types of *factual* disputes is the precise reason for the jury's existence in civil trials. Moreover, establishment of a judicial role in making such factual determinations directly conflicts with hundreds of years of jurisprudence regarding the role of the jury in deciding questions of fact.

II

THE HISTORY OF THE FACT-LAW DISTINCTION

For many centuries, the black-letter rule of the common law has been that judges decide questions of law and juries decide questions of fact.³⁵ The Seventh Amendment provides that:

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.³⁶

While the Seventh Amendment does not explicitly demarcate the fact-law distinction, the Supreme Court has historically assumed that “the jury’s primary function is to decide questions of fact, while judges may permissibly decide questions of law.”³⁷ Generally speaking, state courts have come to the same conclusion when interpreting their constitutions.³⁸ Indeed, American jury-right jurisprudence has a long history of implicitly accepting this fact-law distinction.³⁹ However, after

³⁵ See RICHARD H. FIELD ET AL., *CIVIL PROCEDURE: MATERIALS FOR A BASIC COURSE* 1393 (10th ed. 2010).

³⁶ U.S. CONST. amend. VII.

³⁷ Paul F. Kirgis, *The Right to a Jury Decision on Questions of Fact Under the Seventh Amendment*, 64 OHIO ST. L.J. 1125, 1127–28 (2003) (footnote omitted); see *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958) (“An essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.” (footnote omitted) (citation omitted)); Ronald J. Allen & Michael S. Pardo, *Essay, The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1780 (2003) (“[T]he Seventh Amendment relies on the law-fact distinction to demarcate decision-making authority. Namely, the amendment provides a bright-line constitutional mandate: if an issue is factual and falls within the scope of the amendment, then it must be submitted to a jury . . .”).

³⁸ New York serves as an excellent representative for individual states’ interpretation of their jury right. Similar to the U.S. Constitution, New York’s constitution guarantees the right to “trial by jury,” N.Y. CONST. art. I, § 2, and its high court has accepted that the jury will decide questions of fact while the judge will decide questions of law. See, e.g., *People v. Bennett*, 49 N.Y. 137, 147 (1872) (“[I]t was a question of fact for the jury, and not of law for the court . . .”).

³⁹ See Biglin, *supra* note 11, at 146. See generally Allen & Pardo, *supra* note 37, at 1769 (“[The fact-law distinction] is the legal system’s fundamental and critical distinction.”).

the Supreme Court's 1996 decision in *Markman v. Westview Instruments, Inc.*,⁴⁰ the Court has begun to look beyond the fact-law distinction when allocating decision-making responsibility.⁴¹ Because the Seventh Amendment is not binding on the states, state courts have mostly continued to follow the fact-law distinction rather than adopt the Court's approach in *Markman*.⁴² In fact, several states have chosen to supplement their constitutions by writing statutes that explicitly require "issues of fact" to be tried by a jury.⁴³ Accordingly, Part II of this Note will focus primarily on how the Supreme Court has reinterpreted the federal jury right through its modern Seventh Amendment jurisprudence.

A. Pre-*Markman* Support for Allocating Questions of Fact to the Jury

Courts must answer two questions to determine the extent of a jury's involvement in a case: (1) Does the plaintiff have a cause of action that triggers the jury right? (2) If the jury right does exist, which questions go to the jury and which go to the judge?⁴⁴ To answer the first question, courts look to whether the plaintiff's cause of action was tried at law or equity at the time of the adoption of the Seventh Amendment in 1791.⁴⁵ When answering the second question, courts have historically adhered to the old common law mantra that questions of fact go to the jury and questions of law go to the judge.⁴⁶ Support for the fact-law distinction dictating this separation

⁴⁰ 517 U.S. 370 (1996).

⁴¹ See *id.* at 388–90 (engaging in historical analysis, looking to precedent, and taking into account "functional considerations" when determining whether a judge or jury should interpret patent claims).

⁴² See Joshua D. Stadler, Note, *Ortiz Got It Wrong: Why the Seventh Amendment Does Not Protect the Right to Jury Trial in Class Actions Suits Under FRCP 23*, 61 HASTINGS L.J. 1561, 1592 (2010).

⁴³ See, e.g., CONN. GEN. STAT. § 52-215 (1958) ("All issues of fact in any such case shall be tried by the jury . . ."); N.Y. C.P.L.R. 4101 (Consol. 2012) ("In the following actions, the issues of fact shall be tried by a jury unless a jury trial is waived . . .").

⁴⁴ Joan E. Schaffner, *The Seventh Amendment Right to Civil Jury Trial: The Supreme Court Giveth and the Supreme Court Taketh Away*, 31 U. BALT. L. REV. 225, 235 (2002).

⁴⁵ See Kirgis, *supra* note 37, at 1127. The two-part analysis to determine the jury's role in a trial is often referred to as the "historical test," and it inhabits an interesting place in American jurisprudence in that it is "widely criticized but entrenched." *Id.* The criticism goes to both extremes as some scholars maintain that looking to history is entirely unnecessary, see, e.g., Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 74–76, while others believe courts should apply an even more strict historical approach, see, e.g., Suja A. Thomas, Essay, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 142–43 (2007).

⁴⁶ See Schaffner, *supra* note 44, at 241–42. See generally Ellen E. Sward, *The Seventh Amendment and the Alchemy of Fact and Law*, 33 SETON HALL L. REV. 573, 587 (2003) ("Defining the right in this manner is consistent with English practice, where the law/fact distinction was the principle means of allocating decision-making authority between judge and jury.").

of decision-making duties can be found in various places. For example, the Seventh Amendment explicitly refers to “facts” in its second clause⁴⁷ and, although this clause does not expressly allocate questions of fact to the jury, “it suggests that questions of fact [are] understood to be peculiarly the jury’s province.”⁴⁸ There are also various legislative enactments that lend support to the fact-law distinction.⁴⁹ Lastly, and perhaps most importantly, the Supreme Court has issued many opinions affirming the jury’s role in deciding questions of fact.⁵⁰ In a famous 1958 case, the Court wrote that “under the influence—if not the command—of the Seventh Amendment, [the federal system] assigns the decisions of disputed questions of fact to the jury.”⁵¹ However, after *Markman* and its progeny, the Court began to look beyond the fact-law distinction when deciding whether a jury should decide a particular question.

B. *Markman* and Its Progeny

Since the Supreme Court decided *Markman* in 1996, the opinion has become indispensable in determining the role of judges and juries under the Seventh Amendment. The central issue in the case was whether patent claim construction was a matter for the judge or jury.⁵² In a unanimous opinion, the Court held that patent claim con-

⁴⁷ U.S. CONST. amend. VII (“[N]o *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.” (emphasis added)).

⁴⁸ Kirgis, *supra* note 37, at 1133.

⁴⁹ The Judiciary Act enacted by the first Congress, which preceded the ratification of the Seventh Amendment, provides that “the trial of issues in fact[] in the district courts . . . shall be by jury.” Judiciary Act of 1789, ch. 20, sec. 9, 1 Stat. 73, 77. Modern enactments also confirm the allocation of questions of fact to the jury. See 28 U.S.C. § 1872 (2006) (“In all original actions at law in the Supreme Court against citizens of the United States, issues of fact shall be tried by a jury.”). Even the Federal Rules of Civil Procedure make reference to this allocation. See FED. R. CIV. P. 38(c) (stating that when one party requests a jury trial on only a fraction of the issues in the case, the other party may demand a jury trial on “all factual issues triable by jury”).

⁵⁰ See, e.g., *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931) (“All of vital significance in trial by jury is that issues of fact be submitted for determination . . . by the jury”); *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (“The limitation imposed by the [Seventh] Amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.”).

⁵¹ *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958).

⁵² When a patent is filed, it includes one or more “claims” which “particularly point[] out and distinctly claim[] the subject matter which the applicant regards as his invention.” 35 U.S.C. § 112 (2006). The claim “defines the scope” of a patent grant and is used by courts to determine whether another party has infringed upon the patent. See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372–74 (1996). At trial, the judicial actor who constructs the patent claim often must determine what particular words in the patent mean. In *Markman*, part of the patent dispute hinged on the meaning of the word “inventory.” See *id.* at 375.

struction was a question of law for the judge.⁵³ The Court based its analysis on the two-question inquiry stated above. The Court quickly dispensed with the first question by stating that the case required a jury trial because patent infringement actions were tried at law in 1791.⁵⁴ It is the second question that occupies the bulk of the Court's opinion.

In answering the second question concerning which particular issues should go to the judge or jury, the Court asked itself "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."⁵⁵ Historically, the Court has linked the "substance of the common-law right" to the resolution of factual disputes by the jury;⁵⁶ however, in this case, the Court separated the substance of the right from the question of fact discussion.⁵⁷ Instead, the Court determined the substance of the common law right by looking to history, precedent, and other functional considerations.⁵⁸ Looking to history to determine which judicial actor should construct patent claims required the Court to examine American and English case law starting from approximately 1791—the year the United States adopted the Seventh Amendment.⁵⁹ Unfortunately, this search was inconclusive as the Court quickly determined that nothing closely resembling claim construction appeared during the 1700s.⁶⁰ Next, the Court considered existing precedent, which proved inconsequential to the present action because such precedents addressed product identification rather than claim construction.⁶¹ Unable to unearth an answer in the previous two areas, the Court focused its analysis on functional considerations. The Court acknowledged the "highly technical" nature of patents and noted that "[t]he construction of written instruments is one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis."⁶² Because the question at hand fell

⁵³ See *id.* at 390.

⁵⁴ See *id.* at 377.

⁵⁵ *Id.* at 376.

⁵⁶ See *Walker v. N. M. & S. Pac. R.R.*, 165 U.S. 593, 596 (1897) (stating that the aim of the Seventh Amendment is to preserve "substance of right," which "requires that questions of fact in common law actions . . . be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative."); see also *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 498 (1931) ("All of vital significance in trial by jury is that issues of fact be submitted for determination . . . by the jury . . .").

⁵⁷ See *Markman*, 517 U.S. at 378.

⁵⁸ *Id.* at 388 ("Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury to define terms of art.").

⁵⁹ See *id.* at 378–81.

⁶⁰ See *id.* at 378–79.

⁶¹ See *id.* at 386–88.

⁶² *Id.* at 388–89.

“somewhere between a pristine legal standard and a simple historical fact,” the Court placed increased emphasis on which “judicial actor [was] better positioned than [the other] to decide the issue in question.”⁶³ Ultimately, the Court concluded that patent claim construction was a matter fit for the judge, not the jury.⁶⁴

The *Markman* decision produced an immense scholarly reaction, much of it harshly critical of the Court’s decision.⁶⁵ In the spirit of redemption, the Court availed itself of the opportunity to revisit the contentious issue just a few years later in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*⁶⁶ There, the Court faced the issue of whether a judge or jury should decide a regulatory takings claim.⁶⁷ In its jury instruction, the trial judge stated that the jury should find for Del Monte Dunes “if it found either that Del Monte Dunes had been denied all economically viable use of its property or that the city’s decision to reject the plaintiff’s 190 unit development proposal did not substantially advance a legitimate public purpose.”⁶⁸ The jury found for Del Monte Dunes, and the City of Monterey appealed to the Ninth Circuit Court of Appeals and then to the Supreme Court, claiming that the judge should have been the judicial actor to decide the takings claim.⁶⁹

⁶³ *Id.* at 388 (internal quotation marks omitted) (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)).

⁶⁴ *See id.* at 390. In the final paragraphs of the *Markman* opinion, the Court briefly spoke of “the importance of uniformity” in the treatment of patent claim construction. *See id.* Indeed, the court saw uniformity as an independent reason to designate claim construction a question for the judge, believing that having judges settle these questions would result in greater uniformity. *See id.* The underlying rationale being that a judge is more likely to have of a more accurate interpretation of patent claims than a jury. This rationale has received strong criticism from commentators. *See, e.g.*, Greg J. Michelson, Note, *Did the Markman Court Ignore Fact, Substance, and the Spirit of the Constitution in its Rush Toward Uniformity?*, 30 *LOV. L.A. L. REV.* 1749, 1775 (1997) (“The notion that a single judge is capable of understanding that which would confuse and mislead the combined wisdom of twelve lay jurors is paternalistic and should be rejected.”). Interestingly, several studies have shown that reversal rates for patent claim construction cases have actually increased since *Markman*. *See, e.g.* Kimberly A. Moore, *Markman Eight Years Later: Is Claim Construction More Predictable?*, 9 *LEWIS & CLARK L. REV.* 231 (2005); David L. Schwartz, *Pre-Markman Reversal Rates*, 43 *LOV. L.A. L. REV.* 1073 (2010). Thus, the Court’s decision did not create more uniformity in patent claim construction.

⁶⁵ *See, e.g.*, John R. Lane & Christine A. Pepe, *Living Before, Through, and with Markman: Claim Construction as a Matter of Law*, 1 *BUFF. INTELL. PROP. L.J.* 59 (2001) (discussing how *Markman* created strategic ramifications for the parties and legal decision-making complications for the courts); David B. Pieper, *The Appropriate Judicial Actor for Patent Interpretation: A Commentary on the Supreme Court’s Decision in Markman v. Westview Instruments, Inc.*, 51 *ARK. L. REV.* 159, 175–79 (1998) (discussing problems associated with declaring claim interpretation a matter of law, including judges’ lack of specialized skill, lack of finality in decisions, and reduction of the right of trial by jury).

⁶⁶ 526 U.S. 687 (1999).

⁶⁷ *See id.* at 707.

⁶⁸ *Id.* at 700 (citations omitted) (internal quotation marks omitted).

⁶⁹ *See id.* at 701–02.

The Court employed the analytical structure established in *Markman*, first exhausting the dual investigative avenues of history and precedent, which proved inconclusive.⁷⁰ Thus, the decision would turn on the Court's examination of functional considerations. However, in contrast to *Markman*, the Court's functional analysis focused predominantly on the fact-law distinction. The court stated that "[i]n actions at law[,] predominantly factual issues are in most cases allocated to the jury" and that takings claims are "essentially ad hoc, factual inquiries requiring complex factual assessments of the purposes and economic effects of government actions."⁷¹ With specific regard to the question of whether the City of Monterey's decision to reject the development proposal substantially advanced a legitimate public interest, the Court pronounced that the question begat a mixture of law and fact that was so "essentially fact-bound [in] nature" that it must go to the jury.⁷² *Del Monte Dunes*, while following *Markman*'s analytical framework, re-emphasized the importance of the fact-law distinction by placing the focus of the analysis on the factual *content of the question* rather than the *judicial actor* best positioned to answer the question.⁷³ The case seemed to create a spectrum with questions of fact at one end and questions of law at the other; resolution of a particular question by either judge or jury thus depends on the question's proximity to either of the spectrum's endpoints.

III

THE APPLICATION OF RES JUDICATA FROM THE NINETEENTH CENTURY TO MODERN TIMES

Res judicata involves both state and federal law because the court trying the second action must apply the res judicata law of the rendering court.⁷⁴ For example, if an Iowa state court rendered the first decision and the defendant sought to use issue preclusion as a defense in a second trial in California state court, then California would have to apply Iowa's res judicata law. Because it would be too cumbersome to catalogue every court's res judicata law, this Note aims to ex-

⁷⁰ See *id.* at 718–20.

⁷¹ *Id.* at 720 (citations omitted) (internal quotation marks omitted).

⁷² *Id.* at 721 (alteration in original) (citation omitted) (internal quotation marks omitted).

⁷³ See Kirgis, *supra* note 37, at 1142–43.

⁷⁴ See RESTATEMENT (SECOND) OF JUDGMENTS §§ 86–87 (1982); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 95 cmt. e (1971); see also *City of Chicago v. St. John's United Church of Christ*, 935 N.E.2d 1158, 1168 (Ill. App. Ct. 2010) (stating that the res judicata law of the rendering court determines the applicability of res judicata in the subsequent court); *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 598 (N.J. 1991) ("In general, the binding effect of a judgment is determined by the law of the jurisdiction that rendered it." (citation omitted)).

amine a range of states and the federal courts in order to provide a well-rounded picture of how *res judicata* application operates.

The courts of nineteenth-century America treated *res judicata* much differently than do modern courts. In the 1800s, the jury was the judicial actor that determined whether a former judgment precluded an issue or claim.⁷⁵

However, after the turn of the century, there was a shift in the application of *res judicata* as a growing number of judges began to decide *res judicata* issues themselves as a matter of law. By the second half of the twentieth century, it was nearly universally held that the application of *res judicata* was a question of law for the judge.⁷⁶ Because nothing has been written on this shift from question of fact to question of law, this migration must be examined through the primary case law.

A. *Res Judicata* Cases of the Nineteenth Century and the Migration to Question of Law

As discussed in Part I, there are many scenarios in which *res judicata* application involves factual determinations.⁷⁷ Whenever disputed issues of fact arise, state and federal jury-right jurisprudence dictate that the matter should go to the jury for resolution.⁷⁸ Indeed, most of the *res judicata* cases of the nineteenth century did exactly that.⁷⁹ For example, in *James v. Lawrenceburgh Insurance Co.*, the plaintiff sued the defendant to recover debt on a promissory note, and the defendant claimed that the plaintiff had already recovered this debt in a former action.⁸⁰ The trial court submitted to the jury the issue of whether the two debts were identical, an action that the Supreme Court of Indiana upheld.⁸¹ The court stated that if a plaintiff responds to a defendant's *res judicata* defense by contending that the present and former causes of action are not identical, then the jury

⁷⁵ See, e.g., *Packet Co. v. Sickles*, 72 U.S. (5 Wall.) 580, 593–94 (1866) (stating that the jury should be the judicial actor to settle factual disputes involving extrinsic evidence when determining the applicability of *res judicata*); *James v. Lawrenceburgh Ins. Co.*, 6 Blackf. 525, 526 (Ind. 1843) (“If to a plea of former recovery, the plaintiff reply that the causes of action are not the same, the issue is for a jury.”); *Amsden v. Dubuque & Sioux City R.R.*, 32 Iowa 288, 292 (1871) (holding that it is the role of the jury to determine whether the identity of the former and present causes of action are the same); *Finley v. Hanbest*, 30 Pa. 190, 193–94 (1858) (stating that whether the causes of action were identical is a question for the jury); *Crotzer v. Russell*, 9 Serg. & Rawle 81, 83 (Pa. 1822) (explaining that when parol evidence is needed to determine whether a matter had been tried and previously decided between the same parties, it is a question for the jury).

⁷⁶ See *supra* note 14.

⁷⁷ See *supra* Part I.

⁷⁸ See *supra* Part II.

⁷⁹ See *id.*

⁸⁰ See 6 Blackf. 525, 526–27 (Ind. 1843).

⁸¹ *Id.*

must be the judicial actor to resolve the issue.⁸² This was a common holding for many nineteenth century courts;⁸³ even the Supreme Court of the United States evinced a similar opinion in *Packet Co. v. Sickles*. In *Packet Co.*, the Court stated that there is a right to have a jury settle factual discrepancies involving extrinsic evidence when parties use such evidence to establish which issues were actually decided in a previous action.⁸⁴ The Court went on to suggest that the preclusion question should be submitted to the jury and tried alongside all the other evidence involving the merits.⁸⁵ Courts would then instruct the jury that if it found that a former judgment precluded a particular issue, then it need not proceed to the merits of that issue; however, if the jury found there was no preclusion, it would proceed to the merits.⁸⁶

As the turn of the century approached, courts began to rethink the jury's role in the application of *res judicata*. Without issuing decisions explicitly moving *res judicata* from a question of fact to a question of law, courts gradually modified their *res judicata* doctrines in a manner diminishing the jury's role, slowly facilitating the shift from a question of fact to one of law. With both issue and claim preclusion, courts throughout the country began to rule that it was the judge's prerogative to determine *res judicata*'s applicability.⁸⁷ In the second half of the twentieth century, nearly every state and federal court agreed that application of *res judicata* was a question of law for the judge to determine.⁸⁸ Cases in which the litigants were entitled to a trial by jury regarding an issue of fact involving *res judicata* became nearly nonexistent.⁸⁹

Interestingly, despite calling *res judicata* a "question of law," courts in many twentieth-century cases still fully acknowledged that they were making factual determinations when deciding the applica-

⁸² *Id.*

⁸³ *See supra* note 75.

⁸⁴ 72 U.S. 580, 593-94 (1866).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Compare* *Hempstead v. City of Des Moines*, 3 N.W. 123, 127 (Iowa 1879) ("It was the province of the court [in a *res judicata* matter] to determine what issues are involved in each case and what matter was decided in the chancery action."), *with* *Amsden v. Dubuque & Sioux City R.R.*, 32 Iowa 288, 292 (1871) (holding that it is the role of the jury to determine whether the identity of the former and present causes of action are the same).

⁸⁸ *See supra* note 14.

⁸⁹ Although these types of cases are extremely rare, they did not disappear completely. *See* *Hanna v. Riggs*, 333 So.2d 563, 566 (Ala. 1976); *Walz v. Agric. Ins. Co. of Watertown, N.Y.*, 282 F. 646, 649 (E.D. Mich. 1922); *Texas & New Orleans R.R. v. Barnhouse*, 293 S.W.2d 261, 266 (Tex. 1956). The impact of these cases, however, was limited as the courts did not follow the logic of these decisions in subsequent cases.

bility of *res judicata*.⁹⁰ For example, in *Hoy v. Jackson*, the court discussed how conflicting evidence on an issue of fact must be resolved by proceeding to trial; however, the court went on to say that “the fact issues germane to a *res judicata*/collateral estoppel issue are determined by the court, not the jury.”⁹¹ Presently, even though the requirements of *res judicata* remain nearly identical to those of the nineteenth century, it is the province of the court to settle factual discrepancies involving the application of *res judicata*.

B. Lacking a Legal Justification for Holding *Res Judicata* Application as a Question of Law

Curiously, *res judicata*’s migration from question of fact to question of law occurred without the courts supplying any explicit legal justification or overruling cases. Instead, courts gradually usurped the jury’s decision-making role over time. Even today, examination of modern *res judicata* and jury-right jurisprudence reveals no legal justification for having the court decide factual disputes involving the application of *res judicata*.

1. *Res Judicata* Jurisprudence

Exploration of various courts’ *res judicata* case law reveals that almost all of the nineteenth-century cases holding that factual disputes involving *res judicata* are for the jury have not been overturned. Consider the Supreme Court of Iowa: the court recently stated that “[w]hether the elements of issue preclusion are satisfied is a question of law.”⁹² When determining the applicability of issue preclusion, Iowa’s first requirement is that “the issue concluded must be identical.”⁹³ However, in an 1871 case, the court held that when a party pleads a former adjudication as *res judicata*, “[t]he identity of the causes of action is a question of fact, to be determined by the jury

⁹⁰ See, e.g., *Del Mar Avionics v. Quinton Instruments Co.*, 645 F.2d 832, 835 (9th Cir. 1981) (“Whether a nonparty controlled the earlier litigation is a question of fact for the trial court.” (citation omitted)); *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1109 (6th Cir. 1981) (stating that for the purposes of determining the applicability of *res judicata*, “[w]hether privity exists in a given case is a question of fact”); *MetraHealth Ins. Co. v. Drake*, 68 F. Supp. 2d 752, 758 (E.D. Tex. 1999) (“The determination of whether a party’s interests were ‘virtually’ or adequately represented in a previous suit is one of fact to be decided by the court.” (citation omitted)); *Stone v. Entergy Servs., Inc.*, 744 So. 2d 141, 143 (La. Ct. App. 1999) (“[W]hat matters were ‘actually litigated’ and decided in a prior action . . . is a factual question [for the court].” (citation omitted)); *DeLisle v. Avallone*, 874 P.2d 1266, 1269 (N.M. Ct. App. 1994) (“The sufficiency of a nonparty’s control over litigation [for purposes of issue preclusion] is a question of fact.” (citations omitted)); *Hoy v. Jackson*, 554 P.2d 561, 562 & n.4 (Or. Ct. App. 1976) (en banc).

⁹¹ 554 P.2d at 562 & n.4 (citation omitted).

⁹² *Grant v. Iowa Dep’t of Human Servs.*, 722 N.W.2d 169, 173 (Iowa 2006) (citations omitted).

⁹³ *Id.* at 174 (quoting *Comes v. Microsoft Corp.*, 709 N.W.2d 114, 117 (Iowa 2006)).

upon the evidence adduced. It is not the province of the court to withdraw such question from the jury, by an instruction or upon motion of a party."⁹⁴ Interestingly, Iowa has no case explicitly stating that the court is *moving* this query from a question of fact to a question of law. Rather, the court simply began stating in a matter-of-fact manner that *res judicata* was a matter to be decided by the court.⁹⁵ Other states have a very similar history wherein their courts hold *res judicata* as a question of law but provide no justification for the annexation of the jury's decision-making role. This is very surprising, as these courts have taken away one of the most fundamental constitutional rights for litigants: to have a jury hear disputed issues of fact.

Federal courts similarly hold *res judicata* as a question of law.⁹⁶ However, as previously discussed, the Supreme Court's opinion in *Packet Co.* stated that it is the jury's duty to settle discrepancies in the extrinsic evidence when parties use such evidence to establish what issues were actually decided in a former action.⁹⁷ To date, although this part of the Court's opinion in *Packet Co.* has been practically forgotten, the Court has not overruled it. Thus, litigants attempting to use federal judgments to preclude an issue or claim in a second adjudication retain the right to have a jury resolve any factual disparities in the extrinsic evidence.⁹⁸ Any court that denies such a right directly violates Supreme Court precedent.

2. Federal Jury-Right Jurisprudence

Although the Supreme Court's Seventh Amendment jurisprudence forges several paths by which judges may make factual determinations, this jurisprudence provides no justification for depriving the jury of the ability to resolve factual discrepancies involving *res judicata*. As discussed in Part II, courts must answer two questions to determine the extent of the jury's involvement in a case: (1) Does the plaintiff have a cause of action that triggers the jury right? (2) If the jury right does exist, which questions go to the jury and which go to the judge?⁹⁹ Because *res judicata* is a legal defense, rather than an equitable defense, courts tried *res judicata at law* at the time of the

⁹⁴ *Amsden v. Dubuque & Sioux City R.R.*, 32 Iowa 288, 292 (1871) (citation omitted).

⁹⁵ See *supra* note 75.

⁹⁶ See, e.g., *In re Antonakis*, 207 B.R. 201, 204 (Bankr. E.D. Cal. 1997) ("[T]he availability of issue preclusion [under federal law] in a particular case is a question of law, [and] the decision whether to apply the doctrine is vested in the trial court's discretion." (citations omitted)).

⁹⁷ See 72 U.S. 580, 593–94 (1866).

⁹⁸ Regardless of whether a party is in state or federal court, "[f]ederal law governs the preclusive effects of a federal judgment." *Stone v. Entergy Servs., Inc.*, 744 So.2d 141, 142 (La. Ct. App. 1999). Thus, *Packet Co.* controls factual disputes involving *res judicata*'s application to federal judgments.

⁹⁹ See *supra* Part II.A.

Seventh Amendment's adoption.¹⁰⁰ Thus, *res judicata* triggers the jury right.

After triggering the jury right, one must determine which questions go to the judge and which go to the jury. Even when using the post-*Markman* approach of looking beyond the fact-law distinction, the jury must still be the one who resolves factual discrepancies involving *res judicata*. When deciding whether a question should go to the judge or jury, the *Markman* court examined three areas: history, precedent, and functional considerations.¹⁰¹ When looking to history, one must examine whether the particular question was given to the judge or jury at the time of the Seventh Amendment's adoption. A survey of case law starting from approximately 1791—when the United States adopted the Seventh Amendment—reveals that the jury was responsible for determining whether a former judgment would preclude a later claim.¹⁰² The Court intended the inquiry to end at the historical analysis if there was “clear historical evidence” of leaving a particular question for the jury;¹⁰³ however, given the variability of historical research and for the sake of this Note, precedent and functional considerations will be examined as well.

Similar to the inquiry the Court in *Markman* conducted, looking to precedent for an answer to this question provides no clear guidance because many courts make blanket statements that *res judicata* is a “question of law” and have supporting precedent maintaining that factual disputes concerning *res judicata* must go to the jury.¹⁰⁴ Such holdings hardly provide the clarity courts require in order to provide an answer to this question. Even the Supreme Court itself still has good case law stating that courts must submit *res judicata*'s factual discrepancies involving extrinsic evidence to the jury.¹⁰⁵ Thus, looking to existing precedent does not provide an answer as to whether the judge or the jury should resolve these types of factual disputes.

The focus of the present analysis now turns to functional considerations in order to determine whether factual disputes concerning

¹⁰⁰ See Richard C. Gaskins, Jr. & Shawn F. Sullivan, *New Clean Air Act Enforcement Provisions and the Defense of Enforcement Actions*, 10 J. ENVTL. L. & LITIG. 39, 61 (1995); see also *Windsor Square Homeowners Ass'n v. Citation Homes*, 62 Cal. Rptr. 2d 818, 824 (Cal. App. Ct. 1997) (“[R]es judicata . . . is a legal and not an equitable defense . . .”).

¹⁰¹ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 384, 388 (1996).

¹⁰² See, e.g., *Kennedy v. Fairman*, 2 N.C. (1 Hayw.) 458, 460 (N.C. 1797) (“[T]he defendant pleaded amongst other things, a former judgment. The jury found a former judgment recovered at Wilmington not yet satisfied.” (emphasis added)).

¹⁰³ *Markman*, 517 U.S. at 377; see also James M. Patrick, *Preserving the Right to a Jury Trial in Public Employee Free Speech Litigation: The Protected Status of Speech Must Be Labeled a Mixed Question of Law and Fact*, 79 U. CIN. L. REV. 375, 384 (2010) (stating that the fact that discovering courts historically gave a question to the jury could be a “decisive factor” in the *Markman* analysis).

¹⁰⁴ See *supra* Part III.B.1.

¹⁰⁵ See *Packet Co. v. Sickles*, 72 U.S. 580, 593–94 (1866).

res judicata must go to the judge or jury. The Supreme Court has only analyzed these types of functional considerations in two cases: *Markman* and *Del Monte Dunes*.¹⁰⁶ These two cases approach functional considerations differently and thus must be analyzed independently. In *Markman*'s functional considerations analysis, the Court conducted a holistic inquiry that primarily focused on which judicial actor was better suited to handle patent claim construction.¹⁰⁷ The Court decided judges were better positioned to construct patent claims because such claims involve "highly technical" information and "construction of written instruments is one of those things that judges often do and are likely to do better than jurors."¹⁰⁸ One might make the argument that such reasoning could be applied to res judicata disputes; however, this argument cannot prevail. Unlike the "highly technical" patent claim construction in *Markman*, res judicata disputes can involve the entire gamut of legal matters—from the elementary to the complex. Although decision making concerning the applicability of res judicata may involve legal terminology and documents, it is hardly any different than relying on a jury to hear evidence involving a basic contract. It would simply be too large of a leap to equate the scientific data present in patent claims to every possible res judicata dispute that might arise. To allow this argument to succeed would encourage a slippery slope whereby a judge could take any question deemed "highly technical" from the jury.

Markman's other justification for giving patent claim construction to judges was that judges are typically better at construing written instruments.¹⁰⁹ While res judicata does require one to look to the previous record to determine what was litigated in the first proceeding, disputed issues of fact involving res judicata do not arise solely from this inquiry. Judges' skill in construing written instruments does not justify permitting them to determine whether a party had a full and fair opportunity to litigate in the first action, whether the parties had an unspoken agreement about claim splitting, whether the current parties were in privity with the former parties of the first action, or whether future litigation was unforeseeable at the time of the first adjudication. In short, it would be unjust to allow judges to decide res

¹⁰⁶ For a further analysis of both *Markman* and *Del Monte Dunes*, see *supra* Part II.

¹⁰⁷ *Markman*, 517 U.S. at 388–89.

¹⁰⁸ *Id.* at 388. Some scholars are critical of moving a question of fact to a question of law based on which judicial actor is better positioned to answer a given question. See e.g., Allen & Pardo, *supra* note 37, at 1783 ("Perhaps judges are better fact-finders in commercial litigation—because of complexity, their knowledge of the Code or commercial practices, or the desire for uniformity and predictability—but this does not make 'legal' issues out of factual issues . . .").

¹⁰⁹ See 517 U.S. at 388.

judicata disputes based on a skill that applies only to a small portion of the entire res judicata inquiry.¹¹⁰

In *Del Monte Dunes*, decided three years after *Markman*, the Court held that the jury should be the judicial actor to decide takings claims.¹¹¹ The Court approached the functional considerations analysis in a different manner than in *Markman*, placing heavy emphasis on the fact-law distinction rather than on the judicial actor best qualified to answer the question. The Court held that a takings claim, which involves assessing whether a landowner has been deprived of “all economically viable use” of the property in question, is a mixed question of law and fact that is so “essentially fact-bound in nature”¹¹² that the jury must decide the issue. It seems as if the Court envisioned a spectrum with questions of fact at one end and questions of law at the other, giving the takings question to the jury because it was closer to the “fact” end. One scholar has gone so far as to suggest that after *Del Monte Dunes*, the functional considerations analysis does no more than enshrine the fact-law distinction.¹¹³

Following the Court’s functional considerations logic in *Del Monte Dunes*, res judicata disputes would likely go to the jury for resolution. Similar to a takings inquiry, a res judicata dispute is a matter that mixes fact and law. Although res judicata contains legal aspects, it is fundamentally a factual inquiry and thus lies closer to the “fact” side of the *Del Monte Dunes* spectrum.¹¹⁴ There are two types of questions typically assigned to juries as “questions of fact”: “(1) determining what happened, that is, what the parties did and what the circumstances were; and (2) evaluating those facts in terms of their legal consequences, for instance, whether the conduct of the defendant in the circumstances was not that of a reasonable person.”¹¹⁵ Res judicata’s requirements and exceptions occupy both of these categories; examples include: determining what matters were actually litigated in the

¹¹⁰ The *Markman* case also cited the importance of uniformity as an independent reason for assigning patent claim construction to the judge. See *id.* at 390. However, this rationale is inapplicable to res judicata disputes. Even if one were to temporarily accept *Markman*’s rationale that judges are more suited to handle complex technical questions for the sake of uniformity, res judicata’s factual disputes do not involve highly technical issues. Applying *Markman*’s uniformity rationale to res judicata would be similar to allocating all contractual disputes—or really any kind of factual dispute—to judges simply to attain greater uniformity in the courts. There is a constitutional right to have a jury hear factual disputes and this cannot be discarded anytime it appears that a judge could come to a decision with greater predictability.

¹¹¹ See *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 694 (1999).

¹¹² *Id.* at 720–21.

¹¹³ See Kirgis, *supra* note 37, at 1143.

¹¹⁴ For cases stating the factual components of res judicata, see *supra* note 90.

¹¹⁵ FIELD ET AL., *supra* note 35, at 1393 (quoting *Yee v. Escondido*, 503 U.S. 519, 523 (1992)).

previous action, whether the parties had an agreement about claim splitting in the former adjudication, and whether one issue is identical to another issue. These inquiries do not require application of a legal principle to a set of facts; instead, it is the facts themselves that are in dispute and need to be resolved. Thus, *res judicata* is closer to the “question of fact” side of the *Del Monte Dunes* spectrum, and courts should give these matters to the jury.

Further, it is likely that the *Del Monte Dunes* analysis would be more suited to *res judicata* disputes than the *Markman* analysis. Although the Court in *Del Monte Dunes* stated that the takings claim involved “complex factual assessments,” the Court did not mention *Markman*’s reasoning of giving highly technical information to the judge.¹¹⁶ This suggests that the Court may have intended *Markman* to be limited specifically to patent claims. Indeed, the *Markman* Court stated that they need not consider “whether [the] conclusion that the Seventh Amendment does not require terms of art in patent claims to be submitted to the jury supports a similar result in other types of cases.”¹¹⁷ Regardless of *Markman*’s possible patent limitations, it is clear that *Del Monte Dunes* reemphasized the fact-law distinction that *Markman* had diminished.¹¹⁸ Additionally, while *Markman* seems to have been a deviation from the Court’s Seventh Amendment jurisprudence, the returned significance of the fact-law distinction in *Del Monte Dunes* represents a more natural progression of the Court’s previous cases on the subject.¹¹⁹

Although the Seventh Amendment and its case law are not binding on the states, “[f]ederal jury law sometimes applies of its own force in state court.”¹²⁰ That being said, state courts have been wary to adopt the reformed jury-right framework conceived by the Supreme Court in *Markman*. However, some state courts possess reasoning very similar to the *Del Monte Dunes* spectrum concerning mixed questions of law and fact. Unable to fit certain questions squarely as questions of law or questions of fact, these courts answer the judge or jury question based on whether legal or factual issues predominate.¹²¹ Thus, while state courts do not possess the same framework of looking to

116 See *Del Monte Dunes*, 526 U.S. at 720.

117 *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 383–84 n.9 (1996).

118 See *Kirgis*, *supra* note 37, at 1143.

119 See *supra* Part II.A.

120 *FIELD ET AL.*, *supra* note 35, at 1510.

121 See, e.g., *McKinney v. State*, 640 So.2d 1183, 1184 (Fla. Ct. App. 1994) (“[T]he status of Lakeland Christian School is a mixed question of fact and law in which the legal issues predominate.”); *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 254 P.3d 641, 647 (Nev. 2011) (“The availability of issue preclusion is a mixed question of law and fact[] in which legal issues predominate and, [o]nce it is determined [to be] available, the actual decision to apply it is left to the decision of the tribunal in which it is invoked.” (alterations in original) (internal quotation marks omitted) (citations omitted)).

history, precedent, and functional considerations, some of them do decide which judicial actor will decide an issue based on whether it is more similar to a factual or a legal inquiry—resembling the *Del Monte Dunes* spectrum.

C. Modern Application of Res Judicata

By the second half of the twentieth century, the application of res judicata in America had become largely uniform. It is nearly impossible to find a court today that holds res judicata disputes as questions of fact; instead, the vast majority of courts find res judicata to be a question of law.¹²² Although these courts are similar in that they all give res judicata disputes to the judge, they differ considerably in the way they perceive this “question of law.” Some courts view res judicata as a pure question of law without any substantive factual component.¹²³ Others fully acknowledge the factual component of res judicata but still give the question to the judge.¹²⁴ Even when making statements such as, “what matters were ‘actually litigated’ and decided in a prior action . . . is a factual question,” these courts bypass the jury and let the judge decide any factual discrepancies concerning res judicata.¹²⁵ Despite this overwhelming dissolution of the jury right, there were several cases in the second half of the twentieth century that gave res judicata disputes to the jury.¹²⁶ In *Hanna v. Riggs*, the Supreme Court of Alabama held that “where a former judgment is set up as a bar and there is a factual dispute as to whether there is such an identity of parties, subject matter or cause of action as will support the plea, this question of fact is one for the jury.”¹²⁷ Although decided in 1976, *Hanna* gets authority for its holding from cases from the 1920s and 1930s, when many states were still forming their res judicata doctrine.¹²⁸ Despite never being overruled, *Hanna* has not been followed

¹²² See *supra* note 17.

¹²³ See, e.g., *Prusky v. Reliastar Life Ins. Co.*, 502 F. Supp. 2d 422, 427 n.9 (E.D. Pa. 2007) (“[R]es judicata and/or collateral estoppel, turn not on questions of fact, but on pure questions of law.” (emphasis added)); see also *Global Oceanic Enters. v. Hynum*, 857 So. 2d 659, 661 (Miss. 2003) (“[R]es judicata is a legal rather than a factual determination.”).

¹²⁴ See *supra* note 90.

¹²⁵ *Stone v. Entergy Servs., Inc.*, 744 So. 2d 141, 143 (La. Ct. App. 1999).

¹²⁶ See *supra* note 89.

¹²⁷ *Hanna v. Riggs*, 333 So. 2d 563, 566 (Ala. 1976).

¹²⁸ *Id.*; see *Missouri Pac. R.R. v. Burks*, 121 S.W.2d 65, 68 (Ark. 1938) (holding that the issue of whether the parties had previously agreed to a “covenant against suit,” which controlled whether the case was barred by res judicata, was one for the jury); *Dolby v. Whaley*, 197 A. 161, 167 (Del. 1938) (“[I]t was for [the jury] to decide whether the Justice had determined precisely the same issue involved in this case on that petition.”); *Poehl v. Cincinnati Traction Co.*, 151 N.E. 806, 808 (Ohio 1925) (“[T]he question should have been submitted to the jury as to whether or not the . . . judgment . . . recovered from the city of Cincinnati [in a prior proceeding] was full compensation for [alleged] loss and injury.”).

by any Alabama case, and, as of today, Alabama courts hold res judicata as a question of law.¹²⁹

There are some courts that proclaim res judicata is a mixed question of law and fact and give the issue to the judge because they believe it is a question where legal issues predominate—similar to being closer to the “law” end of the *Del Monte Dunes* spectrum.¹³⁰ The California courts, in contrast to courts that hold res judicata as a mixed question, are unique in that they represent one of the only jurisdictions to explicitly declare that there is no right to a jury trial on a res judicata defense.¹³¹ While other courts implicitly say the same thing by giving the question to the judge, California does not tiptoe around its res judicata doctrine and makes its holding very clear. In *Windsor Square Homeowners Association v. Citation Homes*, the court held that when a party attempts to use res judicata as a defense, a court may bifurcate the trial and try the res judicata issue without a jury, even where disputed facts underlie the defense.¹³² The court rationalized its decision by stating that res judicata often involves questions of fact and law, and “[w]hile all [res judicata] issues may have factual predicates, they are peculiarly legal determinations.”¹³³ However, the court did not provide any reasoning for *why* res judicata is more legal than factual other than saying that res judicata issues are “often mixed fact-law determinations, involving, for instance, the assertion of jurisdiction, a decision better made by the court alone.”¹³⁴ The court seemed to forget that a party may use res judicata for any fact from a former adjudication, not simply one pertaining to legal matters such as jurisdiction. Strangely, the court went on to admit that “the facts that need to be determined [in res judicata disputes] are fairly simple” and that the authority it relies on for its holding “assumes, without much analytical discussion, that such factual issues are naturally tried to the court.”¹³⁵ Even the *California Practice Guide* deems this doctrine “ques-

¹²⁹ See *Walker v. Blackwell*, 800 So. 2d 582, 587 (Ala. 2001); *Watkins v. Harper*, 984 So. 2d 472, 474 (Ala. Civ. App. 2007).

¹³⁰ See, e.g., *Redrock Valley Ranch, LLC v. Washoe Cnty.*, 254 P.3d 641, 647 (Nev. 2011) (“The availability of issue preclusion is a mixed question of law and fact[] in which legal issues predominate and, once it is determined [to be] available, the actual decision to apply it is left to the discretion of the tribunal in which it is invoked.” (alteration in original) (citations omitted) (internal quotation marks omitted) (quoting *State v. Sutton*, 103 P.3d 8, 16 (Nev. 2004)); *rsc Quality Measurement Co. v. IPSOS-ASI, Inc.*, 196 F. Supp. 2d 609, 619 (S.D. Ohio 2002) (“[W]hether a claim is barred by res judicata presents a mixed question of law and fact in which legal issues predominate.” (citations omitted)).

¹³¹ See *Windsor Square Homeowners Assoc. v. Citation Homes*, 62 Cal. Rptr. 2d 818, 824–25 (Cal. Ct. App. 1997).

¹³² See *id.* at 824–25; see also WILLIAM E. WEGNER ET AL., *CALIFORNIA PRACTICE GUIDE: CIVIL TRIALS & EVIDENCE* ch. 2-C, 2:92.20 (2011).

¹³³ *Windsor Square*, 62 Cal. Rptr. 2d at 825.

¹³⁴ *Id.* at 824.

¹³⁵ *Id.* at 824–25.

tionable” and goes on to state that a defendant “has a constitutional right to a jury trial on any disputed facts involved in the defense.”¹³⁶ Thus, the court’s circular reasoning is insufficient to justify declaring res judicata as “peculiarly legal” and giving all res judicata disputes to the court. Rather, res judicata is primarily an investigation into disputed facts,¹³⁷ and courts must submit res judicata’s factual disputes to the jury.

IV

RES JUDICATA AS A PRELIMINARY SCREENING QUESTION

Although the right to a trial by jury has been a hallmark of the American judicial system for centuries,¹³⁸ a few caveats have emerged over the years that allow courts to determine disputed issues of fact without implicating the Seventh Amendment. One scholar refers to this phenomenon as the “judicial screening function,” where “[j]uries are simply not eligible to decide the many procedural and preliminary questions that arise prior to and during trial.”¹³⁹ These questions go to the judge not because of their content but because of their function. As long as the judge’s decision regulates the manner in which parties present an issue for determination by the jury, the judge may decide these questions as a matter of law.¹⁴⁰ The two examples of this doctrine are facts pertaining to the admission of evidence (henceforth, “evidentiary facts”) and jurisdictional facts.

Federal Rules of Civil Procedure 12(b)(1) and 12(b)(2) provide for motions to dismiss for lack of jurisdiction; defendants may use them to dispute the facts alleged by plaintiffs to invoke the court’s jurisdiction.¹⁴¹ When a defendant uses these motions, factual disputes may arise concerning matters such as “whether a long-arm statute is satisfied, whether process has been adequately served, whether the requirement of diversity is satisfied, and whether a federal statute might govern the ultimate disposition of the case.”¹⁴² When disputes concerning jurisdictional facts develop, judges often hold preliminary hearings and examine extrinsic evidence in order to settle the dis-

¹³⁶ WILLIAM F. RYLAARSDAM, ET AL., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL, Ch. 12(I)-D, 12:292.1 (2011).

¹³⁷ For a more detailed discussion of the factual component of determining the applicability of res judicata, see *supra* Part III.B.2.

¹³⁸ See William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 68 (2006) (“The jury is, after all, one of two defining features of our legal system. Nearly all civil jury trials and ninety percent of criminal jury trials on the planet take place in the United States.” (footnotes omitted)).

¹³⁹ Kirgis, *supra* note 37, at 1145.

¹⁴⁰ See *id.* at 1146.

¹⁴¹ See FED. R. CIV. P. 12(b)(1)–(2).

¹⁴² Kirgis, *supra* note 37, at 1147 (footnotes omitted).

putes themselves as a matter of law.¹⁴³ However, the Supreme Court has created an important exception to this rule: judges may not decide jurisdictional facts when such facts are “intertwined with the merits” of the cause of action.¹⁴⁴ This exception serves to protect the Seventh Amendment’s guarantee of a jury trial for causes of action at law.¹⁴⁵

Similar to jurisdictional facts, judges may also settle some disputed issues of fact concerning the admissibility of evidence. Federal Rule of Evidence 104 and some of its state-law analogues, such as California Evidence Code sections 403 and 405, permit a judge to have a preliminary hearing, take extrinsic evidence, and decide “those questions of fact conditioning the admissibility of evidence upon a finding of fact as a necessary foundation to satisfy a rule of law.”¹⁴⁶ These evidentiary questions often include matters involving the exclusion of such items as privileged information, hearsay, and character evidence.¹⁴⁷ Although these types of determinations involve settling disputed facts, the jury plays no role in the decision-making process. However, in order to protect the Seventh Amendment’s right to trial by jury, this rule contains an exception similar to that in jurisdictional facts:

When the preliminary fact question and the ultimate question for the jury to resolve on the merits are the same, there is a seeming dilemma if the judge were to resolve the question of fact in such a way that the case would come to an end. Hence, to promote the value of trial by jury, many courts . . . exhibit[] strong reluctance to allow the orthodox rule to operate.¹⁴⁸

Courts label these types of evidentiary and jurisdictional decisions as “questions of law” more so as a matter of convenience than as a counterpoint to a “questions of fact.” Courts fully acknowledge that these are fundamentally factual decisions but choose to label them as questions of law simply to note that judges, not juries, make these determinations.¹⁴⁹ It is important to emphasize that these are special-

¹⁴³ See Stefania A. Di Trolio, Note, *Undermining and Untwining: The Right to a Jury Trial and Rule 12(b)(1)*, 33 SETON HALL L. REV. 1247, 1247, 1257–60 (2003).

¹⁴⁴ See *Land v. Dollar*, 330 U.S. 731, 735–39 (1947) (holding that when jurisdiction turns on the merits, courts require a trial by jury on the merits); Di Trolio, *supra* note 143, at 1259.

¹⁴⁵ See Di Trolio, *supra* note 143, at 1266 (asserting that the “intertwined with the merits” exception “polices the application of Rule 12(b)(1) to ensure that the right to a jury trial is preserved” (internal quotation marks omitted)).

¹⁴⁶ Norman M. Garland, *An Essay On: Of Judges and Juries Revisited in the Context of Certain Preliminary Fact Questions Determining the Admissibility of Evidence Under Federal and California Rules of Evidence*, 36 SW. U. L. REV. 853, 854 (2008).

¹⁴⁷ See, e.g., FED. R. EVID. 404 (character); FED. R. EVID. 501–02 (privilege); FED. R. EVID. 801–07 (hearsay).

¹⁴⁸ Garland, *supra* note 146, at 860.

¹⁴⁹ See Kirgis, *supra* note 37, at 1146.

ized questions unrepresentative of the true distinction between questions of law and questions of fact. Although courts have never explicitly included *res judicata* in the judicial screening function category, it is plausible to make the argument that the judicial screening function's logic justifies holding *res judicata* as a question of law; however, such an argument cannot succeed for several reasons.

The first reason is that judges' ability to decide jurisdictional and evidentiary questions comes explicitly from the legislature, and legislatures have simply not stated that judges are the judicial actors who should decide *res judicata* disputes. For example, both the Federal Rules of Civil Procedure and the Federal Rules of Evidence explicitly grant judges the power to decide jurisdictional facts and some evidentiary facts without a jury;¹⁵⁰ there is no such analogue for *res judicata*. In fact, the text of Federal Rule of Civil Procedure 8(c) explicitly lists *res judicata* as an affirmative defense, not as a pretrial matter for the judge.¹⁵¹

The second and primary reason that the judicial screening doctrine cannot apply to *res judicata* is that factual disputes concerning *res judicata* go more to the merits of a case whereas jurisdictional and evidentiary facts are procedural. Jurisdictional facts are procedural because they determine whether a party even has the right to enter the court. Evidentiary facts are similarly procedural in that they control the presentation of evidence to the ultimate fact finder. By contrast, *res judicata* goes directly to the merits of the case and is seen as an affirmative *defense* rather than a pretrial procedural inquiry for the judge. As a point of comparison, the following are defenses that Rule 8(c) lists in addition to *res judicata*: assumption of the risk, contributory negligence, duress, fraud, and statute of limitations.¹⁵² These defenses, including *res judicata*, go to the merits of the case by presenting new information for the jury to consider in order to accurately determine whether a party should prevail. For example, if a plaintiff alleges that a defendant owes him \$500, and a defendant counters that the plaintiff was already paid \$500 by the defendant in another lawsuit, then the defendant is attacking the merits of the plaintiff's argument, not any type of procedure. Whereas jurisdictional and evidentiary facts are specifically designed to *avoid* the merits, *res judicata* is specifically designed to *attack* the merits.

¹⁵⁰ See FED. R. CIV. P. 12(i) ("If a party so moves, any defense listed in Rule 12(b)(1)-(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial."); FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

¹⁵¹ See FED. R. CIV. P. 8(c).

¹⁵² See *id.*

Moreover, the primary fear that arises from allowing judges to resolve jurisdictional and evidentiary facts is that the judge might reach matters ultimately intended for the jury or make a decision that effectively brings the case to an end.¹⁵³ Granting judges the power to settle factual *res judicata* disputes brings both these fears to fruition. For example, a judge might determine that an important issue deserves preclusion after making a factual determination that the party had a full and fair opportunity to litigate in the first adjudication. This single issue could be a controlling factor that determines the outcome of a case. These fears are especially pronounced when judges make factual determinations regarding claim preclusion, which allows judges to conclude the entire case with one decision. Thus, *res judicata* facts may not be placed within the judge's judicial screening function. Rather, juries must be the judicial actor to settle *res judicata* disputes.

V

A PROPOSAL FOR HOW TO SETTLE RES JUDICATA DISPUTES

The modern application of *res judicata* violates the right to a jury that every litigant in the United States possesses. In order to comply with the Seventh Amendment and state constitutions, modern courts must modify their *res judicata* doctrines so that any factual disputes concerning *res judicata* go to the jury. What follows is a proposed procedure allowing courts to preserve judicial economy while simultaneously protecting the right to have a jury hear *res judicata* disputes. When a party submits a defense of claim or issue preclusion, the court must first determine whether there are any disputed material facts related to the defense that would prevent the matter from being resolved on the pleadings or by summary judgment.¹⁵⁴ If the parties present no disputed material facts, the court may settle the dispute by summary judgment; however, if there are disputed material facts, the court may not resolve the factual disputes itself and must instead submit the defense to a jury. When a party attempts to use claim preclusion, it would be prudent for a court to bifurcate the trial and try the claim preclusion matter independently. After the jury hears the disputed facts regarding the application of claim preclusion, the trial may take one of two paths: (1) if the jury finds that the claim is precluded, then the trial ends; (2) if the jury finds the claim is not pre-

¹⁵³ See *supra* notes 144, 148 and accompanying text.

¹⁵⁴ Courts typically dispose of modern *res judicata* disputes by a judgment on the pleadings or summary judgment, so this step should not deviate too far from modern trial procedure. See CASAD & CLERMONT, *supra* note 18, at 237. Instead, this proposal intends to limit judges' findings of preclusion to instances where both parties do not dispute any factual components.

cluded, then the case will move ahead and be tried on the merits. Because of the narrow scope of the bifurcated trial, it would most often proceed quickly and not waste judicial resources as greatly as some might fear. In fact, this approach is substantially similar to that already used in California,¹⁵⁵ but instead of having the court be the fact finder in the bifurcated trial, the parties have the right to have a jury decide whether the matter is precluded.

Similar to claim preclusion, when a litigant attempts to use issue preclusion, a court may choose to use the bifurcation approach discussed above. The scope of the bifurcated trial will often be even narrower than with claim preclusion and would likely proceed more speedily. As an alternative, courts may wish to adopt the approach suggested by the Supreme Court in *Packet Co.*. There, the Court suggested that the preclusion question should be tried together with all the other evidence bearing on the issues so that the jury may decide on the merits in the event that it rejects the claim of preclusion.¹⁵⁶ This approach eliminates the need for bifurcation and uses the jury already selected for the case on the merits to review the preclusion question as well. By using the trial's existing momentum of already having a jury in place, judicial resources receive little additional strain because the parties would only need to tack on a few additional disputes. However, the Supreme Court's suggested approach does carry negative aspects as well. First, the jury's exposure to the merits of the issue is likely to influence its decision when answering preclusion questions.¹⁵⁷ Second, this approach would result in parties in the second action arguing that the issue was actually decided in the first adjudication *and* arguing the issue on the merits. Parties would likely fear that if the jury decided the issue was not precluded, they would be at an enormous disadvantage if they did not exert enough effort in arguing the issue on the merits. Thus, in the long run, this approach would actually be more detrimental to judicial economy than the bifurcation option because parties would litigate on the merits and on res judicata in order to cover any possible contingencies. Accordingly, bifurcation is the best option for courts to protect the jury right *and* preserve judicial economy.¹⁵⁸

The practical implications of adopting the above proposal would have important consequences in the modern judicial system. Primarily, courts would have to call upon juries more frequently, or desig-

¹⁵⁵ See *supra* note 132 and accompanying text.

¹⁵⁶ See 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 4420 (2d ed. 2002) (discussing *Packet Co. v. Sickles*, 72 U.S. 580, 593–94 (1866)).

¹⁵⁷ See *id.* ("Moreover, it is no insult to the jury to suggest that its resolution of the preclusion question is apt to be influenced strongly by its exposure to the merits.")

¹⁵⁸ See *id.* ("If there is to be jury trial of the issue-preclusion question, it should be set ahead of trial on the merits.")

nate the judge as finder of fact, in order to settle disputes that previously were handled as matters of law. Such a shift could result in more expensive and longer-lasting litigation, but this is a small price to pay for protecting such an important constitutional right. In fact, the founding fathers cited the denial of the right to a jury trial in the Declaration of Independence as among the reasons for America's rebellion against England.¹⁵⁹ Some might argue that this proposal militates against *res judicata's* goal of preventing repetitive litigation and promoting judicial economy; however, it is important to remember that the true purpose of *res judicata* is not simply to save the court's time but to prevent a matter previously decided from being tried again.¹⁶⁰ And surely courts should not condone the sacrificing of constitutional rights merely to save some time. Indeed, the Supreme Court previously stated that the benefits to judicial economy created by *res judicata* were an "insufficient basis for departing from our long-standing commitment to preserving a litigant's right to a jury trial."¹⁶¹

Although this proposal of having juries decide *res judicata* disputes might seem alarming, it does not change the requirements of proving *res judicata* nor give litigants an extra "bite at the apple;" rather, it only changes the judicial actor who hears such disputes. Parties must still face the same hurdles that have guarded *res judicata* for years, only now they have the right to have a jury hear their arguments rather than only a judge. This proposal does not allow juries to reexamine the merits of previously decided disputes or determine whether the first court decided the matter correctly; instead, the jury will only determine whether a past issue was *actually* decided in a previous adjudication. For centuries, the United States Constitution and the constitutions of individual states have placed their trust in the jury to ascertain the truth in factual disputes. In turn, the jury must be permitted to exercise this duty, enshrined in confidence, to resolve *res judicata* disputes.

CONCLUSION

When the application of *res judicata* involves factual disputes, the jury must be the judicial actor to resolve these discrepancies. The fact-law distinction, which gives questions of fact to the jury and questions of law to the judge, has guided American courts for hundreds of years.¹⁶² From the time of the adoption of the Seventh Amendment until the end of the nineteenth century, courts have viewed *res judi-*

¹⁵⁹ See THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (accusing King George III of "depriving us in many cases, of the benefits of Trial by Jury").

¹⁶⁰ See DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 16 (2001).

¹⁶¹ *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554 (1990).

¹⁶² See *supra* Part II.

cata disputes as factual determinations within the province of the jury.¹⁶³ The migration from question of fact to question of law in the twentieth century lacked any proffered legal justification, and even as the courts proclaimed *res judicata* as distinctively within the judge's dominion, they still acknowledged the factual nature of the *res judicata* inquiry.¹⁶⁴ Even the judicial screening doctrine and modern Seventh Amendment jurisprudence cannot justify holding *res judicata* as a question of law. Thus, although state and federal courts hold *res judicata* as a question of law, there is no legal justification for doing so. By trying the preclusion claim separately in a bifurcated trial, courts protect litigants' constitutional right to a jury trial. One judge has been so bold as to state that "[t]he most stunning and successful experiment in direct popular sovereignty in all history is the American jury."¹⁶⁵ Accordingly, any curtailment of the jury's role in trial litigation should not occur without a valid, robust legal justification.

163 See *supra* Part III.A.

164 See *supra* Part III.B.

165 Young, *supra* note 138, at 69.