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ISSUES

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ABSTRACT

The Federal Rules of Civil Procedure have issues—148 issues to be exact. Although the Rules use the term “issue” throughout their text, they do not use it in the same way each time. In some circumstances, the meaning of “issue” is made clear by surrounding context, minimizing any interpretive difficulty. But sometimes context does not clarify the term’s meaning, creating interpretive challenges. This Article argues that the ambiguous term “issue” found in Federal Rules of Civil Procedure 50 and 52 is best read to mean a “dispute of fact.” This reading best comports with judicial interpretations of Rules 50 and 52, best fits their history and purpose, and best connects them with conceptually related rules of civil procedure. In order to eliminate the ambiguity of the term “issue”—and avoid future

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interpretive difficulties—Rules 50 and 52 should be amended to clarify their meaning.

TABLE OF CONTENTS

INTRODUCTION	1008
I. THE AMBIGUITY OF THE TERM “ISSUE” IN RULES 50 AND 52	1012
<i>A. The Text and Operation of Rules 50 and 52</i>	1012
<i>B. The Ambiguity of the Text of Rules 50 and 52</i>	1014
II. THE “ISSUE” IN RULES 50 AND 52 IS A DISPUTE OF FACT . . .	1019
<i>A. Aligning the Text of Rules 50 and 52 with Judicial Interpretations</i>	1020
<i>B. Aligning the Text of Rules 50 and 52 with Their History and Purpose</i>	1023
<i>C. Aligning the Text of Rules 50 and 52 with Related Rules</i>	1029
III. RESOLVING THE “ISSUES” IN RULES 50 AND 52	1033
CONCLUSIONS AND FUTURE DIRECTIONS	1038
APPENDIX—PROPOSED AMENDMENTS	1041

INTRODUCTION

The Federal Rules of Civil Procedure have *issues*—148 issues to be exact.¹ Although the Rules use the term “issue” throughout their text, they do not use it in the same way each time. Sometimes, the Rules use the term “issue” to mean “dispute of fact.”² Other times, they use it to mean “controversy” or “send out.”³ And still other times, the meaning of the term “issue” is ambiguous.⁴ There is nothing inherently amiss when a single text uses the same word in multiple ways. Indeed, words often are ambiguous or polysemous—that is, a single word often has multiple meanings or senses.⁵ And when a word is ambiguous or polysemous, context normally helps the reader determine the meaning of a particular usage.⁶ This is common not only in ordinary speech, but also in legal language.⁷ No legal interpreter, for example, confuses a “claim” in the context of civil procedure with a “claim” in the context of the False Claims Act.⁸ Rather, context tells the interpreter whether the text means

1. This number includes variants including “issue,” “issues,” “issued,” and “issuing” wherever they appear in the Federal Rules of Civil Procedure, including headings, but excluding the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions and Supplemental Rules for Social Security Actions.

2. FED. R. CIV. P. 38(c) (a party may demand a jury trial “on any ... or all factual issues triable by jury”); *id.* at 49(a)(2) (instructions “enable the jury to make its findings on each submitted issue”).

3. *Id.* at 26(f)(2) (“discuss any issue about preserving discoverable information”); *id.* at 4(b) (“A summons ... must be issued for each defendant.”).

4. *Id.* at 9(a) (using “issue” to mean either legal argument or, perhaps, factual dispute). The term “issue” is vague or ambiguous not only in the Federal Rules, but even outside of the context of law altogether. See ERNEST GOWERS, *THE COMPLETE PLAIN WORDS* 113 (1954) (“The word ‘issue’ has a very wide range of proper meanings as a noun, and should not be made to do any more work—the work, for instance, of subject, topic, consideration and dispute.”) (emphasis omitted).

5. Jana M. Mason, Elizabeth Kniseley & Janet Kendall, *Effects of Polysemous Words on Sentence Comprehension*, 15 *READING RSCH. Q.* 49, 51 (1979) (“Words which contain more than one meaning are called polysemous words.”).

6. *Id.* (“[S]ubtle differences in meaning are clarified only through context.”).

7. Evan C. Zoldan, *The Conversation Canon*, 110 *KY. L.J.* 1, 7 (2022) (noting that terms used in legal contexts can have different meanings when used in nonlegal contexts); see also Daniel J. Hemel, *Polysemy and the Law*, 76 *VAND. L. REV.* 1067, 1067 (“Polysemy—the existence of multiple related meanings for the same word or phrase—is a frequent phenomenon in legal and lay language.”).

8. Compare FED. R. CIV. P. 8(a)(2) (requiring a “short and plain statement of the claim”), with 31 U.S.C. § 3729 (prohibiting “false” and “fraudulent claim[s]”).

a statement of facts that gives rise to a right to relief⁹ or a demand on the public fisc.¹⁰ Not surprisingly, therefore, the meaning of the term “issue” in the Rules often is made clear by surrounding context, minimizing any interpretive difficulty.¹¹

But, sometimes clarifying context is missing from the Rules, making it a challenge to discern the meaning of the term “issue.” This Article will consider the missing context and resulting ambiguity in the use of the term “issue” in two rules central to federal practice: Rule 50(a) and (b), Judgment as a Matter of Law, and the conceptually related Rule 52(c), Judgment on Partial Findings.¹² Because of formal amendments to the Rules, judicial interpretations, and the rise of textualism as a method of interpreting the Rules, the term “issue” in Rules 50 and 52, which once was clear, has been rendered ambiguous.

Fortunately, there is a relatively easy solution to this problem. Rules 50 and 52 can be amended to replace ambiguous uses of the term “issue” with language clarifying that the term means a *dispute of fact*. Amending the term “issue” to reflect this meaning would align the text of Rules 50 and 52 with the Supreme Court’s consistent interpretation of their language. Moreover, this change would align the text of these rules with their history and purpose, which reflect a concern with the resolution of disputes of fact. Finally, this change would align the language of Rules 50 and 52 with other rules of civil procedure that embody analogous concepts. In order to assist the work of the Committee on Rules of Practice and Procedure and the Civil Rules Advisory Committee—the entities responsible for drafting amendments to the Federal Rules—this Article proposes

9. FED. R. CIV. P. 8(a)(2) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

10. In the context of the False Claims Act, “the term ‘claim’ ... means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that ... is presented to an officer, employee, or agent of the United States.” 31 U.S.C. § 3729(b)(2).

11. For example, Rule 38(c) refers in one place to “issues of fact” and in other places to “issues” alone. In context, it is likely that all of the uses of “issue” in Rule 38(c) are referring to the same thing, leading to the conclusion that they all refer to issues (*i.e.* disputes) of fact. FED. R. CIV. P. 38(c).

12. *Id.* at 50(a)-(b), 52(c).

specific language to amend Rules 50 and 52 along with proposed committee notes explaining these changes.¹³

Now is the right time to consider these modest but important changes to the Rules. Whether rightly or wrongly,¹⁴ the Supreme Court increasingly interprets the Rules as if they were statutes, invoking principles of statutory interpretation¹⁵ and applying textualist principles when interpreting them.¹⁶ Most saliently, the Court often applies textual canons of interpretation that emphasize the text of the Rules and deemphasize other sources of meaning, like evidence of purpose or longstanding judicial interpretations.¹⁷ This heightened emphasis on the text of the Rules threatens to force courts to choose between the text and, on the other hand, these other sources of meaning. Most saliently, textual

13. See 28 U.S.C. § 2071-72 (authorizing the Supreme Court to promulgate rules of procedure). For a description of the federal procedural rulemaking process, see generally *Overview for the Bench, Bar, and Public*, U.S. CTS., <https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public> [<https://perma.cc/5X22-RZRV>]. For a description of the civil rulemaking process, see generally Jordan M. Singer, *Minds Intertwined: The Cognitive Teamwork of Federal Civil Rulemaking*, 100 DENV. L. REV. 223 (2022).

14. There is a good deal of debate over the proper methodology for interpreting the Rules. See, e.g., Lumen N. Mulligan & Glen Staszewski, *Civil Rules Interpretive Theory*, 101 MINN. L. REV. 2167, 2175-76 (2017) (arguing that the Court should not interpret the Rules as if they were statutes); Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1085 (1993) (criticizing the decision to apply principles of textualism to the Rules as “misguided, unwarranted, and inappropriate”).

15. See *Kemp v. United States*, 142 S. Ct. 1856, 1862 (2022) (interpreting Rule 60 according to its “ordinary meaning”); see also Mulligan & Staszewski, *supra* note 14, at 2175 (“Traditionally, when the Supreme Court addresses the matter of Rules interpretation, it reflexively assumes that the Rules are for all practical purposes just like statutes and should be interpreted as such.”); Elizabeth G. Porter, *Pragmatism Rules*, 101 CORNELL L. REV. 123, 125-26 (2015) (“[T]he Court’s decisions in this mode treat Rules and statutes as functionally interchangeable.”).

16. Moore, *supra* note 14, at 1073 (equating trend in Supreme Court’s interpretation of the Rules to Court’s textualist interpretations of statutes more generally); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LITIG. 313, 336 (2012) (noting that modern cases evince a “[s]tricter textualism in rule interpretation”). But, not always. As recent research shows, some courts of appeals still search for the purpose of the Rules. See, e.g., Lumen N. Mulligan & Emily Pennington, *Purposivist Reasoning in Federal Civil Procedure*, 100 DENV. L. REV. 383, 412 (2022) (“[W]e conclude that the circuits deploy textualist reasoning less often for Rules issues than they do for other questions. This is an important trend, especially against the backdrop of the Supreme Court’s oscillating interpretive approaches in Rules cases.”).

17. *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius* in a case about Rule 8 pleading).

canons of interpretation,¹⁸ like the canons of consistent usage¹⁹ and meaningful variation,²⁰ ask courts to assume that terms used in legal texts have one and only one meaning. In order to alleviate the risk that courts adopting textualist methods will have to choose between text and purpose, the text of Rules 50 and 52 should be amended to reflect the meaning they are meant to convey.²¹ Accordingly, amending Rules 50 and 52 to ensure that, as far as is practicable, each term embodies one and only one concept will avoid a clash between textualist canons of interpretation and, on the other hand, longstanding interpretations and evidence of their purpose.

More generally, the adoption of these changes will help the Advisory Committee accomplish its stated goal of making the Rules easier to understand and making their “style and terminology consistent throughout.”²² Perhaps ironically, the current, ambiguous text of Rules 50 and 52 was added specifically to make the language clear and accessible to nonlawyers.²³ Amending the Rules to eliminate ambiguous uses of the term “issue” in Rules 50 and 52 will

18. See Evan C. Zoldan, *Canon Spotting*, 59 HOUS. L. REV. 621 (2022).

19. *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (recognizing “the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning”); see also WILLIAM N. ESKRIDGE, JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 413 (2016) (“Interpret the same or similar terms in a statute the same way.”).

20. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”); ESKRIDGE, JR., *supra* note 19, at 413 (“Presume against reading a specific idea into general words when precise language elsewhere in the statute reveals that Congress knew how to identify that specific idea.”).

21. Arguably, the Supreme Court departed from the plain text of the Rules in *Twombly* and *Iqbal*, cases that have received considerable criticism and caused considerable confusion. For an argument that the text of the Rules should match their interpretation, see A. Benjamin Spencer, *Pleading Conditions of the Mind Under Rule 9(b): Repairing the Damage Wrought by Iqbal*, 41 CARDOZO L. REV. 1015, 1054 (2020) (“If our rules of federal civil procedure are not to be an overtly duplicitous exercise in which the rules say one thing but mean another, then either the Court must interpret the rules faithfully according to their text, or the text of the rules should be brought into conformity with their interpretation.”).

22. FED. R. CIV. P. 1 advisory committee’s note to 2007 amendment.

23. SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON THE RULES OF PRACTICE AND PROCEDURE 8 (1990), https://www.uscourts.gov/sites/default/files/fr_import/ST09-1990.pdf [<https://perma.cc/T785-FB7B>] [hereinafter RULES OF PRACTICE AND PROCEDURE REPORT] (noting that one reason for the 1991 Amendments to Rule 50 was to provide “sufficient clarity that an uninstructed reader of the rule can gain some understanding of its function”).

advance the Advisory Committee's laudable goals of clarity, consistency of usage, and accessibility.

I. THE AMBIGUITY OF THE TERM "ISSUE" IN RULES 50 AND 52

A. *The Text and Operation of Rules 50 and 52*

The Rules use the term "issue" to mean different things in different places. Some of these uses are clear and require little extrinsic context to clarify their meaning. For example, Rule 4(b) provides that if a "summons is properly completed, the clerk must sign, seal, and *issue* it."²⁴ Here, as with most of its uses in the Rules, the term "issue" unambiguously means "send out"—as in, the clerk must send out a completed summons.

But, sometimes, the term "issue" is ambiguous—that is, it could have one of two or more different meanings in a given context.²⁵ Perhaps most consequentially, consider conceptually related Rules 50 and 52, both of which permit the court to grant judgment due to evidentiary insufficiency against a party who has been "fully heard on an *issue*" critical to its case.²⁶ In relevant part, Rule 50 provides:

(a)(1) If a party has been fully heard on an *issue* during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that *issue*, the court may:

(A) resolve the *issue* against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that *issue*.²⁷

24. FED. R. CIV. P. 4(b) (emphasis added).

25. For a concise description of ambiguity and its relationship with polysemy, see Adam Sennet, *Ambiguity*, STAN. ENCYCLOPEDIA OF PHIL. (May 22, 2021), <https://plato.stanford.edu/entries/ambiguity/> [https://perma.cc/Z3LU-ASUD]; see also Mason et al., *supra* note 5, at 51 ("Words which contain more than one meaning are called polysemous words.").

26. FED. R. CIV. P. 50 (emphasis added); *id.* at 52 (emphasis added).

27. *Id.* at 50(a)(1) (emphasis added). Relatedly, Rule 50 later also provides:

No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was

Rule 50 allows the court to grant judgment as a matter of law in a jury trial when there is insufficient evidence for the jury to reach a verdict for the nonmoving party.²⁸ Rule 50(a), which codifies the older directed verdict motion,²⁹ allows the court to grant judgment as a matter of law during trial, before a case is submitted to the jury.³⁰ Rule 50(b), which codifies the older motion for judgment notwithstanding the verdict,³¹ is substantively identical to Rule 50(a), allowing a party to renew a previously made motion for judgment as a matter of law after a case has been submitted to the jury.³² The purpose of both motions is the same: to allow the trial court to resolve disputes over claims or defenses when the evidence presented at trial admits of only one permissible outcome.³³ Accordingly, Rule 50 can help the court resolve litigation more quickly by terminating an unnecessary litigation.³⁴

Rule 52(c) serves an analogous role in the context of bench trials. A Rule 52(c) motion, which permits the court to grant judgment on partial findings, provides, in relevant part:

If a party has been fully heard on an *issue* during a nonjury trial and the court finds against the party on that *issue*, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that *issue*.³⁵

discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59.

Id. at 50(b).

28. *Id.* at 50(a)(1).

29. *Id.* at 50 advisory committee's note to 1991 amendment.

30. *Id.* at 50(a).

31. *Id.* at 50 advisory committee's note to 1991 amendment.

32. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 396 (2006) (“[A] party in a civil jury trial that believes the evidence is legally insufficient to support an adverse jury verdict will seek a judgment as a matter of law by filing a motion pursuant to Federal Rule of Civil Procedure 50(a) before submission of the case to the jury, and then (if the Rule 50(a) motion is not granted and the jury subsequently decides against that party) a motion pursuant to Rule 50(b).”).

33. *See* FED. R. CIV. P. 50(a); *id.* at 50 advisory committee's note to 1991 amendment.

34. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 250 (1940) (“The rule was adopted for the purpose of speeding litigation and preventing unnecessary retrials.”).

35. FED. R. CIV. P. 52(c) (emphasis added).

Rule 52(c) provides a mechanism for the court to enter judgment when the court can “appropriately make a dispositive finding of fact on the evidence.”³⁶ Like Rule 50, Rule 52(c) is motivated by efficiency concerns: a court may grant the motion before all possible evidence has been introduced when the court determines that the additional evidence would not change the outcome.³⁷ But, unlike Rule 50, Rule 52(c) allows the court to make factual findings, including weighing witness credibility.³⁸ Rather than simply determining, as a matter of law, what a reasonable jury could or could not find, Rule 52(c) allows the trial court itself to make those findings of fact.³⁹

B. The Ambiguity of the Text of Rules 50 and 52

Although Rules 50 and 52(c) are normally applied without much difficulty, the text of these rules is ambiguous because the term “issue,” used in both rules, is susceptible of more than one meaning.⁴⁰ In ordinary (that is, nonlegal) language, “issue” often is used as an approximate and gentler synonym for more precise and pointed terms, like “subject, topic, consideration and dispute.”⁴¹ Indeed, as one scholar of the English language concluded after reviewing

36. *Id.* at 52 advisory committee’s note to 1991 amendment; *see also* 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2573.1 (3d ed. 2008); *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 632 (5th Cir. 2001) (“Judgment entered under Rule 52(c) is made after the district court has heard all of the ‘evidence bearing on crucial issues of fact.’”).

37. *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 272 n.21 (3d Cir. 2010) (“The requirement that a party must first be ‘fully heard’ does not, however, ‘amount to a right to introduce every shred of evidence that a party wishes, without regard to the probative value of that evidence.’” (quoting *First Va. Banks, Inc. v. BP Expl. & Oil, Inc.*, 206 F.3d 404, 407 (4th Cir. 2000))).

38. *See* FED. R. CIV. P. 52(c).

39. *See* WRIGHT & MILLER, *supra* note 36, § 2573.1 (“Granting a motion under Rule 52(c) at the trial stage is a decision on the merits in favor of the moving party.”).

40. RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 197 (2012) (“If a sentence is ambiguous, what a speaker is likely to mean in uttering the sentence is not settled by its literal meaning.... Where a sentence features an ambiguous word (or phrase) the sentence is ambiguous between at least two alternative formulations.”); *see also* David Tuggy, *Ambiguity, Polysemy, and Vagueness*, 4 COGNITIVE LINGUISTICS 273, 273 (1993) (“The difference between ambiguity and vagueness is a matter of whether two or more meanings associated with a given phonological form are distinct (ambiguous), or united as non-distinguished subcases of a single, more general meaning (vague).”).

41. *See* GOWERS, *supra* note 4, at 113 (emphasis omitted).

the myriad ways that the term is used, “issue” is drastically over-extended and “should not be made to do any more work.”⁴² And the variety of ways that “issue” is used in legal language is so diverse as to be overwhelming. Black’s Law Dictionary lists dozens of phrases that use the word “issue,” noting that an “issue may take the form of a separate and discrete question of law or fact, or a combination of both.”⁴³ And legal writers have long referred, alternately, to an “issue of fact,” “issue of law,” or “rais[ing] an issue.”⁴⁴ Indeed, because the term “issue” can refer to so many different concepts in legal language, it has been characterized as an example of legal argot, that is, legal language that is “insufficiently technical or specific to qualify as a term of art.”⁴⁵

The rest of the text of Rules 50 and 52 does little to clear up the meaning of the term “issue.” On one hand, both rules refer to “finding[s]” on an issue.⁴⁶ This reference suggests that the term refers to *facts*—after all, it is facts that are usually found.⁴⁷ On the other hand, both Rules 50 and 52(c) also reference being “heard” on an issue;⁴⁸ this reference to being heard could be read to suggest that the term “issue” means a legal argument—at least in the sense that judges are often said to hear argument.⁴⁹ Because of the ambiguity in the text of these rules, it is not surprising that courts sometimes have failed to interpret the term “issue” precisely. The Court of Appeals for the Ninth Circuit, for example, has defined the term “issue” to mean, rather amorphously, “claims, defenses, or entire cases.”⁵⁰

Normally, ambiguity on the face of a text presents scant challenge for an interpreter because the ambiguity can be resolved by

42. *Id.*

43. *Issue*, BLACK’S LAW DICTIONARY (11th ed. 2019) (listing approximately forty phrases that include the word “issue”).

44. DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 19 (1963) (describing the characteristics of legal language, particularly those characteristics that make it difficult to understand for those untrained in the law).

45. *Id.* at 18-19.

46. FED. R. CIV. P. 50; *id.* at 52(c).

47. *See, e.g., id.* at 52 (referring to findings of fact and conclusions of law).

48. *Id.* at 50; *id.* at 52(c).

49. *See, e.g., Lucia v. Sec. & Exch. Comm’n*, 138 S. Ct. 2044, 2050 (2018) (“The Court of Appeals ... heard argument in the case.”).

50. *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923, 926 (9th Cir. 2007).

examining the term in context.⁵¹ But the ambiguity of the term “issue” in Rules 50 and 52 is not resolved by examining typical sources of disambiguation, like the way that the term is used elsewhere in the Rules, in closely related legal contexts, or in records of the drafting history of Rules 50 and 52.⁵²

First, examining how the term “issue” is used elsewhere in the Rules does nothing to clear up the ambiguity of Rules 50 and 52(c). Rather, various inconsistent uses of the term “issue” pervade the Rules. For example, Rule 16 provides that the district court may order “a separate trial ... of a claim, counterclaim, crossclaim, third-party claim, or particular *issue*.”⁵³ The juxtaposition of different types of “claim[s]” with a “*particular issue*” suggests that the term in Rule 16 refers to an element or component of a claim.⁵⁴ By contrast, Rule 26 appears to use the term “issue” to mean a “problem,” “controversy,” or “legal argument” when it requires parties to meet and confer to discuss “any issues about preserving discoverable information”⁵⁵ and formulate a discovery plan including “issues about disclosure, discovery, or preservation of electronically stored information.”⁵⁶ And Rule 9(a) provides that a party must raise certain “issues”—that is, certain special matters like capacity to sue or be sued—“by a specific denial.”⁵⁷ In this context, the use of “issue” appears to mean “allegation of fact,” “controversy” or, perhaps, “legal defense.”⁵⁸

Not surprisingly, and perhaps most tellingly, the Advisory Committee itself found that the term “issue” in the Rules is ambiguous. In 2010, the language of Rule 56, Summary Judgment, was changed from “genuine *issue*” of material fact to its current form, “genuine

51. Mason et al., *supra* note 5, at 51 (“[S]ubtle differences in meaning are clarified only through context.”).

52. Moreover, the term is ambiguous outside of legal language as well. See GOWERS, *supra* note 4, at 113.

53. FED. R. CIV. P. 16(c)(2)(M) (emphasis added).

54. *Id.* (emphasis added). But, elsewhere, Rule 16 permits the district court to adopt special procedures to manage actions involving “complex issues, multiple parties, difficult legal questions, or unusual proof problems.” *Id.* at 16(c)(2)(L). Here, discerning what “issue” means is somewhat more challenging. At the very least, because “legal questions” is listed separately, “issues” probably means something other than purely legal questions.

55. *Id.* at 26(f)(2).

56. *Id.* at 26(f)(3).

57. *Id.* at 9(a).

58. *See id.*

dispute” of material fact.⁵⁹ In discussions prior to this change, the Advisory Committee specifically noted that the term “issue” was ambiguous.⁶⁰ Although the Advisory Committee recognized that the longstanding meaning of “issue” in Rule 56 was dispute of fact, the Committee nevertheless updated the language of the rule out of concern over confusion about its meaning.⁶¹ Specifically, the Advisory Committee expressed concern that the term “issue” was also used in the Rules to mean things other than a dispute, including “a component of the case” and “component of a claim or defense.”⁶²

Second, the ambiguity of the term in Rules 50 and 52(c) might be of less consequence if the term was used consistently in legal contexts outside of the Rules themselves. However, in other legal contexts the term “issue” can have multiple meanings. As noted, the term “issue” is used in dozens of ways in legal language.⁶³ But even narrowing down the scope of inquiry to procedure does not eliminate the ambiguity. In the context of “issue preclusion,” for example, the term “issue” can apply either to legal or factual determinations.⁶⁴

Third, the history of the creation of Rules 50 and 52(c) fails to resolve the ambiguity about their meaning. Although the current iterations of these two rules use the term “issue,” this is a relatively recent change. In 1991, the term “issue” was introduced into Rules 50 and 52 as part of the transition to their current forms.⁶⁵ Curiously, at one point, the draft of Rules 50 and 52 included language that would have been clear: an early draft used the word “*fact*” rather than “issue” in both rules.⁶⁶ However, at the suggestion of prominent members of the Advisory Committee, the term “fact” in

59. *Id.* at 56 advisory committee’s note to 2010 amendment (emphasis added).

60. REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, at 81 (2007).

61. *See id.* at 80-81.

62. *Id.* at 81, 89.

63. *Issue*, BLACK’S LAW DICTIONARY (11th ed. 2019) (listing approximately forty phrases that include the word “issue”).

64. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (“Issue preclusion, in contrast, bars ‘successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,’ even if the issue recurs in the context of a different claim.” (quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001))).

65. FED. R. CIV. P. 52 advisory committee’s note to 1991 amendment; ADVISORY COMMITTEE ON THE CIVIL RULES: MINUTES 54 (1989) (“The proposed revision of Rule 52 to add subdivision (c) parallel to Rule 50 was also approved.”).

66. ADVISORY COMMITTEE ON THE CIVIL RULES, MINUTES OF CIVIL RULES COMMITTEE MEETING 7 (1990) (noting the change to “issue” from “fact” in Rules 50 and 52).

the draft was replaced with the current term.⁶⁷ The stated reason for this change was to avoid an unnecessary distinction between law and facts,⁶⁸ and likely reflects a strain of scholarly skepticism toward the idea that questions of law and questions of fact can be neatly distinguished.⁶⁹

Despite the new language added in 1991, including the addition of the seemingly purposefully ambiguous term “issue,” the 1991 Amendments have not led to confusion in the application of Rules 50 and 52, at least in the mine-run of cases. The Advisory Committee notes made clear that the 1991 Amendments were not intended to make any substantive change to the directed verdict and judgment notwithstanding the verdict devices.⁷⁰ As a result, judges and lawyers, for many years familiar with the old motions, would also have understood the concepts embodied by the new language of Rules 50 and 52.

Perhaps most importantly, the 1991 Amendments connected judgment as a matter of law and judgment on partial findings with conceptually related summary judgment. By adding the term “issue,” the 1991 Amendments aligned the language of Rules 50 and 52 with the language of Rule 56, summary judgment, which already used the term “issue.”⁷¹ As a result, if there was any doubt about the meaning of “issue” in Rules 50 and 52, reference to Rule 56 would have cleared up the confusion.

But, subsequent changes stripped necessary context from the term “issue” as it is used in Rules 50 and 52, making once-clear language ambiguous. Amendments in 2010 replaced the term “issue” in Rule 56 with the term “dispute,” providing that summary judgment could be granted only when there is “no genuine *dispute* as to any material fact.”⁷² On its own, this change was salutary. By

67. *Id.*

68. *See id.*

69. *See* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1769 (2003) (doubting the coherence of the law-fact distinction); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1867-68 (1966).

70. FED. R. CIV. P. 50 advisory committee’s note to 1991 amendment.

71. FED. R. CIV. P. 56(c) (1991).

72. FED. R. CIV. P. 56 advisory committee’s note to 2010 amendment (emphasis added) (“Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word—genuine ‘issue’ becomes genuine ‘dispute.’ ‘Dispute’

replacing the term “issue” with “dispute,” Rule 56 better reflected actual summary judgment practice.⁷³ But here the problem arose: by adding the term “issue” in 1991 to Rules 50 and 52 to connect them with Rule 56, and then eliminating the term in 2010 from Rule 56, these amendments, combined, left the term “issue” in Rules 50 and 52 disconnected from its main point of reference.

In sum, the term “issue,” as used in Rule 50 and 52, is ambiguous. On its face, it could mean, among other possibilities, disputes of fact or disputes of law. This ambiguity is not resolved by other uses of the term, either in the Rules or in other contexts, because of the multiplicity of meanings of the term. And this ambiguity is confirmed both by the history of the Rules and by the occasional judicial opinion that construes this term in surprising ways. In order to foster consistent and predictable interpretations of the Rules, the meaning of “issue” in Rules 50 and 52 should be clarified. The next Part takes up this task.

II. THE “ISSUE” IN RULES 50 AND 52 IS A DISPUTE OF FACT

As this Article has described, the term “issue,” as used in Federal Rules of Civil Procedure 50 and 52, is ambiguous. What, then, *should* the term “issue” mean in these rules? This Part argues that the term “issue” in Rules 50 and 52 is best read to mean a “*dispute of fact*.” Reading Rules 50 and 52 in this way best aligns the text of these rules with the way that courts typically interpret them. Moreover, reading Rules 50 and 52 to reflect factual disputes aligns the text of these rules with their history and purpose. Finally, this reading makes Rules 50 and 52 more coherent with conceptually related rules. Part III will propose that Rules 50 and 52 be amended to strike the term “issue” and replace it with a different term—one that reflects that these rules properly concern factual disputes.

better reflects the focus of a summary-judgment determination.”).

73. REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 15 (2007).

A. Aligning the Text of Rules 50 and 52 with Judicial Interpretations

Reading the term “issue” in Rules 50 and 52 to mean a dispute of fact best aligns the text of these rules with judicial opinions that interpret them. With limited exceptions,⁷⁴ courts consistently interpret the term “issue” in Rules 50 and 52 to mean a “dispute of fact.”⁷⁵ On this reading, a party making a Rule 50 motion has been “fully heard on an issue” when it has been given the opportunity to present evidence in order to support one version of a *factual dispute*.⁷⁶ And when there is not a sufficient evidentiary basis to find for a party on an “issue,” it is because there is no genuine *disagreement about the facts* supporting a claim or defense.⁷⁷

Indeed, reading “issue” to mean a “dispute of fact” best describes what courts do when they grant or deny a Rule 50 motion.⁷⁸ Consider *Whitehead v. Bond*, a typical Rule 50 case.⁷⁹ After the defendants prevailed at trial, the plaintiff appealed, arguing that the trial court erroneously denied his Rule 50 motion for judgment as a matter of law because the defendants’ version of the facts was

74. See *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923, 926 (9th Cir. 2007) (defining “issue” in Rule 50 as “claims, defenses, or entire cases”); *Swope v. Oneida Sch. Dist. No. 351*, No. 4:17-cv-00113-DCN, WL 2016521, at *1 (D. Idaho May 7, 2019) (same); *Cascade Yarns, Inc. v. Knitting Fever, Inc.*, No. C10-861, 2015 WL 3407882, at *3 (W.D. Wash. May 27, 2015).

75. For Rule 50, see *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986) (noting that the directed verdict standard asks “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law”). See also 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2713.1 (4th ed. 2016) (“[Rule 50 calls] upon the court to make basically the same determination [as Rule 56]—that there is no genuine dispute of material fact and that the moving party is entitled to prevail as a matter of law.”). For Rule 52(c), see WRIGHT & MILLER, *supra* note 36, § 2573.1. See also *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 632 (5th Cir. 2001) (“Judgment entered under Rule 52(c) is made after the district court has heard all of the ‘evidence bearing on crucial issues of fact.’”).

76. FED. R. CIV. P. 50 advisory committee’s note to 1991 amendment (noting that a court may “consider a motion for judgment as a matter of law as soon as a party has completed a presentation on a *fact* essential to that party’s case” (emphasis added)); see also *Summers*, 508 F.3d at 928 (reversing grant of judgment as a matter of law when party “had not completed her presentation on any of the essential disputed facts” (emphasis omitted)).

77. See 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521 (3d ed. 2008); see also *Weisgram v. Marley Co.*, 528 U.S. 440, 448 (2000).

78. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149-50 (2000) (describing the proper way for a court to review a Rule 50 motion).

79. 680 F.3d 919 (7th Cir. 2012).

“inherently incredible.”⁸⁰ The court held that because the case turned on a factual dispute, which could not be resolved by the court, the case was properly submitted to the jury for resolution.⁸¹ In the language of Rule 50, the trial court could not “resolve the issue against” the defendants because the court is not permitted to pick one version of the fact in dispute over another.⁸² Here, as courts consistently do, the court interpreted the term “issue” to mean a “dispute of fact.”⁸³

If there was any doubt that Rule 50 concerns disputes of fact, the Supreme Court dispelled it in *Anderson v. Liberty Lobby*, in which the Court explicitly linked Rule 50 to Rule 56, Summary Judgment, a rule more obviously concerned with disputes of fact.⁸⁴ In this foundational case, the Supreme Court clarified that, under both rules, the trial court’s role is to evaluate any “*factual disputes*” to determine whether the “evidence presents a sufficient *disagreement* to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”⁸⁵ As the Court made clear, Rule 50 (like Rule 56) is concerned with evaluating the sufficiency of the evidence presented. Accordingly, the “issue” on which a party must be fully heard before the court opines on the sufficiency of the evidence is a factual dispute.⁸⁶ Not surprisingly, Wright and Miller summarized the state of the law after *Anderson* by noting that Rule 50 (like Rule 56) is triggered when “there is no genuine dispute of material fact and ... the moving party is entitled to prevail as a matter of law.”⁸⁷

80. *Id.* at 922.

81. *See id.*

82. FED. R. CIV. P. 50(a)(1)(A).

83. *See Whitehead*, 680 F.3d at 925 (“In cases involving simple issues but highly disputed facts (an apt description of this case), greater deference should be afforded the jury’s verdict.” (quoting *Latino v. Kaizer*, 58 F.3d 310, 314 (7th Cir. 1995))).

84. 477 U.S. 242, 248 (1986); Arthur R. Miller, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*, POUND CIV. JUST. INST. 1, 4 (2008) (summary judgment was successful only when the nonmoving party “was unable to point to the existence of a factual conflict on a material issue”).

85. *Anderson*, 477 U.S. at 248, 251-52 (emphasis added).

86. *See id.*

87. *See WRIGHT ET AL.*, *supra* note 75, § 2713.1. Indeed, the current language of Rule 50 was written explicitly to make the court’s interpretation of Rule 50 parallel to its interpretation of Rule 56, which itself more clearly describes resolution of a factual dispute. In 1991, when the “issue” language of Rule 50 was added, Rule 56 permitted courts to grant

Similarly, in its recent *Dupree* opinion the Supreme Court implicitly confirmed that “issue” means “dispute of fact.”⁸⁸ In *Dupree*, the Court considered whether a party must make a Rule 50 motion to preserve, for appeal, a “purely legal” question rejected by the trial court on summary judgment.⁸⁹ The Court noted that the purpose of Rule 50 is to allow trial courts to weigh the sufficiency of the evidence.⁹⁰ Accordingly, the purpose of Rule 50 is not served by requiring the trial court to review a purely legal question (as opposed to a factual dispute) on a Rule 50 motion in order to preserve it for appeal.⁹¹ The Court concluded that a party was not required to make a Rule 50 motion to preserve a purely legal question rejected on summary judgment.⁹² By holding that purely legal questions are outside the purview of Rule 50, the Court implicitly confirmed that Rule 50 concerns disputes of fact rather than disputes over legal interpretation.

In the context of Rule 52, courts also consistently interpret the term “issue” to mean a “dispute of fact.” On this reading, a party has been “fully heard on an issue” when it has presented enough evidence to allow the court to make findings on a disputed question of fact.⁹³ And when the court finds against a party on an “issue,” the court resolves that disputed question of fact.⁹⁴ Accordingly, in the context of Rule 52, courts hold that a party has been fully heard on an issue when it has presented all of its witnesses on an essential element of its claim.⁹⁵ Consider *Ritchie v. United States*, a typical

summary judgment when there was “no genuine *issue* as to any material fact.” FED. R. CIV. P. 56 (1991) (emphasis added). By adding the word “issue” in Rule 50 in 1991, the Advisory Committee made it clear that the court’s role under both rules was the same. *See also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000) (“And the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that the ‘inquiry under each is the same.’” (quoting *Anderson*, 447 U.S. at 250-51 (1986))).

88. *Dupree v. Younger*, 598 U.S. 729, 731 (2023).

89. *Id.* at 731.

90. *Id.* at 735.

91. *Id.*

92. *Id.* at 737-38.

93. FED. R. CIV. P. 52(c); *id.* at 52 advisory committee’s note to 1991 amendment; *see also* *WRIGHT & MILLER*, *supra* note 36, § 2573.1; *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 632 (5th Cir. 2001) (“Judgment entered under Rule 52(c) is made after the district court has heard all of the ‘evidence bearing on crucial issues of fact.’”).

94. *See* *Rego v. ARC Water Treatment Co.*, 181 F.3d 396, 400 (3d Cir. 1999) (“[U]nder Rule 52(c), the district court can resolve disputed factual questions.”).

95. *See* *Gannon v. United States*, 292 F. App’x 170, 173-74 (3d Cir. 2008) (upholding

Rule 52 case.⁹⁶ There, the plaintiff alleged that the defendant, the United States, was responsible for surreptitiously administering LSD to him, setting off a series of events that resulted in his conviction for attempted robbery.⁹⁷ After the plaintiff presented his witnesses, the trial court granted the United States's Rule 52(c) motion.⁹⁸ The Court of Appeals affirmed, holding that the trial court properly resolved the disputed question of fact—whether the United States administered LSD to the plaintiff—on the government's motion.⁹⁹ In doing so, the Court of Appeals confirmed that the “issues” that the trial court resolves on a 52(c) motion are factual disputes.¹⁰⁰

B. Aligning the Text of Rules 50 and 52 with Their History and Purpose

The history of the formulation of current Rules 50 and 52 also suggests that the term “issue” is best read to mean a “dispute of fact.” The term “issue” was added to Rule 50 as part of a wholesale redrafting in 1991.¹⁰¹ Before the 1991 changes, previous iterations used older terms—“directed verdict” and “judgment notwithstanding the verdict”¹⁰²—to describe when a party could seek judgment

district court's holding that a party was “fully heard on the issue because their causation expert had testified fully, and they offered no other witnesses on the issue of causation as distinct from the issue of contamination”).

96. 451 F.3d 1019, 1022 (9th Cir. 2006).

97. *Id.* at 1021.

98. *Id.* at 1021-22.

99. *Id.* at 1023-24.

100. *Id.* at 1023 (“Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact.”).

101. See FED. R. CIV. P. 50 (1991) and accompanying committee notes (describing addition of term “issue”). For the history of the directed verdict and judgment as a matter of law, see Renée Lettow Lerner, *The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938*, 81 GEO. WASH. L. REV. 448, 457-60 (2013) (describing the development of the directed verdict motion from its predecessor mechanisms, including the comment on evidence, demurrer to evidence, and nonsuit); William Wirt Blume, *Origin and Development of the Directed Verdict*, 48 MICH. L. REV. 555, 571-72 (1950) (describing the development of the directed verdict from predecessor motions).

102. Judgment notwithstanding the verdict was a common law motion which, originally, could be made only by the plaintiff and could be based only on the pleadings. Lerner, *supra* note 101, at 516. Eventually the motion was expanded to apply to either party and came to encompass the entire record. See *id.*; FED. R. CIV. P. 50 (1938). The motion was added to the Rules in 1938 in substance, but not in name. See *id.* (1938); Lerner, *supra* note 101, at 523.

because of the insufficiency of an opponent's evidentiary showing.¹⁰³ Although these motions themselves were based on even older procedural mechanisms with different constraints,¹⁰⁴ by the time the Rules adopted the motion for a directed verdict and the mechanism that became judgment notwithstanding the verdict, these motions undoubtedly were used to test *evidentiary* sufficiency.¹⁰⁵ That is, directed verdict and judgment notwithstanding the verdict motions allowed the court to enter judgment without, or despite, input from the jury. But, importantly, the court's power stopped where the jury's power began: with the power to "determine contested issues of fact."¹⁰⁶

In 1991, the Rules were amended to replace the terms "directed verdict" and "judgment notwithstanding the verdict" with the modern term, "judgment as a matter of law."¹⁰⁷ It was at this time, too, that the term "issue" was introduced into Rule 50.¹⁰⁸ Despite this change in terminology, however, as the Advisory Committee assured, the change in language was intended to render "no change in the existing standard" well-known from case law.¹⁰⁹ As a result, the 1991 Amendments were intended to preserve the standard that prevailed under the older motions, allowing the court to grant judgment when there was no dispute of fact that warranted resolution by a

103. The Rules provided expressly for a directed verdict from their inception until the language was amended in 1991. See FED. R. CIV. P. 50 advisory committee's note to 1991 amendment ("The revision abandons the familiar terminology of *direction of verdict*."). Compare FED. R. CIV. P. 50 (1938), with FED. R. CIV. P. 50 (1991).

104. These older procedural mechanisms had become, or were becoming, obsolete at the time that the Rules adopted the directed verdict and judgment notwithstanding the verdict language. See Lerner, *supra* note 101, at 458-60 (describing the development of the directed verdict motion from its predecessor mechanisms, including the comment on evidence, demurrer to evidence, and nonsuit); see Blume, *supra* note 101, at 571-72 ("If it was proper for the judge to instruct the jurors there was no evidence tending to prove a certain fact, and improper for him to instruct them they could find such fact in the absence of evidence, there was no reason why the judge could not tell the jurors simply to find for the defendant.").

105. See Lerner, *supra* note 101, at 475, 523; see also Blume, *supra* note 101, at 585.

106. *Berry v. United States*, 312 U.S. 450, 452-53 (1941) (distinguishing between the roles of the judge and jury).

107. See FED. R. CIV. P. 50 advisory committee's note to 1991 amendment (noting change in terminology).

108. *Id.* (noting introduction of term "issue").

109. *Id.*; *Hanover Am. Ins. Co. v. Tattooed Millionaire Ent., LLC*, 974 F.3d 767, 779 (6th Cir. 2020) ("The term 'motion for judgment as a matter of law' under Federal Rule of Civil Procedure 50 amalgamates the old terms 'directed verdict' and 'verdict JNOV.'" (internal citation omitted)).

jury. Indeed, the Advisory Committee notes confirm that the revision of the motions for directed verdict and judgment notwithstanding the verdict wrought changes in name only.¹¹⁰ Accordingly, the Advisory Committee notes explaining the change in language observed that the court was permitted to grant judgment as a matter of law “as soon as a party has completed a presentation on a *fact* essential to that party’s case.”¹¹¹ And conversely, the court was not permitted to enter judgment against a party who was not “afforded an opportunity to present any available evidence bearing on that *fact*.”¹¹² Indeed, when describing the 1991 changes to Rule 50, the Advisory Committee used the phrase “decide an issue” interchangeably with “resol[ve] ... particular factual issues,” confirming that, in Rule 50, “issue” means a “dispute of fact.”¹¹³

At the same time that Rule 50 was amended to replace the older terminology with the modern terms, Rule 52(c) was added as a “companion” provision to Rule 50.¹¹⁴ When adopted, Rule 52(c)’s standard was nearly identical to the standard provided in Rule 50, including the terms “issue” and “judgment as a matter of law.”¹¹⁵ Although the term “judgment as a matter of law” subsequently was dropped from Rule 52(c),¹¹⁶ the term “issue” was retained.¹¹⁷ As the parallel language suggests, Rule 52(c) was added with the purpose of creating a bench trial analog to judgment as a matter of law—including its focus on disputes of fact.¹¹⁸ And as the Advisory Committee Notes confirm, 52(c) was intended to “parallel” the revisions

110. FED. R. CIV. P. 50 advisory committee’s note to 1991 amendment.

111. *Id.* (emphasis added).

112. *Id.* (emphasis added).

113. *Id.* (“This subdivision deals only with the entry of judgment and not with the resolution of particular factual issues as a matter of law. The court may, as before, properly refuse to instruct a jury to decide an issue if a reasonable jury could on the evidence presented decide that issue in only one way.”).

114. RULES OF PRACTICE AND PROCEDURE REPORT, *supra* note 23, at 8-9 (noting that Rule 52(c) is intended to be a “companion” to new Rule 50).

115. FED. R. CIV. P. 52 (1991).

116. *See* FED. R. CIV. P. 52. This change was made to ensure that the standard for judgment on partial findings during a bench trial was not mistaken for the standard for judgment as a matter of law during a jury trial. *Id.* at 52 advisory committee’s note to 2007 amendment.

117. *See id.* at 52.

118. *See id.*

to Rule 50 for bench trials.¹¹⁹ Accordingly, 52(c) provides a mechanism for the court to enter judgment during a bench trial when the court “can appropriately make a dispositive finding of fact on the evidence.”¹²⁰ And this decision is appropriate only “after the court has heard all the evidence bearing on the crucial issue of fact.”¹²¹

Comparing Rule 52(c) to the rule it was intended to replace confirms this reading.¹²² Prior to 1991, former Rule 41(b) explicitly allowed the court to test the sufficiency of the evidence presented by the plaintiff in a bench trial.¹²³ Although the language of former Rule 41(b) was not carried over to Rule 52(c), the Advisory Committee made clear that the older device was “replaced by the new provisions of Rule 52(c).”¹²⁴ With this change, Rule 52(c) became the appropriate way for a defendant to test the sufficiency of a plaintiff’s evidence in a bench trial before the presentation of all of the evidence.¹²⁵

The above-described historical account shows that Rules 50 and 52(c) are modeled on older devices that were concerned with evidentiary sufficiency.¹²⁶ Interpreting Rules 50 and 52(c) to pertain to disputes of fact, therefore, aligns these rules with their historical development. Moreover, this interpretation also makes sense of the relationship between the judge and jury that had developed by the time the Rules were first adopted. In the early constitutional period, it was considered acceptable not only for judges, but also for juries,

119. FED. R. CIV. P. 52 advisory committee’s note to 1991 amendment; ADVISORY COMMITTEE ON THE CIVIL RULES, *supra* note 65, at 54 (“The proposed revision of Rule 52 to add subdivision (c) parallel to Rule 50 was also approved.”).

120. FED. R. CIV. P. 52 advisory committee’s note to 1991 amendment; *see also* WRIGHT & MILLER, *supra* note 36, § 2573.1; *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 632 (5th Cir. 2001) (“Judgment entered under Rule 52(c) is made after the district court has heard all of the ‘evidence bearing on crucial issues of fact.’” (internal citation omitted)).

121. FED. R. CIV. P. 52 advisory committee’s note to 1991 amendment.

122. Rule 52(c), in part, incorporated concepts that were previously articulated in former Rule 41(b). *Id.* (“The new subdivision [52(c)] replaces part of Rule 41(b), which formerly authorized a dismissal at the close of the plaintiff’s case if the plaintiff had failed to carry an essential burden of proof.”).

123. RULES OF PRACTICE AND PROCEDURE REPORT, *supra* note 23, at 7 (“Rule 41 would be revised to delete the provision for its use as a method of evaluating the sufficiency of the evidence presented at trial by a plaintiff. This language would be replaced by a new provision found in Rule 52(c).”).

124. FED. R. CIV. P. 41 advisory committee’s notes to 1991 amendment.

125. *See id.*

126. *See* RULES OF PRACTICE AND PROCEDURE REPORT, *supra* note 23, at 8-9.

to interpret the law.¹²⁷ In the early *Brailsford* case, the Supreme Court noted that a jury has “a right to ... determine the law as well as the fact in controversy.”¹²⁸ But, the view that juries are permitted to determine law as well as facts, whatever its persuasive force as a normative matter, was no longer current in federal courts at the time the Rules were first adopted.¹²⁹ Rather, the standard view at that time was harder-edged: the court possessed the power to determine the law while the jury had the power to determine the facts.¹³⁰ As the Supreme Court articulated in *Dimick v. Schiedt*, a case decided contemporaneously with the formulation of the Rules, “[t]he controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”¹³¹ Although scholars understandably have expressed doubts about whether the categories of fact and law can be distinguished so neatly,¹³² courts continue to reiterate this basic distinction.¹³³

The view current by the time the Federal Rules were adopted—that judges determine law while juries determine facts—supports

127. *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794); see also WRIGHT & MILLER, *supra* note 77, § 2521 (“[T]here was a time in the American colonies when it was thought that juries could decide both questions of law and questions of fact.”); Edward H. Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 912 (1971).

128. *Brailsford*, 3 U.S. at 4.

129. This is also largely true in the states. See Cooper, *supra* note 127, at 914. However, in a few states, it is less clear. For example, in some states, courts attempt to make the fine distinction between the jury “determining” the law on its own and “ignoring” the law as instructed by the judge. Compare IND. CONST. art. I, § 19 (“In all criminal cases whatever, the jury shall have the right to determine the law and the facts.”), with *Holden v. State*, 788 N.E.2d 1253, 1255 (Ind. 2003) (“[A] jury has no more right to ignore the law than it has to ignore the facts in a case.” (quoting *Bivins v. State*, 642 N.E. 928, 946 (Ind. 1994) (citation omitted))).

130. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); see also WRIGHT & MILLER, *supra* note 77, § 2521.

131. *Dimick*, 293 U.S. at 486.

132. Allen & Pardo, *supra* note 69, at 1769 (doubting the coherence of the fact-law distinction); Weiner, *supra* note 69, at 1867-68 (same).

133. See, e.g., *Morales v. Fry*, 873 F.3d 817, 823 (9th Cir. 2017) (“A bifurcation of duties is unavoidable: only the jury can decide the disputed factual issues, while only the judge can decide whether the right was clearly established once the factual issues are resolved.” (citing *Dimick*, 293 U.S. at 486)); *Am. Tech. Ceramics Corp. v. Presidio Components, Inc.*, 490 F. Supp. 3d 593, 632 (E.D.N.Y. 2020) (citing *Dimick* for the distinction between facts and law); *ePlus, Inc. v. Lawson Software, Inc.*, 946 F. Supp. 2d 472, 481 (E.D. Va. 2013) (referring to the distinction in *Dimick* between law and facts as “a fundamental principle of our jurisprudence”).

the conclusion that the term “issue” in Rule 50 means a factual dispute. On this reading, the judge has the power to grant judgment as a matter of law when the party opposing the motion has failed to present evidentiary support for a claim or defense sufficient to warrant jury consideration.¹³⁴ By contrast, when more than one version of a factual dispute has evidentiary support, the judge lacks the power to grant judgment as a matter of law.¹³⁵ This standard reading of Rule 50 makes sense *only* if it is the judge, rather than the jury, that makes the legal determination—that is, whether there is legally sufficient evidence to support a claim or defense. If the converse were true—if the term “issue” in Rule 50 included legal conclusions—then Rule 50 would give power to the jury to make legal determinations in some cases.¹³⁶

To see why this is true, recall that when a judge denies a motion for judgment as a matter of law, the jury rather than the judge resolves the dispute.¹³⁷ If the term “issue” included questions of law, then the jury returning a verdict after the court denies such a motion could be resolving questions of law.¹³⁸ While this reading of Rule 50 is conceptually possible,¹³⁹ it does not comport with the view—espoused contemporaneously with the adoption of the Federal Rules—that judges make legal determinations, while juries are restricted to factual findings.¹⁴⁰ Nor does it comport with the Advisory Committee’s view that Rule 50 is predicated on the existence of the “court’s duty to assure enforcement of the controlling law.”¹⁴¹

134. FED. R. CIV. P. 50.

135. *See id.*

136. *See id.*

137. *See id.*

138. *See id.*

139. For a description of jury nullification in the context of civil matters, see Lars Noah, *Civil Jury Nullification*, 86 IOWA L. REV. 1601, 1603, 1658 (2001) (“[W]hen a jury chooses to disregard the laws adopted by legislatures or courts, it undemocratically usurps the law-making function lodged in those institutions.”).

140. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

141. FED. R. CIV. P. 50, advisory committee’s note to 1991 amendment. There is one interesting complication. In 1991, the term “issue” was introduced into Rule 50, with parallel changes to Rule 52. ADVISORY COMMITTEE ON THE CIVIL RULES, *supra* note 66, at 7. But, curiously, the Advisory Committee did consider language, both for Rules 50 and 52, that would explicitly have referred to disputes of fact rather than issues. *Id.* Explicit reference to disputes of fact would have matched the historical understanding of Rule 50. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). Nevertheless, at the suggestion of prominent members of the Advisory Committee, the original draft of Rules 50 and 52 was

C. Aligning the Text of Rules 50 and 52 with Related Rules

Rules 50 and 52 serve functions analogous to other rules of civil procedure, but only if their term “issue” is read to mean a “dispute of fact.” First, this reading makes Rules 50 and 52 fit well with the logic of other procedural rules that test the sufficiency of the evidence. Several key procedural devices give the trial court opportunities to test the legal sufficiency of the evidence—that is, to compare the facts that have been developed with the substantive law to see whether they align.¹⁴² Once the court makes this determination, the Rules allow the court to grant judgment for one of the parties.¹⁴³ These familiar devices—the motion to dismiss,¹⁴⁴ motion for judgment on the pleadings,¹⁴⁵ and motion for summary judgment¹⁴⁶—share important conceptual similarities with each other and, importantly, with Rules 50 and 52.¹⁴⁷

Each of these devices can be thought of as involving a two-step process. At step one, the court identifies the set of facts that have

changed to replace the term “facts” with the current term “issues.” ADVISORY COMMITTEE ON THE CIVIL RULES, *supra* note 66, at 7. The stated reason for this change was to avoid an unnecessary distinction between law and facts. *Id.* It is not clear precisely what this change was intended to accomplish. However, for the reasons described above, it was already long established that the role of determining law in the federal system was confined to the judge. See *Dimick*, 293 U.S. at 486. As a result, it is unlikely that the change to the term “issue” was intended to give juries the power once again to determine law.

142. Philip A. Trautman, *Pleading Principles and Problems in Washington*, 56 WASH. L. REV. 687, 707 (1981) (describing the similar legal question raised by a motion to dismiss, motion for summary judgment, and motion for judgment on the pleadings).

143. *See id.*

144. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (“A Rule 12(b)(6) motion tests the legal sufficiency of a complaint.”).

145. *Hayden v. Paterson*, 594 F.3d 150, 160 (2d Cir. 2010) (“To survive a Rule 12(c) motion, ... [a] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))).

146. *Anderson*, 477 U.S. at 249 (“[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.”); cf. Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 172 (2007) (rejecting the standard view that, under summary judgment, “a court can dismiss a case for insufficient evidence”).

147. The connection between Rules 12(b)(6), 12(c), and 56 is apparent on the face of the Rules. Rule 12 provides that 12(b)(6) and 12(c) motions can be converted into a Rule 56 motion when it is presented with matters outside the pleadings. FED. R. CIV. P. 12(d) (“If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.”).

been developed up to that point in the litigation.¹⁴⁸ This determination normally is straightforward. At the motion to dismiss stage, the set of facts are those pleaded in the complaint, taken as true.¹⁴⁹ At the motion for judgment on the pleadings stage, the relevant set of facts are those pleaded in the complaint or the answer, again, taken as true.¹⁵⁰ At the motion for summary judgment stage, the relevant set of facts are those collected and produced during discovery about which there is no genuine dispute.¹⁵¹ At each stage, step two is the same: the court takes the set of facts it identified at step one and compares it with the substantive law to see whether they align.¹⁵² In other words, at each key stage of litigation, after the court identifies the relevant set of facts, the court's role is the same—to test the facts against the substantive law to determine whether judgment is warranted.¹⁵³ Accordingly, when the facts pleaded in the complaint, taken as true, fail to state a claim for which the substantive law provides relief, the court may dismiss the claim.¹⁵⁴ And when a claim or defense rests on facts over which there is no genuine dispute, and these facts do not align with a claim or defense that the law recognizes, the court may grant summary judgment on that claim or defense.¹⁵⁵

Rule 50 follows the same logic—provided that its term “issue” means a “dispute of fact.” On a motion for judgment as a matter of law, step one calls on the court to identify the relevant set of facts

148. See Trautman, *supra* note 142, at 707-08.

149. The pleaded facts are taken as true, with the caveat that the facts must be “plausible” after *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” (citation omitted)).

150. The “plausibility” caveat that applies to the defendant’s 12(b)(6) motion applies also to its 12(c) motion. See *Hayden*, 594 F.3d at 160 (applying plausibility standard to defendant’s 12(c) motion). In some jurisdictions, the plausibility standard applies also to the plaintiff’s 12(c) motion. *GEOMC Co. v. Calmare Therapeutics Inc.*, 918 F.3d 92, 98 (2d Cir. 2019) (“[T]he plausibility standard of *Twombly* applies to determining the sufficiency of all pleadings, including the pleading of an affirmative defense.”).

151. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (“Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” (citation omitted)).

152. See Trautman, *supra* note 142, at 707-08.

153. See *id.*

154. *Jones v. Bock*, 549 U.S. 199, 215 (2007) (“A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief.”).

155. *Scott*, 550 U.S. at 380.

that will be tested for legal sufficiency.¹⁵⁶ Here, the relevant set of facts are those facts in the record, including evidence presented at trial.¹⁵⁷ At step two, the court compares this body of facts with the substantive law to determine whether they align.¹⁵⁸ At step one, the court can resolve any factual dispute about which no reasonable jury could find for the party resisting the motion; then, at step two, the court can grant judgment on any claim or defense that depends on the resolution of that factual dispute.¹⁵⁹ So, too, with a Rule 52 motion for judgment on partial findings in a bench trial. At step one, the court identifies the relevant set of facts—that is, those facts that the court has found in its capacity as the finder of fact.¹⁶⁰ At step two, the court compares its findings to the parties’ claims and defenses to determine whether judgment should be granted.¹⁶¹

The similarities between Rules 12(b)(6), 12(c), and 56, and, on the other hand, Rules 50 and 52, reveal that they can all serve a similar role and function in analogous ways. Provided that the term “issue” in Rules 50 and 52 means “dispute of fact,” each of these rules serves as a mechanism to allow the trial court to identify a relevant set of facts and then compare those facts to the substantive law to see whether they align.¹⁶² In this way, each of these rules allows the court to test the sufficiency of the evidence at a key stage of litigation.¹⁶³ Reading the term “issue” to mean “dispute of fact,” therefore, aligns Rules 50 and 52 with the logic of these analogous rules.

Second, reading the term “issue” in Rules 50 and 52 to mean a “dispute of fact” realigns their meaning with the language and meaning of Rule 56. At one time, these rules shared common language, reflecting their common purpose. Because of the 2010 amendments to the Rules, the text of Rules 50, 52, and 56 was

156. *Ortiz v. Jordan*, 562 U.S. 180, 189 (2011) (holding that Rule 50(b) “permits the entry, postverdict, of judgment for the verdict loser if the court finds that the evidence was legally insufficient to sustain the verdict”).

157. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (“It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.”).

158. *See Ortiz*, 562 U.S. at 189.

159. *See id.*

160. *See* FED. R. CIV. P. 52.

161. *See id.*

162. *See id.* at 50, 52.

163. *See id.* at 12(b)(6), 12(c), 50, 52.

misaligned and their common purpose was obscured. Reading the term “issue” in Rules 50 and 52 to mean “dispute of fact” realigns the meaning of Rules 50 and 52 with conceptually related Rule 56.

In 1991, the Advisory Committee amended Rule 50 to replace the “directed verdict” and “judgment notwithstanding the verdict” motions with a motion for “judgment as a matter of law.”¹⁶⁴ In doing so, the Advisory Committee introduced the terms “issue” and “judgment as a matter of law” into Rules 50 and 52.¹⁶⁵ This change connected Rules 50 and 52 with conceptually related Rule 56, which already used both of these same terms in setting out the parameters of a motion for summary judgment.¹⁶⁶ Indeed, the choice of language for the 1991 Amendments deliberately connected Rules 50 and 52 with Rule 56. As the Advisory Committee Notes describe, the 1991 Amendment language was added to Rule 50 specifically because it was already present in Rule 56.¹⁶⁷ The common language, noted the Advisory Committee, “serves to link” Rules 50 and 56.¹⁶⁸ Similarly, these same common terms were used in Rule 52 to link it to Rule 50 and, by extension, to Rule 56.¹⁶⁹

While the 1991 Amendments clarified the connection among Rules 50, 52, and 56, the 2010 Amendments blurred this once-clear link. In 2010, Rule 56 was amended by replacing the term “issue” with “dispute,” clarifying that summary judgment could be granted only when there was “no genuine *dispute* as to any material fact.”¹⁷⁰ Now, consider the effect of the 1991 Amendments and the 2010 Amendments in tandem. By adding the term “issue” to Rules 50 and

164. See FED. R. CIV. P. 50 advisory committee’s note to 1991 amendment (“The revision abandons the familiar terminology of *direction of verdict*.... If a motion is denominated a motion for ... judgment notwithstanding the verdict, ... [s]uch a motion should be treated as a motion for judgment as a matter of law.”).

165. *Id.* at 50(a), 52(c).

166. FED. R. CIV. P. 56 (1991).

167. FED. R. CIV. P. 50 advisory committee’s note to 1991 amendment (“The term ‘judgment as a matter of law’ is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules.”).

168. *Id.*

169. See *id.* at 52(c) advisory committee’s note to 1991 amendment (“Subdivision (c) ... parallels the revised Rule 50(a).”).

170. *Id.* at 56(a) (emphasis added); *id.* advisory committee’s note to 2010 amendment (“Subdivision (a) carries forward the summary-judgment standard expressed in former subdivision (c), changing only one word—genuine ‘issue’ becomes genuine ‘dispute.’ ‘Dispute’ better reflects the focus of a summary-judgment determination.”).

52 in 1991, but then eliminating the term “issue” from Rule 56 in 2010, these amendments, together, left the term “issue” in Rules 50 and 52 disconnected from its reference point. Put otherwise, when Rule 50 used the terms “directed verdict” and “judgment notwithstanding the verdict,” longstanding experience with these motions made it clear that the rule dealt with disputes of fact.¹⁷¹ When this terminology was eliminated, no interpretive harm was done because Rule 50 and Rule 56 were connected explicitly through the use of similar language, ensuring that it was clear that Rule 50 continued to refer to disputes of fact. So, too, Rule 52, which also was originally framed with parallel language.¹⁷² But, when the term “issue” was subsequently eliminated from Rule 56, the term “issue” in Rules 50 and 52 was left without a referent.¹⁷³ Reading the term “issue” in Rules 50 and 52 to mean “dispute of fact” connects these rules with Rule 56, which served as the template for their current language. Giving the term “issue” in Rules 50 and 52 the same meaning as “dispute” in Rule 56 clarifies that they cover parallel situations, just as they always have done.¹⁷⁴

V. RESOLVING THE “ISSUES” IN RULES 50 AND 52

This Article has shown that reading the term “issue” in Rules 50 and 52 to mean a “dispute of fact” best comports with judicial practice, makes sense of the history and purpose of Rules 50 and 52, and connects these rules with the logic of conceptually related rules of civil procedure. Nevertheless, the text of these rules does not clearly reflect their best reading and the ambiguity of the text gives cause for concern. As the details of the 1991 and 2010 Amendments fade from memory, along with the once-common knowledge of the

171. *Id.* at 50 advisory committee’s note to 1991 amendment.

172. *See supra* note 166 and accompanying text.

173. *See supra* notes 166-68 and accompanying text.

174. Notably, Rule 56 is implicated when there is no genuine dispute of *material* fact. It is not necessary to introduce the term “material” into Rules 50 and 52 to align them with Rule 56 because Rules 50 and 52 have analogous language already. Rules 50 and 52 are implicated only when “under the controlling law, [a claim or defense] can be maintained or defeated only with a favorable finding on that issue.” FED. R. CIV. P. 50(a)(1)(B), 52(c). This language does the same work as “material” in Rule 56. *Id.* at 56(f)-(g).

significance of the terms “directed verdict” and “judgment notwithstanding the verdict,” misinterpretations are more likely to occur. A good-faith interpreter unacquainted with this history might well doubt that the term “issue” in Rule 50 and 52 means a “dispute of fact.” Particularly with the ascendancy of textualism—as interpreters continue to discount evidence of purpose in favor of meaning that can be gleaned from text and canons of interpretation—it may become harder to explain why the term “issue” in these rules means a “dispute of fact.”¹⁷⁵ Consider, for example, the rule of meaningful variation, a textual canon suggesting that two different terms must mean different things.¹⁷⁶ This canon would seem to *preclude* reading the term “issue” in Rules 50 and 52 to mean the same thing as Rule 56’s term, “dispute of fact,” despite their historical connection. Concomitantly, consider the canon of consistent usage, a textual canon suggesting that courts read the same term in two different places in a statute in the same way.¹⁷⁷ This canon could impel courts to read the term “issue” in Rule 50 and 52 to mean the same thing as the term “issue” in other Rules, where it can mean anything from a component of a claim,¹⁷⁸ to a problem or legal argument,¹⁷⁹ to a legal defense.¹⁸⁰ In short, although the ambiguity of the text of Rules 50 and 52 presents few difficulties now, it may well develop into a trap for the unwary in the near future. Indeed, in what may be a preview to the coming clash between textualism and the Rules, the circuit split that required the Supreme Court’s resolution in *Dupree*

175. See, e.g., Victoria Nourse, *Textualism 3.0: Statutory Interpretation After Justice Scalia*, 70 ALA. L. REV. 667, 668-69 (2019) (“Textualism does not solve the problem, as we know, of legislative history.”).

176. *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006) (“A familiar principle of statutory construction ... is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.”); see Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453, 492 (2018) (“In statutes ... where Congress oscillates between two terms even within the same subsection, it must be presumed that Congress included this variation for a reason.”).

177. *United States v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring) (“[T]he presumption of consistent usage [is] the rule of thumb that a term generally means the same thing each time it is used.”).

178. See, e.g., FED. R. CIV. P. 16(c)(2)(M) (“claim, counterclaim, crossclaim, third-party claim, or particular issue”).

179. See, e.g., *id.* at 26(f)(2) (“any issues about preserving discoverable information”).

180. See, e.g., *id.* at 9(a) (“To raise any of those *issues*,” that is, certain special matters like capacity to sue or be sued, “a party must do so by a specific denial.” (emphasis added)).

can be attributed to the elevation of the text of Rule 50 over its purpose by some lower courts.¹⁸¹

To fix the current ambiguity that exists and avoid future interpretive problems, Rules 50 and 52 should be amended to strike the term “issue” and replace it with a different term—one that means, unambiguously, a “dispute of fact.” Accordingly, the Committee on Practice and Procedure and the Civil Rules Advisory Committee should consider adopting the following proposed language for Rule 50:

If a party has been fully heard on an ~~issue~~ factual dispute during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that ~~issue~~ factual dispute, the court may:

- (A) resolve the ~~issue~~ factual dispute against the party; and
- (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that ~~issue~~ factual dispute.¹⁸²

This proposed language will eliminate the ambiguity in Rule 50, ensuring that it clearly conveys its best reading. First, with limited exceptions,¹⁸³ courts consistently interpret “issue” to mean “dispute of fact.”¹⁸⁴ Accordingly, this proposed amendment conforms the text of Rule 50 to the most prevalent judicial interpretation of that rule. Second, this proposed language reflects the history and purpose of Rule 50. Since their adoption into the Rules, the procedural devices

181. See, e.g., *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 422-23 (4th Cir. 2005) (rejecting distinction between legal and factual disputes under Rule 50) (*overruled by Dupree v. Younger*, 598 U.S. 729 (2023)).

182. See FED. R. CIV. P. 50 (alteration added).

183. See, e.g., *Summers v. Delta Air Lines, Inc.*, 508 F.3d 923, 926 (9th Cir. 2007) (defining “issue” in Rule 50 to mean, rather amorphously, “claims, defenses, or entire cases”).

184. See, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 259 (1986) (noting that under Rule 50, the trial court’s role is to evaluate any “*factual dispute*” to determine “whether the evidence presents a sufficient *disagreement* to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law” (emphasis added) (citation omitted)); see also *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 150 (2000) (“And the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that the ‘inquiry under each is the same.’”); WRIGHT ET AL., *supra* note 75, § 2713.1 (Rule 50 and Rule 56 both require a showing “that there is no genuine dispute of material fact and that the moving party is entitled to prevail as a matter of law”).

that became judgment as a matter of law have been used to test evidentiary sufficiency.¹⁸⁵ This proposed language confirms that current Rule 50 applies the same substantive standard as the directed verdict and judgment notwithstanding the verdict devices. Concomitantly, this proposed language better reflects the distinction that has developed over time between the respective roles of the judge and jury. Accordingly, the proposed language ensures that the judge decides questions of law and the jury resolves genuine factual disputes.¹⁸⁶ Third and finally, this proposed language aligns Rule 50 with the logic of other procedural devices that test the sufficiency of the evidence, found in conceptually related Rules 12(b)(6), 12(c), and 56.¹⁸⁷ In particular, it eliminates the unintended misalignment between the operative language of Rule 56—which explicitly describes a “dispute of fact”—and the language of Rule 50, despite the fact that Rule 50 was amended in 1991 to connect it explicitly to Rule 56.¹⁸⁸

One caveat should be mentioned: although these proposed amendments should not change the operation of Rule 50, they might be read to make a subtle change to the potential scope of Rule 50. As noted, the text of Rule 50 elides the distinction between facts and law by referring to “issues.” This ambiguity, whether purposeful or not, appears to be in line with the doubts expressed by some scholars about whether the line between the categories of law and fact are as distinct as courts treat them.¹⁸⁹ By leaving the term ambiguous, then, Rule 50 could be read to allow courts to deny a motion for judgment as a matter of law when only a legal question is in

185. See Lerner, *supra* note 101, at 523; see also Blume, *supra* note 101, at 585; Berry v. United States, 312 U.S. 450, 453 (1941) (noting that these motions do not allow courts to resolve “contested issues of fact”).

186. See *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (“The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts.”); see also WRIGHT & MILLER, *supra* note 77, § 2521 (noting the evolution of the judge/jury relationship).

187. See Trautman, *supra* note 142, at 707 (describing the similar legal question raised by a motion to dismiss, motion for summary judgment, and motion for judgment on the pleadings).

188. FED. R. CIV. P. 50 advisory committee’s note to 1991 amendment (“The term ‘judgment as a matter of law’ is an almost equally familiar term and appears in the text of Rule 56; its use in Rule 50 calls attention to the relationship between the two rules.”).

189. Allen & Pardo, *supra* note 69, at 1769 (doubting the coherence of the fact-law distinction); Weiner, *supra* note 69, at 1867 (same).

dispute, leaving the power to determine the law to the jury. As argued above, this power not only has been rejected by the Supreme Court, but it also is inconsistent with the logic and structure of the rest of the Rules.¹⁹⁰ Nevertheless, because of the ambiguity of the term “issue” in Rule 50, it is a power that, arguably, is consistent with the text of Rule 50. The effect of the proposed amendments, therefore, would be to confirm that the subject of Rule 50 is evidentiary sufficiency, codify *Dimick*, and prevent courts from empowering juries to determine questions of law.

Similarly, the Committee on Practice and Procedure and the Civil Rules Advisory Committee should consider making the following analogous change to Rule 52:

Rule 52.

* * *

If a party has been fully heard on an ~~issue~~ factual dispute during a nonjury trial and the court finds against the party on that ~~issue~~ factual dispute, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that ~~issue~~ factual dispute.¹⁹¹

As with the above-described changes to Rule 50, this proposed change would eliminate the ambiguity created by the term “issue,” ensuring that the text of Rule 52 reflects its best reading. First, this change will conform the text of Rule 52 to the way that courts consistently interpret it, that is, to concern disputes of fact.¹⁹² Second, this proposed language also reflects the history and purpose of Rule 52. Indeed, Rule 52(c) was added specifically to serve as an analog to Rule 50, with the parallel language intended to perform a parallel

190. See *supra* Section II.A.

191. See FED. R. CIV. P. 52 (alteration added).

192. See WRIGHT & MILLER, *supra* note 36, § 2573.1; see also *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 632 (5th Cir. 2001) (“Judgment entered under Rule 52(c) is made after the district court has heard all of the ‘evidence bearing on crucial issues of fact.’” (quotation omitted)); see also *Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006) (“Rule 52(c) expressly authorizes the district judge to resolve disputed issues of fact.” (citation omitted)).

function.¹⁹³ Retaining this symmetry by keeping the language in Rule 52(c) parallel to the language in Rule 50 will best achieve its purpose. Third, this proposed language makes Rule 52 fit the logic of similar rules by aligning its language not only with the language of analogous Rule 50, but also with conceptually related Rules 12(b)(6), 12(c), and 56.¹⁹⁴

CONCLUSIONS AND FUTURE DIRECTIONS

The Federal Rules of Civil Procedure were designed to fade into the background. When they work well, they are nearly invisible, allowing the parties to assert claims and defenses, and argue the merits of their cases, without getting ensnared in a thicket of procedure. Clear, unambiguous language setting out these procedural rules is a prerequisite to fair outcomes. Only when the parties and court know what procedural rules mean can the rules work as they are intended. This Article's investigation into the meaning of the term "issue," as used in Rules 50 and 52, allows us to draw a few conclusions. It also suggests the work that remains to be done.

First, this Article supports the conclusion that the Civil Rules Advisory Committee and the Committee on Rules of Practice and Procedure should amend Rules 50 and 52 to ensure that their text reflects their best meaning. Although courts rarely have trouble interpreting the term "issue" in these rules, explicitly providing that these rules refer to disputes of fact makes it easier for both lawyers and those untrained in the law alike to understand their operation. Put simply, if these rules say what they mean, they will be easier for litigants to use.

Aligning the text and purpose of these rules is especially crucial now because courts increasingly interpret the Rules as if they were statutes. In particular, courts now apply textual canons of statutory

193. See FED. R. CIV. P. 52 advisory committee's note to 1991 amendment; ADVISORY COMMITTEE ON CIVIL RULES, *supra* note 66, at 54 (Apr. 1989) ("The proposed revision of Rule 52 to add subdivision (c) parallel to Rule 50 was also approved.")

194. Trautman, *supra* note 142, at 707 (describing the similar legal question raised by a motion to dismiss, motion for summary judgment, and motion for judgment on the pleadings).

interpretation to the Rules, sometimes excluding other sources of meaning, like evidence of purpose.¹⁹⁵ In this environment, it is especially important that, as far as practicable, terms found in the Rules are clear rather than ambiguous and embody one and only one concept. Amending Rules 50 and 52 to ensure that each term embodies its intended concept will ensure that courts interpret each term in the Rules according to its purpose.

In order to address these concerns, the Appendix following this Conclusion includes the text of Rules 50 and 52 with the amendments proposed in Part III. Following each rule is proposed Advisory Committee language. As the Supreme Court has recognized, Advisory Committee Notes are a reliable source for interpreting the Federal Rules.¹⁹⁶ Accordingly, the proposed Advisory Committee Notes to the amendments proposed here are designed to explain succinctly the rationale for the amendments.

Second, this Article suggests that Rules 50 and 52 are far from the only Rules that would benefit from disambiguation. The Rules are full of issues—that is, uses of term “issue.” Although sometimes the meaning is clear, like the many uses of “issue” to mean “send out,” other times it is ambiguous.¹⁹⁷ For example, Rule 26’s use of the term, on its face, could be read to mean either a problem or legal argument.¹⁹⁸ Rule 9’s use of the term could be read to mean either an allegation of fact or a legal defense.¹⁹⁹ In short, the problem identified with the term “issue” in Rules 50 and 52 is, in some ways, just the tip of the iceberg. In order to ensure that the text of all of the Rules reflects their meaning, all of the rules that use the term “issue” should be revisited to consider whether they are ambiguous. By

195. See *Leatherman v. Tarrant Cnty. Narcotics Intel. & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius* in a case about Rule 8 pleading); Moore, *supra* note 14, at 1073 (equating trend in Supreme Court’s interpretation of the Rules to Court’s textualist interpretations of statutes more generally); Wasserman, *supra* note 16, at 336 (noting that modern cases evince a “[s]tricter textualism in rule interpretation”).

196. *United States v. Vonn*, 535 U.S. 55, 64 n.6 (2002) (“In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed.” (citation omitted)).

197. See *supra* notes 53-58 and accompanying text.

198. FED. R. CIV. P. 26(f)(2) (“[A]ny issues about preserving discoverable information.”).

199. *Id.* at 9(a) (“To raise any of those *issues*,” that is, certain special matters like capacity to sue or be sued, “a party must do so by a specific denial.” (emphasis added)).

following the path set out in this Article—that is, exploring judicial interpretations, history and purpose, and normative considerations—the Civil Rules Advisory Committee and Committee on Rules of Practice and Procedure can amend the Rules to ensure that their text reflects their best reading.

Third, this Article suggests that the “issues” associated with the Federal Rules of Civil Procedure are not limited to the term “issue.” Word meanings change over time.²⁰⁰ And formal amendments and judicial interpretations can obscure clarifying context. As a result, textual meaning that once was obvious can become ambiguous; once-clear concepts can become murky; and once-settled law can become unsettled.²⁰¹ Accordingly, the Civil Rules Advisory Committee and Committee on Rules of Practice and Procedure should continue to monitor the Rules for ambiguities that can be corrected. These committees have done so in the past to good effect, for example, when they conformed the language of Rule 50 to match Rule 56. Continual attention to the language of the Rules can help realize the central goal that animated their creation: to reduce the dependence of litigation success on esoteric knowledge of procedure. In the words of Charles E. Clark, a principal architect of the Federal Rules of Civil Procedure, a properly functioning procedural system is a key tool for subordinating “civil procedure to the ends of substantive justice.”²⁰²

200. MELLINKOFF, *supra* note 44, at 325 (“Many of the words that lawyers traditionally use have followed a language pattern of the common speech; they have changed meaning without changing their spelling. Sometimes the change-of-meaning has been slight—an added use, a different sense or connotation; sometimes the change has been drastic.” (citation omitted)); *see also* Elizabeth Closs Traugott, *Semantic Change*, in OXFORD RESEARCH ENCYCLOPEDIA, LINGUISTICS (2017) (classifying types of language change, including metaphorization, metonymization, pejoration, amelioration, narrowing, and generalization).

201. For example, and as commentators have noted, Rule 41 permits a plaintiff to voluntarily dismiss an action but not a claim. A possible consequence of this language, likely unintended, is to permit a plaintiff to dismiss only an entire case, but not to dismiss one claim within that case. Because of the unintuitive nature of this result, courts do not interpret this language consistently. FED. R. CIV. P. 41(a)(1)(A) (“[T]he plaintiff may dismiss an action without a court order.”); *see also* Letter from David J. Wenthold & Zachary T. Reynolds to Committee on Rules of Practice and Procedure (July 24, 2022). To take another example, courts are split on the meaning of the term “delivering” in Rule 45. While some interpret it to mean hand-delivery, others interpret it to include delivery by U.S. Mail. FED. R. CIV. P. 45(b)(1) (“Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person.”).

202. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L. Q. 297, 297 (1938).

APPENDIX—PROPOSED AMENDMENTS AND PROPOSED ADVISORY
COMMITTEE NOTES²⁰³

Rule 50. Judgment as a Matter of Law in a Jury Trial;
Related Motion for a New Trial; Conditional Ruling

(a) JUDGMENT AS A MATTER OF LAW.

(1) *In General.* If a party has been fully heard on an ~~issue~~ factual dispute during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that ~~issue~~ factual dispute, the court may:

(A) resolve the ~~issue~~ factual dispute against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that ~~issue~~ factual dispute.

(2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) RENEWING THE MOTION AFTER TRIAL; ALTERNATIVE MOTION FOR A NEW TRIAL. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint

203. New material in the Federal Rules is underlined; matter to be omitted is struck through. All committee note language is new.

request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

- (1) allow judgment on the verdict, if the jury returned a verdict;
- (2) order a new trial; or
- (3) direct the entry of judgment as a matter of law.

(c) GRANTING THE RENEWED MOTION; CONDITIONAL RULING ON A MOTION FOR A NEW TRIAL.

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) TIME FOR A LOSING PARTY'S NEW-TRIAL MOTION. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) DENYING THE MOTION FOR JUDGMENT AS A MATTER OF LAW; REVERSAL ON APPEAL. If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial,

direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

PROPOSED NOTES OF ADVISORY COMMITTEE ON RULES—[YEAR]

Amendment Subdivision (a). The term “issue” is deleted to eliminate any ambiguity in its meaning and replaced with the term “factual dispute.” This amendment aligns the text of Rule 50 with the Supreme Court’s consistent interpretation of its language. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 151 (2000); *see also* 10A Charles Alan Wright et al., *Federal Practice and Procedure* § 2713.1 (2016). This amendment also aligns the text of Rule 50 with the history of its development and its purpose. In particular, this amendment clarifies the proper division of authority between the trial judge and the jury: it is the judge who decides, as a matter of law, whether the evidence supporting the nonmoving party’s version of a dispute of fact is sufficient to warrant submission to a jury. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *see also* 9B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2521 (3d ed. 2008). This amendment also conforms the language of Rule 50 to the operation of conceptually related Rules 12(b)(6), 12(c), and 56. Most saliently, it reconnects the language of Rule 50 with the language of Rule 56, confirming that both rules continue to concern disputes of fact, just as they did when both rules used the term “issue.” *See* Fed. R. Civ. P. 56 advisory committee’s note to 2010 amendment.

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Rule 52. Findings and Conclusions by the Court;
Judgment on Partial Findings

(a) FINDINGS AND CONCLUSIONS.

(1) *In General.* In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately. The findings and conclusions may be stated on the record after the close of the evidence or may appear in

an opinion or a memorandum of decision filed by the court. Judgment must be entered under Rule 58.

(2) *For an Interlocutory Injunction.* In granting or refusing an interlocutory injunction, the court must similarly state the findings and conclusions that support its action.

(3) *For a Motion.* The court is not required to state findings or conclusions when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion.

(4) *Effect of a Master's Findings.* A master's findings, to the extent adopted by the court, must be considered the court's findings.

(5) *Questioning the Evidentiary Support.* A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings.

(6) *Setting Aside the Findings.* Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) AMENDED OR ADDITIONAL FINDINGS. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

(c) JUDGMENT ON PARTIAL FINDINGS. If a party has been fully heard on an ~~issue~~ factual dispute during a nonjury trial and the court finds against the party on that ~~issue~~ factual dispute, the court may enter judgment against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that ~~issue~~ factual dispute. The court may, however, decline to render any judgment until the close of the evidence. A

judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

PROPOSED NOTES OF ADVISORY COMMITTEE ON RULES—[YEAR]

Amendment Subdivision (c). The term “issue” is deleted to eliminate any ambiguity in its meaning and replaced with the term “factual dispute.” Like the parallel change made to Rule 50, this change conforms the Rule’s text to the way that courts consistently interpret it—that is, to provide for the resolution of disputes of fact. 9C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2573.1 (3d ed. 2008); see, e.g., *Ritchie v. United States*, 451 F.3d 1019, 1023 (9th Cir. 2006). This amended language also reflects the history and purpose of Rule 52(c), which was added in 1991 to serve as a bench-trial analog to Rule 50. Fed. R. Civ. P. 52 advisory committee’s note to 1991 amendment. Finally, the amended language makes clear the connection between Rule 52(c) and, not only Rule 50, but also conceptually related Rules 12(b)(6), 12(c), and 56.