



New Jury Trial Expansion as Structural Constitutional Reform

Jennifer L. Mascott

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*Jennifer L. Mascott**

Abstract

Evidence from British practice to the 1789 Judiciary Act then up through nineteenth-century judicial opinions and the contemporary Federal Rules of Criminal Procedure suggests that the “interest of justice” standard to grant a new trial is more defendant-protective than the standard a number of federal circuit courts apply. That evidence suggests new trials were considered warranted whenever a guilty verdict was “contrary to the evidence.” Early jurists and theorists viewed the new trial right as an important safeguard of the underlying, more fundamental, constitutional right to a criminal jury trial—rather than in tension with it as several circuit courts have suggested in recent opinions.

Over the past two years, at least three federal circuit courts have issued opinions deepening the circuit divide on the proper evidentiary standard for district courts to grant Federal Rule of Criminal Procedure 33 new trial rights. The proper standard for affirming new trial grants was recently raised in a petition to the Supreme Court from one of Hunter Biden’s business associates, making the legal question an issue in cases with significant public valence. Although the Court recently denied this petition, another Second Circuit case raising the same circuit split continues to percolate following the Second Circuit’s interlocutory reversal of a new trial grant.

Evidence unpacked by the article includes every reference to the new trial mechanism in documentary histories of the constitutional ratification debates and the First Congress, along with nineteenth and twentieth-century judicial opinions showing the important of the new trial motion in safeguarding the liberty of minorities, as well as the drafting history of the initial federal rules of criminal procedure. This evidence demonstrates the connection between criminal new trial motions and key constitutional democratic norms underlying the federal separation of powers and the role of jury trials in constraining federal executive authority.

* Asst Prof of Law & Codirector of the Gray Center for the Study of the Administrative State at Scalia Law School, previously serving as Deputy Asst Atty General in the Office of Legal Counsel & Associate Deputy Atty General at the U.S. Dept of Justice. Public Member of the Administrative Conference of the United States & elected Councilmember of the ABA’s Administrative Law Section. With thanks for excellent research assistance from R. Trent McCotter, Jamieson Knopf, and Tyler Shannon. This draft paper has also benefited from comments during presentations at the University of Michigan Public Law Workshop hosted by Professors Julian Mortenson and Chris Walker and at George Mason University’s Scalia Law School faculty workshop series.

Introduction

Recent high-profile federal appellate court decisions have reassessed the proper standard for judges to grant new trials under Federal Rule of Criminal Procedure 33, reversing guilty jury verdicts.¹ The terms of the Rule provide that “[u]pon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.”²

This method for acquiring relief from a guilty verdict is in addition to, and substantially distinct from, the Rule 29 motion for a judgment of acquittal.³ While Rule 29 motions permanently override conviction, Rule 33 new trials essentially instate a second jury trial. But because both Rule 29 and Rule 33 motions provide mechanisms for a single federal judge to reverse a jury verdict, the motions often are viewed as a piece.⁴ Federal appellate courts often exercise caution in review of a federal judge’s decision to grant either motion. And circuits across the country apply multiple, and arguably significantly distinct, formulations of the legal standard both for the district court’s reversal of the conviction and

¹ See *Cert Petn, Archer v. United States* (S. Ct. Oct. 29 2023) (cert denied, an. 22, 2024). The amicus brief of Criminal Procedure Scholars filed in that case similarly discusses Blackstonian theory and early practice in the United States as evidence for the more deferential side of the circuit divide on application of Fed. R. Crim. Pr. 33, available at https://www.supremecourt.gov/DocketPDF/23/23-414/290146/20231120152346768_Archer%20Amicus%20Brief.pdf. This paper builds on that amicus work along with my academic amicus briefs in similar cases, comprehensively canvassing discussions of new trial motions in the Documentary History volumes of both the ratification of the Constitution and the first Congress, along with explaining how the divergence in the scope of the criminal pardon power in British and American practice has led to a more expansive role for new trials in U.S. federal practice, and more deeply grounding the need for a properly broad new trial scope to preservation of the fundamental constitutional criminal jury trial right. See also *U.S. v. Rafiekien*, 68 F.4th 177, 187 (4th Cir. 2023); *U.S. v. Crittenden*, 46 F.4th 292 (5th Cir. 2022) (en banc) (reversing 25 F.4th 347 (5th Cir. 2022)); *United States v. Landesman*, 17 F.4th 298, 331 (2d Cir. 2021) (challenged subsequently through a petition for certiorari filed by Nordlicht, a prominent white collar defendant who founded and previously served as chief investment officer of Platinum Partners in New York).

² Fed. R. Crim. P. 33(a).

³ Fed. R. Crim. P. 29(a) (“After the government closes its evidence or after the close of all the evidence, the court on the defendant’s motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.”).

⁴ See *infra* part (discussing the conflation of the Rule 29 and Rule 33 standards by several federal circuits).

the circuit court's review standard for affirming or reversing the new trial grant.

Both white collar and more traditional criminal defendants such as those convicted of drug crimes and other less flashy offenses have seen a spate of appellate reversals of district court grants of new trial motions. In a time when the jury trial is vanishingly rare and the federal criminal justice system significantly favors defendants who plea before reaching trial, appellate reversal of a district judge's determination that the trial process was so flawed a second trial is warranted might be surprising.

As the jury trial right is a core individual rights feature of the federal constitutional system⁵ with longstanding, pre-constitutional origins, the assumption of many modern jurists is that any procedure reversing a jury verdict tramples such a right and must be applied with great caution.⁶ In recent practice, Federal Rule 33 grants of a new trial are at times conflated with the Rule 29 judgment of acquittal standard, both seen as potentially unwelcome intrusions on the jury system and thus meriting close review.⁷ But Founding-era evidence suggests that the mechanism of a judicial grant of a new trial was instead historically viewed as a critical *safeguard* of jury trial rights.⁸ The judicial grant of a new criminal trial most immediately results in the grant of an additional jury trial proceeding. And its availability helps to provide an alternative check on improper, unjust, or corrupt jury verdicts without the much stronger medicine of reversal of a jury verdict accompanied by acquittal.

This article uncovers evidence dating from the time of Blackstone and the U.S. constitutional ratification era suggesting that the grant of a new criminal trial was historically viewed as an important adjunct to the criminal jury trial protection, rather than a mechanism at odds with the

⁵ U.S. Const. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed”); *id.* amend. vii (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”).

⁶ *See infra* part I (examples from recent circuit court case law reversing district court grants of a new trial).

⁷ [See CA5 en banc court, reversing the CA5 panel and the CA2 decision].

⁸ *See infra* Part II.

jury trial right.⁹ The evidence and analysis includes each reference to the new trial mechanism in the multivolume documentary histories of both the ratification of the Constitution and the First Federal Congress. The paper traces this pre-constitutional evidence up through the Judiciary Act of 1789 and then nineteenth and twentieth-century state and federal practice indicating that the new trial mechanism adopted in the Federal Rules of Criminal Procedure incorporates the same relatively generous standard for granting a second jury trial that the First Federal Congress provided in the Judiciary Act of 1789 several months after ratification of the Constitution.¹⁰ The Judiciary Act contains provisions relevant to a perhaps surprising number of features that still relate to separation of powers debates in modern practice such as questions over the proper standard for evaluating the sufficiency of evidence in support of a new trial motion and the appropriate role of court-appointed criminal contempt prosecutors.¹¹

The evidence related to the proper Rule 33 standard suggests it is significantly more generous than that currently applied by several federal circuits who decline to deferentially review district judge Rule 33 grants. Rather, these courts have incorrectly treated the Rule 33 standard as roughly commensurate with the insufficient evidence standard of Rule 29

⁹ See initial discussion of the Blackstonian evidence in Professor Mascott's amicus briefs filed in the Supreme Court (Nordlicht) and before the Fifth Circuit sitting en banc (Crittenden). The Fifth Circuit discussed the Blackstonian evidence in its decision. This paper further explores and analyzes the implications of the Blackstone Commentary discussion of new trial motions and expands the discussion with evidence from the constitutional ratification debates and the time of the First Congress, along with nineteenth-century U.S. Supreme Court discussion of the new trial right's relationship with the constitutional jury function.

¹⁰ "And be it further enacted, That all the said courts of the United States shall have power to grant new trial, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law . . ." Judiciary Act of 1789, section 17. See *infra* parts II-III. See also Cassandra Burke Robertson, *Invisible Error*, 50 CONN. L. REV. 161, 170-71 (2018) (briefly discussing the Blackstonian articulation of the standard as "contrary to the clear weight of the evidence" and contending that the conception of the district court judge as a "thirteenth juror" "was incorporated into the early common law of the original colonies" and subsequently integrated into state and federal procedure).

¹¹ See, e.g., Gorsuch opinion dissenting from the denial of certiorari review in *Donziger v. United States* (March 2023); Judiciary Act of 1789 (permitting court-appointed criminal contempt prosecutions to weigh in on alleged misconduct and the proper punishment for violations).

that requires finding there is so little evidence that a jury could not constitutionally have reached a guilty verdict.¹²

Blackstone suggests in his commentaries that at common law, judges could grant new trials when a guilty verdict was against the “weight of the evidence” or contrary to evidence that would further the administration of justice. And throughout the late eighteenth, nineteenth, and early twentieth centuries, U.S. federal and state courts recognized new trials as a safety valve to correct guilty verdicts contrary to the weight of the evidence where the evidence was “doubtful” or a verdict did not “satisfy the conscience of a judge.”¹³

In recent years, several litigants have identified a deep federal circuit split in interpretation of the “interest of justice” Rule 33 standard for granting new trials.¹⁴ Illustrating the steady reoccurrence of the issue, the Supreme Court denied in January 2024 the second petition for certiorari on this precise legal question connected with litigation involving a former business associate of Hunter Biden, *Archer v. United States* (2d Cir. June 7, 2023) (cert petn filed Oct. 16, 2023).¹⁵ The earlier petition in the litigation was denied in 2021, when the case was in an interlocutory posture before the Supreme Court. The Second Circuit still has another criminal conviction percolating evoking the “interest of justice” circuit split, that may also return to the Supreme Court in a second cert petition following sentencing.¹⁶

In addition to discrepant applications of the Rule 33 standard between circuits, federal appeals courts at times internally suffer inconsistency on the standard, both for a district court judge to grant a new trial under Rule 33 and for an appellate court to review that determination. For example, in 2022 the U.S. Court of Appeals for the Fifth Circuit sat en banc to consider aspects of these questions.¹⁷

¹² See *infra* Part .

¹³ See, e.g., *United States v. Harding*, 26 F. Cas. 131, 137 (C.C.E.D. Pa. 1846) (Grier, J., Circuit Justice); *State v. Hopkins*, 1794 WL 303, at *2 (S.C. Ct. Com. Pl. & Gen. Sess. 1794).

¹⁴ See, e.g., *Nordlicht* (2022); *Archer* (2021).

¹⁵ Petition available here: https://www.supremecourt.gov/DocketPDF/23/23-414/285203/20231016201504612_No.%20_____%20-%20Petition.pdf.

¹⁶ See *Nordlicht* (cert petn denied 2022); Amicus Br. of Prof. Jennifer L. Mascott raising a number of the legal questions and historical details discussed in this draft article.

¹⁷ See *Crittenden* (en banc).

Although the legal standard for appellate review of discretionary district court determinations is “abuse of discretion,” appellate courts at times reverse citing simply a judge’s misapplication or misunderstanding of the Rule 33 standard making it unclear whether the district-level determination has received any deference.¹⁸ Although follow-up work could reexamine whether appellate courts are reviewing district court new trial grants using the correct appellate review standard, the first-order business is evaluating whether circuit courts throughout the country uniformly understand the correct standard for the district-court ruling in the first instance. Litigants have contended there is a deep split on how trenchantly district courts may review jury convictions.

Reexamination of the historical common law basis for the grant of the new trial mechanism, as it was understood from as long ago as Blackstonian England, and in light of the U.S. constitutional jury trial protection, helps shed light on this question.

Rule 33 new jury trials may be an overlooked but important component to criminal jury trial reform. The Rule 33 motion is available only to the criminal defendant¹⁹ and, thus, more frequent employment of this mechanism for finetuning the jury trial system would recalibrate the criminal justice system away from potential overreach by federal criminal prosecutors, both in cases involving traditionally less-advantaged defendants and more well-heeled defendants who find themselves facing financial or other regulatory-related criminal prosecutions.²⁰ The evidence from the era of Blackstone up through the 1789 enactment of the Judiciary Act and then the twentieth-century creation of the federal criminal rules suggests that courts applied a relatively deferential against the weight of evidence standard to grant new trials up through the mid-twentieth century. This historic tension stands in tension with the more trenchant standards employed by at least several modern circuit courts, requiring more like an extraordinary error in the weighing of the evidence to justify reversal of a guilty jury verdict.²¹

¹⁸ See, e.g., CA5; CA2.

¹⁹ See Fed. R. Crim. P. 33(a) (“Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. . .”). The terms of Rule 33 explicitly encompass the possibility of the grant of a new trial on the basis of “newly discovered evidence.” See *id.* 33(b). Such motions must be brought within three years of a verdict or guilty finding. Other motions are subject to a 14-day limit.

²⁰ Compare Nordlicht, with Crittenden.

²¹ See *infra* Part I.

To date, the Court has not definitively pronounced on the legal meaning of the “interest of justice” standard of Rule 33. Although the Supreme Court has yet to consider the circuit split, several recent petitions for certiorari review and en banc court consideration suggest that the Court might need to interpret this standard on the near horizon. With criminal justice reform and problems in the jury trial system gaining prominence in recent years, the Supreme Court may well want to consider this issue to address the proper scope of the new trial protection for criminal jury trials, a critical component of American self-government and an important constraint on federal prosecutorial overreach.²²

I. Background and Current Legal Doctrine

The federal rule of criminal procedure governing new trial motions under current practice incorporates and permits courts to grant such trials under the textually general, facially open-ended standard “if the interest of justice so requires.”²³ By its terms, the rule does not define or list examples of circumstances that satisfy the standard, although the accompanying time limits for filing new trial motions indicate that newly discovered evidence could constitute one such ground.²⁴ Generally, a defendant must file a new trial motion within 14 days of a verdict, but the terms of the rule permit motions based on newly discovered evidence for up to three years post-verdict.²⁵

The “interest of justice” standard is not an unfamiliar one within the rules of federal procedure. The Rules Enabling Act generally authorizes a standing committee to recommend to the Judicial Conference new rules that promote “the interest of justice.”²⁶ In

²² See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 83-84 (1998) (explaining that all state constitutions drafted in the Founding era from 1776 through 1787 uniformly mandated criminal jury trials).

²³ “Upon the defendant’s motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. . . .” Fed. R. Crim. P. 33(a).

²⁴ See *id.*

²⁵ See *id.* at 33(b)(1)-(2).

²⁶ See 28 U.S.C. § 2073(b) (“The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence Such standing committee shall . . . recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee . . . as may be necessary to maintain consistency and otherwise promote the interest of justice.”).

addition, several other federal rules of criminal procedure specifically invoke “the interest of justice”: Rule 15 permitting depositions of prospective witnesses “in the interest of justice” for “exceptional circumstances,”²⁷ Rule 21(b) permitting trial transfers “in the interest of justice,”²⁸ Rules 32.1(b)(1) and (2) tying the denial of witnesses in probation violation cases to “the interest of justice,”²⁹ and Rule 42(a)(2) requiring appointment of a government prosecutor for judicial criminal contempt charges unless “the interest of justice” necessitates a private attorney.³⁰

But neither federal statutes nor the federal rules of criminal procedure further define that general standard, which may apply differently depending upon the context in which the decisionmaker is called upon to evaluate just procedures.³¹ The right to request a new trial granted in the federal rules of civil procedure is no more detailed or explicit, authorizing judges to grant new jury trials “for any reason for

²⁷ Fed. R. Civ. P. 15(a)(1).

²⁸ *Id.* Rule 21(b)

²⁹ *Id.* Rule 32.1(b)(1)(B)(iii); *id.* Rule 32.1(b)(2)(C).

³⁰ *Id.* Rule 42(a)(2). This particular rule was the subject of a separate petition for certiorari before the U.S. Supreme Court in 2022, contending that the judicial appointment of a prosecutor violates the separation of powers and independence of the judiciary. *See* Cert Petn, Docket #22-274, denied by *Donziger v. United States*, 143 S. Ct. 888 (Mar. 27, 2023) (with Justices Kavanaugh & Gorsuch dissenting from denial of cert). The petition was from a split U.S. Court of Appeals for the Second Circuit decision in *United States v. Donziger* rejecting a criminal contempt defendant’s claim that the appointment of a prosecutor by a federal court violates the U.S. Constitution’s Appointments Clause, *see* U.S. Const. art. II, § 2, cl. 2. *See* *United States v. Donziger*, 38 F.4th 290 (2d Cir. 2022) (majority opinion by Judge Michael Park, with dissenting opinion by Judge Steven Menashi).

³¹ *See also, e.g.*, 18 U.S.C. § 1963(g)(1) (in one of a few dozen statutory provisions referencing “the interest of justice,” providing that for property forfeited in criminal racketeering cases, the Attorney General may grant mitigation petitions, restore forfeited property, “or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter”); *id.* § 2518(8)(d) (providing where law enforcement has intercepted communications that a judge “shall cause to be served on . . . such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice” an inventory related to government interception of wire communications and “such portions of the intercepted communications . . . as the judge determines to be in the interest of justice”).

which a new trial has heretofore been granted in an action at law in federal court.”³²

By its terms, the federal new trial right is limited to defendant challenges to convictions and guilty verdicts.³³ Rule 33 does not authorize the government to request a new trial following an acquittal, consistent with double jeopardy concerns and the role of the constitutional jury trial protection as a democratic check against too-ready prosecution followed by conviction via a lone elite governmental decisionmaker.³⁴ Further underscoring the pro-defendant posture and thumb on the scale of the proceeding in favor of district court discretion particularly in cases of new trial grants rather than denials, Rule 33 Further, the district court’s historic wide latitude in granting a new trial, and the motion’s fundamental purpose to provide a final backstop for criminal defendants wrongly convicted, was implicit in the asymmetric appeals procedures applicable to the motion until 1984. It was not until 1984 that Congress authorized the *government* to appeal new-trial grants—as opposed to the significantly more longstanding ability of defendants to appeal new-trial denials.³⁵

The new trial motion’s existence might seem in tension with this jury trial protection as its most immediate consequence is reversal of the

³² Fed. R. Civ. P. 59(a)(1). Absent from the civil new trial motion analogue to the Fed. R. Crim. P. new trial right, an “interest of justice” standard appears less frequently in the Federal Rules of Civil Procedure than in the criminal procedure rules. The main body of the civil procedure rules incorporate the phrase only one time, in Rule 32(a)(4) which permits the use of depositions instead of testimony during a civil trial due to certain “exceptional circumstances” in “the interest of justice.” The supplemental rules for asset forfeiture actions and maritime or admiralty claims incorporate an “interest of justice” standard into judicial venue transfer determinations. *See* Fed. R. Civ. P. App’x Rule F(9).

³³ *See* Fed. R. Crim. P. 33(a) (authorizing defendants to make a new trial motion but not the government).

³⁴ *See, e.g.*, *Tibbs v. Florida* (noting that the “principle, that the Double Jeopardy Clause imposes no limitations whatever upon the power to *retry* a defendant who has succeeded in getting his first conviction set aside has persevered to the present” (emphasis in original) (quotations and citations omitted)); *see also id.* at 41 (“[T]he Double Jeopardy Clause attaches special weight to judgments of acquittal. A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.” *Compare, e.g., with* Fed. R. Crim. P. 31(b)(3) (explicitly authorizing the government in the distinct circumstance of lack of jury agreement on a verdict to “*retry* any defendant on any count on which the jury could not agree” (emphasis added)).

³⁵ *See* Pub. L. No. 98-473, Title II, 1206 (codified at 18 U.S.C. 3871); *United States v. Rafiekien*, 68 F.4th 177, 187 (4th Cir. 2023).

jury by a governmental decisionmaker, the Article III judge. But in contrast to the Rule 29 motion for acquittal, the granting of a Rule 33 new trial motion eventually returns the trial to a second jury.³⁶ The judge's determination on the motion is by no means the last word in the criminal matter.³⁷ Moreover, whatever democratic concerns motivated the constitutional jury trial protection to stand as a check against overactive federal or state prosecutors³⁸ are not in play when it is a criminal conviction that is being second-guessed, rather than acquittal.³⁹

As this article further explains in uncovering the Blackstonian and Founding-era evidence about the historical use of the new trial mechanism, the procedure was to serve a purifying function to preserve the jury trial right in its best form.⁴⁰ The outcome of the new trial motion is to ensure that even after the democratic jury institution has convicted, there is yet another check if there was reason to doubt the legitimacy of that initial guilty verdict. As described by multiple federal courts, the judge serves as a thirteenth actor, one step outside the initial jury body itself. That “thirteenth juror” has authority to require a second jury to sit in judgment of the defendant where there is reason to doubt justice has been served even after an initial jury of peers has convicted based on federal charges brought by a separate branch of government, subject to

³⁶ See Fed. R. Crim. P. 29(a) (requiring the court to enter a judgment of acquittal upon the defendant's motion “of any offense for which the evidence is insufficient to sustain a conviction”). See also Tibbs at 42 (describing the distinct considerations at play when a judge reverses a conviction calling for a new trial versus issuing an acquittal, including that a reversal requires only a determination that “a guilty verdict is against the weight of the evidence” because the “judge disagrees with a jury's resolution of conflicting evidence” rather than that the evidence is definitively insufficient to support conviction).

³⁷ See *Tibbs*, 457 U.S. at 42-43 (“The reversal [of a conviction] simply affords the defendant a second opportunity to seek a favorable judgment.”).

³⁸ Cf. *id.* at 41-42 (noting that the Double Jeopardy Clause's prohibition on permitting the prosecution a second attempt at supplying sufficient evidence for conviction lies “at the core of the Clause's protections,” preventing the government from “unfairly burden[ing] the defendant and creat[ing] a risk of conviction through sheer governmental perseverance”).

³⁹ See *id.* at 40-41 (noting that the Supreme Court “has recognized that society would pay too high a price were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction”)

⁴⁰ See *infra* part.

the additional threshold check of grand jury indictment by peers in felony cases.⁴¹

Despite the absence of a specified list in the federal rules of the particular grounds establishing the level of “interest of justice” that would warrant a second jury trial, federal district judges nonetheless have a practice of granting new trial motions in cases where there has been legal error such as flawed jury instructions or the improper exclusion of evidence, where corruption is suspected, or where there is a claim that the evidence was insufficient or material new evidence might undermine the guilty verdict.⁴² Consistent with the general longstanding historical provenance of the new trial mechanism, these same grounds were recognized by Blackstone as historic bases for granting a new trial.⁴³

Separate from these legal and suspected corruption grounds for the new trial right, the Rule 33 new trial motion is also available on the factually driven ground that the weight of the evidence is against a guilty verdict. The Supreme Court has articulated that the granting of such motions is warranted when a trial judge determines a guilty verdict was against the “weight of the evidence” and disagrees with the jury’s balancing of conflicting evidence.⁴⁴ When articulating that standard in 1982 in *Tibbs v. Florida*, the Court clearly distinguished between acquittals justified only under an insufficiency of the evidence standard and new trials warranted by the lesser standard of judicial disagreement with a jury’s balancing of evidence.⁴⁵ But the Court did not directly

⁴¹ See Fed. R. Crim. P. 7(a)(1) (requiring an indictment in felony cases); see *id.* at Rule 6 (discussing the requisite constitution of a grand jury); *Tibbs v. Florida*, 457 U.S. 31, 42-43 n.18 (1982). See also U.S. Const. amend. v (imposing the requirement that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury” subject to national security exceptions).

⁴² See, e.g., Crittenden, at 296 (en banc) (describing the available grounds for a new trial as including when the trial is infected with an error such as “the erroneous admission or exclusion of evidence, inflammatory comments by a lawyer, or faulty jury instructions” in addition to “when the court believes the evidence weighs heavily against the verdict” (internal quotation omitted). See also Cassandra Burke Robertson, *Invisible Error*, 50 CONN. L. REV. 161, 163-64 (2018).

⁴³ 3 BLACKSTONE at *387

⁴⁴ See *Tibbs v. Florida*, 457 U.S. 31 (1982).

⁴⁵ See *id.* at 42 & 43 n.18

evaluate how evenhanded or lopsided evidence must be to warrant that judicial discretion to grant a new trial after conviction.⁴⁶

In the intervening decades, multiple federal courts of appeals have applied dramatically different standards and tests to evaluate when a district court judge's grant of a new trial is warranted under Federal Rule of Criminal Procedure 33, leading litigants to petition for Supreme Court review and contend there is a circuit split in the implementation and legal definition of the "interest of justice" standard as applied to weight of the evidence claims.⁴⁷

Over the past two years, at least four circuit courts have loosely reviewed district court grants of new trial motions. In the Fourth Circuit which applies a more lenient weight of the evidence standard, the district court's grant was affirmed as within its proper discretion. The U.S. Court of Appeals for the Second, Fifth, and Eleventh Circuits in contrast apply more trenchant review to the district court new trial grants, and all three circuits ultimately reversed the new trial grants before them in 2022 and 2023.⁴⁸ The Fifth Circuit itself had internal disagreement on the proper application of the new trial weight-of-the-evidence standard, with the reversal not coming until en banc review of a split panel decision affirming a district court grant of a new trial.⁴⁹ In the Second Circuit, two cases petitioned to the Supreme Court involved white collar defendants including a business associate of Hunter Biden, while the Fifth Circuit defendant had been convicted of possession with intent to distribute methamphetamine.⁵⁰

⁴⁶ See *id.* at 38-44.

⁴⁷ See generally Nordlicht, *supra* note 14; Pet'n for Cert., Archer v. United States, No. 20-1644 (S. Ct. June 2021); Pet'n for Cert., Archer v. United States, No. 23-414 (Oct. 19, 2023).

⁴⁸ See United States v. Archer; Crittenden; United States v. Witt, 43 F.4th 1188 (11th Cir. 2022).

⁴⁹ See United States v. Crittenden, 46 F.4th 292, 297, 300 & n.6 (5th Cir. 2022) (en banc) (suggesting that district courts must find that a jury verdict *both* weighs against the evidence *and* might have caused a miscarriage of justice before granting a new trial); United States v. Crittenden, 25 F.4th 347, 349 (5th Cir. 2022), *vacated by* Crittenden, 26 F.4th 1015 (5th Cir. 2022) (split panel decision holding that the district court properly used its discretion to grant a new trial after concluding "that the evidence failed to show" a requisite element of the crime).

⁵⁰ Crittenden, 46 F.4th 292, 295 (5th Cir. 2022) (en banc) ((reversing new trial grant and reinstating jury verdict on possession with intent to distribute methamphetamine).

The Fourth Circuit affirmed, in a split decision, the grant of a new trial for a defendant who had been convicted of criminal conspiracy and “acting as an unregistered agent of a foreign government.”⁵¹ The Fourth Circuit initially had reversed and remanded, however, requiring the district court to provide a fuller explanation for its order of a new trial.⁵² It affirmed only upon the second appeal.⁵³ The case was politically tinged; the defendant was an executive at a lobbying firm that he had cofounded with former Trump Administration official Michael Flynn.⁵⁴

In explaining its ultimate affirmance of the new trial grant, the Fourth Circuit parroted the description of the judge as sitting as a kind of “thirteenth juror” (a characterization missing in the Second and Fifth Circuit decisions). The court did nonetheless say that new trials should be granted on weight-of-the-evidence grounds “only in ‘rare’ instances.” The district court judge cannot merely have the view “that the case could have come out the other way” but she needs to conclude that it would actually be unjust to enter the judgment of guilty. Nonetheless, the Fourth Circuit found it permissible for the district court judge to conduct his own assessment of witness credibility and to make a new trial determination “based on the ‘cumulative’ weight of the evidence rather than by separately rejecting each individual offer of proof by the government.”⁵⁵

In contrast to the Fifth Circuit, which seemed to conclude that the jury’s strong constitutional role was an important counter-consideration to the typical level of significant deference awarded under abuse-of-discretion review, the Fourth Circuit here noted that it could reverse the district court only if its determination had been arbitrary and capricious. In particular, the circuit court acknowledged that “[t]he balance of proof is often close” and might turn on the kids on personal assessments of

⁵¹ See *Rafiekian*, 68 F.4th at 180.

⁵² See *id.* at 185 (noting that in the original district court decision, which both issued a judgment of acquittal on the grounds of insufficient evidence and awarded a new trial, the court had provided reasoning related to only the sufficiency-of-evidence standard and not the new trial).

⁵³ See *id.* at 180

⁵⁴ See *id.*

⁵⁵ *Id.* at 186-87.

factors like witness demeanor whose tenor can be fully appreciated only in person during the trial.⁵⁶

The Fourth Circuit noted specifically that the issuance and affirmance of a new trial order is consistent with the jury's important function "because holding a new trial still leaves the final decision in the hands of the jury."⁵⁷ Only if the district court were to engage in error such as resting its decision "on erroneous factual or legal premises," acting "arbitrarily," or "fail[ing] to adequately take into account judicially recognized factors constraining its exercise of discretion," would the circuit court find reversal justified.⁵⁸

In contrast, the Second Circuit has repeatedly suggested that a "district court must defer to the jury's resolution of conflicting evidence" unless the "evidence was patently incredible or defie[d] physical realities," or an "evidentiary or instructional error compromised the reliability of the verdict."⁵⁹ The Second Circuit has stressed that a court may not "set aside the verdict simply because it feels some other result would be more reasonable." And it has treated as similar, and favorably compared, a Rule 33 motion to the analysis accompanying a grant of acquittal under Rule 29, finding that for both motions the court "must be careful to consider any reliable trial evidence as a whole, rather than on a piecemeal basis."⁶⁰

The Second Circuit, further, stated that in its view, "[a]bsent exceptional circumstances," a district court could not evaluate witness credibility, "discount[] substantial circumstantial evidence," "act as the factfinder," or "mak[e] contrary factual findings based on inferences that the jury clearly rejected."⁶¹ With this approach, the Second Circuit squarely differs from the Fourth Circuit, for example, which in 2023 issued an opinion explaining how district court judges had a role to play in conducting their own evaluation of the proper inferences from the evidence despite a jury verdict to the contrary.⁶²

⁵⁶ *See id.* at 187.

⁵⁷ *Id.*

⁵⁸ *See id.* at 187.

⁵⁹ *Id.* at 188-189.

⁶⁰ *See id.* at 189.

⁶¹ *Id.* at 194.

⁶² Compare, e.g., *Archer* at 194, with *Rafiekian*.

The standards applied in the Second, Fifth, and Eleventh circuits arguably differ significantly from the standards applied in numerous other circuit courts. For example, in *United States v. Witt*, the Eleventh Circuit suggested that a new trial would be warranted only where the evidence includes “uncertainties and discrepancies” even though it acknowledged that district court judges can evaluate witness credibility.⁶³ The Eleventh Circuit previously has gone so far as to suggest that the typical deferential “abuse of discretion” review standard cannot be applied as generously in a review of a new trial grant as in other types of appellate review, including the review of new trial denials (despite the lack of power to review any new trial grants prior to 1984). The circuit court instead would provide sufficiently close review to assure itself that the district court judge has not “simply substitute[d] his judgment for that of the jury.”⁶⁴ In the 2004 decision espousing these standards, the Eleventh Circuit also suggested it would review new trials granted “based on the weight of the evidence” more carefully than new trials granted on other grounds.⁶⁵ The court believes its proper role is to provide sufficiently close review to assure itself that the district court judge has not “simply substitute[d] his judgment for that of the jury.”⁶⁶ The court would therefore affirm Rule 33 grants only if the evidence relied on by the jury “preponderate[d] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand.”⁶⁷ Like the Second and the Fifth circuits, the Eleventh Circuit has explicitly stated its lesser deference to district court new trial grants stems from its concern that the abuse of discretion standard in such cases is at odds with the jury trial and right and constitutional notices of deference to juries on questions of fact.

The Fifth Circuit has most recently noted that “[t]he jury’s constitutional role in deciding criminal trials leaves little room for judicial second-guessing” and that district court review of verdicts must be “quite limited.”⁶⁸ Discussing the centuries of history of the new trial

⁶³ 43 F.4th 1188, 1194 (11th Cir. 2022); Archer Pet’n at 23.

⁶⁴ See *id.* (internal quotation omitted).

⁶⁵ See *Butcher v. United States*, 368 F.3d 1290, 1296 (11th Cir. 2004); Nordlicht Cert. Pet’n at 21 (further characterizing and detailing this Eleventh Circuit decision and standard).

⁶⁶ See *id.* (internal quotation omitted).

⁶⁷ See *Butcher v. United States*, 368 F.3d 1290, 1297 (11th Cir. 2004).

⁶⁸ *Id.* at 496 (internal quotation omitted) (alteration in original).

right which long existed alongside the vaunted jury trial procedure in British practice, the court noted that new trials had historically been awarded “when it was clear that justice ha[d] not been done by the first.”⁶⁹ The court also acknowledged the longstanding availability of the new trial mechanism prior to ratification of the Bill of Rights, continuing up through the promulgating of the initial federal rules of criminal procedure in the 1930s.⁷⁰

That said, although continuing on to parrot the historic Blackstonian standard on which Rule 33 is rooted as permitting new trials when the first verdict was “contrary to the evidence,” the Fifth Circuit en banc court also included more trenchant language suggesting that it might at times affirm only new trials granted for more egregious, significantly flawed verdicts. For example, the en banc court noted that district court judges may weigh the evidence before the jury when evaluating a new trial motion, but then harkened back to circuit precedent indicating that this power must be “exercised with caution and invoked only in exceptional cases.”⁷¹ According to the Fifth Circuit sitting en banc, new trials cannot be granted “merely because the court would have ruled the other way.”⁷² And the kinds of “exceptional occasions” measuring up to that tougher standard exist only where “the verdict may have resulted in a miscarriage of justice.”⁷³ Jury determinations that would have constituted exceptional circumstances in the en banc court’s view include instances where the government’s case “depend[s] on farfetched inferences or solely on the testimony of a cooperating codefendant” or where “principal witnesses” were “obviously incredible,” there was “meaningful exculpatory evidence,” or a “significant risk that the verdict turned on improper factors.”⁷⁴

Several other circuits at times have issued internally inconsistent articulations of the evidentiary showing required to demonstrate that the interest of justice requires the grant of a new trial. For example, within the U.S. Court of Appeals for the Sixth Circuit, appellate panels have

⁶⁹ See *id.* at 496-97 (discussing some of the history in the Brief of Professor Jennifer L Mascott, pro se amicus curiae).

⁷⁰ *Id.* at 296 (discussing history detailed in the amicus brief).

⁷¹ See *id.* at 297 (internal quotations omitted).

⁷² *Id.*

⁷³ See *id.* at 297 (internal quotations omitted).

⁷⁴ Crittenden.

reversed district court judges for new trial determinations discrediting evidence that the appellate court would have left up to the jury but on other occasions *deferred* to judicial weighing of the evidence and credibility determinations.⁷⁵ The Sixth Circuit has also issued opinions stating that a district judge is not to sit as a “thirteenth juror” to redo a district court’s weighing of the evidence⁷⁶ even though the “thirteenth juror” role was a proper one for the judge present at trial.⁷⁷ This conclusion squarely conflicts with other circuit courts contending the judge’s “thirteenth juror” role is part and parcel of the jury process. The Fourth, D.C., and Tenth, courts have used the “thirteenth juror” formulation to describe the district court judge’s significant discretion in reviewing the verdict and judging for herself the credibility of witnesses and the proper balancing of the evidence.⁷⁸ That said, in the Sixth Circuit case dispelling the idea of judge as juror, the court was reviewing a new trial denial rather than grant⁷⁹—and, arguably, more skepticism is appropriate when reviewing denials as the new trial mechanism has historically served as one final avenue for criminal defendant protection.

Finally, circuits like the U.S. Court of Appeals for the Seventh, Eighth, and Ninth Circuits have reviewed the granting of a new trial more deferentially, indicating that it is appropriate for district court judges to reach evidentiary inferences and evaluate witness credibility as part of

⁷⁵ See *United States v. Burks*, 974 F.3d 622, 625 (6th Cir. 2020); *United States v. Mallory*, 902 F.3d 584, 596-97 (6th Cir. 2018).

⁷⁶ See *Mallory*, 902 F.3d at 597 (noting that it’s the district court judge who is capable of serving as the thirteenth juror because he is “[t]he judge must saw the witnesses and sat with the evidence at trial”). Interestingly, Judge Thapar’s opinion goes so far as to declare that it is not the appellate court’s role in any way to evaluate whether the “manifest weight of the evidence” supports the verdict and that the appellate court is really there just to evaluate the correct legal standard. Judge Thapar’s opinion for the circuit court on this point relies on a 1988 Sixth Circuit opinion. Although Judge Thapar explains how the distinctions between the appellate review panel and the firsthand witness of the district court justify the appellate court’s deference, his statement seems in tension with *Tibbs* itself, where the Supreme Court raised the “thirteenth juror” analogy and described it as applicable to the appellate court).

⁷⁷ See *id.* at 596 (noting that the very function of the new trial motion is to require “the trial judge to take on the role of a thirteenth juror” and that this role includes “weighing evidence and making credibility determinations firsthand to ensure there is not a miscarriage of justice”).

⁷⁸ See *Rafiekian*, 68 F.4th at 186; *United States v. Lopez*, 576 F.2d 840, 845 n.1 (10th Cir. 1978); *United States v. Brodie*, 295 F.2d 157, 160 (D.C. Cir. 1961); *Archer Cert Pet’n* at 22 (2023).

⁷⁹ See *id.* at 596.

their new trial determinations.⁸⁰ For example, the Seventh Circuit has noted that “in weighing a motion for a new trial,” a court “must necessarily consider the credibility of the witnesses” and is not limited to determining just “whether the testimony is so incredible that it should have been excluded.”⁸¹ Further, it observed that many courts have observed that the standard for granting a new trial is fundamentally distinct from the judgment of acquittal standard, which requires “view[ing] all evidence in the light most favorable to the prosecution.” In contrast, on a motion for a new trial, “the court may reweigh the evidence.”⁸² And the Seventh Circuit has previously explained that questionable evidence—even where it is “not inconsistent with physical reality or otherwise incredible”—requires the granting of a new trial where “the complete record . . . does not permit a *confident* conclusion that the defendant is guilty beyond a reasonable doubt.”⁸³

More recently, in 2016, even though it noted that “[m]otions for new trials based on the weight of the evidence are generally disfavored” and should be granting “sparingly and with caution” only in “exceptional cases,” the Eighth Circuit explained that a “district court’s discretion is quite broad.”⁸⁴ In particular, in affirming a district court grant of a new trial, the circuit court observed that district judges “can weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain the verdict.”⁸⁵ This longstanding position by the circuit also explained that for such weighing by the district court to be done improperly and constitute an “abuse of discretion,” there must be some way in which the court “commit[ted] a clear error of judgment” in its weighing of the relevant factors.⁸⁶

⁸⁰ See, e.g., *United States v. Morales*, 902 F.2d 604, 608 (7th Cir. 1990). See also *Pet’n for Cert., Nordlicht v. United States*, No. 21-1319 (S. Ct. March 2022); *United States v. Alston*, 974 F.2d 1206, 1211 (9th Cir. 1992) (treating Rule 33 determinations as factually driven judgments and contending that reversal of such a district court judgment should occur only for “egregious cases”).

⁸¹ *United States v. Washington*, 184 F.3d 653, 657 (7th Cir. 1999).

⁸² See *id.* at 657-58.

⁸³ See *United States v. Morales*, 902 F.2d 604, 608 (7th Cir. 1990), *modified by United States v. Morales*, 910 F.2d 467 (7th Cir. 1990).

⁸⁴ *United States v. Stacks*, 821 F.3d 1038, 1044 (8th Cir. 2016).

⁸⁵ See *id.*

⁸⁶ See *United States v. Knight*, 800 F.3d 491, 504-05 (8th Cir. 2015); see also *United States v. Dodd*, 391 F.3d 930, 934 (8th Cir. 2004).

Within the Ninth Circuit, the appellate court has detailed that the new trial power is “much broader” than a district court’s power to acquit.⁸⁷ In particular the district court “may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses” and the reviewing circuit court “carries a significant burden to show an abuse of discretion” before reversing a new trial grant.⁸⁸ Further, the court explicitly noted that “because an order directing a new trial leaves the final decision in the hands of the jury, it does not usurp the jury’s function in the way a judgment of acquittal does.”⁸⁹ In light of the appealability of new trial grants only as of 1984, the Ninth Circuit has concluded that reversals of such grants on appeal should remain rare and be limited to just “egregious” cases of abuse.⁹⁰

The U.S. Court of Appeals for the Tenth Circuit similarly has square tension with the circuits more generous in the scope of the role of the district court judge’s own individual analysis in evaluation of new trial motions. Although the appeals court indicated that it wasn’t clear whether the defendant was appealing denial of his motion for a new trial or a judgment of acquittal or both, the court indicated that a sufficiency of the evidence claim could be brought under either type of motion and that the analysis under Rule 29 and 33 would lead to the same outcome. Under both motions, the court said it would reverse “only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” It then went on to explain that it would not even evaluate witness credibility because the jury as factfinder must “resolve conflicting testimony, weigh the evidence, and draw inferences.”⁹¹

Finally, the U.S. Court of Appeals for the First Circuit also skeptically views district court grants of new trials. Their understanding, even in opinions within the past twenty years, arguably stands even further afield than some of the other circuits on this side of the split as it

⁸⁷ See *United States v. Inzunza*, 638 F.3d 1006,1026 (9th Cir. 2011).

⁸⁸ *United States v. Alston*, 974 F.2d 1211-12 (9th Cir. 1992).

⁸⁹ See *id.* at 1212.

⁹⁰ See *id.*; 3 Charles Alan Wright, *Federal Practice and Procedure* § 559 at 95 (Supp. 1992).

⁹¹ See *United States v. Dewberry*, 790 F.3d 1022, 1028 (10th Cir. 2015) (internal quotation omitted). *But see* *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999) (stating in passing that a trial court “is free to weigh the evidence and assess witness credibility” on a new trial motion in a decision reversing the district court’s grant of such a motion).

is in some aspects simply flawed and directly at odds with recent Supreme Court precedent like *Tibbs*—beyond even what the proper deferential standard would have been as an historic matter. The First Circuit has repeatedly indicated that a district court judge may not sit as a thirteenth juror which in its view would disrupt the jury’s inviolate role.⁹² This squarely contradicts the Supreme Court’s 1982 description of judges properly playing just that role in new trial motions, consistent with constitutional jury trial protections.⁹³ The Supreme Court has analogized the judicial review of a jury verdict under a new trial motion as analogous to a deadlocked jury itself rather than an acquittal, where the judge as a necessary decisionmaker in the jury trial process simply disagrees with one of the other essentially decisionmakers in the process—the initial twelve-member jury sitting under the judge’s superintendence.⁹⁴

The Supreme Court has never purported to resolve or address this circuit split over the proper interpretation of the “interest of justice” standard of Rule 33. But in addition to the twentieth-century description of judges as a “thirteenth juror” in criminal disputes and the explanation that evidence must preponderate heavily against the verdict to justify a new trial, the Court in the nineteenth century gave general context to the historic scope of the procedure. The Court explained in 1834 that the proper mechanism for addressing jury verdicts found to be “against the evidence,” if “at all to be applied by the court,” is a judge-ordered new trial.⁹⁵ Then six decades later, when explaining the standard further, the Court articulated that defendants could move for new trials where a

⁹² See, e.g., *United States v. Merlino*, 592 F.3d 22, 32-33 (1st Cir. 2005) (quoting a 2005 First Circuit opinion that stated a “district court judge is not a thirteenth juror who may set aside a verdict merely because he would have reached a different result” (internal quotation omitted)); *United States v. Rothrock*, 806 F.2d 318, 322 (1st Cir. 1986) (“This court has emphatically stated that a trial judge is not a thirteenth juror who may set aside a verdict merely because he would have reached a different result.”). The First Circuit also said that for new trial motions based on weight-of-the-evidence claims in particular, “it [must be] quite clear that the jury has reached a seriously erroneous result (internal quotation omitted) (alteration in original).” *Merlino*, 592 F.3d at 33.

⁹³ See *Tibbs v. Florida* 457 U.S. 31 (1982)

⁹⁴ See *id.* (reasoning that a judge’s “disagree[ment] with the jury’s resolution of the conflicting testimony . . . no more signifies acquittal than does a disagreement among the jurors themselves” similar to how “[a] deadlocked jury . . . does not result in an acquittal barring retrial under the Double Jeopardy Clause”).

⁹⁵ *Lee v. Lee*, 33 U.S. 44, 50 (1834).

verdict was “manifestly against the weight of evidence.”⁹⁶ The Court was clear that the determination whether to reverse a verdict under that standard was a matter of discretion in the lower court.⁹⁷

In a case involving review of denial of a new trial for excessive damages in the civil context, the Court toward the close of the twentieth century indicated that the authority to grant new trials “in actions at law in the courts of the United States” is significant and broad. That authority is based on the English common law practice “well established prior to the establishment of our Government” which included authority to grant new trials “for a variety of reasons with a view to the attainment of justice.”⁹⁸ Further, the Court quoted favorably lower court decisions noting that the trial court power to grant new trials “is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.”⁹⁹

There were significantly more questions over the course of the history of American new trial practice whether appellate courts could review a federal trial court’s denial of new trial motions without intruding on the jury trial protection, at least within the Seventh Amendment civil context. The Reexamination Clause applicable to civil

⁹⁶ See *Crumpton v. United States*, 138 U.S. 361, 362, 363 (1891) (explaining that on the separate question of whether “to direct a verdict for the defendant,” the weighing of the evidence is a “question[] exclusively for the jury” as a jury must consider any evidence in support of a verdict but a defendant can move for a new trial upon the ground that the verdict was “manifestly against the weight of evidence”).

⁹⁷ See *id.* at 363-64 (explaining that “the granting or refusing of [the defendant] new trial] motion is a matter of discretion” and that this standard was “settled” in three prior Supreme Court decisions). In this case, the Court was reviewing a murder conviction, incorporating and relying upon past precedent addressing new trial motions from both civil and criminal cases without distinguishing among the two. *Id.* at 363 (citing *Freeborn v. Smith*, 69 U.S. 160, 176-77 (1864), in which the Supreme Court observed that “our decision has always been, that the granting or refusing a new trial is a matter of discretion with the court below, which we cannot review on writ of error”; *Railway Co. v. Heck*, 102 U.S. 120, 120 (1880), which explained that the Court could not review on writ of error a district court’s new trial determination as “[w]e have uniformly held that, as a motion for new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here”; and *Lancaster v. Collins*, 115 U.S. 222, 225 (1885), which noted that some questions suitable for review by “a new trial in the trial court” are “not the proper subject of a bill of exceptions or of a writ of error”).

⁹⁸ *Gasperini v. Ctr. For Humanities*, 518 U.S. 415, 433 (1996).

⁹⁹ See *id.* (quoting *Aetna Casualty & Surety Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941)).

trials in the Bill of Rights instructs that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”¹⁰⁰

The Supreme Court, ultimately in *Gasperini v. Center for Humanities*,¹⁰¹ 518 U.S. 415, 433 (1996), resolved that at least in the context of reviewing jury damages awards, “appellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice.” Even though appellate courts “must give the benefit of every doubt to the judgment of the trial judge,” whether the “upper limit” of that deference “has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law.”¹⁰² Indeed, if this standard were taken seriously, it is hard to imagine what instance would justify an appellate court reversing a district court’s new trial grant, as almost any uncertainty in the district court’s reweighing of evidence—already a judgment call rather than an exact empirical science—would be resolved in the district court’s favor.

II. Historical Evidence on the Role of New Trial Motions Rooted in English Common Law

The jury trial right is a critical democratic protection within the constitutional structure to constrain government power. Scholars have written extensively about the scope of the jury trial right, its functions, and both strengths and weaknesses inherent in its incorporation into American civil and criminal law.¹⁰³

The complexities of the jury trial function and its similarities and contrasts with other forms of government-checking mechanisms are

¹⁰⁰ *Gasperini* at 433-34; U.S. Const. amend. vii.

¹⁰¹ 518 U.S. 415, 433 (1996).

¹⁰² *See Gasperini*, 518 U.S. at 435.

¹⁰³ *See, e.g.*, RENEE LETTOW LERNER, *THE JURY: A VERY SHORT INTRODUCTION* (New York: Oxford University Press 2023); Renee Lerner, *The Surprising Views of Montesquieu and Tocqueville about Juries: Juries Empower Judges*, 81 *LOUISIANA L. REV.* 1 (2020); SUJA THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES* (2016); Cassandra Burke Robertson, *Judging Jury Verdicts*, 83 *TUL. L. REV.* 157 (2008); Andrew s. Pollis, *The Appellate Judge as the Thirteenth Juror: Combating Implicit Bias in Criminal Convictions* (2022).

sufficiently vast to easily fill or focus an entire scholarly career. This paper builds on that prior scholarship and does not rehash the extensive exploration of the general jury trial right itself that legal scholarship has richly canvassed for decades. Rather, this article addresses one discrete piece of the jury trial protection—motions for a new jury trial following a guilty criminal verdict. To that end, this section canvasses every reference to the new trial mechanism in the volumes of the *Documentary History of the Ratification of the Constitution* and the *Documentary History of the First Federal Congress* along with providing the context of Blackstone’s theorizing about the longstanding mechanism under British practice.

Because the granting of new trial motions results in reversal of a jury verdict by a federal judge, typically thought to be a more elite entity within the federal structure in juxtaposition to the populist jury of peers, the motion is commonly seen as in tension with the jury trial right. It may be seen as undermining the right, similar to an order of acquittal which erases a conviction entirely. Or as a mechanism that usefully counterbalances a jury verdict, which otherwise might be essentially unreviewable and which some scholars have questioned as potentially susceptible to corruption, superficial influence, ignorance, or indifference. Even a few federal circuit courts view the new trial mechanism as in tension with the jury trial right. The Second and Eleventh Circuits in particular have expressed this view.¹⁰⁴

But that is incorrect. And the view that the new trial right chafes against jury trial protection has led to several circuit courts providing insufficient protection to the new trial mechanism by too readily reversing district court grants of new trials.¹⁰⁵ Based in large part on the misunderstanding that a new trial motion conviction reversal undermines the jury institution, these circuit courts have constrained the mechanism’s use, shrinking it to narrower than the historically understood contours of the new trial mechanism now in Rule 33 and originally in the 1789 Judiciary Act.¹⁰⁶ Situating the grant of a new trial accurately within its historic role as an important adjunct of the jury trial process would better inform judicial assessment of the proper breadth of the mechanism.

¹⁰⁴ See *supra* notes and accompanying text.

¹⁰⁵ See *supra* Part I.

¹⁰⁶ See *supra* Part I.

Historical evidence unpacked in this section of the paper indicates that the new trial function has been understood both as an essential purifying mechanism for the jury trial right and as an important component of that right over the course of hundreds of years. Rather than enforcement and provision of the new trial mechanism serving to undermine the jury trial right, it serves to strengthen and preserve it. In the seventeenth century, English commentator William Blackstone wrote fairly extensively about the ability to grant a new trial as an important, and longstanding, purifying mechanism for the jury trial process. His analysis also indicates that the availability of a new trial mechanism made the jury trial right more secure. Without the mechanism no one with a firsthand view of the presentation trial evidence and testimony would have a chance to review a jury's determination outside of the much more severe medicine of a grant of acquittal. Blackstone's statements about new trials and their role within jury proceedings also suggest that the "interest of justice" standard in Rule 33 is more likely aligned with the more generous side of the modern circuit split over the proper scope of Rule 33 than the more trenchant review standard applied by circuits like the Second, Fifth, and Eleventh.

Professor Suja Thomas has addressed the connection between Blackstonian thought and the historic scope of the new trial mechanism in English-American practice. She notes that in the event of a guilty verdict where evidence was found to be "contrary to evidence," the Court of King's Bench had the power to grant a new trial. Her estimation was that this corrective mechanism "was used in many instances."¹⁰⁷ The procedure was not provided for felony convictions under Blackstone-era British practice, although otherwise it was generally available.¹⁰⁸

Further, Professor Thomas's work has discussed several Founding-era statements indicating that although the necessity of the jury trial was baked into the Constitution, leaders of the Founding-era generation also recognized that "the jury was not infallible."¹⁰⁹ For example, James Wilson opined that juries make mistakes even though a jury remains the preferable institution for decision-making in questions of guilt and liability or innocence. Mistakes could be corrected through mechanisms such as the dismissal of biased jurors or the provision of a

¹⁰⁷ See THOMAS, *supra*, at 156 (internal quotation omitted).

¹⁰⁸ See, e.g., THOMAS.

¹⁰⁹ THOMAS, *supra* at 67-69.

new trial in Wilson's view.¹¹⁰ Similarly, Thomas Jefferson assessed that a jury could do wrong but that more unjust mistakes would be made in the absence of a jury.¹¹¹ Blackstone acknowledged early on that the new trial mechanism would assist jury purification and, consequently, underlying confidence in the jury process as a workable institution.¹¹²

Although not discussed nearly as extensively as the core jury process itself, a number of pre-constitutional and Founding-era statements, preceding and leading up to enactment of the 1789 Judiciary Act and the Bill of Rights, echo a Blackstonian view of the new trial motion as consistent with the jury trial right.¹¹³ These include statements by Alexander Hamilton in Federalist No. 83. Although English common law apparently provided a new trial mechanism for only civil trials and misdemeanors, not felonies, federal courts applied the new trial procedures of the early judiciary acts to felony convictions in the era immediately following their enactment. There are not numerous federal new trial cases in the early nineteenth century, in part because of the relative dearth of federal criminal offenses at the time. But the existence of early nineteenth cases for felony offenses including homicide suggests the 1789 Judiciary Act provision of new trials in all "common law" cases where it was available was understood to include felony convictions as well as misdemeanors and civil offenses.

Detailed below are statements from the constitutional ratification and first Congress debates along with influential commentators such as Justice Story and William Blackstone, who analyzed the new trial function and its purpose in his historic, foundational commentaries. Although his views cannot be taken as dispositive for American practice, several Founding-era statements and documents cited by the Supreme Court suggest that English common law practice generally is reflected in the early American statutory federal new trial right.¹¹⁴ Further, early Americans are understood to have been influenced by Blackstone's legal commentaries, and the U.S. Supreme Court has at times incorporated Blackstonian understandings into its

¹¹⁰ See THOMAS, *supra* at 68-69 (discussing 2 JAMES WILSON, COLLECTED WORKS 1001-02, 1009 (Liberty Fund)).

¹¹¹ See *id.*

¹¹² See 3 BLACKSTONE'S COMMENTARIES.

¹¹³ See *infra* notes.

¹¹⁴ English, as opposed to state/local/colonial common law.

legal analysis, making it useful to understand the Blackstonian view of significant early legal doctrines.

A. New Trials, Ratification, and the First Federal Congress

This article canvasses every reference to the phrase “new trial” in the digital editions of the Documentary History of the First Federal Congress¹¹⁵ and the Documentary History of the Ratification¹¹⁶ of the U.S. Constitution.¹¹⁷ Although not extensive, those references buttress the analysis of the new trial motion as protective and supportive of the jury trial right, affirm its consistency with common law practices, and suggest trial court judges were to have significant discretion in the awarding of

¹¹⁵ The Documentary History of the First Federal Congress’s aim is to “provide a full record of the debates and actions of the First Congress” through “the official papers of the Congress” and “all unofficial material . . . that may illuminate the proceedings” such as “letters to or from congressmen, newspaper accounts, shorthand transcriptions of debates, [or] diary entries.” 1 Documentary History of the First Federal Congress vii (Introduction) (hereinafter “DHFFC”).

¹¹⁶ The digital edition of the Documentary History of the Ratification of the Constitution includes the first twenty volumes of the series with accompanying appendices, maps, and biographical gazetteers. Editors of the project have indicated that the project generally contains copies of more than 60,000 documents including legislative and convention records, newspapers, pamphlets, and private papers where relevant to provide primary documents sources addressing the deliberations over the ratification of both the original U.S. Constitution and the Bill of Rights from 1787 to 1791. Note on the Digital Edition, The Documentary History of the Ratification of the Constitution Digital Edition, ed. John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber and Margaret A. Hogan. Charlottesville: University of Virginia Press, 2009. available at <https://rotunda-upress-virginia-edu.mutex.gmu.edu/founders/default.xqy?keys=RNCN-print&mode=TOC> (hereinafter “DHRC”).

¹¹⁷ This search was conducted using the phrase “new trial” in UVA Rotunda’s digital collection of the first twenty volumes of the Documentary History of the Ratification, and yielded twelve documents using the term. The analogous digital search in Rotunda’s digital Documentary History of the First Federal Congress yielded sixteen documents. This yield is small, but the existence of the documents shows that at least some influential individuals in the Founding era understood the jury trial to historically be accompanied by the new trial mechanism and provide some insight into the functions the mechanism was to perform and how liberally judges were able to award new trials under the common law. In conjunction with the earlier Blackstonian evidence, several of the Founding-era descriptions of new trials cited by the Supreme Court over the years, and the discussion and treatment of new trials in early federal and state court cases, these statements shed light on the scope of the new trial right as a historical matter.

such new trials. Also, the new trial was an important alternative to acquittal, which permanently vacates a jury-awarded conviction.

The first two excerpts are from 18th-century versions of the Georgia State Constitution, which in 1777 provided for plaintiffs or defendants in civil cases to appeal from a jury determination in the state's superior court within three days and "demand a new trial by a special jury."¹¹⁸ That special jury was to consist of twelve jurors chosen from among a group of 18 including six jurors nominated by each party and six jurors whose names were "taken indifferently out of a box provided for that cause."¹¹⁹ There was to be no appeal from that "special jury to try the cause."¹²⁰ The 1777 Georgia Constitution also, separately, provided that "trial by jury [was] to remain inviolate forever."¹²¹ In 1789, Article III section 2 of the Georgia Constitution provided that judges should be empowered "to direct a new trial by jury within the county where the action originated" and that the new trial "shall be final." Again, the constitution also separately provided, this time in Article IV, for "trial by jury" to "remain inviolate."¹²²

Then in a letter from Richard Henry Lee¹²³ to Samuel Adams that is printed in two separate volumes, Lee cites Lord Mansfield's decision to set aside an acquittal of seditious libel charges against a publisher and order a new trial and prosecution as an example of the dangers of the original constitutional text not expressly granting freedom of the press and securing a jury trial right.¹²⁴ But this concern about the new trial in that case was its use as a tool to override an acquittal which ultimately raises double jeopardy concerns in American practice as secured by the eventually ratified Bill of Rights. Adams, the President of the

¹¹⁸ § 48, The Constitution of the State of Georgia (Savannah, 1777) (Evans 15308) Ratification of the Bill of Rights, Volume XXXVII: Origins at 67-68.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 68.

¹²¹ § 61, at 68.

¹²² DHRC at 69. The Constitution of the State of Georgia, Ratified the 6th of May, 1789 (Augusta, 1789) (Evans 21850).

¹²³ Lee served as United States Senator from Virginia from 1789 through 1792 and under the Articles of Confederation was the sixth president of Congress. He also signed the Declaration of Independence.

¹²⁴ See Letter from October 5, 1787, 8 DHRC (Ratification by the State, Volume VIII: Virginia, No. 1), at 5 n.7; *id.* 13 DHRC at 323.

Massachusetts Senate, eventually voted favorably for the Constitution as part of Massachusetts's ratifying convention.¹²⁵

Alexander White, who voted in favor of constitutional ratification as a member of the Virginia ratifying convention, wrote an essay in Virginia's Winchester Gazette contending that opponents to the Constitution had falsely claimed that the Article III provisions permitting appellate review would override a right for juries to determine facts. In contrast, White observed, the only way under the historical civil law doctrines to override factual determinations of the trial court is through the procedures of a writ of attainor or a new trial. Appellate review, according to White, was never understood to involve the admission of new evidence during that stage of review. Writs of error were only for "matter[s] of law arising upon the face of the proceedings" as explained in Blackstone's commentaries.¹²⁶

Then the index entry on "justice" references notes in response to George Mason's constitutional objections as suggesting that justice requires the availability of new trials.¹²⁷ In the correspondence submitted to the New Jersey Ratifying Convention in response to the objections raised by Mason after declining to sign the Constitution along with two other delegates present at the Constitutional Convention, the author addresses concerns over the constitutional text's omission of a jury trial right in civil cases.¹²⁸

The correspondent first notes that the Constitution certainly does not eliminate "[t]he right of trial by jury" but that "it is altogether left to the general government to dilate the subject as they please." The Constitution more broadly can establish only "general principles" and "the extending and enlarging them to particular cases will be the business of the future Congress." More specifically, the correspondent notes that although the Supreme Court has potential appellate jurisdiction over

¹²⁵ *Id.* at 36 n.1 (DHRC, Digiton Edition, volume 8).

¹²⁶ See 8 DHRC 403 & n.7 (statement to the people of Virginia by Alexander White who had voted to ratify the Constitution as part of the Virginia ratifying convention).

¹²⁷ Index Entry on "Justice," 36 DHRC (Cumulative Indexes to Volumes 1-34: Cumulative Subject Index). See also Reply to George Mason's Objections to the Constitution, *New Jersey Journal*, December 19 & 26, 3 DHRC 154 (Ratification by the States; Delaware, New Jersey, Georgia, and Connecticut).

¹²⁸ 3 DHRC at & 154 n.1 & 548 ("Another important and weighty objection brought against the Constitution is that there is no security for the right of trial by jury in civil cases.").

both law and fact, “this by no means excludes the idea of trial by jury.” New Jersey’s practice at the time provided a representative example of how its supreme court’s original jurisdiction over law and fact was never presumed to amount to the trial of fact without jury intervention. Indeed according to the observer, within that state there was ‘nothing more common than to set verdicts aside where it appears that justice has not been fairly obtained by the losing party, and new trials are ordered in the same court for the sake of substantial justice.’”

Further, this observer believed that Connecticut had a similar practice of permitting multiple jury trials and that ‘there have been instances of three jury trials in one cause.’ This explanation of the new trial provision suggests that new trials were consistent with, and one aspect of the jury trial right, and that they were available as a mode of fixing error consistent with jury trial of fact. Just as appellate review would be available for review of legal determinations, new trials would be available for review of facts and fairness and justice were treated in these comments as touchstone standards for evaluation of when new trials were warranted consistent with the jury right.¹²⁹

A reference to the example of Lord Mansfield granting a new trial to overcome acquittal is also raised in one of Cincinnatus’s responses to James Wilson’s strong support of the Constitution. Here, Cincinnatus makes the claim that the absence of a textual constitutional right to a civil jury trial in conjunction with Supreme Court appellate review over law and fact causes the jury trial right to be at risk. And where the document also omits an express freedom of the press, perhaps publishers need to fear that they, too, could be subject to judicial rulings that intentionally suppress the role of a jury that might find innocence and block the government from successfully bringing suit against printers who object to or expose their actions.¹³⁰

A reference to “new trials” also arises several times in brief notes taken by attendees of the state ratification conventions, albeit without the provision of much extra insight into the meaning of the note. There are notations attributed to John Smilie including expressions of concern that the Constitution harms democracy and appeals will wrongly override jury

¹²⁹ See 3 DHRC 158 (Ratification by the States, Volume III: Delaware, New Jersey, Georgia, and Connecticut – Reply to George Mason’s Objections to the Constitution, New Jersey Journal, December 19, 26).

¹³⁰ See Cincinnatus I: To James Wilson, Esquire, New York Journal, Nov. 1, 1787, 19 DHRC (Ratification by the States: New York, No. 1), at 163-164 & n.5.

verdicts. Subsequently he notes that volume 3 of Blackstone's commentaries on juries indicates the "[t]he propriety of new trials." Several individuals referenced in this page of notes maintain concerns that appellate review of fact might squelch or override a jury verdict.¹³¹

In the North Carolina ratification debates, Mr. Maclaine mentioned new trial practice as he was explaining why the original Constitution omitted any definitive reference to civil jury trials. He explained that the particulars of the provision of civil jury trials in the States could be diverse—in some states, an appeal involved a new trial in the superior court and in others the appellate court could hear no new testimony but had to reach its decision based only on the inferior court record. He said that in establishing federal practice under the new Constitution, Congress would "undoubtedly make such regulations" regarding these kinds of details "as will suit the convenience and secure the liberty of the people."¹³²

In Federalist No. 83, Alexander Hamilton also discussed jury trials and the mechanism of granting a new trial. In contrast to the "preservation of liberty," thought by some to be the key reason for the jury trial in civil cases, he identified "security against corruption" as "[t]he strongest argument in its favour."¹³³ The existence of a jury means that corruption requires influencing both the court and the jury, because in the natural course, a "court will generally grant a new trial" in cases "where the jury have gone evidently wrong."¹³⁴ Hamilton then posits that the institution of a jury trial subject to the possibility of a new trial provides a "double security" and will "tend[] to preserve the purity of both institutions."¹³⁵

Hamilton's essay also concedes that he had doubt about the "essentiality" of jury trial in many civil cases, and he notes the complexity of constitutionalizing a civil jury trial practice because contemporary jury practice varied so significantly state by state.¹³⁶ Ultimately, he saw virtue

¹³¹ See 2 DHRC at 525-26 (Ratification by the States, Volume II: Pennsylvania).

¹³² Convention Debates, July 28, 1788, 30 DHRC, 324, at 362-63 (Ratification by the States, Volume XXX: North Carolina, No. 1).

¹³³ FEDERALIST NO. 83, available at https://avalon.law.yale.edu/18th_century/fed83.asp.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

in leaving the establishment of specific contours of the federal civil jury to the legislative process rather than constitutionalizing it with great detail. Nonetheless, in the course of discussing state practice he observed that Georgia, with its common law courts, already had in place common law courts where “an appeal of course lies from the verdict of one jury to another, which is called a special jury.”¹³⁷ And his comments suggested that a new jury trial was provided as a matter of course in four eastern states within which “the trial by jury not only stands upon a broader foundation than in the other states” but where it is treated as “an appeal *of course* from one jury to another till there have been two verdicts out of three on one side.”¹³⁸ Hamilton’s descriptions suggest that there were already a number of states where new trial or new verdict options were seen as entirely consistent with the trial by jury.

Finally, James Monroe who objected to ratification and maintained concerns about the use of a federal court system to resolve ordinary disputes, also referenced new trials in the context of a particularly strong objection to what he described as the “extraordinary and exceptionable” appellate review of fact.¹³⁹ In his view, the review of fact would require either resolution of the evidence by the court itself on appeal or submission of the facts to a second jury. While a court judging the facts under the first or new trial would dispense with the jury trial right, in Monroe’s estimation the granting of a second jury trial also would be problematic—but for the distinct reason that a party might have to be inconvenienced by traveling to a distant federal court rather than local courts maintaining jurisdiction over typical controversies.¹⁴⁰ The idea of a new trial with juries resolving facts implicitly, even here, is viewed as consistent with the jury trial right. It is the idea of judges definitively resolving facts, particularly if that were to occur on appeal, that the constitutional questioners dread.¹⁴¹

In the Documentary History of the First Federal Congress (“DHFCC”), most of the 16 documents referencing “new trials” relate to

¹³⁷ *Id.*

¹³⁸ *Id.* (emphasis in original).

¹³⁹ See 9 DHRC, 872-73 (Ratification by the States; Virginia, No. 2).

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

the First Judiciary Act provisions authorizing the proceeding.¹⁴² The Judiciary Bill, S-1, when it was introduced in the Senate on June 12, 1789, provided in section 17 that all federal courts “shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.”¹⁴³ Section 18 of that draft provided that when judgments on a verdict in civil actions were entered in a circuit court, the execution of that judgment could be stayed for 42 days to give time to file a motion for a new trial. If such a motion were filed within 42 days, then execution of the initial judgment would “be further stayed to the next session of said court” and the “former judgment shall be thereby rendered void” in cases where “a new trial be granted.”¹⁴⁴ Section 18 provided that the original judgment could be stayed for purposes of filing the new trial motion “on motion of either party, at the discretion of the court.”¹⁴⁵

The documentary history prints three versions of the Senate bill—from June, July, and then the final version enacted on September 24 of that year.¹⁴⁶ The only changes made in the new trial clause in section 17 seem minor and relatively mundane. The prefatory clause in section 17 originally was drafted “And be it further enacted by the Authority aforesaid.”¹⁴⁷ The reference to the Authority aforesaid is recorded as being struck out during the bill’s initial consideration in June and does not reappear in the volume’s records. There are some changes in capitalization, for example, with references to both “Courts’ and the “Jury’ capitalized by the July version of the bill.¹⁴⁸ Finally, the new trial provision initially appears in June as its own independent sentence in section 17, but is connected to the following section 17 clause authorizing courts to impose and administer oaths, punish for contempt, and make procedural rules, with a colon by the July version of the bill.

Section 18 similarly changes very little from the initial draft text developed during June and July of 1789 to the final version enacted on

¹⁴² See 5 DHFFC, at 1172, 1183. (Volume 5: Legislative Histories: Funding Act [HR-63] through Militia Bill [HR-112]).

¹⁴³ See *id.*

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See 5 DHFFC at 1150-60.

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

September 24.¹⁴⁹ Like section 17, the draft text edits included capitalization alterations.¹⁵⁰ Legislators also reordered phrasing in the statutory language establishing the issuance of a circuit court judgment as the trigger for either party to have the opportunity to file a new trial motion.¹⁵¹ But substantively, the content related to the new trial motion remained almost identical from the time of introduction, other than the alteration that the phrase “Motion for a new trial” appearing in both the June and July documentary records was modified to “Petition for a new trial” by September 24. The change from “motion” to “petition” was made in the U.S. House.¹⁵²

In all three versions, several procedural facets of new trial motions remained constant: (i) section 18 addressed circuit court judgments in civil actions; (ii) either party could file a motion upon the execution of the judgment that the court, “at [its] discretion,” could stay for up to 42 days “from the time of entering judgment”; (iii) the filing of the motion had to be accompanied by a certificate permitting its filing that a circuit court judge “may make or refuse at his discretion”; and (iv) if the new trial motion or petition was granted, “the former judgment shall be thereby rendered void”; (v) if a circuit court judge permits the filing of new trial motion, the execution of the former judgment would be stayed beyond the 42 days if necessary “to the next session of said Court.”¹⁵³

¹⁴⁹ Compare 5 DHFFC at 1150, 1157 (sections 17 and 18 dated September 24, 1789), with *id.* at 1172-1183 (dated June 12 and noting that the finally enacted section 18 was inserted between section 17 and section 19 sometime after the bill’s initial drafting); *id.* at 1167-68 (indicating that the draft Judiciary Act originated in the Senate and that the final enacted section 18 was added during Senate consideration of the bill on July 10).

¹⁵⁰ See, e.g., (“circuit court” to “circuit Court” and “Verdict in a civil Action”) (June) (July).

¹⁵¹ See *id.* (striking “That when Judgment shall be entered in a circuit court in a upon a verdict judgment upon a verdict in a civil action shall be entered,” to instead read simply “That when in a circuit court, judgment upon a verdict in a civil action shall be entered . . .”). (June version).

¹⁵² See 5 DHFFC 1204 & nn. 56-57.

¹⁵³ Compare the printing of the draft bill in the June 12th documentary legislative record (5 DHFFC 1172, 1183-84), with the printing in the July 17th legislative record (5 DHFFC 1195, 1203-04), with the September 24th legislative record (5 DHFFC 1150, 1157). A Senate committee was appointed on April 7, 1789, to begin work crafting the bill. 5 DHFFC 1166. Eventually one Senator from each State was on the committee. The bill was presented in the Senate and read on June 12, 1789. Section 18 was added on July 11 (redesignating the earlier section 18 as section 19, in the version of the bill approved in the Senate on July 17 and the enacted version of the Act). The bill passed

Ten entries of search results include Founding-era correspondence between legislators that briefly reference “new trials.” These letters involve discussion and commentary on the proposed 1789 Judiciary Act.

James Sullivan wrote to Elbridge Gerry twice with correspondence that referenced new trials.¹⁵⁴ A June 30, 1789 entry described how American federal judicial practice would mirror English circuit court practice in some respects, including the provisions of new trials.¹⁵⁵ The letter dated July 30 of that same year describes that in England new trials were granted when there are legal errors in jury instructions, there are new facts available, evidence was improperly admitted or rejected, or “When a Jury have given a Verdict clearly against Law and Evidence.”¹⁵⁶ Sullivan observed that a new trial was “never granted . . . where the Scales of Justice hang nearly equal” but nonetheless concluded the draft Judiciary Act of 1789 would permit appeal and review “of right, and the second trial proceed Substantially as though another had never been.”¹⁵⁷

Several additional comments suggest an understanding that new trials, or at least review of jury convictions, were supposed to be fairly broadly permissible. For example, Edward Shippen suggested consolidating the inferior district and circuit courts and giving the Supreme Court the Power “to order new Trials in Cases where the inferior Courts should refuse to grant them.”¹⁵⁸ Robert Livingston thought that the granting of a new trial should not necessarily immediately void the first trial judgment but that the judgment should simply be “voidable on such conditions as the court might direct” and that when granting a new trial a court should have discretion to provide the trial on the terms that he saw appropriate.¹⁵⁹

by Senate on a recorded vote of 14 to 6 on July 17. The House passed the Act initially on September 17. See 5 DHFFC 1167-71.

¹⁵⁴ See James Sullivan to Elbridge Gerry, July 30, 1789, 16 DHFFC 1172, 1173 (Volume 16: Correspondence: First Session, June-August 1789).

¹⁵⁵ See James Sullivan to Elbridge Gerry, June 30, 1789, 16 DHFFC 896 (Volume 16: Correspondence: First Session, June-August 1789).

¹⁵⁶ See Sullivan, *supra* note 161.

¹⁵⁷ See *id.*

¹⁵⁸ Edward Shippen to Robert Morris, July 13, 1789, 16 DHFFC 1020, 1021.

¹⁵⁹ See Robert R. Livingston to Oliver Ellsworth, June 24, 1789, 851, 852 (1789).

A handful of other remarks on the new trial mechanism shed little light on the understanding of the relevant scope of the process. Fisher Ames just writes notes on the Act that mentions “New Trials” as part of his discussion of concerns with floated proposals to eliminate all federal inferior courts and give state courts original jurisdiction over all causes other than those that Article III specifies as within the mandatory original jurisdiction of the U.S. Supreme Court.¹⁶⁰ Richard Parker wrote to Richard Henry Lee that he thought 42 days was too long for a stay to permit the filing of a motion for a new trial.¹⁶¹

David Sewall opined in a letter to Caleb Strong on March 28 that trials should be subject to the potential for a new trial motion only for “the usual Causes for which by law a New Trial ought to be granted.”¹⁶² He then noted that property causes should not benefit from retrial of facts by juries more frequently than cases involving ‘life.’ He also refers to “the repeated Trial of Facts by Jury a N[ew] Englandism.”¹⁶³ He then suggests in the future the mechanism could “Operate in a pernicious manner, When it shall so happen that Evidence of any kind may be procured.”¹⁶⁴

In May of that same year, Sewall sent a follow-up sketch of notes, at first suggesting that “[t]he power of granting new Trials should be placed in every Court.”¹⁶⁵ He also suggested this power was “perhaps a part of the Judicial Power” itself and that this new trial method “may answer all the purposes of “Reviews” of facts on appeal.¹⁶⁶ He described those in Massachusetts as “hav[ing] been used to various Trials of the same Facts by different Juries of Course.”¹⁶⁷ But he says “the time will come when the Ill consequences of this mode will appear” and that some think it might be for the good if there were further review in cases only

¹⁶⁰ Fisher Ames to John Lowell, July 28, 1789, 16 DHFFC 1155, 1157 (Volume 16: Correspondence: First Session, June-August 1789).

¹⁶¹ Richard Parker to Richard Henry Lee, July 6, 1789, 16 DHFC 967, 968.

¹⁶² David Sewall to Caleb Strong, Mar. 28, 1789, 15 DHFFC 143 (Volume 15: Correspondence: First Session, March-May 1789).

¹⁶³ *Id.*

¹⁶⁴ *See id.*

¹⁶⁵ David Sewall to Caleb Strong, May 2, 1789, 15 DHFFC 433 (1789).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

where “Justice and Equity required it.”¹⁶⁸ In his view federal appeals “in the Nature of a Writ of Error . . . may be more expedient.”¹⁶⁹

In the period intervening his writing of those two letters to Caleb Strong, Sewall wrote to George Thatcher in April indicating that he had not yet staked out a firm position on various aspects of the potential federal judicial system.¹⁷⁰ In this letter he expresses the view that one jury trial should be adequate in both civil and criminal matters, “unless some legal reason can be assigned for a New Trial.”¹⁷¹ Where there is a legal reason for such a trial, he opines that it should be within the court where the initial trial occurred “Within a Certain limited Term.”¹⁷² He believes these factors would keep the causes of the federal judiciary as “Contracted as possible” and help prevent too many minor matters from coming before the Supreme Court on review.¹⁷³ This suggests that new trials were thought to apply in criminal proceedings.

Finally, John Samuel Sherburne wrote to John Langdon on December 28, 1790, that it would be beneficial to “rid the General Court of the numerous petitions for new trials, & throw those complaints where they ought to be made, into our Judicial Courts.”¹⁷⁴ This suggests at least that new trials were understood to be a fairly typical method of recourse, especially with the description of such petitions as “numerous.”

The remaining three documents yielded in the search include a newspaper excerpt, Senate debate notes, and an Attorney General report dated December 27, 1790, that suggested amendments to the 1789 Act and the federal judicial system, which included a simplified version of section 17 of the 1789 bill. Specifically the draft in this report would have provided that federal courts “shall have power to grant new trials according to the principles of law.”¹⁷⁵ Regarding juries the Act would have further provided that juries be “sworn and impannelled in all cases

¹⁶⁸ *Id.*

¹⁶⁹ David Sewall to Caleb Strong, May 2, 1789, 15 DHFFC 433 (1789).

¹⁷⁰ *See* David Sewall to George Thatcher, Apr. 11, 1789, 15 DHFFC 248-49.

¹⁷¹ *See id.*

¹⁷² *See id.*

¹⁷³ *See id.*

¹⁷⁴ John Samuel Sherburne to John Langdon, 21 DHFFC 248, 248-49 (Correspondence, Third Session: Nov. 1790-March 1791).

¹⁷⁵ Report of the Attorney General, Dec. 27, 1790 (printed on Dec. 31, 1790), at 8 DHFFC 608, 638-39.

prescribe by the Constitution of the United States and the common law.”¹⁷⁶ One clear indication that there was at least some connection between even criminal trials and the common law was the report’s statement that “[p]rovided always, that in criminal cases, juries of the vicinage shall be summoned, according to the course of the common law.”¹⁷⁷ The report was introduced with the explanation that its first purpose was “to suggest any defects existing in the judiciary system” and it observed that “[t]he Courts of the United States demand an organization” of which there is no entirely apposite example in foreign historical practice.¹⁷⁸

Additional relevant references include correspondence, articles, and notes in Volume 15 of the first Congress’s documentary history, including an excerpt from a letter that Aedabnus Burke wrote to the South Carolina senate on January 26, 1789, commenting on a commission to revise state statutes.¹⁷⁹ This statement opined that to preserve uniformity throughout all federal courts, there was to be a court of errors and motions in the seat of government where matters of law from that circuit such as special verdicts and “motions for new trials” would be argued.¹⁸⁰ This article also subsequently describes jury trial participation as “the most important and sacred duty of our judicature” which “requires men of capacity and independence” even though the wealthy are avoiding it.¹⁸¹ The final document referencing new trials simply includes acknowledgment of their existence in the Notes on Senate Debates.¹⁸²

The excavation and explication of this historical understanding can have critical importance for courts seeking how to initially determine whether to grant a new trial at the district court level and, further, for circuit courts determining how narrowly to review the scope of Rule 33 motions raising weight-of-the-evidence claims. In addition to the U.S.

¹⁷⁶ *See id.* at 639.

¹⁷⁷ 8 DHFFC 639 (Volume 8: Petition Histories and Nonlegislative Official Documents).

¹⁷⁸ *See* 8 DHFFC 608, 608.

¹⁷⁹ 15 DHFFC 473, 473.

¹⁸⁰ 15 DHFFC 473 (Correspondence: First Session, March-May 1789).

¹⁸¹ 15 DHFFC 473-74.

¹⁸² *See* 9 DHFFC 480-81 (The Diary of William Maclay and Other Notes on Senate Debates).

Constitution's subdivision of three categories of governmental power across three distinct branches,¹⁸³ the federal system includes the additional backstop of a jury of one's peers, serving as a brake and checking function before the prosecution of crime by the government or certain civil law violations by private actors imposes the ultimate burden of a life, liberty, or property deprivation.¹⁸⁴

Juries serve a facially straightforward function of involving the citizenry in the weighty governmental process of convicting an individual of committing a crime and potentially being deprived of life or liberty as a consequence. This more democratic function is also an adjunct to the procedural function of a jury trial, which provides an additional set of decisionmakers—or gatekeepers—before governmental investigation of the violation of government-made laws can result in the imposition of a guilty sentence. This division of decisionmaking power¹⁸⁵—in one sense between the executive governmental prosecutor and the judicial system but also within the judicial system between the judge presiding over the matter and the jury who makes dispositive determinations on the facts—has strong similarities to the Constitution's horizontal division of governmental power among three branches subject to potent vetogates.¹⁸⁶

B. Story, Blackstone, and Supreme Court Opinions Discussing the History and Underpinnings of New Trial Motions

¹⁸³ See, e.g., U.S. Const. art. I, § 1 (vesting of only limited enumerated legislative powers in the federal Congress); *id.* art. I § 7 (bicameralism and presentment requirements for the enactment of legislation); *id.* art. I, §§ 2-3 (division of federal legislature into two distinct chambers); *id.* art. II, § 2 (establishment of the mandatory role of Congress in both creating federal offices “by Law” and consenting to presidential appointment of officers); *id.* art. III (limiting the federal judicial power to resolution of “cases” or “controvers[ies]”).

¹⁸⁴ See U.S. CONST. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury . . .”).

¹⁸⁵ Cf. Donald J. Kochan, *The Mask of Virtue: Theories of Aretaic Legislation in a Public Choice Perspective*, 58 ST. LOUIS U. L.J. 295, 310-14 (2014) (describing the structuring of the federal constitutional framework to constrain federal power and human nature).

¹⁸⁶ But see early criminal statutes [postal offenses; other crimes early on? Maybe customs laws or the treasury dept?]

Theorists of the English legal antecedents of American law described reliance on the jury trial as a “grand bulwark” of liberty.¹⁸⁷ That understanding also appears in early American constitutional treatises such as Justice Story’s constitutional commentaries.¹⁸⁸ The longstanding view of the purpose of a new trial motion as described by Blackstone was to provide a kind of purifying mechanism for jury trials. The grant of a new trial would provide protection in the event of jury error, but it would result in the granting of a second trial rather than a verdict entered by a trial judge. This more modest option would better preserve self-governance and the jury model.¹⁸⁹

In English practice in the eighteenth century, judges could grant motions for a new trial for mistakes such as improper jury instructions or evidentiary errors along with verdicts issued “against the weight of evidence” or to further “the ends of justice.”¹⁹⁰ A number of these challenges involve issues of law, which in modern practice is not thought to be within the special provenance of juries as decisionmakers in modern practice. But the determination of a verdict “against the weight of evidence” clearly does involve a measure of reevaluation of factual determinations of the jury by a judge. Subversion of a jury’s factual analysis and conviction or acquittal, reached without the influence of improper corruption or external legal error, is thought to intrude on the fundamental jury trial right. The question then is whether the

¹⁸⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *342 (1768) (“BLACKSTONE”).

¹⁸⁸ See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773 (1833) (“STORY”) (The jury “was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties, and watched with an unceasing jealousy and solicitude.”).

¹⁸⁹ See, e.g., 3 BLACKSTONE, at *390–91 (“If every verdict was final in the first instance, it would tend to destroy this valuable method of trial Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts in the opinion of his counsel, or even in the opinion of bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be decisive: he would arraign the determination as manifestly unjust; and abhor a tribunal which he imagined had done him an injury without a possibility of redress. Granting a new trial, under proper regulations, cures all these inconveniences, and at the same preserves intire and renders perfect that most excellent method of decision, which is the glory of the English law.”).

¹⁹⁰ Mary Ellen Brennan, Interpreting the Phrase “Newly Discovered Evidence”: May Previously Unavailable Exculpatory Testimony Serve as the Basis for a Motion for a New Trial Under Rule 33?, 77 FORDHAM L. REV. 1095, 1101-02 (2008); Lester B. Orfield, New Trial in Federal Criminal Cases, 2 VILL. L. REV. 293, 304 (1957);

reexamination by the trial judge of the weight of the evidence supporting a guilty verdict or verdict of liability, leading to a second jury trial, tramples the jury trial right or concomitant with it, and if the latter, whether there is a level of factual error constitutionally or legally required for a judge to take that second trial step.

In particular, Blackstone describes the requisite standard for awarding a new trial motion to be the presence of “a verdict without or contrary to the evidence, so that [the judge] is reasonably dissatisfied therewith” or misdirection by the judge leading to “an unjustifiable verdict” or grounds of similar import.¹⁹¹ According to Blackstone, the new trial motion had roots as far back of the fourteenth century derived from the English monarch’s “superintendent power.” Originally new trials were granted only for misbehavior rather than error.¹⁹² But that changed in 1700 with English judges starting to apply “discretion to grant new trials not only to remedy juror misconduct or corruption, but also to guard against unjust verdicts.”¹⁹³ Blackstone and English cases described the appropriate standard for awarding a new trial as the “necessary for justice” standard where either there had been “certainty” or a “reasonable doubt” that justice was not done.¹⁹⁴ New trials also were granted where there had been newly discovered evidence.¹⁹⁵ Blackstone’s Commentaries indicated that new trials were warranted “in all cases of moment” where the first trial had not administered justice, including where the verdict was contrary to evidence.¹⁹⁶

Blackstone catalogued six causes justifying new trials such as including where “it appear[ed] by the judge’s report . . . that the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith.”¹⁹⁷ According to Blackstone, this

¹⁹¹ 3 BLACKSTONE, *supra*, at 387-88.

¹⁹² See Brennan, *supra* note 35, at 1100-02.

¹⁹³ See Brennan, *supra* note 35, at 1101 (briefly summarizing the British practice dating back to 1400).

¹⁹⁴ 3 *id.* at *391; see, e.g., *Bright v. Enyon* (1757) 97 Eng. Rep. 365 (KB) (allowing the grant of a new trial “when there is a reasonable doubt, or perhaps a certainty, that justice has not been done”); *The Queen v. The Corporation of Helston* (1795) 88 Eng. Rep. 693, 694 (KB) (“[T]he ground and foundation of granting new trials, when either the Judge or the jury are to blame, is one and the same, viz. doing justice to the party.”).

¹⁹⁵ See Brennan, *supra* note 35, at 1102.

¹⁹⁶ See 3 *id.* at *389.

¹⁹⁷ 3 BLACKSTONE, at *387.

factual basis for a new trial was “very commonly” awarded.¹⁹⁸ The court of common pleas provided the broadest application of this standard, where courts would sometimes grant new trials on the basis of the trial judge’s view of the case alone, “unfortified by any report of the evidence”—such as a 1648 decision cited by Blackstone in which the trial judge had the conviction that the original decision-makers in the trial had a conflict of interest in the case.¹⁹⁹

Blackstone conceived of unbridled jury authority as “capricious” in the same way that the question of criminal conviction should not just be left up to a single unreviewable judge.²⁰⁰ The jury trial could be only as effective as it was reliable.²⁰¹ By offering essentially a rehearing, the new trial system served as a key backstop protecting against unwieldy governmental prosecution and conviction running roughshod over defendant rights.²⁰²

In the United States in the early nineteenth century, Justice Joseph Story echoed Blackstone’s sentiments on the essential protections of jury trials and noted that jury verdicts offer a “double security against the prejudices of judges” who may otherwise be partial to the government.²⁰³ But that security would be effective only if the jury trial process contained within it a means to guard “against a spirit of violence and vindictiveness on the part of the people” of the jury that could undermine its otherwise effective counterweight to an elitist judge’s determinations on liability and criminal conviction.²⁰⁴ This security was provided in part by the requirement that jury trials occur within the vicinage of the defendant, so that the prejudices of distant populations

¹⁹⁸ See 3 *id.* at *373–75 (emphasis omitted).

¹⁹⁹ See *Smith v. Hancock* (1648) 82 Eng. Rep. 592 (C.P.); 3 Blackstone, at *388.

²⁰⁰ 3 *id.* at *379–80.

²⁰¹ *Cf., e.g.,* 3 *id.* at *379 (identifying the “trial by jury” as “the glory of the English law”).

²⁰² See 3 *id.* at *373–79, 389–91 (assigning questions of law to judges and questions of fact to juries, subject to new trials in cases of error such as verdicts contrary to evidence). *Cf.* STORY § 1758 (noting that early State law at times relied on “one jury to review another jury’s determination,” waiting for the agreement of two verdicts before ruling on certain issues).

²⁰³ See STORY, § 1774, at 765 & n. 293 (“I commend to the diligent perusal of every scholar, and every legislator, the noble eulogium of Mr. Justice Blackstone on the trial by jury. It is one of the most beautiful, as well as most forcible, expositions of that classical jurist.”).

²⁰⁴ See STORY, § 1774.

and mobs would not be predisposed against him.²⁰⁵ Also, the predilections of judges “who may partake of the wishes and opinions of the government” as well as “the passions of the multitude” could “scarcely” be constrained in any manner other “than by the severe control of courts of justice, and by the firm and impartial verdict of a jury sworn to do right, and *guided solely by legal evidence and a sense of duty*.”²⁰⁶

Justice Story’s observations, further, aligned with Hamilton’s observations in Federalist No. 83 that the ability of a judge to reverse a jury verdict through a new trial motion provided the useful accountability available through the existence of two separate entities serving as decision-making bodies in the jury trial process.²⁰⁷ The coexistence of both a jury with the power to acquit and a judge with the power to reverse a problematic guilty verdict meant that two bodies would need to be persuaded, and thereby also corrupted, before any foul play or improper tampering with the case or verdict could transpire.

Although the new trial right had strong origins in civil cases, the same new trial authority extended to at least some criminal cases in English practice. The King’s Bench could order a new trial when “contrary to evidence[,] the jury have found the prisoner guilty.”²⁰⁸ Further, Justice Story’s commentaries suggest that the guarantee of a jury in criminal trials was “conceded by all to be essential to political and civil liberty” but “the inestimable privilege of a trial by jury in civil cases” was “scarcely inferior” to the criminal jury trial privilege as evidenced by

²⁰⁵ See, e.g., Story, § 1775 (observing that the requirement that a jury be held in the state of the commission of the crime would save a defendant from “oppressive expenses” as well as secure him being “subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him”).

²⁰⁶ See STORY, § 1774 (emphasis added), 3 Blackstone Commentaries at 765.

²⁰⁷ See, e.g., 3 Blackstone at n.281, at 801-806 (describing that “the inestimable privilege of a trial by jury in civil cases” [is] “a privilege scarcely inferior to that in criminal cases” and quoting in its entirety Federalist No. 83 by Alexander Hamilton on the virtues of jury trial rights and the Constitution’s omission of a civil jury trial guarantee in the original seven Articles and using the “double security” phrase that Justice Story echoes, separately, in section 177 of his commentaries).

²⁰⁸ 4 BLACKSTONE, *supra*, at *354–55; see R. v. Smith (1681) 84 Eng. Rep. 1197 (KB) (granting a new trial after the defendant was found guilty of perjury “against the direction of the [lower court] judge”); R. v. Simons (1751) 96 Eng. Rep. 794, 794 (granting a new trial when the jury’s issuance of a guilty verdict without the requisite finding of criminal intent to make a false criminal accusation of robbery was “contrary to the directions of the Judge in a matter of law”).

its explicit mention in the Bill of Rights ratified in the several years following the ratification of the original seven articles of the Constitution.²⁰⁹

New jury trials guarded against unjust, overzealous prosecution and were available in cases of conviction, albeit not acquittal.²¹⁰ For example, in the 1600s in a criminal perjury case, the King's Court specified "that new trials may be in criminal cases at the prayer of the defendant, where he is convicted (but) not at the suit of the King where he is acquitted, no more in criminal cases than in capital."²¹¹

Blackstone's commentaries tie the "interest of justice" formulation to the notion that a new criminal trial is warranted wherever the trial judge concludes that "the jury have brought in a verdict without or contrary to evidence, so that he is reasonably dissatisfied therewith."²¹² Granting of the motion was therefore a discretionary determination based on a judge's weighing of the evidence at trial. Where a verdict was "contrary to evidence," a new trial was justified. That said, the common-law new trial standard in England required evidence "against the former verdict . . . [to] very strongly preponderate."²¹³ It was insufficient for the granting of a new trial for the "scales of evidence" to be "nearly equal"; there had to be a "manifest" mistake.²¹⁴

III. Early Incorporation of the English Common Law Standard in U.S. Law—the Constitution and the Judiciary Act of 1789

The original text of the Constitution addressed jury trials explicitly in only one location—the Article III clauses vesting and delineating power in a federal judiciary. That text required jury trials in federal court

²⁰⁹ See Justice Story, § 1762 (citing to the footnote reprinting Hamilton's Federalist No. 83), at 761.

²¹⁰ See 4 BLACKSTONE, *supra*, at *233; see also, *e.g.*, R. v. Read (observing that new trials could be granted "on good cause" to challenge a conviction but not for the government to contest acquittal).

²¹¹ R. v. Read, 12-13 Hill 271, 271.

²¹² 3 BLACKSTONE, at *387.

²¹³ See Brennan, *supra* note 35, at 1101-02.

²¹⁴ 3 BLACKSTONE, *supra*, at 391-92. See also Renee B. Lettow, New Trial for Verdict Against Law: Judge-Jury Relations in Early Nineteenth-Century America, 71 NOTRE DAME L. REV. 505, 515-16 (1996).

only for crimes, and those other than in cases of impeachment.²¹⁵ Similar to the subsequent, more comprehensive, jury trial requirements in the Bill of Rights, the Article III, section 2, clause 3 requirement mandated that the criminal jury trial “be held in the State where the said Crimes shall have been committed.”²¹⁶ This location requirement held unless the crimes were not committed within a State, in which case Congress had the authority to direct the place of the Trial. This particular jury provision is best viewed as a *structural* constitutional protection, in the sense that it limited the exercise of federal criminal power to only trials with the oversight of a jury. This arguably contrasts with the subsequent framing of jury trials as a protected individual liberty in the sixth and seventh amendments.²¹⁷

Despite objections during various state convention ratifying debates about the absence of a more comprehensive constitutional requirement for jury trials, no comprehensive jury guarantee was inserted into the original constitutional text. Subsequent to the ratification of the Constitution, the first Congress enacted the initial Judiciary Act on September 24, 1789.²¹⁸ That act imposed several statutory jury-related requirements, building on the minimum threshold required by the original Article III text. For example, Section 9 of the 1789 act provided that “the trial of issues in fact, in the district courts, in all causes . . . shall be by jury” except in civil admiralty and maritime cases. The “trial of issues in fact in the circuit courts” was also to “be by jury” except in suits “of equity, and of admiralty, and maritime jurisdiction,”²¹⁹ as was the “trial of issues in fact in the Supreme Cort, in all actions at law against citizens of the United States.”²²⁰ Section 17 of the Act, then, gave “all the said courts of the United States” the “power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.” The Act also provided for juries to assess the sum due to plaintiffs in

²¹⁵ See U.S. Const. art. III, § 2, cl. 3.

²¹⁶ Compare U.S. Const. amends. vi & vii, with U.S. Const. art. III, § 2, cl. 3.

²¹⁷ Compare, e.g., U.S. Const. art. III, § 2, cl. 3 (“The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury”), with U.S. Const. amend. v (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except . . .” (emphasis added)).

²¹⁸ See 1 Stat. 73 (1789).

²¹⁹ § 12.

²²⁰ § 13.

forfeiture cases, if requested by either party, when the sum for the judgment is uncertain.²²¹ Section 29 then addressed the composition of juries in cases punishable by death.

Next, within the Bill of Rights ratified on December 15, 1791, juries were addressed four times. First, the Fifth Amendment provided that “[n]o person” was to be held to answer for capital or infamous crimes unless on presentment or indictment by a Grand Jury subject to national security exceptions.²²² In criminal prosecutions, “the accused” was given the “right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ,” thereby implicitly also embedding the localized protection of the involvement of the public to adjudge guilt within the particular state where the crime occurred even if the crime was a violation of federal law.

The Seventh Amendment then addressed juries in the civil context, expressly incorporating “common law” whatever that may be into the jury trial guarantee. Although the amendment did not use terms explicitly referring to the individual (like “the accused” in amendment six and “person” in amendment five), the civil jury text expressly referred to “the *right*” to trial by jury.²²³ That right was to be preserved “[i]n Suits at common law” in controversies involving more than twenty dollars and “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”²²⁴ Right there, the terms of the amendment would seem to address the issue of new trials, which by their nature involve the retrial of fact previously heard by an earlier jury. But by its terms the Seventh Amendment refers the interpreter back to the “common law” to permit treatment of facts as they were handled in prior practice such as the pre-constitutional new trial motion.

The new trial motion currently provided through Federal Rule of Criminal Procedure 33 authorizes the granting of a new trial when required “in the interest of justice.” Similar to this contemporary text which incorporates an open-textured standard, the first provision in federal law to authorize new trial motions, enacted in the Judiciary Act of

²²¹ § 26, Judiciary Act of 1789.

²²² U.S. Const. amend. v.

²²³ See U.S. Const. amend. vii (emphasis added).

²²⁴ *Id.* (emphases added).

1789, also incorporated an external standard into its provision of a new trial mechanism in jury trials. In particular, section 17 of the Act provided “[t]hat all said courts of the United States shall have power to grant new trials, *in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law.*”²²⁵

The evidence in this part regarding the incorporation of the English common law standard into the Judiciary Act’s provision of a new trial motion indicates that the British common law standard of Blackstone of “against the weight of the evidence” entered American law from the first year of the first Congress. And early federal cases, as complemented by early state court cases, up through the creation of the Federal Rules of Criminal Procedure in the first half of the twentieth century, show that the “interest of justice” standard in Rule 33 is the descendant of the British common law standard and requires, for a new trial on evidentiary grounds, just that the weight of the evidence be against the verdict. Section IV of this paper further unpacks the continuity between pre-federal rules standards and the Rule 33 “interest of justice” standard. The early federal and case law and history around the time of 1789 and in the following decades reveals the understanding of the new trial standard from that early era, which included incorporation of the British common law into American practice expressly through the terms of section 17 of the 1789 Act.

The Founding generation was closely familiar with Blackstonian theory, which both heavily influenced and explicated the content of British common law.²²⁶ The 1789 Judiciary Act’s language incorporating preexisting common law standards—derived from both British practice and state and colonial practice within America—remained unchanged for more than 150 years.²²⁷ Then with the promulgation of the Federal Rules

²²⁵ § 17, 1 Stat. 73, 87 (emphasis added). Judiciary Act of 1789, ch. 20, 1 Stat. 73 § 17.

²²⁶ See *infra* Part. Cf. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1411 (2020) (Kavanaugh, J., concurring in part) (noting U.S. constitutional analysis’s generally heavy reliance on Blackstone and incorporation of significant aspects of British practice); *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008) (similar).

²²⁷ See *United States v. Smith*, 331 U.S. 469, 472 n.1 (1947) (quoting 28 U.S.C. § 391 (1940)).

of Criminal Procedure in the 1940s, Rule 33 codified the longstanding common law standard and tradition.²²⁸

The congressional adoption of the English common law new trial legal standard through enactment of the Judiciary Act of 1789 preceded even the ratification of the explicit civil jury trial protections in the Bill of Rights in 1791. Article III, section 2 of the Constitution expressly required jury trials in federal criminal cases. But the criminal grand jury²²⁹ and the constitutional protection for civil jury trials did not exist until the ratification of the Bill of Rights.²³⁰

None of these textual provisions addressed the trial court's role in supervising the jury and the authority to grant new trials. But through its constitutionally assigned power to create and regulate inferior tribunals including the authority to craft federal procedural rules, the First Congress provided the new trial protection.²³¹ In 1789, the same week that it considered the jury trial features of the Bill of Rights, Congress authorized courts to grant new trials in all "cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law."²³² In addition, the statutory new trial provisions had an explicit discretionary component, with section 18 of the Act assigning trial judges discretion to decline to issue certificates permitting new trial petitions in civil cases.²³³

IV. Early Federal and State Case Law and Twentieth-Century Adoption of the Federal Rules of Criminal Procedure

²²⁸ See *infra* Part.

²²⁹ See U.S. Const. amends. v–vi.

²³⁰ See *id.* amend. vii.

²³¹ See *id.* art. I, § 8, cl. 9 (inferior tribunals); *id.* art. I § 8, cl. 18 (Necessary and Proper Clause); *id.* art. III, § 1; see also *Hanna v. Plumer*, 380 U.S. 460, 472 (1964); Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 839–40 & n.77 (2008) (discussing congressional authority over federal court procedural rules).

²³² Judiciary Act of 1789, § 17; see also AMAR, *supra*, at 89, 96–97 (highlighting the jury trial's prominence in the Bill of Rights).

²³³ See Judiciary Act of 1789, 1 Stat. 73, 83, §§ 17–18 (requiring that a petition for a new trial be accompanied by "a certificate thereon from either of the judges of [the deciding court], that he allows the same to be filed, which certificate he may make or refuse at his discretion"). See also *supra* notes and accompanying text for the legislative history of sections 17 and 18 of the Judiciary Act as catalogued in the volumes of the *Documentary History of the First Federal Congress*.

Then-Professor Barrett's scholarship addressing procedural common law observed that section 17's open-ended text incorporated preexisting common law. Federal courts consequently applied the same "interest of justice" standard that English law had embodied.²³⁴ Nineteenth-century analysis like that of Justice Story concurred that a jury's factual determinations must be reexamined only in accordance with common law rules and modes of operation.²³⁵ The Supreme Court reflected this same understanding in 1807, suggesting that the contours of the jury trial should be fleshed out in light of common law principles.²³⁶

Justice Story, further, quoted state court language emphasizing that "[t]he trial by jury is justly dear to the American people" and "has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."²³⁷ In recounting the terms of the Seventh Amendment, Justice Story observed that in 1791, the basis of the jurisprudence of every state in the Union was "essentially that of the common law in its widest meaning" and the Seventh Amendment phrase "common law" was "used in contradistinction to equity, and admiralty, and maritime jurisprudence."²³⁸ He also noted that there was objection initially to appellate jurisdiction over review of questions of fact on the ground that such review might constitute "an implied supersedure of the trial by jury."²³⁹ But the term, or concept, of "appellate jurisdiction" did not have a uniform meaning throughout all parts of the country. In some regions, such as New England, "an appeal from one jury to another [was] familiar both in language and practice, and [was] even a matter of course, until there have been two verdicts on one side."²⁴⁰ The concept of appeal, "taken in the abstract, denotes nothing more, than the power of one tribunal to review the proceedings of another, either as to the law, or fact, or both. The mode of doing it may depend on action custom, or

²³⁴ See Amy C. Barrett, *Procedural Common Law*, 94 VA. L. REV. 813, 857 n.134 (2008).

²³⁵ See Story § 1764.

²³⁶ See *Ex Parte Bollman and Ex Parte Swartwout*, 8 U.S. (4 Cranch) 75, 80 (1807).

²³⁷ Story § 1758, *Commentaries on the Constitution of the United States* at 759-60.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.* at 760.

legislative provision . . . and may be with, or without, the aid of a jury, as may be judged advisable.”²⁴¹

According to Justice Story, if “the re-examination of a fact, once determined by a jury, should in any case be admitted under the proposed constitution, it may be so regulated, as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.”²⁴² So long as the higher court like the Supreme Court is now reexamining the facts, once found by the jury, it can take appellate jurisdiction over a factual record and opine on the law as applied to that agreed-upon record; in that sense the higher court “unquestionably ha[s] jurisdiction of both fact and law” without any problematic higher-level redo “of facts decided by juries in the inferior courts.”²⁴³

Over centuries, federal and state courts would implement the new trial mechanism as a safety valve to correct convictions where a verdict failed to “satisfy the conscience of the judge” or the evidence was “doubtful.”²⁴⁴ The grant of a new trial served as a backstop of protection for defendants charged with a wide range of crimes, including extraordinarily vulnerable individuals such as free people of color in the pre-Civil War southern and border states initially convicted on the basis of little or questionable evidence.²⁴⁵

For example, Justice James Iredell drafted an opinion on a new trial grant in a 1799 case “for Treason by levying war against the United States” while riding circuit in Pennsylvania. That particular case involved the legal challenge that one of the jurors manifested bias rather than a challenge to the weight of the evidence, but Justice Iredell opined that wherever “injustice” might otherwise result, new trials are warranted.²⁴⁶ Even though one of the judges disagreed with Justice Iredell’s finding of bias, he acquiesced in Justice Iredell’s opinion on the ground that there would be no harm to “the interests of public justice” by

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.* § 1759.

²⁴⁴ *See, e.g.,* United States v. Harding, 26 F. Cas. 131, 137 (C.C.E.D. Pa. 1846) (Grier, J., Circuit Justice); State v. Hopkins, 1794 WL 303, at *2 (S.C. Ct. Com. Pl. & Gen. Sess. 1794).

²⁴⁵ Lettow, *supra* note, at 525-26.

²⁴⁶ *See* United States v. Fries, 3 U.S. (Dall.) 515, 518 (C.C.D. Pa. 1799).

“the delay of a new trial,” implicitly suggesting that new trials do not hamper or necessarily burden the jury trial right even where there is disagreement on their necessity.²⁴⁷

The concept of a guilty verdict needing to comply with the “conscience of the judge” also emerged in federal criminal cases in the first half of the nineteenth century as Justice Robert Cooper Grier observed in an 1846 opinion riding circuit in the Eastern District of Pennsylvania.²⁴⁸ The case involved a capital murder conviction and a new trial motion on the ground that “the verdict was against the evidence.”²⁴⁹ If issuing the decision alone, Justice Grier would not have concluded that a new trial was warranted but he acquiesced in District Judge Kane’s opinion.²⁵⁰

Judge Kane based that ruling in large part on his conclusion that “the principle of the law is clear” that before a sentence can be pronounced, the defendant “has a right to the judicial determination of his guilt by the court, as well as by the jury.”²⁵¹ If the “verdict does not satisfy the conscience of the judge, the prisoner is entitled to a new trial.”²⁵²

Under this rubric, the new trial stands as an important protection against too-ready conviction, establishing an achievable bar for ensuring that a judge has superintended the guilty verdict and justice is properly administered. Specifically, the understanding espoused in this opinion is that “[t]he judge, himself, at the very latest moment, may, *sua sponte*, award a new trial.”²⁵³ The opinion indicates that this was “done not unfrequently in England” for non-felony cases and, “in other cases, the English court respites the prisoner till the royal prerogative can either commute the punishment, so as to conform it to the merits, or relieve against the improper conviction by a pardon.”²⁵⁴

²⁴⁷ *See id.* at 518-19.

²⁴⁸ *See* United States v. Harding, 26 F. Cas. 131, 136 (E.D. Pa. 1846) (notes summarizing the case).

²⁴⁹ *Id.*

²⁵⁰ *See id.* at 137 (opinion of Grier, C.J.)

²⁵¹ *Id.* at 136.

²⁵² *Id.*

²⁵³ *Id.* at 136 (opinion by Kane, D.J.).

²⁵⁴ *Id.*

In the United States, “where the powers of the constitution are distributed differently, and the chief magistrate has no part in the judicial administration, the experience of all of us is full of precedents for the grant of new trials upon the suggestion of the court.”²⁵⁵ The King’s pardoning power was a much more routine component of the administration of law in British practice. The narrower use of pardons under American practice, where pardons are available only for the president to administer,²⁵⁶ places much greater pressure on corrective mechanisms available to the judicial branch like the new trial motion. Even though pardoning and judicial powers are clearly separated in federal practice, “the exclusion of” the judicial department “from the right to grant reprieves, cannot relieve a judge from the responsibilities of an erroneous or improper conviction.”²⁵⁷ Consequently, “the new trial becomes an indispensable resort.”²⁵⁸

In addition to the legal standard for granting a new trial amounting to one where the verdict was against the weight of the evidence, the Supreme Court and other federal courts along the way noted that the evaluation of whether the body of evidence in a given case was indeed against the verdict was within the discretion of the trial court judge.²⁵⁹ The Supreme Court did not take factual review of such determinations upon a writ of error.²⁶⁰ The discretionary nature of the

²⁵⁵ *Id.*

²⁵⁶ U.S. CONST. art. II, § 2, cl. 1 (“[H]e shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”).

²⁵⁷ *Harding*, 26 F. Cas. at 137.

²⁵⁸ *See id.* Judge Kane notes that Justice Story was of the view that new trials were unavailable in capital cases. But Judge Kane feels Justice Story was motivated by the concern with double jeopardy. In Judge Kane’s view, the Constitution favors life, and not destruction, and it cannot be that any potential “injustice of a second conviction, requires [a citizen] to suffer under the injustice of a first.”). *See id.*

²⁵⁹ *See, e.g.,* *Freeborn v. Smith* 69 U.S. 160, 176 (1864) (“[O]ur decision has always been, that the granting or refusing a new trial is a matter of discretion with the court below, which we cannot review on writ of error.”); *see also* Amy C. Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 382 n.227 (2006) citing an 1809 Supreme Court decision for “holding that decision whether to grant new trial is within discretion of inferior court and Supreme Court will not interfere on writ of error”).

²⁶⁰ *See, e.g.,* *Crumpton v. United States*, 138 U.S.361, 363 (1891) (“The weight of this evidence, and the extent to which it was contradicted or explained away by witnesses on behalf of the defendant, were questions exclusively for the jury, and not reviewable upon writ of error. If the verdict were manifestly against the weight of

scope of the trial judge's review authority on the weight-of-evidence question buttresses the conclusion and analysis that the trial judge was seen as having a critical role to play within the jury trial right in evaluating the consistency between the evidence and the jury determination.

In particular, although it was a state court decision, an 1897 concurrence by Justice Williams of the Pennsylvania Supreme Court²⁶¹ was described by the U.S. Court of Appeals for the Fourth Circuit several years prior to the codification of the federal rules of criminal procedure "as an influential statement of the broad power to order new trials" in its tracing of the history of the new trial power.²⁶² As part of an in-depth recounting of British new trial practice, Justice Williams had observed that it was the judge's duty to set aside a verdict and grant a new trial with another jury if the judge is not satisfied with the verdict. In Justice Williams's estimation, this was settled English practice as early as 1665.²⁶³

The Fourth Circuit opinion also recounted Justice Williams's understanding that the power to revise excessive verdicts via new trials "was firmly settled in England before the foundation of this colony, and has always existed here without challenge under any of our constitutions."²⁶⁴ That power was to pursue "sound judicial discretion" and to prevent the jury system from becoming "a capricious and intolerable tyranny, which no people could long endure."²⁶⁵ Further, the court opined that back at the time of the Magna Charta, "trial by jury" involved a 12-person decision "under the advice and legal direction of a

evidence, defendant was at liberty to move for a new trial upon that ground; but that the granting or refusing of such a motion is a matter of discretion is settled.").

²⁶¹ *Smith v. Times Publishing Co.*, 178 Pa. 481 (1897).

²⁶² *See, e.g., Aetna Cas. & Sur. Co. v. Yeatts*, 122 F.2d 350, 353 (4th Cir. 1941) (citing American and English cases that demonstrated the power to grant new civil jury trials "is one of the historic safeguards of that right"), (overruled on other grounds in

Gasperini v. Center for Humanities, 518 U.S. 415, 433 (1996), which still cited the case for the proposition that the federal civil rules new trial authority is "large").

²⁶³ *See Smith*, 178 Pa. 481, 506 (Pa. 1897).

²⁶⁴ *Aetna*, 122 F.2d at 353 (quoting multiple opinions in *Times Publishing*, the late nineteenth-century Pennsylvania Supreme Court decision).

²⁶⁵ *See id.*

law judge” and the jury’s issuance of a decision was as part of “the court of which they are a part” not as a separate entity unto itself.²⁶⁶

According to the court opinion, historically the jury verdict did not even represent a judgment of the court “unless the judge is satisfied with it.”²⁶⁷ The judge was just as responsible for the justice of the outcome as the jury and his duty was to set aside verdicts with which he was dissatisfied. As far back as 1665, the “supervisory control of the court . . . was promptly exercised to relieve against the miscarriage of justice,” and this supervisory power “was then thought to be in aid of trial by jury.”²⁶⁸ Lord Mansfield himself described the granting of a new trial as doing “no more than having [a] cause more deliberately considered by another jury.”²⁶⁹ The judge was thought to be the thirteenth juror and the jury only ever had the power to issue a determination and try a cause “with the assistance of the judge.” Indeed, in 1757 Lord Mansfield stated that “[i]t is absolutely necessary to justice, that there should, upon many occasions, be opportunities of reconsidering the cause by a new trial.”²⁷⁰ Therefore, new trials are permissible “*in any case* where the ends of justice so require.”²⁷¹

More, the history of the review of jury determinations in England suggested to the court a reliance on a longstanding power to correct false verdicts but not in a “distinctively appellate court.”²⁷² Originally the “remedy was by attain, a jury of 24 being called to review the findings of fact by the first 12” and then the imposition of severe penalties for the mistaken jurors if the second verdict differed from the first.²⁷³ Their land could even be taken from them. This did not transpire in a court of errors reviewing an inferior court “but the court in which the trial was had.”²⁷⁴

²⁶⁶ *Id.*

²⁶⁷ *See id.*

²⁶⁸ *See id.*

²⁶⁹ *Id.*

²⁷⁰ *Aetna*, 122 F.2d at 353-54 (internal quotation omitted).

²⁷¹ *Id.* at 354 (emphasis added)

²⁷² *See Times Pub.*, 178 Pa. at 519 (opinion by Dean, J.)

²⁷³ *See id.*

²⁷⁴ *Id.*

Even though the state court practice is not directly informative about the implementation of the new trial standard under the federal Judiciary Act, these decisions provide evidence about the common-law understanding of the contours of the “interest of justice” standard at the time the federal new trial right and constitutional rights were provided.

Finally, in *United States v. Wonson*, Justice Story delivered the opinion riding circuit for the District of Massachusetts, explaining that “[t]he common law . . . is not the common law of any individual state, . . . but it is the common law of England.”²⁷⁵ under which “facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown.” He then describes it as “obvious to every person acquainted with the history of the law” the point that “facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court, before which the suit is depending, for good cause shown” or unless a superior tribunal reverses of writ of error, “and a venire facias de novo is awarded.”²⁷⁶ He calls this “the invariable usage settled by the decisions of ages.”²⁷⁷

Scholars have suggested based on early American practice that “[f]ederal and state constitutional guarantees of a jury trial were not considered obstacles to a new trial.”²⁷⁸ According to Professor Renee (Lettow) Lerner, longtime scholar on the history of the jury trial and comparative law, “[b]y the 1830s, new trial for verdict against law was routine.”²⁷⁹ For example, while riding circuit in 1799, Justice James Iredell granted a new trial in a criminal case for treason. Although the error in that case involved a question of law, Justice Iredell observed that a new trial was warranted wherever “injustice” otherwise would result.²⁸⁰ Judge Richard Peters disagreed with Justice Iredell’s view of the evidence but nonetheless “acquiesced” in the grant of a new trial because “the

²⁷⁵ *United States v. Wonson*, 28 F. Cas. 745, 750 (D. Mass. 1812).

²⁷⁶ *Id.*

²⁷⁷ *United States v. Wonson*, 28 F. Cas. 745, 750 (D. Mass. 1812).

²⁷⁸ Lettow, *supra* note 41, at 524.

²⁷⁹ *See id.*

²⁸⁰ *United States v. Fries*, 3 U.S. 515, 518 (C.C.D. Pa. 1799).

interests of public justice, and the influence of public example, would not be impaired by the delay of a new trial.”²⁸¹

In the mid-nineteenth century, federal judges considering a new trial motion for the circuit court of the Eastern District of Pennsylvania concluded that a new criminal trial could be granted “if the principles of accustomed and essential justice invite [the] action.”²⁸² Writing separately in the felony murder case, District Court Judge Kane explained, “The defendant, before sentence can be pronounced on him, has a right to the judicial determination of his guilt by the court, as well as by the jury.”²⁸³ And a prisoner “is entitled to a new trial” where “the verdict does not satisfy the conscience of the judge.”²⁸⁴ Judge Kane had found no record of case law within the circuit “in which a new trial ha[d] been refused for the want of authority in the court to grant it.”²⁸⁵

In 1804, Justice Washington noted that although he believed it was his “duty” to “leave the evidence to the jury,” that he “cannot conceive how the granting of a new trial, can impair the benefits of a jury trial.”²⁸⁶ It is “certainly most consistent with the objects of justice, to afford such an opportunity.”²⁸⁷ The verdict should be set aside if it is “plainly against evidence” or “doubt might exist as to the correctness of the conclusion drawn by the jury” in a “case of great consequence.”²⁸⁸ If the set-aside verdict would result in a judge awarding a verdict contrary to the earlier verdict, then the considerations would be different, but the new trial motion “merely” led to the case being “re-heard, before a new jury; when it may be more deliberately considered.”²⁸⁹ This discussion and analysis arose in a civil case involving an action of trover against an

²⁸¹ *Id.* at 519.

²⁸² Harding, 26 F. Cas. at 137 (opinion of Kane, District Judge).

²⁸³ *Id.* at 136 (opinion of Kane, D.J.).

²⁸⁴ *Id.* at 137 (opinion of Kane, D.J.).

²⁸⁵ *Id.* at 136–37 (opinion of Kane, D.J.).

²⁸⁶ Kohne v. Insurance Co. of North Amer., 14 F. Cas. 838, 838-39 (D. Penn. 1804).

²⁸⁷ *Id.* at 838.

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 838-39 (noting also that it would be “most safe” and “most consistent with the privileges of the jury, and attended with less embarrassment to leave the jury perfectly at liberty as to the weight of evidence; particularly if it be at all contradictory” but Justice Washington still certainly was not willing to “surrender[] the power of the court, to set aside a verdict palpably contrary to evidence.”

insurance company involving the payment of duties in international trade.²⁹⁰

State courts also granted new trials for verdicts contrary to the evidence.²⁹¹ For example, in 1794 a South Carolina court granted a new trial on the ground of evidence of potential juror bias in a case involving forgery and a potential capital sentence. Even though there were questions about the veracity of statements indicating bias and the character of the witness making the claim “was a doubtful point,” the Court still concluded that “it was the duty of the Court to lean on the merciful side, and give the prisoner another chance for a fair trial.”²⁹² So state practice here included the provision of a new jury trial in a capital criminal case, and the court found the more liberal granting of a new trial to be supportive of defendant rights and the jury trial deliberation of guilt, rather than to undermine it. Also, this case gives evidence of an approach to err on the side of granting additional process and leaning in favor of the new trial.

Approximately twenty years later, in an 1817 South Carolina criminal case evaluating whether a grand larceny conviction “was against the weight of evidence,” the judge echoed similar sentiments, observing that “it will be sometimes the duty of the court to give the prisoner the advantage of another trial” following conviction.²⁹³ Even though the jury is “properly uncontrollable” in “all cases of acquittal” and the judge would “seldom feel myself at liberty to weigh very scrupulously after them,” the jury right is “not altogether inviolable” and where “the preponderance of testimony . . . [was] greatly against the conviction,” there should be reversal.²⁹⁴

A number of state-court judges in the late eighteenth century and first quarter of the nineteenth century ordered new trials in civil and

²⁹⁰ See *id.* at 838.

²⁹¹ *Cf. Smith v. Times Pub. Co.*, 178 Pa. 481, 509 (1897) (Williams, J., concurring) (describing “the common law rule in 1790” that a “verdict [could be] set aside either by the trial judge” or an appellate court).

²⁹² *State v. Hopkins*, 1794 WL 303, at **1-2 (S.C. Ct. Com. Pl. & Gen. Sess. 1794).

²⁹³ *State v. Wood*, 1817 WL 485, at *1 (S.C. Const. App. 1817) (noting also that the right to have the jury weigh evidence was “highly sacred, but not altogether inviolable” and that in acquittal, the jury is “properly uncontrollable” but it is sometimes the court’s duty to give the benefit of another trial even though the judge would seldom feel “at liberty to weigh testimony very scrupulously after [the jury]”).

²⁹⁴ See *id.* at 11.

criminal cases where the evidence weighed decidedly against the verdict. New trials were granted reversing convictions for offenses ranging from forcible entry to grand larceny to intent to steal.²⁹⁵ The general connection between availability of a new trial and an initial guilty jury conviction apparently was so well-understood and common at the time that then-scholar and professor Amy Coney Barrett considered whether state courts believed themselves to have inherent procedural power to grant new trials even without specific statutory authority to do so. And she cited judicial opinions and scholarship in the first half-century after constitutional ratification that suggested an “incidental” or “inherent” power of courts at common law included the setting aside of jury verdicts “for just cause” and the granting of new trials.²⁹⁶

The early case law granting new trials reveals this category of review was particularly critical for vulnerable defendants, such as defendants of color in pre-Civil War southern and border states. On several significant occasions, 19th-century state courts granted new trials in cases involving particularly vulnerable defendants who had been convicted for high-profile crimes. For example, in *Ball v. Commonwealth*, an appellate court reversed a trial judge who had suggested he could not grant a new trial to “a free woman of colour” convicted “for the murder of a white man”²⁹⁷ on the ground that new trials “have been often granted on the circuits, where the evidence did not warrant the finding.”²⁹⁸

The judges considered in particular the contention that English common law had provided no new trial mechanism in felony or treason cases and that in such case, a prisoner would be “respited until a pardon

²⁹⁵ See, e.g., *State v. Bird*, 1 Mo. 585, 586 (1825) (“remand[ing] for a new trial” “because the court thinks the weight of evidence is greatly in favor of the plaintiff,” who had been convicted of “marking hogs, with intent to steal”); *Bird v. Bird*, 2 Root 411, 413 (Conn. 1796) (observing in a case involving “a prosecution for a forcible entry and detainer” that every court authorized to provide a jury trial can set aside the verdict “for just cause”). Cf. *Inhabitants of Durham v. Inhabitants of Lewiston*, 4 Me. 140, 142 (1826) (describing counsel’s argument in a civil case that the court had “inherent power . . . to grant new trials at common law”). See also Barrett, *Procedural Common Law*, 94 VA. L. REV. at 869 n.169 (collecting and describing these cases).

²⁹⁶ See *id.* at n.169. See also Charles Edwards, *The Juryman’s Guide Throughout the State of New York* (N.Y., O. Halsted 1831) (“Perhaps the power to grant new trials, for certain just causes . . . is necessarily incident to every court that has power to try.”).

²⁹⁷ 35 Va. 726, 726 (Va. Gen. Ct. 1837).

²⁹⁸ *Id.* at 729.

is applied for.”²⁹⁹ New trials had been available primarily in civil proceedings or for criminal misdemeanors under early British practice, not for felonies. The Supreme Court of Virginia concluded it was not bound by this limitation. The justices “believed that a contrary practice ha[d] long prevailed in th[e] state.”³⁰⁰ The court concluded that the availability of new trials in felony and treason cases was a practice “suitable to our constitution and laws, and agreeable to justice and humanity.”³⁰¹ Also, pardons would not adequately address one’s reputation or “the infamy of a conviction” so complete justice necessitated the possibility of a new trial rather than a mere pardon.³⁰² Further, the British pardoning practice, according to the court, was broader than American pardoning practice—it provided for a “[c]onditional or commutative pardon[.]” whereas American pardons only “wholly discharge[ed] from punishment,” making pardons in our system appropriate for fewer criminal defendants.³⁰³ If a defendant in England, for example, were pardoned from first-degree murder, he could remain under sentencing for second-degree murder. Not so under United States practice, where a pardon from the most severe charge would absolve entirely from any punishment on that offense, contributing further to the reduced usefulness, and effectiveness, of pardoning in our system as an alternative to the new trial mechanism.³⁰⁴

Finally, the American system had “a more varied scale of crimes, with appropriate punishments,” than the British code, which the court concluded also justified departure from an English rule of limiting new trial motions to misdemeanors.³⁰⁵ The older English system, providing for “death or nothing, for most offences,” created a difference that along with the pardoning distinctions, “the spirit of our institutions,” and “a due regard to justice and humanity, fully justif[ied] a departure from the english rule.”³⁰⁶

²⁹⁹ *Id.* at 728.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *See id.* at 728-29.

³⁰³ *Id.* at 730.

³⁰⁴ *See id.* at 729-30.

³⁰⁵ *Id.* at 731.

³⁰⁶ *Id.*

The state supreme court of Massachusetts also found the new trial mechanism appropriate in felony cases, despite early British practice to the contrary.³⁰⁷ Although in England mistakes in capital cases were usually presented for pardoning by the crown, the Massachusetts Supreme Court noted that “every citizen” has “the right . . . to have a fair and *legal* trial before his peers, the jury; and it is hardly consistent with that right, that it should be left to the will or discretion of the judge, whether a representation of an actual irregularity shall be made to the pardoning power; or to the discretion of the latter.”³⁰⁸ In the court’s view, if the error arose from any ground justifying a new trial in cases of misdemeanor, the convicted individual “should, upon his own motion, have another trial; instead of being obliged to rely upon the disposition of the court to recommend a pardon, or of the executive power to grant it.”³⁰⁹ The Massachusetts court further noted that in the federal case of *United States v. Fries* and in South Carolina and New York, new trial motions had also been granted in felony cases.³¹⁰

Grayson v. Commonwealth, provides another example in Virginia state court of the reliance on a new trial motion to help the disadvantaged that might otherwise have lacked fair treatment under the law at the time. There an African-American gentleman convicted of murder and sentenced to death received a new trial.³¹¹ The court held that “[w]here the evidence is contradictory, and the verdict is against the weight of evidence, a new trial may be granted by the Court which presides at the trial.”³¹² The opinion made the point that new trials could be granted in all cases upon the motion of the accused and were governed by the same rules in civil and criminal cases.³¹³ Grounds for awarding a new trial included where “the verdict is contrary to the evidence” or “the

³⁰⁷ See *Massachusetts v. Green*, 17 Mass. 515 (1822).

³⁰⁸ *Id.* at 534.

³⁰⁹ *Id.* at 535.

³¹⁰ *Id.* at 535-36. In 1832, the Supreme Court of Judicature of New York found that a new trial cannot be great in cases involving offenses more serious than misdemeanors. *People v. Comstock*, 8 Wend. 549, 549 (NY 1832). But earlier, in 1820, in *People v. Goodwin*, 18 Johns. 187, 187 (N.Y. 1820), the New York state court held that in cases of felony a new trial was appropriate if the jury had been deliberating for so long on a verdict it was likely they would never reach agreement. In such cases, the jury could be discharged and the defendant receive another jury trial. *Id.*

³¹¹ 47 Va. 712 (Va. Gen. Ct. 1849).

³¹² *Id.* at 724.

³¹³ *Id.* at 723.

verdict is without evidence to support it” because there has been no proof of a material fact or insufficient evidence.³¹⁴ Where some evidence has been presented, the Court cannot grant a new trial just because the court would have decided the case differently in the first instance but “the evidence should be plainly insufficient to warrant the finding of the jury.”³¹⁵ There was to be no appellate review where the evidence was contradictory and the verdict against its weight, only where the verdict was *without* supporting evidence.³¹⁶

In *Jerry v. State*, the Supreme Court of Indiana granted a new trial for “Jerry, a man of color,” who had received a capital sentence for murder.³¹⁷ Even after the court had applied “every fair inference in favor of the verdict and judgment,” it concluded that “strong doubts” remained “whether the testimony supports the verdict.” In that “case of so much doubt,” a new verdict was justified.³¹⁸ The defendant had made threats against the deceased man, but the decedent had beaten and threatened the defendant multiple times. ³¹⁹

Both federal and state courts therefore recognized that the new trial mechanism provided a critical protection for the jury right. Further, both federal and state courts applied the English common law standard for the weight of the evidence required to merit a new trial in cases where that procedure was available.

IV. Incorporation into Rule 33 and Implications for Modern Practice

Evidence from just prior to the promulgation of the first Federal rules of Criminal Procedure in the early 1940s further demonstrates continuity in the evidentiary standard for post-conviction new trials from the pre-constitutional era through modern practice. That evidence demonstrates synergy between the “contrary to evidence” standard of Blackstone, the 1789 Act’s incorporation of new trials on grounds

³¹⁴ *See id.* at 723-24.

³¹⁵ *Id.* at 723-24.

³¹⁶ *See id.*

³¹⁷ 1 Blackf. 395, 396 (Ind. 1825).

³¹⁸ *Id.* at 398.

³¹⁹ *See id.* at 397-98.

“usually . . . granted in the courts of law,” and the “interest of justice” language in the Federal Rules (language that has remained unchanged in the federal criminal procedural rules since their first edition).

For more than 150 years, the new trial provision of section 17 of the Judiciary Act remained in materially identical form.³²⁰ As of the time of the initial drafting of the federal rules, in 1940, the new trial grant was codified in section 391 of Title 28 of the U.S. Code. This provision applied in both criminal and civil cases.³²¹

The U.S. Supreme Court Advisory Committee on the Rules of Criminal Procedure maintained continuity with that provision in the early 1940s when it distilled a complex web of rules and statutes into a draft uniform Federal Rules of Criminal Procedure.³²² During the

³²⁰ Compare 28 U.S.C. § 391 (1940) (“All United States courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually granted in the courts of law. . . .”), with the 1789 Act (“That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law . . .”).

There were several intervening versions of the federal new trial provision, but they all retained that same phrasing. In 1911, the earlier provision was transferred into the Judicial Code from the Revised Statutes, which were repealed. See § 269, Act of Mar. 3, 1911; 1 Stat. 1160 (providing in chapter eleven, containing “provisions common to more than one court,” that “[a]ll of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law”). See also Note, 28 U.S.C. § 391 (1940) (explaining that the new trial provisions had been contained in the revised statutes derived from the Judiciary Act until the provision’s incorporation into the Judicial Code); Act of Mar. 3, 1911, ch. 231, § 297, 36 Stat. 1168 (repealing earlier statutory provisions).

In 1919, Congress added a second sentence to the new trial provision, explicitly referencing both criminal and civil cases and enacting a harmless error rule. See ch. 48, Act of Feb. 26, 1919, 40 Stat. 1181 (“ . . . On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.”). The last recorded statutory change directly relevant to the procedure prior to the drafting of the original federal rules was a 1928 enactment, which abolished the writ of error in civil and criminal cases in favor of appeal. Act of Jan. 31, 1928, Stat. 54.

³²¹ See Lester B. Orfield, *New Trials in Federal Criminal Cases*, 2 VILL. L. REV. 293, 293 (1957). Two other relevant provisions included the Supreme Court’s provision addressing new criminal trials in Rule 11 of its Criminal Appeals Rules along with Rule 59 addressing civil trials in the Federal Rules of Civil Procedure. See *id.*

³²² See Lester B. Orfield, *The Federal Rules of Criminal Procedure*, 33 CAL. L. REV. 543, 543 (1945) (member of the U.S. Supreme Court Advisory Committee on Rules of Criminal Procedure).

drafting process, the authors initially provided that “existing grounds for new trial be continued” under the new system of rules.³²³ Subsequent drafts then reframed these grounds as conveying that a “new trial might be granted ‘whenever required in the interests of justice.’”³²⁴ Some other new developments included in the initial draft rule, such as that a new trial could be granted for reconsideration of only a portion of the issues in the case, were eliminated in the second draft.³²⁵ There were at least ten drafts prepared by the Advisory Committee. The final draft was submitted to the Supreme Court in August 1944 and then reported to Congress and printed in January 1945.³²⁶

The “interest[] of justice” phrasing was the drafting committee’s formulation for conveying, and tracking, the preexisting common law terminology. The Advisory Committee Notes on the rule explain that it “substantially continue[d] existing practice.”³²⁷ The second draft, from January 1942, incorporated a number of changes, including the specification that a new trial is permissible “whenever required in the interests of justice.” Other changes included procedural updates related to timing and a capability for the court to initiate a new trial order.³²⁸

The sixth draft made an additional change by altering the first sentence of the relevant rule to combine the “interest of justice” language with a clear instruction that a court could grant the new trial.³²⁹ A separate subsection of the rule also preserved the common-law procedure of a writ of error coram nobis for “order[s] entered through mistake, inadvertence, surprise, or neglect.”³³⁰ Even with this all of this language a group of four rules advisory committee members filed a criticism of the “preliminary draft” of the rule, from 1943, for not providing enough protection to criminal defendants because there were

³²³ Lester B. Orfield, *New Trials in Federal Criminal Cases*, 2 VILL. L. REV. 293, 293–94 (1957).

³²⁴ *Id.* at 294–304.

³²⁵ *See id.* at 293–94.

³²⁶ Orfield, *Federal Rules* at 543–44.

³²⁷ 18 U.S. Code Appendix: Fed. R. Crim. P. 33, “Notes of Advisory Committee on Rules-1944.”

³²⁸ *See* Orfield, Villanova, at 294.

³²⁹ Orfield at 295.

³³⁰ *See id.*

too few grounds for awarding a new trial free from time-limit constraints.³³¹

Along with the concern about the retention of time limits, however, the scholars observed approbatively that one of the rule's strengths was the "broad basis" that it provided for new trials.³³² The time limits these scholars hoped would be eliminated were those connected to the provision of a new trial in cases of "fraud, duress or other gross impropriety" because they believed the new trial motion was superior to the writ of habeas corpus as "a device for correcting gross injustices." First, it was a benefit that the motion would be made in the same court where the judgment was rendered and there were no serious questions about double jeopardy problems in the case of new trial motions, in these scholars' view.³³³

In Professor Orfield's in-depth discussion and analysis of the criminal new trial motion, he surveys the motion's history—reporting that English practice included new trials in civil cases from the time of the fourteenth century and that the motion came into play in criminal cases in the second half of the seventeenth century with misdemeanors.³³⁴ According to Orfield's study, historically there had been fairly broad grounds for granting new trials including for "verdict[s] against the weight of the evidence" or for "the furtherance of the end of justice."³³⁵ According to Orfield, new trials were not available following felony convictions, which benefited solely from the availability of writs of error coram nobis for errors of fact.³³⁶

The mechanics of new trial grants were different than under American practice, with the King's Bench considering such motions en banc rather than the judge who had presided over the trial.³³⁷ Orfield reported that in 1907, British new trial motions were eliminated.³³⁸ The

³³¹ *See id.* at 296.

³³² *See id.* at 294-95.

³³³ *See id.* at 296-97. The group signing the letter included Professors Wechsler, Orfield, Glueck, and Dession. *See id.* at 296.

³³⁴ Orfield, 1957, at 304.

³³⁵ *Id.*

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ *See id.*

Kansas Supreme Court, in 1871, indicated that although the common law generally may have lacked criminal new trial jurisdiction, some state courts assumed it as a power conferred by nonetheless “long usage,” and the courts in the United States “ha[d] assumed and exercised with great uniformity the power of granting new trials in criminal cases.”³³⁹ There were only two reported cases, according to the court, that suggested new trials were unavailable in criminal cases in American practice.³⁴⁰ Sometimes states granted statutory authority for new trial procedures, and in other states courts assumed the power to grant new trials in the general interest of public safety and justice.³⁴¹ Further, for example, the U.S. Supreme Court has previously noted that even juror reading of a newspaper adverse to the defendant containing prejudicial information could justify the reversal of a conviction and grant of a new trial to the defendant, particularly in a capital case where the need for justice is obvious and paramount.³⁴²

Several federal cases decided within the decade of the federal rules’ incorporation of the new trial right echo and reflect the breadth of the grounds for which new trials can be granted, including new trials based on insufficiency of the evidence. Orfield describes the insufficiency of the evidence standard as becoming more favorable to defendants over time. Initially it was granted for verdicts “clearly against the evidence” with more latitude granted in criminal cases than in civil.³⁴³ The judge needed to “be well satisfied of the insufficiency of the evidence to convince the jury of the correctness of the verdict.”³⁴⁴

But the Supreme Court then in the late nineteenth century, according to Orfield, suggested it would not review a determination that a verdict was “contrary to the weight of the evidence if there was any evidence proper to go to the jury to support the verdict.”³⁴⁵ This framing,

³³⁹ *State v. McCord*, 8 Kan. 232, 241-42 (Kan. 1871).

³⁴⁰ *See id.* at 242-43.

³⁴¹ *See id.*

³⁴² *See Mattox v. United States*, 146 U.S. 140, 150-51 (1892). *See also* Orfield, 1957, at 309-11 (describing this case and this principle and the general range of new trial decisions based on claims of negative newspaper coverage of which the jury had awareness).

³⁴³ *See* Orfield, 1957, at 322.

³⁴⁴ *Id.*

³⁴⁵ *See id.* (discussing Supreme Court decisions in *Crumpton v. United States*, 138 U.S. 361 (1891), and *Moore v. United States*, 150 U.S. 57 (1893)).

however, suggests that the discretion, and deference, was given to initial trial-court *denials* of the motion—not necessarily to *appellate* reversals of grants of new trials.

Notably, the trial judge’s discretion was seen as so pronounced that Orfield’s characterization of the cases suggests that the standard for reversing a trial judge denial of a motion was as tough a hurdle to overcome as the standard for granting a judgment of acquittal following a guilty jury verdict.³⁴⁶ But where a trial judge instead *granted* a new trial motion it was to be upheld so long as the judge thought the evidence “lack[ed] that degree of persuasiveness without which there should be no conviction.”³⁴⁷ Further, Orfield described the mid-twentieth century cases as establishing that “it is the exclusive and unassignable function of the trial judge to grant or refuse a new trial in cases of conflicting evidence.”³⁴⁸ Also, as early as 1921, the federal courts were describing the district judge’s role in criminal jury trials as “sitting as the thirteenth juror.”³⁴⁹

Several federal decisions on new trial motions issued in the several years leading up to the final issuance of the federal rules of criminal procedure included weight of the evidence claims.³⁵⁰ The district court judge’s understanding was that such motions were “addressed peculiarly to the discretion of the trial judge” who should consider them “with especial conscientiousness.”³⁵¹ Circuit courts at time expressed agreement. For example the Seventh Circuit in 1939 explained that “the disposition of a motion for a new trial rests within the sound discretion of the trial judge” who may grant a new trial where “the evidence is conflicting” without review on appeal “except for clear abuse of discretion.”³⁵² The Eighth and Ninth Circuits had issued similar

³⁴⁶ See Orfield, 1957, at 322-23.

³⁴⁷ See *id.* (describing the cases as establishing that a district court judge is not compelled to grant a new trial unless “he is convinced that reasonable men could not have considered that the evidence established guilt beyond a reasonable doubt”).

³⁴⁸ Orfield, 1957, at 323.

³⁴⁹ See Orfield, 1957, at 323 (quoting *Applebaum v. United States*, 274 Fed. 43, 6 (7th Cir. 1921)).

³⁵⁰ See *id.*

³⁵¹ *United States v. Ryan*, 23 F. Supp. 513, 515-17 (W.D. Mo. 1938).

³⁵² *United States v. Holt*, 108 F.2d 365, 369 (7th Cir. 1939).

explanations in the twentieth-century decades leading up to development of the federal rules.³⁵³

In addition, federal court decisions leading up to development of the federal rules conceived of a meaningful, and appropriate and even integrated, role for a judge in reviewing the accuracy and justice of jury determinations. For example, a judge in the Northern District of Indiana recounted favorably a Fourth Circuit opinion's explanation that the accused in a jury trial has every possible advantage because "[i]n effect he has a trial by the judge in addition to the trial by the jury" through it being both "the province" and also "the duty of the judge to pass upon the verdict of the jury and the sufficiency of the evidence to support the verdict."³⁵⁴ On the basis of these types of principles, the district judge in that case concluded that it was his "duty to grant a new trial unless I am satisfied beyond a reasonable doubt that the verdict is justified under the evidence."³⁵⁵ One 1948 Northern District of Pennsylvania judge instead concluded that the court must view the evidence most favorably to the Government, give the Government the benefit of all inferences reasonably drawn from evidence, and refrain from credibility determinations, thereby supporting and sustaining the verdict so long as "there is substantial evidence to support it."³⁵⁶

Professor Orfield's analysis indicated that appellate courts around the time had the view that district courts should receive deference for their decision on a new trial motion.³⁵⁷ For example, in 1951 the D.C. Circuit explained that "[o]rdinarily we would not disturb the action of the trial court on such a motion."³⁵⁸ Further, the appeals court in that case noted that although new trial motions should be "temperately" utilized, the justification for awarding them on the basis of insufficiency of the

³⁵³ See, e.g., *Alvarado v. United States*, 9 F.2d 385, 389 (9th Cir. 1925) (noting that the court had "repeatedly held that it will not review the happenings at the trial under an assignment of error based on the denial of a motion for a new trial"); *Taylor v. United States*, 19 F.3d 813, 817 (8th Cir. 1927) (noting the clear abuse of discretion standard and the special "discretion of the trial judge" underlying consideration of the motion).

³⁵⁴ *United States v. Kaadt*, 31 F. Supp. 546, 547 (N.D. Ind. 1940) (discussing and quoting *Rees v. United States*, 95 F.2d 784, 790 (4th Cir. 1938)).

³⁵⁵ *Kaadt*, 31 F. Supp. At 547; Orfield, 1957 at 323.

³⁵⁶ Orfield, 1957 at 323 (quoting *United States v. Sorrentino*, 78 F. Supp. 425, 428 (N.D. Pa. 1948)).

³⁵⁷ See *id.* at 330.

³⁵⁸ *Benton v. United States*, 188 F.2d 625, 627 (D.C. Cir. 1951).

evidence “is broader in scope” than the justification required to grant a new trial “based on newly discovered evidence.”³⁵⁹

In a National Archives compilation labeled “Final Report 1943 to Supreme Court” and dated November 1943, there is a reference to a draft Rule 35 authorizing new trials for “newly discovered evidence or for deprivation of constitutional rights.”³⁶⁰ The reference includes a notation that this draft rule was “[v]igorously criticized” based largely on the concern that permitting new trials for alleged constitutional rights deprivations “would open Pandora’s Box.”³⁶¹ The final report version of Rule 35 dated November 1943 included language to authorize the granting of a new trial to a defendant “if required in the interest of justice.”³⁶² The rest of the language was about various aspects of the process of granting the trial such as a five-day deadline for making a motion except for motions based on “newly discovered evidence” or constitutional violation claims.³⁶³ There was a proposed form provided in the appendix for new trial motions. Two of the justifications listed for the motion included where “[t]he verdict is contrary to the weight of the evidence” or “[t]he verdict is not supported by substantial evidence.”³⁶⁴

Orfield’s description of the “interest of justice” standard was that “it is possible to obtain a new trial on any fair or reasonable ground,” making the rule “favorable to the defendant.”³⁶⁵ Drafting notes referenced several opinions where a trial judge had granted a new trial because he was “not satisfied as to the guilt of the defendants” based on the record of the evidence.³⁶⁶ Cases applying that standard to guilty verdicts against the “weight of evidence” were not uncommon in the years preceding the codification of the federal criminal procedural

³⁵⁹ *Id.*

³⁶⁰ See Book 10, Final Report 1943 to Supreme Court, “Not Adopted but Further Revised and Second Preliminary Draft Followed,” Nov. 1943, at 71 (available online through the National Archives).

³⁶¹ See *id.* at 70-71.

³⁶² *Id.* at 72.

³⁶³ See *id.*

³⁶⁴ See *id.* at 143.

³⁶⁵ Lester B. Orfield, The Federal Rules of Criminal Procedure, 33 Cal. L. Rev. 543, 574 (1945).

³⁶⁶ FED. R. CRIM. P., PRELIMINARY DRAFT: WITH NOTES AND FORMS, at 135-37 (1943) (discussing *Edwards v. United States*, 7 F.2d 357, 362 (8th Cir. 1925)).

rules.³⁶⁷ Not only was that standard in line with the broad discretionary authority of trial judges to grant new trials in the centuries of practice following the initial Judiciary Act and early case law, but some federal district courts had concluded that there was a *duty* to grant new trials unless they were “satisfied beyond a reasonable doubt that the verdict [was] justified under the evidence.”³⁶⁸ This balance in favor of granting a second opportunity for the defendant to be acquitted is synergistic with the general purpose of the new trial mechanism, over centuries, to be a final backstop of protection for the citizenry facing federal prosecution and potential loss of liberty and freedom after conviction in the face of powerful federal prosecutors with the authority to charge, investigate, and marshal evidence.

Conclusion

The Federal Rules of Criminal Procedure codified the long practice, dating back to English common law, of allowing courts to weigh the evidence and order a new trial where a verdict is against its weight. Both historically and under the Rules, that power is distinct from the courts’ authority to direct a verdict of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, which requires a stronger showing and is less frequently satisfied.

That said, despite the relatively longstanding and consistent framework for granting new criminal trials, recent judicial opinions have demonstrated uncertainty in the lower federal courts about the scope of Rule 33 authority to grant new trials. Motions for a new criminal jury trial arise in a variety of criminal matters. Such motions were relied on in early American cases where the crime was notorious or where the defendant was a person of color convicted based on circumstantial evidence that might survive a pure sufficiency analysis yet still leave the judge with significant doubts about guilt. More recently, the issue of when a judge can order a new criminal trial has arisen in cases charging crimes as serious and variegated as fraud, drug possession, murder, and damage to a nuclear weapons storage facility.

As a number of scholars have observed, the criminal jury trial right has steadily diminished in prominence and application since its

³⁶⁷ See also, e.g., *United States v. Robinson*, 71 F. Supp. 9, 11 (D.D.C. 1947) (collecting authorities).

³⁶⁸ See *Orfield, Villanova*, at 322-24; *United States v. Kaadt*, 31 F. Supp. 546, 547 (N.D. Ind.).

ratification. While its origins reveal the right to a criminal jury trial to be “justly dear to the American people” such that every encroachment on it is “watched with great jealousy,”³⁶⁹ the modern conflation of the Rule 29 and Rule 33 standards in some circuit courts has whittled down this protection. In his in-depth study of the Bill of Rights, Professor Akhil Amar describes the jury as “a paradigmatic image underlying the original Bill of Rights” as it appears in three of the original ten constitutional amendments in addition to its incorporation into Article III of the original constitutional text.³⁷⁰ Professor Amar also contends that the absence of the role of the jury in features of criminal proceedings such as the issuance of warrants and sentencing motivated the Fourth and Eighth Amendments restriction of discretion in those determinations.³⁷¹

Professor Amar, further, highlights the asymmetrical nature of the jury trial protection in favor of defendants, with the intended right of double jeopardy attaching to preclude any reversal of *acquittal* by a properly instructed jury in modern American practice stemming back to pre-constitutional British common law.³⁷² In Professor Amar’s telling, “[t]he jury summed up—indeed embodied—the ideals of populism federalism, and civic virtue that were the essence of the original Bill of Rights.”³⁷³

Professor Amar observes that the jury trial system is a structural constitutional feature first appearing in Article III as a command parallel to the mandate that jurisdiction “shall extend” to certain kinds of cases.³⁷⁴ The individual rights component of the jury trial is apparent in its inclusion in the Bill of Rights. Rather than serving as a redundant protection, the jury trial provision in the Sixth Amendment prescribes the location of the jury trial, securing the safeguard that “impartial” residents of “the State and district wherein the crime shall have been committed” in a district “previously ascertained by law” will issue the

³⁶⁹ See, e.g., STORY *supra* § 1763.

³⁷⁰ AMAR, *supra*, at 96.

³⁷¹ See *id.* (referencing the restriction that warrants may issue only “upon probable cause” and the prohibition on “[e]xcessive bail,” “excessive fines,” and “cruel and unusual punishments”).

³⁷² See *id.* at 96-97.

³⁷³ See *id.* at 97.

³⁷⁴ See *id.* at 105; U.S. CONST. art. III (“the trial of all Crimes . . . shall be by jury”).

verdict.³⁷⁵ The federal circuit courts of appeals on the side of the Rule 33 divide obscuring the distinction between the new trial and judgment of acquittal standards remove the incentive for parties to request a new trial. Consequently, their approach expands the likelihood that parties will instead pursue the more intrusive remedy of requesting a judgment of acquittal. Review and restoration of the proper, textually based historical standard for granting new trials would be a significant step toward returning the jury trial to its vaunted role in criminal trials and the American system of self-governance.

³⁷⁵ See U.S. CONST. amend. vi; AMAR, *supra*, at 105.