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I Lost at Trial - In the Court of Appeals!: The Expanding Power of the Federal Appellate Courts to Reexamine Facts

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I. INTRODUCTION

A foundational premise in our legal system is that the jury determines matters of fact. Under the corresponding corollary, appellate courts may review questions of law,[1] but they may not redetermine the facts.[2]

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1. Pullman-Standard v. Swint, 456 U.S. 273, 291 (1982) ("'[Factfinding] is the basic responsibility of district courts, rather than appellate courts . . . .'" (quoting DeMarco v. United States, 415 U.S. 449, 450 n.22 (1974))); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) ("[A]ppellate courts must constantly have in mind that their function is not to decide factual issues de novo."); *see also* Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 657 (1988) ("[T]rial courts are primarily responsible for sifting the evidence and finding the facts, while appellate courts are primarily responsible for developing the law.").

2. The distinction between "law" and "fact" is incapable of precise definition. 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 2.13, at 2-93 to 2-94 (2d ed. 1992) ("In spite of some clarity at wicks' ends, the area in between these 'pure' examples gets increasingly sticky, and the courts cannot resolve the tricky differences by bare citation to the general rule of appellate lawmaking or by pointing to the ubiquitous but quixotic law-fact distinction."); LEON GREEN, JUDGE AND JURY 270 (1930) ("[T]hose equally expansible and collapsible terms 'law' and 'fact.' . . . They are basic assumptions; irreducible minimums and the most comprehensive maximums at the same instant. They readily accommodate themselves to any meaning we desire to give them."). However, this Article addresses two specific areas—jury damage awards and the weight of the evidence—that the United States Supreme Court expressly has held to constitute "factual" determinations for more than 150 years. Refer to notes 51–66, 142–86 *infra* and accompanying text.

This established dichotomy between the responsibilities of the jury and those of the reviewing court resulted from the jury's revered position in our country's history.[3] One of the primary motivations behind the Declaration of Independence was the Crown's attempt to encroach upon the right to trial by jury.[4] In recognition of the jury's importance, the Seventh Amendment of the United States Constitution both preserves the right to jury trial and prohibits federal appellate courts from reexamining facts determined by a jury:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[5]

In just the last few years, however, the United States Supreme Court, in a sharp break with more than 150 years of Seventh Amendment jurisprudence,[6] has transferred to federal appellate courts meaningful power to supplant jury verdicts. This power, in effect, permits significant de novo review of jury fact-finding. Thus, the Court's recent decisions have dramatically undermined the jury's supremacy as the first and final fact-finder.[7]

In the past five years, the Supreme Court has issued three decisions expanding federal appellate court power into the fact-

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3. Refer to notes 31–51 *infra* and accompanying text.

4. The Declaration of Independence states, in pertinent part:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world. . . . He has . . . giv[en] his Assent to [Parliament's] Acts of pretended Legislation: . . . For depriving us in many cases, of the benefits of Trial by Jury.

THE DECLARATION OF INDEPENDENCE paras. 2, 15, 20 (U.S. 1776); *accord* Stephan Landsman, *The Civil Jury in America: Scenes From an Unappreciated History*, 44 HASTINGS L.J. 579, 596 (1993) [hereinafter Landsman, *Unappreciated History*] (suggesting that America's struggle with England over the "inestimable privilege" of a trial by jury was a motivating force in America's fight for independence); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting) ("It is perhaps easy to forget, now more than 200 years removed from the events, that the right of trial by jury was held in such esteem by the colonists that its deprivation at the hands of the English was one of the important grievances leading to the break with England.").

5. U.S. CONST. amend. VII; refer to notes 31–51 *infra* and accompanying text (describing the importance of jury trials and how provisions protecting the sanctity of jury verdicts were incorporated into the Constitution).

6. Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 237 ("During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the seventh amendment right to a jury trial in civil cases.").

7. Refer to notes 76–138, 224–66 *infra* and accompanying text.

finding arena by directly contravening its own long-established precedent.[8] The subject matters of these three decisions were distinctly unrelated: the application of *Erie*[9] principles to a New York law supplying a state-court standard of review;[10] the admission of expert evidence on review from the denial of a motion for judgment as a matter of law;[11] and the review of a punitive damages award in a trademark action.[12] These substantive distinctions have largely obscured the Court's underlying procedural revolution.[13]

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8. *Id.* Although the Seventh Amendment also bears upon the reexamination of jury fact-finding by district court judges, this Article focuses on factual reexamination by the federal appellate courts.

9. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

10. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 426–31 (1996) (applying "'the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws'" (quoting Hanna v. Plumer, 380 U.S. 460, 468 (1965))).

11. Weisgram v. Marley Co., 528 U.S. 440, 456–57 (2000).

12. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1678–81 (2001).

13. The commentary addressing the *Gasperini* and *Weisgram* decisions has focused on the substantive legal issues. *See, e.g.*, Stephen D. Easton, *Ammunition for the Shoot-Out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 516–17 n.160 (2000) (noting that several appellate courts have reversed judgments resulting from jury verdicts based on wrongly admitted expert testimony) (citing, *inter alia*, Weisgram v. Marley Co., 169 F.3d 514, 521–22 (8th Cir. 1999), *aff'd*, 528 U.S. 440 (2000)); C. Douglas Floyd, *Erie Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 304–05 (determining that *Gasperini* confuses the *Erie* doctrine by providing a decision that can be interpreted to both expand and contract *Byrd v. Blue Ridge Rural Electric Co-op., Inc.*, 356 U.S. 525 (1958)); Richard D. Freer, *Some Thoughts on the State of* Erie *After* Gasperini, 76 TEX. L. REV. 1637, 1637–39 (1998) (observing that *Gasperini* fails to clarify the two prongs of the *Erie* doctrine and the *Byrd* decision); Michael H. Graham, *The Expert Witness Predicament: Determining "Reliable" Under the Gatekeeping Test of* Daubert, Kumho, *and Proposed Amended Rule 702 of the Federal Rules of Evidence*, 54 U. MIAMI L. REV. 317, 341–43 & n.63 (2000) (noting that *Weisgram* is illustrative of a case in which the exclusion of expert testimony was not supported by an explanative theory that had "been derived and employed in a manner consistent with processes customarily employed by experts in the particular field"); Wendy Collins Perdue, *The Sources and Scope of Federal Procedural Common Law: Some Reflections on* Erie *and* Gasperini, 46 U. KAN. L. REV. 751, 771–74 (1998) (demonstrating that *Gasperini*, when analyzed under the two-pronged approach of federal common law, produces the same decision as the Supreme Court and illustrates that common law analysis is a straightforward approach to *Erie* cases); Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court is Doing a Halfway Decent Job in Its* Erie-Hanna *Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 963–66 (1998) (asserting that the *Gasperini* decision is not "a major shift in the Supreme Court's *Erie* jurisprudence"). The same is true of the *Leatherman* commentary, which due to the recency of the Supreme Court's decision, addresses the Court of Appeals' opinion. *See, e.g.*, Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611, 728 & n.441 (1999) (asserting that design features are functional and do not violate a trademark if it is not possible to design a functional product without the design features); Dale P. Olson, *Common Law Misappropriation in the Digital Era*, 64 MO. L. REV. 837, 841–42 (1999) (recognizing *Leatherman*'s enunciation that "federal patent laws do not create an

In 1996, *Gasperini v. Center for Humanities*[14]—the *Erie* case—gave federal appellate courts the power to review a trial court's denial of a motion to set aside a jury verdict as excessive.[15] In 2000, *Weisgram v. Marley Co.*[16]—a products liability case in which liability turned on expert evidence—authorized federal appellate courts to instruct district courts to enter judgment against the original verdict winner, based on the appellate court's own determination regarding the admissibility of evidence and its subsequent reweighing of the evidence.[17] Most recently, in 2001, *Cooper Industries, Inc. v. Leatherman Tool Group*[18]—a trademark case—authorized de novo federal appellate review of a jury's punitive damage award.[19]

These Supreme Court decisions dramatically alter the balance of power between the trial and appellate courts by authorizing federal appellate courts to substitute their judgment for the determinations made during district court proceedings in two significant ways: (1) with respect to the fact-finding function of the jury; and (2) with respect to the discretionary power of the district court.[20] Both of these areas implicate the Seventh Amendment.

The Supreme Court's intrusion into jury fact-finding is the very evil contemplated by the Framers, and the very evil the Seventh Amendment was intended to prevent.[21] The Supreme Court's intrusion into the discretionary power of the district court also implicates the Seventh Amendment by, in effect, permitting appellate reexamination of jury fact-finding in a manner other "than according to the rules of the common law."[22] Thus, both developments upset the Framers' concept of the respective spheres of the trial courts and juries versus the federal appellate courts.

The Supreme Court's decisions had historically held that federal appellate courts could neither review jury verdicts for

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affirmative 'right to copy' material in the public domain"); William Patry, *The Enumerated Powers Doctrine and Intellectual Property: An Imminent Constitutional Collision*, 67 GEO. WASH. L. REV. 359, 368–69 n.54 (1999) (citing *Leatherman* as demonstrative of the Federal Circuit's failure to endorse the notion that ideas within the public domain should remain there for public use).

14. 518 U.S. 415 (1996).
15. Refer to notes 76–94 *infra* and accompanying text.
16. 528 U.S. 440 (2000).
17. Refer to notes 224–66 *infra* and accompanying text.
18. 121 S. Ct. 1678 (2001).
19. Refer to notes 95–138 *infra* and accompanying text.
20. Refer to notes 143–86 *infra* and accompanying text.
21. Refer to notes 31–51 *infra* and accompanying text.
22. U.S. CONST. amend. VII; refer to notes 183–84 *infra* and accompanying text.

challenges to the weight of the evidence, nor review jury damages awards for challenges based on excessiveness, because these challenges go to questions of fact.[23] In addition, the Court's earlier decisions consistently counseled that the trial judge's discretion in granting or refusing new trials on factual grounds was essentially unreviewable by appellate courts.[24] After the Court's recent decisions, however, appellate courts no longer need defer to the trial judge, but instead may reweigh the evidence and deem the original verdict winner the ultimate litigation loser.[25] Accordingly, the Supreme Court has substituted the federal appellate courts as courts of both first and last resort

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23. *See, e.g.*, McCaughn v. Real Estate Land Title & Trust Co., 297 U.S. 606, 608 (1936) (stating that "[t]he appellate court cannot pass upon the weight of the evidence" in reviewing the jury verdict); Hansen v. Boyd, 161 U.S. 397, 402 (1896) ("[Asking the Court] to determine the weight of proof . . . [would] usurp the province of the jury."); Metro. R.R. Co. v. Moore, 121 U.S. 558, 574 (1887) (noting that motions for new trial based on an excessive damages claim present "purely a question of fact" which cannot be reviewed); Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. . . . [O]ur power is restricted to the determination of questions of law arising upon the record."); R.R. Co. v. Fraloff, 100 U.S. 24, 31–32 (1879).

> [T]his Court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. . . . Whether [the trial court's] action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of the parties.

Id. (citations omitted); United States v. Laub, 37 U.S. 1, 5 (1838) ("[I]t is a point too well settled, to be now drawn in question, that the effect and sufficiency of the evidence are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial . . . ."). *But see* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993) (Stevens, J., plurality opinion) (stating that a "grossly excessive" punishment imposed on a tortfeasor may constitute an arbitrary deprivation of property in violation of the Due Process Clause).

24. *See, e.g.*, Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 253 (1940) (observing that a trial judge's order denying a new trial may be appealed only in the "most exceptional circumstances"); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) ("The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions . . . ."). *See generally* 6A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 59.08[6], at 59-166 to 59-167 (2d ed. 1995) [hereinafter MOORE'S FEDERAL PRACTICE] ("The oft stated rule [is] that the grant or denial of a motion for a new trial is a matter within the discretion of the trial court."); *accord* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815, at 162 (2d ed. 1995) [hereinafter FEDERAL PRACTICE AND PROCEDURE] ("The final determination of whether a new trial or remittitur is appropriate, however, is committed to the sound discretion of the trial court."). Refer to notes 146–47 *infra* and accompanying text.

25. *See* Schnapper, *supra* note 6, at 353–54 ("[L]eft to their own devices, a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box.").

by effectively eliminating the parties' original judgment—and implementing another—without affording the parties an opportunity to move for a new trial before the original fact-finder.[26] These Supreme Court decisions, in effect, permit the federal appellate courts to reexamine the facts and then enter judgment based on their reexamination—which constitutes the equivalent of a new trial conducted by, and in, the federal courts of appeals.[27]

These intrusions cannot be justified as necessary adaptations to new circumstances that were unanticipated by the Framers. As the Court itself has noted, "effectuat[ing] any change in these rules [of common law] is not to deal with the common law, qua common law, but to alter the Constitution."[28] Accordingly, these decisions violate the Seventh Amendment.

The Court's intrusion into Seventh Amendment protections upsets the balance of the parties' interests, implicates fairness concerns, undermines democratic principles, and creates the potential for further erosion of this principle in other areas. Similarly, the Court's intrusion into the discretionary power of the district court evades the jurisdictional hierarchy historically recognized between the respective provinces of the jury, the district court generally, and the appellate courts.

Part II of this Article traces the historical context and application of the Seventh Amendment's Reexamination Clause. This historical review reveals that the express purpose behind the Reexamination Clause was to prevent the very intrusion into the fact-finding province of the jury recently authorized by *Gasperini*, *Weisgram*, and *Leatherman*. This review also reflects the protection historically accorded to district court rulings in this area. Part III examines the Court's historical perspective regarding federal appellate court review of jury awards challenged as excessive, and the impact of the *Gasperini* and *Leatherman* decisions in this area. Part IV examines the Supreme Court's jurisprudence regarding the ability of federal appellate courts to enter judgment against the original verdict winner without providing an opportunity to present a new trial motion to the district court, and examines the impact of the

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26. *E.g.*, Weisgram v. Marley Co., 528 U.S. 440, 457 (2000) (allowing federal appellate courts to direct the entry of judgment as a matter of law when, after "excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict").

27. *See* Schnapper, *supra* note 6, at 353–54 (noting that failure to enforce the Seventh Amendment gives [appellate] judges "the raw power to overrule any jury verdict with which they happen to disagree").

28. Dimick v. Schiedt, 293 U.S. 474, 487 (1935).

decisions in *Weisgram* and its predecessor, *Neely v. Martin K. Eby Construction Co.*,[29] upon this jurisprudence. Part V discusses the constitutional ramifications of the analyses in *Gasperini*, *Weisgram*, and *Leatherman*, which portend increasing federal appellate court interference with the jury's long-standing and constitutionally protected fact-finding role. This intrusion amounts to an actual transfer of power from juries and trial judges to the federal appellate courts.[30] Finally, Part VI discusses the motivations behind these recent decisions and whether the imperfections in the civil jury system warrant reevaluation of the Seventh Amendment.

II. THE SEVENTH AMENDMENT'S REEXAMINATION CLAUSE

The Seventh Amendment's Reexamination Clause provides an express constitutional guarantee against federal appellate court reexamination of jury findings.[31] This guarantee was prompted by Article III, which conferred "appellate jurisdiction both as to law and fact" upon the Supreme Court.[32] Many feared the Framers' inclusion of this language in Article III, particularly in light of the Constitution's omission of any mention of jury

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29. 386 U.S. 317 (1967).

30. Refer to Part V *infra* (opining that the intrusion asserts that appellate judges are more able than district court judges and juries).

31. U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law"). The Seventh Amendment applies only to federal appellate courts; it does not apply to state appellate courts. *See, e.g.*, Union Pac. R. Co. v. Hadley, 246 U.S. 330, 334 (1918) (reviewing the state trial court's remittitur and stating that "[b]eyond the question of attributing misconduct to the jury we are not concerned to inquire whether its [the state court's] reasons were right or wrong."). On its face, the language of the Seventh Amendment applies only to facts found by a jury, rather than facts found by the district court during a bench trial. U.S. CONST. amend. VII (stating that only "fact[s] tried by a *jury*" should be evaluated only under common law rules) (emphasis added). Although appellate courts accord deference to findings of fact by the district court, they do so pursuant to a "clearly erroneous" standard of review rather than the complete deference of the Seventh Amendment. FED. R. CIV. P. 52(a) (setting forth the "clearly erroneous" standard of review); 1 CHILDRESS & DAVIS, *supra* note 2, § 3.02(D), at 3-26 to 3-27 ("The civil verdict's standard of review is intended to give more deference to the jury than to the federal judge, whose bench trial factfindings can be rejected—even if they are reasonable —if the appellate court concludes that as a whole they are clearly erroneous."); Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 4–5 (1991) (stating that "fact-finding by judges [is] reviewable under the clearly erroneous standard" whereas fact-finding by juries is accorded "complete deference" under the Seventh Amendment).

32. U.S. CONST. art. III, § 2. *See* United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750). Interestingly, this phrasing of "law and fact," which subsequently became so controversial, was accepted at the Constitutional Convention without question. HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 26 (1953).

trial, was intended to impliedly supersede the right to jury trial.[33] "[O]ne of the most powerful objections urged against" ratifying the Constitution was that Article III's power "would enable that court, with or without a new jury, to re-examine the whole facts, which had been settled by a previous jury."[34]

There is no indication that the Framers sought to accomplish a de facto abolition of the civil jury trial in federal courts.[35] Several reasons have been proffered for the Constitution's omission of a civil jury trial provision,[36] including the difficulty of drafting a uniform provision[37] and the Framers' anticipation that

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33. *See* Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 34–36 (discussing Antifederalist sentiment that the power of the judiciary could "absorb" the right to jury trial); Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 292, 295 (1966) (noting that the lack of a provision for civil juries held a prominent position in Antifederalist resistance to the Constitution); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 723 n.246 (1973) (analyzing the Pennsylvania ratification convention to discuss the "customary" Antifederalist objections); *see also Essays of Brutus*, *in* 2 HERBERT J. STORING, THE COMPLETE ANTI-FEDERALIST 431–32 (1981) ("The appellate jurisdiction granted to the supreme court, in [article III], has justly been considered as one of the most objectionable parts of the constitution . . . .").

> An appeal will lay in all appellate causes from the verdict of the jury, even as to mere facts, to the judges of the supreme court. Thus, in effect, we establish the civil law in this point; for if the jurisdiction of the jury be not final, as to facts, it is of little or no importance.

Id. at 322 (*Letters from the Federal Farmer*).

34. *Wonson*, 28 F. Cas. at 750; THE FEDERALIST No. 81, at 488 (Alexander Hamilton) (John C. Hamilton ed., 1961). *See also* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830) ("One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases."). Congress addressed these concerns, prior to the Seventh Amendment's adoption, in the Judiciary Act of 1789, which provided that, in reexamining civil judgments upon a writ of error, "there shall be no reversal in either [the circuit or Supreme Court] . . . for any error in fact." 1 Stat. 73, 84–85; *see* Capital Traction Co. v. Hof, 174 U.S. 1, 10 (1899). *See generally* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 102 (1923) (noting the intention of the drafters of the Judiciary Act of 1789 to try and "allay the fears" of the Antifederalists by providing appellate jurisdiction to the Supreme Court only on a writ of error).

35. *See* Wolfram, *supra* note 33, at 657–66 ("[T]he defenders of the proposed constitution were reduced almost entirely to defending the omission of a guarantee of jury trial as a problem of technical draftsmanship."); EDWARD S. CORWIN, THE CONSTITUTION OF THE UNITED STATES: ANALYSIS AND INTERPRETATION 1451–52 (1992).

36. The omission appears intentional, rather than a mere oversight, because Hamilton originally proposed a civil jury trial provision. THE FEDERALIST No. 81, *supra* note 34, at lxvi. The Framers briefly discussed a civil jury trial provision on September 12, 1787. 1 BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 438 (1971).

37. *See* THE FEDERALIST No. 83, *supra* note 34, at 624; 2 STORING, *supra* note 33, at 249 (*Letters from The Federal Farmer*) (noting the Federalist argument that "trials by jury in civil causes, it is said, varies so much in the several states, that no words could be found for the uniform establishment of it"); *id.* at 148 (*Letters of Centinel*) ("Mr. *Wilson* says, that it would have been impracticable to have made a general rule for jury trial in the civil cases assigned to the federal judiciary, because of the want of uniformity in the

most cases would be heard in the state courts.[38] It has also been suggested that the Framers drafted Article III's language broadly to encompass the review of facts in non-jury matters.[39]

Although the Federalist Papers suggested a mere statutory limitation to Article III's reexamination provision,[40] Congress provided full constitutional protection by subsequently including the Reexamination Clause in drafting the Seventh Amendment.[41] Thus, regardless of the Framers' intent with respect to Article III's language, the Seventh Amendment expressly clarified the limited reach of factual review by the federal appellate courts.[42] Accordingly, the Seventh Amendment alleviated the "apprehensions . . . of new trials by the appellate courts" by adopting the rules of the common law.[43]

Many viewed the civil jury as one of the most important features of a democracy.[44] Accordingly, at common law, appellate courts could review judgments only on writ of error, which limited review to questions of law.[45] The writ of error barred

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mode of jury trial, as practised [*sic*] by the several states.").

38. *See* THE FEDERALIST No. 83, *supra* note 34, at 614.

39. *See id.* at 604.

40. *Id.* at 604–05.

41. For a tracing of the proposals and resolutions culminating in the Seventh Amendment, beginning with the original version proposed by Madison to the House of Representatives on June 8, 1789, see NEIL H. COGAN, THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 493–506 (1997); *see also* 2 SCHWARTZ, *supra* note 36, at 1113.

42. United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (noting that the Seventh Amendment expressly reduced the scope of Supreme Court review).

43. *Id.* at 750. The need for protection against central authority also had a practical dimension; the Antifederalists feared federal courts would oppress local debtors on behalf of out-of-state creditors. 2 STORING, *supra* note 33, at 71 (*Writings of Luther Martin*); Wolfram, *supra* note 33, at 678–79; Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 509 (1998).

44. *See* 2 STORING, *supra* note 33, at 320 (*Letters from The Federal Farmer*); 3 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 379 (William D. Lewis ed., 1922) (characterizing right of trial by jury as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy"); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) [hereinafter Amar, *Reinventing Juries*] ("No idea was more central to our Bill of Rights—indeed, to America's distinctive regime of government of the people, by the people, and for the people—than the idea of the jury.").

45. *Wonson*, 28 F. Cas. at 748–49; Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 445–48 (1830) ("The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings."). *See also* 3 BLACKSTONE, *supra* note 44, at 405 ("The writ of error only lies upon matter of law arising upon the face of the proceedings; so that no evidence is required to substantiate or support it; and there is no method of reversing an error in the determination of facts, but by an attaint, or a new trial, to correct the mistakes of the former verdict."); 2 STORING, *supra* note 33, at 322

reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence.[46]

> "The only modes known to the common law to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo, by an appellate court, for some error of law which intervened in the proceedings."[47]

At the time of the Seventh Amendment's adoption, the jury was seen as an essential check upon the power of a potentially oppressive or corrupt federal judiciary.[48] Distrust of the judiciary caused many Antifederalists to urge that juries decide the law as well as the facts.[49] Indeed, colonial and early American juries were vested with the power to make both factual and legal determinations.[50] Not until

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(*Letters from The Federal Farmer*) ("By the common law, in Great Britain and America, there is no appeal from the verdict of the jury, as to facts, to any judges whatever—the jurisdiction of the jury is complete and final in this; and only errors in law are carried up . . . . Thus the juries are left masters as to facts . . . ."). For a summary of the historical development of the jury at English common law, see James B. Thayer, *The Jury and Its Development*, 5 HARV. L. REV. 249 (Part I), 295 (Part II), 357 (Part III) (1892).

46. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 452 (Scalia, J., dissenting) ("It [the Seventh Amendment] quite plainly barred reviewing courts from entertaining claims that the jury's verdict was contrary to the evidence."); refer to notes 143–47 *infra* and accompanying text.

47. *Parsons*, 28 U.S. at 448. A "venire facias de novo" was an order directing a new trial. *See* Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 471–72 (1999).

48. Stephan Landsman, *The History and Objectives of the Civil Jury System*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 23 (Robert E. Litan ed., 1993) [hereinafter Landsman, *Civil Jury System*] ("[D]uring the formative period of the Republic, the jury came to be viewed as the essential counterbalance to the threat of excessive judicial power."); 2 STORING, *supra* note 33, at 320 (*Letters from The Federal Farmer*) ("If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases."); Wolfram, *supra* note 33, at 708–09 (noting the "familiar legend that juries in civil cases were intended to guard private litigants against the oppression of judges. . . . Elbridge Gerry had supported the provision for civil jury trial in the Philadelphia Convention 'to guard [against] corrupt Judges.' He later wrote that he had opposed the absence of a jury trial guarantee because 'a federal judiciary, with the powers above mentioned, would be as oppressive and dangerous, as the establishment of a star-chamber . . . .'" (alteration in original)).

49. RICHARD E. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 201–03 (1971); Carrington, *supra* note 33, at 44; VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 37 (1986) ("[T]he writings of Adams, Jefferson, Elbridge Gerry, and other framers of the Constitution made it clear that they believed that the jury could, and should, decide law as well as fact.").

50. *See, e.g.*, Carrington, *supra* note 33, at 44; Landsman, *Unappreciated History*, *supra* note 4, at 592–93; Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 54 n.2 (2001); Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 421 (1996).

1895 did the Supreme Court revoke the jury's right to make legal determinations in cases decided in federal court.[51]

The Supreme Court's recent decisions in *Gasperini*, *Weisgram*, and *Leatherman* have expanded federal appellate court authority into jury fact-finding—a venue from which it was expressly, intentionally, excluded.[52] Moreover, this recent expansion was not motivated by new legal developments or heretofore unknown procedures.[53] The Supreme Court's prior decisions had addressed challenges to jury awards of damages, including punitive damages, on the basis of excessiveness long before *Gasperini* and *Leatherman*.[54] The Court's prior decisions had addressed federal appellate court review of the grant or denial of a new trial motion long before *Weisgram*.[55] In each instance, the Court's previous decisions had held that the issue was "settled" more than 100 years ago.

Parts III and IV address the Supreme Court's jurisprudence in the specific areas of federal appellate review of district court denials of motions to set aside a jury award as excessive, and the ability of federal appellate courts to instruct district courts to enter judgment against the original verdict winner.

III. APPELLATE REVIEW OF JURY AWARDS AS "EXCESSIVE"

This Part of the Article examines the Supreme Court's historical perspective regarding federal appellate review of jury awards as excessive, and the impact of the Court's *Gasperini* and *Leatherman* decisions in this area.

A. Honoring Constitutional Intent: The First 150 Years

Until *Gasperini*, the Supreme Court repeatedly held that the proper measure of damages, including punitive damages, "involves only a question of fact."[56] The Supreme Court held early and often

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51. Sparf v. United States, 156 U.S. 51, 102 (1895) ("Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts. . . . ").

52. Refer to notes 41–51 *supra* and accompanying text.

53. Refer to notes 148–49 *infra* and accompanying text.

54. *See, e.g.*, Metro. R. Co. v. Moore, 121 U.S. 558, 565 (1887); Barry v. Edmunds, 116 U.S. 550 (1886); refer to notes 56–65 *infra* and accompanying text.

55. *E.g.*, Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933); Marine Ins. Co. of Alexandria v. Young, 9 U.S. (5 Cranch) 187, 190–91 (1809); refer to notes 146–47 *infra* and accompanying text.

56. *E.g.*, St. Louis, Iron Mountain & Southern Ry. Co. v. Craft, 237 U.S. 648, 661 (1915); *Moore*, 121 U.S. at 574 (noting that motions for a new trial based on an excessive damages claim present "purely a question of fact" which cannot be reviewed); *Edmunds*, 116 U.S. at 565 ("[N]othing is better settled than that . . . it is the peculiar function of the jury to determine the

that awards of damages were factual determinations, and thus federal appellate review of an allegedly excessive jury verdict was simply unavailable.[57] At common law, an award of damages could not be reexamined; a trial judge could not substitute his own assessment of the proper amount of damages for that awarded by the jury. If the trial judge believed the jury's award was excessive or inadequate, the only cure available was a new trial.[58] The limited exceptions to this general rule were well-defined. Historically, case law authorized courts to reduce damages as a matter of law in only two circumstances: (1) when the law prohibited recovery as to an identifiable portion of the jury's award,[59] or (2) when the jury's award reflected an obvious error or miscalculation.[60]

The Supreme Court had expressly noted that motions for a new trial based on an allegedly excessive jury verdict present purely a question of fact because excessiveness is "not determinable by any fixed and certain rule of law," but rather "involves an estimate on the part of the court of the force and efficacy of the evidence."[61] Accordingly, the Court repeatedly refused to reexamine the alleged excessiveness of jury verdicts, finding such federal appellate review constitutionally impermissible:[62]

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amount [of punitive damages] by their verdict."); Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for a new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law . . . ."); Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (punitive damages have "been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case").

57. Refer to notes 61–63 *infra* and accompanying text.

58. Refer to notes 45–47 *supra* and accompanying text.

59. *E.g.*, New York, Lake Erie & W. R. v. Estill, 147 U.S. 591, 619–22 (1893); Ins. Co. v. Piaggio, 83 U.S. (16 Wall.) 378, 386–88 (1872) (holding that the jury committed legal error in awarding damages beyond the amount due on an insurance policy plus interest, and that the court could enter judgment disallowing those damages rather than order a new trial); Westchester Fire Ins. Co. v. Hanley, 284 F.2d 409, 418 (6th Cir. 1960) (finding that rather than ordering a new trial, the court could reduce the jury's award of damages against the insurance company by twenty-five percent where the jury had not given effect to an insurance policy provision that the company would be liable for only seventy-five percent of the insured's loss); Ins. Co. of N. Am. v. Fed. Express Corp., 189 F.3d 914, 923 (9th Cir. 1999) (holding that summary judgment is appropriate when the Warsaw Convention limits the amount of damages to which the plaintiff is entitled).

60. Examples include situations where a plaintiff seeks an award fixed at a sum certain or one that can be made certain by computation. *E.g.*, Liriano v. Hobart Corp., 170 F.3d 264, 272–73 (2d Cir. 1999) (adding undisputed amount of a hospital bill to a jury's award); EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244, 1252–53 (11th Cir. 1997) (correcting a jury's calculation of back pay).

61. Metro. R. Co. v. Moore, 121 U.S. 558, 574 (1887).

62. In eleven cases decided between 1879 and 1933, the Supreme Court expressly held that it lacked the authority even to consider objections to the size of a jury verdict. *E.g.*, St. Louis, Iron Mountain & Southern Ry. Co. v. Craft, 237 U.S. 648, 661 (1915) ("The award does seem large, but . . . [i]t involves only a question of fact, and is not open to reconsideration here.");

> No error of law appearing upon the record, this court cannot reverse the judgment because, upon examination of the evidence, we may be of the opinion that the jury should have returned a verdict for a less amount. If the jury acted upon a gross mistake of facts, or were governed by some improper influence or bias, the remedy therefore rested with the court below, under its general power to set aside the verdict. But that court finding that the verdict was abundantly sustained by the evidence, and that there was no ground to suppose that the jury had not performed their duty impartially and justly, refused to disturb the verdict, and overruled a motion for new trial. Whether its action, in that particular, was erroneous or not, our power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury . . . .[63]

The Supreme Court's decisions[64] in this area maintained clarity and consistency for more than 150 years[65]—until the Court changed course in *Gasperini*.[66]

Moore, 121 U.S. at 574; Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883). *See generally* Schnapper, *supra* note 6, at 243 n.31 (noting that "under the Seventh Amendment, . . . [factual] issue[s] should have been left to the jury's determination") (internal quotations omitted). Likewise, the Court concluded that additur was unconstitutional because it was not authorized at common law in 1791. *See* Dimick v. Schiedt, 293 U.S. 474, 476–77 (1935).

In three cases decided just before *Gasperini*, the Supreme Court appeared to suggest, in the context of constitutional due process limitations on punitive damage awards, that appellate courts historically could review jury awards for excessiveness. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580–81 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415, 422–25 (1994) (chronicling English cases dealing with the grant of a new trial on the basis of excessive damages); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 459–62 (1993) (analyzing the criteria for determining whether an award is "excessive"). Notably, however, each case involved the review of a state court decision, and in each instance the Court cited state court decisions and cases from England for this proposition, rather than the Court's own jurisprudence.

63. R.R. Co. v. Fraloff, 100 U.S. 24, 31–32 (1879).

64. But not the decisions of the courts of appeals. Refer to notes 73–75 *infra* and accompanying text.

65. *See, e.g.*, *Craft*, 237 U.S. at 661; *accord* Slocum v. New York Life Ins. Co., 228 U.S. 364, 399 (1913) ("[I]nstead of ordering a new trial, as was required at common law, the circuit court of appeals [which overturned a jury verdict and ordered the trial court to grant a judgment notwithstanding the verdict for the defendant] itself re-examined the issues, resolved them in favor of the defendant, and directed judgment accordingly. This, we hold, could not be done consistently with the 7th Amendment, which not only preserves the common-law right of trial by jury, but expressly forbids that issues of fact settled by such a trial shall be re-examined otherwise than 'according to the rules of the common law.'"); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447–48 (1830); 6A MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 59.08[6], at 59-160 to 59-161 n.8 (noting that the range of appellate review did not include review of the size of a damages award); 11 FEDERAL PRACTICE AND PROCEDURE, *supra* note 24, § 2820, at 208–09 (stating that it was a settled principle that a trial court's discretion to review jury verdicts for excessiveness was not reviewable on appeal).

66. *See* FEDERAL PRACTICE AND PROCEDURE, *supra* note 24, § 2820, at 34 (Supp. 2001).

B. Judicial Activism: The Gasperini *Decision*

Although the Supreme Court's decisions reflected a consistent prohibition against reviewing the size of jury verdicts, the federal courts of appeals started edging into this area in the middle of the twentieth century. Two events apparently fostered this intrusion: the Judicial Code of 1948, and dictum in a 1950 Supreme Court decision.[67]

The Judicial Code of 1948 eliminated a provision stating that federal appellate courts could not reverse "for any error in fact"—a phrase that had appeared in the Judicial Code for more than 150 years.[68] The Reviser's Notes expressly stated that the language was changed in order "to avoid any construction that matters of fact are not reviewable in nonjury cases."[69] Despite this explanatory note, the use of which would have avoided Seventh Amendment implications, this revision was offered as one rationalization for federal appellate court encroachment into this area.[70]

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67. *See* Affolder v. New York, Chicago & St. Louis R.R. Co., 339 U.S. 96, 101 (1950). Professor Wright recognized the danger of this trend in an article written more than four decades ago. Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 755–57 (1957) [hereinafter Wright, *Doubtful Omniscience*] (noting that *Affolder* and the Judicial Code of 1948 had been read to allow appellate review of excessive jury awards). Another danger identified by Professor Wright was the practice, by some appellate courts, of using de novo review when the district court's findings were based upon documentary evidence. *Id.* at 764–71. Professor Wright noted that principles of statutory construction mandated the application of the "clearly erroneous" standard of review to documentary evidence as well as oral evidence. *Id.* at 769–70. Yet nearly thirty years passed before the United States Supreme Court, relying on the directive of amended Rule 52(a) of the Federal Rules of Civil Procedure, disapproved of the use of de novo review. Anderson v. City of Bessemer City, 470 U.S. 564, 573–74 (1985). In 1985, the Court held that findings of fact, including those based upon physical or documentary evidence, were subject to a "clearly erroneous," rather than de novo, standard of review. *Id.* However, in light of the Supreme Court's subsequent intrusions into jury fact-finding determinations, it remains to be seen whether the current Court eventually will undermine this protection as well. *Cf.* Hunt v. Cromartie, 121 S. Ct. 1452, 1459 (2001) (noting, in reviewing factual findings from a bench trial, rather than from a jury trial, that an "extensive review of the District Court's findings, for clear error, is warranted" because "the key evidence consisted primarily of documents and expert testimony. Credibility evaluations played a minor role.").

68. This phrase appeared in Section 22 of the Judicial Code of 1789. 1 Stat. 84, 85 (1789). The same phrase appeared in Section 879 of the Judicial Code of 1940. *See* 6 JAMES WM. MOORE, FEDERAL PRACTICE 3826 (2d ed. 1953); Sunray Oil Corp. v. Allbritton, 188 F.2d 751, 756 (5th Cir. 1951) (Holmes, J., dissenting) (noting that the phrase survived in the Judicial Code "for over a century and a half" before being deleted by the "1948 codifiers in their 'Schedule of Laws Repealed'").

69. Title 28, UNITED STATES CODE JUDICIARY AND JUDICIAL PROCEDURE WITH OFFICIAL LEGISLATIVE HISTORY AND REVISER'S NOTES 1900 (West 1948), *cited in* Wright, *Doubtful Omniscience*, *supra* note 67, at 757 n.30.

70. *See* Wright, *Doubtful Omniscience*, *supra* note 67, at 757.

In addition, in its 1950 *Affolder* opinion, the Supreme Court stated in dictum, "We agree with the Court of Appeals that the amount of damages awarded by the District Court's judgment is not monstrous in the circumstances of this case."[71] The amount of the damages award was not an issue before the Court in *Affolder*—neither the defendant nor the court of appeals had claimed the verdict was "'monstrous' or otherwise excessive."[72] Nevertheless, federal courts of appeals subsequently relied on this dictum as indicating they possessed the authority to review the size of jury verdicts.[73] Despite several opportunities, the Supreme Court did not address this growing practice.[74] Within a decade, all but one of the federal courts of appeals, without even referring to the Seventh Amendment, had concluded they possessed the power to review the size of jury verdicts.[75]

The Supreme Court relied on these federal appellate court decisions as the primary justification for its result in *Gasperini v. Center for Humanities*.[76] In *Gasperini*, the Court authorized appellate court intrusion into the fact-finding arena of the jury by permitting—contrary to its prior decisions—federal appellate court review of a jury award of damages for excessiveness.

Gasperini, a diversity action, involved the loss of a journalist's slide transparencies of Central America, which were intended for use in an educational videotape and were lost by the

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71. *Affolder*, 339 U.S. at 101.

72. William H. DeParcq & Charles Alan Wright, *Damages Under the Federal Employers' Liability Act*, 17 OHIO ST. L.J. 430, 471 (1956); Wright, *Doubtful Omniscience*, *supra* note 67, at 756.

73. 11 FEDERAL PRACTICE AND PROCEDURE, *supra* note 24, § 2820, at 210; *e.g.*, S. Pac. Co. v. Guthrie, 186 F.2d 926, 931 (9th Cir. 1951) ("[T]his language would be without point unless the Supreme Court was of the opinion that it might do something about the excessiveness of the verdict if its amount could be called 'monstrous.'").

74. *E.g.*, Hulett v. Brinson, 229 F.2d 22, 23–25 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1014 (1956) (finding that federal courts may reverse an excessive verdict only where the trial court abused its discretion by allowing a "grossly excessive or monstrous" verdict to stand); Chicago, Rock Island & Pac. Ry. Co. v. Kifer, 216 F.2d 753, 756–57 (10th Cir. 1954), *cert. denied*, 348 U.S. 917 (1955); Bucher v. Krause, 200 F.2d 576, 586–87 (7th Cir. 1952), *cert. denied*, 345 U.S. 997 (1953) (dismissing the "rather astounding conclusion" of some courts that appellate courts have no power to review an abuse of discretion by the trial court in allowing a large verdict to stand).

75. Only the Eighth Circuit refrained from reaching into this area. DeParcq & Wright, *supra* note 72, at 467, 469; Wright, *Doubtful Omniscience*, *supra* note 67, at 753; Ballard v. Forbes, 208 F.2d 883, 888 (1st Cir. 1954); Comiskey v. Pennsylvania R.R. Co., 228 F.2d 687, 688 (2d Cir. 1956); Trowbridge v. Abrasive Co. of Pa., 190 F.2d 825, 830 (3d Cir. 1951); Virginian Ry. v. Armentrout, 166 F.2d 400, 408 (4th Cir. 1948); Whiteman v. Pitrie, 220 F.2d 914, 919 (5th Cir. 1955); Sebring Trucking Co. v. White, 187 F.2d 486, 486 (6th Cir. 1951); *Bucher*, 200 F.2d at 586–88; *Guthrie*, 186 F.2d at 929; *Kifer*, 216 F.2d at 756–57.

76. 518 U.S. 415, 435–36 (1996).

producers of that videotape.[77] The jury awarded Gasperini $450,000 in compensatory damages, representing $1,500 for each of the 300 lost slides, based on expert testimony regarding the industry standard.[78]

The United States Court of Appeals for the Second Circuit vacated the judgment, concluding that "testimony on industry standard alone was insufficient to justify a verdict."[79] The court set aside the verdict and ordered a new trial unless Gasperini agreed to a remittitur of $100,000.[80]

In the United States Supreme Court, Gasperini challenged the Second Circuit's decision as shifting fact-finding responsibility from the trial judge and jury to the federal appellate court, thereby violating the Seventh Amendment's Reexamination Clause.[81] Although the Supreme Court acknowledged "[s]uch review was once deemed inconsonant with the Seventh Amendment's Reexamination Clause,"[82] the Court upheld the Second Circuit's review of the district court's denial of the motion to set aside the award as excessive.[83]

The Supreme Court relied primarily on the existing practice of the federal appellate courts in reaching this result.[84] The Court offered a "changing times" rationale, noting that the meaning of the Seventh Amendment was not "fixed at 1791."[85] The Court also

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77. *Id.* at 419.

78. *Id.* at 420.

79. *Id.*

80. *Id.* at 421. In doing so, the Second Circuit applied a New York state law empowering the New York state appellate courts to review the size of jury verdicts and to order new trials when the jury's award "deviates materially from what would be reasonable compensation." *Id.* at 418–19. This state law provision, expressly authorizing appellate court review of jury findings, ordinarily would cause no conflict with the Seventh Amendment, because the Seventh Amendment does not apply to state courts. *Id.* at 432. However, because *Gasperini* was a diversity action, the Second Circuit's use of the New York law conflicted with the Seventh Amendment, which expressly prohibits federal appellate courts from reexamining a jury's factual findings. After completing an *Erie* analysis, the Supreme Court concluded that New York law governed the allowable damages, but that the district court, rather than the federal court of appeals, bore the primary responsibility for checking the jury's verdict against New York's "deviates materially" standard, due to the proscriptions of the Seventh Amendment. *Id.* at 438–39.

81. *Id.* at 431.

82. *Id.* at 434. The Court observed that "appellate review of a federal trial court's denial of a motion to set aside a jury's verdict as excessive is a relatively late . . . development." *Id.*; refer to notes 62–66 *supra* and accompanying text; *see also* Lincoln v. Power, 151 U.S. 436, 437–38 (1894); Williamson v. Osenton, 220 F. 653, 655 (4th Cir. 1915); 6A MOORE'S FEDERAL PRACTICE, *supra* note 24, ¶ 59.08[6], at 59-167 (collecting cases).

83. *Gasperini*, 518 U.S. at 436.

84. *Id.* at 435–36.

85. *Id.* at 436 n.20 ("If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, 'twelve good

made some attempt to recharacterize the damages issue as a question of law, stating, "Whether damages are excessive for the claim-in-suit must be governed by *some law*."[86] However, in light of its long-standing precedent, the Court ultimately had no choice but to rest its rationale on current practice and judicial control—and to do so, it had to disregard the Seventh Amendment.[87]

Gasperini authorized federal appellate review of the potential excessiveness of a jury award using an abuse of discretion standard.[88] However, the Court concluded the Second Circuit, after finding an abuse of discretion, had reached too far by subsequently setting the remittitur amount.[89] Because the district court did not employ the appropriate state standard in checking the jury's verdict, the Court instructed remand to the district court to evaluate the verdict under the appropriate standard.[90]

In a scathing dissent, Justice Scalia correctly accused the majority of "all but ignor[ing] the relevant history,"[91] stating:

> Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment's prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness.[92]

Gasperini is an analytically unconvincing attempt by the Court to ignore its previous jurisprudence and thereby sidestep the Seventh Amendment. Indeed, a separate dissenting opinion by Justice Stevens[93] characterized the issue of federal appellate

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men and true' . . . .").

86. *Id.* at 438 n.22.

87. *Id.* at 435 (noting that "appellate review for abuse of discretion is . . . a control necessary and proper to the fair administration of justice ").

88. *Id.* at 419.

89. *Id.* at 439.

90. *Id.*

91. *Id.* at 458 (Scalia, J., dissenting).

92. *Id.* at 448–49 (Scalia, J., dissenting).

93. Justice Stevens would have affirmed the Second Circuit's decision in its entirety. *Id.* at 439, 440–41 (Stevens, J., dissenting).

review of a jury award for excessiveness as "an open one."[94] The Court's willingness to treat the Reexamination Clause as an outmoded, non-binding notion is troubling. Even more troubling is the Court's continued intrusion into this area, and its further extension of the reach of appellate review.

C. Unsettling Reasoning and Far-Reaching Rationales: The Leatherman *Decision*

The Supreme Court's undermining of jury fact determinations went even further in *Leatherman*, in which the Court authorized de novo review of a jury's punitive damages award.[95] In *Leatherman*, a trademark case, a jury awarded $50,000 in compensatory and $4.5 million in punitive damages against a company for using a "mock-up" of a competitor's product in its posters, packaging, and advertising.[96] The district court rejected the defendant's contention that the punitive damage award was so grossly excessive as to violate due process[97] and entered judgment in accordance with the jury's verdict.[98]

The United States Court of Appeals for the Ninth Circuit, in an unpublished opinion, affirmed the punitive damages award using an abuse of discretion standard of review.[99] Concluding that the Ninth Circuit should have used a de novo standard of review, rather than the abuse of discretion standard, the Supreme Court vacated the judgment and remanded.[100]

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94. *Id.* at 442 (Stevens, J., dissenting) ("[F]or the last 30 years, we have consistently reserved the question whether the Constitution permits such review . . . and, in the meantime, every Court of Appeals has agreed that the Seventh Amendment establishes no bar . . . . [I therefore take] the question to be an open one . . . .").

95. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1689 (2001).

96. *Id.* at 1680–81.

97. The defendant based its argument on *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), in which the Supreme Court held that a "grossly excessive" punishment imposed on a tortfeasor may constitute an arbitrary deprivation of property violating the Due Process Clause. *BMW*, 517 U.S. at 562, 568. The Court authorized de novo review of excessive punitive damages awards for potential violations of the Due Process Clause by evaluating three factors: (1) the degree of the defendant's reprehensibility or culpability, (2) the relationship between the penalty and the harm or potential harm to the victim caused by the defendant's actions, and (3) the sanctions authorized or imposed in other cases for comparable misconduct. *Id.* at 574–75.

98. *Leatherman*, 121 S. Ct. at 1681.

99. *Id.* at 1682.

100. *Id.* at 1689. As recently as 1989, the Court expressed reservations about "stray[ing] too far from traditional common-law standards, or [taking] steps which ultimately might interfere with the proper role of the jury." Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 280 n.26 (1989) (authorizing appellate review of a district court's ruling on a motion to set aside a punitive damages award as excessive, using an abuse of discretion standard).

Despite the current controversial status of punitive damages, historically the amount of punitive damages had indisputably been a jury determination.[101] The Supreme Court's early decisions treated punitive damage awards in the same manner as any other jury award of damages—as a factual determination, unreviewable for challenged excessiveness on appeal.[102] However, in *Leatherman*, the Court rewrote history, stating flatly, "the level of punitive damages is not really a 'fact . . . tried' by the jury."[103] This recasting of the nature of punitive damages enabled the Court to conclude that federal appellate review did not "implicate . . . Seventh Amendment concerns."[104] In a footnote, the Court's tortured reasoning was apparent.

The Court first attempted to recharacterize punitive damages as "a fact-sensitive undertaking," but refused to acknowledge that jury awards of punitive damages constitute "'fact[s]' within the meaning of the Seventh Amendment[]."[105] Perhaps sensing this distinction was unpersuasive, the Court, as it had done in *Gasperini*, proffered a "changing times" argument.

The Court noted "punitive damages have evolved somewhat" over time, observing that "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."[106] The Court stated "the theory behind punitive damages has shifted towards a more purely punitive (and therefore less factual) understanding."[107] However, the fallacy of the Court's rationalization is apparent from the very cases it cites, which clearly express the notion of punitive damages as "punishment":

> 'It is a well-established principle of the common law . . . that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. . . . [C]ourts permit juries to

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101. *See, e.g.*, Barry v. Edmunds, 116 U.S. 550, 565 (1886) (noting that "it is the peculiar function of the jury" to set the amount of punitive damages); Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851) (stating that punitive damages should be "left to the discretion of the jury").

102. Refer to notes 56–58 *supra* and accompanying text.

103. *Leatherman*, 121 S. Ct. at 1686.

104. *See id.* at 1686.

105. *Id.* at 1686 n.11.

106. *Id.*

107. *Id.*

> add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something further by way of punishment or example, which has sometimes been called 'smart money.' This has always been left to the discretion of the jury, as the degree of the punishment to be thus inflicted must depend on the peculiar circumstances of each case."[108]

The Court also rejected the suggestion that its previous decision in *Honda Motor Co. v. Oberg* rested upon an "assumption that punitive damages awards [constitute] findings of fact."[109] However, the Court's protestations were singularly unpersuasive. Although *Oberg* concerned the Oregon Constitution, the applicable provision closely tracked the language of the Seventh Amendment's Reexamination Clause, prohibiting reexamination of any "fact tried by a jury."[110] At no point did *Oberg* suggest punitive damages might not constitute "facts." Instead, their status as facts was presumed throughout the *Oberg* decision.[111]

In its parting shot on this point, the Court acknowledged "[i]t might be argued that the deterrent function of punitive damages suggests that the amount of such damages awarded is indeed a 'fact' found by the jury and that, as a result, the Seventh Amendment is implicated in appellate review of that award."[112] The Court then flatly rejected this suggestion because "it is clear that juries do not normally engage in . . . a finely tuned exercise of deterrence calibration when awarding punitive damages."[113] "After all," the Court noted, "deterrence is not the only purpose

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108. Barry v. Edmunds, 116 U.S. 550, 562–63 (1886) (quoting Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1851)).

109. *Leatherman*, 121 S. Ct. at 1686 n.10 (citing Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994)). In *Oberg*, the Court held the Oregon Constitution violated due process because it did not permit any judicial review of punitive damages awards for potential arbitrariness. *Oberg*, 512 U.S. at 432.

110. *Oberg*, 512 U.S. at 427 n.5.

111. The previous Supreme Court decisions addressing due process constitutional limitations on punitive damages had involved the Court's review of state court decisions. *E.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) (reviewing decision of Alabama Supreme Court); *Oberg*, 512 U.S. at 415, 418 (reviewing decision of Oregon Supreme Court); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 446 (1993) (Stevens, J., plurality opinion) (reviewing decision of West Virginia Supreme Court). Accordingly, *Leatherman* was the first time that the Court had faced the competing constitutional considerations of the Seventh Amendment's Reexamination Clause and the Fourteenth Amendment's Due Process Clause. By concluding that punitive damage awards were not "facts," the Court dodged the constitutional conflict.

112. *Leatherman*, 121 S. Ct. at 1687.

113. *Id.*

served by punitive damages."[114] This rationalization is a precursor of potential future Court action in reexamining jury awards.[115]

The difficulty with the Court's rationale is that the Court's description of the imprecision involved in calculating punitive damages is equally apt for many, and perhaps most, other types of damages. Damages for pain, suffering, and emotional distress readily come to mind as imprecise measures. Equally imprecise are such determinations as damages for loss of eyesight, loss of a limb, loss of consortium, or brain damage.[116] As Justice Ginsburg observed in her *Leatherman* dissent, "One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage. Both derive their meaning from a set of underlying facts as determined by a jury."[117] Accordingly, the Court's reliance on imprecise calculation as a justification for appellate court meddling is an unsettling rationale that portends further undermining of jury damage awards in the future.

In her dissent, Justice Ginsburg also noted that other recent Court decisions would appear to constrain appellate review of punitive damages awards to an abuse of discretion standard.[118] In particular, she noted *Gasperini*, in which she wrote for the Court, had "held that appellate review of a federal trial court's refusal to set aside a jury verdict as excessive is reconcilable with the Seventh Amendment if appellate control [is] limited to review for abuse of discretion."[119] Justice Ginsburg observed *Gasperini*'s reasoning in this regard "applies as well to an action challenging a punitive damages award as excessive under the Constitution."[120] In addition, Justice Ginsburg noted the Court's *Browning-Ferris* decision "signaled our recognition that appellate review of punitive damages, if permissible at all, would involve *at most* abuse-of-discretion review."[121]

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114. *Id.*

115. Refer to notes 116–17 *infra* and accompanying text.

116. The potential reach of this language becomes even more apparent, and troubling, when we consider that "a substantial portion of modern appeals involve challenges to the size of verdicts awarded to the survivors of painful or disfiguring injuries, to the families of those fatally injured, or to plaintiffs claiming emotional harms." Schnapper, *supra* note 6, at 319 (citations omitted). Thus, pursuant to the Court's reasoning in *Leatherman*, a "substantial portion" of appeals are subject to the appellate court's de novo recalculation of the damages award.

117. *Leatherman*, 121 S. Ct. at 1691 (Ginsburg, J., dissenting).

118. *Id.* at 1690–91 (Ginsburg, J., dissenting).

119. *Id.* at 1690 (Ginsburg, J., dissenting) (internal quotation marks omitted).

120. *Id.* (Ginsburg, J., dissenting).

121. *Id.* at 1691 (Ginsburg, J., dissenting) (emphasis in the original). The majority

Most interesting, from the vantagepoint of this Article, are Justice Ginsburg's comments that inadvertently acknowledged the exceptionally intrusive nature of appellate review in the fact-finding arena. Downplaying the potential impact of her dissent, Justice Ginsburg noted "there is little difference between review *de novo* and review for abuse of discretion,"[122] and stated that "the practical difference between the Court's approach and my own is not large. . . . I suspect [the Court's] approach and mine will yield different outcomes in few cases."[123]

Justice Ginsburg's comments are remarkable given the traditional understanding of the range of standards available for appellate review. Under prevailing law, de novo review and review for an abuse of discretion fall at nearly opposite ends of the standard of review continuum.[124]

> A standard of review indicates to the reviewing court the degree of deference that it is to give to the actions and decisions under review. In other words, it is a statement of the power not only of the appellate court but also of the tribunal below, measured by the hesitation of the appellate court to overturn the lower court's decision.[125]

De novo review involves an independent evaluation by the appellate court, according no deference to the lower court's determination.[126] Issues of law are the classic example of matters subject to de novo review.[127] When applying de novo review, "[i]f

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opinion distinguished *Browning-Ferris* as involving an excessiveness challenge based on state law, whereas the challenge in *Leatherman* was based on federal constitutional grounds. *Id.* at 1684 & n.7. However, as Justice Ginsburg notes, "[i]t is unclear . . . why this distinction should make a difference. Of the three guideposts . . . established for assessing constitutional excessiveness, two were derived from common-law standards that typically inform state law." *Id.* at 1691 (Ginsburg, J., dissenting).

122. *Id.* at 1692 (Ginsburg, J., dissenting).

123. *Id.* at 1692–93 (Ginsburg, J., dissenting).

124. Sward, *supra* note 31, at 5. According to Professor Sward, de novo stands at one end of the standard of review continuum. *Id.* At the other end, the only standard entitled to more deference than the abuse of discretion standard is that of "no review," which she describes as the "complete deference" accorded to "fact-finding by juries." *Id.*; 1 CHILDRESS & DAVIS, *supra* note 2, § 2.14, at 2-102 (defining de novo review as "one of *no particular deference*" or "an *independent conclusion on the record*"); *id.* § 4.02, at 4-17 (stating that the abuse of discretion standard involves "substantial deference"); *id.* § 4.21, at 4-158 (concluding that the abuse of discretion standard "is meant to insulate the judge's choice from appellate second-guessing").

125. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROC. 47, 47–48 (2000).

126. Refer to note 124 *supra* (summarizing scholarly writings that illustrate the proper deference to be accorded the de novo and abuse of discretion standards of review).

127. 1 CHILDRESS & DAVIS, *supra* note 2, § 2.13, at 2-92.

the [appellate] court agrees with the trial court decision, it is sustained; otherwise, the lower court decision is reversed."[128]

At the other end of the spectrum is review for an abuse of discretion, which accords wide latitude and substantial deference to the lower court's determination.[129] *"[D]iscretion* implies the power to choose within a range of acceptable options."[130] Evidentiary rulings are the classic example of matters subject to an abuse of discretion review.[131] An appellate court may not reverse a lower court's ruling that is subject to an abuse of discretion standard of review if the reviewing court merely disagrees with the ruling.[132] Instead, the reviewing court may reverse only if "it appears that [the lower court's ruling] was exercised on grounds, or for reasons, clearly untenable or to an extent clearly unreasonable."[133]

Thus, the abuse of discretion standard of review, which accords considerable deference to the decision made at the trial level, leaves the primary responsibility for resolving that matter to the trial court.[134] In contrast, the de novo standard of review, which accords non-deferential, independent review by the appellate court, places primary decision-making authority in the appellate court.[135]

Obviously these two standards are nearly polar opposites. Accordingly, for Justice Ginsburg to ascribe "little difference" between the two standards essentially acknowledges both the broadening sweep of the federal appellate courts' reach and the intrusive nature of the scrutiny involved when appellate courts review jury damage awards.[136]

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128. Davis, *supra* note 125, at 48.

129. Sward, *supra* note 31, at 7.

130. 1 CHILDRESS & DAVIS, *supra* note 2, § 4.01(A), at 4–3 n.3.

131. *Id.* § 4.02, at 4-16 to 4-17.

132. *Id.* § 4.02, at 4-17.

133. Bringhurst v. Harkins, 122 A. 783, 787 (Del. 1923); *see also* Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 641 (1971).

134. Sward, *supra* note 31, at 4.

135. *Id.*

136. Refer to note 61 *supra* and accompanying text. The federal courts have been eroding the more deferential standards of review for some time.

> An error of law can involve anything from simple reliance on an overturned case, to a complex mix of the evidence at hand with the effort to state some substance and guidance that will apply beyond the facts of the particular case. The latter mission may be considered lawmaking, but it is not undoubtedly so, and the appellate court in its action may be either just doing its job or usurping the trial judge's job.

1 CHILDRESS & DAVIS, *supra* note 2, § 2.13, at 2-94.

> The usual generic approach of broadly using abuse of discretion language

On their face, *Gasperini* and *Leatherman* are remarkable for their disregard of 150 years of Seventh Amendment jurisprudence with only the mildest of protest. *Gasperini* and *Leatherman* stand in stark contrast to the Supreme Court's early decisions, which refused to intrude into jury fact-finding and repeatedly held that the Seventh Amendment restricted federal appellate court power solely to questions of law.[137] Contrast the following language, from a 1915 Supreme Court decision, with the Court's approach today:

> [I]t is said that the award of $5,000 as damages for pain and suffering, even though extreme, for so short a period as approximately thirty minutes, is excessive. The award does seem large, but the power, and with it the duty and responsibility, of dealing with this matter, rested upon the courts below. It involves only a question of fact, and is not open to reconsideration here.[138]

The Supreme Court has eroded the jury's supremacy as fact-finder by expanding the power of the federal appellate courts to reexamine those facts. In any single decision, taken alone, the erosion may seem almost imperceptible. But the expanding power of the federal appellate courts is emerging from several directions simultaneously,[139] and the combined effect has a powerful undermining impact upon the Seventh Amendment.

As discussed in Part IV, the Supreme Court has expanded the power of the federal appellate courts, at the expense of the trial courts, in a related manner that is perhaps even more troubling—undermining a litigant's ability, after an adverse ruling on appeal, to bring a new trial motion before the original

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> obviously overstates the actual deference given to many specific types of rulings on evidence law.... [M]any cases do not rely on an abuse test or refer to the judge's discretion at all, but—apparently following the principle that errors of law are freely corrected—simply decide whether or not the evidence was admissible; if not, and prejudice resulted, the reviewing court will reverse.

Id. § 4.02, at 4-25.

137. *E.g.*, Metro. R. Co. v. Moore, 121 U.S. 558, 574 (1887) (noting motions for new trial based on an excessive damages claim present "purely a question of fact" which cannot be reviewed); Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the ground that the damages are excessive cannot be doubted. Whether the order overruling the motion for a new trial, based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law....").

138. St. Louis, Iron Mountain, & S. Ry. Co. v. Craft, 237 U.S. 648, 661 (1915); *see also* S. Ry.—Carolina Div. v. Bennett, 233 U.S. 80, 86–87 (1914) (stating, with respect to a $20,000 jury verdict in a wrongful death case in which the decedent earned only $700 a year, that "a case of mere excess upon the evidence is a matter to be dealt with by the trial court. It does not present a question for re-examination here upon a writ of error.").

139. Refer to notes 142–266 *infra* and accompanying text.

district court judge.[140] This expansion similarly violates constitutional doctrine and long-standing case law.[141]

IV. APPELLATE REVIEW OF THE WEIGHT OF THE EVIDENCE AND INTRUSION INTO THE DISTRICT COURTS' DISCRETIONARY POWER

The Supreme Court allowed further intrusion into the fact-finding function of the jury in *Weisgram v. Marley Co.*[142] Historically, the Supreme Court had repeatedly held that, under the Seventh Amendment, the federal appellate courts could not review a jury's verdict for the weight or sufficiency of the evidence.[143] Any such challenge was limited to a new trial motion before the trial judge, and this discretionary power was not reviewable on appeal.[144] Although the Supreme Court later recharacterized a challenge to the sufficiency of the evidence as an issue of law, and thereby reviewable on appeal, the Court authorized only one remedy upon finding such error—remand to the district court.[145] In *Weisgram*, however, the Supreme Court dramatically altered these established principles.

A. Honoring Constitutional Intent: The First 150 Years

For more than 100 years before the adoption of the Federal Rules of Civil Procedure in 1938, the Supreme Court repeatedly held that, under the Seventh Amendment, the federal appellate courts could not reexamine the trial court's denial of a new trial motion based on a challenge to a jury's verdict for the weight or sufficiency of the evidence.[146] Although sometimes phrased in

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140. Refer to notes 224–66 *infra* and accompanying text.

141. Refer to notes 146–86 *infra* and accompanying text.

142. 528 U.S. 440, 443–44 (2000).

143. Refer to note 23 *supra* and accompanying text; Aetna Life Ins. Co. of Hartford v. Ward, 140 U.S. 76, 91 (1891) ("We have no concern with questions of fact, or the weight to be given to the evidence . . . ."); United States v. Laub, 37 U.S. 1, 5 (1838) ("[I]t is a point too well settled, to be now drawn in question, that the effect and sufficiency of the evidence are for the consideration and determination of the jury; and the error is to be redressed, if at all, by application to the court below for a new trial . . . ."); Marine Ins. Co. of Alexandria v. Young, 9 U.S. (5 Cranch.) 187, 191 (1809) (stating that it is improper for an appellate court to re-examine denial of a motion for new trial "upon the ground that the verdict was contrary to the evidence").

144. *See, e.g.*, United States v. Jefferson Elec. Mfg. Co., 291 U.S. 386, 407 (1934) (stating that review of the weight of evidence was a question of fact beyond appellate review regardless of how the appellate court found the quality of the evidence); Crumpton v. United States, 138 U.S. 361, 363 (1891) (explaining that the weight of evidence is a question for the jury which cannot be reviewed).

145. Refer to notes 163–82 *infra* and accompanying text.

146. *See, e.g.*, R.R. Co. v. Fraloff, 100 U.S. 24, 31 (1879) ("Whether [the district court's] action, [in overruling a motion for new trial] was erroneous or not, our power is

terms of trial court "discretion," the grant or denial of a new trial motion was treated, in application, as unreviewable.[147]

Over time, the federal judiciary created new procedural devices to control juries.[148] The creation of motions for directed verdict and judgment notwithstanding the verdict, devices unknown at common law, expanded the ability of the trial court to second-guess the jury's verdict.[149] These procedural devices

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restricted by the Constitution to the determination of questions of law arising upon the record."); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474 (1933).

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a Circuit Court of Appeals.

Id. at 481.

147. *See, e.g.*, Springer v. United States, 102 U.S. 586, 595 (1880) ("To grant or refuse a new trial was a matter within the discretion of the court. That it was refused cannot be assigned for error here."); Ry. Co. v. Heck, 102 U.S. 120, 120 (1880) ("We have uniformly held that, as a motion for new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here."); Newcomb v. Wood, 97 U.S. 581, 583–84 (1878) ("It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error."); Pomeroy's Lessee v. State Bank of Ind., 68 U.S. (1 Wall.) 592, 597–98 (1863) ("Authorities are numerous that a motion for a new trial in the Federal courts is a motion addressed to the discretion of the court, and that the decision of the court in granting or refusing it is not the proper subject of a bill of exceptions. . . . Indeed, the universal rule of practice is, that matters resting entirely in discretion are not re-examinable in a court of errors . . . .") (citations omitted).

Other cases rested this rule directly on the Seventh Amendment's Reexamination Clause. The result was the same under either approach: the trial court's ruling was considered unreviewable. *E.g.*, *Fairmount Glass Works*, 287 U.S. at 482 (citing both the Seventh Amendment and the trial court's discretion as reasons for denying review); Metro. R. Co. v. Moore, 121 U.S. 558, 573 (1887) (observing that the trial court is better suited to hear evidence and that the Seventh Amendment may prohibit review); Williamson v. Osenton, 220 F. 653, 655 (4th Cir. 1915) (holding that the Seventh Amendment prevented appellate review of excessive jury verdicts).

148. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 929 (1987) ("By the beginning of the nineteenth century, American judges had begun to restrict the role of the jury. They questioned the jury's right to decide issues of law, tightened rules of evidence in order to control what juries heard, treated what had been fact issues as law issues, and regularly set aside jury verdicts as contrary to the law."); Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 (1964) (noting that during the nineteenth century both the directed verdict and special verdict were introduced).

149. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 333 (1995) ("The twentieth century also produced an even more forthright encroachment on jury power in the device of the judgment notwithstanding the verdict, popularly known as JNOV, which, as its name suggests, allows the judge to override a jury verdict that he concludes no reasonable jury could have reached. In other words, the entry of a JNOV is tantamount to a judicial holding that the jury in the case acted unreasonably or irrationally in reaching its

were memorialized in the promulgation of the Federal Rules of Civil Procedure in 1938.[150]

Generally, the Federal Rules of Civil Procedure sought to achieve several goals, including a single uniform system of procedure in the federal courts,[151] relaxed procedural formalities,[152] and merger of the common law and equity systems.[153] Among the provisions in the Federal Rules were rules for directed verdicts, judgments notwithstanding the verdict, and new trials.

Directed verdicts and judgments notwithstanding the verdict, now both called judgments as a matter of law,[154] are governed, respectively, by Rules 50(a)[155] and 50(b)[156] of the

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verdict."); refer to notes 169–70 *infra* and accompanying text.

150. Edson R. Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 28–29 (1938) (noting that judgments notwithstanding the verdict were recognized "in some six or eight states," and acknowledging that "if the verdict was for the wrong party as a matter of law on the evidence . . . the only remedy at common law was a new trial. A wrong verdict in such a case could never be corrected by entering the right judgment.").

151. *See* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L. REV. 757, 780–81 (1995) (explaining that, prior to the Federal Rules of Civil Procedure, federal district courts had to follow the procedures of the state courts in which they sat); Charles E. Clark, *The Challenge of a New Federal Civil Procedure*, 20 CORNELL L.Q. 443, 451 (1935).

152. *See* Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 551 (1939) (commenting that with a simpler code mistakes in procedure will not "prejudice . . . rights" in a case); Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057, 1059–60 (1955) (endorsing the new Federal Rules' focus on deciding cases on the merits rather than on procedural grounds).

153. *See* Subrin, *supra* note 148, at 974 (arguing that, through the federal rules, "equity had swallowed common law").

154. The 1991 amendments to the Federal Rules of Civil Procedure changed the nomenclature of Rule 50, substituting "judgment as a matter of law" for both the terms "judgment notwithstanding the verdict" and "directed verdict." *See* FED. R. CIV. P. 50 advisory committee's note (1991). The 1991 change is in terminology only, with no change as to how these devices operate. *See id.*

155. Federal Rule of Civil Procedure 50(a) provides:

> (1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> (2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

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

156. Federal Rule of Civil Procedure 50(b) provides, in pertinent part:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal

Federal Rules. "Rule 50 is one of the judicial control devices provided by the Federal Rules . . . so that the district court may enforce rules of law."[157] New trials are governed by Rule 59.[158] "Rule 59 recognizes the common-law principle that it is the duty of a judge who is not satisfied with the verdict of a jury to set the verdict aside and grant a new trial."[159]

After the promulgation of the Federal Rules, the federal courts of appeals made several attempts to weaken the Supreme Court's established precedent with respect to new trial motions involving the weight or sufficiency of the jury's verdict.[160] Although the Supreme Court authorized federal appellate review of orders granting or denying judgments notwithstanding the verdict,[161] the Court restricted the options available to the appellate courts upon finding such error.[162] The Court expressly denied federal appellate courts the power to enter a contrary judgment or to grant a new trial in civil jury cases.[163] Instead, the Court restricted federal appellate courts, upon finding error, to remanding the matter back to the district court to determine whether to enter judgment or grant a new trial.

For example, in *Montgomery Ward & Co. v. Duncan*, a personal injury action, the United States Court of Appeals for the Eighth Circuit found the district court erred in entering judgment notwithstanding the verdict after the jury had awarded

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> questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59.

FED. R. CIV. P. 50(b).

157. 9A FEDERAL PRACTICE AND PROCEDURE, *supra* note 24, § 2521, at 240.

158. Federal Rule of Civil Procedure 59(a) provides, in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

FED. R. CIV. P. 59(a).

159. 11 FEDERAL PRACTICE AND PROCEDURE, *supra* note 24, § 2801, at 40.

160. Refer to notes 164–82 *infra* and accompanying text.

161. Permitting such appellate review required a recharacterization of a challenge to the sufficiency of the evidence as constituting a question of law, refer to note 168 *infra*, rather than its historical characterization as a factual determination for the jury. Refer to note 143 *supra* and accompanying text.

162. *See* Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 217–18 (1947) (holding that the appellate court cannot direct the lower court to enter judgment if there was no motion for judgment notwithstanding the verdict at trial).

163. *See, e.g.*, Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) (noting that appellate courts cannot review motions for a new trial that are based on errors of fact).

damages to the plaintiff.[164] The Eighth Circuit remanded the case to the district court with instructions to enter judgment in favor of the plaintiff.[165]

The Supreme Court modified the Eighth Circuit's decision by providing for remand to the district court to hear and rule upon the defendant's new trial motion.[166] Observing that "[t]he grounds assigned for a new trial have not been considered by the [trial] court,"[167] the Court noted the different purposes served by motions for judgment notwithstanding the verdict as contrasted with motions for new trial:

> Each motion, as the rule recognizes, has its own office. The motion for judgment [notwithstanding the verdict] cannot be granted unless, as a matter of law, the opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed. The motion for a new trial may invoke the discretion of the court insofar as it is bottomed on the claim that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury.[168]

This explanation of the different purposes served by a motion for judgment notwithstanding the verdict and by a motion for a new trial is particularly illustrative. As defined by the Court, a motion for judgment notwithstanding the verdict involves a question of law,[169] and thus comes within the traditional purview of the appellate courts.[170] However, a motion for new trial generally contains a discretionary component necessitating an evaluation of facts, which is the district

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164. 311 U.S. 243, 247 (1940).

165. *Id.*

166. *Id.* at 255.

167. *Id.* at 252.

168. *Id.* at 251.

169. *Id.*

170. *Id.* at 254. In effect, this definition was itself a sleight of hand, which the Court accomplished in an earlier decision by recharacterizing the sufficiency of the evidence as being a matter of law, thereby permitting judges to second-guess the jury without expressly reexamining decided facts. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 659 (1935) (finding judgment notwithstanding the verdict constitutional by recharacterizing the "asserted insufficiency of the evidence" as a "question of law to be resolved by the court"). *See also* Dooley, *supra* note 149, at 334–35 ("By enlarging the domain of 'legal questions,' by recognizing devices that facilitate second-guessing of jury decisions, and by redefining the circumstances under which that interference may occur, the legal system has quietly but unquestionably eroded the power of the jury.").

court's—rather than the appellate court's—area of expertise.[171] Accordingly, a motion for a new trial falls within the exclusive purview of the district court.

Similarly, in *Cone v. West Virginia Pulp & Paper Co.*,[172] the United States Court of Appeals for the Fourth Circuit concluded the district court had erroneously admitted certain evidence offered by the plaintiff to prove his legal title to the property.[173] The Fourth Circuit further held that without this improperly admitted evidence the plaintiff's proof was insufficient to submit the question of title to the jury.[174] However, the Fourth Circuit declined to remand the matter to the district court, instead directing entry of judgment for the defendant—despite the defendant's failure to move for judgment notwithstanding the verdict in the district court.[175]

The Supreme Court reversed, finding "the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand."[176] The Court noted that, even when a district court is convinced that it should have directed a verdict for the losing party, this does not mandate entry of judgment notwithstanding the verdict.[177] Rather, the district court has a choice between two alternatives: ordering a new trial or directing entry of judgment.[178]

The Supreme Court expressly rejected the suggestion that the plaintiff could have presented affidavits to the Fourth Circuit to support his claim for a new trial,[179] noting this suggestion "would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court."[180] The Court further noted "a litigant should

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171. *See Montgomery Ward*, 311 U.S. at 254 (stating that the trial judge's "disposition of the motion for a new trial would not ordinarily be reviewable").

172. 330 U.S. 212 (1947).

173. *Id.* at 214.

174. *Id.*

175. *Id.*

176. *Id.* at 218.

177. *Id.* at 215 ("Rule 50(b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though the court is persuaded that it erred in failing to direct a verdict for the losing party.").

178. *See id.*

179. *Id.* at 218. This point will acquire particular significance in the next section. Refer to notes 213–16 *infra* and accompanying text.

180. *Cone*, 330 U.S. at 218. The "discretionary responsibility" referred to ruling on a motion for a new trial:

> [Rule 50] does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and

not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question."[181] Accordingly, even after the promulgation of the Federal Rules of Civil Procedure, the Supreme Court refused to authorize the federal appellate courts to grant a motion for judgment notwithstanding the verdict and to direct entry of that judgment without providing an opportunity for the original verdict winner to move for a new trial before the district court.[182]

This perspective regarding new trial versus entry of judgment notwithstanding the verdict also has a constitutional dimension. The Seventh Amendment prevents reexamination of any fact tried by a jury other "than according to the rules of the common law,"[183] and the common law permitted reexamination of such facts only by the granting of a new trial.[184] Granting a new trial results in a rehearing of the case before another jury, and thereby dodges the constitutional ramifications that adhere upon reexamination of jury verdicts.[185] Accordingly, the remand of

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> the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone.

Id. at 215–16 (citations omitted).

181. *Id.* at 217; Globe Liquor Co. v. San Roman, 332 U.S. 571, 574 (1948):

> What we said in the *Cone* case is peculiarly appropriate here: "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." It was error therefore for the Circuit Court of Appeals to direct the District Court to enter judgment for the respondents.

Id.

182. *Cone*, 330 U.S. at 217–18.

183. U.S. CONST. amend. VII.

184. Refer to notes 44–47 *supra* and accompanying text.

185. Sir William Blackstone summarized this point:

> A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other; and the subsequent verdict, though contrary to the first, imports no blame upon the former jury, who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.

3 BLACKSTONE, *supra* note 44, at 391; *see also* Marsh v. Ill. Cent. R. Co., 175 F.2d 498, 500 (5th Cir. 1949) ("[A] motion for new trial . . . never supercedes the jury, but as its name states, it results in another jury trial. . . ."); Albert D. Brault & John A. Lynch, Jr., *The*

cases involving evidentiary error permits the district court to exercise its discretion regarding the choice of new trial or entry of judgment—avoiding the constitutionally-prohibited appellate reexamination of facts tried by a jury. However, despite the consistency of the Supreme Court's early jurisprudence in this area,[186] the Court subsequently took a dramatic about-face in its *Neely* and *Weisgram* decisions.

B. Judicial Activism: The Neely *Decision*

The Supreme Court's decisions in *Neely*[187] and *Weisgram*[188] represent a radical break from its previous decisions.[189] The reasons behind this break include the Court's disregard of the historical interpretation of district judges' discretionary power,[190] and the Court's focus on the broadest interpretive scope of the Federal Rules of Civil Procedure,[191] rather than the constraints of the Seventh Amendment.

The Court had historically held that, upon a finding that the evidence did not support the jury's verdict, the district court alone possessed the discretion to determine whether to enter judgment notwithstanding the verdict or to order a new trial.[192] In *Neely* and *Weisgram*, however, the Court shifted the balance of power away from the district court by authorizing the federal appellate courts to make this determination.[193] In addition, both *Neely* and *Weisgram* focused on interpreting the language in the Federal Rules broadly,[194] without exploring the potential impact of such an interpretation upon the Seventh Amendment.[195]

Neely was a diversity action alleging wrongful death due to negligence in constructing, maintaining, and supervising a

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Motion for New Trial and Its Constitutional Tension, 28 U. BALT. L. REV. 1, 4 (1998) ("[G]ranting a new trial does not impair the right to trial by jury because it simply results in another jury trial.").

186. Refer to notes 146–82 *supra* and accompanying text.

187. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967).

188. Weisgram v. Marley Co., 528 U.S. 440 (2000).

189. Refer to notes 146–82 *supra* and accompanying text.

190. Refer to notes 146–47 *supra* and accompanying text.

191. Refer to notes 246–48 *infra* and accompanying text.

192. Refer to notes 172–82 *supra* and accompanying text.

193. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 322 (1967) ("[T]he statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal."); *see also Weisgram*, 528 U.S. at 444 ("[T]he appellate court may appropriately instruct the district court to enter judgment against the jury-verdict winner.").

194. Refer to notes 206–09, 246–47 *infra* and accompanying text.

195. Refer to notes 217–21, 267 *infra* and accompanying text.

platform in a missile silo.[196] At trial, the defendant moved for a directed verdict, arguing there was no evidence of negligence, breach of duty, or proximate cause.[197] The trial judge denied the motion and the matter was submitted to the jury, which returned a $25,000 verdict for the plaintiff.[198] The defendant then moved for judgment notwithstanding the jury's verdict or, in the alternative, a new trial.[199] Characterizing the evidence as presenting a "close case,"[200] the trial judge denied the motions.[201]

The United States Court of Appeals for the Tenth Circuit reversed, finding the evidence was insufficient to establish either negligence or proximate cause.[202] In reversing the trial court's judgment, the Tenth Circuit additionally instructed the district court to dismiss the action.[203] The plaintiff sought review in the Supreme Court, arguing the Tenth Circuit exceeded its authority in instructing dismissal.[204] The Supreme Court affirmed the Tenth Circuit's judgment.[205]

The Supreme Court's opinion focused on whether a federal appellate court, after concluding that insufficient evidence supported the jury's verdict, has the power to order a district court to dismiss the case.[206] Remarkably, the Court's majority concluded in the affirmative.[207] In particular, this finding appears

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196. Martin K. Eby Constr. Co. v. Neely, 344 F.2d 482 (10th Cir. 1965), *aff'd*, 386 U.S. 317 (1967).

197. *Id.* at 483.

198. *Id.*

199. *Id.*

200. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 334 (1967) (Black, J., dissenting).

201. *Neely*, 344 F.2d at 483.

202. *Id.* at 486.

> Neely was observed coming across the platform, and the next thing that is known is that he was falling into the silo. There is no evidence of the cause of Neely's fall. The uncontradicted evidence does show that the platform did not break, that the railing did not break, and that there were no grease spots on the platform upon which he might have slipped. In short, the most that the evidence establishes is that Neely was on a platform constructed by Eby's employees at the time he fell.

Id. at 485.

203. *Id.* at 486.

204. *Neely*, 386 U.S. at 320.

205. *Id.*

206. *Id.* at 319–20.

207. *Id.* at 330. Justices Douglas and Fortas would have reversed, because they concluded the evidence of negligence and proximate cause was sufficient to go to the jury. *Id.* at 330. Justice Black dissented from the majority opinion, stating: "This holding cries for reversal." *Id.* at 334 (Black, J., dissenting). He noted:

> First, I think the evidence in this case was clearly sufficient to go to the jury on the issues of both negligence and proximate cause. Second, I think that under our prior decisions and Rule 50, a court of appeals, in reversing a trial court's

directly contrary to the Court's previous decision in *Cone*, in which the Court stated the district judge, not the appellate court, was to decide the new trial issue in the first instance.[208] The majority distinguished *Cone* as involving a defendant who "had not moved for judgment n.o.v. in the trial court, but only for a new trial, and consequently the Court of Appeals was precluded from directing any disposition other than a new trial."[209] However, this was not the only basis for *Cone*'s conclusion.

Cone explained that Rule 50(b) "does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives."[210] *Cone* then emphasized the district judge's unique perspective, concluding: "Determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart."[211] Thus, *Cone* suggested that, rather than ordering the district court to dismiss the case, the appellate court should remand to permit the district judge to decide whether entry of judgment or a new trial is more appropriate.[212]

The Supreme Court expressly—and narrowly—treated the *Neely* case as "pitched on the total lack of power in the Court of Appeals to direct entry of judgment for respondent."[213] In deciding the case, the Court appeared to rely heavily on the failure of the appellee—the jury verdict winner—to raise grounds for a new

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> refusal to enter judgment *n.o.v.* on the ground of insufficiency of the evidence, is entirely powerless to order the trial court to dismiss the case, thus depriving the verdict winner of any opportunity to present a motion for new trial to the trial judge who is thoroughly familiar with the case. Third, even if a court of appeals has that power, I find it manifestly unfair to affirm the Court of Appeals' judgment here without giving this petitioner a chance to present her grounds for a new trial to the Court of Appeals as the Court today for the first time holds she must.

Id. at 330–31 (Black, J., dissenting).

208. Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 216–17 (1947); refer to notes 172–82 *supra* and accompanying text. Ironically, the *Neely* Court again emphasized that courts of appeals should consider the importance of the trial court's "firsthand knowledge" of the case in deciding whether to instruct dismissal, yet then ignored this very factor. *Neely*, 386 U.S. at 325–26 ("But these considerations do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal.").

209. *Neely*, 386 U.S. at 324.

210. *Cone*, 330 U.S. at 215; refer to notes 172–82 *supra* and accompanying text.

211. *Cone*, 330 U.S. at 216.

212. Refer to notes 172–82 *supra* and accompanying text.

213. *Neely*, 386 U.S. at 330.

trial on appeal.[214] This was a new, and indeed novel, consideration. The Court's prior decisions under the Federal Rules made no mention of any necessity for the verdict winner, on appeal, to request a new trial in the event that the appellate court should decide to reverse the original judgment.[215] Indeed, in *Cone*, the Court had expressly rejected this very notion of moving for a new trial in the appellate court as intruding into the "discretionary responsibility" of the district court.[216]

This latter point, regarding the discretionary power of the district judge, is of particular significance because it reflects the current Supreme Court's disregard of "discretion" as historically used in this context. Contrary to its early decisions, the Supreme Court failed to respect the district court's allocation of "discretion" in this area as unchallengeable and unreviewable.[217] Instead, the Court transformed the historical notion of the district court's "discretionary power," which meant "unreviewable,"[218] into a concept akin to an evidentiary ruling, which is subject to an "abuse of discretion" standard of review.[219] In so doing, the Court metamorphosed "discretionary power" into nearly the opposite of its original meaning, by changing an unreviewable decision into a reviewable one.[220]

By authorizing federal appellate courts to order district courts to dismiss a case after concluding, on appeal, that insufficient evidence supported the jury's verdict, *Neely* broke

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214. *Id.* at 328–29 ("[I]t should not be an undue burden [for the appellee] to indicate in his brief why he is entitled to a new trial should his judgment be set aside.").

215. *See* Globe Liquor Co. v. San Roman, 332 U.S. 571, 574 (1948) (stating that because the original verdict losers did not move for judgment notwithstanding the verdict, "it was error to direct the District Court to enter a judgment in their favor. The case should go back to the District Court for a new trial.").

216. *See Cone*, 330 U.S. at 218 (rejecting the suggestion that the original verdict winner "could have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial, and that that court could thereupon have remanded the question to the District Court to pass upon it," noting "[s]uch a circuitous method of determining the question cannot be approved," and further noting this method "would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court"); refer to notes 179–82 *supra* and accompanying text.

217. Refer to notes 143–44 *supra* and accompanying text.

218. *See, e.g.*, Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1933) (stating that neither the Supreme Court or a court of appeals could review the decision of a federal trial court to grant or deny a motion for a new trial); refer to notes 146–47 *supra* and accompanying text.

219. Refer to notes 129–34 *supra* and accompanying text (explaining the "abuse of discretion" standard of review).

220. This concept of an unreviewable ruling was a most limited one, applying only to the district court's grant or refusal of a *new trial*. Refer to notes 146–47, 171 *supra* and accompanying text. Any error in the substance of the district court's underlying ruling, such as whether judgment as a matter of law was appropriate, was still subject to appellate review. Refer to notes 169–71 *supra* and accompanying text.

from the Supreme Court's established jurisprudence.[221] Moreover, requiring the original verdict winner to move for a new trial in order to preserve its availability in the event of a future adverse ruling[222] dealt a double blow to verdict winners reversed on appeal. *Neely* deprived verdict winners, whose verdict was reversed on appeal, of not only their original jury verdict, but also of their ability to move for a new trial in the original forum—the district court—in the event of an appellate court reversal.[223]

C. *The* Weisgram *Decision: Permitting Federal Appellate Courts to Conduct the Equivalent of New Trials*

The Supreme Court expanded the power of the federal appellate courts in an even more dramatic and revolutionary manner in *Weisgram*.[224] In *Weisgram*, the Court undermined the established realm of the jury and district court by permitting the federal appellate court to undertake three independent evaluations consecutively. In *Weisgram*, the Eighth Circuit: (1) reviewed an evidentiary ruling;[225] (2) upon finding error, proceeded to review the evidence absent the challenged evidence it had just stricken;[226] and (3) upon determining that without the improperly admitted evidence, insufficient evidence remained to support the jury's verdict, entered judgment notwithstanding the verdict.[227] The Supreme Court affirmed these multiple determinations.[228]

Weisgram, a diversity action, involved a claim that a defective electric baseboard heater caused a fire resulting in wrongful death.[229] At trial, the plaintiffs offered the testimony of three expert witnesses to prove the heater's defect and its causal connection to the fire.[230] The defendant objected to this testimony as unreliable and inadmissible under Federal Rule of Evidence

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221. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 319–20 (1967); refer to notes 206–16 *supra* and accompanying text.

222. *Neely*, 386 U.S. at 329 ("Rule 50(d) makes express and adequate provision for the opportunity . . . to present [the plaintiff's] grounds for a new trial in the event his verdict is set aside by the court of appeals.").

223. *Id.* at 329–30.

224. Weisgram v. Marley Co., 528 U.S. 440 (2000).

225. *Id.* at 445. Specifically, the appellate court reviewed expert witness testimony, "the sole evidence supporting plaintiffs' product defect charge." *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 446.

229. *Id.* at 444.

230. *Id.* at 445.

702;[231] the district judge overruled the objections.[232] At the close of the plaintiffs' evidence, and again at the close of all the evidence, the defendant moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), arguing the plaintiffs had not satisfied their burden of proof on the issues of defect and causation.[233] The court denied the motions.[234] The matter went to the jury, which returned a verdict for the plaintiffs.[235] The defendant then moved for judgment as a matter of law or, in the alternative, a new trial under Federal Rules of Civil Procedure 50 and 59.[236] The court again denied the motions.[237]

On appeal, the United States Court of Appeals for the Eighth Circuit found the expert testimony speculative and thus incompetent to prove the case.[238] The Eighth Circuit then reexamined the evidence absent the expert testimony and found it insufficient to sustain the jury's verdict.[239] The Eighth Circuit consequently directed judgment as a matter of law for the defendant, rejecting any contention that it was required to remand for a new trial.[240]

The Supreme Court affirmed, rejecting the plaintiffs' contention that an insufficiency of evidence caused by the striking of evidence on appeal required remand to the district court to consider whether a new trial was warranted.[241] Rather, the Court concluded that federal appellate courts may direct the entry of judgment as a matter of law when, after "excis[ing] testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict."[242]

The Court acknowledged "the respective competences of trial and appellate forums," noting *Neely*'s cautions with respect to the hearing of new trial motions by the district court in the first instance due to "the trial judge's first-hand knowledge of

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231. *Id.* Rule 702 of the Federal Rules of Evidence provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED R. EVID. 702.

232. *Weisgram*, 528 U.S. at 445.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 456–57.

242. *Id.* at 457.

witnesses, testimony, and issues—because of his 'feel' for the overall case."[243] However, the Court then completely disregarded these purported concerns.[244]

The Supreme Court's willingness to ignore its own admonitions regarding the respective courts' competencies was cast in terms of the interpretation of the federal rules and of judicial economy.[245] Relying on its prior decision in *Neely*, the Supreme Court held that when a federal appellate court determines that a district court erroneously denied a motion for judgment as a matter of law, the appellate court has three equally valid options. The court may: "(1) order a new trial at the verdict winner's request or on its own motion, (2) remand the case for the trial court to decide whether a new trial or entry of judgment for the defendant is warranted, or (3) direct the entry of judgment as a matter of law for the defendant."[246]

As an initial matter, Rule 50 does not clearly state the tripartite of appellate options that the Court set forth so unequivocally. Rule 50(d) provides:

> If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.[247]

The rule's language is at least equally consistent with the appellate court's grant of a new trial and with review of a new trial motion by the trial court, without permitting the appellate court to direct the entry of judgment as a matter of law. Indeed, a number of federal appellate courts had previously held it inappropriate to direct entry of judgment as a matter of law

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243. *Id.* at 450–51 (quoting Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 325 (1967)).

244. *See id.* at 451–52 (noting the *Neely* court, while discussing concern of the "closeness of the trial court to the case[,]" ultimately held the appellate court may, as one of its options, "direct the entry of judgment as a matter of law for the defendant").

245. *See id.* at 451 (indicating the purpose of Rule 50 is "to speed litigation and avoid unnecessary retrials" (quoting *Neely*, 386 U.S. at 326)).

246. *Id.* at 451–52.

247. FED. R. CIV. P. 50(d). The language of Rule 50(d) expressly authorizes federal appellate courts to determine "that the appellee is entitled to a new trial." *Id.* However, the rule's language does not appear to authorize the converse; the rule does not grant federal appellate courts the power to deny a new trial motion. Refer to notes 164–86 *supra* and accompanying text.

under the circumstances posed in *Weisgram*—where the appellate court determined evidence was erroneously admitted at trial and the remaining, properly admitted, evidence was insufficient to uphold the judgment.[248]

More importantly, even accepting the Supreme Court's interpretive parsing of Rule 50, a more fundamental problem remains. In *Weisgram*, the Supreme Court cited *Neely* for the proposition that federal appellate courts have the power to order entry of judgment for the moving party where a motion for judgment as a matter of law had erroneously been denied by the trial court.[249] However, an "erroneous denial of a motion for judgment as a matter of law" is not an accurate characterization of the events in *Weisgram*.

To the extent that the Eighth Circuit found trial court error, the error involved an evidentiary ruling.[250] It was only by virtue of overstepping traditional federal appellate court boundaries—not once, not twice, but three times—that the Eighth Circuit reached its ultimate result.[251] Thus, *Weisgram* did not merely apply *Neely*; *Weisgram* took federal appellate court power to a new level.

In *Weisgram*, the party who won a jury verdict was denied that verdict after a compounded series of appellate determinations.[252] The Eighth Circuit first reviewed an evidentiary ruling.[253] The standard of review for an evidentiary ruling is abuse of discretion.[254] When such abuse is found, the appellate court must ascertain whether the error was so prejudicial to the trial's outcome that it is convinced the jury

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248. *See, e.g.*, Kinser v. Gehl Co., 184 F.3d 1259, 1267 (10th Cir. 1999); Schudel v. Gen. Elec. Co., 120 F.3d 991, 995 (9th Cir. 1997) (noting "[t]he record should be taken as it existed when the trial closed"); Jackson v. Pleasant Grove Health Care Ctr., 980 F.2d 692, 696 (11th Cir. 1993) (holding a court "may not exclude previously admitted evidence" when ruling on a motion for a judgment notwithstanding the verdict); Midcontinent Broad. Co. v. North Cent. Airlines, Inc., 471 F.2d 357, 358–59 (8th Cir. 1973) (finding a judgment notwithstanding the verdict "cannot be entered on a diminished record after the elimination of incompetent evidence" and noting the proper remedy in such circumstances is a new trial).

249. *Weisgram*, 528 U.S. at 451–52.

250. *Id.* at 440 (noting the Eighth Circuit panel found "the testimony of Weisgram's expert witnesses, the sole evidence supporting the product defect charge, was speculative and not shown to be scientifically sound, and was therefore incompetent to prove plaintiffs' case").

251. Refer to notes 252–63 *infra* and accompanying text.

252. *Weisgram*, 528 U.S. at 456.

253. *Id.* at 440.

254. *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 174 n.1 (1997); Ashcraft & Gerel v. Coady, 244 F.3d 948, 952 (D.C. Cir. 2001); Bank of Montreal v. Signet Bank, 193 F.3d 818, 833 (4th Cir. 1999).

reached a seriously erroneous result or the verdict is a miscarriage of justice.[255] If this standard is satisfied, the remedy is a new trial.[256]

Here, however, the Eighth Circuit, after deciding the evidentiary ruling was prejudicial, did not remand the matter for a new trial.[257] The appellate court thereby short-circuited the established procedures for remedying an erroneous evidentiary ruling. The court instead undertook a different, additional, examination—the appellate court essentially tried the case itself. The Eighth Circuit independently reviewed the evidence, absent the challenged expert evidence that it had just stricken.[258] It then determined that, without this erroneously admitted evidence, insufficient evidence remained to support the jury's verdict.[259]

This augmentation of federal appellate court review and power far exceeded the review permitted in *Neely*.[260] Based upon its independent conclusion that insufficient evidence remained without the newly-excised expert testimony, the Eighth Circuit found the district court should have granted the defendant's motion for judgment as a matter of law.[261] At this point, the Eighth Circuit undertook its third evaluation: although the appellate court again could have remanded the case to permit the district court to determine whether entry of judgment or a new trial was more appropriate, it again declined to do so.[262] Instead, the Eighth Circuit entered its own independent determination as the final judgment,[263] providing no recourse for the jury verdict winner, who had been deprived of that verdict and had become the ultimate litigation loser.

Directing entry of judgment as a matter of law when a federal appellate court concludes evidence was admitted erroneously and that the remaining evidence is insufficient to

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255. *See, e.g.*, Hester v. BIC Corp., 225 F.3d 178, 181 (2d Cir. 2000); Agushi v. Duerr, 196 F.3d 754, 759 (7th Cir. 1999).

256. *See, e.g.*, Elcock v. Kmart Corp., 233 F.3d 734, 738 (3d Cir. 2000); Becker v. Arco Chem. Co., 207 F.3d 176, 179–80 (3d Cir. 2000). Under the Supreme Court's early jurisprudence, however, the remedy for an erroneous evidentiary ruling was to remand the matter to the district court to determine whether to grant a new trial. Refer to notes 168–82 *supra* and accompanying text.

257. *Weisgram*, 528 U.S. at 440.

258. *Id.* at 440–41.

259. *Id.* at 440.

260. *See* Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 325–26 (1967) (stating that "obviously judgment for the defendant-appellant should not be ordered where the plaintiff-appellee urges ground for nonsuit or new trial which should more appropriately be addressed to the trial court").

261. *Weisgram*, 528 U.S. at 440.

262. *Id.*

263. *Id.* at 440–41.

support the jury's verdict ends the case.[264] There are no further proceedings; no further opportunities to pursue the matter. However, judicial economy comes at the expense of fairness.

The error of the Supreme Court's approach is highlighted by the divergent opinions in the *Weisgram* case itself. The district judge believed the expert evidence was reliable.[265] On appeal, the panel was split; two of the Eighth Circuit judges found the evidence inadmissible, but the third judge agreed with the district judge.[266] Under these circumstances, with a split on the admissibility issue among the judges, depriving the verdict winner of the opportunity to seek a new trial before the district judge seems particularly unfair.

Under the Seventh Amendment, federal appellate courts may not reexamine facts tried by a jury, and have no authority to conduct the equivalent of an appellate court trial.[267] The Supreme Court's recent decisions accord insufficient respect to the lines of demarcation separating the provinces of the appellate courts, the district courts, and the jury, and suggest further constitutional ramifications.

V. THE CONSTITUTIONAL RAMIFICATIONS OF *GASPERINI*, *WEISGRAM*, AND *LEATHERMAN*

The troubling erosion of the jury function embodied in *Gasperini*, *Weisgram*, and *Leatherman* is exactly what the Framers feared. The "studied purpose" of the Reexamination Clause was to protect jury findings from judicial reexamination.[268] Yet *Gasperini*, *Weisgram*, and *Leatherman* expressly authorize this prohibited judicial reexamination, thereby rendering the jury's verdict subject to appellate "second-guessing."[269]

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264. *See id.* at 456–57.

265. *Id.* at 445.

266. *Id.* at 445–46 ("The dissenting judge disagreed on both points, concluding that the expert evidence was properly admitted and that the appropriate remedy for improper admission of expert testimony is the award of a new trial, not judgment as a matter of law.").

267. Refer to note 5 *supra* and accompanying text (explaining that the Seventh Amendment prohibits federal appellate courts from reexamining facts determined by a jury).

268. *See* Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

269. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1686 (2001) (stating that because a punitive damages award by a jury "does not constitute a finding of 'fact,' appellate review . . . does not implicate Seventh Amendment concerns"); *Weisgram*, 528 U.S. at 457 (finding the authority of appellate courts to "direct the entry of judgment as a matter of law extends to cases in which, on excision of testimony erroneously admitted, there remains sufficient evidence to support the jury's verdict");

It is well established that "The common law is not immutable, but flexible . . . [and is] susceptible of growth and adaptation to new circumstances and situations[.]"[270] However, this will not justify intrusions of a constitutional dimension. The Reexamination Clause adopted "the rules of the common law" as its standard.[271] Accordingly, as the Supreme Court itself has recognized with respect to this very constitutional provision:

> [H]ere we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution. The distinction is fundamental . . . .[272]

The Supreme Court's *Gasperini*, *Weisgram*, and *Leatherman* decisions dealt neither with new legal concepts or procedures unknown at common law, nor with concepts or procedures known at common law but now obsolete. Historically, federal appellate courts repeatedly tried to review jury damages awards for excessiveness,[273] and the Supreme Court repeatedly held such awards were unreviewable factual determinations.[274] Historically, federal appellate courts repeatedly tried to review district court grants or denials of new trials involving factual grounds,[275] and the Supreme Court repeatedly held such exercises of district court discretion unreviewable.[276]

The Court's recent decisions are revolutionary for their flouting of the settled understanding of the Seventh Amendment's Reexamination Clause. To evaluate a jury's verdict for excessiveness, as authorized in *Gasperini* and *Leatherman*, the federal appellate court necessarily must review the jury's factual findings.[277] Reevaluating the jury's verdict after a post-

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Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435 (1996) (holding that nothing in the Seventh Amendment "precludes appellate review of the trial judges' denial of a motion to set aside [a jury verdict] as excessive" (quoting Grunenthal v. Long Island R.R., 393 U.S. 156, 164 (1968) (Stewart, J., dissenting))).

270. Dimick v. Schiedt, 293 U.S. 474, 487 (1935) (stating "the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule").

271. *See Redman*, 295 U.S. at 657.

272. *Dimick*, 293 U.S. at 487.

273. Refer to note 23 *supra* and accompanying text.

274. Refer to note 23 *supra* and accompanying text.

275. Refer to note 24 *supra* and accompanying text.

276. Refer to note 24 *supra* and accompanying text.

277. *See* Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1691 (2001) (Ginsburg, J., dissenting) ("[T]here can be no question that a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings—*e.g.*, the extent of harm or potential harm caused by the defendant's

trial exclusion of evidence and concluding a new trial is unjustified, as authorized in *Weisgram*, goes both to an evaluation of the weight of the evidence and to the district court's discretion in granting or denying new trials on factual grounds.[278] Yet, before these most recent decisions, the Supreme Court itself repeatedly held that the Seventh Amendment prohibited these very bases for federal appellate court reevaluation of a jury verdict and prohibited review of new trial motions.[279] The dangers of permitting these types of appellate court intervention are amply illustrated by *Gasperini* and *Weisgram* themselves.

Gasperini permits federal appellate review of a jury's award for excessiveness under the purportedly deferential abuse of discretion standard.[280] The "protection" of an abuse of discretion standard is illusory,[281] as *Gasperini* itself demonstrates. As the common law has long recognized, finding a jury award excessive

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misconduct, whether the defendant acted in good faith, whether the misconduct was an individual instance or part of a broader pattern, whether the defendant behaved negligently, recklessly, or maliciously."); William Wirt Blume, *Review of Facts in Jury Cases—The Seventh Amendment*, 20 J. AM. JUDICATURE SOC'Y 130, 131 (1935) ("In deciding whether a jury found against the weight of evidence, the trial judge must weigh the evidence and decide the facts. In reviewing his decision the appellate court is reviewing the case on the facts."); refer to note 61 *supra* and accompanying text; Wright, *Doubtful Omniscience*, *supra* note 67, at 761 ("Very few people are deceived into thinking the issue has been transmuted into an issue of law because the appellate court says it is finding only that the trial judge abused his discretion in not finding the clear weight of the evidence to be contrary to the verdict.").

278. *See, e.g.*, Hansen v. Boyd, 161 U.S. 397, 402–03 (1896) ("There was no motion made at the close of the evidence to direct a verdict, and both parties therefore agreed to the submission of the issues of fact to the consideration of the jury. In the absence of such a request we must assume that there was sufficient evidence to warrant the court in permitting the jury to draw the inferences proper to be deduced from the evidence in the case."); *accord* Hartford Life Annuity Ins. Co. v. Unsell, 144 U.S. 439, 451 (1892) ("[Defendant] did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury. As no error of law was committed to the prejudice of the defendant, the judgment must be [a]ffirmed."); Hartford Accident & Indem. Co. v. Jasper, 144 F.2d 266, 267–68 (9th Cir. 1944) ("[E]ven where the appellate court is convinced that the finding could have been otherwise upon the evidence, the findings of the trial court are conclusive.").

279. Refer to notes 23–24, 56–65, 146–86 *supra* and accompanying text.

280. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 434–35 (1996).

281. As Judge Nangle noted twenty years ago in the context of the "clearly erroneous" standard of review:

> The appellate courts have failed increasingly to accord to the trial court's findings of fact the respect and deference envisioned by the Clearly Erroneous Rule. Although purporting to pay homage to the Clearly Erroneous Rule, appellate courts have become less reticent to substitute their view of the evidence for that of the trial court to "do justice."

John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409, 410 (1981). *See also Leatherman*, 121 S. Ct. at 1692 (Ginsburg, J., dissenting) (noting "there is little difference between review *de novo* and review for abuse of discretion"); refer to notes 122–36 *supra* and accompanying text (quoting Justice Ginsburg's statement).

requires, by definition, a reexamination of the facts found by the jury.[282] The appellate court must review not only the record of the district court proceedings for legal error, but must also review the facts found by the jury and the jury's verdict itself.

The transparencies at issue in *Gasperini* had been lost.[283] The jury, as fact-finder, could not see the "uniqueness" of the slides because they were unavailable—and the Second Circuit, reviewing only the written record, had even less information available.[284] Indeed, the attorneys did not argue the issue of the amount of damages on appeal, and therefore the Second Circuit did not have the exhibits most critical in evaluating damages.[285] Yet, despite the lack of argument and information, on appeal the Second Circuit simply substituted its judgment for that of the jury.[286]

Weisgram illustrates a similar hazard. The admissibility of expert evidence is a legal determination.[287] Among the four judges who reviewed the evidence before the case reached the Supreme Court (the district court judge and three Eighth Circuit judges), there was an even split: two judges believed the expert evidence was admissible and two believed the evidence was inadmissible.[288] Yet the Eighth Circuit declined to order a new trial[289]—the established, traditional remedy for erroneous evidentiary rulings.[290] Intruding further, the court found the now-excluded evidence rendered the evidence insufficient for the jury's verdict,[291] which precluded the original verdict winner from

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282. Refer to notes 61–62 *supra* and accompanying text.

283. *Gasperini*, 518 U.S. at 415.

284. *Id.* at 431 (explaining the appellate court had to evaluate the jury award "without the benefit of an opinion from the District Court, which had denied 'without comment' the Center's Rule 59 motion"); refer to note 285 *infra* and accompanying text (noting the court did not have before it the exhibits to damages).

285. *See* Gasperini v. Ctr. for Humanities, Inc., 972 F. Supp. 765, 772 (S.D.N.Y. 1997), *rev'd on other grounds*, 149 F.3d 137 (2d Cir. 1998) (finding, on remand, that the Second Circuit's opinion regarding the propriety of an award of $100,000 was "entitled to little weight because the attorneys did not argue the issue of amount, and the exhibits in evidence, which are most critical in evaluating damages, were not even sent to the Court of Appeals, nor were they requested by that Court. . . . [T]he appellate panel which selected the initial remittitur figure of $100,000.00 never saw the video [created by the Center for Humanities using Gasperini's slides] or the list describing the lost slides . . . .").

286. *See id.* at 772–73.

287. United States v. Watson, 587 F.2d 365, 369 (7th Cir. 1978) (asserting the admissibility of expert testimony is governed by Rule 702 and gives the trial court judge broad discretion).

288. Weisgram v. Marley Co., 528 U.S. 440, 445–46 (2001); Weisgram v. Marley Co., 169 F.3d 514, 515 (8th Cir. 1999).

289. *Weisgram*, 528 U.S. at 445–46.

290. Refer to notes 253–56 *supra* and accompanying text.

291. *Weisgram*, 528 U.S. at 445–46.

moving in the district court for a new trial. This is a grave usurpation of the fact-finding province of the jury.

The commentary preceding and following the Supreme Court's decision in *Weisgram* has focused on the implications of expert testimony and Rule 702 of the Federal Rules of Evidence.[292] However, nothing in the Court's opinion restricts its reach to cases involving expert testimony. Indeed, *Weisgram* states, without reference to Rule 702, that appellate courts may instruct district courts to enter judgment against the original verdict winner:[293] "Appellate authority to make this determination is no less when the evidence is rendered insufficient by the removal of erroneously admitted testimony than it is when the evidence, without any deletion, is insufficient."[294] Although the Supreme Court effectively concluded this distinction was one without a difference,[295] this assertion defies logic. "There is a world of difference between a legally incorrect input that taints a jury's verdict and an output that is 'tainted' only by a federal appellate court's after-the-fact assessment that the verdict is against the weight of the evidence."[296]

Unlike *Neely*, in which the appellate court held the plaintiff had failed to produce sufficient evidence to warrant a jury verdict,[297] the proof introduced at trial in *Weisgram* was initially sufficient. However, the proof was rendered insufficient by a subsequent event—the Eighth Circuit's determination that the expert evidence was inadmissible.[298] In *Weisgram*, the Eighth Circuit reached beyond the situation that had been presented to the district court. In the district court, the defendant objected to

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292. Refer to note 13 *supra* and accompanying text.

293. *Weisgram*, 528 U.S. at 444.

> [T]he court of appeals has authority to render the final decision. If, in the particular case, the appellate tribunal determines that the district court is better positioned to decide whether a new trial, rather than judgment for defendant, should be ordered, the court of appeals should return the case to the trial court for such an assessment. But if, as in the instant case, the court of appeals concludes that further proceedings are unwarranted because the loser on appeal has had a full and fair opportunity to present the case, including arguments for a new trial, the appellate court may appropriately instruct the district court to enter judgment against the jury-verdict winner.

Id. at 443–44.

294. *Id.* at 444.

295. *Id.* at 443–44.

296. Jonathan S. Massey & Kenneth J. Chesebro, *Challenging Federal Appellate Review of Damage Awards: Lawyers Should Cite the Forgotten Second Clause of the Seventh Amendment*, TRIAL, May 1, 1995, at 56, *available at* 1995 WL 15142630.

297. Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 319 (1967).

298. *Weisgram*, 528 U.S. at 445.

the expert evidence and moved for a judgment as a matter of law.[299] Sustaining the use of the expert evidence rendered the evidence sufficient to support the jury's verdict. The district court had no reason to consider whether excluding this expert evidence would leave insufficient evidence remaining to support the verdict. Nor did the district court have the opportunity to consider whether, if insufficient evidence were to remain after excluding the expert evidence, a new trial would be warranted.[300]

On appeal, the Eighth Circuit made a commonplace initial determination that the district court already had considered—the admissibility of the expert evidence.[301] If an abuse of discretion occurs in determining admissibility, the accepted, commonplace remedy is a new trial.[302] After evaluating the admissibility of the challenged evidence, however, the Eighth Circuit augmented its review by progressing to two supplemental determinations not previously evaluated by the district court—whether the record, absent this newly-excised evidence, could still support the verdict, and if not, whether a new trial was warranted.[303] In doing so, the Eighth Circuit, with the subsequent blessing of the Supreme Court,[304] effectively arrogated onto itself the role and duties of the trial court, making determinations constitutionally and historically entrusted to the jury and the district court.

The potential ramifications of these recent decisions are far-reaching. The reasoning supporting appellate review in *Gasperini*, *Weisgram*, and *Leatherman* can be used to rationalize other reexaminations of jury fact-finding. In *Leatherman*, the Court characterized punitive damages as "not constitut[ing] a finding of 'fact[]'" because "juries do not normally engage in . . . a finely tuned exercise of deterrence calibration when awarding punitive damages."[305] If a "finely tuned exercise of . . . calibration" is the Court's new definition of fact-finding, imagine the future consequences. Damages for pain and suffering, loss or impairment of a body part or bodily function, and mental anguish all involve imprecise measures. The same is true of credibility determinations. Jurors do not merely tally the number of

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299. *Id.*

300. Trial courts do not issue their evidentiary rulings in the alternative, for obvious practical reasons. After *Weisgram*, however, one is left to wonder if the conscientious district court judge will be forced to do exactly that.

301. *Weisgram*, 528 U.S. at 445.

302. Refer to note 256 *supra* and accompanying text.

303. *Weisgram*, 528 U.S. at 445–46.

304. *Id.* at 456–57.

305. Cooper Indus. Inc. v. Leatherman Tool Group, Inc., 121 S. Ct. 1678, 1686–87 (2001).

witnesses appearing for each side; instead they often must rely on vague, inarticulable perceptions of character and veracity.

In addition, *Neely* and *Weisgram* potentially authorize the equivalent of new trials in the federal appellate courts. Upon a determination that an evidentiary error occurred in the district court, the federal appellate court may now reexamine the remaining evidence and proceed to enter judgment as a matter of law or a new trial. Accordingly, these recent decisions potentially preview further undermining of the Reexamination Clause.[306]

VI. THE MOTIVATION BEHIND *GASPERINI*, *WEISGRAM*, AND *LEATHERMAN*: DISTRUST OF THE CIVIL JURY

Gasperini, *Weisgram*, and *Leatherman* reflect a Supreme Court trend eroding the fact-finding province of the jury and enlarging the scope of federal appellate review. The unspoken premise underlying such appellate intercession is that appellate judges, despite their distance from the trial-level events, are more reliable, more knowledgeable, and more capable than the district judge and the jury combined. There is no objective basis for believing that appellate judges are better qualified to ascertain the facts from the evidence presented to, and personally reviewed by, the jury. Instead, the Supreme Court's authorization of federal appellate court usurpation of the jury function likely stems from a more fundamental problem—a distrust of the civil jury.[307]

The Supreme Court's apparent distrust of the civil jury, and its resultant expansion of federal appellate court power, will eventually force a historical confrontation. The Seventh

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306. In particular, language in the Supreme Court's opinions suggests potential future appellate intermeddling may occur with respect to fact-finding based on documentary evidence. *Cf.* Hunt v. Cromartie, 121 S. Ct. 1452, 1459 (2001) (noting an "extensive review of the District Court's findings, for clear error, is warranted" because "the key evidence consisted primarily of documents and expert testimony. Credibility evaluations played a minor role."). *See also Leatherman*, 121 S. Ct. at 1687–88 (explaining that courts evaluating a punitive damages award for consistency with due process must "consider three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." The Court then stated: "Only with respect to the first . . . inquiry do the district courts have a somewhat superior vantage over courts of appeals, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor. Trial courts and appellate courts seem equally capable of analyzing the second factor. And the third . . . criterion, which calls for a broad legal comparison, seems more suited to the expertise of appellate courts.").

307. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) (expressing concern that "juries will use their verdicts to express biases against big businesses").

Amendment, with its constitutional prohibition against factual reexamination, is based on a fundamental assumption of jury reasonableness.[308] The Supreme Court's recent decisions suggest the antithesis—an assumption of jury unreasonableness.[309] This Part of the Article examines this phenomenon, its causes, and whether the admitted imperfections in our jury system justify a "reexamination" of the Reexamination Clause.

A. *Perspectives on the Civil Jury*

Unlike the political climate of the late 1700s—when juries generally were revered[310]—today's juries are openly criticized in the popular press as irrational and incompetent.[311] However, this

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308. As Professor Amar has observed:

> If we seek a paradigmatic image underlying the Bill of Rights, we cannot go far wrong in picking the jury. Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its absence strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth). So too, the double jeopardy clause, which makes no explicit mention of juries, should be understood to safeguard not simply the individual defendant's interest in avoiding vexation, but also the integrity of the initial petit jury's judgment (much like the Seventh Amendment's rule against "re-examin[ation]" of the civil jury's verdict).... The jury summed up—indeed embodied—the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991) [hereinafter Amar, *Bill of Rights*] (alteration in original).

309. *See* Dooley, *supra* note 149, at 337 ("[T]he earlier assumption of the reasonableness of juries has been replaced with the assumption that juries are unreasonable, and this assumption is brought to bear on a whole range of decisions made about what goes on in courtrooms.").

310. Refer to notes 44–51 *supra* and accompanying text. *See also* Amar, *Bill of Rights*, *supra* note 308, at 1195 (noting our acceptance of judges' superior ability to consider questions of law stands in sharp contrast to "the powerful and prevailing sense of 200 years ago that the Constitution was the people's law").

311. Professor Vidmar has catalogued the negative, frequently-made claims asserted about jury behavior and verdicts in personal injury cases as follows:

> Jury irrationality, the jury lottery, spiraling damage awards, unbridled juror sympathies, the dangerous national sport of punitive damages, the 'deep pockets' effect, commonplace verdicts in which fifty or even eighty percent of the award is for pain and suffering, racial and gender biases in verdicts, runaway juries, pro-plaintiff tendencies, capriciousness and unreliability, the defective jury system, exorbitant and unjustified awards, stifled product innovation, raised insurance rates, doctors leaving pediatrics and other areas of practice, nuisance cases, thousands of cases settled for unrealistic amounts because of the threat of even larger jury awards, and an American economy suffering from the litigation costs that must be passed on to consumers.

Neil Vidmar, *Pap and Circumstance: What Jury Verdict Statistics Can Tell Us About Jury Behavior and the Tort System*, 28 SUFFOLK U. L. REV. 1205, 1205 (1994); *see also* Amar, *Reinventing Juries*, *supra* note 44, at 1169 ("[N]o idea today has suffered more abuse—from benign neglect to malignant hostility to cynical manipulation and strategic perversion—than the idea of the jury."); refer to notes 211–20 *supra* and accompanying text (expounding upon the notion that the press has helped to foster a perception of jury

change in political climate does not justify and will not support constitutional intrusions.[312]

Despite repeated studies contradicting negative popular perceptions regarding jury verdicts,[313] the Supreme Court's expansion of federal appellate court authority to reexamine

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incompetence).

312. Refer to notes 313–24 *infra* and accompanying text.

313. *See, e.g.*, HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 55, 63–64 (1966) (detailing the results of a classic study involving 3,576 jury trials before 555 different judges in the 1950s showing an overall magnitude of agreement of nearly 80% between the actual jury verdict and the matching hypothetical verdict of the judge, and finding that in 12% of the civil cases the jury favors the plaintiff while in 10% the judge favors the plaintiff, a finding "in the teeth of the popular expectation that the jury in personal injury cases favors the plaintiff, at least if that expectation is taken to mean that the jury is more likely to favor the plaintiff than is the judge"); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1125–26, 1133–34 (1992) (analyzing a study covering fiscal years 1979-1989 for all ninety-four federal districts, using data gathered by the Administrative Office of the United States Courts, comparing plaintiff win rates and recoveries in civil cases tried before juries and judges, and concluding that contrary to popular belief, in two of the most controversial areas of tort law—product liability and medical malpractice—plaintiffs "prevail at trial at a much higher rate before *judges* than they do before juries") (emphasis added); Neil Vidmar & Jeffrey J. Rice, *Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals*, 78 IOWA L. REV. 883, 883–84 (1993) (reporting "a controlled experiment involving a medical negligence case, comparing juror awards with those rendered by experienced legal professionals," and concluding that the damages awarded "for pain and suffering and disfigurement and the rationales behind the awards did not differ between the two sets of decisionmakers"); VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 216 (2000) ("The . . . claim, that juries are pro-plaintiff, cannot be supported. The studies that have contrasted judicial views and civil jury verdicts find substantial overlap between judge and jury, and when their decisions diverge, juries are no more likely to favor the plaintiff in civil litigation, including litigation with business defendants."); Marc Galanter, *The Regulatory Function of the Civil Jury, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 70 (Robert E. Litan ed., 1993) ("The literature, on the whole, converges on the judgment that juries are fine decisionmakers. They are conscientious, collectively they understand and recall the evidence as well as judges, and they decide on the basis of the evidence presented."); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 898 (1998) [hereinafter Vidmar, *Empirical Perspective*] (summarizing studies of civil juries and concluding that "[r]esearch findings bearing on the performance of civil juries yield little support for the extreme claims charging juries with poor and irresponsible performance").

If the anecdotes accurately reflected jury verdicts, one would expect to find the vast majority of jury verdicts favoring plaintiffs. But this is not the reality. The most recent study compiled by the Rand Institute for Civil Justice concluded that across all cases, plaintiffs won only "slightly more than 55 percent of all verdicts," and they won "least often in medical malpractice and product liability cases, winning only 33 percent of the former and 44 percent of the latter." ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985, at xv, 39 (1996) (reporting a study based on jury verdicts from 1985-1994 in fifteen jurisdictions across the country). "Perhaps the most striking finding that emerges from the jury verdict data in this study is that punitive damages are awarded very rarely." *Id.* at 33. The study noted that punitive damages were awarded in only 2.6% of all product liability verdicts. *Id.* at 36.

facts[314] appears to be based on a perception, fueled by the press and other sources, that juries are untrustworthy and unpredictable.[315] Juries have been erroneously, but widely,

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314. As Professor Malone noted over fifty years ago:

> Courts wanted to control juries during the last century, they want to control them today, and they will probably want to continue to control them in the future. If we take away contributory negligence from the judges, they will find some other way. It's hard to beat judicial ingenuity.

Wex S. Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 182 (1946).

315. *See* HANS, *supra* note 313, at 70 ("A number of scholars have attempted to determine why people continue to believe that litigation is out of control, if the actual court statistics do not paint such a dire picture. They have identified two potential culprits: first, media reporting of civil lawsuits, and second, advertising campaigns, sponsored by business and insurance groups, about the civil litigation system."); Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us about Decisionmaking by Civil Juries, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 138–39 (Robert E. Litan ed., 1993) [hereinafter MacCoun, *Inside the Black Box*] (reporting that media descriptions of jury verdicts "usually seem outrageous, often suggesting that the jury in question was irrational, incompetent, or hopelessly prejudiced"); Dooley, *supra* note 149, at 329–30 ("[Y]et the popular press, the entertainment media, and highly esteemed legal scholars have bemoaned the unpredictability and the 'irrational' behavior of juries."); Vidmar, *Empirical Perspective*, *supra* note 313, at 875–76 ("Studies clearly show that media reports are selective in the reporting of trial outcomes. Media coverage is heavily skewed toward reporting plaintiff wins and large damage awards. Unfortunately, this bias in reporting fuels legislative debate and public perceptions of the jury system.") (footnote omitted).

Insurance companies and other proponents of tort reform publicize large jury verdicts as indicative of the irrationality and incompetence of lay juries. For example, one widely-reported case involved a jury award of $2.7 million to a woman who suffered burns after spilling hot coffee served by a McDonald's Restaurant. Liebeck v. McDonald's Rests., Inc., No. CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994). Certain facts were unpublicized, including: the elderly plaintiff was a passenger in her grandson's car; the spillage occurred while the car was stopped and as she placed the styrofoam cup between her knees and attempted to remove the plastic lid; the plaintiff suffered third degree burns over six percent of her body; her injuries required eight days' hospitalization and skin graft surgery; McDonald's had received more than 700 claims resulting from coffee burns; McDonald's maintained its coffee at a serving temperature of 180-190 degrees when typical at-home serving temperature ranges between 135-140 degrees; the plaintiff would not have suffered serious injury had McDonald's maintained its coffee temperature at even 155 degrees; McDonald's had rejected the plaintiff's offer to settle for the amount of her medical expenses (about $11,000); and the trial court's remittitur of the award amount to $480,000. Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731–33 (1998); *The McDonald's Scalding Coffee Case*, ASSN TRIAL LAWS. OF AM., *at* http://www.atlanet.org/CJFacts/other/mcdonald.ht (last visited Oct. 28, 2001) (summarizing the little-known facts behind the McDonald's case); HANS, *supra* note 313, at 71–73 (observing that "few of these explanatory details ever made it into subsequent stories about the [McDonald's] case," and that generally the media "overrepresent[s] plaintiff win rates and award amounts"). As Professor Galanter has observed about such "folklore" or "horror stories":

> [A] substantial portion of the horror stories are stories of nutty claims that, if they are pursued at all, are quickly discarded by courts. Second, the stories invariably tell of a claim by an individual against an institution, governmental body, or corporation. If grotesque or unfounded claims are brought against

castigated as unreliable fact-finders susceptible to emotional and irrational determinations and incapable of comprehending complex material.[316] Accordingly, the Supreme Court's recent decisions have broadened the power of the federal appellate courts in an attempt to increase the judiciary's control over jury verdicts.[317] However, the language of the Seventh Amendment stands as a barrier to the Supreme Court's action because the Seventh Amendment disallows this particular judgment by expressly insulating jury fact-finding from federal appellate reexamination.[318]

In an anti-jury climate, federal appellate court review is promoted as a path to ensuring "justice."[319] The question, of course, is justice for whom? "Justice" necessarily contains a subjective element,[320] and one's definition of "justice" often will

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> individuals by other individuals or by corporate entities, they do not ascend into the pantheon of horror stories, nor do accounts of grotesque or frivolous defenses. It is a universe in which corporations and governments are victims, and individuals (and their lawyers) are the aggressors. Third, these stories are neither experiential nor analytic accounts, but disembodied cartoon-like tales that pivot on a single bizarre feature .... They are abstracted from media accounts and re-circulated by entrepreneurial publicists through a succession of other media. In the course of this re-circulation, they are further simplified and decontextualized.

Galanter, *supra*, at 731 (footnote omitted); *see also* Landsman, *Civil Jury System*, *supra* note 48, at 54 (noting Forsyth cautioned more than a hundred years ago against "arguments by anecdote," saying "[i]t would not be difficult for an opponent of the system to cite ludicrous examples of foolish verdicts, but they would be a very unfair sample of the average quality; and nothing can be more unsafe than to make exceptional cases the basis of legislation").

316. *See* HANS & VIDMAR, *supra* note 49, at 163 ("[T]he hard facts indicate that on the whole the jury behaves responsibly and rationally."); *id.* at 245 ("Critics have charged that the jury falls short on three main grounds: it is incompetent, it is prejudiced, and it wages war with the law. However, when hard facts rather than anecdote and opinion are considered, the charges do not appear warranted."). *See generally* Dooley, *supra* note 149 (examining the power distribution between judge and jury and analyzing the underlying factors leading to a cultural fear of jury irrationality); Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47 (1977); Lilly, *supra* note 50.

317. Refer to Parts III and IV *supra* (addressing the rationale behind the *Gasperini*, *Weisgram*, and *Leatherman* decisions).

318. U.S. CONST. amend. VII.

319. *See, e.g.*, *Schnapper*, *supra* note 6, at 253 (listing the two primary purposes of appellate review of civil jury verdicts as protecting against unbalanced cross-sections of the public on juries and protecting against jury biases).

320. As Judge Higginbotham has observed: "All judicial decisions ultimately reflect a certain arbitrariness. Although we often claim that our judicial decisions are more than mere attempts to justify a predetermined outcome and that they actually reflect reasoned analysis, this frequently belies reality." Higginbotham, *supra* note 316, at 56. *See also* CHILDRESS & DAVIS, *supra* note 2, § 3.11, at 3-113 (noting that "subjective valuations" often factor into jury awards); HANS, *supra* note 313, at 224 ("[T]he evaluation of the central issues in most trials depends on basic human judgment, not on highly technical issues understood by only a few experts.").

differ according to one's perspective.[321] When federal appellate judges are permitted to review the size of the verdict and the weight and sufficiency of the evidence, this necessarily injects the subjective views of those appellate judges onto the jury's determination. Regardless of the standard of review, the survival of the jury's determination on appeal will largely depend upon the appellate judges' subjective perceptions of its appropriateness.[322] However, the very reason behind the adoption of the Seventh Amendment was to constrain the power of the federal judiciary in favor of the community standards reflected in the jury.[323] Thus, the Court's recent

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A study of published federal appellate court decisions issued from October 1984 through October 1985 found a reversal rate of 49% for cases involving a challenge to the sufficiency of the evidence to support the jury's verdict. Schnapper, *supra* note 6, at 246–47. The study found "the likelihood that a jury verdict will be overturned on appeal depends to a substantial degree on the background of the judges who compose the particular appellate panel that decides each case." *Id.* at 248. In addition, this study showed that "in commercial litigation the appellate courts show no inclination to favor either side. But where a corporate or government defendant is sued by an injured individual, the courts of appeals generally uphold verdicts for the defendants, but reverse verdicts in favor of the plaintiffs." *Id.* at 250.

321. The Supreme Court seems to fear that juries do not accord "justice" to big businesses. The Court has expressly stated its concern that "juries will use their verdicts to express biases against big businesses." Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994). *See also* Marcia Coyle, *Term Reveals Pragmatic Supreme Court: Not Given to Speculation, the Court Addresses Only the Issues Directly Before It, Say Observers*, NAT'L L.J., July 29, 1996, at C2 (quoting the Vice President of the National Chamber Litigation Center of the U.S. Chamber of Commerce, who, in observing that recent Supreme Court decisions have been business friendly, stated: "[T]he Court is addressing some of the most vexing problems confronting business-tort reform. . . . The Court is not in our pocket, but we have had some fairly good decisions."). *But see* HANS, *supra* note 313, at 217, 220 (positing that the claim that "civil jurors are hostile to business . . . does not find much support in a close empirical analysis," and noting that all research projects "thus far have failed to find the predicted deep-pockets effect").

322. Brault & Lynch, *supra* note 185, at 94.

> When a judge sets aside a verdict that is the product of deliberations untainted by influences not created by the jury itself, such action entails the judge substituting his judgment of the facts and the credibility of the witnesses for that of the jury. . . . Such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts.

Id. (footnote omitted).

> Appellate reversals of jury verdicts are occurring in precisely the kinds of cases in which differences might well exist between the willingness of judges and of juries to protect vigilantly constitutional rights. Appellate panels have repeatedly overturned jury verdicts because the appellate judges were less willing than the jurors who had heard those cases to believe that officials would retaliate against private citizens for criticizing the government, or that police or prison officials would use or tolerate violence, and were less willing than juries to impose liability on cities or high ranking officials rather than just on low level employees.

Schnapper, *supra* note 6, at 255–56 (footnotes omitted).

323. Refer to notes 347–51 *infra* and accompanying text (discussing the Framers'

decisions directly contravene the Framers' intent.[324]

Admittedly, the jury system is imperfect. No one would dispute that juries, comprised as they are of individuals, are fallible.[325] But the judiciary, comprised as it is of individuals, is similarly fallible.[326] Indeed, if judges were infallible, there would be no need for appellate courts, because there would never be any need to reverse a prior court's ruling or other determination.

No one would deny that jurors may possess biases or prejudices.[327] But judges similarly possess biases and prejudices.[328] Indeed, the highly political nature of judicial

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intentions in adopting the Seventh Amendment). *See also* JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 6 (1994) ("[T]here would be little point to a jury system if we expected jurors always to decide cases exactly as judges would decide them. The whole point is to subject law to a democratic interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written."); HANS, *supra* note 313, at 226–27 ("[T]he verdicts of judges and juries overlap to a considerable degree, but when they diverge, the jury is more likely to incorporate community notions of justice into its decisions, because judges represent a narrower slice of society than jurors do.").

324. Refer to notes 31–51 *supra* and accompanying text. *See also* Dimick v. Schiedt, 293 U.S. 474, 490–91 (1935) (noting that the Seventh Amendment's purpose was "to safeguard the jury's function from any encroachment which the common law did not permit").

325. *See generally* Dooley, *supra* note 149, at 325 which asserts:

> The modern American jury has a bipolar presence in the popular consciousness. On the one hand, the jury is a cultural icon as revered in the United States as the flag, its contribution to democracy equated to voting. On the other hand, the jury is reviled as an agent of arbitrary injustice, its output considered evidence of the decline of moral consensus.

Id. (footnotes omitted). Milton D. Green, *Juries and Justice—The Jury's Role in Personal Injury Cases*, 1962 U. ILL. L.F. 152, 152 ("The jury system has been unmercifully beaten in the literature of the law for the past fifty years."); Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 502 (1976) ("The merits of the civil jury have long been debated by legal commentators.").

326. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 829 (2001) ("Our study demonstrates that judges rely on the same cognitive decision-making process as laypersons and other experts, which leaves them vulnerable to cognitive illusions that can produce poor judgments."); Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 5 (1994) (quoting Lord MacMillan as stating that "a judge does not shed the attributes of common humanity when he assumes the ermine. The ordinary human mind is a mass of prepossessions inherited and acquired, often none the less dangerous because unrecognized by the possessor. . . . [A judge] must purge his mind not only of partiality to persons, but of partiality to arguments, a much more subtle matter, for every legal mind is apt to have an innate susceptibility to particular classes of arguments").

327. As Professor Redish suggested:

> It has been contended that jurors, either consciously or subconsciously, often do not perform the task of fact finder in an objective manner, but rather are influenced by their personal likes or dislikes for the appearance, views or social position of the litigants. . . . [O]ften the entire trial setting is such that even well intentioned jurors will be caught up in the emotions and theatrics engendered by counsel and litigants.

Redish, *supra* note 325, at 502–03.

328. *See* MacCoun, *Inside the Black Box*, *supra* note 315, at 169 ("Judges are also vulnerable

appointments, and the corresponding political "litmus test" approach often employed in selecting judicial candidates, virtually ensures judicial biases and prejudices of some sort.[329]

Despite the jury's flaws, benefits also exist in the number[330] and diversity[331] of individuals on a jury panel. Other benefits of a

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[to extralegal biases], even with the best of intentions."); LLOYD E. MOORE, THE JURY: TOOLS OF KINGS, PALLADIUM OF LIBERTY 244 (2d ed. 1988) ("The serious claim is made that juries are prejudiced, irrational, and emotional. What trial lawyer would not occasionally find those same qualities in judges?"); Amar, *Reinventing Juries*, *supra* note 44, at 1174 ("Judges, of course, are charged with protecting... constitutional values; but they too have perverse and partisan incentives here."); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 846 (1935) (noting that "the political, economic, and professional background and activities of our various judges" are the "motivating forces which mold legal decisions"); Nugent, *supra* note 326, at 3 ("[A]ll judges, as a part of basic human functioning, bring to each decision a package of personal biases and beliefs that may unconsciously and unintentionally affect the decisionmaking process."); Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 HARV. L. REV. 1435, 1435 (1966) (noting that "the bias of the judge may not be apparent from the record"). However, "many judges are slow to accept the possibility of bias in their own decision-making, viewing the existence of partiality as improbable . . . ." Nugent, *supra*, at 49; *see also id.* at 5 ("[J]udges are typically appalled if their impartiality is called into question[,]... believ[ing] themselves to be consistently objective, impartial and fair.").

329. *See* David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1506–09, 1516–17 (1992) (declaring that the ideological screening of potential judges by the executive branch has created an incentive for judges to give, and Congress to seek, public commitments on specific issues); *id.* at 1507–08 (noting "institutionalized screening" by the executive branch occurs with respect to judicial appointments for the Supreme Court, the courts of appeals, and the federal district courts); *id.* at 1516 ("Whenever politics becomes strongly ideological, people who want to be on the Supreme Court have an incentive to campaign for the Court by reshaping their views. When a President pursues an ideological appointments strategy, the incentive is even greater."). For example, a study of published federal appellate court decisions issued from October 1984 through October 1985 noted:

> The likelihood that a jury verdict would be overturned was substantially higher if one or more members of the appellate panel had been selected by the Reagan Administration.... Opinions written by non-Reagan judges reversed jury verdicts in forty-four percent of all appeals, compared to a reversal rate of 77.3% in opinions written by Reagan judges. The disparity was even greater when an appellant challenged a jury verdict in favor of the plaintiff.

Schnapper, *supra* note 6, at 252–53.

330. The Supreme Court itself, in an earlier era, noted these benefits:

> Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1873). *See also* CHARLES W. JOINER, CIVIL JUSTICE AND THE JURY 136 (1962) ("[T]welve jurors can do these jobs better, in the long run, than one judge.").

331. The lack of diversity in original jury panels—which, of course, was matched by the equal lack of diversity in the composition of the federal judiciary—has been remedied in part by constitutional amendment. *See* Amar, *Reinventing Juries*, *supra* note 44, at 1173. Despite the potential and desire for further progress, the diversity of jury panels is

jury panel include the availability of voir dire to ascertain potential bias[332] and peremptory challenges to strike jurors with suspected biases—procedures unavailable to "screen" judges for their biases.[333] The potential drawbacks of juries were known at the time of the Seventh Amendment's adoption,[334] yet the Framers opted for lay fact-finding over judicial fact-finding.[335]

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far greater than the diversity of the federal bench.

332. *See* HANS & VIDMAR, *supra* note 49, at 67–72 (describing voir dire generally); Nugent, *supra* note 326, at 49 ("As the judicial system employs mechanisms to expose jurors' biases and permits parties opportunities to avoid a particular juror's biases, a jury may be the best means of protecting against the operation of the individual biases of judges."). As Professor Landsman has observed:

> The jury is the most neutral and passive decisionmaker available. It is not called upon to rule on any pretrial disputes, nor is it involved in the administration of the lawsuit. At trial, it hears only evidence that has been screened for objectionable and prejudicial material. Juries are made up of people who come together to hear one case; they are, therefore, unlikely to be tainted by the sorts of predispositions judges may develop over the course of their careers either about certain sorts of claims or certain lawyers or litigants. Because the jury comprises a group, no single juror's prejudices can destroy its ability to reach a fair decision. Moreover, its members may be questioned before trial in voir dire, which facilitates the removal of potentially biased individuals. All this is to be contrasted with the position of trial judges, . . . who have to labor unceasingly to manage the litigation before them, who inescapably bring their legal and political experiences into the courtroom with them, and who cannot be questioned regarding their opinions or sympathies.

Stephan Landsman, *The Civil Jury in America*, 62 LAW & CONTEMP. PROBS. 285, 288 (1999).

333. Although a motion for judicial disqualification is an available remedy when a judge's impartiality is questioned, this remedy is predicated upon counsel's knowledge of a basis for questioning the judge's impartiality. *See* 28 U.S.C. § 144 (1994) (requiring an affidavit containing statement of facts and reasons for believing the judge is biased); RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.10.1, at 21 (1996) (noting that attorneys should never file judicial disqualification motions "without a solid basis in fact and law . . . and unless careful investigation convinces the moving attorney that the judge against whom the motion is being directed actually possesses such bias"); Nugent, *supra* note 326, at 24 (noting that section 144 requires a party to prove "that the judge possesses actual personal bias or prejudice").

334. *See, e.g.*, 4 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 381–85 (1803) (discussing the "defects" of trial by jury but nevertheless concluding that even if these defects "continue unremedied and unsupplied, still (with all its imperfections) I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that was ever established in any country"); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1678 (2000) ("In recognizing that juries might protect the defendant's liberty, Blackstone also recognized circumstances in which local bias might threaten that liberty.").

335. Even if we assume that the criticisms of juries as being incapable, emotional, or irrational have some merit, these criticisms do not justify ignoring the Seventh Amendment. Perhaps the criticism that jurors are ignorant requires changes to voir dire strategy. *E.g.*, Amar, *Reinventing Juries*, *supra* note 44, at 1182 ("We do not try . . . to pick the most stupid persons imaginable to serve in our legislatures, or on our judiciary. When ordinary citizens vote, they have never been subject to a reverse literacy test reflected in the following joke: 'Knock knock . . . Who's there? . . . O.J. . . . O.J. who? . . .

Nor is the Seventh Amendment's Reexamination Clause an anachronism—an irrelevant impediment to modern legal practice and procedure.[336] Indeed, we need the jury today more than perhaps any other time in our history.

B. Should the Reexamination Clause be Reexamined?

The Supreme Court's effective disregard of the Reexamination Clause in its recent decisions, the gradual usurpation of jury fact-finding, and the criticism of juries in the popular press lead to the logical question of whether we should reexamine the Reexamination Clause.[337] In addition to the fallacy of the premises underlying criticisms of the jury explored in the previous Section,[338] however, the primacy of jury fact-finding serves several important purposes. Juries promote participatory democracy and provide an essential check upon the federal judiciary.[339] Moreover, permitting the federal appellate courts an enlarged scope of review over jury fact-finding fails to

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Congratulations, you're on the jury!'"); Stuart Taylor, Jr., *Selecting Juries: Dumb and Dumber*, LEGAL TIMES, Apr. 14, 1997, at 33 (noting "the deplorable tendency of the selection process to purge the best-informed people from juries" and quoting a prosecutor as saying: "Smart people will analyze the hell out of your case. They have a higher standard. They take those words 'reasonable doubt' and actually try to think about them. You don't want those people."). Perhaps the criticism that juries often do not understand the jury instructions requires more comprehensible jury instructions. *See, e.g.*, Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77 (1988) (discussing studies reflecting juror confusion over jury instructions); Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37 (1993) (analyzing numerous studies about jury instructions and concluding that jurors may better understand instructions if informed of their right to ask questions and provided with adequate responses). Perhaps the criticism that juries are susceptible to emotional pleas requires changes to the range of permissible trial tactics. *See, e.g.*, Carrington, *supra* note 33, at 67–69 (noting "the penetration of business advertising ethics and techniques into the presentation of cases in court," including "[c]arefully rehearsed testimony," the use of mock juries, forensic experts with "style and techniques that seem to be adapted from 'televangelism,'" and trial lawyers who have "mastered the media skills of Hollywood and Madison Avenue to enhance trial exhibits and presentations with graphic displays, some illuminating and others obscuring reality") (footnotes omitted).

336. *See* Guthrie et al., *supra* note 326, at 827 (concluding that "[o]n balance, . . . results suggest that those clamoring for judges to replace juries should proceed with caution").

337. Disregard of the principles of the Reexamination Clause is already apparent. Indeed, a study of federal appellate decisions issued in 1984-85, involving requests that the appellate court reexamine an issue of fact tried by a jury, found that of the 208 decisions addressing such requests, only one majority opinion and one dissent referred to the existence of the Seventh Amendment. *See* Schnapper, *supra* note 6, at 253.

338. Refer to notes 313–35 *supra* and accompanying text (discussing the fallacy in criticizing juries and the jury system).

339. *See* Higginbotham, *supra* note 316, at 58 (noting that "[t]he jury serves as a check upon the judge's power in each case").

acknowledge the pitfalls of such review, including the nature of appellate review generally, judicial economy, fairness to the litigants, the respective purviews of the trial and appellate courts, and the limited supervision of appellate courts.[340]

The popular denigration of the jury overlooks its crucial importance to both our system of participatory democracy and our system of checks and balances. Our representative form of government feels very distant to most people today.[341] Running for President or for Congress requires substantial financial resources that are unavailable to most citizens.[342] Becoming a judge requires powerful political connections.[343] The right to vote, although having far fewer restrictions, prerequisites, and impediments, is often viewed with apathy by constituents who dislike the available choices and believe their vote has little impact.[344] Compare these forms of participatory democracy with that of jury service.[345]

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340. *See id.* at 56–60 (discussing the "important contribution of juries in restoring the proper balance to the decisionmaking process").

341. *See* Brendan Troy Ishikawa, *Amending the Constitution: Just Not Every November*, 44 CLEV. ST. L. REV. 303, 310 (1996) (discussing the Framers' concerns of a distant and unresponsive government).

342. *See* Federal Election Commission, *Financing the 1996 Presidential Campaign* (reporting that in the 1996 presidential general election campaigns, Clinton spent $36,679,887; Dole spent $48,537,793; Perot spent $15,867,309), *available at* http://www.fec.gov/pres96/presgen1.htm (last visited Sept. 28, 2001); Federal Election Commission, *FEC Reports on Congressional Fundraising for 1997-98* (reporting that in 1998, the average spent by winning Congressional candidates was $4,796,969 for Senate candidates and $666,437 for candidates for House of Representatives), *available at* http://www.fec.gov/press/canye98.htm (last visited Sept. 28, 2001).

343. *See generally* Strauss & Sunstein, *supra* note 329 (discussing possible solutions to the problem of partisanship in Supreme Court nominations).

344. *See generally* Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596, 1596–1600 (discussing the apathy of the minority in majority vote settings).

345. *See* Gregory Kafoury, *Raiding the Initiative: Corporations vs. Citizens*, 34 WILLAMETTE L. REV. 729, 729–30 (1998) ("In our nation, we see the Congress, the presidency, and the state legislatures largely bought and paid for.... When a great corporation comes before 12 citizens, it cannot rig the outcome."); Amar, *Bill of Rights*, *supra* note 308, at 1187 (stating that although "[u]nable to harbor any realistic expectations about serving in the small House of Representatives or the even more aristocratic Senate, ordinary citizens could nevertheless participate in the application of national law through their service on juries"); *id.* at 1140 ("Precisely because ordinary citizens could not aspire to serve as national legislators, there was a vital need to guarantee their role as jurors. This was especially true because national laws, adopted by persons unfamiliar with local circumstances, would need to be modified in their application by representatives better acquainted with local needs and customs.") (footnote omitted). As Thomas Jefferson wrote: "Were I called upon to decide, whether the people had best be omitted in the legislative or judiciary department, I would say it is better to leave them out of the legislative. The execution of the laws is more important than the making of them." HANS & VIDMAR, *supra* note 49, at 36 (quoting THE WORKS OF THOMAS JEFFERSON).

The jury as an institution embodies democracy.[346] Today, jurors are drawn from voters of all races, occupations, backgrounds, and affiliations.[347] Each juror has an immediate, direct, and powerful impact on the resolution of a case. By participating on a jury, jurors learn something about the law and the legal system.[348] Jurors hold the power, duty, and responsibility of ensuring that they reach a reasoned consensus. Few opportunities combine education and experience, power and equality, knowledge and common sense, while simultaneously promoting democracy and civic duty.[349]

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346. *See* Amar, *Bill of Rights*, *supra* note 308, at 1210 ("I hope it has not escaped our notice that no phrase appears in more of the first ten amendments than 'the people.'"); Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218 (1995) ("Jury service was understood at the time of the founding by leaders on all sides of the ratification debate as one of the fundamental prerequisites to majoritarian self-government.").

347. *See* Amar, *Reinventing Juries*, *supra* note 44, at 1173 (noting the Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments "reaffirm popular self-government and demand only that all the people should count, and vote—[and] count and vote . . . in juries, too").

348. *See* HANS, *supra* note 313, at 225–26; Amar, *Bill of Rights*, *supra* note 308, at 1186 (noting that years ago, "judges often seized the occasion to educate the jurors about legal and political values"); Amar, *Reinventing Juries*, *supra* note 44, at 1174 (lamenting that "over the years, short-term convenience of litigants has won out against the long-run values of public education and participation").

349. *See* HANS, *supra* note 313, at 226 (indicating post-trial studies of jurors have commonly found them very positive about their jury experience, and suggesting "[j]ury duty could translate into a greater appreciation for the legal system"); *accord* Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 286, 298–99 (Robert E. Litan ed., 1993); JANICE T. MUNSTERMAN ET AL., NAT'L CTR. FOR STATE COURTS, THE RELATIONSHIP OF JUROR FEES AND TERMS OF SERVICE TO JURY SYSTEM PERFORMANCE 2, 6 (1991) (relating a study of state and federal courts involving 8,468 jurors and finding 81% percent had a favorable attitude toward jury service). This favorable response after jury service is remarkable in light of the burdens imposed by jury service and the attempt of some citizens to avoid jury service. *See* Amar, *Reinventing Juries*, *supra* note 44, at 1174 (noting that "[t]he benefits of jury service are widely dispersed—they redound to fellow citizens as well as the individual jurors. But the individual juror bears all of the cost—the hassle, the inconvenience, the foregone wages—of jury service."). "Jury service is not just a right, but a duty; predictably few of us have militantly insisted that we perform this duty, just as few of us insisted in the Reagan years that we pay our fair share of the intergenerational tax burden." *Id.* (footnote omitted). As Alexis de Tocqueville wrote:

> [T]he jury as an institution really puts control of society into the hands of the people . . . . Juries invest each citizen with a sort of magisterial office; they make all men feel that they have duties toward society and that they take a share in its government. . . . It should be regarded as a free school which is always open and in which each juror learns his rights . . . and is given practical lessons in the law . . . .

ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 273–75 (J.P. Mayer ed., George Lawrence trans., Harper Perennial 1969) (footnote omitted).

More importantly, the jury is a critical component in our system of checks and balances.[350] In essence, the federal judiciary is a form of aristocracy. Federal judges are neither elected by the people nor selected under a system of meritocracy; they are political appointees.[351] In limiting appellate review to questions of law and prohibiting appellate reexamination of jury fact-finding, the Seventh Amendment imposes an express constitutional check on federal judicial power.[352]

To the extent that federal appellate courts review a jury's factual determinations and the district judge's discretionary power to grant or deny a new trial, their role is transformed from that of appellate courts into super juries. Even aside from the constitutional prohibitions against this result,[353] federal appellate reexamination is undesirable for at least seven additional reasons: (1) the appellate court's distance from the original proceedings; (2) the respective specialties of the jury and the appellate court; (3) judicial economy; (4) fairness to litigants; (5) the increased difficulty of judicial disqualification at the

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350. *See* Amar, *Reinventing Juries*, *supra* note 44, at 1174 ("The jury was to check the judge—much as the legislature was to check the executive, the House to check the Senate, and the states to check the national government."); Amar, *Bill of Rights*, *supra* note 308, at 1196 ("[I]t is anachronistic to see jury trial as an issue of individual right rather than (also, and, more fundamentally) a question of government structure."); *id.* at 1186 ("Just as state legislators could protect their constituents against central oppression, so too jurors could obviously 'interpose' themselves against central tyranny through the devices of presentments, nonindictments, and general verdicts."); JOINER, *supra* note 330, at 18 ("The division of function between judge and jury creates a system of checks and balances built into the typical jury trial and unique in our system of judicial administration."); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE *FOR* 19 (1981) ("The question was not fundamentally whether the lack of adequate provision for jury trial would weaken a traditional bulwark of individual rights (although that was also involved) but whether it would fatally weaken the role of the people in the *administration* of government.").

351. U.S. CONST. art. II, § 2, cl. 2 (prescribing how federal judges are appointed). *See also* Charles Silver, *American Political Theory Considered—A Review of the Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory by Martin H. Redish*, 60 GEO. WASH. L. REV. 562, 583 (1992) (stating that federal judges are political appointees).

352. As one author has opined:

> [T]he jury system should be retained to keep the people participating in the administration of justice. . . . Not only does power tend to corrupt but it tends to give those who wield it a contempt for the masses. . . . [The jury] is independent of politicians and outside influences. It brings to the decision of each case an approach fresh from the community and in that broad field of discretion arising from disputed facts it applies community standards. These are the standards by which the parties to the action live. Truly the jury guarantees that the law shall belong to the people.

JOINER, *supra* note 330, at 146.

353. *See* U.S. CONST. amend. VII (establishing the right to jury trial and stating that facts tried by jury should not be reexamined).

appellate level;[354] (6) the limited supervision of the federal appellate courts;[355] and (7) the greater availability of procedural protections at the district court level.[356]

As an initial matter, appellate review is a paper review. The appellate judges did not observe the witnesses, did not hear the presentations, and did not watch the parties throughout the proceedings. Fact-finding is a multi-faceted process, and the appellate court simply does not possess all of the information available to jurors through their in-person observations.[357] There is an element of subjectivity in fact-finding and in justice itself.[358] Fact-finding does not involve merely the tallying of the number of witnesses for each side, and a "fair" verdict for a particular case cannot be identified with pinpoint precision.[359] It is these very ambiguities that the Framers intentionally chose to leave in the hands of the jury—and expressly withdrew from the hands of the federal judiciary.[360]

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354. *See* Edward G. Burg, Comment, *Meeting the Challenge: Rethinking Judicial Disqualification*, 69 CAL. L. REV. 1445, 1463 n.101 (1981) (discussing the difficulty of having appellate judges disqualified); Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 638 (1987) (noting the short notice in appellate courts and the complications that arise).

355. *See* 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY (illustrating that the number of Supreme Court filings has increased while the number of cases argued has decreased), *available at* http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html (last visited Oct. 3, 2001); Erwin Chemerinsky, *Supreme Court Review: The Shrinking Docket*, TRIAL, May 1996, at 71–72 (noting that the Supreme Court docket is shrinking while the number of certiorari petitions is rising).

356. *See* FED. R. CIV. P. 50 (Judgment as a Matter of Law); FED. R. CIV. P. 59 (New Trial).

357. As noted by Judge Nangle:

> It is impossible for any appellate judge or judges to read a bare transcript and secure from it all of the nuances bearing on the question of credibility—the lifted eyebrow; the "yes" which means "no" or "maybe," or vice versa; the delays or hesitations in answering questions; the soft-spoken word; the loud voice; the nervous voice; the quizzical glance.

Nangle, *supra* note 281, at 422 n.87 (citation omitted). *See also* George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. 14, 50 (1992) ("No record on appeal, however complete, can capture the richness of the trial situation. Moreover, even the most well-intentioned judge cannot always resist the temptation to take some trial court finding out of context.").

358. *See* Nugent, *supra* note 326, at 6 (noting that fact-finding contains a subjective component); refer to note 320 *supra* and accompanying text (discussing subjectivity in jury decisions and in the term "justice").

359. Refer to notes 319–22 *supra* and accompanying text (noting that subjective perceptions and perspectives influence fact finders and judges).

360. *See* Higginbotham, *supra* note 316, at 60 ("The jury performs a valuable function by resolving black box, or arbitrary, factual issues and spares the judiciary from engaging in subterfuge that weakens its credibility with the public. . . . [T]he absence of a jury generally results in a corresponding increase in the role and power of the appellate courts."); Carrington, *supra* note 33, at 33 (asserting that the "original mission of the civil jury was to constrain the power of the federal judiciary").

Second, even if the federal appellate court were in an equally good position as the jury to determine a particular fact, it does not follow that the appellate court should undertake such review—nor that the appellate court's perspective should prevail.[361] Such a notion upsets the entire foundation of traditional federal appellate review. Factual determinations are the "specialty" of the jury; legal determinations are the "specialty" of the appellate courts.[362] If we refuse to accord deference to the respective "specialties" of the courts, we must question the continued vitality and credibility of the district courts.[363] Federal appellate review of both legal and factual determinations undermines the legitimacy of the jury and the district court.[364]

Third, appellate reexamination of the facts encourages losing litigants to appeal and thus does not promote judicial economy. Reexamination of the facts by the appellate courts provides the losing attorney with another attempt at persuading the "fact-finder" that her client should prevail.[365]

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361. *See* Mars Steel Corp. v. Cont'l Bank N.A., 880 F.2d 928 (7th Cir. 1989):

> Fact-intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential because the role of appellate courts in establishing and articulating rules of law is not at stake. District judges have the best information about the patterns of their cases, information appellate judges could only duplicate at great cost in time. . . . Even when the dispute may be resolved by examining documents, the claim that the court of appeals is in as good a position as the district judge to review a written record disregards the division of labor (why should three judges redo the work of one?), the sense of the situation that is valuable on all occasions, and the fact that having redone all of the work the court of appeals would not produce a valuable precedent.

Id. at 933–34 (citation omitted).

362. Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985) ("The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise."); Fairchild v. Lockhart, 857 F.2d 1204, 1207 n.4 (8th Cir. 1988) ("This Court is not suited to hearing evidence and making findings of fact. That is a function for the district courts."); Mucha v. King, 792 F.2d 602, 606 (7th Cir. 1986) (noting Rule 52(a) of the Federal Rules of Civil Procedure rests "on notions of the proper division of responsibilities between trial and appellate courts rather than just on considerations of comparative accessibility to the evidence"); *id.* at 605 (appellate courts' "main responsibility is to maintain the uniformity and coherence of the law, a responsibility not engaged if the only question is the legal significance of a particular and nonrecurring set of historical events"). *See also* Edward H. Cooper, *Civil Rule 50(A): Rationing and Rationalizing the Resources of Appellate Review*, 63 NOTRE DAME L. REV. 645, 657 (1988) ("[T]rial courts are primarily responsible for sifting the evidence and finding the facts, while appellate courts are primarily responsible for developing the law.") (footnote omitted).

363. *See* Christie, *supra* note 357, at 56 ("There would be no point in having a trial . . . if the conclusions arrived at can be overturned merely because a subsequent reviewer disagrees with them.").

364. *See* Wright, *Doubtful Omniscience*, *supra* note 67, at 781.

365. *See Anderson*, 470 U.S. at 575 ("As the Court has stated in a different context,

Fourth, the litigants' interests and fairness concerns are also implicated. Civil appeals are expensive, putting poorer litigants at the mercy of wealthier litigants.[366] The certainty of the jury's determination is replaced by the uncertainty created by reexamination in the appellate court. It is ironic that at the same time that the Supreme Court has steadily restricted federal appellate review in criminal cases,[367] it is expanding appellate review and creating greater uncertainty in civil cases.

Fifth, procedures for disqualifying appellate judges are less well-defined[368] and less flexible than procedures for disqualifying jurors.[369] Moreover, potential grounds for disqualification often are more difficult to ascertain at the appellate level.[370] Attorneys typically do not even know the identities of the appellate judges who will hear their case until oral argument has been scheduled.[371] Moreover, in trial court proceedings, the district judge and attorneys have numerous contacts over a period of time,[372] which may reveal potential biases or prejudices. In

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the trial on the merits should be 'the main event . . . rather than a tryout on the road.'" (quoting Wainright v. Sykes, 433 U.S. 72, 90 (1977) (internal quotations omitted))).

366. *See* Laura C. Baucus, *How Long Should Bad Attorneys Have To Wait? The Immediate Appeal of Attorney Sanctions Under the Collateral Order Doctrine*, 46 WAYNE L. REV. 289, 293 (asserting that the "appeals process is extremely costly and time consuming").

367. *See, e.g.*, Ronald J. Tabak & J. Mark Lane, *Judicial Activism and Legislative "Reform" of Federal Habeas Corpus: A Critical Analysis of Recent Developments and Current Proposals*, 55 ALB. L. REV. 1, 4 (1991) (noting that the Rehnquist Court eliminated habeas writ for death row inmates without a congressional mandate); Gerald F. Uelmen, *2001: A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, 58 LAW & CONTEMP. PROBS. 13, 28 (1995) (suggesting that the difference between no counsel and incompetent counsel is a judicial fiction that enables courts to make distinctions under the Sixth Amendment that do not exist in reality).

368. The federal judicial disqualification statute, by its terms, applies only to district court judges, not appellate court judges. *See* 28 U.S.C. § 144 (1994) (referring to "any proceeding in a district court"); Pilla v. Am. Bar Ass'n, 542 F.2d 56, 58 (8th Cir. 1976) (stating that § 144 does not apply to federal appellate judges). This leaves recusal as the only remedy in the federal appellate courts—a remedy which is vested solely in the appellate judges themselves. Burg, *supra* note 354, at 1463 n.101 (noting that "the method for challenging appellate judges who refuse to step aside is a mystery. Section 144 does not apply because it is limited on its face to trial judges. Only § 455 [recusal] applies to appellate judges, and it contains no procedure for invocation.").

369. In particular, voir dire and peremptory challenges do not apply to appellate judges. Refer to note 332 *supra* and accompanying text (noting that there are several safeguards protecting against biased jurors).

370. *See* Stempel, *supra* note 354, at 639 (noting that this issue often "does not arise until after the panel has ruled on the merits. This is probably the result of the short notice of panel composition, the relatively fast pace of an appellate briefing and argument schedule, and the perhaps lower profile of circuit judges and their personal and financial ties.").

371. *See id.* at 638 (noting that "litigants are notified of the three-judge panel that will hear their case only a relatively short time before oral argument").

372. *See* FED. R. CIV. P. 16 (Pretrial Conferences).

contrast, an attorney's only contact with the appellate judges hearing the case is often a single, thirty-minute oral argument[373]—making the opportunities to learn of an appellate judge's potential bias exceptionally limited.

Sixth, there is only limited supervision of the federal appellate courts. As a practical matter, the federal courts of appeals are the courts of last resort for nearly all litigants. The United States Supreme Court grants fewer than 100 petitions for writs of certiorari each year,[374] just over one percent of the petitions filed.[375] Thus, as a practical matter, federal appellate court decisions are rarely reviewed.[376] This reality places the original verdict winner in jeopardy of losing her jury verdict unfairly, and without the possibility of correction, due to the de facto finality of the appellate courts.[377]

Finally, even if appellate reexamination of the facts would occasionally correct an erroneous result, this would not be universally true.[378] Appellate courts are not omniscient.[379]

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373. *See* Dennis Owens, *Appellate Brief Writing in the Eighth Circuit*, 57 J. MO. B. 75, 82–83 (2001) (noting that appellants must file statements stating the "amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument"); Karen J. Williams, *Help Us Help You: A Fourth Circuit Primer on Effective Oral Arguments*, 50 S.C. L. REV. 591, 592–93 (1999) ("The panels are selected randomly, and the attorneys arguing the appeal do not know prior to arriving at court on the day of their argument which judges will hear their case.... Individual cases are allotted up to one hour for oral argument—thirty minutes per side.") (footnote omitted).

374. 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html (last visited Oct. 3, 2001). The Supreme Court's Web site states that during its 1999 Term, it heard eighty-three cases and disposed of seventy-nine in seventy-four signed opinions. *Id.* In its 1998 Term, the Court heard ninety cases and disposed of eighty-four in seventy-five signed opinions. *Id.*

375. *See id.* (total number of case filings for 1999 Term was 7,377; the number of filings in the federal courts of appeals totaled 54,697); David G. Savage, *Docket Reflects Ideological Shifts: Shrinking Caseload, Cert. Denials Suggest an Unfolding Agenda*, 81 A.B.A. J. 40, 40 (Dec. 1995); Chemerinsky, *supra* note 355, at 71–72. *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 79–86 (1996) (examining the Supreme Court's caseload from 1960-1995).

376. By way of comparison, in 1999, the federal courts of appeals terminated 23,665 cases on the merits by affirming or reversing. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 11 (Dec. 31, 1999) *available at* http://www.uscourts.gov/judbus1999/b05sep1999.pdf (last visited Oct. 3, 2001). Using this figure—which excludes procedural terminations, dismissals, and remands—the Supreme Court reviewed fewer than 0.4% of the decisions of the federal courts of appeals. *Id.*

377. *See* 2000 YEAR-END REPORT ON THE FEDERAL JUDICIARY, *available at* http://www.supremecourtus.gov/publicinfo/year-end/2000year-endreport.html (last visited Oct. 3, 2001); ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, STATISTICAL TABLES FOR THE FEDERAL JUDICIARY 11 (December 31, 1999), *available at* http://www.uscourts.gov/judbus1999/b05sep99.pdf.

378. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 574–75 (1985) ("Duplication of the trial judge's [fact-finding] efforts in the court of appeals would very

Substantial procedural protections against error already exist in the district courts, including judgment as a matter of law, new trial, and remittitur. But these protections are absent, or at least attenuated, when the federal appellate courts function as de novo reviewers of jury fact-finding. If the jury's determination was correct, subsequent appellate "correction" will result in a substantive injustice. "The fairness rationale requires that there be a mechanism for correcting fact-finding errors in the trial court, but that appellate courts be prevented from 'correcting' non-existent errors. . . . [T]hat is an abstract ideal at best."[380]

The temptation to intermeddle is strong, if not overwhelming. But the Seventh Amendment expressly accords an important role to citizens through the civil jury in our democracy. We must not forfeit this role thoughtlessly. Unless and until the people's representatives choose to alter or eliminate the Reexamination Clause through the amendment process,[381] we should not be willing to permit the federal judiciary, no matter how well-intentioned, to second-guess the jury on appeal.[382]

The Supreme Court's retreat from its previous jurisprudence gravely undermines the Reexamination Clause. The Court's recent cases ignore the express proscriptions of the Seventh Amendment and expand the power of the federal appellate courts at the expense of the power of the people as manifested in the civil jury. The Court must recognize and enforce the Reexamination Clause's prohibitions against federal appellate court reexamination of facts before its encroachment in this area causes even greater mischief.

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likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.").

379. *See* Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible; we are infallible because we are final."); Guthrie et al., *supra* note 326, at 780 ("[W]holly apart from political orientation and self-interest, the very nature of human thought can induce judges to make consistent and predictable mistakes in particular situations."); *id.* at 784 ("[O]ur study provides empirical support for Jerome Frank's assertion that 'when all is said and done, we must face the fact that judges are human.'" (quoting JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 410 (1949))).

380. Sward, *supra* note 31, at 23.

381. *See* U.S. CONST. art. V. Professor Amar has suggested that constitutional amendment is also available by direct appeal to, and ratification by, a majority of voters. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043, 1044 (1988) (arguing that "We the people of the United States have the authority to amend the Constitution").

382. *See* Amar, *Bill of Rights*, *supra* note 308, at 1210 (noting that it is the "people who constitute the rock on which our Constitution is built"); *see also* Amar, *Reinventing Juries*, *supra* note 44, at 1174 ("The deepest constitutional function of the jury is to serve the people, not the parties—to serve them by involving them in the administration of justice and the grand project of democratic self-government.").

The recent expansion of federal appellate court power not only jeopardizes the foundation underlying the Reexamination Clause,[383] it also potentially jeopardizes the right to jury trial. Authorizing review of factual findings permits federal appellate judges to substitute their preferred result for that originally determined by the jury. The Reexamination Clause, which applies only to federal courts, means nothing if federal appellate courts may reexamine and ultimately redetermine the facts; the right to jury trial means nothing if a federal appellate court may disregard the jury's findings and impose its own factual conclusions.

VII. CONCLUSION

The Supreme Court's *Gasperini*, *Weisgram*, and *Leatherman* decisions contradict the Court's well-settled jurisprudence and subvert the Reexamination Clause of the Seventh Amendment. Authorizing federal appellate courts to review the size of jury verdicts, reweigh the evidence, and reevaluate the sufficiency of the evidence are constitutionally impermissible reexaminations of facts found by a jury. Indeed, these factual reexaminations are the equivalent of a new trial conducted by, and in, the federal courts of appeals. The reasoning in these recent cases poses a serious risk of expanding federal appellate court power to redetermine facts into other areas, thereby further undermining the Seventh Amendment. The right to a jury trial, so carefully preserved by the Seventh Amendment, will truly mean nothing if the jury's factual findings may be reweighed, reevaluated, and redetermined by new "fact-finders" on appeal.

383. *See* U.S. CONST. amend. VII ("[T]he right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined by any Court of the United States . . . .").