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Gasperini v. Center for Humanities, Inc.: State Jury Award Controls Supplant Seventh Amendment Protections

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Note

Gasperini v. Center For Humanities, Inc:[1] State Jury Award Controls Supplant Seventh Amendment Protections

> In the trial by jury, the right to which is secured by the 7th Amendment, both the court and the jury are essential factors. To the former is committed the power of direction and superintendence and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either, or to permit one to disregard the province of the other, is to impinge on that right.[2]

I. Introduction

In reviewing new trial motions on grounds of verdict excessiveness, should a federal court, sitting in diversity, apply a state or federal law standard of review? Whether such a motion is granted or denied, are federal courts of appeals barred from reviewing a district court decision by the Seventh Amendment's Re-examination Clause?

The Supreme Court has treated the Seventh Amendment as a compilation of two independent clauses, both of which preserve a separate and distinct right.[3] Together, the Amendment regulates the duties of and limitations upon both judge and jury within the federal court system.[4] However, the two clauses are

1. 116 S. Ct. 2211 (1996).
2. Slocum v. N.Y. Life Insurance Co., 228 U.S. 364, 382 (1913).
3. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-48 (1830). *See also* The Justices v. Murray, 76 U.S. (1 Wall.) 273, 277 (1870)
4. *See* Edmonson v. Leesvelle Concrete Co., Inc., 500 U.S. 614, 624-625 (1991); Dimick v. Schiedt, 293 U.S. 474, 485-88 (1935).

not "to be construed together," nor are they to be "regarded as inseparable."[5]

It is the contemporary abandonment of the second clause of the Seventh Amendment that is the focus of this article. The second clause states, "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, [other] than according to the rules of the common law."[6] This clause has been referred to as the Re-examination Clause.[7] Behind the adoption of the Re-examination Clause is a "studied purpose" to protect the right to a jury trial from future impairments resulting from attempts to enlarge re-examination power.[8]

The background section of this article will begin in Part II by tracing the development of the *Erie* doctrine.[9] The Supreme Court's traditional determination of whether federal or state law should supply the standard to review jury findings will also be addressed in Part II. Part III of the background will focus on the Seventh Amendment's prohibition on federal appellate court review of factual issues determined by a jury. Since the parameters of the prohibition are derived from the structure of English common law, the status of jury verdict review at the time of the adoption of the Seventh Amendment in the English judiciary system will be examined. Part III will close with a focus on the Supreme Court's traditional interpretation of the second clause of the Seventh Amendment and its more recent treatment by the courts of appeals. Thereafter, Part IV will trace the factual background and procedural history of the note case, *Gasperini v. Center for Humanities, Inc.*,[10] together with an outline of the Supreme Court's opinion and both Justice Stevens' and Justice Scalia's dissents.

The analysis section will examine the inapplicability of state law review standards to the review of federal trial rulings on new trial motions for jury verdict excessiveness. It shall be shown that the Court conducted an incomplete *Erie* analysis,

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5. *The Justices*, 76 U.S. at 277.

6. U.S. CONST. amend. VII. The first clause of the Seventh Amendment reads "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." *Id.*

7. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2222 (1996).

8. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

9. *See infra* Part II.

10. 116 S. Ct. 2211.

thus arriving at the erroneous conclusion that New York's Civil Practice Law and Rules 5501(c)[11] standard should be applied in federal court. Additionally, since the Federal Rules of Civil Procedure address the matter of granting new trials on grounds of verdict excessiveness, there should be no question that federal as opposed to state law should control. The second part of the analysis section will address the traditional interpretation of the second clause of the Seventh Amendment as a ban on federal appellate review of trial court decisions on new trial motions for excessiveness. Thereafter, the more recent deviation by the courts of appeals from this prohibitory history will be explored. It will be shown that the Supreme Court responded to this deviation by departing from tradition and validating this type of appellate review, notwithstanding a heated dissent from Justice Scalia. As a result, the Supreme Court indirectly delegated to the courts of appeals the responsibility of interpreting the Constitution. In the end, the status of the second clause of the Seventh Amendment was drastically downgraded.

II. Choice of Law: Erie Doctrine and the Designation of State or Federal Law

A. *The Rules of Decision Act and the Rules Enabling Act*

The Rules of Decision Act, § 34 of the Judiciary Act of 1789, requires that when federal courts preside over state actions, "[t]he laws of the several states, except where the Constitution . . . of the United States or the Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions."[12] One such limitation on the application of state law in federal courts is embodied in the Rules Enabling Act.[13] The Rules Enabling Act statutorily delegates to the Supreme Court, when directing federal courts, the authority to "prescribe, by general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals."[14] Pursuant to such authority, the Supreme Court adopted the Fed-

11. N.Y. C.P.L.R. 5501(c) (McKinney Supp. 1995).

12. 28 U.S.C. § 1652 (1995).

13. *See* Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 4-5 (1987) (citing Hanna v. Plumer, 380 U.S. 460 (1965)).

14. 28 U.S.C. § 2072.

eral Rules of Civil Procedure which define the structure and procedure of the federal court system.[15] However, the Supreme Court was precluded from formulating rules that would "abridge, enlarge, [or] modify the substantive rights" of any litigant.[16] A particular rule is encompassed within the scope of authority granted by the Rules Enabling Act and thus is constitutional if the issue addressed by the rule in question genuinely centers on procedure.[17] In the event that it is determined that a given rule under examination can be characterized as "indisputably procedural," that rule will be found to be constitutional.[18]

B. *Choice of Law: The Application of the Erie Doctrine*

1. Erie Railroad Co. v. Tompkins[19]

The *Erie* doctrine was first articulated in a negligence case filed by a Pennsylvania citizen in New York Southern District Court pursuant to diversity jurisdiction,[20] against a railroad incorporated in New York, for injuries inflicted in Pennsylvania.[21] Interpreting the Rules of Decision Act, the Court held that state substantive law should be applied in federal diversity actions.[22] Further, such applicable state law was to be derived from either state statutory or common law.[23] In so ruling, the Court declared that there was "no federal general common law."[24] Further, the Court continued, Congress lacked constitutional authority to craft "substantive rules of common law" which could be applied to state-created actions.[25]

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15. *See* Sears, Roebuck and Co. v. Mackey, 351 U.S. 427, 433 n.5 (1956).
16. *See* 28 U.S.C. § 2072.
17. *See* Sibbach v. Wilson & Co., Inc., 312 U.S. 1, 12-14 (1941). To determine if a matter relates to procedure, one must ask if the matter addresses "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Id.* at 14.
18. *Burlington*, 480 U.S. at 5.
19. 304 U.S. 64 (1938).
20. *See* 28 U.S.C. § 1332. Section 1332 states "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between . . . citizens of different [s]tates." *Id.*
21. *See Erie,* 304 U.S. at 69.
22. *See id.* at 78.
23. *See id.*
24. *Id.*
25. *See id.*

Therefore, *Erie* announced the legal principle that federal courts, sitting in diversity jurisdiction over state claims, must apply state substantive law.[26] The application of state law was necessary to avoid discrimination against a state citizen.[27] If state law was not applied, non-citizens, with the option of choosing the court in which to bring their action, could choose the law that would put them at an advantage and their opponent at a disadvantage.[28] The potential for disparate treatment between courts increased the possibility of forum-shopping.[29] Although the Court fashioned a solution to eliminate the risk of forum-shopping whereby state substantive law was to be applied by the federal court,[30] it failed to elucidate a clear analysis to be employed by lower federal courts in determining which issues were in fact substantive. The Court did, however, state that "matters governed by the Federal Constitution or by Acts of Congress" were explicitly exempt from being characterized as substantive.[31]

2. Guaranty Trust Co. v. York[32]

Guaranty Trust addressed the issue of whether a statute of limitations was substantive law.[33] More specifically, the issue was whether a state's statute of limitations should be applied in a federal court, sitting in diversity jurisdiction, even though the federal statute of limitations was longer.[34] First, Justice Frankfurter stated that an abstract characterization of particular elements of law as procedural or substantive was irrelevant to the issue of choice of law.[35] However, what was vital to the correct analysis was the understanding that a plaintiff's "right to recover," when suing on a state-created action in a federal court, stemmed from state law.[36] Accordingly, if a state court would bar recovery, a federal court was barred from providing a forum

26. *See Erie*, 304 U.S. at 64.
27. *See id.* at 75-77.
28. *See id.* at 74-75.
29. *See id.* at 75.
30. *See id.*
31. *See Erie*, 304 U.S. at 78.
32. 326 U.S. 99 (1945).
33. *See id.*
34. *See id.* at 107.
35. *See id.* at 109.
36. *See id.* at 108-09.

for recovery in that action.[37] In so determining, the Court declared that the necessary inquiry to pose in ruling on whether state law applies in federal court was not whether the particular state law concerned the "manner and means by which a right to recover . . . is enforced."[38] Rather, a state law will be characterized as a "matter of substance," and will be applied in federal court, if the application of the particular state law "significantly affect[s] the result of a litigation."[39]

The application of the state statute of limitations, instead of the federal statute of limitations, in *Guaranty Trust* would have had a significant effect on the action and would have acted as a total bar to recovery.[40] That is, the federal statute of limitations would have given life to a cause of action which was dead under state law.[41] Focusing on the effect state law had on the outcome of the litigation, the Court ruled that the state statute of limitations should apply.[42] The analysis engaged in by the *Guaranty Trust* Court would later be referred to as the "outcome-determinative" test.[43]

3. Byrd v. Blue Ridge Rural Electric Cooperative, Inc[44]

Following *Guaranty Trust*, some judicial commentators voiced the belief that the Court's expansive "outcome-determinative" test would undoubtedly engulf nearly every federal law of procedure.[45] However, *Byrd* signaled a modification of the *Guaranty Trust* interpretation of *Erie* which partially redirected the legal analysis on the choice of law question.[46] In *Byrd*, defendant, Blue Ridge, raised an affirmative defense under South Carolina law that the plaintiff, as a statutory employee of Byrd, was limited to workers' compensation and thus barred from tort recovery.[47] The issue before the Court was

37. *See Guaranty Trust*, 326 U.S. at 110.
38. *Id.* at 109.
39. *Id.*
40. *See id.* at 107.
41. *See id.* at 107, 109.
42. *See Guaranty Trust*, 326 U.S. at 110.
43. *See* Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring).
44. 356 U.S. 525 (1958).
45. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4504 (2d ed. 1996).
46. *See Byrd*, 356 U.S. at 525.
47. *See id.* at 526-28.

whether a South Carolina Supreme Court decision,[48] which assigned to the judge the factual determination of defining a person as a statutory employee, should be applied in federal court despite the federal policy, which required that all factual determinations be made by a jury.[49]

Interpreting the holding of *Erie*, the *Byrd* Court found that *Erie* required federal courts to conform to state law when such law substantially affected the outcome of the case in a manner that would result in a divergence between federal and state court holdings.[50] Applying this *Erie* interpretation to the instant case, the Court admitted that such a divergent outcome could, on the facts, be possible.[51] However, *Byrd* declared that the possibility of divergent results could not be exclusively considered when competing federal considerations exist.[52] The fact that a particular state law had a substantial impact on the outcome of a litigation was not dispositive of its application.[53] State law cannot be allowed to disrupt an essential function or the overall character of the federal judiciary.[54] Therefore, the objective of providing evenhanded enforcement of state rights and laws by the federal judiciary could not dictate an unquestioned application of those laws.[55] Rather, the state's interest in applying its law so as to avoid divergent outcomes must be weighed against competing federal policy interests.[56]

While balancing the competing federal and state interests in applying their respective laws, the *Byrd* Court noted that the Seventh Amendment and its protection of the jury trial was an essential part of the federal court system.[57] The state interest in allocating to the trial judge the task of deciding whether a party to a litigation was a statutory employee proved less weighty.[58] The state interest was accorded lower weight since

48. *See id.* at 533-34 (citing Adams v. Davison-Paxon Co., 96 S.E.2d 566 (1957)).
49. *See id.* at 533-34.
50. *See id.* at 536-39.
51. *See Byrd*, 356 U.S. at 537.
52. *See id.*
53. *See id.* at 537-38.
54. *See id.* at 538-39.
55. *See id.* at 537-38.
56. *See Byrd*, 356 U.S. at 538.
57. *See id.* at 539.
58. *See id.* at 538.

this state allocation of power to a judge was not inseparably intertwined with a particular right but rather was based upon state policy.[59] As a result, the state interest, which assigns to the judge the resolution of factual issues, was outweighed by the counter assignment of that function within the federal system to the jury via the Seventh Amendment.[60]

Thus, *Byrd* added to the *Erie* line of cases the need to balance competing state and federal interests where state and federal procedural law directly conflicted.[61] In making a determination of whether state law should be applied in federal courts, the Court stated that "countervailing considerations" would have to be examined together with the effects on a litigation's outcome.[62] However, the Court failed to articulate any clear list of such factors.[63] What the Supreme Court did articulate was a general proposition that those elements which are essential to the process of the federal judiciary and supported by the Constitution, such as allocation of certain functions to the jury under the Seventh Amendment, are on the counter considerations list.[64]

Lastly, after directing that a balancing of competing federal and state interests be conducted, the Supreme Court redirected its analysis to address the potential of divergent outcomes.[65] Although possible, the fact that a "different result would follow" under federal as opposed to state law was found to be dubious, especially in light of elements which existed within the federal system that would reduce any such divergence.[66] One such element that would decrease the potential for divergent outcomes in a particular case was the federal trial court judge's authority to review the weight of the evidence.[67] Since federal court judges are authorized to grant new trials when the verdict does not comport with the weight of the evidence, the possibility of

59. *See id.* at 534-36.
60. *See id.* at 539.
61. *See Byrd*, 356 U.S. at 537-39.
62. *See id.* at 537-39.
63. *See id.* at 537-38.
64. *Id.* at 539.
65. *See id.* at 539-40.
66. *See Byrd,* 356 U.S. at 539.
67. *See id.* at 539-40.

divergent verdicts is greatly decreased, as is the weight of the state's interest in having its law applied.[68]

4. Hanna v. Plumer[69]

The *Hanna* Court, revisiting the outcome-determinative test articulated in *Guaranty Trust*, declared that the test was never developed to be a "talisman"[70] or a "litmus test"[71] to determine whether to apply state law in a federal diversity case.[72] However, the *Hanna* court did reaffirm the stance that federal courts should apply state substantive law and federal procedural law.[73] Noting the potential for confusion as to where one begins and the other ends, the Court recognized that the line between the two characteristics varied depending on the legal nature of a case.[74] As such, the Court, frowning on strict, uniform implementation of a substantive-procedural analysis, advocated an application that would advance the "twin aims of the *Erie* doctrine: discouragement of forum-shopping and the avoidance of inequitable administration of the laws."[75]

However, the *Hanna* Court ruled that the analysis embodied in the *Erie* doctrine's substantive-procedural dichotomy need not be employed when a Federal Rule of Civil Procedure covered the issue in question, irrespective of conflicting state law.[76] Although the Court conceded that the *Erie* doctrine analysis had been applied in cases where one party argued that the Federal Rules of Civil Procedure controlled, applying the *Erie* doctrine on those occasions was appropriate because the scope of the Rules was being construed broadly.[77] However, where a state law conflicted with a Federal Rule of Civil Procedure and the latter was sufficiently broad to clearly speak to the issue in question, the federal rule must be applied, assuming it was a valid exercise of Congress' power under the Rules Enabling Act,

68. *See id.*
69. 380 U.S. 460 (1965).
70. *Hanna*, 380 U.S. at 467-68.
71. *Id.* at 466-67.
72. *See id.*
73. *See id.* at 465-66.
74. *See id.* at 471.
75. *Hanna*, 380 U.S. at 468.
76. *See id.* at 470.
77. *See id.*

as extended to the Supreme Court.[78] If however, the rule's scope did not speak directly to the issue at hand, the *Erie* doctrine analysis would control.[79]

C. *Erie Doctrine Applied to the Review of New Trial Motion for Excessive Jury Awards*

1. *The Second Circuit and the Erie Doctrine*

In 1952, the Second Circuit ruled that where federal jurisdiction is based upon diversity, the law of the state in which the federal court sits governs the measure of damages.[80] However, the court later questioned whether the standard to be employed when weighing the sufficiency of evidence in such a case was to be provided by state or federal law.[81] Without settling the issue,[82] the Second Circuit commented that the process of judging whether a trial court order directing that a new trial be had on grounds of excessive damages "[wa]s usually considered a matter of federal law."[83] This issue remained unsettled in the Second Circuit, at least until 1981, when the court acknowledged that the task of answering the question of whether federal of state law applied to this decision "had been a source of difficulty for federal courts."[84]

On an appeal from a trial court denial to set aside a verdict on grounds of excessiveness in *Martell v. Boardwalk Enterprises, Inc.*,[85] the Second Circuit stated that trial court action would be weighed against an abuse of discretion standard, which was derived from federal case law.[86] However, the court continued, in order for a federal court to decide whether the size of the jury set damages "shocked the judicial conscience" to a sufficient degree to warrant being set aside, reference must be made to comparable awards upheld in the state that provided

78. *See id.*

79. *See id.*

80. *See* Emerman v. Cohen, 199 F.2d 857, 858 (2d Cir. 1952).

81. *See* Index Fund, Inc. v. Insurance Co. of North America, 580 F.2d 1158, 1163 (2d Cir. 1978).

82. *See id.* at 1163.

83. Id. at 1163.

84. Hegger v. Green, 646 F.2d 22, 29-30, n.8 (2d Cir. 1981).

85. 748 F.2d 740 (2d Cir. 1984) (involving a personal injury case based upon diversity jurisdiction).

86. *See id.* at 750.

the action being sued upon.[87] In doing so, the *Martell* Court directed that federal court determinations on the issue of jury award excessiveness should mirror the maximum award level which would be condoned by state law.[88]

The stance in *Martell* was affirmed by the Second Circuit in *Consorti v. Armstrong World Industries, Inc.*[89] The *Consorti* Court, conducting an *Erie* analysis, determined that the question of what level of damages would be proper to award for a given injury was substantive in nature and should be controlled by state law.[90] However, the Court opined that the New York standard of equating excessiveness with any award that "deviated materially"[91] from reasonable compensation was ambiguous.[92] Nevertheless, the Second Circuit validated the application of state law, equating New York's "deviates materially" standard of reviewing excessive jury awards to a statutorily specified damage awards maximum, which the court noted was clearly substantive.[93]

2. *The Supreme Court's Application of* Erie *to Jury Award Review*

The Supreme Court, on two separate occasions, has suggested that when an appellate court reviews a damages award granted by a jury, it is governed by federal law.[94] Further, the Court has ruled that federal law should be applied by federal

87. *Id.*(quoting United States ex rel. Larkin v. Oswald, 510 F.2d 583, 589 (2d Cir. 1975)).

88. *See id.* at 740.

89. 72 F.3d 1003 (2d Cir. 1995).

90. *Id.* at 1011.

91. *See infra* Part II.D.

92. *See Consorti,* 72 F.3d at 1012.

93. *See id.* at 1011. The Second Circuit's decision was vacated by the Supreme Court so that the decision might be reviewed in light of the standard embodied within *Gasperini v. Center for Humanities, Inc. See* Consorti v. Owens-Corning Fiberglas Corp., 116 S. Ct. 2576 (1996). On remand, the Second Circuit confirmed that its initial ruling, which provided that state law applies in federal cases based on diversity jurisdiction, where the issue before the court was whether a jury award was excessive, was in line with the Supreme Court decision in *Gasperini. See* Consorti v. Armstrong World Indus., Inc., 103 F.3d 2 (2d Cir. 1996).

94. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2236-37 (1996) (Scalia, J., dissenting) (citing Browning-Ferris Ind. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79 (1989); Donovan v. Penn Shipping Co., Inc., 429 U.S. 648, 649-50 (1977)).

courts sitting in diversity in cases where there is a potential for infringement upon the rights of the Seventh Amendment as a result of operation by state law.[95] One such case which holds that the review of jury damage verdicts in a federal diversity suit should be governed by federal law is *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[96] There, the Supreme Court ruled that a district court's disposition of a new trial motion on grounds for excessiveness should be guided by the federal standard evolving out of Federal Rule of Civil Procedure 59.[97] Thus, when posed with such a motion, a court should question whether an "abuse of discretion" occurred.[98]

D. *New York's "Deviates Materially" Standard*

New York courts' traditional standard of reviewing verdicts for excessiveness was whether the award level "shocks the conscience."[99] The standard was identical to the one being employed by federal courts of appeals.[100] However, in 1986, New York enacted a new standard whereby state courts were required to determine if a verdict "deviated materially" from reasonable compensation.[101] As Governor Mario Cuomo noted in

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95. *See* Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525, 539 (1958); Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 376-77 (1913). *See also* WRIGHT, *supra* note 45, § 4511, at 314.

96. 492 U.S. at 278-279. Although stating that in a diversity case state law was to be applied to the legal basis of recovery and the propriety of granting punitive damages as well as to those elements that the jury should consider in setting the punitive award, federal law was to supply the correct standard of review to be employed by the district court and the court of appeals in reviewing the award. *See id.* The Court drew the distinction that state law ruled in determining whether the amount of an award was excessive for a particular injury but federal law supplied the standard used to determine if such excessiveness was so extreme as to warrant a new trial or remittitur. *See id.*

97. *See id.* at 279. The adopted rule, Federal Rule of Civil Procedure 59, states in pertinent part that "[a] new trial may be granted to all or any of the issues . . . 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." FED. R. CIV. P. 59.

98. *See Browning-Ferris*, 492 U.S. at 279; *see also Gasperini*, 116 S. Ct. at 2223.

99. N.Y. C.P.L.R. 5501(c) commentary at C5501:10 (McKinney 1995).

100. *See Gasperini*, 116 S. Ct. at 2217 (citing Consorti v. Armstrong World Indus., Inc., 72 F.3d 1001, 1012-13 (2d Cir. 1995)).

101. N.Y. C.P.L.R. 5501(c) commentary at C5501:10.

> In reviewing a money judgment in an action in which an itemized verdict is required . . . in which it is contended that the award is excessive or inade-

his executive memoranda that was issued on the day he signed the new standard into law, the purpose of the legislative change was to implement a standard of review of jury awards that would allow for greater appellate court discretion.[102] Relaxing the pre-1986 standard of review, the new standard provided New York appellate courts greater leeway to modify verdicts that they deemed unreasonable or excessive.[103] Although the new standard was directed at appellate courts, application of the standard by New York's trial courts to overturn excessive damages awards has been validated by several departments.[104] Some New York state courts have noted that a continued adherence to the former "shocks the conscience" standard by a trial court is erroneous, reasoning that trial courts should be applying the same standard as appellate courts.[105]

III. Appellate Review of Excessiveness of Jury Awards

A. *Federal Review*

1. *The Adoption of the Seventh Amendment*

One of the major controversies surrounding the newly-drafted Constitution was the lack of an express number of provisions articulating a basic sets of rights to be guaranteed to the new country's citizens.[106] One such right that was enjoyed by

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quate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation.

N.Y. C.P.L.R. 5501(c).

102. *See* 1986 N.Y. Laws 682. In the words of Governor Cuomo, the new standard "will assure greater scrutiny of the amount of verdicts and promote greater stability in the tort system and greater fairness for similarly situated defendants throughout the State." *Id.*; *see also Gasperini*, 116 S. Ct. at 2217-18.

103. *See Consorti*, 72 F.3d at 1003; O'Connor v. Graziosi, 131 A.D.2d 553, 554, 516 N.Y.S.2d 276, 277 (2d Dep't 1987).

104. *See* Shea v. Icelandair, 925 F. Supp. 1014, 1021 (S.D.N.Y 1996) (citing Inya v. Ide Hyundai, Inc., 209 A.D.2d 1015, 619 N.Y.S.2d 440 (4th Dep't 1994); Prunty v. YMCA of Lockport, Inc., 206 A.D.2d 911, 912, 616 N.Y.S.2d 117, 118 (4th Dep't 1994); Cochetti v. Gralow, 192 A.D. 2d 974, 597 N.Y.S.2d 234 (3d Dep't 1993); Shurgan v. Tedesco, 179 A.D.2d 805, 806, 578 N.Y.S.2d 658, 659 (2d Dep't 1992)).

105. *See* Wendell v. Supermarkets General Corp., 189 A.D.2d 1063, 1064-65, 592 N.Y.S.2d 895, 896-97 (3d Cir. 1993); *In re* New York City Asbestos Litigation, 173 Misc.2d 121, 660 N.Y.S.2d 803 (Sup. Ct. N.Y. County 1990).

106. *See* J. R. POLE, THE AMERICAN CONSTITUTION FOR AND AGAINST 17, 17-18 (1987); *see also* THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLU-

the colonists but was absent from the main text of the Constitution was a provision ensuring the right to jury trial.[107] Prior to the creation of a federal Constitution, eleven of the thirteen states had adopted specific provisions within their respective state constitutions ensuring the right to a civil trial by jury.[108] An attempt was made to insert a provision into the Constitution which would guarantee that "trial by jury shall be preserved as usual in civil cases."[109] However, due to the diversity of treatment and use of the jury trial among the states, no "usual" standard existed so this provision was not inserted.[110] The absence of an express provision creating the right to a jury trial in civil suits caused much consternation.[111]

A source of concern for the future status of the right to a jury trial was the expansive scope of review that was extended to the Supreme Court via Article III, § 2, cl. 2.[112] That provision granted the Supreme Court appellate authority to review questions of both law and fact.[113] The objection to this scope of federal appellate review was that facts found by a jury would be subject to a type of re-examination which differed from that which was allowed "according to the rules of the common

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TIONARY ORIGINS OF AMERICAN LIBERTIES 35 (Patrick T. Conley & John P. Kaminski eds., Madison House 1992). "Immediately upon the adjournment of the Constitutional Convention, Anti-federalists began their campaign against the Constitution because of its omission of a bill of rights." *Id.* at 25; Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 243 (1897).

107. U.S. CONST.

108. *See* BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND 86, 88-89 (1977).

109. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS, 1776-1791, 117 (1991).

110. *Id.*

111. *See* Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830). It was during a Constitutional Convention debate concerning the right to jury trial that the first motion was made to include in the soon to be proposed Constitution, a Bill of Rights which would provide for a number of fundamental rights. *See also* SCHWARTZ, *supra* note 108, at 104.

112. *See* Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 243 (1897); United States v. Wonson, 28 F. Cas. 745, 750 (C.C. Mass., May Term 1812) (No. 17, 750); Brief for the Petitioner at 23, Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996) (No. 95-719) (quoting Slocum v. N.Y. Life Insurance Co., 228 U.S. 364, 377 (1913)).

113. *See* U.S. CONST. art. III, § 2, cl. 2. "[T]he Supreme Court shall have appellate jurisdiction, both as to [l]aw and [f]act, ..." *Id.*

law."[114] In response to the proposed Constitution, eight states, concerned with the adoption of a Bill of Rights, advanced separate proposed amendments.[115] Of the eight states, seven noted the right to jury trials in civil cases as part of the amendment proposals.[116] No personal right was more frequently demanded by the states in the proposed amendments.[117] Ultimately, the Federalists, who characterized the inclusion of a clause granting the right to a jury trial as unnecessary,[118] conceded that the right would be amended to the Constitution by the First Congress.[119]

As anti-federalists voiced their concern that the constitutional grant of appellate review as exercised by the Supreme Court would indirectly culminate in the demise of the jury trial, the rights now secured by the Seventh Amendment began to come into constitutional focus.[120] James Madison concerned with the future of the right to trial by jury in civil cases sought to have the right preserved in its common law form.[121] Madison made a proposal during the first session of Congress that the

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114. *Chicago, Burlington and Quincy R.R. Co*, 166 U.S. at 243; United Gas Public Service Co. v. State of Texas, 303 U.S. 123, 151 (1938) (Black, J., concurring).

115. *See* SCHWARTZ, *supra* note 108, at 156-57.

116. *See id.* at 158.

117. *See id.* at 156-58. Out of all Bill of Right guarantees proposed to be embodied in the amendments, guarantees which did not speak to the personal rights of individuals that were proposed by each of the eight states were the right of the states to reserve those powers not specifically granted to the federal government, a bar on Congress from interfering in elections and a limit on the federal power to tax. *See* EDWARD DUMBAULD, THE BILL OF RIGHTS: AND WHAT IT MEANS TODAY 32-33 (Greenwood Press 1979) (1957).

118. *See* THE FEDERALIST NO. 83 (Alexander Hamilton). Alexander Hamilton acknowledged the "essentiality of trial by jury in civil cases" within the new governments structure. *See* id. at 259 (Alexander Hamilton) (Roy P. Fairfield ed., 2d ed. 1981). However, Mr. Hamilton argued that the right to a jury trial would be unaffected by the Constitution's adoption. *See id.* at 257.

119. *See* Donald S. Lutz, *The U.S. Bill of Rights in Historical Perspective*, *in* CONTEXTS OF THE BILL OF RIGHTS 12 (Stephen L. Schechter and Richard B. Bernstein eds., 1990). James Madison, a Federalist and a believer in the idea that a bill of rights was both dangerous and unnecessary, had promised that if the constitution was ratified, he would support legislation adopting a bill of rights. *See id.*

120. *See* The Justices v. Murray, 76 U.S. (1 Wall.) 273, 281-82 (1870) (citing THE FEDERALIST NO. 81 (Alexander Hamilton)); *see also* Slocum v. N.Y. Life Ins. Co., 228 U.S. 364, 377 (1913).

121. SCHWARTZ, *supra* note 108, at 167. *See also* Capital Traction Co. v. Hof, 174 U.S. 1, 7 (1899).

Constitution's grant of appellate jurisdiction to the Supreme Court be augmented so as to include the language, "nor shall any fact, triable by a jury, be otherwise re-examinable than according to the principles of the common law."[122] The proposal was defeated but its substance is reflected in the Seventh Amendment.[123] The debate on the right to civil trial by jury culminated in the adoption of the Seventh Amendment, together with the other rights secured by the Bill of Rights.[124] The ratified and adopted form of the Seventh Amendment reads as follows: "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."[125] With hindsight, the Supreme Court has affirmed that intent behind the adoption of the Seventh Amendment in its final form was drawn in such a manner so as to protect the jury trial right and to foreclose appellate factual review that is counter to the common law tradition.[126]

2. *Seventh Amendment's Re-examination Restriction is Derived From Common Law.*

a. *Could you be more specific?*

The Seventh Amendment provides that the re-examination of factual determinations made by a jury will only be permitted "according to the rules of the common law."[127] However, the Amendment failed to articulate from which common law the rules were to be derived.[128] The amorphous reference to common law in the Amendment also failed to designate the specific time period of common law to which the Amendment referred.[129] As a result, two questions were left unanswered: which common law should apply and during what time period of that common law should the Seventh Amendment be framed.

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122. *Hof*, 174 U.S. at 7.
123. *See id.* at 7.
124. *See* SCHWARTZ, *supra* note 108, at 181-86.
125. U.S. CONST. amend. VII.
126. *See* Chicago, Burlington and Quincy R.R. Co. v. Chicago, 166 U.S. 226, 243 (1897); Jacob v. City of New York, 315 U.S. 752 (1942).
127. U.S. CONST. amend. VII.
128. *See id.*
129. *See id.*

The reference to common law was not directed at the common law taking shape in the colonies at the time of the Seventh Amendment's adoption.[130] One reason cited as support for this contention is that the diversity of the law between colonies was extensive.[131] Rather, it has been generally held that the common law applicable to questions involving the Seventh Amendment is actually English common law.[132] Further, the general consensus has been that any interpretation of the Seventh Amendment's mandate hinges on the status of common law as it existed at the time of the Amendment's adoption in 1791.[133]

b. *English Common Law and the* Nisi Prius *System*[134] *in 1791*

The geographic base of the English common law system, at the time of the adoption of the Seventh Amendment, was in Westminster, England.[135] At the courts in Westminster, civil trials were commenced and pleadings were conducted.[136] Trials progressed there, with a full court of judges, sitting en banc,[137] presiding over and ruling on legal issues.[138] However, the en

130. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 8 (1899) (noting that Congress, when discussing the adoption of the Seventh Amendment, "had in view the rules of the common law of England; and not the rules of that law as modified by local statute or usage in any of the states").

131. *See* United States v. Wonson, 28 F. Cas. 745, 750 (C.C. Mass., Mat Term 1812) (No. 16, 750) ("the common law [the Seventh Amendment] alluded to is not the common law of any individual state, (for it probably differs in all)").

132. *See* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); *see also* Dimick v. Schiedt, 293 U.S. 474, 476-77 (1935); Liberty Oil Co. v. Condon National Bank, 260 U.S. 235, 243 (1922); Root v. Railway Co., 105 U.S. 189, 206-07 (1881) (citing Fenn v. Holme, 62 U.S. 21 How.) 481 (1858)).

133. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48 (1937); *Redman*, 295 U.S. at 657; *Dimick*, 293 U.S. at 476.

134. *Nisi Prius* courts are "courts [which] are held for the trial of issues of fact before a jury and one presiding judge." BLACK'S LAW DICTIONARY 1047 (6th ed. 1991).

135. *See* GEOFFREY RADCLIFFE & GEOFFREY CROSS, THE ENGLISH LEGAL SYSTEM 91 (G.J. Hand & D.J. Bentley eds., 6th ed. 1977).

136. *See id.* at 177-78.

137. *See id.* at 182; En banc is a "full bench" or "a session where the entire membership of the court will participate in the decision rather than the regular quorum." BLACK'S LAW DICTIONARY 526-27 (6th ed. 1991).

138. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF COMMON LAW 166 (5th ed. 1956).

banc court would not ordinarily rule on issues of fact at Westminster.[139]

When a disputed issue of fact arose, the en banc court in Westminster directed a jury trial be conducted via the *nisi prius* system.[140] *Nisi Prius* was functionally a circuit system, established for civil cases in 1285 by the Statute of Westminster II.[141] However, the *nisi prius* "trial judge was not a [separate] court"[142] from the en banc court, but rather, merely an extension of the court in Westminster.[143] Further, the system functioned solely for the convenience of the en banc court.[144] The system called for certain court officers to leave Westminster throughout the year and travel through England, forming a circuit structure, to preside over trials on issues of fact.[145] On writs of *nisi prius*,[146] officers acting within the *nisi prius* system performed the functions of supervising the jury trial and documenting the ultimate verdict when reached.[147] When a verdict was reached at the *nisi prius* trial, that proceeding was complete and the *nisi prius*' authority over the proceeding was terminated.[148]

The use of this system did not extend beyond its functional purpose of avoiding the burden of calling jurors, witnesses and parties to Westminster.[149] That is, the *nisi prius* judge could not enter judgment, but rather returned to Westminster with the verdict, where it was "added to the record of the case."[150] Upon receiving the verdict, the en banc court at Westminster proceeded to enter judgment.[151]

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139. *See* RADCLIFFE & CROSS, *supra* note 135, at 182.

140. *See id.* at 92.

141. *See id.* at 91.

142. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 20, 117 (2nd ed. 1979).

143. *See id.* at 19-20.

144. *See id.* at 19.

145. *See* RADCLIFFE & CROSS, *supra* note 135, at 182.

146. *See* BAKER, *supra* note 142, at 19.

147. W.J.V. WINDEYER, LECTURES ON LEGAL HISTORY 137 (2nd ed. 1949).

148. *See* RADCLIFFE & CROSS, *supra* note 135, at 185.

149. *See id.* at 92.

150. *See id.* at 92, 135.

151. *See id.* at 185.

Before entering a judgment, however, the en banc court accepted and ruled on all motions for new trials.[152] If a motion for a new trial was made, it was necessary to present such motion to the en banc court before it entered judgment.[153] The bases for new trial motions were that the damages awarded were excessive, the verdict was against the weight of the evidence, or the instructions given to the jury were erroneous.[154] In reviewing the motion, the en banc court had the benefit of the "notes taken by the trial judge and his report on the trial."[155] Nevertheless, a survey of English cases revealed that motions for a new trial based upon erroneous factual determinations by a jury would only be granted if such action was certified by the trial judge.[156]

Motions for new trials differed from an appeal of the verdict via a writ of error.[157] The latter was a means of appealing from an en banc court's judgment and was "in form, a new action commenced on a new writ."[158] As to the former, when an en banc court reviewed a new trial motion, it was not acting "in the capacity of a superior court."[159] However, since the en banc court commanded full authority to rule on these motions, additional or subsequent factual review by the appellate courts was foreclosed.[160]

c. *English Common Law Appellate Review*

At the time the Seventh Amendment was adopted, the avenues available for rehearing a civil case at English common law were severely limited.[161] After the en banc court had entered the judgment, the only avenue open for appeal was that of a

152. *See id.* at 186.

153. *See* BAKER, *supra* note 142, at 119-20.

154. *See* RADCLIFFE & CROSS, *supra* note 135, at 186.

155. *See id.* at 186.

156. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2819, n.18 (2d 1995) (citing Maxfield Weisbrod, *Limitations on Trial by Jury in Illinois*, 19 CHI.-KENT L. REV. 91, 92 (1940)).

157. *See* 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH COMMON LAW 213-214 (7th ed. 1971). For explanation of writ of error, *see infra* text accompanying notes 160-69.

158. WINDEYER, *supra* note 147, at 142-43.

159. BAKER, *supra* note 142, at 120.

160. *See id.* at 120.

161. *See* RADCLIFFE & CROSS, *supra* note 135, at 210.

writ of error.[162] Only on writs of error were the en banc judges directed to forward a case to a superior court.[163] However, writs of error were limited to legal issues "upon the face of the proceeding."[164] Since a writ of error was the only means of appeal, there was no avenue to review "an error in the determination of facts."[165] Therefore, a disgruntled party could not bring a writ of error claiming that the verdict was against the weight of the evidence or for the alleged erroneous denial of a new trial motion on the same grounds.[166]

An appeal, or writ of error, re-designated the case to a court different from the court in which the judgment was entered.[167] That is, on a writ of error, an appellant commenced an "entirely new proceeding" in a separate court.[168] In so reviewing, an appellate court could order a remittitur in certain cases, whereby the award winner was given the choice of accepting a reduced damages award or having a new trial ordered.[169] However, as to new trial motions, a trial court's denial was not reviewable on a writ of error.[170]

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162. *See* BAKER, *supra* note 142, at 120.

163. *See id.* at 118-20.

164. *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 405-06 (1967). Examples of errors that could be included in a writ of error were en banc decisions on a demurrer as well as any jury instructions that were given by the judge, if objected to on the record. WINDEYER, *supra* note 147, at 142-43.

165. BLACKSTONE, *supra* note 164, at 405-06. An appeal on a writ of error was "only on a question of law, never on questions of fact." WINDEYER, *supra* note 147, at 142-43.

166. *See* RADCLIFFE & CROSS, *supra* note 135, at 211-12.

167. *See id.* at 210.

168. *See id.* at 210.

169. *See* Dimick v. Schiedt, 293 U.S. 474, 482-87 (1935). The power of federal appellate courts to employ the use of a remittitur was validated as early as 1822 by Justice Story. *See id.* at 483. Justice Story, finding that the use of a remittitur was not in violation of the Seventh Amendment, noted that the practice was employed by English courts at the time the Seventh Amendment bar on appellate review of facts was adopted. *See id.* at 484-85.

170. *See* RADCLIFFE & CROSS, *supra* note 135, at 211-12; WINDEYER, *supra* note 147, at 142-43.

3. *Application of Common Law: The American Tradition*

a. *Supreme Court History Upholds the Seventh Amendment and Common Law Interpretation*

The Supreme Court established, through "a longstanding and well-reasoned line of precedent that" federal appellate courts were barred from reviewing factual issues settled by a jury.[171] A principal source of the prohibition on appellate review based was the Supreme Court's interpretation of the Re-examination Clause of the Seventh Amendment.[172] The Court has viewed the Clause as a general prohibition on federal appellate courts from re-examining factual findings of a jury.[173] The interpretation was consistent with the belief that the Re-examination Clause was actually drafted to allay fears that the appellate courts would wield the power to grant new trials on factual issues.[174]

Justice Story provided the first definitive interpretation of the Seventh Amendment's restriction on appellate factual review in *Parsons v. Bedford*.[175] The question presented in *Parsons* was whether it was error for a federal district court judge to refuse to transcribe certain testimonial facts so that they may be used for review by an appellate court.[176] Ruling that the purpose of the transcript was to provide a record of trial information to facilitate the review of the facts underlying the ver-

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171. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2230 (1996) (Scalia, J., dissenting). Justice Scalia interpreted this line of precedent to bar a federal appellate court from revisiting a district court's denial of a motion for a new trial premised on the grounds that the jury award was excessive. *See id.* at 2232. *See also* Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481 (1983).

172. *See Fairmount Glass Works*, 287 U.S. at 482-83 (other sources which have been citing as support for inhibiting appellate review of trial court rulings on new trial motions include (1) the language of §22 of the Judiciary Act of 1789, (2) the "historical limitation of the writ of error to matters within the record," which did not include new trial motions and (3) that the issue was simply a matter that should remain at the discretion of the trial court); Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 443-44 (1830). *See also* United Gas Public Service Co. v. State of Texas, 303 U.S. 123, 151 (1938) (Black, J., concurring).

173. *See Parsons*, 28 U.S. (3 Pet.) at 447-48.

174. *See* Walker v. New Mexico & Southern Pac. R.R. Co., 165 U.S. 593, 593, 596; United States v. Wonson, 28 F.Cas. 745, 750 (C.C. Mass., May Term 1812) (No. 16, 750).

175. 28 U.S. (3 Pet.) 433 (1830)

176. *See id.* at 441-43.

dict, Justice Story reasoned that such district court action was not error.[177] Justice Story stated that such action would have been considered error if the Supreme Court could have acted on the record or performed some factual review.[178] However, the common law system of review, extended to the federal system via the Re-examination Clause of the Seventh Amendment, barred such review of fact findings determined by a jury.[179] As was the case at common law, such facts can only be re-examined via a new trial, which could only be granted "by the court where the issue was tried or to which the record was properly returnable, or . . . by an appellate court for some error of law."[180]

The question which logically follows is which issues are encompassed in the fact-finding domain of the jury. The acts of weighing witness credibility and reaching ultimate conclusions from controverted facts are well within the scope of the jury's sole authority.[181] Stated otherwise, the determination of liability in a case was a factual issue to be settled by a jury.[182] Additionally, the determination as to the correct level of assignable damages to a particular injury illustrated a question of fact to be determined by the jury.[183] Assuming there is no violation of a statutory designated maximum recovery amount,[184] an inquiry into a damages award on the grounds of excessiveness is a

177. *See id.* at 443-49.

178. *See id.*

179. *See id.*

180. *Parsons*, 28 U.S. (3 Pet.) at 448. This common law limitation has been echoed by the Supreme Court on a number of occasions. *See* Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899); Lincoln v. Power, 151 U.S. 436, 438 (1894); New York Cent. & Hudson R.R. Co. v. Fraloff, 100 U.S. 24, 31 (1879); Slocum v. N.Y. Life Insurance Co., 228 U.S. 364, 397 (1913); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935).

181. *See* Ellis v. Union Pac. R.R. Co., 329 U.S. 649, 653 (1947); Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944).

182. *See Ellis*, 329 U.S. at 652-53; Dimick v. Schiedt, 293 U.S. 474, 486 (1935); Preston v. Prather, 137 U.S. 604, 609 (1891). *See also* WRIGHT *supra* note 156, § 2820, at 208.

183. *See Dimick*, 293 U.S. at 486; Kennon v. Gilmer, 131 U.S. 22, 29 (1889). *See also* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2232 (1996) (Scalia, J., dissenting) (quoting St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648, 661 (1915)).

184. *See* Miller v. Maryland Casualty Co., 40 F.2d 463, 464 (2d Cir. 1930) (citing Southern Ry.—Carolina Div. v. Bennett, 233 U.S. 80 (1914)). *See also* WRIGHT *supra* note 156, § 2820, at 207.

question of fact,[185] and remains such on appeal.[186] Accordingly, a subsequent motion for a new trial based upon a claim of excessiveness of a jury award is also considered strictly a question of fact.[187]

The Supreme Court has historically ruled that federal appellate courts are barred from reviewing a jury verdict for damages as being against the weight of the evidence.[188] Furthermore, the bar on appellate review of factual issues determined by a jury extends to the Supreme Court, regardless of whether the case arises from a state or federal court.[189] In addressing any such action, the Court has stated that any factual review thereon be undertaken solely at the direction of the trial court.[190] Thus, where the instructions posed to the jury were

185. *See Craft*, 237 U.S. at 661. The issue of whether a given jury verdict is excessive represents a question of fact since 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." Metropolitan R.R. Co. v. Moore, 121 U.S. 558, 574 (1887).

186. *See Bennett*, 233 U.S. at 87; Herencia v. Guzman, 219 U.S. 44 (1910); Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883). The Court noted that since "there was evidence proper for the consideration of the jury the objection that the . . . damages were excessive cannot be considered." *Herencia*, 219 U.S. at 45.

187. *See* Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-82 (1933); *Gasperini*, 116 S. Ct. at 2232 (Scalia, J., dissenting) (quoting *Moore*, 121 U.S. at 574.) *See also* WRIGHT *supra* note 156, § 2820, at 208.

188. *See* McCaughn v. Real Estate Land Title & Trust Co., 297 U.S. 606, 608 (1936); Lehnen v. Dickson, 148 U.S. 71, 72-73 (1893); Wilson v. Everett, 139 U.S. 616, 621 (1891); Lancaster v. Collins, 115 U.S. 222, 225 (1885).

189. *See* Republican River Bridge Co. v. Kansas Pac. R.R. Co., 92 U.S. 315, 317(1875). *See also* Kaufman v. Tredway, 195 U.S. 271, 273 (1904) (issue of whether payment of money was made while payor was insolvent and whether recipient had cause to know such was intended as a preference was not reviewable by the Court); Packet Co. v. McCue, 84 U.S. 508, 514 (1873) (where the jury was posed with the issue of whether decedent was still within the master-servant relationship when he slipped off a dock and died of injuries sustained, "their decision on [this] question of fact [was] not subject to review" by the Supreme Court"); Marine Ins. Co. of Alexandria v. Young, 9 U.S. (5 Cranch) 187, 191 (1809) (the Court could not revisit the factual issue submitted to the jury of whether defendant had notice of an approaching storm).

190. *See* New York, L.E. & W.R.R. v. Winter's Adm'r, 143 U.S. 60, 75 (1892); Barreda v. Silsbee, 62 U.S. (21 How.) 146, 166-67 (1859); Parsons v. Bedford, 28 U.S. (3 Pet) 443, 447 (1830). *See also* Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 358-59 (1962) (Neither the Supreme Court or a court of appeals could "redetermine facts found by the jury any more than the [d]istrict [c]ourt can predetermine them.").

legally sound and there did not exist an alternative legal question at issue, subsequent appellate review was foreclosed.[191]

As stated, this review prohibition has included the review of whether a jury award was excessive.[192] Even if an appellate court thought the jury award returned should have been a higher or lower amount, that court lacked the power to affect that verdict.[193] Since verdict excessiveness reflected a factual matter rather than an issue of law, denials for new trials based upon verdict excessiveness cannot be revisited on appeal.[194] That is, because motions for new trials for verdict excessiveness are necessarily factual questions, the denial of such a motion based upon a claim that the verdict was counter to the weight of the evidence is not subject to review.[195]

b. *A Few Cracks in the Wall: Some Cases Tinker With the Scope of the Seventh Amendment*

The Seventh Amendment and its bar on appellate re-examination of facts has not been interpreted and applied as a legal straightjacket, denying any trace of modern judicial development in favor of the minutiae of common law practice.[196]

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191. *See* Delaware, Lackawanna & Western R.R. Co. v. Converse, 139 U.S. 469, 475 (1891); New York Cent. & Hudson R.R. Co. v. Fraloff, 100 U.S. 24, 31 (1879). *But see* WRIGHT *supra* note 156, § 2818, at 197.

192. *See generally* St. Louis, I.M. & S.R. Co. v. Craft, 237 U.S. 648, 661 (1915); *Gasperini*, 116 S. Ct. at 2232, n.3 (Scalia, J., dissenting) (quoting Wabash Ry. Co. v. McDaniels, 107 U.S. 454, 456 (1883) ("That we are without authority to disturb the judgment upon the grounds that the damages are excessive cannot be doubted.")); Kennon v. Gilmer, 131 U.S. 22, 29 (1889).

193. *Fraloff*, 100 U.S. at 24. "[H]owever it was ascertained by the court that the verdict was too large . . . the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this court." *Gasperini*, 116 S. Ct. at 2232, n.3 (Scalia, J., dissenting) (quoting Arkansas Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 75 (1889)); *Wilson*, 139 U.S. at 621 (the Supreme Court was barred from redetermining whether a $10,000.00 jury verdict "should have been for either $5,000. or $15,000").

194. *See Wilson*, 139 U.S. at 621; *Craft*, 237 U.S. at 661. *See also* Arkansas Valley Land v. Cattle Co., 130 U.S. 69 (1889). *See also* WRIGHT *supra* note 156, § 2820, at 218.

195. U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940); *Kennon*, 131 U.S. at 29; *see also* The "Abbotsford", 98 U.S. 440, 444-45 (1878).

196. *See* Galloway v. U.S., 319 U.S. 372, 390-92 (1943). *See, e.g.*, Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494 (1930). In an action for breach of contract where there were issues of liability and damages, an appellate grant of a new trial solely for on the issue of damages was upheld even though a grant allowing for a new trial of part of an action was nonexistent at common law.

Rather, the Court has repetitively articulated a stance that the Seventh Amendment draws into the federal judicial system only the essential substance and not the entire form of practice at common law.[197] That view maintains that not every common law procedural element need be adhered to in the federal system.[198] Such a stance could be validated on grounds that the rules which existed at the time the Seventh Amendment was adopted were not exactly "crystalized into a fixed and immutable system," but were rather in a state of flux and constant development.[199] Nevertheless, the Court has continued to reduce the scope of procedural elements which enjoy the protection provided by the Seventh Amendment.[200] Recently, the Court has declared that the Seventh Amendment protection extends only to those "incidents which are regarded as fundamental . . . and of the essence of the system of trial by jury."[201]

4. *Mirroring Common Law, Federal Trial Courts Can Alter Jury Findings*

As was the practice at common law, federal trial courts had the power to review certain factual issues determined by the jury, including the size of awarded damages.[202] In actuality, only the trial judge could exercise the authority to field factual errors arising from the trial.[203] In performing such a review, the trial or district court judge determines if the evidence

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See id. at 497. In validating its action, the Court noted that it was "not now concerned with the form of the ancient rule," but rather with its substance." *Id.* at 498. *But see* Liberty Oil Co. v. Condon National Bank, 260 U.S. 235, 242 (1922) ("The right of trial by jury is preserved exactly as it was at common law.").

197. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336 (1979); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); Galloway v. U.S., 319 U.S. 372, 390-92 (1943).

198. *See Redman*, 295 U.S. at 657; *Ex parte* Peterson, 253 U.S. 300 (1920); Walker v. New Mexico & Southern Pac. R.R. Co., 165 U.S. 593, 596 (1897).

199. Galloway v. U.S., 319 U.S. 372, 389-92(1943).

200. *See* Markman v. Westview Instruments, Inc., 517 U.S. 370, ___ (1996).

201. *Id.* at ___ (quoting Tull v. United States, 481 U.S. 412, 426 (1987).

202. *See* Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481-83, n. 8 (1933) (providing an extensive listing of cases noting that such decision is within the discretion of the trial judge); Arkansas Valley Land v. Cattle Co., 130 U.S. 69 (1889). *But see* Dagnello v. Long Island Lighting Co., 289 F.2d 797, 802-803 (2d Cir. 1961).

203. *See Fairmount Glass Works*, 287 U.S. at 481; U.S. v. Laub, 37 U.S. 1, 5 (1838).

presented and submitted to the jury was sufficient to support the verdict.[204] After the jury has settled all factual questions and set an award, facts could be re-examined via a new trial granted "by the court where the issue was tried or to which the record was properly returnable."[205] A trial judge, in contemplating whether to grant a new trial, could draw his conclusions directly from the evidence he saw and witnesses he heard testify first hand.[206] By operation of those determinations, trial court judges were able to provide a sufficient safety valve whereby excessive or runaway verdicts were examined and regulated.[207]

5. *The Second Circuit Extends Appellate Reach*

In *Miller v. Maryland Casualty Co.*,[208] the Second Circuit, posed with a trial court denial of a new trial motion grounded upon the level of damages awarded, stated that it lacked the power to review the motion on appeal.[209] In support of its ruling, the court noted that at common law, a new trial motion was a separated review process from a bill of exceptions and that there was no review of trial court decisions on such motions.[210] Without a violation of a statutorily set damages limit,[211] rulings as to the excessiveness of damages was to remain within the discretion of the trial court.[212] In certain cases, however, some appellate courts began to assert the power to review trial court orders denying new trial motions when a case could be made that the trial court abused its discretion.[213] Although counter to Supreme Court practice, the Second Circuit commented that

204. *See* Metropolitan R.R. Co. v. Moore, 121 U.S. 558, 568 (1887). *See also* WRIGHT *supra* note 156, § 2806, at 63-67. *But see Galloway*, 319 U.S. at 389.

205. Parsons v. Bedford, 28 U.S. (3 Pet.) 443, 448 (1830).

206. *See* Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 215-16 (1947); *Moore*, 121 U.S. at 572-73. *See also* WRIGHT *supra* note 156, § 2818, at 196-97.

207. *See* Honda Motors Co. v. Oberg, 114 S. Ct. 2331, 2335 (1994); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991).

208. 40 F.2d 463 (2d Cir. 1930).

209. *See id.* at 464.

210. *See id.*

211. *See id* (citing Southern Ry.—Carolina Div. v. Bennett, 233 U.S. 80 (1914)); Astles v. Quaker City Bus Co., 158 F.2d 979, 980 (2d Cir. 1947) (award in excess of a statutory damage maximum would trigger a question of law that is subject to appellate review).

212. *See Miller*, 40 F.2d at 464.

213. *See id.* at 465.

such "gloss ha[d] become the supposed principle" and a misguided general belief germinated that this type of review was valid.[214]

After *Miller*, one case noted that limited appellate review existed[215] whereas others found that there was no review of denials of new trial motions.[216] In *Stevenson v. Hearst Consolidated Publications, Inc.*,[217] the Second Circuit again clearly articulated the doctrine that Courts of Appeals lack the authority to revisit trial court orders denying or granting new trial motions based on errors of fact, which includes the excessiveness of jury awards.[218] Less than ten years later, the Second Circuit validated such appellate review in *Dagnello v. Long Island Railroad Company*.[219]

Cataloging the history of case law that barred such review, the *Dagnello* court commented that it was "strange that the rule of non-reviewability should have hung on so long," in light of scholarly commentary in its favor.[220] In validating its new power, the Second Circuit first noted that at common law, new trial motions were neither addressed to trial judges nor were those judges authorized to grant new trials on grounds of monetary award excessiveness.[221] The court continued its analysis by stating that the Seventh Amendment should not be allowed to "perpetuate in changeless form the minutiae of trial practice" at common law.[222] The court reasoned that the validation of federal appellate court review of a trial court orders denying new trial motions based on excessiveness would not impact the

214. *Id.*

215. *See, e.g.*, Herring v. Luckenbach S.S. Co., 137 F.2d 598, 599 (2d Cir. 1943) (Appellate review is allowed where there is an "improper excess . . . clearly ascertainable from the record.").

216. *See* Flint v. Youngstown Sheet & Tube Co., 143 F.2d 923 (2d Cir. 1944); Powers v. Wilson, 110 F.2d 960 (2d Cir. 1940) (where a jury assessed damages without exceeding a legal maximum, the Second Circuit hesitated to review a trial court denial of a new trial motion, explicitly refusing to engage in an abuse of discretion analysis).

217. 214 F.2d 902 (2d Cir. 1954).

218. *Id.* at 910.

219. 289 F.2d 797 (2d Cir. 1961).

220. *Id.* at 806.

221. *See id.* at 802-03 n.9.

222. *Id.* at 803-04 (quoting Dimick v. Schiedt, 293 U.S. 474, 490-91) (1935) (Stone, J., dissenting).

essential elements of common law practice in the "slightest degree."[223]

In an effort to derail any argument that an appellate court was not in an efficient position to engage in such review, the Second Circuit confirmed that appellate courts "perform this function daily and with satisfaction to the public."[224] Embracing an abuse of discretion standard, the court warned that reversing trial court orders related to damage excessiveness warranted restraint yet such appellate action was necessary when an award was "so high that it would be a denial of justice to permit it to stand."[225] Drawing support from other circuits, the *Dagnello* court noted that at least eight other courts of appeals had already validated such review and others seemed to agree with such a position.[226] The Second Circuit affirmed *Dagnello's* appellate review in *Consorti v. Armstrong World Industries, Inc.*, wherein it validated the application of New York's standard thus allowing itself to revisit the facts assessed by the jury and modify the award to a reasonable level of compensation.[227]

6. *The Supreme Court Passes on Addressing the Question of Appellate Review*

The Supreme Court has approached the issue of appellate review of factual issues settled by a jury but has never settled

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223. *Id.* at 805.

224. *See Dagnello*, 289 F.2d at 806.

225. *See id.* at 806. *Accord* Narin v. National Railroad Passenger Corp., 837 F.2d 565, 566-67 (1988); Yodice v. Koninklijke Nederlandsche Stoomboot Maatchappij, 471 F.2d 705, 706-07 (1972). *But see* Stonewall Insurance Co. v. Asbestos Claims Management Corp., 73 F.3d 1178, 1199 (2d Cir. 1995) (a trial court denial of a new trial motion made on grounds that the verdict was against the weight of evidence is "one of those few rulings that is simply unavailable for appellate review).

226. *See Dagnello,* 289 F.2d at 802. *See also* CHARLES ALAN WRIGHT ET AL., *supra* note 156, § 2820 (all the circuits have validated this type of appellate review); Grunenthal v. Long Island Railroad Co., 393 U.S. 156, 157 n.3 (1968).

227. Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1003, *vacated by Consorti*, 116 S. Ct. 2576, 2576 (1996), *on remand,* 103 F.3d 2 (1996). The Supreme Court invalidated the approach to the review taken by Consorti. *See* Gasperini v. Center for Humanities, Inc.,116 S. Ct 2211, 2221 (1996). Rather, as the Second Circuit summarized on remand, the state standard of review was to be applied by the trial court and the federal appellate court was to review any resultant determination under the standard of abuse of discretion. *See Consorti*, 103 F.3d at 4.

the issue.[228] In 1933, the Court was presented with the issue, in *Fairmount Glass Works v. Cub Fork Coal Co.*, of whether it could overturn a jury verdict based upon an abuse of discretion by the trial court.[229] The Court recognized that it has often refrained from setting aside verdicts which could be characterized as excessive, with "the circuit courts of appeals . . . generally follow[ing] a similar polity."[230] However, in the end, the Court stopped short of ruling whether such power existed.[231]

More recently in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, the Court addressed the issue of an appellate court's authority to review a denial of a new trial on the grounds of excessiveness.[232] In *Browning-Ferris*, the District Court declined to set aside a six million dollar punitive damages award as excessive. The court of appeals, applying an abuse of discretion standard, reviewed and affirmed the ruling.[233] Noting that it was not "review[ing] directly the award for excessiveness," the Court found that the court of appeals was correct in ruling that the District Court did not abuse its discretion.[234] However, in a footnote referring to two other Supreme Court cases, *Grunenthal v. Long Island Railroad Co.*[235] and *Neese v. Southern Railway Co.*,[236] the Court declared that it has never expressly extended or validated the practice of appellate review of lower court denials of motions to set aside excessive verdicts.[237]

In *Neese*, the Court granted certiorari to address appellate factual review but resolved the case without getting to the review question.[238] Rather, the Court ruled that the district court's denial of the motion was supported by the record and was not an abuse of discretion.[239] In *Grunenthal*, the Court reviewed a court of appeals' order directing the district court to

228. See Gasperini v. Center for Humanities, Inc., 116 S.Ct 2211, 2223 (1996).
229. 287 U.S. 474 (1933).
230. *Id.* at 485.
231. *Id.*
232. 492 U.S. 257, 257 (1989).
233. *See id.*
234. *See id.* at 278.
235. 393 U.S. 156 (1968).
236. 350 U.S. 77 (1955).
237. *See Browning-Ferris*, 492 U.S. at 279 n.25.
238. *See* Neese, 350 U.S. at 77.
239. *See id.*

grant a new trial unless the petitioner agreed to a remittitur.[240] Avoiding the issue of constitutional appellate review, the Court noted that even if the court of appeals was authorized to review the District Court's ruling, the exercise of such review was unnecessary in the present case since the facts before the court supported the jury award.[241] Nevertheless, the Court stated that it had actually conducted an its own independent review of the evidence in question.[242]

IV. The Supreme Court Finally Speaks in *Gasperini v. Center for Humanities, Inc.*[243]

A. *Facts*

William Gasperini (hereinafter "Gasperini"), a photo-journalist, entered a contract in 1990 with the Center for Humanities (hereinafter "Center") to lend it 300 original color transparencies reflecting on-site scenes in Central America.[244] The photographs, shot over a seven year period, were to be used in an education film produced by the Center entitled *Conflict in Central America*.[245] The subject matter of the transparencies ranged from political and social scenes, which were well covered by other media, to rarely captured wartime action shots.[246] After production was complete, the Center failed to return the transparencies, explaining that they were lost during production.[247] As such, Gasperini filed suit in the Southern District of New York, asserting diversity jurisdiction,[248] to regain the value

240. *See Grunenthal*, 393 U.S. at 156-57.

241. *See id.* at 158-59.

242. *Id.* at 160.

243. 116 S. Ct. 2211 (1996).

244. *See* Brief for the Petitioner at 2, Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996) (No. 95-719); Brief for the Respondent at 1, Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211 (1996) (No. 95-719) (the district court opinion remains unpublished so all trial facts will be provided by either petitioner's or respondent's briefs to the Supreme Court. Where available, a reference to both briefs will be given.). Copies of both briefs will be maintained at the offices of the Pace Law Review.

245. *See* Petitioner's Brief at 2, *Gasperini* (No. 95-719); Respondent's Brief at 1, *Gasperini* (No. 95-719).

246. *See* Petitioner's Brief at 2, *Gasperini* (No. 95-719).

247. *See id.* at 2; Respondent's Brief at 1, *Gasperini* (No. 95-719).

248. *See* 28 U.S.C. § 1332; *see supra* note 19.

of the lost transparencies, arguing negligence, breach of contract and conversion.[249]

The Center admitted liability, leaving only the issue of damages, which was tried by jury in June of 1994.[250] Prior to trial, Judge Brieant, the trial judge, denied the Center's motion in limine[251] to exclude certain evidence that was to be used to establish an industry standard value of $1,500.00 per slide.[252] At a three-day trial, Gasperini offered the testimony of several photography experts.[253] Experts described Gasperini as a "first class professional photojournalist," and testified as to the high demand for Central American photos.[254] Noting the transparencies' potential for future value in both the editorial and advertising market, one expert valued the 300 transparencies at $1,500.00 each.[255] Another expert witness testified that the value of similar transparencies, where the cost of a single use could approach tens of thousands of dollars and repetitive use was common, was not affected by the photographer's prior history of sales success.[256] The Center's sole witness, a "buyer of photography," testified that he found only 47 photos of interest and that he would pay approximately $250.00 for each per use.[257] However, that witness also stated that the photos had an income generating life of 94 years and that the demand for such transparencies could come from several sources.[258]

Additional evidence, including both visual exhibits and a showing of the film produced with Gasperini's transparencies, *Conflict in Central America*, was provided for the jury's review.[259] As to earning potential, Gasperini admitted to making

249. *See Gasperini*, 116 S. Ct 2211, 2216.

250. *See* Petitioner's Brief at 2, *Gasperini* (No. 95-719); Respondent's Brief at 1, *Gasperini* (No. 95-719).

251. A motion in limine is "[a]ny motion, whether used before or during trial, by which exclusion is sought of anticipated prejudicial evidence." BLACK'S LAW DICTIONARY 787 (6th ed. 1991).

252. *See* Respondent's Brief at 2, *Gasperini* (No. 95-719).

253. *See* Petitioner's Brief at 3-6, *Gasperini* (No. 95-719); Respondent's Brief at 3, *Gasperini* (No. 95-719).

254. *See* Petitioner's Brief at 4-5, *Gasperini* (No. 95-719).

255. *See id.* at 5; Respondent's Brief at 2, *Gasperini* (No. 95-719).

256. *See* Petitioner's Brief at 6, *Gasperini* (No. 95-719).

257. *See id.*

258. *See id.*

259. *See id.* at 2-3.

only approximately $10,000.00 from photography between the ten years preceding trial.[260] However, he explained that during that period he was not actively marketing his transparencies but rather, building his portfolio in Central America.[261] Gasperini testified that he had planned to compile the photos and publish them in a book on Central America,[262] although no evidence was presented that Gasperini had ever sought or obtained a publisher.[263]

In assessing damages, the jury was instructed to consider the "content and subject matter of the lost slides," the photographer's experience and reputation, and "prior licensing fees collected" by the photographer.[264] The jury returned a verdict of $450,000.00, or $1,500.00 for each slide.[265] The Center moved pursuant to Federal Rule of Civil Procedure 59(a) [hereinafter Federal Rule 59][266] for a new trial on the grounds that certain evidence was admitted erroneously and that the verdict was excessive.[267] The motion was denied without comment and the Center appealed.[268]

B. *The Court of Appeals*

On appeal, Judge Calabresi, writing for the Second Circuit Court of Appeals, ruled that the award granted by the jury was excessive under New York law and directed a new trial unless Gasperini accepted a $100,000.00 remittitur.[269] In reaching this conclusion, Judge Calabresi applied New York's standard for reviewing appeals for excessive verdicts embodied in New York Civil Procedure Law and Rules section 5501(c) [hereinaf-

260. *See id.* at 3; Respondent's Brief at 4, *Gasperini* (No. 95-719). Forty percent of the $10,000.00 total fees represent monies from the rental of the instant photos by Center for Humanities. *See* Respondent's Brief at 4, *Gasperini* (No. 95-719).

261. *See* Petitioner's Brief at 3, *Gasperini* (No. 95-719).

262. *See id.*; Respondent's Brief at 4, *Gasperini* (No. 95-719).

263. *See* Respondent's Brief at 4, *Gasperini* (No. 95-719).

264. *See* Petitioner's Brief at 7, *Gasperini* (No. 95-719).

265. *See id.*; Respondent's Brief at 5, *Gasperini* (No. 95-719).

266. *See supra* note 81.

267. *See* Petitioner's Brief at 7, *Gasperini* (No. 95-719); Respondent's Brief at 5, *Gasperini* (No. 95-719).

268. *See* Petitioner's Brief at 7, *Gasperini* (No. 95-719).

269. *See* Gasperini v. Center for Humanities, Inc., 66 F.3d 427, 428 (2d Cir. 1995).

ter C.P.L.R. 5501(c)] "deviates materially" test.[270] The sole rationale provided by the Court in applying New York's standard was that it was reviewing a diversity case.[271] The Court did, however, note that New York's standard provided less deference to the jury than the traditional federal standard.[272]

On review, the Second Circuit surveyed past jury awards granted for lost transparencies by New York's Appellate Division and discerned three separate questions of fact that must be addressed at trial when evaluating the value of transparencies: the existence of an industry standard, the uniqueness of the subject matter, and the earning level of the photographer.[273] Although recognizing each of these factors as relevant in the evaluation process, the court denied the Center's sole legal claim that the trial court erred in allowing the jury to hear and to take into consideration evidence of an industry standard.[274] However, the court did comment that New York's Appellate Division has ruled that an industry standard could not alone be used as a valuation gauge.[275] Having so noted, the Court turned its focus toward re-evaluating the sufficiency of factual evidence offered by Gasperini on the latter two factors through the prism of the New York's "deviates materially" standard.[276]

In conducting its review of the facts presented at trial, the Court claimed to draw "all reasonable inferences in favor of Gasperini."[277] On the factor of uniqueness, the Court found, based on certain "plausible evidence," the uniqueness of a number of the transparencies was unquestionable.[278] However, the Court, conceding that a photographer's own "skill, judgment and perspective" added to a photo's uniqueness, ruled that with-

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270. *See id.* at 430.

271. *See id.*

272. *See id.*

273. *See Gasperini*, 66 F.3d at 428-439. In defining the industry standard factor, the *Gasperini* court noted that such can be gleaned from various New York decisions. *See id. See generally* Allen MacWeeney, Inc. v. Squire Assocs., 176 A.D.2d 217, 218, 574 N.Y.S.2d 340, 341 (1st Dep't 1991), *leave to appeal denied*, 82 N.Y.2d 651, 619 N.E.2d 659, 601 N.Y.S.2d 581 (1993) (declares that uniqueness and earning level must be considered).

274. *See Gasperini*, 66 F.3d at 429.

275. *See id.* at 428.

276. *See id.* at 429-31.

277. *Id.* at 431.

278. *See id.*

out the benefit of viewing either the actual transparencies or a video of them, a reasonable jury could not find all 300 of the transparencies worth $1,500.00 each.[279] The Court determined that only fifty photos warranted the jury's $1,500.00 award.[280]

Addressing the factor of the earning level of the photographer, the Court ruled that since photography had only generated $10,000.00 for Gasperini in the preceding 10 years, there was insufficient evidence of an earning level to support the verdict.[281] After discounting the evidence of potential profits from a photo book Gasperini planned to publish because no evidence was offered that a publisher was or would be found to publish the work, the Court found that no evidence was offered that he would earn additional income from photography.[282] In summary, the Court stated that Gasperini "failed to make a showing on either . . . [uniqueness or earning level] . . . sufficient to sustain the jury's verdict."[283]

Ironically, the Second Circuit noted that it was within the jury's authority, rather than their own, to set the specific level of awards.[284] Further, it noted that its ability to accurately weigh awards was difficult because it dealt solely with a "cold paper record," of which the court lacked factual knowledge, and could only be compared to other cases.[285] However, the Court claimed it was its responsibility to "patrol the outer bounds" of what may be deemed reasonable compensation.[286] In so patrolling, the Second Circuit upheld the $1,500.00 award for each of the fifty photos it thought were unique, and without noting its own valuation process, set the value of the remaining photos at $100.00.[287]

C. *The Supreme Court Majority Opinion*

The Supreme Court granted certiorari to clarify the correct standard federal courts should employ when reviewing a denial

279. *See Gasperini*, 66 F.3d at 429-31.
280. *See id.* at 431.
281. *See id.* at 429.
282. *See id.*
283. *Id.*
284. *See Gasperini*, 66 F.2d at 431.
285. *See id.*
286. *See id.* at 431.
287. *See id.*

of a new trial motion for jury verdict excessiveness in a state-created cause of action.[288] Posed with this issue, the Court recognized that a federal court sitting in diversity jurisdiction over a state-created action must act as an alternative state court, and thus must rely on state substantive law to rule on state rights.[289] Accordingly, the Court ruled that the state law standards of review, here New York's Civil Practice Law and Rules section 5501(c), should be applied in federal district courts sitting in diversity when deciding whether a jury verdict was excessive.[290] The Court's main support for its decision stemmed from the forecast that if the state standards of review were not applied, substantial deviations in the size of monetary awards between state and federal courts "may be expected."[291] Thus, the Court declared that the outcome-determinative test required the application of New York law on that point of law.[292] Furthermore, the Court held that an appellate court could review a district court's ruling under an "abuse of discretion" standard.[293]

Addressing New York Civil Practice Law and Rules section 5501(c), the Court noted that this "deviates materially" standard, which provided less deference to jury verdicts than New York's prior "shocks the conscience" standard, arose from a movement of state tort reform.[294] In application, the determination of whether an award "deviates materially" from reasonable compensation required appellate courts to compare the instant jury award to prior approved awards in similar cases.[295] As such, the majority noted that C.P.L.R. 5501(c) does not provide a statutory limit on allowable damages for particular injuries which, the majority admitted, would have been considered substantive law under the *Erie* doctrine.[296] Rather, C.P.L.R. 5501(c) provides a procedural instruction which allocated deci-

288. *See Gasperini*, 116 S. Ct. at 2217.

289. *See id.* at 2219.

290. *See id.* at 2215.

291. *Id.* at 2221.

292. *See id.*

293. *See Gasperini*, 116 S. Ct. at 2215.

294. *See id.* at 2218. For explanation behind the adoption of New York's new standard of review, *see supra* note 98.

295. *See id.* at 2218.

296. *See id.* at 2220.

sion-making authority to the appellate courts regarding damages.[297] However, the state's purpose in enacting the stricter C.P.L.R. 5501(c) standard was to control verdict awards, making "the State's objective manifestly substantive."[298] Since the standard is substantive in nature, the majority declared that the *Erie* doctrine required that the state standard be applied.[299]

In deciding which level of the federal judicial system should apply this standard of review, the Court noted that the New York Legislature originally intended the standard to be applied by the state's appellate divisions.[300] However, the majority noted that New York state case law, since the adoption of the "deviates materially" standard, applied the standard to trial courts.[301] Justice Ginsberg declared that this trend of application to "the trial level [was the] key to this case."[302] Federal trial courts would have to apply the New York standard; however, application by a federal appellate court would alter the character of the federal judicial system and violate the constraints of the Seventh Amendment Re-examination Clause.[303] It was those constraints that rendered the Second Circuit's application of C.P.L.R. 5501(c), in the instant case, violative of the essential character of the federal system derived from the Seventh Amendment.[304]

The Court noted that the power to review jury verdicts and grant new trial motions for verdict excessiveness was historically the sole province of the district court.[305] The federal district courts were capable of effectively "performing the checking function" of New York's "deviates materially" standard of review.[306] Furthermore, since trial courts dealt with cases first hand while appellate courts were limited to cold paper records,

297. *See id.* at 2219.

298. *Gasperini*, 116 S. Ct. at 2220. The Court noted that the standard is at the same time both substantive, in that it "controls how much a plaintiff can be awarded," and procedural, in that it "assigns decision making authority to New York's Appellate Division." *Id.* at 2219.

299. *See id.* at 2221.

300. *See id.* at 2218.

301. *See id.*

302. *Gasperini*, 116 S. Ct. at 2218.

303. *See id.* at 2221.

304. *See id.* at 2221-22.

305. *See id.* at 2222.

306. *See id.* at 2224.

such allocation of review to the former seemed to be the most practical.[307]

Having affirmed the federal district courts authority to grant or deny motions for new trial motions for excessiveness of a verdict, the Court considered whether federal courts of appeals could review those trial court rulings.[308] The Court noted that the exercise of that power by courts of appeals was a "relatively late, and less secure development," than the historical right of the district courts to grant new trials.[309] Further, the Court noted that this appellate exercise of power had historically been viewed as a Seventh Amendment violation.[310] However, the Court stated that such review was necessary to insure the "fair administration of justice."[311]

Although great deference was accorded to the district courts when they ruled on a motion for a new trial on the grounds of an excessive verdict, the majority noted that there is an outer limit where appellate court intervention and review is warranted.[312] Beyond that outer limit, an excess is transformed from a question of fact to a question of law.[313] Supported by such reasoning and the fact that all federal circuits have already engaged in such review, the Court declared that appellate review on the aforementioned motions was valid and not violative of the Seventh Amendment.[314] However, to accurately reflect the deference due to the district courts, the abuse of discretion standard should be employed during such review.[315]

The Court noted that the District Court failed to address the issue sufficiently to satisfy the "deviates materially" analysis.[316] Thus, the majority vacated the judgment rendered by the Second Circuit Court of Appeals and remanded the case to the District Court.[317] On remand, the District Court must review

307. *See Gasperini*, 116 S. Ct. at 2225.
308. *See id.* at 2223-24.
309. *See id.* at 2222-23.
310. *See id.* at 2223.
311. *Id.*
312. *See Gasperini*, 116 S. Ct. at 2223 (citing with approval Dagnello v. Long Island R.R. Co., 289 F.2d 797, 806 (1961)).
313. *See id.* at 2223 (citing with approval *Dagnello*, 289 F.2d at 806).
314. *See id.* at 2223-24.
315. *See id.* at 2225.
316. *See id.*
317. *See Gasperini*, 116 S. Ct. at 2225.

the verdict in light of the requirements of the "deviates materially" standard.[318]

D. *The Dissents*

1. *Justice Stevens*

In his dissent, Justice Stevens agreed with the majority's *Erie* analysis, as well as its finding that federal appellate courts, sitting in diversity, are not inhibited by the Seventh Amendment to review excessiveness of jury verdicts.[319] As to the former, he declared that since there was "no conceivable conflict between Federal Rule of Civil Procedure 59" and New York's "deviates materially" standard, the *Erie* doctrine was the appropriate analysis to apply.[320] In applying the doctrine, Justice Stevens noted that state procedure does not control in federal courts.[321] However, when a legal maximum award recoverable is set by the state legislature in a particular action that maximum award controls in federal court.[322] Here, Justice Stevens noted that New York's practice of limiting awards by requiring a comparison of the instant award to similar past cases, pursuant to C.P.L.R. 5501(c), was no less substantive for *Erie* analysis purposes than a statutorily imposed damages cap.[323]

As to whether appellate courts could review district courts new trial motion determinations on new trial motions for jury verdict excessiveness, Justice Stevens stated that a verdict may be so excessive as to "be insupportable as a matter of law."[324] Such is the case if an award exceeds a statutory recovery cap.[325] Since New York's standard sets a recovery limit but ties that limit to a factual comparison of the instant case to other cases, the resulting issue for review becomes a hybrid law-fact question.[326] Appellate review of this mixed legal-fact question would be valid as long as the reviewing court resolves "all record infer-

318. *See id.*
319. *See id.* (Stevens, J., dissenting).
320. *See id.* at 2226 n.1.
321. *See id.* at 2226.
322. *See Gasperini*, 116 S. Ct. at 2225-26.
323. *See id.*
324. *Id.* at 2227 (Stevens, J., dissenting).
325. *See id.*
326. *See id.*

ences in favor of the fact-finder's decision."[327] In so doing, the appellate court would not be re-examining facts but would rather be isolating the excessive legal portion.[328]

Additionally, Justice Stevens found that there was no validity to the argument that the Seventh Amendment precludes either the district courts or the appellate courts from ruling on jury verdicts.[329] Explaining the structure of English common law courts, Justice Stevens wrote that the en banc courts sitting at Westminster were appellate courts because the *nisi prius* judge did not always serve on the en banc court.[330] Since the en banc courts reviewed the excessiveness of verdicts, Justice Stevens validated the present appellate review since the Seventh Amendment made exception to the re-examination of a jury verdict where similar re-examination was practiced in courts at common law.[331]

However, Justice Stevens dissented with the majority's conclusion that the Seventh Amendment mandates that the appellate courts apply an abuse of discretion standard when reviewing the District Court's application of the "deviates materially" test.[332] According to Stevens, there remains a need to extend deference to trial courts when motions deal with "legal, yet fact-intensive, questions."[333] However, given the majority's contention that the "deviates materially" standard defines a substantive award limit, the assignment of a different standard to the appellate courts "undermine[s] the conclusion that the Re-examination Clause is relevant to this case."[334] The majority erred in not applying the state "deviates materially" standard to the federal courts of appeals.[335]

Justice Stevens also dissented in the ultimate disposition of the case.[336] There was, in his opinion, no reason to remand the case to the District Court since the Second Circuit had already

327. *Gasperini*, 116 S. Ct. at 2227.
328. *See id.*
329. *See id.* at 2229 (Stevens, J., dissenting).
330. *See id.* at 2228.
331. *See id.* at 2227-28.
332. *See Gasperini*, 116 S. Ct. at 2229.
333. *Id.* at 2230.
334. *Id.* at 2229 (Stevens, J., dissenting).
335. *See id.* at 2229-30.
336. *See id.* at 2230.

conducted a correct analysis in light of the "deviates materially" standard.[337] As such, Justice Stevens would have affirmed the Court of Appeal's ruling.[338]

2. *Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas*

Justice Scalia vehemently attacked the majority's ruling as an unfortunate deviation from traditional American federal jurisprudence and a complete disregard for the Constitutional right to a jury trial.[339] By extending authority to the appellate courts to review jury awards for excessiveness, the majority effectively ruled that the Seventh Amendment's second clause had "outlived its usefulness."[340] Justice Scalia further remonstrated the majority for its radical constitutional abandonment which was supported not by sound legal analysis, but by the simple fact that the federal circuit courts have chosen to ignore legal history.[341]

Turning first to review New York's Civil Practice Law and Rules section 5501(c), Justice Scalia articulated the necessary two step approach to its application: 1) the determination of a range of awards that would be reasonable, and 2) "whether the particular jury award deviates materially from that range."[342] The task of determining the range of reasonable compensation necessarily demanded a factual re-examination of the appealed issue of the jury set damages amount.[343] Justice Scalia opined that such a practice, which entailed readdressing an issue tried by a jury, was an inappropriate and unconstitutional exercise for the federal appellate courts.[344]

According to the dissent, a reflection on history revealed that the Seventh Amendment's Re-examination Clause was adopted to ensure that federal courts are barred from re-examining factual issues tried and resolved by a jury, except for mat-

337. *See Gasperini*, 116 S. Ct. at 2226.
338. *See id.*
339. *See id.* at 2230 (Scalia, J., dissenting).
340. *Id.*
341. *See id.*
342. *Gasperini*, 116 S. Ct. at 2230 (quoting Consorti v. Armstrong World Indus., Inc., 72 F.3d 1003, 1113 (1995)).
343. *See id.* at 2230-31.
344. *See id.* at 2231 (Scalia, J., dissenting).

ters traditionally allowed at common law.[345] At common law, trial courts were authorized to grant new trials when a jury verdict was against the weight of the evidence.[346] Appellate review, however, was authorized only via writs of error, which could only contain questions of legal error.[347]

In support of the bar on appellate review, Scalia traced the history of English common law at the time the Seventh Amendment was adopted.[348] After a *nisi prius* trial, motions for a new trial were made to the en banc court prior to the entry of judgment.[349] However, he noted that any characterization of the en banc court as an appellate court was both erroneous and functionally misplaced.[350] The dissent maintained that a survey of cases, at the time, illustrated that new trials were not granted unless the *nisi prius* judge who presided over the trial certified such action.[351] Scalia insisted that it was only after such motions were ruled on and judgment was entered that the ability to appeal on writ of error arose.[352] As such, the en banc court hearing new trial motions on grounds of jury verdict excessiveness acted as a trial court.[353]

Addressing the issue of excessiveness, the dissent asserted that the issue of the appropriate level of damages to award is a factual question.[354] Additionally, Justice Scalia found that both challenges to excessive jury set awards and motions for new trials based on such excessiveness pose solely factual questions for review.[355] Having determined that these issues "necessarily pose[d] a factual question," Justice Scalia declared that such review by federal appellate courts of appeals was in contravention with the re-examination prohibition of the Seventh Amendment.[356] Furthermore, he stated that any attempt to characterize the excessiveness of a verdict as a legal question, or to

345. *See id.* at 2231-32.
346. *See id.*
347. *See Gasperini*, 116 S. Ct. at 2231-32.
348. *See id.* at 2233.
349. *See id.* (Scalia, J., dissenting).
350. *See id.* at 2233-34.
351. *See id.* at 2234 n.5 (referring to Weisbrod, *supra* note 155, at 92).
352. *See Gasperini,* 116 S. Ct. at 2234.
353. *See id.* at 2233-34 (Scalia, J., dissenting).
354. *See id.* at 2231.
355. *See id.* at 2230-31.
356. *See id.* at 2232.

equate the review of such as the application of a legal standard avoids the simple fact that either situation would require an unconstitutional factual re-examination.[357]

Having asserted that factual review for excessiveness should be exercised solely by the trial courts, Justice Scalia conceded that appellate review in instances of trial court error may in fact result in a more just judicial system.[358] However, Justice Scalia noted that a more just system did not render federal appellate review any less unconstitutional.[359] Since federal appellate review is barred by the Seventh Amendment, any further debate concerning the standard to be applied at the appellate level in reviewing a trial court's ruling on a new trial motion for excessive jury verdicts is pointless.[360] Even an extremely deferential appellate standard of review cannot change a factual question to a legal matter on which an appellate court could constitutionally comment.[361] A review based upon the "abuse of discretion" standard, which the majority assigned to the federal appellate courts, still requires an impermissible re-examination of the facts of the case.[362]

Dissenting from the majority's application of New York's Civil Practice Law and Rules section 5501(c) standard of review for assessing jury verdicts in federal court, Justice Scalia articulated what he saw as four separate but intertwined flaws in the majority's choice of law analysis.[363] The composite result of these flaws was the authorized upset of the allocation of functions in the structure of the federal judicial system.[364]

First, Justice Scalia echoed the historical view of the Court that the review of jury awards in federal court was a matter controlled by federal law.[365] Although state law provides factors which the jury should consider in setting the award, it was federal law that controls matters relating to "the proper review of the jury award by a federal district court and courts of ap-

357. *See Gasperini*, 116 S. Ct. at 2236.
358. *See id.* at 2231 (Scalia, J., dissenting).
359. *See id.* at 2231.
360. *See id.* at 2236.
361. *See id.*
362. *See Gasperini*, 116 S. Ct. at 2236.
363. *See id.* at 2236-40 (Scalia, J., dissenting).
364. *See id.* at 2236.
365. *See id.* at 2236-37.

peal."[366] By altering the federal district court's role as sole commentator on the verdict excessiveness issue and the appropriate standard to be applied to it, the majority ran counter to the federal policy articulated in *Byrd* of not disrupting the judge-jury relationship.[367]

Second, Scalia opined in dissent that the majority's characterization of New York's standard as substantive for purposes of *Erie* analysis was flawed, declaring that the majority's analogy between C.P.L.R. 5501(c) and a statutory cap "fail[ed] utterly."[368] Scalia explained that there exists a clear and fundamental difference between a rule of law (e.g., a statutory cap) and a rule of review (e.g., C.P.L.R. 5501(c)).[369] The latter, unlike the nature of substantive law, exemplifies the effort to ensure that the law is adhered to but it does not change the underlying law itself.[370]

Third, Scalia maintained that the majority, in ruling that C.P.L.R. 5501(c) was substantive, misconstrued the *Erie* analysis by solely considering the outcome-determinative test.[371] The majority erroneously disregarded the *Byrd* Court's spin on *Erie* that balanced appropriate countervailing considerations; here, the considerations that were allegedly disregarded included the federal right to a jury trial and the applicable standards of review of jury awards.[372] Notwithstanding that the majority's assertions are derived from the fundamentals of the *Erie* test, Scalia discounted the majority's reliance on the potential for differing outcomes in federal and state courts in the same case.[373] In light of the district courts' power to grant new trials where the jury award is excessive according to the federal standard, Scalia characterized the majority's reliance on the future potential for substantial deviation in awards as unfounded.[374] As such, by adopting the state standard of review, the majority ex-

366. *Id.* at 2237 (quoting Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 278-79 (1989)).

367. *See Gasperini*, 116 S. Ct. at 2237 (Scalia, J., dissenting).

368. *Id.* at 2238 (Justice Scalia makes clear that a statutorily established maximum would be characterized as substantive under the *Erie* doctrine).

369. *See id.*

370. *See id.*

371. *See id.* at 2238 (Scalia, J., dissenting).

372. *See Gasperini*, 116 S. Ct. at 2238-39.

373. *See id.* at 2238.

374. *See id.* at 2238-39.

changed the potential for consistently divergent outcomes (the occurrence of which was highly questionable to begin with), with the destruction of the uniformity of federal practice.[375]

Justice Scalia's final condemnation of the majority's application of state law is derived from the Federal Rules of Civil Procedure.[376] Since the standard applied in addressing motions for a new trial is designated in Federal Rule of Civil Procedure 59 [hereinafter Federal Rule 59], the dissent declared that the majority's defective analysis rendered the *Erie* doctrine immaterial.[377] Federal Rule 59 states that a "new trial may be granted . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."[378] As the last five words suggest, through reference to federal courts, the articulated standard to be applied must be federal in nature.[379] Thus, since Rule 59 is sufficiently broad to conflict with state law on the issue of the standard applicable to new trial motions, such federal rule must govern.[380]

3. *On Remand to the District Court*

Revisiting its initial decision on remand, after being vacated by the Supreme Court, Judge Brieant first addressed the *Erie* doctrine issue.[381] Noting that the Supreme Court's analysis was not so much an extension of the doctrine as a return to the older strict outcome-determinative test of *Guaranty Trust*, Judge Brieant set about applying the New York standard of review.[382] Such an application required the court to review "what [the] trial court considered, namely the actual facts of [the] case."[383] Determining that the Second Circuit approach to New York's standard was to decrease the jury award to the maximum level which would not be seen as excessive, the district court set the maximum award at $375,000.00, contingent upon

375. *See id.*
376. *See id.* at 2239 (Scalia, J., dissenting).
377. *See Gasperini*, 116 S. Ct. at 2239.
378. *Id.* (quoting FED. R. CIV. P. 59).
379. *See id.* at 2239.
380. *See id.*
381. *See* Gasperini v. Center for Humanities, Inc., 972 F. Supp. 765 (S.D.N.Y. 1997).
382. *See id.* at 767.
383. *Id.* at 769.

the acceptance of a $75,000.00 remittitur against the original $450,000.00 award.[384]

In brief treatment of the Seventh Amendment issue, Judge Brieant noted that the District Court had initially viewed the award level set by the trial jury as high.[385] However, the Center's new trial motion was denied because the District Court did not want to interfere with an award set by a jury.[386] The source of hesitancy in upsetting the jury award arose from the "mystique of the Seventh Amendment."[387] However, since the Supreme Court has now validated the use of less deferential state review standards, Judge Brieant warned against the potential negative effects on trial administration and case settlement if federal trial judges were to begin to act too freely in modifying jury verdicts.[388]

V. Analysis

Gasperini v. Center for Humanities exemplifies and continues a line of case law which has gradually devalued the rights and protections provided by the Seventh Amendment.[389] The means employed by the majority to accomplish this constitutional contravention is initially supplied by its incomplete *Erie* doctrine analysis. The end product of the Court's *Erie* analysis is that federal courts, sitting in diversity, are to employ a state standard of review when reviewing trial court orders denying new trial motions on grounds of jury award excessiveness.[390] The unavoidable consequence of this ruling is that the deferential protection given to factual jury determinations by the Seventh Amendment's Re-examination Clause[391] is supplanted with potentially fifty different state review standards, each providing as much or as little jury deference as each state sees fit.

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384. *See id.* at 768, 773.

385. *See id.* at 772.

386. *See Gasperini*, 972 F. Supp. at 722.

387. *Id.*

388. *See id.* at n.3.

389. Justice Black once commented that there has been a "gradual process of judicial erosion which in one-hundred-fifty years has slowly worn away . . . the essential guarantee[s] of the Seventh Amendment." Galloway v. United States, 319 U.S. 372, 397 (1943) (Black, J., dissenting).

390. *See supra* text accompanying notes 290-92.

391. *See supra* notes 6-8 and accompanying text.

This consequence as well as the need to conduct a full *Erie* analysis could have been avoided given the fact that the issue on appeal was the denial of a new trial motion.[392] As Justice Scalia explained in his dissent, Federal Rule 59,[393] which provides the guidelines for making and reviewing such a motion, should have been referred to as the appropriate law to follow.[394] Pursuant to *Hanna*, when there is a Federal Rule of Civil Procedure on point with the issue before the court, the federal judiciary system is constrained to apply that federal rule.[395] The language of Federal Rule 59 instructs a court, reviewing a motion for a new trial, to apply a federal standard of review.[396] In light of the fact that Federal Rule 59 had been adopted as the ruling authority on motions for damages awards,[397] the majority erred in not applying the federal standard required by the rule.

However, the majority did not comply with Federal Rule 59, but rather conducted its own *Erie* analysis. Generally, when deciphering which elements of state law are to govern in federal diversity litigation, the *Erie* doctrine instructs that a dividing line should be drawn along a procedural and substantive line, with federal law providing the former and state law providing the latter.[398] Although the line is not easily drawn between the two,[399] if the application of some aspect of state law, in place of the analogous federal law, would substantially impact the outcome of a litigation[400] or result in a different outcome,[401] such aspect would likely be termed substantive.[402] Acknowledging that New York's review standard[403] was formulated to act as a control on damage awards,[404] the *Gasperini* majority's initial approach to the choice of law issue mirrored traditional *Erie* analysis by concentrating on the potential for differing litiga-

392. *See supra* text accompanying note 76-78, 97, 376-380.
393. *See supra* note 97.
394. *See supra* notes 97, 376-380 and accompanying text.
395. *See supra* text accompanying notes 76-78.
396. *See supra* text accompanying notes 97, 379-80.
397. *See supra* text accompanying notes 96-97.
398. *See supra* text accompanying notes 26, 73.
399. *See supra* text accompanying note 74.
400. *See supra* text accompanying notes 36-39.
401. *See supra* text accompanying notes 27-29, 50-53, 75.
402. *See supra* text accompanying notes 26-30, 39.
403. *See supra* notes 99-105 and accompanying text.
404. *See supra* text accompanying notes 294-98.

tion outcomes resulting from the application of a state standard.[405] However, the *Gasperini* majority also noted that New York's standard embodies aspects of procedure that "would be out of sync with the federal system."[406]

Thereafter, the majority stepped beyond, or away from, the traditional *Erie* test by investigating New York's purpose behind adopting its present standard of review[407] and subsequently ruling that the state's intent to restrict jury awards rendered the standard substantive in nature.[408] This hybrid twist to *Erie's* traditional procedural/substantive distinction consequently blurred the line between the law that provides the procedures to obtain recovery and that which embodies the right to recovery.[409] Nevertheless, by the operation of this hybrid approach, the majority validated state law application,[410] thus dismissing the prior view that a standard of review in the federal system was a matter controlled by federal law.[411]

What should not be overlooked is the majority's misguided treatment of New York's review standard as a statutory cap on damages.[412] Both the majority and Justice Scalia concede that an award cap set by state law would be substantive for *Erie* purposes,[413] however, that view fails to comport with C.P.L.R. 5501(c). Rather, C.P.L.R. 5501(c) supplies a non-static appellate mechanism which provides the means to control the size of jury awards;[414] that is, a "soft cap on damages."[415] Any resultant limits which germinate from the application of that stan-

405. *See supra* text accompanying notes 26-29, 289-92. Justice Scalia, in his *Gasperini* dissent, questioned the majority's claim that there existed an actual potential for differing outcomes, noting as support the fact that federal district court trial judges have the authority to weigh the sufficiency of the evidence in relation to the jury's award. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct 2211, 2238-39 (1996) (Scalia,, J., dissenting).

406. *Gasperini,* 116 S.Ct at 2219; *supra* text accompanying notes 297, 303-04.

407. *See supra* text accompanying notes 294-98. *See also* Gasperini v. Center for Humanities, Inc., 972 F. Supp. 765, 767 (S.D.N.Y. 1997).

408. *See supra* text accompanying notes 298-99.

409. *See supra* text accompanying notes 35-39.

410. *See supra* text accompanying notes 299.

411. *See supra* text accompanying notes 80-83, 94-98, 365-66, 369-70. .

412. *See supra* text accompanying notes 368-370.

413. *See supra* text accompanying notes 296, 368-70.

414. *See supra* notes 99-105 and accompanying text.

415. Gasperini v. Center for Humanities, Inc., No. 95-719, 1996 WL 191793, at *17 (Apr. 16, 1996) (Official Transcript of Oral Argument).

dard by state courts should be adhered to by federal courts[416] so as to avoid the possibility of divergent outcomes.[417] However, where a federal court utilizes the mechanism itself, the benefit of a cognizable state court limit is replaced by the adoption of a standard which operates merely to compromise the deference extended to jury awards by the Re-examination Clause.

After concluding that the application of New York's standard would affect the litigation's outcome[418] and that the standard was substantive in nature,[419] the Court ended its analysis.[420] Therein lies the majority's major analytical misstep, in that a complete *Erie* doctrine analysis requires that the concerns which accompany the outcome-determinative test must be weighed together with a balancing of competing federal and state interests in having their law apply.[421] However, the state's interest in controlling damage awards was not weighed against the federal interest of federal court compliance with the Re-examination Clause's bar on appellate review of jury fact determinations. Rather, the majority considered the Seventh Amendment prohibition only after it completed its *Erie* analysis, at which point it reassigned the application of C.P.L.R. 5501(c) appellate review standard to the federal district court so as not to offend the Amendment.[422] This judicially fashioned assimilation leaves the impression that if the weight of the Seventh Amendment, previously held to be a dispositive federal interest in an *Erie* balancing,[423] was of such a degree as to require the Court to effectively rewrite New York's standard, it should have at least warranted consideration during the Court's *Erie* analysis.

Unfortunately, the majority does not conclude the opinion with its *Erie* analysis. Rather, it continues by explicitly extending to federal appellate courts the authority to review district court denials of new trial motions for verdict

416. *See supra* text accompanying notes 23, 80, 87.
417. *See supra* text accompanying notes 50-53, 27-29, 75.
418. *See supra* text accompanying notes 291-92.
419. *See supra* text accompanying notes 298-99.
420. *See supra* text accompanying notes 288-99.
421. *See supra* text accompanying notes 53-56.
422. *See supra* text accompanying notes 300-04.
423. *See supra* text accompanying notes 57-60, 64.

excessiveness.[424] Although acknowledging that such review has been historically viewed as violative of the Seventh Amendment[425] and that the exercise of such review by Courts of Appeals is a fairly recent phenomenon,[426] the majority agreed with the Second Circuit's rationale that this type of review is necessary to ensure adequate control of awards and "fair administration of justice."[427]

If the federal judicial system was devoid of any review of jury verdicts, the majority's claim that fairness required appellate review of jury awards could arguably be valid. However, as pointed out by Justice Scalia, the district court judges were already providing such review.[428] The *Gasperini* majority itself conceded that the federal "district court[s] [were] capable of performing the checking function" of reviewing jury awards for excessiveness.[429] As such, the conclusion that additional appellate review of trial judges' decisions was required to insure that efficient and accurate review was served, does not necessarily follow.

The prohibition on the appellate review of damage award excessiveness is derived, via the Seventh Amendment's Re-examination Clause, from common law.[430] Pursuant to English common law practice,[431] the review of a jury determined award for excessiveness, which was seen as a factual issue,[432] could only be conducted by a trial court.[433] Although there could be appellate examination of trial determinations on a writ of error,[434] this review was limited to errors of law, such as improper jury instructions.[435] It is this tradition of review that provided the impetus for[436] and was secured by the Seventh Amend-

424. *See supra* text accompanying notes 311-15.
425. *See supra* text accompanying notes 310.
426. *See supra* text accompanying notes 309.
427. Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2223.
428. *See supra* text accompanying notes 367, 374.
429. *Gasperini*, 116 S. Ct. at 2224.
430. *See supra* notes 127-33 and accompanying text.
431. *See supra* notes 135-70 and accompanying text.
432. *See supra* text accompanying notes 164-66.
433. *See supra* text accompanying notes 152-56, 165-66.
434. *See supra* text accompanying notes 161-70.
435. *See supra* note 164 and accompanying text.
436. *See supra* text accompanying notes 114, 121, 126.

ment.[437] Thus, by authorizing appellate review of jury award excessiveness, the *Gasperini* court violated the common law practice embodied in the Seventh Amendment.

In reference to this common law, the Supreme Court, as early as 1830, declared that facts could be re-examined only by means of a new trial motion when granted "by the court where the issue was tried or which the record was properly returnable."[438] This rule, which has been repeatedly reaffirmed,[439] exempts federal appellate court comment on new trial motions. There has been some commentary to the effect that the en banc court in Westminister was in fact an appellate court reviewing *nisi prius* judgments and thus the Seventh Amendment is not violated when courts of appeals rule on denial of such motions since the practice existed at common law.[440] However, this is a mischaracterization of the English judicial structure, since the *nisi prius* judges were merely an extension of the en banc court,[441] which was a trial level court.[442] It is this structure that is adopted into the federal system and should have acted to bar federal appellate review of jury award excessiveness.[443] Unfortunately, the *Gasperini* majority chose to deviate from this prohibition, thus departing from a long Supreme Court record of adherence to it.[444]

Although this constitutional prohibition extended to the courts of appeals,[445] the courts of appeals had already begun to engage in such review.[446] The *Gasperini* majority noted that each circuit has agreed that the review of trial court orders denying new trial motions based upon jury award excessiveness was authorized where the size of an award exceeds a level that is so great as to render the award a reviewable question of

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437. *See supra* text accompanying notes 127-33.

438. Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 448 (1830).

439. *See supra* note 180.

440. *See supra* notes 221, 330 and accompanying text.

441. *See supra* text accompanying notes 142-51.

442. *See* Gasperini v. Center for Humanities, Inc., No. 95-719, 1996 WL 191793, at *31 (Apr. 16, 1996) (Official Transcript of Oral Argument). *See also supra* text accompanying note 159.

443. *See supra* notes 171-74, 192-95 and accompanying text.

444. *See supra* text accompanying notes 171.

445. *See* Healy v. Ratta, 292 U.S. 263, 270 (1934). *See also supra* note 188 and accompanying text.

446. *See supra* notes 219-27, 309, 314 and accompanying text.

law.[447] By adopting such a rationale to validate its authorization of appellate review,[448] the majority dismissed a line of reasoning developed by the Supreme Court that once an issue is classified as a question of fact, it is not converted to a question of law simply by operation of the appeal process.[449] Where a particular issue has been characterized as a factual question, the appellate review of such necessitates a violative referral back to the facts on which it was based.[450] This blatant factual review has historically been held violative of the Seventh Amendment, irrespective of whether the District Court properly reviewed the award or not.[451] Only when a case could be made that the trial judge failed in his duty to consider the new trial motion at all was there an exception to the rule that review of new trial motions was within the complete discretion of the trial judge and outside the realm of appellate court power.[452]

In a confusing turn of logic, after declaring that federal appellate courts could review trial court denials of new trial motions on the ground of verdict excessiveness, the *Gasperini* majority stated that New York's standard of review, which the majority had earlier noted was to be applied in state appellate courts, could not be applied by federal appellate courts.[453] Moreover, the majority stated that if the federal appellate courts were allowed to employ that standard, the essential character of the federal judiciary structure would be altered.[454] Endeavoring to explain the allocation of the state appellate standard to federal trial courts, and not to federal appellate courts, the majority first claimed that practicality dictated such an allocation.[455] Since the trial judge dealt with the case first

447. *See supra* text accompanying notes 312-14.

448. *See supra* text accompanying notes 311-314.

449. *See supra* note 186 and accompanying notes text.

450. *See supra* text accompanying notes 242, 343-44. *See also* Arkansas Valley Land and Cattle Co. v. Mann, 130 U.S. 69, 74 (1889) (When presented with a new trial motion on grounds of excessiveness, "[t]he court necessarily determines, in its own mind, whether a verdict for a given amount would be . . . excessive."); Narin v. National Railroad Passenger Corp., 837 F.2d 565, 567 (1988).

451. *See supra* text accompanying note 190-95, 204-207, 209-212.

452. *See* Miller v. Maryland Casualty Co., 40 F.2d 463 (2d Cir. 1930) (citing Mattox v. U.S., 146 U.S. 140 (1892).

453. *See supra* text accompanying notes 302-08.

454. *See supra* text accompanying notes 303-04.

455. *See supra* text accompanying notes 306-07.

hand, it was only practical to have the trial judge determine whether the award "deviated materially" from reasonable compensation.[456] However, this logic seems to cut against the Court's assertion that it was necessary to have appellate courts review district courts on the issue of the excessiveness of a jury award. If the trial judge had a better opportunity to weigh the evidence against New York's standard,[457] granting the authority to courts of appeals to conduct a subsequent review would seem more likely to frustrate, rather than foster, the fair administration of justice.

In further support of its allocation of the New York standard to the district court, the *Gasperini* majority stated the state standard could not be applied "by federal appellate courts without violating the Seventh Amendment's re-examination clause."[458] However, the majority had also declared, for the first time, that federal appellate courts could review the factual issue of verdict excessiveness without violating the Seventh Amendment.[459] Given this validation, how then could the application of a state standard by federal appellate courts be violative of the Amendment? It would seem that the Re-examination Clause's bar on federal appellate review has been reduced to a question of the degree of deference accorded a jury finding by a particular standard of review. That is, if the appellate standard is "abuse of discretion," then the Seventh Amendment is not violated; however if the standard is less deferential, as is the "materially deviates" standard, there is a constitutional violation. As noted by Justice Stevens, the majority's reference to the Seventh Amendment undermined their analysis.[460]

In summary, the majority declared that an appellate court could review a ruling by a district court, which had applied a state standard of review, on the excessiveness of a jury verdict, without violating the Seventh Amendment's bar on the re-examination of facts found by the jury. However, that same federal appellate court could not engage in the same review without violating the Seventh Amendment. This creates con-

456. *See supra* text accompanying note 307.
457. See supra text accompanying notes 206-07.
458. *See* Gasperini v. Center for Humanities, 116 S. Ct 2211, 2219 (1996).
459. *See supra* text accompanying notes 308-11.
460. *See supra* text accompanying notes 332-35.

siderable confusion. Whereas before *Gasperini*, federal trial courts reviewed new trial motions for excessiveness pursuant to Federal Rule 59's deferential standard of "shocks the conscience,"[461] and federal appellate courts lacked any statutory or judicially validated reviewing power,[462] *Gasperini* opened the door for a less deferential state standard to be applied by district courts and inserted the "abuse of discretion" standard at the appellate level.[463] This is not a very comforting trend from a Seventh Amendment viewpoint. The majority's twisted maze of illogical reasoning took one further turn when the majority noted that when reviewing trial court orders, a "federal [appellate] court must be guided by the damage-control standard state law supplie[d]."[464]

Assuming the majority was warranted in absorbing New York's standard into the federal system, its decision to fashion a rule whereby state standards were to be applied by district courts was not without its flaws. The majority failed to take into consideration, in establishing this rule, that some state standards may not accommodate the confines and constraints of the Seventh Amendment. As noted in *Gasperini*, the trend in New York state courts extending its standard of review, originally fashioned for New York appellate courts, to the state's trial courts was instrumental in allowing the standard to be assimilated into the federal system.[465] Because of such application at the state trial level, the majority was able to incorporate the state standard into the federal judicial system without a constitutional snag.[466] However, the question of how federal courts were to apply state law that did not conform to the Seventh Amendment constraints is left unanswered. Furthermore, even if state law conformed with the Seventh Amendment, the possibility of having a different standard for each state casts a dark shadow upon conformity within the federal judicial system.

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461. *See supra* text accompanying notes 87, 98.

462. *See supra* notes 171-95 and accompanying text.

463. *See supra* text accompanying notes 288-93.

464. Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2225 (1996).

465. *See supra* text accompanying notes 301-02.

466. *See supra* text accompanying notes 303-04.

In the end, the majority clarified that the appellate court was to review the district court's "deviates materially" review pursuant to an "abuse of discretion" standard.[467] The adoption of this appellate standard was to afford the district court some degree of discretion.[468] However, even with the adoption of this highly deferential legal standard, the fact remains that application of this standard requires the federal courts of appeals to engage in re-examination of the facts underlying an award found by a jury.[469] It is this inescapable fact that renders the Re-examination Clause of the Seventh Amendment inoperative.

VI. Conclusion

The Supreme Court's decision in *Gasperini v. Center for Humanities, Inc.*[470] marked an inauspicious move for the Court. Although the Court is not restrained from overruling past decisions, such action must find its foundation in concrete, logical reasoning. The need for sound analysis becomes paramount when the matter revolves around the direct interpretation of the Constitution. Here, the Court forged new constitutional ground, contrary to an interpretive tradition that dates back to the adoption of the Constitution.[471] As such, the highlights of the Court's analysis are that present day conceptions of fairness and the modern circuit courts' practice warrants appellate review in certain circumstances.[472] Such support falls dangerously short of that which should be embraced before overturning long-standing constitutional tradition.

An unfortunate consequence emanating from the Court's authorization of appellate review is an indirect grant of creative interpretive powers to the courts of appeals. That is, the Supreme Court has set a precedent that the courts of appeals can abandon traditional federal practice, engage in conduct previously held unconstitutional and have their new practice upheld. Here, the fact that a constitutional amendment was rendered outdated doctrine gives the impression that nothing is

467. *See supra* text accompanying notes 314-15.
468. *See supra* text accompanying note 315.
469. *See supra* text accompanying notes 242, 181-187.
470. 116 S. Ct. 2211 (1996).
471. *See supra* notes 107-26, 171-74 and accompanying text.
472. *See supra* text accompanying notes 312-14, 341.

taboo. In the final analysis, it seems that circuit court discretion has been expanded considerably, to the detriment of both the Seventh Amendment and the Supreme Court.

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