COMMENTS

JUDICIAL GATEKEEPING AND THE SEVENTH AMENDMENT: HOW *DAUBERT* INFRINGES ON THE CONSTITUTIONAL RIGHT TO A CIVIL JURY TRIAL

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I. INTRODUCTION

The complexity of modern day civil litigation has created unique pressures on the American legal system. Many cases now entail multiple parties, dozens of witnesses, and unprecedented amounts of discovery. Disputes involving securities regulation, civil rights, and mass torts have tested the limits of court administration and case management. And somewhere within this evolving legal terrain stands the civil jury: laypersons who must weigh increasingly complex evidence and determine fault, liability, and causation.

As courts struggle to develop new procedures to manage their expanding civil dockets, the jury trial often becomes a focus of attention. Although the Seventh Amendment to the United States Constitution guarantees the right to a jury trial in most federal civil suits, some scholars and judges have questioned whether modern day cases are too complex for jurors to decide properly. A tension has developed between the right to a jury trial and effective judicial management of complex litigation.

The Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] aimed to relieve some of this tension by giving federal judges gatekeeping power over what expert evidence reaches the jury.[2] The Court reasoned that, if juries never saw confusing, unreliable, or inaccurate evidence, then their decisions would more likely be based on an appropriate understanding of the facts instead of other superficial considerations.[3] Despite these good intentions, *Daubert*'s practical effect within the legal system has been the erosion of the right to a civil jury trial because judges often use their gatekeeping power to block cases from ever reaching the jury. In short, courts are using *Daubert* in a way that circumvents the Seventh Amendment.

This Article begins by reviewing the history, purpose, and function of the Seventh Amendment within the American constitutional system. It then discusses the Supreme Court's analytical framework for preserving the fundamental features of the right to a civil jury trial while simultaneously permitting rational legal development of the jury system. Next, the Article provides a brief overview of the Court's *Daubert* jurisprudence, and argues that the creation of judicial gatekeeping has caused an institutional shift of adjudicatory authority away from juries and into the hands of judges in violation of the Seventh Amendment. The Article concludes by suggesting three legal reforms that would achieve many of the same goals of *Daubert* without infringing on the jury's constitutionally protected fact-finding power.

II. HISTORY OF THE SEVENTH AMENDMENT

The Founding Fathers cherished the right to trial by jury.[4] Indeed, "its deprivation at the hands of the English was one of the important grievances" leading to the American Revolution.[5] The Declaration of Independence even cites the lack of jury trials as one of the gravest injuries against free people, "having in direct object the establishment of an absolute Tyranny over [the] States."[6] Records from early American history are filled with references to juries serving as "anchors" in society that prevent the State from straying too far from principles of republican governance.[7]

1. 509 U.S. 579 (1993).
2. *Id.* at 597.
3. *See id.* at 592.
4. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 340 (1979) (Rehnquist, J., dissenting).
5. *Id.*
6. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); *see id.* para. 20 ("For depriving us in many cases, of the benefits of Trial by Jury.").
7. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), *in* 15 THE PAPERS OF THOMAS

Although the Founders often spoke of the importance of criminal juries, they viewed civil juries with similar reverence.[8] Patrick Henry even described the right to trial by jury in civil suits as "one of the greatest securities to the rights of the people, [which] ought to remain sacred and inviolable."[9]

To be sure, the Framers were most concerned about protecting personal liberties from an oppressive executive, but they were equally weary of an oppressive judiciary.[10] Many of the debates at the 1787 Continental Congress involved creating government structures that minimized the potential for judicial oppression.[11] From these debates, the civil jury emerged "as [a] necessary... counterbalance [to] an invigorated judiciary."[12] After Hugh Williamson suggested the "necessity" of a provision to secure the right to jury trials in civil cases,[13] Elbridge Gerry concurred by stating that civil juries were indispensible safeguards against "corrupt Judges."[14] Agreement about the importance of this judicial counterbalance was so widespread that it was even suggested that Article III, Section 2 be amended to include language preserving the "usual" right to civil jury trials.[15] For many at the Convention, "the jury represented the most effective means available to secure the independence and integrity of the judicial branch of the colonial government."[16] In short, the Founders viewed the jury as an important bulwark against *all* forms of government oppression,[17] including judicially created injustices.[18]

JEFFERSON 269 (Julian Boyd ed., 1958).

8. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 664 (1973). Alexis de Tocqueville also commented on the importance of civil jury trials in the new American nation: "Juries, especially civil juries, instill some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 274 (Jacob Peter Mayer ed., 2000).

9. Edith Guild Henderson, *Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 298 (1966) (quoting a debate on the ratification of the Bill of Rights).

10. *See* Stephen Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579, 618 (1993).

11. *Id.* at 580–81.

12. *Id.* at 581.

13. MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 587 (1911).

14. *Id.*

15. *Id.* at 628.

16. Landsman, *supra* note 10, at 596.

17. Williams v. Florida, 399 U.S. 78, 100 (1970); *see also* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting) (describing jury trials as an "important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign, or, it might be added, to that of the judiciary").

18. *See, e.g.*, Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the . . . overconditioned or biased response of a judge."); Duncan v. Louisiana, 391 U.S.

Based on the Framers' strong support of civil juries, it may seem counterintuitive that the Constitution emerged from the Continental Congress without a reference to jury trials.[19] But in all likelihood, this omission was not due to anti-jury sentiment; instead, it resulted because the Framers viewed the right to trial by jury as so inextricably linked to the new constitutional system that including language specifically preserving it was unnecessarily repetitive.[20] Moreover, "[t]he right to trial by jury was probably the only one universally secured by the first American state constitutions."[21] And because the states had sufficiently protected the right to a civil jury trial, the new Constitution did not need to do the same.[22]

Regardless of the reason why the new Constitution did not mention the civil jury, its omission "triggered a firestorm of protest."[23] The Anti-federalists led the attack.[24] One of their most prevalent and persuasive criticisms of the new Constitution was its lack of any provision securing the right to civil jury trials.[25] "The Anti-Federalists insisted that the Constitution should explicitly recognize the traditional procedural rights.... The most important of these was the trial by jury."[26] Patrick Henry, Samuel Adams, and George Mason rallied opposition to the Constitution "by asserting that [it] would abolish civil juries altogether," thereby giving judges nearly unencumbered power to constrain personal liberties.[27] Jury trials were thus necessary to restrict judicial discretion and further the interests of democracy.[28]

145, 156 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge.").

19. Notably, Mr. Gerry voted against ratification, in part, because Article I seemingly gave Congress the power "to establish a tribunal without juries." FARRAND, *supra* note 13, at 632–33.

20. *See* Wolfram, *supra* note 8, at 656.

21. *Id.* at 655 (quoting LEONARD W. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY 281 (1960)).

22. *See id.*

23. Landsman, *supra* note 10, at 598.

24. *Id.* at 599.

25. *See* Henderson, *supra* note 9, at 295 ("The almost complete lack of any bill of rights was a principal part of the Anti-Federalist argument; the lack of provision for civil juries was a prominent part of this argument . . . ."); *see also* THE FEDERALIST NO. 83, at 289 (Alexander Hamilton) (David Wooton ed., 2003) ("The objection to the plan of the convention, which has met with most success in this state, and perhaps in several of the other states, is that relative to the want of a constitutional provision for the trial by jury in civil cases." (emphasis omitted)); HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 64 (1981) ("[O]ne of the most widely uttered objections against the Constitution was that it did not provide for (and thus effectively abolished) trial by jury in civil cases."). *See generally* Wolfram, *supra* note 8, at 669–73 (reviewing the Anti-federalist attacks on the new Constitution).

26. STORING, *supra* note 25, at 64.

27. Kenneth S. Klein, *The Myth of How To Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1009 (1992).

28. *See* Landsman, *supra* note 10, at 600; *cf.* Wolfram, *supra* note 8, at 671–72.

The Federalists responded to these criticisms by arguing that the absence of a specified right in the proposed Constitution did not mean that the right was abolished.[29] Alexander Hamilton, for example, agreed that the civil jury system was a "valuable check upon corruption,"[30] and he eventually wrote Federalist Paper 83 to respond to the Anti-federalists' charge that the new Constitution would destroy the right to a civil jury trial.[31] In it, Hamilton confirmed that the right's omission from the Constitution was due to disagreements about whether such a provision was *necessary*, not whether the right was *important*:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.[32]

In sum, records surrounding the Constitution's ratification reveal a broad consensus that civil jury rights were an important element of free society. "The only disagreement seems to be over whether civil jury rights were the most important of all individual rights, or simply one of the most important rights."[33] For that reason, amending the Constitution to memorialize the right to a civil jury trial was relatively uncontroversial. After a brief debate, the First Congress passed the Seventh Amendment on September 25, 1789, which became effective on December 15, 1791.[34] The amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.[35]

> [T]he anti-federalists were not arguing for the institution of civil jury trial in the belief that jury trials were short, inexpensive, decorous and productive of the same decisions that judges sitting without juries would produce. The inconveniences of jury trial were accepted precisely because in important instances . . . the jury would reach a result that the judge either could not or would not reach. Those who favored the civil jury . . . avowed that important areas of protection for litigants in general, and for debtors in particular, would be placed in grave danger unless it were required that juries sit in civil cases.

Id.

29. *See* THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 25, at 290.

30. *Id.* at 291.

31. *See* Stanton D. Krauss, *Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 416 (1999).

32. THE FEDERALIST NO. 83 (Alexander Hamilton), *supra* note 25, at 292.

33. Klein, *supra* note 27, at 1010.

34. Wolfram, *supra* note 8, at 725–26.

35. U.S. CONST. amend. VII.

By preserving the right to civil jury trials, the Seventh Amendment diffused adjudicatory power among "neighbors and equals," thereby reducing the risk of judicial oppression.[36]

This Article proceeds by placing the Seventh Amendment's history at the forefront of its analysis. Our Founders considered the right to a civil jury trial to be a vital check on judicial power.[37] Thus, any institutional shift of adjudicatory authority away from the jury and into the hands of a state actor—judges—must be viewed skeptically.

III. HOW HAVE COURTS INTERPRETED THE SEVENTH AMENDMENT?

A. The Jury as an Independent Constitutional Actor

Historically, the federal courts have been uneasy with judicial intrusions into the province of the jury. Consider, for example, *United States v. Wonson*,[38] in which then-Judge Story authored the first judicial opinion interpreting the Seventh Amendment.[39] In *Wonson*, the government challenged the accuracy of a jury verdict, and asked the appellate court to reverse the verdict or resubmit the case to a new jury.[40] Judge Story began his analysis by noting that, "when then constitution [sic] was submitted to the people for adoption, one of the most powerful objections urged against it was, that in civil causes it did not secure the trial of facts by a jury."[41] He reasoned that the Framers passed the Seventh Amendment "to remove the weight of this objection" and prevent judges from intruding—either directly or indirectly—into the province of the jury.[42] Thus, because he was

36. Letter from Richard Henry Lee to Edmund Randolph (Oct. 16, 1787), *in* THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 504 (Jonathan Elliot ed., 2d ed. 1891) (quoting Judge William Blackstone).

37. Lisa S. Meyer, Note, *Taking the "Complexity" Out of Complex Litigation: Preserving the Constitutional Right to a Civil Jury Trial*, 28 VAL. U. L. REV. 337, 348 (1993).

38. 28 F. Cas. 745 (C.C.D. Mass. 1812) (No. 16750).

39. *See id.*; *see also* James L. "Larry" Wright & M. Matthew Williams, *Remember the Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 467 (2004) ("The most influential case in the initial development of the Seventh Amendment's historical test came from a Massachusetts federal circuit court [in *Wonson*].").

40. *Wonson*, 28 F. Cas. at 745.

41. *Id.* at 750.

42. *Id.* Judge Story's analysis on this point parallels Anti-federalist criticisms of the proposed Constitution. The Anti-federalists alleged that, without a constitutional guarantee to the right to a civil jury trial, appellate courts could essentially "gut the authority of . . . juries by redetermining 'law and fact.'" Krauss, *supra* note 31, at 412.

constitutionally prohibited from reexamining the jury's factual determinations, Judge Story denied the government's request for relief.[43]

The *Wonson* decision embraced an extremely limited role for judges in civil jury trials. The Seventh Amendment carved out an adjudicatory function that federal judges simply cannot perform: finding facts. Judge Story's analysis treated the civil jury as an independent constitutional actor, not unlike a fourth branch of government.[44] As such, the jury has a constitutionally protected sphere of fact-finding power with which the other branches of government—specifically the judiciary—are prohibited from interfering.[45]

B. The Supreme Court's "Historical Test"

Until recently, the Supreme Court has followed Judge Story's analysis and used the history of the Seventh Amendment as a jurisprudential tool to maintain the exclusive fact-finding authority of civil juries.[46] The Court's method of analyzing Seventh Amendment questions—sometimes called the "historical test"—hinges upon the Amendment's reference to "preserving" the right to a civil jury trial.[47] The scope of the right thus depends on *when* the amendment became effective.[48] As the Court has stated, "[b]ecause the Seventh Amendment demands preservation of the jury trial right, our cases have uniformly held that the content of the right must be judged by historical standards."[49]

For that reason, the Court has consistently referred to English trial practice circa 1791 when determining the appropriate scope of the right to a trial by jury in civil cases.[50] More than any other constitutional provision, a proper analysis of the Seventh Amendment depends on the historical setting

43. *Wonson*, 28 F. Cas. at 750–51. Of course, appellate courts maintain the power to set aside jury verdicts for errors of law. *Id.* at 750.

44. *See* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1870 (2008).

45. *Id.* at 1869.

46. *See* Markman v. Westview Instruments, 517 U.S. 370, 376 (1996) ("Since Justice Story's day, we have understood that the right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted." (citation omitted)).

47. David L. Shapiro & Daniel R. Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 448 (1971).

48. *Cf. id.* at 449 ("[W]e do not see how an historical inquiry can be avoided when a [S]eventh [A]mendment question is raised.").

49. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344 (1979) (Rehnquist, J., dissenting).

50. Wolfram, *supra* note 8, at 640; *see also* Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1913) (stating that the Seventh Amendment preserves the right to civil jury trials as it "existed under the English common law when the amendment was adopted").

in which the amendment was adopted.[51] This referential interpretive framework means that *English* common law defines the scope of the *American* right to a civil jury trial.[52] The Court's interpretation of the Seventh Amendment, therefore, has remained largely stagnant for the past two centuries.[53]

C. Modernizing the Right to a Civil Jury Trial

The demands of modern day trial practice have forced the Court to abandon a strict legal orthodoxy of *per se* compliance with the antiquated features of the English jury.[54] Quite simply, modern civil disputes do not resemble those from 1791, and the American legal system needs to adapt. Blind adherence to English common law would "place modern judicial administration in an historical straight jacket, controlled by the policies of a society 200 years ago."[55]

Recognizing that such historical dependency could threaten rational legal development, the Court has permitted some modern deviation from English common law. Its new jurisprudential course preserves the *substance* of common law civil jury trials—in particular the jury's power to find facts—while simultaneously allowing procedural modifications in the interest of efficiency.[56] Put another way, the Seventh Amendment "preserve[s] the basic institution of the jury trial... not the great mass of procedural forms and details."[57] The constitutionality of a legal reform that alters any feature of the common law jury thus "resolves itself into a question of what

51. *Parklane Hosiery Co.*, 439 U.S. at 339–40.

52. Wolfram, *supra* note 8, at 641; *see also* United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16750) ("Beyond all question, the common law [referred to in the Seventh Amendment] is not the common law of any individual state . . . but it is the common law of England, the grand reservoir of all our jurisprudence."). For a critique of the Court's historical mode of analysis and an explanation for how it can be traced to Judge Story's opinion in *Wonson*, see generally Klein, *supra* note 27, at 1020–30, and Krauss, *supra* note 31, at 460–78.

53. Wolfram, *supra* note 8, at 649.

54. *See* Colgrove v. Battin, 413 U.S. 149, 161 (1973) (discussing why the Seventh Amendment did not "saddle archaic and presently unworkable common-law procedures upon the federal courts" or "nullify innovative changes" to modern day trials). *But cf.* Simler v. Conner, 372 U.S. 221, 222 (1963) ("The federal policy favoring jury trials is of historic and continuing strength.").

55. Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 487 (1975); *see also id.* at 530 ("[N]o constitutional provision can be interpreted in a social vacuum.").

56. Henderson, *supra* note 9, at 336; *cf.* Meyer, *supra* note 37, at 346 ("[C]ourts have . . . held that the purpose of the Seventh Amendment was to preserve the *substance* of the jury trial right rather than the exact details of the procedure as it existed in 1791.").

57. Galloway v. United States, 319 U.S. 372, 392 (1943).

requirements are *fundamental* and what are *unessential*."[58]

English common law, for example, guaranteed civil plaintiffs the right to a twelve-person jury,[59] and for many years, the Court maintained that a guarantee to a "trial by jury" meant "a trial by a jury of twelve."[60] But in 1970, the Court permitted federal judges to empanel civil juries of six, reasoning that the historical requirement of twelve jurors was incidental to the common law right to a jury trial.[61] Federal courts were thus free to modify the composition of civil juries, but, importantly, not free to alter the jury's essential fact-finding function.[62] The former legal reform is sufficiently peripheral to the Seventh Amendment's guarantee; the latter strikes at its core. Put another way, the *qualities* of juries may change, but the *right* to jury trial may not.[63]

This distinction between the fundamental and unessential qualities of civil juries is important. Modern legal developments—such as the increasing complexity and size of civil suits[64]—have pressured our justice system to resolve disputes more efficiently.[65] The system has responded to this pressure by reducing jury sizes, promulgating new rules of evidence,

58. Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 671 (1918) (emphasis added).

59. Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

60. *Id.*; *see also* Maxwell v. Dow, 176 U.S. 581, 586 (1900).

61. Colgrove v. Battin, 413 U.S. 149, 160 (1973) ("[A] jury of six satisfies the Seventh Amendment's guarantee of trial by jury in civil cases."); *see also* Williams v. Florida, 399 U.S. 78, 102 (1970) (describing the twelve person jury as an "historical accident"); JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 180 (1994) ("[T]he Court reasoned that the number twelve was a fluke of history unrelated to the core functions of the jury.").

62. Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931); *see also* Dimick v. Schiedt, 293 U.S. 474, 486 (1935) ("Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.").

63. *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 345 (1979) (Rehnquist, J., dissenting) ("If a jury would have been impaneled in a particular kind of case in 1791, then the Seventh Amendment requires a jury trial today, if either party so desires."); Curtis v. Loether, 415 U.S. 189, 193 (1974) ("[The] thrust of the [Seventh] Amendment was to preserve the right to jury trial as it existed in 1791."); Beacon Theatres v. Westover, 359 U.S. 500, 510 n.18 (1959) ("This Court has long emphasized the importance of the jury trial."); Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657 (1935) ("The aim of the Amendment, as this Court has held, is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure."); Scott v. Neely, 140 U.S. 106, 109–10 (1891) ("In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it.").

64. *See infra* Part III.D.

65. *See* John W. Wesley, Note, *Scientific Evidence and the Question of Judicial Capacity*, 25 WM. & MARY L. REV. 675, 686 (1984) ("The increased use of scientific evidence, the trend toward a more relaxed standard of admissibility, and the increasing number of suits involving science and technology will compound the problem of delay. Thus, scientific evidence often creates additional burdens of manageability and poses serious problems of judicial administration.").

and updating antiquated rules of procedure[66]—all of which have changed the institutional framework within which litigants assert their Seventh Amendment rights. Many of these institutional modifications are constitutionally permissible. Legal developments that merely change the *form* of civil jury trials remain sufficiently detached from the core *right* preserved in the Seventh Amendment.[67] Yet other changes in the law can go—and have gone—too far.[68] One of the key challenges for our legal system, therefore, is modernizing judicial administration without circumventing the constitutional right to civil jury trials. Federal courts are not bound to follow England's rules of evidence from 1791,[69] but they are bound to respect civil litigants' right to a trial by jury. As then-Justice Rehnquist stated in *Parklane Hosiery Co. v. Shore*,

> To say that the Seventh Amendment does not tie federal courts to the exact procedure of the common law in 1791 doesnot imply, however, that any nominally "procedural" change can be implemented, regardless of its impact on the functions of the jury. For to sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.[70]

In other words, any legal reform that erodes the jury's historical fact-finding function is unconstitutional.

D. The Challenges of Complex Evidence

Striking the constitutional balance between improving judicial administration and preserving the jury's fact-finding primacy is not easy, and the increased complexity of modern day civil litigation has made achieving this balance even more challenging. In recent years, for example, the number of science-based grievances reaching the courtroom has increased substantially.[71] "Few dispute that litigation today deals with more

66. *See Gasoline Prod. Co.*, 283 U.S. at 498.

67. *See* Wolfram, *supra* note 8, at 735 ("What is said to be preserved is not the institution of jury trial as it then existed . . . but rather the 'right' to jury trial."); *see also Gasoline Prod. Co.*, 283 U.S. at 498 (distinguishing between the "form" and "substance" of Seventh Amendment guarantees); *cf.* FED. R. CIV. P. 38(a) ("The right of trial by jury as declared by the Seventh Amendment to the Constitution . . . shall be preserved to the parties inviolate.").

68. *See infra* Part V.

69. Galloway v. United States, 319 U.S. 372, 390 (1943) ("The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law of 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then prevailing.").

70. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 345–46 (1979) (Rehnquist, J., dissenting).

71. *See* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 97 (1990); *see also* Adam Siegel, Note, *Setting Limits on Judicial Scientific, Technical, and Other Specialized Fact-Finding in the New Millennium*, 86 CORNELL L. REV. 167, 167 n.1 (2000)

complex scientific issues than it did in the past."[72] Many civil trials now take months to complete, entail multiple parties, and involve vast quantities of evidence.[73] "This combination of factors results in cases so complicated that they are difficult for both attorneys and courts to manage and for any of the trial participants, including juries, to understand."[74] Such complex cases raise serious questions regarding whether the scientifically unsophisticated fact-finder is, or should be, able to decide between the two competing versions of "truth" presented in the courtroom.[75]

In the latter part of the twentieth century, many scholars and judges questioned whether jurors could even comprehend the evidence of complex civil litigation. According to one commentator: "It is difficult to believe that lay jurors can be thrust into a complicated antitrust or shareholder derivative action and, on the basis of conflicting expert testimony, determine whether a challenged business practice is improper."[76] Chief Justice Warren Burger further attacked the fact-finding abilities of modern juries by "suggest[ing] that jurors lack the abilities required to deal with the complex issues often presented in federal civil trials."[77]

To be sure, not all courts and commentators demeaned juror intelligence at the end of the twentieth century.[78] But a broad consensus did exist that the increasingly complex scientific evidence of civil litigation raised serious questions about the propriety and viability of the jury's historical fact-finding primacy. The layperson jury simply seemed incapable of properly understanding and weighing this new evidence.[79] For that reason, there was

(compiling cases).

72. Eugene Morgulis, Note, *Juror Reactions to Scientific Testimony: Unique Challenges in Complex Mass Torts*, 15 B.U. J. SCI. & TECH. L. 252, 270 (2009).

73. Meyer, *supra* note 37, at 337–38.

74. *Id.* at 338.

75. *See* SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 43 (1995).

76. Redish, *supra* note 55, at 505.

77. Joe S. Cecil, Valerie P. Hans & Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials*, 40 AM. U. L. REV. 727, 733 & n.37 (1991) (reviewing Chief Justice Burger's criticisms of the modern jury).

78. *See, e.g.*, *In re* U.S. Fin. Sec. Litig., 609 F.2d 411, 429–30 (9th Cir. 1979) ("The opponents of the use of juries in complex civil cases generally assume that jurors are incapable of understanding complicated matters. This argument unnecessarily and improperly demeans the intelligence of the citizens of this Nation. We do not accept such an assertion."); Jones v. Orenstein, 73 F.R.D. 604, 606 (S.D.N.Y. 1977) (denying a motion to quash a jury demand because, although the case was a complex derivative class action, it was not beyond the practical abilities of a jury); Radial Lip Mach., Inc. v. Int'l Carbide Corp., 76 F.R.D. 224, 229 (N.D. Ill. 1977) (rejecting plaintiff's request for a bench trial because the jury was able to understand the complex trademark infringement issues involved in the case); *see also infra* Part V.C.

79. For a review of the legal climate surrounding the admissibility of expert evidence in the 1980s and early 1990s, see Amy T. Schultz, *The New Gatekeepers: Judging Scientific Evidence in a Post*-Frye

a clear trend in the 1980s "to diminish the role of the jury in civil actions."[80] And in 1993, the Supreme Court continued this trend when it issued *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[81]

IV. THE *DAUBERT* TRILOGY: A BRIEF OVERVIEW

A. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*

In *Daubert*, the Court responded to the increased complexity of modern day litigation by outlining a gatekeeping function for judges when parties seek to introduce expert testimony at trial.[82] According to the Court, Federal Rule of Evidence 702 ("Rule 702") obligates trial judges to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[83] As a threshold matter,[84] trial judges should exclude expert testimony if they determine that such evidence will not reliably assist the jury in ascertaining disputed facts.[85] The *Daubert* opinion thus "deputizes federal judges as amateur scientist gatekeepers."[86] If the proposed scientific evidence is reliable, the judge may permit its presentation to the jury; if it is unreliable, the judge will keep the evidence from the jury.

To help judges perform this new gatekeeping duty, the *Daubert* opinion outlined general components of "good science," such as whether an expert's proposed theory or technique has been tested, subjected to peer review and published, or sufficiently investigated to establish margins of error.[87] These factors are only guidelines. *Daubert* did not "hand judges a step-by-step

World, 72 N.C. L. REV. 1060 (1994).

80. Paul B. Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment?*, 38 CATH. U. L. REV. 737, 764 (1989).

81. 509 U.S. 579, 597 (1993).

82. *Id.* at 585.

83. *Id.* at 589.

84. *See Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1556 (1995).

85. *Daubert*, 509 U.S. at 592.

86. Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 291 (2007).

87. *Daubert*, 509 U.S. at 593–94. Before Congress enacted the Federal Rules of Evidence, many federal courts followed the dictates of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and determined the admissibility of scientific evidence by looking exclusively at its "general acceptance" in the scientific community. *Frye*, 293 F. at 1014. *Daubert*, however, relegated this once-controlling inquiry into just one of several factors that determine admissibility. *See Daubert*, 509 U.S. at 589 ("*Frye* made 'general acceptance' the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.").

guide to applying scientific principles."[88] Trial court judges—who often lack scientific sophistication[89]—thus maintain considerable discretion over what expert evidence, if any, ultimately reaches the jury.

B. *General Electric Co. v. Joiner*

The Court further defined the role of the *Daubert* gatekeeper in *General Electric Co. v. Joiner*.[90] There, the Court held that appellate courts should use the highly deferential "abuse of discretion" standard when reviewing a trial court's decision to admit or exclude expert testimony under *Daubert*.[91] *Joiner* is also notable because it advised federal judges to conduct an inquiry into the basis of proposed expert testimony.[92] This inquiry helps to ensure that opinion evidence is connected to reliable science by more than simply "*ipse dixit* of the expert."[93] Put another way, trial judges should focus on the science underlying an expert's opinion, not merely the witness's conclusions derived therefrom.[94] If expert testimony strays too far from reliable science, the trial court must exclude the testimony.[95]

In short, *Joiner* substantially broadened and deepened the judicial gatekeeping responsibilities outlined in *Daubert*. Federal judges must now scrutinize the *factual predicates* of expert opinions to determine whether they comport with principles of reliable science.

C. *Kumho Tire Co. v. Carmichael*

The third and final case of the *Daubert* trilogy is *Kumho Tire Co. v. Carmichael*.[96] In *Kumho*, the Supreme Court clarified that *Daubert*'s gatekeeping requirement applies to *all* expert testimony, regardless of

88. *Confronting the New Challenges of Scientific Evidence*, *supra* note 84, at 1556–57.

89. *See infra* Part V.C.

90. 522 U.S. 136, 142–43 (1997).

91. *Id.* at 138–39.

92. *Cf. id.* at 147 (Breyer, J., concurring) ("The Court's opinion, which I join, emphasizes *Daubert*'s statement that a trial judge, acting as a 'gatekeeper', must 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" (citation omitted)).

93. *Id.* at 146 (majority opinion); *see also* Margaret A. Berger, *Expert Testimony: The Supreme Court's Rules*, ISSUES SCI. & TECH., 57, 61 (2000) ("[S]terling credentials are not enough. . . . [A]n expert's outstanding qualifications will not make the expert's opinion admissible unless the expert has a valid basis for how and why a conclusion was reached.").

94. ERICA BEECHER-MONAS, EVALUATING SCIENTIFIC EVIDENCE 11 (2007).

95. *See Joiner*, 522 U.S. at 146–47.

96. 526 U.S. 137 (1999).

whether it is based on professional studies or personal experience.[97] Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."[98] Accordingly, *Kumho* held that trial judges have gatekeeping power to exclude all proposed expert testimony from trial proceedings. District judges now have incredible "discretionary authority"—reversible only on grounds of abuse—over what, if any, expert evidence ultimately reaches the jury.[99]

V. JUDICIAL GATEKEEPING'S THREAT TO THE SEVENTH AMENDMENT

A. Not Just Another Rule of Evidence

The questions presented in the *Daubert* line of cases primarily involved the appropriate scope of Rule 702.[100] *Daubert* may thus be viewed as just another evidentiary constraint limiting the jury's access to prejudicial or irrelevant evidence, much in the same way that the Federal Rules of Evidence generally prohibit hearsay or speculation. This perspective, however, fails to appreciate the way that *Daubert* functions in modern day practice. The Supreme Court may have intended *Daubert* to give federal judges gatekeeping power over *evidence*, but in practice, *Daubert* gives federal judges gatekeeeping power over *the right to a civil jury trial*.

Consider, for example, toxic tort cases, where "plaintiffs cannot prove that the defendants' pharmaceuticals or chemicals caused their damaged health without expert testimony on causation, the crucial issue in these cases."[101] In many toxic tort disputes, judges use pre-trial "*Daubert* hearings" to "exclude so much of the evidence upon which plaintiffs intend to rely that a given case cannot proceed."[102] Put another way, a trial judge's

97. *Id.* at 152.

98. *Id.* at 147.

99. *Id.* at 158.

100. *Daubert* involved whether amendments to the Federal Rules of Evidence superseded the Court's ruling in *Frye v. United States*. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 587 (1993). *Joiner* involved what standard of review applied to evidence excluded under Rule 702. *See Joiner*, 522 U.S. at 138–39. Finally, *Kumho* involved what types of experts Rule 702 encompasses. *See Kumho*, 526 U.S. at 141; *see also* Libas, Ltd. v. United States, 193 F.3d 1361, 1366 (Fed. Cir. 1999) ("*Daubert* and *Kumho* were decided in the context of determining standards for the admissibility of expert testimony under the Federal Rules of Evidence . . . .").

101. Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 21 (2008) (citation omitted).

102. TELLUS INST., *DAUBERT*: THE MOST INFLUENTIAL SUPREME COURT RULING YOU'VE NEVER HEARD OF 3(2003), http://www.defendingscience.org/upload/Daubert-The-Most-Influential-Supreme-Court-Decision-You-ve-Never-Heard-Of-2003.pdf; *cf.* NICOLE L. WATERS & JESSICA P. HODGE, NAT'L CTR. FOR STATE COURTS, THE EFFECTS OF THE *DAUBERT* TRILOGY IN DELAWARE SUPERIOR COURT 21 (2009), http://www.ncsonline.org/wc/publications/res_daubert_effdaubdelawaresupctfinal.pdf ("Civil

decision to exclude proposed expert testimony is outcome determinative: the evidentiary ruling leads directly to a summary judgment dismissal, thereby blocking the case from ever reaching a jury.[103] Other Federal Rules of Evidence may prevent litigants from introducing certain *evidence* at trial, but rarely do they prevent entire *cases* from reaching a jury altogether.

Indeed, modern day "[f]ederal jurisprudence is largely the product of summary judgment."[104] Since *Daubert*, the frequency of motions for summary judgment in civil litigation has increased significantly, as has the frequency with which judges grant such motions.[105] *Daubert* has thus transferred substantial case disposition power away from juries and into the hands of judges. Chief Justice Feldman of the Arizona Supreme Court found this shift particularly troubling:

> In my mind, *Daubert* gives trial judges far more authority over civil cases than they ought to have.... What I feared would happen eventually, *and what has happened*, is that instead of having jury trials we now have *Daubert* hearings before the judge. The judge, in effect, then determines the outcome of the case by granting summary judgment. To my mind, this far exceeds any power that the Constitution gave judges over jury trials.[106]

Judicial gatekeeping is also troubling because federal judges have lengthy dockets, and consequently "have an incentive to dispose of cases quickly."[107] In turn, judges may use their gatekeeping discretion to exclude evidence and grant summary judgment in a greater percentage of cases than

defense attorneys, by and large, filed the majority of motions to challenge expert testimony. The differential impact of these motions was realized by civil plaintiffs, due to the potential dispositive nature of the motion against a lone expert.").

103. Weinstein, *supra* note 101, at 21–22; *see also* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 327 n.8 (2007) ("In numerous contexts, gatekeeping judicial determinations prevent submission of claims to a jury's judgment . . . ."); WATERS & HODGE, *supra* note 102, at 1 (arguing that "[e]liminating an expert witness may dispose a case"); *id.* at 15 ("The impact of the bench rulings on admissibility of experts influences the disposition. For instance, if a plaintiff's lone expert is excluded, typically the case is resolved by either a summary judgment or a directed verdict."); TELLUS INST., *supra* note 102, at 3 ("Polluters and manufacturers of dangerous products are successfully using *Daubert* to keep juries from hearing scientific or any other evidence against them.").

104. Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1897 (1998).

105. *See* LLOYD DIXON & BRIAN GILL, RAND INST. FOR CIVIL JUSTICE, CHANGES IN THE STANDARDS FOR ADMITTING EXPERT EVIDENCE IN FEDERAL CIVIL CASES SINCE THE *DAUBERT* DECISION 56 (2001); *see also* Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?*, 40 ST. MARY'S L.J. 795, 826 (2009) (providing an anecdotal discussion of how the *Daubert* trilogy has "spawned a substantial number of challenges to experts in a vast number of cases"). *But cf.* ERIC HELLAND & JONATHAN KLICK, DOES ANYONE GET STOPPED AT THE GATE? AN EMPIRICAL ASSESSMENT OF THE *DAUBERT* TRILOGY IN THE STATES (2009), *available at* http://lsr.nellco.org/upenn_wps/270 (reporting that state court adoption of the *Daubert* standard produces no effect on what type of experts are called to testify at trial).

106. TELLUS INST., *supra* note 102, at 13 (emphasis added) (citation omitted).

107. A. Leah Vickers, Daubert, *Critique and Interpretation: What Empirical Studies Tell Us About the Application of* Daubert, 40 U.S.F. L. REV. 109, 117 (2005).

may be justified.[108] Put another way, "*Daubert* gives a powerful tool to judges with incentives to dismiss."[109] Such potential for judicial oppression is precisely what the Founders intended to prevent with the Seventh Amendment.[110]

Daubert thus provides judges with the awesome—and unique—power to stop a case from proceeding to a jury based solely on an evidentiary ruling.[111] "[T]he judge[,] acting as a gatekeeper at a *Daubert* hearing[,]... is essentially blocking a litigant's right to a jury trial."[112] Federal trial judges are acting as *jury* gatekeepers; to access the jury, a litigant must first go through the judge. This judicial control over the right to civil jury trials undermines the fundamental guarantee of the Seventh Amendment.[113] As one scholar described:

> *Daubert* affects pretrial practices like discovery and summary judgment far more than trial, the supposed domain of rules of evidence. In the name of *Daubert* and Evidence, judges who so choose have a powerful tool with which *to manipulate the American system of adjudication and bypass the Seventh Amendment*.[114]

Not only are gatekeeping judges resolving *factual* disputes among opposing witnesses, but they are also resolving such disputes in a way that "poses a threat to the continued viability of the Seventh Amendment jury trial."[115]

The threat that *Daubert* gatekeeping poses to jury trials becomes particularly clear with an appreciation of the extensive use of expert testimony in civil litigation. One pre-*Daubert* study of jury verdicts in California reported that experts testified in eighty-six percent of civil jury trials.[116] In most of these cases, both parties called expert witnesses,[117] and

108. *Id.*

109. Kanner & Casey, *supra* note 86, at 298. "If a court is unwilling or unable to try cases, *Daubert* certainly can be abused. The opportunity to dismiss a case which should be heard by a jury is within every judge's grasp." *Id.*

110. *See supra* notes 4–18 and accompanying text; *see also* Kanner & Casey, *supra* note 86, at 307 (arguing that *Daubert* gives judges the opportunity to inject their personal preferences into the American judicial system).

111. *Cf.* TELLUS INST., *supra* note 102, at 16 (noting that the *Daubert* line of cases "hand[s] judges extensive powers for deciding not only whether complex evidence should be allowed into the courtroom, but whether the case should move forward at all when there are differences of opinion among experts").

112. Kanner & Casey, *supra* note 86, at 292.

113. *Cf. supra* Part II.

114. Weinstein, *supra* note 101, at 22 (emphasis added); *see also id.* at 105 (noting how *Daubert* has highlighted the "reluctance" of courts "to allow juries to decide cases").

115. *Id.* at 112.

116. Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1119 (1991).

117. *Id.* at 1120.

an average of 3.8 experts testified per trial.[118] This widespread use of expert testimony in civil litigation, which is expected to increase in the future,[119] highlights the extraordinary opportunity for judges to prevent cases from proceeding to a jury, especially because defendants are increasingly using *Daubert* hearings as a litigation strategy. One study of state civil cases reported that defendants challenged plaintiffs' expert witness proffers eighty-two percent of the time.[120] Almost half of these challenges were successful.[121]

B. Gatekeeping in Practice

1. Judicial Fact-Finding

The nature of *Daubert* evidentiary decision-making further highlights the distinction between it and other rules of evidence. For instance, when ruling on a liability insurance objection, the judge simply determines whether a party is offering evidence of insurance to prove negligence.[122] The judicial inquiry is similarly straightforward with criminal history, character, and hearsay evidence, for which the Federal Rules of Evidence are fairly easy to apply; judges frequently rule on such objections at trial with little or no argument from counsel.

But ruling on a *Daubert* objection is entirely different. "In their role as amateur scientists, [gatekeeper] judges examine a theory, gather opposing facts about it, and then attempt to make a 'reasoned judgment' about which set of facts are [sic] correct."[123] Sorting out conflicting facts and determining the appropriate credence to give competing expert witnesses, however, is the constitutionally safeguarded purpose of the jury.[124] *Daubert* thus robs the jury of its role as arbiter of the weight and credibility of

118. *Id.* at 1119.

119. Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 6 (2000).

120. D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 110–11 (2000).

121. *Id.* at 111.

122. FED. R. EVID. 411.

123. Kanner & Casey, *supra* note 86, at 291–92; *see also* David M. Malone & Paul J. Zwier, *Epistemology After* Daubert, Kumho Tire, *and the New Federal Rule of Evidence 702*, 74 TEMP. L. REV. 103, 106 (2001) (arguing that *Daubert* "empowers the trial judge to cross the line between making a legal determination and making a final fact determination").

124. Barefoot v. Estelle, 463 U.S. 880, 902 (1983); *see also* United States v. Cisneros, 203 F.3d 333, 343 (5th Cir. 2000) ("Credibility determinations are the exclusive province of the jury . . . ." (citation omitted)); Kanner & Casey, *supra* note 86, at 292.

evidence.[125] In *Wonson*, Judge Story outlined a bright line rule that the Seventh Amendment prevents judges from interfering with the civil jury's fact-finding domain. *Daubert* violates that rule.

2. Increased Costs, Decreased Jury Trials

Before the Court issued *Daubert*, litigants challenged the admissibility of expert testimony during trial.[126] After *Daubert*, however, litigants raise the majority of such challenges in motions *in limine*.[127] These motions usually lead to *Daubert* hearings, which resemble full trials: the judge presides, the expert is cross examined, and a stenographer creates a transcript.[128] *Daubert* hearings are essentially "dry runs" of jury trials,[129] and can be one of the most expensive, adversarial, and time-consuming phases of litigation.[130]

The additional cost of *Daubert* hearings can itself be a barrier to jury trials. Large law firms, for example, may request a *Daubert* hearing to drive up litigation costs and disadvantage smaller, opposing firms.[131] Litigants seeking to utilize expert testimony must now pay for and conduct two trials: one before the gatekeeping judge and one (potentially) before the jury. These costs can be prohibitive to litigants—usually plaintiffs—seeking access to jury trials.[132] Defending a *Daubert* motion "can cost

125. *See* Brief for Ass'n of Trial Lawyers for Pub. Justice as Amicus Curiae Supporting Respondents, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709), 1998 WL 734430, at *22 [hereinafter Brief for Trial Lawyers].

126. DAVID M. FLORES ET AL., EFFECTS OF *DAUBERT* ON EXPERT EVIDENCE PRACTICES IN FEDERAL DISTRICT COURT OF SOUTH CAROLINA 30 (2008), http://www.defendingscience.org/courts/upload/SKAPP-PROJECT-FINAL-REPORT-3-18-08.pdf.

127. *Id.* at 19.

128. *See* Thomas G. Gutheil & Harold J. Bursztajn, *Attorney Abuses of* Daubert *Hearings: Junk Science, Junk Law, or Just Plain Obstruction?*, 33 J. AM. ACAD. PSYCHIATRY L. 150, 152 (2005).

129. *Id.* at 151.

130. Kanner & Casey, *supra* note 86, at 324.

131. Gutheil & Bursztajn, *supra* note 128, at 152.

132. According to one scholar:

> Separate *Daubert* hearings can be quite expensive, consuming many hours of attorney and expert witness time. The prospect of shepherding expert witnesses through depositions and *Daubert* hearings in which opposing attorneys launch intensive attacks on the corpuscles of the relevant scientific studies, as well as on the expert witnesses' own conclusions, may be enough to discourage even the most aggressive trial attorney from taking even the most meritorious cases in which causation in fact is a seriously contested issue.

Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 KAN. L. REV. 897, 933 (2004).

plaintiffs hundreds and thousands of dollars."[133]

This substantial expense may help to explain why the number of toxic tort jury trials has steadily decreased in the years following *Daubert*.[134] Defendants began using *Daubert* motions to drive up plaintiffs' costs and erect "smoke screens" that attack well-regarded experts simply to prevent cases from proceeding to trial.[135] In one study of *Daubert*'s impact within the Delaware Superior Court,[136] plaintiffs' attorneys expressed concern about "the additional costs and fees that arise out of the discovery process and depositions of experts in response to a *Daubert* challenge."[137] These extra costs likely contributed to Delaware's "clear trend" away from jury trials in post-*Daubert* case dispositions.[138] Similar trends exist in the federal courts: despite an increase in litigation over the past few decades, the number of federal civil trials between 1992 and 2002 decreased by twenty-eight percent.[139]

C. Are Judges Better Equipped Than Juries To Decide the Reliability of Expert Evidence?

One theme present throughout the *Daubert* trilogy is the underlying fear that unsophisticated jurors will "fall prey to cunning expert witnesses" and return verdicts inconsistent with reliable science.[140] "[T]he Supreme Court's overriding concern... was with the problem of jury exposure to confusing and unreliable expert testimony."[141] In other words, the Court

133. TELLUS INST., *supra* note 102, at 12.

134. *Id.*

135. Kanner & Casey, *supra* note 86, at 306.

136. In 1999, the Delaware Supreme Court adopted the *Daubert* trilogy as binding precedent within the state court system. *See* M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 522 (Del. 1999).

137. WATERS & HODGE, *supra* note 102, at 18.

138. *Id.*

139. Patricia Lee Refo, *The Vanishing Trial*, 30 ABA J. SEC. LITIG. 2, 2 (2004) (reporting that federal courts held 4,279 jury trials in 1992, but only 3,006 in 2002). "[O]ur federal courts actually tried fewer cases in 2002 than they did in 1962, despite a fivefold increase in the number of civil filings." *Id.* (emphasis omitted); *cf.* Kanner & Casey, *supra* note 86, at 315 (reporting that the number of federal civil jury trials between 1985 and 2003 decreased by 79%) (citing Leonard Post, *Federal Tort Trials Continue Downward Spiral*, NAT'L L.J., Aug. 22, 2005, at 1). For a discussion about why the rate of civil jury trials has decreased—including a discussion of *Daubert*—see Furgeson, *supra* note 105, at 813–90. *See generally* Paula Hannaford-Agor, Robert C. LaFountain & Shauna Strickland, *Trial Trends and Implications for the Civil Justice System*, 11 CASELOAD HIGHLIGHTS 3 (2005), *available at* http://www.ncsconline.org/d_research/csp/highlights/highlights_main_page.html (follow "Trial Trends and Implications for the Civil Justice System" hyperlink under "Title" to download "PDF") (discussing the causes and implications of the "vanishing" civil jury trial).

140. David J. Damiani, *Proposals for Reform in the Evaluation of Expert Testimony in Pharmaceutical Mass Tort Cases*, 13 ALB. L. J. SCI. TECH. 517, 546 (2003).

141. Loeffel Steel Prod. v. Delta Brands, Inc., 372 F. Supp. 2d 1104, 1122 (N.D. Ill. 2005).

was worried that, in the presence of conflicting testimony about complex evidence, jurors would decide cases based not upon an appropriate comprehension of the evidence, but upon some other superficial factor. *Daubert* further assumes that judges will not suffer from these shortcomings because they are better equipped than jurors—through education, experience, or sophistication—to determine the validity and reliability of expert evidence.[142]

This reasoning is questionable at best.[143] Legal expertise does not equate to scientific expertise. Most judges lack formal scientific training, and when it comes to understanding and assessing expert testimony, they are laypeople—just like most jurors—who struggle to comprehend complex evidence.[144] *Daubert* thus transferred authority to determine the credibility and reliability of expert testimony from non-expert juries to non-expert judges.[145]

One survey of state trial court judges found that only six percent of them properly understood the scientific meaning of falsifiability, a key principle used to assess the merits of scientific evidence.[146] The authors of that study questioned whether judges could properly administer the *Daubert* criteria given their "lack of sophistication" regarding important principles of scientific validity.[147] In other words, judicial gatekeeping "is likely to

142. *See, e.g.*, Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1678 (1998) (noting that *Daubert* assumes that judges are "in a significantly better epistemic position to decide whether proffered scientific evidence is sufficiently reliable to be admissible in a trial before a nonexpert jury"); Damiani, *supra* note 140, at 545–46 ("Concerns over expert testimony lie at the heart of the real and proposed authority shift to judges; *Daubert*, *Joiner*, and *Kumho* operate on the theory that the evidence rules give experts excessive authority and make jurors excessively vulnerable." (quotation omitted)).

143. *See* Brief for Neil Vidmar et al. as Amicus Curiae Supporting Respondents, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (No. 97-1709), 1998 WL 734434, at *14 [hereinafter Brief for Vidmar] ("None of the studies [on jurors' ability to comprehend complex evidence] produced any evidence that in the face of complicated testimony jurors simply deferred to the experts and suspended their responsibility to make the best judgment that they could.").

144. Wesley, *supra* note 65, at 685. Indeed, empirical evidence reveals substantial similarities between how judges and juries scrutinize and weigh evidence. *See* Brief for Vidmar, *supra* note 143, at **7–10 (reviewing studies showing trial judges' and experts' agreement with jury verdicts).

145. Brewer, *supra* note 142, at 1678; *cf.* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES 188 (2007) ("The difficulties that both judges and juries face in evaluating expert evidence challenge the easy assumption that, because of education or experience, a trial judge deciding alone will more often than not do better than the jury in judging scientific expert testimony.").

146. Sophia I. Gatowksi et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 LAW & HUM. BEHAV. 433, 444–45 & fig.1 (2001).

147. *Id.* at 453.

produce inconsistent, arbitrary, and unpredictable results"[148]—the very sort of judge-made injustices that our Founding Fathers sought to eliminate when they passed the Seventh Amendment.[149]

Furthermore, empirical investigations of jury decision-making tend to disprove criticisms of the jury's ability to understand complex cases.[150] In a 1991 study, a group of legal scholars identified a "sharp contrast" between the research and popular legal opinion regarding jury competence.[151] According to the study, the weight of available research showed that jurors were "remarkably adept" fact-finders whose capabilities even "extend[ed] to cases of the greatest complexity."[152] Although jurors may struggle to comprehend complex litigation, "there is no firm evidence that their judgments have therefore been wrong."[153]

In sum, *Daubert* assumes that judges are better able than jurors to understand and scrutinize expert testimony. This assumption is wrong; it rests on anecdotes, not data. Available jury research shows that jurors can—and do—comprehend expert testimony at least as well as judges.[154] That is not to say that jurors do not struggle with complex evidence. The point is simply that, in cases where jurors may have been confused, "judges would have been equally confused."[155] Both are likely to struggle and make mistakes. But, as Thomas Jefferson once stated, the risk of an incorrect

148. Vickers, *supra* note 107, at 120.

149. Notably, because these non-expert judges may possess an incorrect understanding on scientific reliability, they may prevent experts from testifying for erroneous reasons. *See* CARL F. CRANOR, TOXIC TORTS: SCIENCE, LAW, AND THE POSSIBILITY OF JUSTICE 16 (2006). Poor implementation of the *Daubert* criteria can thus create improperly high barriers for plaintiffs seeking access to trials, thereby depriving litigants of their Seventh Amendment rights. *See id.* at 17.

150. *See generally* Cecil, Hans & Wiggins, *supra* note 77, at 744–75.

151. *Id.* at 744.

152. *Id.* at 745.

153. Robert D. Myers, Ronald S. Reinstein & Gordon M. Griller, *Complex Scientific Evidence and the Jury*, 83 JUDICATURE 150, 152 (1999).

154. Indeed, jurors may be *better* at scrutinizing expert evidence than judges because they share ideas and knowledge with one another. This collaboration may lead to a collective wisdom superior to the individual wisdom of a trial court judge. As the Ninth Circuit explained:

> While we express great confidence in the abilities of judges, no one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience that citizen-jurors bring to bear on a case. We do not accept the underlying premise of appellees' argument, "that a single judge is brighter than the jurors collectively functioning together."

In re U.S. Fin. Sec. Litig., 609 F.2d 411, 431 (9th Cir. 1979) (citation omitted).

155. Brief for Vidmar, *supra* note 143, at *14.

jury verdict "is less dangerous to the [S]tate, and less afflicting to the loser," than leaving such power over the rights of litigants to the potentially oppressive decision of an unelected governmental actor.[156]

VI. ADAPTING THE JURY SYSTEM WITHOUT CIRCUMVENTING THE SEVENTH AMENDMENT: CHANGING THE UNESSENTIAL FEATURES OF THE RIGHT TO A CIVIL JURY TRIAL

Daubert was the Supreme Court's response to the increasingly complex fact-finding demands of modern litigation. The Court's response, however, was flawed. Instead of helping jurors respond to the challenges of complex evidence, *Daubert* removed a portion of the jury's fact-finding authority and gave it to judges. The Court *decreased* the jury's power to resolve civil disputes and *increased* the judge's power to control litigants' access to civil juries. This major shift of adjudicatory authority is a fundamental change to the Seventh Amendment right to a trial by jury. And such fundamental changes are constitutionally impermissible.[157]

This section briefly outlines three ways that the legal system can adapt to the challenges of modern day civil litigation without infringing on the essential functions of the American jury. The goal here is not to provide a full defense of these proposals; instead, the objective is to demonstrate ways that the legal system can address the underlying concerns of *Daubert* without violating the Seventh Amendment. These three proposals thus focus on *enhancing*—rather than circumventing—the fact-finding abilities of jurors. Each proposal alters some unessential feature of the right to a jury trial, leaving the fundamental qualities of that right undisturbed.

A. Increase the Use of Court-Appointed Experts

Because litigants present their cases within an adversarial system, their expert witnesses are likely to present one-sided, distorted perspectives on the evidence.[158] These experts may become "advocates for the side that hired them" and thus abandon objectivity in pursuit of victory at trial.[159] As

156. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 214–15 (1787); *see also id.* at 215 ("In truth, it is better to toss up cross and pile in a cause, than to refer it to a judge whose mind is warped by any motive whatever, in that particular case.").

157. *See supra* notes 69–70 and accompanying text.

158. *See* Hyongsoon Kim, *Adversarialism Defended:* Daubert *and the Judge's Role in Evaluating Expert Evidence*, 34 COLUM. J. L. & SOC. PROBS. 223, 226 (2001) (quotation omitted).

159. MOLLY TREADWAY JOHNSON, CAROL KRAFKA & JOE S. CECIL, FED. JUDICIAL CTR., EXPERT TESTIMONY IN FEDERAL CIVIL TRIALS: A PRELIMINARY ANALYSIS 5 (2000), http://www.fjc.gov/public/pdf.nsf/lookup/exptesti.pdf/$file/exptesti.pdf.

a result, fact-finders—whether judge or jury—can be misled, confused, and frustrated.[160] *Daubert*'s solution to these problems was to eliminate a significant portion of the jury's fact-finding power. A better, constitutional solution is to *help* jurors sort through the biased rhetoric and conflicting expert testimony by providing them with an objective framework within which to scrutinize such evidence.

To provide this framework, judges should more frequently use their power under Federal Rule of Evidence 706 ("Rule 706"), which authorizes them to appoint neutral experts to testify at trial alongside partisan experts called by litigants.[161] These neutral experts will enhance each juror's ability to understand, assess, and evaluate the testimony of the litigants' experts.[162] "Appointing an expert enables a court to compensate for omissions and to obtain evidence, opinions, and explanations not presented by the parties. As such, this procedure promotes rational decision making and accurate decisions."[163] Put simply, neutral experts will improve jury understanding of complex evidence, thus making it more likely that the ultimate verdict will be based on a proper understanding of the relevant facts.

Admittedly, court-appointed experts are not a perfect solution to the increasingly complex nature of civil litigation.[164] Because a court-appointed expert may resolve disputes between the litigants' experts—and therefore be outcome determinative[165]—judges have understandably been reluctant to exercise their authority under Rule 706.[166] But limiting the

160. *See generally* Jody Weisenberg Menon, *Adversarial Medical and Scientific Testimony and Lay Jurors: A Proposal for Medical Malpractice Reform*, 21 AM. J. L. MED. 281, 285–87 (1995) (discussing how adversarial legal systems can operate to confuse jurors).

161. FED. R. EVID. 706(a) ("The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection."). Notably, the *Daubert* opinion encourages judges to "be mindful" of Rule 706 when performing their gatekeeping role. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993).

162. *See* Sophia Cope, *Ripe for Revision: A Critique of Federal Rule of Evidence 706 and the Use of Court-Appointed Experts*, 39 GONZ. L. REV. 163, 168 (2004).

163. Ellen E. Deason, *Court-Appointed Expert Witnesses: Scientific Positivism Meets Bias and Deference*, 77 OR. L. REV. 59, 82 (1998).

164. *See* Gross, *supra* note 116, at 1220 ("The essential flaw in the existing schemes for appointment of experts is the absence of incentives to use them. Appointed experts are never required . . . . Judges, even lawyers, may favor the practice in principle, but in the heat of a particular case appointed experts are always dispensable."). *See generally* Karen Butler Reisinger, Note, *Court-Appointed Expert Panels: A Comparison of Two Models*, 32 IND. L. REV. 225, 235–38 (1998) (reviewing scholarly criticisms of Rule 706).

165. *See, e.g.*, Hiern v. Sarpy, 161 F.R.D. 332, 336 (E.D. La. 1995) ("[A] danger exists that the appointed expert would side with either of the other experts, giving one side an inappropriate numerical advantage."); Deason, *supra* note 163, at 123 ("In a jury case, the concern is that the temptation for jurors to accept uncritically the views of any expert will be increased only if they perceive that the expert has the blessing of the court.").

166. For example, Joe S. Cecil & Thomas S. Willging, *Accepting* Daubert's *Invitation: Defining a Role for Court-Appointed Experts in Assessing Scientific Validity*, 43 EMORY L.J. 995, 1004 (1994), found

scope of Rule 706 testimony may reduce some of this concern about court-appointed experts acting as potential tiebreakers. Their testimony, for example, could be limited to only background or educational information. The court-appointed expert would thus serve as "a teacher who, unaffected by his having been called as a witness by one side or the other, can explain the technical significance of the evidence presented."[167] The goal of such testimony would be to help the jury find facts, not to resolve the underlying dispute.

In like manner, courts could delegate their expert appointment power to a qualified intermediary. Professor Christopher Robertson has developed a legal reform procedure called "blind expertise," whereby an intermediary performs a "double-blinding function" by soliciting expert opinions on behalf of the litigants.[168] The expert would hence "be unaware of whether the plaintiff or defendant was requesting the opinion."[169] After receiving the expert's case assessment, the litigant could either (1) call the expert as a witness and disclose her identity to the opposition, or (2) treat the expert as a consultant, thereby shielding her opinion from discovery within the protective umbrella of the work product doctrine.[170] Because blind experts shrouded in a "veil of ignorance"[171] are more likely to render objective opinions, this procedure would enhance the overall accuracy of expert testimony presented to juries. In turn, verdicts would more likely be based on reliable science and thus more likely be seen as legitimate, final, and factually correct.[172] Although this blinding process cannot guarantee the truth of expert testimony—or the jury verdicts derived therefrom—it would "eliminate the litigant-induced selection, compensation, and affiliation biases that degrade the accuracy of litigation witnesses under the status quo."[173] And it accomplishes all of this without eroding the jury's fact-finding power.

that only twenty percent of federal judges had appointed an independent expert.

167. Leesona Corp. v. Varta Batteries, Inc., 522 F. Supp. 1304, 1312 (S.D.N.Y. 1981).

168. Christopher T. Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 179 (2010).

169. *Id.* at 208.

170. *See id.* at 209–10.

171. JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

172. *Cf.* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 190 (2004) (discussing the relationship among legal procedures, outcome accuracy, and perceived legitimacy of final judgments).

173. Robertson, *supra* note 168, at 179.

B. Improve Expert Witness Accountability

Another way to help juries assess the complex evidence of modern civil litigation is by increasing the accountability of experts who testify at trial.[174] The key to this legal reform is the creation of an institutional incentive that discourages experts from testifying as partisan advocates. Currently, scientific peers rarely evaluate their fellow expert's testimony for accuracy, and so witnesses may feel free to say in court what they would never say to colleagues. As Professor Samuel Gross describes:

> One of the limiting features of our present system is its insularity; what an expert says in litigation is almost never exposed to a disinterested audience of the expert's professional colleagues. As a result, an expert witness is rarely held accountable to those who are best able to evaluate her evidence, and whose opinion may matter most to her career and to her vanity. Breaching this boundary would add a powerful incentive for care and for accuracy.[175]

Professor Gross's solution to achieving increased accountability is for expert opinions to undergo a peer review process similar to that required for many scientific publications.[176] This review process, however, would be time consuming, expensive, and dependent upon the cooperation of professional associations.[177] In short, it would be impractical.

Nonetheless, Professor Gross's solution appropriately focuses on increasing the transparency of expert testimony. An alternative proposal is the creation of a statewide or national electronic database to warehouse transcripts of all expert testimony.[178] Interested parties could then review the transcripts for whatever purpose. The goal would be to create a level of transparency that maintains the accountability of expert witnesses—to their peers, future litigants, or the general public—long after they have left the isolated environment of the courtroom. If witnesses know that their words will forever be available to the public at large, then they will, presumably, be more inclined toward cautious, accurate, and vigilant testimony, as opposed to biased testimony that is shaped by the party calling them.[179]

174. Notably, the use of neutral, court-appointed expert witnesses should help to achieve such accountability. If jurors have a basic understanding of the relevant science *before* partisan experts testify, then those experts would be less inclined to present biased or scientifically incomplete testimony: expert witnesses would presumably be more cautious if they are testifying to an educated jury. Additionally, the mere presence of a scientific colleague (the neutral expert) in the courtroom might also reduce partisan expert "lobbying."

175. Gross, *supra* note 116, at 1213.

176. *Id.*

177. *Id.* at 1214–15.

178. The transcripts, of course, would be appropriately redacted.

179. *Cf.* Wrobleski v. de Lara, 727 A.2d 930, 933 (Md. 1999) (discussing concerns surrounding a

C. Let Jurors Ask Written Questions

Perhaps the easiest way to help jurors understand complex evidence is to grant them the ability to submit written questions to expert witnesses.[180] Other important actors in the legal system already have this power. Before trial, lawyers ask experts questions to better understand the merits of the case and focus court proceedings on the most important issues.[181] During bench trials, judges also question expert witnesses to aid their own understanding of the facts. But jurors—perhaps the most important decision-makers within the legal system—do not have the same opportunity to ask experts questions.[182] "It is time to end this nonsensical practice."[183] The legal system does not further justice by erecting institutional bars to resolving jury confusion about complex evidence.

One model of this type of legal reform is found in the Arizona state courts, which currently permit jurors to take notes and direct questions to witnesses during trials. One study of this system found that such questioning "promote[d] juror understanding of the facts and issues."[184] Moreover, "[b]y empowering jurors with the opportunity to ask questions, they become more attentive, even if they choose not to exercise the questioning option."[185] Another study that reviewed jury questioning in New Jersey civil trials reported a widespread consensus among judges and trial attorneys that jurors become more attentive and better understand testimony after being permitted to ask witnesses questions.[186]

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testifying expert's "bias[] or inclination in favor of the party by whom the witness is employed" (quoting William Foster, Expert Testimony – Prevalent Complaints and Proposed Remedies, Address Before the New Hampshire Medical Society (May 22, 1897), *in* 11 HARV. L. REV. 169, 171 (1897))).

180. Juror questioning of witnesses was common practice in the 1800s, and many Anti-federalists intended that the jury play an active role at trials. *See* Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 454–55 (1996); *see also* Jeffrey S. Berkowitz, Note, *Breaking the Silence: Should Jurors be Allowed To Question Witnesses During Trial?*, 44 VAND. L. REV. 117, 124 (1991) (explaining that the historical practice of permitting juries to ask questions at trial became disfavored because "[t]he modern Anglo-American judicial system places the primary responsibility for eliciting the facts and issues in a case on the parties presenting the evidence").

181. Myers, Reinstein & Griller, *supra* note 153, at 154–55.

182. Peter Lattman, *Should a Jury be Able To Ask Questions During Trial?*, WALL ST. J., Feb. 2, 2007, http://blogs.wsj.com/law/2007/02/02/should-a-jury-be-able-to-ask-questions-during-a-trial/tab/article/ (last visited March 17, 2011) (reporting that only 15% of state courts and 8% of federal courts permit juries to submit questions during trial).

183. Myers, Reinstein & Griller, *supra* note 153, at 155.

184. Larry Heuer & Steven Penrod, *Increasing Juror Participation in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 260 (1996).

185. Meyer, *supra* note 37, at 365.

186. *See* REPORT OF THE CONFERENCE OF CIVIL PRESIDING JUDGES ON ITS EVALUATION OF JUROR QUESTION-ASKING PROCEDURES 10–11 (2006), *available at*

In sum, permitting jurors to ask questions engages them in the trial and provides them with an opportunity to resolve any confusion resulting from hearing complex expert testimony. Indeed, when jurors are permitted to submit questions to witnesses, nearly half of the questions are directed to testifying experts.[187] Furthermore, permitting jurors to ask questions "helps the trial to be more than a mere contest of advocacy[]... [and] helps the trial to maintain a proper focus on the search for truth."[188] And finding truth is, after all, a primary function of our legal system.[189]

VII. CONCLUSION

Daubert encumbers the right to a civil jury trial in at least three ways: (1) by replacing jury fact-finding with judicial fact-finding, (2) by authorizing judges to dismiss cases that do not "survive" *Daubert* hearings,[190] and (3) by permitting litigants "to spend an opponent into [a] disadvantageous settlement or to deter individuals from pursuing their legal rights in the first place."[191] Within this context, *Daubert* is properly understood as a legal development that alters the fundamental substance of the Seventh Amendment right to a civil jury trial. By giving judges the authority to resolve factual disputes and the corresponding discretion to prevent cases from ever reaching a jury, *Daubert* infringes on the core guarantee of the Seventh Amendment.

http://www.judiciary.state.nj.us/jurypilot/jurquest2.pdf.

187. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Jurors' Unanswered Questions*, 41 CT. REV. 20, 22 (2004). One jury, for example, asked a testifying physician, "What is a tear of the meniscus?" *Id.*

188. Eugene A. Lucci, *The Case for Allowing Jurors to Submit Written Questions*, 89 JUDICATURE 16, 19 (2005). "Questioning facilitates juror understanding, attentiveness, and overall satisfaction, improves communications, and corrects erroneous juror beliefs. Some contend it promotes the search for truth and justice." *Id.*; *see also* Diamond, Rose & Murphy, *supra* note 187, at 27 ("Jurors not only appreciate the opportunity to submit questions, but also formulate relevant questions to assist them in evaluating evidence."). *But see* N. Randy Smith, *Why I Do Not Let Jurors Ask Questions in Trials*, 40 IDAHO L. REV. 553, 561 (2004) (arguing that jurors should not be permitted to ask questions at trial because it may inappropriately alter the plaintiff's burden of proof and create a biased trier of fact).

189. *See* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 226 (2006). *But cf.* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596–97 (1993) (comparing the quest for truth in the courtroom with that of scientific analysis, and discussing the legal system's other—perhaps competing—goals of resolving disputes "finally and quickly").

190. WATERS & HODGE, *supra* note 102, at 18.

191. Brief for Trial Lawyers, *supra* note 125, at *21; *see also* Gary Wilson, Vincent Moccio & Daniel O. Fallon, *The Future of Products Liability in America*, 27 WM. MITCHELL L. REV. 85, 102 (2000) ("Losing [a *Daubert*] motion is devastating to the plaintiff's case, but even when the plaintiff prevails, an additional, and often expensive layer of motion practice, including a very expensive *Daubert* hearing, is added to the case.").

Of course, the legal system should adapt to the increasingly complex nature of civil litigation. Theses adaptations, however, must create an institutional framework that helps juries find facts without intruding upon their constitutionally protected adjudicatory responsibilities. *Daubert* fails to accomplish that objective.