WE THE PEOPLE: JURIES, NOT JUDGES, SHOULD BE THE GATEKEEPERS OF EXPERT EVIDENCE

*Krista M. Pikus**

"I believe there are more instances of the abridgement of the freedom of the people, by gradual and silent encroachments by those in power, than by violent and sudden usurpations."

—James Madison, 1788[1]

Introduction

On August 18, 2007, Matthew Valente became paralyzed below the waist with partial paralysis to his upper body from a golf cart accident.[2] At the time of the accident, Valente was eighteen years old and working as a cart and range attendant at La Tourette Golf Course on Staten Island.[3] Valente's work responsibilities included driving and transporting golf carts. La Tourette properly trained Valente on how to operate the golf carts. On the day of the accident, Matthew was driving an E–Z–Go golf cart manufactured by Textron.[4] The golf carts did not have seatbelts or four-wheel brakes.[5] Valente was driving on the cart path when his hat blew off.[6] He applied the brakes, turned the wheel slightly, and the golf cart fishtailed, rolling over onto its passenger side, leaving Valente with a spinal fracture and paralyzed.[7]

Valente and his father brought a products liability suit against the manufacturer of the golf cart.[8] Despite his efforts, Valente's case never made it to

* J.D. Candidate, Notre Dame Law School, 2015; B.S. in Business, Miami University, 2012; B.A. in Psychology, Miami University, 2012. This Note is dedicated to my parents for being expert caregivers all my life. I am grateful to my family, friends, and the staff of the *Notre Dame Law Review* for their support and encouragement in preparing this Note.

1 James Madison Replies to Patrick Henry, Defending the Taxing Power and Explaining Federalism, June 6, 1788, *reprinted in* 2 The Debate on the Constitution 611, 612 (Bernard Bailyn ed., 1993) [hereinafter James Madison Replies].

2 Valente v. Textron, Inc., 931 F. Supp. 2d 409, 414 (E.D.N.Y. 2013).

3 *Id.*

4 *Id.*

5 *Id.* at 429.

6 *Id.* at 414.

7 *Id.*

8 *Id.* at 413.

a jury.[9] Nevertheless, Valente had his "day in court" when the judge conducted a hearing on the reliability of his expert evidence.[10] But that "day in court" consisted of findings made solely by a judge, not by a jury.[11]

The Framers of our Constitution considered the right to a trial by jury to be more than just a fundamental right—it was an essential safeguard against tyranny.[12] Thomas Jefferson said he considered trial by jury "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[13] This right acted as a balance of power between the people and their government.[14] Approximately two hundred years later, Chief Justice Rehnquist proclaimed, "[t]he founders of our Nation considered the right of trial by jury in civil cases an important bulwark against tyranny and corruption, a safeguard too precious to be left to the whim of the sovereign."[15] Indeed, the U.S. Constitution does not contain a "sovereignty" clause.[16] Rather, the first words in the Preamble of the Constitution are: "We the People."[17]

At the time of the founding, Americans considered jury service as a form of political power.[18] This form of political power has dramatically plummeted since then.[19] In 1962, trials resolved approximately twelve percent of federal civil cases.[20] In 2002, that number had dropped to less than two percent.[21] One factor contributing to this significant decrease in trials is the increasing popularity of alternative dispute resolutions.[22] For those who choose to go to trial, the chance of actually getting the case before a jury is still very rare due to various procedural obstacles.[23] In addition to these procedural obstacles, there is an increasing trend in the law of taking decision-

9 *Id.* at 440 (granting defendant's motion for summary judgment after a *Daubert* hearing excluded testimony of plaintiff's experts).

10 *See id.*

11 *See id.*

12 *See* ENCYCLOPEDIA OF AMERICAN CIVIL LIBERTIES 875–77 (Paul Finkelman ed., 2013) (discussing the history and purpose of the right to a trial by jury).

13 Letter from Thomas Jefferson to Thomas Paine, 1789, *in* 7 THE WRITINGS OF THOMAS JEFFERSON 408 (Albert Ellery Bergh ed., 1905).

14 *See* State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1084–87 (Ohio 1999) (discussing the right to a jury trial as an aspect of the separation of powers doctrine).

15 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 343 (1979) (Rehnquist, J., dissenting).

16 *See* U.S. CONST.

17 *Id.* pmbl.

18 *See generally* MICHAEL SINGER, JURY DUTY: RECLAIMING YOUR POLITICAL POWER AND TAKING RESPONSIBILITY 73–108 (2012) (discussing the jury as a political institution).

19 *See* Patricia Lee Refo, *The Vanishing Trial*, LITIGATION, Winter 2004, at 2.

20 *See id.*

21 *See id.*

22 *See* Mark R. Kravitz, *The Vanishing Trial: A Problem in Need of Solution?*, 79 CONN. B.J. 1, 14–23 (2005).

23 *See id.* at 18–21.

making power away from the jury and placing it into the hands of the judge.[24]

The implication of reduced jury authority is evident in the recent case, *Valente v. Textron, Inc.*,[25] discussed above. The judge granted summary judgment for the defense after he excluded Valente's expert evidence following a *Daubert*[26] hearing on the reliability of the methods the expert used in arriving at his conclusions.[27] Since *Daubert* and its progeny reformed the standards on expert evidence,[28] every case involving an expert witness requires the judge to adjudicate the reliability of the expert's methods.[29] The *Daubert* hearing in *Valente v. Textron, Inc.* was thus not before a jury, but only the judge.[30] Valente appealed his case to the Second Circuit asserting that the judge abused his discretion in excluding the expert evidence.[31] The Second Circuit held that the judge's thoughtful and thorough explanation for excluding the evidence demonstrated that he acted within his discretion.[32]

The judge should not have this discretion in the first place. Rather, a jury should decide the reliability of the expert's testimony.[33] While the judge may determine if the proponent of the expert testimony laid enough foundation to establish the witness's qualifications as an expert since it presents questions of law,[34] the jury should determine the reliability of the methods the expert used since it primarily entails questions of fact.[35]

---

24 *See* Adam Liptak, *Cases Keep Flowing In, but the Jury Pool Is Idle*, N.Y. TIMES, Apr. 30, 2007, http://www.nytimes.com/2007/04/30/us/30bar.html?pagewanted=all&_r=0 (recognizing arguments from legal scholars that summary judgment violates the Seventh Amendment because it takes the jury's power to decide and gives it to the judge).

25 931 F. Supp. 2d 409 (E.D.N.Y. 2013).

26 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (holding that judges should act as a gatekeeper in regard to the reliability of expert evidence).

27 *Valente*, 931 F. Supp. 2d at 414.

28 *See* Joseph T. Walsh, *Keeping the Gate: The Evolving Role of the Judiciary in Admitting Scientific Evidence*, 83 JUDICATURE 140, 142 (1999).

29 *See* David E. Bernstein, *The Misbegotten Judicial Resistance to the* Daubert *Revolution*, 89 NOTRE DAME L. REV. 27, 27 (2013) (noting that "by 2000 all expert testimony needed to pass a reliability test before it could be deemed admissible"). If the opponent of the expert evidence fails to object on *Daubert* grounds and requests a ruling on that evidence in a timely manner, the opponent may waive his right to object. *See, e.g.*, Macsenti v. Becker, 237 F.3d 1223, 1233 (10th Cir. 2001); Questar Pipeline Co. v. Grynberg, 201 F.3d 1277, 1289–90 (10th Cir. 2000).

30 *See Valente*, 931 F. Supp. 2d at 413.

31 Valente v. Textron, Inc., 559 F. App'x 11, 12 (2d Cir. 2014).

32 *Id.* at 14.

33 *See infra* Section IV.A.

34 *See* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified . . . ."); *see also* Mathis v. Exxon Corp., 302 F.3d 448, 459 (5th Cir. 2002) ("Whether [the witness] is qualified to testify as an expert is a question of law." (citing FED. R. EVID. 104(a))).

35 *Compare* Sparf v. United States, 156 U.S. 51, 183 (1895) ("[Defendants have a] right to have the jury decide *every* matter of fact involved in that issue." (emphasis added)), *with* 43 WILLIAM C. FLANAGAN & HARRY P. CARROLL, MASSACHUSETTS PRACTICE SERIES: TRIAL PRACTICE § 17.17 (2d ed. 2013) ("In order to qualify, a witness as an expert the proponent

This Note urges restoration of the proper balance of power[36] between judges and juries regarding expert evidence. Our justice system has steadily moved away from letting juries decide important questions of fact and toward putting the decisionmaking power into the hands of judges.[37] The recent developments in evidence law, requiring judges to act as the "gatekeepers" of expert evidence, present significant obstacles for plaintiffs attempting to get cases to a jury.[38] This newer standard in expert evidence is a violation of the foundational precept in American jurisprudence that the people should be the sovereign, not the judge.[39]

Part I discusses the history and development of jurisprudence regarding jury decisionmaking. Part II discusses the development of jurisprudence regarding expert evidence. Part III discusses the current status and empirical implications of the expert evidence standards. Specifically, it seeks to show the jurisprudential flaws in the *Daubert* trilogy, which takes fact-finding away from a jury and allows for more judicial activism by policy-driven judges. Finally, Part IV proposes solutions to resolve the flaws of today's expert evidence standard by returning to juries their proper fact-finding authority and limiting judicial discretion. Practical and theoretical implications are discussed.

I. HISTORY AND JURISPRUDENCE OF JURY DECISIONMAKING IN AMERICA

One of the central tenets in American jurisprudence is the right to a trial by jury.[40] This right to be tried by the people became a symbol of the overthrown power of the king.[41] The Framers saw this right as such a critical

---

of the testimony must, as a preliminary *question of fact*, meet five separate criteria to the satisfaction of the judge." (emphasis added)), *and* 3B JAY E. GRENIG & DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN CIVIL RULES HANDBOOK § 907.02:25 (2014) ("[Wisconsin law on expert evidence] requires a range of findings that *mixes questions of fact and law*." (emphasis added)).

36 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 598–601 (1993) (Rehnquist, J., concurring in part and dissenting in part) (warning that the *Daubert* command for judges to act as gatekeepers may result in judges overextending their judicial power).

37 *See* AKHIL REED AMAR & ALAN HIRSCH, FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS 92 (1998) (arguing that the jury is empowered to do much more than answer questions of fact, but that much of that power has been usurped by the judge); Liptak, *supra* note 24 (recognizing arguments from legal scholars that summary judgment violates the Seventh Amendment because it takes the jury's power to decide and gives it to the judge).

38 *See* Lisa Heinzerling, *Doubting* Daubert, 14 J.L. & POL'Y 65, 78 (2006) ("*Daubert* and cases following it have adjusted the substantive rules of tort by creating extra obstacles to plaintiffs trying to prove their claims.").

39 *See* AMAR & HIRSCH, *supra* note 37, at 126 ("Under our Constitution, sovereignty belongs to the People, not to the government—be it state or federal. . . . [T]he jury plays a leading role in preserving that sovereignty.").

40 *See* Duncan v. Louisiana, 391 U.S. 145, 153–57 (1968) (discussing the right to a trial by jury as a fundamental right).

41 *See id.* at 152–54 (noting that the right to a trial by jury originated as a check on arbitrary treatment from the Crown); *see also* 2 JOSEPH STORY, COMMENTARIES ON THE CON-

aspect of ensuring equality and justice that it appears multiple times in the Bill of Rights. The Fifth Amendment states 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*."[42] The Sixth Amendment similarly states that "[i]n all criminal prosecutions, the accused shall enjoy *the right to a speedy and public trial, by an impartial jury*."[43] Additionally, the Seventh Amendment proclaims, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury* shall be preserved."[44]

A. Development of the Right to Serve on a Jury

Even though the right to a jury trial is a critical and fundamental right, the right to serve on a jury was not extended to all on an equal basis until recently. In 1879, the Supreme Court in *Strauder v. West Virginia*[45] held that the Equal Protection Clause of the Fourteenth Amendment applied to the right of a trial by jury[46] and that service on a jury cannot be limited by race.[47] In that same year, the Supreme Court decided *Virginia v. Rives*,[48] holding that the right to be considered for jury service was distinct from the right to serve on a jury. Accordingly, blacks and minorities were frequently excluded from consideration for jury service. Such discrimination continued until the civil rights movement when more explicit steps were taken to eliminate such discrimination.[49] In 1986, the Supreme Court held in *Batson v. Kentucky*[50] that the Equal Protection Clause forbids prosecutors from challenging potential jurors solely on account of their race.[51] In 1994, the Supreme Court extended the *Batson* rule to gender in *J.E.B. v. Alabama ex rel. T.B.*[52]

Women faced similar struggles in attempting to gain an equal right to serve on a jury. Women could not serve on juries on equal terms as men until the mid-1970s.[53] After such efforts to secure equal rights regarding jury service, one would expect that such a right would be treasured and greatly

---

STITUTION OF THE UNITED STATES § 1780, at 559 (Melville M. Bigelow ed., Little, Brown, & Co., 5th ed. 1891) (1833) ("The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people.").

42 U.S. CONST. amend. V (emphasis added).

43 *Id.* amend. VI (emphasis added).

44 *Id.* amend. VII (emphasis added).

45 100 U.S. 303 (1879).

46 *Id.* at 312.

47 *Id.* at 307–08.

48 100 U.S. 313 (1879).

49 *See generally* Eckstein v. Kirby, 452 F. Supp. 1235, 1240 (E.D. Ark. 1978) (deciding that an action by a state that arbitrarily deprives a person of the opportunity to serve on a jury is a violation of rights secured by the U.S. Constitution).

50 476 U.S. 79 (1986).

51 *Id.* at 80.

52 511 U.S. 127 (1994).

53 *See* Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that women cannot be systematically excluded from jury panels from which petit juries are drawn).

appreciated today. However, the opposite has occurred. Courts have given to judges much of the decisionmaking power originally held by juries.[54] The importance of the right to a trial by jury and allowing the people to act as the fact-finder, however, remains a critical safeguard of the foundational precepts of our Constitution.

B. Jurisprudential Theories of Jury Decisionmaking

Our system of government is based on the idea that the people are sovereign.[55] The idea of popular sovereignty is demonstrated by the structure of our Constitution in Articles I and II, which provide that the people elect representatives for the legislature[56] and elect a President.[57] The President then nominates individuals for the Supreme Court that must be confirmed by the Senate.[58] Jury service is another mechanism of popular sovereignty, as people sit on juries.[59] The right to a trial by jury of one's peers is an integral part of our legal system.[60]

The basis of jury decisionmaking in American jurisprudence is that juries provide a strong check against governmental oppression.[61] One of the primary structural principles of our Constitution that prevents government oppression is the separation of powers.[62] James Madison wrote in the Federalist Papers that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very def-

54 *See* AMAR & HIRSCH, *supra* note 37, at 92 (arguing that juries are empowered to do much more than answer questions of fact, but much of that power has been usurped by the judge); *see also* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 345 (observing that judges now also have the power to reduce jury verdicts).

55 *See* AMAR & HIRSCH, *supra* note 37, at 7 (noting that one of the first principles of American jurisprudence is that the people are sovereign); EDMUND S. MORGAN, INVENTING THE PEOPLE 235–88 (1988) (discussing the concept of popular sovereignty in American jurisprudence); Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 NOTRE DAME L. REV. 1889, 1910 (2008) (same); Michael A. Dawson, Note, *Popular Sovereignty, Double Jeopardy, and the Dual Sovereignty Doctrine*, 102 YALE L.J. 281, 282–84 (1992) (discussing the history and exercise of popular sovereignty in America).

56 U.S. CONST. art. I.

57 *Id.* art. II, § 1.

58 *Id.* § 2.

59 *See* AMAR & HIRSCH, *supra* note 37, at 58 (discussing the political power in jury service and how it acts as a mechanism of popular sovereignty).

60 *See generally* SINGER, *supra* note 18.

61 *See* AMAR & HIRSCH, *supra* note 37, at xiv–xv (noting that juries act as a check on governmental power); Paul Butler, Op-Ed., *Jurors Need to Know That They Can Say No*, N.Y. TIMES, Dec. 20, 2011, http://www.nytimes.com/2011/12/21/opinion/jurors-can-say-no.html?_r=0 (noting that Supreme Court Justice Antonin Scalia mentioned at a Senate hearing that juries could ignore the law and provide a strong check on governmental power).

62 *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 337–38 (2d ed. 1998) (discussing Madison's view on the importance of separation of powers).

inition of tyranny."[63] Safeguards are put in place so that each branch acts as a check and balance on the other branches.[64] The power of judicial review implied in Article III of the Constitution[65] is one example of the principle of checks and balances.[66]

Some have argued that judicial review is at odds with our commitment to democracy. This is commonly called the "counter-majoritarian difficulty."[67] Alexander Bickel used that term to refer to the concern with unelected judges invalidating laws that reflect the will of the majority,[68] thus undermining principles of democracy.[69] However, some scholars perceive judicial review as a necessary check on other branches of government.[70]

How judges are kept in check is unclear.[71] Judges possess a significant amount of power with uncertain rules for exercising that power.[72] Allowing the jury to make more decisions, instead of the judge, acts as a check on the judge's power.[73]

Furthermore, on appellate review, the court reviews questions of law de novo and questions of fact for clear error.[74] The standard for overturning questions of fact is higher than for overturning questions of law.[75] This higher standard for overturning questions primarily decided by juries acts as a check on judges' power to overturn the decision of the people.

---

63 THE FEDERALIST NO. 47 (James Madison).

64 *See* JAMES L. SUNDQUIST, CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT 278–79 (rev. ed. 1992) (discussing the effectiveness of checks and balances); Jim Powell, *James Madison: Checks and Balances to Limit Government Power*, THE FREEMAN (Mar. 1, 1996) http://www.fee.org/the_freeman/detail/james-madison-checks-and-balances-to-limit-government-power (discussing safeguards put in place to limit government power and ensure balance of powers).

65 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recognizing the implied power of judicial review to invalidate unconstitutional laws).

66 *See* Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 628 (1993) ("Judicial review can be and is used to check the actions of wayward majorities.").

67 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16 (1962).

68 *Id.* at 16–23.

69 *See id.* *But see* Or Bassok, *The Two Countermajoritarian Difficulties*, 31 ST. LOUIS U. PUB. L. REV. 333, 362–66 (2012) (discussing a second countermajoritarian difficulty when Justices strike down statutes that are supported by the majority according to public opinion polls).

70 *See, e.g.*, Friedman, *supra* note 66, at 627–28 (discussing how judicial review operates as a check on the other branches of government).

71 *Id.*

72 *Id.*

73 *See* Butler, *supra* note 61 ("Supreme Court justice Antonin Scalia, asked at a Senate hearing about the role of juries in checking governmental power, seemed open to the notion that jurors 'can ignore the law' if the law 'is producing a terrible result.'").

74 *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion').").

75 *Id.* at 557–63.

When juries make decisions, instead of judges, it reaffirms the idea that the power properly lies with the people.[76] On the other hand, when judges have a vast majority of the decisionmaking power, the judge is the "sovereign" instead of the people. Instead, there should be a balance of decisionmaking power between judges and juries. Recently, though, this power has become unbalanced as the decisionmaking power is steadily being taken away from juries and put into the hands of judges.

C. Taking the Decisionmaking Power Away from the Jury

Today, cases are rarely resolved by juries.[77] Studies show that approximately eighty to ninety percent of civil lawsuits settle[78] and ninety percent of criminal cases are never heard by juries, but are instead determined by plea bargains.[79] Of those few cases that actually make it to trial, judges still decide a significant majority of cases.[80] This could be because the parties have waived their right to a jury trial,[81] or because there are no questions of fact remaining.[82]

Our legal system has long accepted the concept of judges deciding questions of law while juries decide questions of fact.[83] One of the primary purposes of a jury is to prevent one person (the judge) from being a sovereign.

---

76 *See* James L. Wright & M. Matthew Williams, *Remember The Alamo: The Seventh Amendment of the United States Constitution, the Doctrine of Incorporation, and State Caps on Jury Awards*, 45 S. TEX. L. REV. 449, 458–59 (2004) (noting that jury trials act as a check on state governmental power); Butler, *supra* note 61.

77 *See* Refo, *supra* note 19, at 2 (noting that in 2002, less than two percent of federal civil cases were disposed of by a jury trial).

78 Jonathan D. Glater, *Study Finds Settling Is Better Than Going to Trial*, N.Y. TIMES, Aug. 7, 2008, http://www.nytimes.com/2008/08/08/business/08law.html.

79 *See* Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?_r=0 ("[R]ights [contained in the Bill of Rights] are, for the overwhelming majority of people hauled into courtrooms across America, theoretical. More than 90 percent of criminal cases are never tried before a jury. Most people charged with crimes forfeit their constitutional rights and plead guilty.").

80 *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 71 (2011) (noting that "judges decide the overwhelming majority of cases in our nation").

81 *See* FED. R. CRIM. P. 23(a)(1) (noting that a criminal trial must be by jury unless the defendant waives this right in writing); FED. R. CIV. P. 38(d) ("A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.").

82 *See* FED. R. CIV. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.").

83 *See* Sparf v. United States, 156 U.S. 51, 183 (1895) (Gray & Shiras, JJ., dissenting) (noting that defendants have a "right to have the jury decide *every* matter of fact involved in that issue" (emphasis added)).

Instead, the people are sovereign.[84] Giving questions of fact to juries and questions of law to judges balances the power between them.[85]

Cases that would typically be in the purview of jury decisionmaking, such as consumer contract disputes, are frequently resolved by arbitration due to mandatory clauses in agreements that consumers likely did not read before agreeing to them.[86] Cases otherwise qualifying for trial are often dismissed due to preliminary evidentiary determinations made solely by the judge,[87] even when such determinations primarily entail questions of fact.[88] Specifically, the change in standards governing expert evidence over the past two decades has significantly decreased the number of cases that are actually decided by juries.[89] Judges deciding questions of fact regarding expert evidence disrupts the balance of power and infringes on juries' already-declining authority.

II. Development of Expert Evidence Jurisprudence

For the past twenty years, courts have debated the standard governing the introduction and evaluation of expert evidence.[90] Generally, courts have

84 *See generally* H.L.A. Hart, The Concept of Law 50–71 (3d ed. 2012) (discussing who and what the sovereign is).

85 *Compare* Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis. L. Rev. 377, 401–02 (1999) (discussing the development of the fact-finding function of the jury), *with Sparf*, 156 U.S. at 183 (Gray & Shiras, JJ., dissenting) (asserting that defendants in a criminal case have the right to have juries decide every question of fact) *and* Amar & Hirsch, *supra* note 37, at 99–100 (positing that allowing juries to decide questions of law would usurp the powers of the court).

86 *See* Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 St. John's L. Rev. 123, 160 (2007) (noting that consumers rarely read or comprehend arbitration agreements).

87 *See, e.g.*, Glastetter v. Novartis Pharm. Corp., 252 F.3d 986, 992 (8th Cir. 2001) (affirming summary judgment for the defense after the district court excluded expert evidence after a *Daubert* hearing); Pride v. BIC Corp., 218 F.3d 566, 581 (6th Cir. 2000) (same); Valente v. Textron, Inc., 931 F. Supp. 2d 409 (E.D.N.Y. 2013) (dismissing a complaint after excluding plaintiffs' expert testimony); Dunn v. Sandoz Pharm. Corp., 275 F. Supp. 2d 672, 684 (M.D.N.C. 2003) (same); Magistrini v. One Hour Martinizing Dry Cleaning, 180 F. Supp. 2d 584, 614 (D.N.J. 2002) (excluding expert evidence following a *Daubert* hearing).

88 *See* 3B Grenig & Blinka, *supra* note 35, § 907.02:25 ("[Wisconsin law on expert evidence] requires a range of findings that *mixes questions of fact and law*, namely, the witness's qualifications, the helpfulness of the testimony, whether the opinion is sufficiently supported by facts and data, the reliability of the witness's principles and methods, and whether the witness applied them in a reliable manner." (emphasis added)); *cf. Sparf*, 156 U.S. at 183 (Gray & Shiras, JJ., dissenting) (asserting that defendants have a "right to have a jury decide *every* matter of *fact* involved in that issue" (emphasis added)).

89 *See* David M. Flores et al., *Examining the Effects of the* Daubert *Trilogy on Expert Evidence Practices in Federal Civil Court: An Empirical Analysis*, 34 S. Ill. U. L.J. 533, 563 (2010) (noting that *Daubert* led to more in limine challenges and less jury involvement in expert witness admission processes).

90 *See, e.g.*, Daniel E. Fisher, Daubert v. Merrell Dow Pharmaceuticals*: The Supreme Court Gives Federal Judges the Keys to the Gate of Admissibility of Expert Scientific Testimony*, 39 S.D.

shifted the authority to assess expert testimony from juries to judges.[91] What was intended to give district courts more flexibility in managing their dockets[92] has resulted in giving judges more power to decide the ultimate issues in the case. This Section presents an overview of the evolution of standards in expert evidence.

A. *The* Frye *Standard*

In many civil and criminal cases, parties call expert witnesses to testify about a question of fact that requires specialized knowledge to evaluate the evidence.[93] Even if the proper foundation is laid to establish the expert's qualifications, opposing parties often object to the reliability of the methods that the expert uses to support his conclusion. Such an objection was made in the case *Frye v. United States*,[94] which started the revolution that changed admissibility standards of expert testimony.

In 1923, James Alphonzo Frye was convicted of murder.[95] Frye sought to introduce evidence of a systolic blood pressure deception test.[96] The systolic blood pressure deception test acted as a lie detector test based on the theory that lies require a conscious effort which will be reflected by a change in blood pressure.[97] The court denied admissibility of this test pursuant to the government's objection[98] on the basis that it did not have scientific recognition among authorities in the field.[99] The court held that "the thing from which the deduction is made must be sufficiently established to have gained *general acceptance in the particular field* in which it belongs."[100] Since the systolic blood pressure deception test had not yet gained such acceptance, the court sustained the government's objection to its admissibility.[101]

L. REV. 141 (1994); Edward J. Imwinkelried, *Judge Versus Jury: Who Should Decide Questions of Preliminary Facts Conditioning the Admissibility of Scientific Evidence?*, 25 WM. & MARY L. REV. 577 (1984); Peter B. Oh, *The Proper Test for Assessing the Admissibility of Nonscientific Expert Evidence Under Federal Rule of Evidence 702*, 45 CLEV. ST. L. REV. 437 (1997).

91 *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (holding that judges, rather than a jury, should act as a gatekeeper in regards to the reliability of expert evidence).

92 *See* David L. Faigman, *The* Daubert *Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. DAVIS L. REV. 893, 896–97 (2013) ("*Daubert* thus began as a modest attempt to expand district courts' management of their dockets.").

93 *See* FED. R. EVID. 702 (listing the criteria required for expert testimony to be admissible).

94 293 F. 1013 (D.C. Cir. 1923).

95 *Id.* at 1013.

96 *Id.* at 1013–14.

97 *Id.*

98 *Id.* at 1014.

99 *Id.*

100 *Id.* (emphasis added).

101 *Id.*

This *Frye* general acceptance standard was the prevailing standard for evaluating expert testimony in federal courts for several decades.[102] This test left the determination of reliability and validity of an expert's methods to the scientific community.[103] Although the judge ultimately made the assessment under *Frye*, the judge's role was still limited since his decision was dependent on the scientific community's assessment of the methods. Developments after *Frye* changed this by having the judge assume a more active role.

B. The Federal Rules of Evidence (1975)

In 1975, Congress adopted the Federal Rules of Evidence.[104] Rule 702, which governs the admissibility of expert testimony, originally stated "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[105] The adoption of the Federal Rules of Evidence did not specifically address whether the *Frye* general acceptance standard still prevailed.[106] Without explicit acknowledgment of the validity of *Frye* in the federal rules, courts varied on its application.[107] Interpretation of the Federal Rules of Evidence standard for expert testimony was altered again in 1993 when the Supreme Court heard *Daubert v. Merrell Dow Pharmaceuticals*.[108]

C. The Daubert *Trilogy*

Standards for admissibility of expert testimony changed dramatically when the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*.[109] The Supreme Court decided two other significant cases addressing expert

102 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 585 (1993) ("In the 70 years since its formulation in the *Frye* case, the 'general acceptance' test has been the dominant standard for determining the admissibility of novel scientific evidence at trial.").

103 *See Frye*, 293 F. at 1014 (holding the systolic blood pressure deception test invalid because it had yet to gain "standing and scientific recognition among physiological and psychological authorities").

104 *See* Boggs v. Blue Diamond Coal Co., 497 F. Supp. 1105, 1123–24 n.103 (E.D. Ky. 1980) ("Congress enacted a statute adopting the Federal Rules of Evidence effective July 1, 1975."); STEPHEN A. SALTZBURG & KENNETH R. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 5 (2d ed. 1977) (discussing the adoption of the Federal Rules of Evidence). For further discussion on the codification of the Federal Rules of Evidence, see Margaret A. Berger, *The Federal Rules of Evidence: Defining and Refining the Goals of Codification*, 12 HOFSTRA L. REV. 255 (1984).

105 An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (1975) (codified as amended in scattered sections of 28 U.S.C.).

106 *See, e.g.*, *Daubert*, 509 U.S. at 589 (noting that "the assertion that the [Federal Rules of Evidence] somehow assimilated *Frye* is unconvincing").

107 *See* Fisher, *supra* note 90, at 152.

108 509 U.S. 579.

109 *Id.*

testimony admissibility after *Daubert*: *General Electric Co. v. Joiner*[110] and *Kumho Tire Co. v. Carmichael*.[111] These three cases are collectively referred to as the "*Daubert* Trilogy." The standards elaborated in this trilogy of cases placed the judge in a significantly more active role,[112] deciding not only questions of law regarding expert testimony, but also questions of fact.[113]

In *Daubert*, the Supreme Court answered the longstanding question of whether the *Frye* standard was still valid for evaluating expert scientific testimony.[114] The Court held that the Federal Rules of Evidence contained the proper standard, not *Frye*[115]—nothing in Rule 702 indicates that *Frye*'s "general acceptance" standard should be the one to govern.[116] The Supreme Court declared that judges should act as "gatekeepers" for expert testimony in determining that their methods were not only relevant, but also reliable.[117] The Court specifically stated that "the Rules of Evidence—especially Rule 702—do assign to the trial *judge* the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[118] Rule 702, however, originally said nothing about the judge—rather than the jury—being the responsible fact-finder.[119]

The committee's note on the year 2000 amendments to the Federal Rules of Evidence report that "in *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers";[120] however, the Federal Rules of Evidence themselves did not provide this specific command.[121] In fact, some scholars note that the Federal Rules of Evidence themselves appear to commit the jury to the determination of scientific validity, but policy considerations have favored the judge making such determination instead.[122]

Federal Rule of Evidence 104 does assign the court the task of deciding any preliminary questions on whether a witness is qualified, a privilege exists, or evidence is admissible.[123] Expert evidence is not necessarily a preliminary question and is not the type that the court *must* decide in the absence of the

110 522 U.S. 136 (1997).

111 526 U.S. 137 (1999).

112 *See Daubert*, 509 U.S. at 597 (noting the more active gatekeeping role for judges).

113 *See* David M. Malone & Paul J. Zwier, *Epistemology after* Daubert, Kumho Tire*, and the New Federal Rule of Evidence 702*, 74 TEMP. L. REV. 103, 118–19 (2001) (arguing that the reliability of methodology presents questions of fact, not questions of law).

114 *Daubert*, 509 U.S. at 587–90.

115 *Id.* at 579.

116 *Id.* at 588.

117 *Id.* at 597.

118 *Id.* (emphasis added).

119 *See generally* An Act to Establish Rules of Evidence for Certain Courts and Proceedings, Pub. L. No. 93-595, 88 Stat. 1926 (1975); FED. R. EVID. 702 (amended 2000).

120 FED. R. EVID. 702 advisory committee's note.

121 *See* Imwinkelried, *supra* note 90, at 616 (arguing that Federal Rules of Evidence 104(b) and 901(b)(9) appear to commit the jury to the determination of scientific validity but policy considerations favor the judge making this determination).

122 *See id.*

123 *See* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

jury. Rule 104(c) specifies guidelines for when the court must conduct a preliminary hearing apart from the jury. The types of preliminary questions for the judge to decide without a jury are: (1) if the admissibility of a confession is involved; (2) if a defendant in a criminal case is a witness and so requests; or (3) if justice so requires.[124] The argument that "justice so requires" a judge, and not the jury, to decide expert testimony questions lacks support.[125]

Nevertheless, having assigned to judges this task of assessing expert testimony admissibility, *Daubert* provides them with guidelines.[126] Factors for judges to consider in this evaluation include if there is a known error rate,[127] if the theory has or can be tested,[128] if the method was subject to peer review or publication,[129] and if the method has achieved widespread acceptance in the field.[130] The Court stated that this does not establish a definitive checklist, but should be a flexible standard.[131] Discretion resides with judges as to whether the proponent of the evidence has met this standard.[132]

In addition to empowering judges to decide important factual questions, the Supreme Court gave judges' *Daubert* rulings great deference upon appellate review. In 1997, the Supreme Court decided *General Electric Co. v. Joiner*,[133] holding that "abuse of discretion" is the proper standard to apply when reviewing the district court's evidentiary rulings.[134] The Court stated that a district court's evidentiary ruling should not be reversed unless it is "manifestly erroneous."[135] Such a deferential standard has led to a high affirmance rate on appellate review.[136] The practical implication of this standard is that judges can effectively decide a case by ruling on the admissibility of expert testimony alone. The case of *Valente v. Textron, Inc.*[137] discussed at the beginning of this Note is illustrative.[138]

---

124 FED. R. EVID. 104(c).

125 *See* Frederick Schauer & Barbara A. Spellman, *Is Expert Evidence Really Different?*, 89 NOTRE DAME L. REV. 1, 14 (2013) (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).

126 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592–95 (1993).

127 *Id.* at 594.

128 *Id.* at 593.

129 *Id.*

130 *Id.* at 594.

131 *Id.*

132 *Id.* at 597 ("We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.").

133 522 U.S. 136 (1997).

134 *Id.* at 146.

135 *Id.* at 142 (citation omitted).

136 *See* Robert Robinson, Daubert v. Merrell Dow Pharmaceuticals *and the Local Construction of Reliability*, 19 ALB. L.J. SCI. & TECH. 39, 63 (2009).

137 931 F. Supp. 2d 409 (E.D.N.Y. 2013) (granting the defense's motion for summary judgment after the judge excluded the plaintiff's expert's testimony as a result of a *Daubert* hearing).

138 *See supra* text accompanying notes 2–11.

In 1999, the Supreme Court expanded trial judges' authority further. In *Kumho Tire Co. v. Carmichael*,[139] the Court held that the *Daubert* standard applies to expert testimony based on technical or other specialized knowledge, not simply expert scientific testimony.[140] Therefore, all expert evidence before a federal court must meet the *Daubert* standard for admissibility.[141]

III. CURRENT STATUS AND IMPLICATIONS OF *DAUBERT*'S EXPERT EVIDENCE STANDARDS

For expert testimony to be admissible in federal court, the proponent of the evidence must meet the threshold provided by Federal Rule of Evidence 702.[142] Rule 702 requires more than just a determination of the expert's qualifications and the reliability of the methods the expert used. In addition to laying a foundation that the expert has the requisite skill, knowledge, education, experience, or training, the proponent must demonstrate that the expert has reliably applied the principles and methods to the facts of the case.[143] Some courts consider juries competent to decide whether the proponent of expert testimony has satisfied the final prong of Rule 702.[144]

The line and reasoning dividing the questions of fact that the judge decides (reliability) from those that the jury may decide (whether the methods were applied reliably to the facts of the case) appears an arbitrary distinction. The committee's note for the year 2000 amendments to Rule 702 recognized the Supreme Court's ruling in *Daubert*.[145] However, the committee stated that it was the *Court* who charged judges with the task of acting as

139 526 U.S. 137 (1999).

140 *Id.* at 158.

141 *See* Bernstein, *supra* note 29, at 27 (noting that "by 2000 all expert testimony needed to pass a reliability test before it could be deemed admissible").

142 FED. R. EVID. 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.").

143 *Id.*

144 *See* Betty Layne DesPortes, *Jury Instructions on Expert Testimony*, BENJAMIN & DESPORTES 2, http://benjamindesportes.com/pdfs/Jury_Instructions.pdf (last visited Oct. 27, 2014) (providing instructions to the jury to evaluate whether the expert applied reliably the methods to the facts); *see also* Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1507–09 (2012) [hereinafter *The Restyled Rules*] (some scholars argue that the final prong of Rule 702 poses a credibility question that should be determined by the jury).

145 In addition to the year 2000 amendments, the Federal Rules of Evidence were "restylized" in 2012, but no substantive changes were made. For further discussion on the reasoning behind the amendments and the re-stylized Federal Rules of Evidence, see *The Restyled Rules*, *supra* note 144.

gatekeepers.[146] Furthermore, the committee notes emphasize that the *Daubert* precedent is not supposed to replace the traditional role of the jury—nor is it "intended to provide an excuse for an automatic challenge to the testimony of every expert."[147] The committee reviewed relevant caselaw and noted that "the rejection of expert testimony is the exception rather than the rule."[148] The committee quoted federal precedent stating that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[149] Yet, evidence demonstrates that *Daubert* and its progeny have done just that.[150]

Daubert and its progeny have resulted in a significant increase in preliminary evidentiary hearings on expert evidence with the jury having no role in the decisionmaking process.[151] The change in standards shifting the power from juries to judges acting as "gatekeepers" has caused fewer cases to go to trial and has diminished the right to a trial by jury.[152]

Some states, recognizing the threat presented by *Daubert*, allow for liberal admissibility of expert opinions.[153] These efforts aim to ensure that the testimony of qualified experts is not kept from the jury due to a judge's opinion of that testimony.[154]

---

146 FED. R. EVID. 702 advisory committee's note.

147 *Id.*

148 *Id.*

149 *Id.* (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)).

150 *See* Flores et al., *supra* note 89, at 561–63 (noting the empirical implications of *Daubert* resulting in a decrease of trials and increase in preliminary evidentiary hearings on expert evidence); *see also* Mara Hatfield, *Putting* Daubert *In Proper Perspective*, LAW360 (Aug. 01, 2013) http://www.law360.com/articles/460776/putting-daubert-in-proper-perspective ("While the role of gatekeeper was set up to eliminate reliance on a bright-line rule requiring general acceptance, the defense bar has turned the role into a chance to convince a judge that a certain study is unreliable merely because it is contradicted.").

151 *See* Flores et al., *supra* note 89, at 561–63 (noting the empirical implications of *Daubert* resulting in a decrease of trials and increase in preliminary evidentiary hearings on expert evidence).

152 *See* Allan Kanner & M. Ryan Casey, Daubert *and the Disappearing Jury Trial*, 69 U. PITT. L. REV. 281, 291–92 (2007) (discussing how *Daubert* undermines the Seventh Amendment).

153 For example, in North Dakota, the expert's qualification is a matter for the trial court's discretion—but the judge has no discretion to determine the strength of the testimony and generally allows the expert's testimony to be admitted into evidence. *See, e.g.*, Myer v. Rygg, 630 N.W.2d 62, 69 (N.D. 2001) ("[O]rdinarily weakness in an expert's opinion affects credibility, not admissibility. The trial court decides the qualifications of the witness to express an opinion on a given topic, but it is the trier of fact whose job it is to decide the expert witness's credibility and the weight to be given to the testimony." (citation omitted)); *see also The Restyled Rules*, *supra* note 144, at 1508 & n.86 (discussing amendments to Arizona's rules of evidence and recognizing the overemphasis on the judge's role as a gatekeeper).

154 *See The Restyled Rules*, *supra* note 144, at 1508 ("[W]e think there's been some overemphasis on this notion of gatekeeping, of keeping away from the jury an expert fully qualified just because [the judge] think[s] [the expert's] opinion is not a good one.").

A. *Empirical Implications*

The *Valente* case discussed above[155] is the quintessential example of *Daubert*'s effects. Like *Valente*, many cases are kept from reaching a jury because of a judge's evidence determination at a pretrial hearing.[156] An empirical study of the effects of the *Daubert* trilogy indicates a statistically significant increase in the number of preliminary evidentiary challenges.[157] Research also indicates that the basis for such challenges changed after *Daubert*.[158] Pre-*Daubert* challenges were primarily based on procedural grounds such as failing to designate an expert.[159] Post-*Daubert* challenges are primarily based on the substantive grounds of the expert's evidence, requiring the adjudication of a crucial component of the case before the trial.[160]

B. *Jurisprudential Implications of the* Daubert *Trilogy*

1. Who Is More Competent to Decide: Judge or Jury?

The *Daubert* standard assumes that judges are more competent than juries to make decisions on the reliability of expert testimony.[161] *Daubert* specifically charges judges to act as "gatekeepers" to keep this type of evidence away from the jury.[162] The *Daubert* "gatekeeping" command to judges is partially based on the fear that juries will give too much weight to incredible or unreliable expert testimony.[163] But when it comes to assessing the *reliability* of methods that the expert employed—why does the Court assume judges are better suited to answer this question than juries?

Judges typically answer questions of law while juries answer questions of fact.[164] This stems from a general acknowledgement that judges are more competent in the law than juries given their legal experience.[165] However, the reliability of an expert's methods (in themselves or their application to

155 *See supra* text accompanying notes 2–11.

156 *See, e.g.*, cases cited *supra* note 87.

157 *See* Flores et al., *supra* note 89, at 563.

158 *See id.*

159 *Id.*

160 *See id.*

161 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993) ("We are confident that federal judges possess the capacity to undertake this review.").

162 *Id.* at 597.

163 *See* Schauer & Spellman, *supra* note 125, at 13–14 ("The concern is that non-expert triers of fact will consistently overvalue expert testimony beyond its intrinsic epistemic worth.").

164 *See, e.g.*, Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that judges decide questions of law while juries decide questions of fact).

165 *See* AMAR & HIRSCH, *supra* note 37, at 98–100 (allowing juries to decide questions of law would usurp the powers of the court).

the case) is a question of fact, not a question of law.[166] Fact questions are traditionally left to the jury to decide.[167]

In a 2001 survey of several hundred state court judges, approximately half of them admitted that they were not adequately prepared to evaluate the range of scientific evidence proffered in their courtrooms.[168] Additionally, almost every judge failed to demonstrate a basic understanding of half of *Daubert*'s criteria.[169] On a federal level, inexperienced judges are more likely to dismiss a case after a *Daubert* hearing to avoid a trial so their weaknesses as trial judges will not be exposed.[170]

A case that calls for an expert witness does so because it requires *specialized knowledge in that particular field.*[171] Unless a judge coincidentally has expertise in that field, they are likely no better qualified than a jury to assess such questions if Rule 702's own standard for qualifications was applied to determine who should decide.[172] Additionally, since *Kumho* expanded *Daubert*'s requirements to govern more than just "scientific" testimony, but also technical or other specialized knowledge,[173] the rule assumes that judges are more qualified than juries to assess practically any evidence in any field that requires advanced knowledge.

The likely purpose of *Daubert* was that the Supreme Court wanted to give district courts more control over their dockets.[174] Given the significant

166 *See* Malone & Zwier, *supra* note 113, at 118 (arguing that the reliability of methodology presents questions of fact, not questions of law).

167 *See Sparf*, 156 U.S. at 89 (noting that juries decide questions of fact); *cf. Daubert*, 509 U.S. at 600–01 (Rehnquist, J., concurring in part and dissenting in part) ("I do not doubt that Rule 702 confides to the judge some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.").

168 Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 LAW & HUM. BEHAV. 433, 442 (2001).

169 *Id.* at 452.

170 *See* Kanner & Casey, *supra* note 152, at 300–02 ("Some district judges are appointed without sufficient consideration of the adequacy of their civil trial experience. Without a minimum of trial experience, many judges seek to avoid trials. In addition, they risk developing biases in the handling of cases that play to their strengths and avoid their weaknesses. . . . Judges without academic or trial experience are going to avoid jury trials at all costs (and defer to the trial court's *Daubert* assessment at the appeals level) so as not to reveal their weaknesses.").

171 *See* FED. R. EVID. 702(a) ("[T]he expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.").

172 *See id.* ("A witness who is qualified as an expert by *knowledge, skill, experience, training, or education* may testify in the form of an opinion . . . ." (emphasis added)).

173 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).

174 *See* Faigman, *supra* note 92, at 909–10 ("The more likely purpose for *Daubert* and its progeny is more pedestrian. . . . [The *Daubert* revolution] was meant to serve a greater agenda than simply an evidentiary one. It was meant to serve the managerial power of trial courts to control their dockets."); *see also* Kanner & Casey, *supra* note 152, at 299 (noting that judges have a strong incentive to dispose of cases through a *Daubert* hearing in order

decrease in trials since *Daubert*,[175] it seems the Court achieved this goal—though at a cost. The jury's fact-finding role on critical questions substantially diminished. This is not the requirement or purpose of Rule 702.[176] *Daubert* and its progeny changed the adversarial system by reducing the right to trial by jury.[177]

2. Who Should Have the Power to Decide: Judge or Jury?

America was founded on the principles of popular sovereignty.[178] Popular sovereignty is the idea that rather than having one individual ruler or monarch, the people have the authority and are the "sovereign."[179] The government gets their authority through the people's consent which is manifested through the election process.[180]

The selection of judges presents a unique situation for the idea of popular sovereignty. Federal judges are nominated by the President and confirmed by the Senate.[181] The selection of state judges, however, varies. Some states have an election process while others have an appointment process.[182]

The dilemma of who decides a case is critical because whoever has the decisionmaking power is essentially in the role of a "sovereign."[183] The right to a trial by jury is a fundamental right in our nation to ensure that the power

---

to manage their dockets); *cf.* Hatfield, *supra* note 150 ("*While the role of gatekeeper was set up to eliminate reliance on a bright-line rule requiring general acceptance*, the defense bar has turned the role into a chance to convince a judge that a certain study is unreliable merely because it is contradicted." (emphasis added)).

175 Refo, *supra* note 19, at 2.

176 *See* FED. R. EVID. 702 advisory committee's note; *see also* United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996) (noting that the judge's role as a "gatekeeper" was not intended to replace the adversary system).

177 *See* Kanner & Casey, *supra* note 152, at 315 ("*Daubert* has severely crippled the plaintiff's right to a jury trial and has had an effect opposite of that which the Supreme Court intended.").

178 *See* Lash, *supra* note 55, at 1938–50.

179 *See* AMAR & HIRSCH, *supra* note 37, at 7 (noting that one of the first principles of American jurisprudence is that the people are sovereign); MORGAN, *supra* note 55, at 235–88 (discussing concept of popular sovereignty in American jurisprudence); Dawson, *supra* note 55, at 282–84 (discussing the history and exercise of popular sovereignty in America); Lash, *supra* note 55, at 1910 (same).

180 *See* Lash, *supra* note 55, at 1938–50.

181 U.S. CONST. art. III.

182 *Compare* Orrin W. Johnson & Laura Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525, 539 (1992) (discussing ethical dilemma inherent in Texas's election process), *with* Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASS'N 32 (2000) (discussing the bifurcated judicial selection system in Kansas where supreme court and court of appeals judges are selected through a nonpartisan commission system, and district court judges are selected by either a nonpartisan commission system or partisan election).

183 *See* Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 790 (2005).

is in the people and to safeguard against tyranny.[184] Although many can agree that some cases might be better suited for a judge instead of a jury,[185] small encroachments upon the jury's power to decide have vast implications for the outcome of the trial as well as if the jury will have any decisionmaking power at all. James Madison forewarned us about the dangers of minor infringements of the people's power when he said, "there are more instances of the abridgement of the freedom of the people, by *gradual and silent encroachments* of those in power, than by violent and sudden usurpations."[186] Taking away the jury's decisionmaking power regarding expert testimony is an example of a *gradual and silent encroachment* that Madison feared.

Some have argued that judges should decide expert testimony reliability instead of juries because juries are more likely to overvalue expert testimony even if it is unreliable.[187] Therefore, the alleged purpose is to promote justice by keeping from the jury unreliable evidence that could influence their decision. Empirical research suggests that these claims about jury overvaluation of expert testimony are doubtful.[188]

A study conducted by the American Bar Association found no unfair influence on jury's decisionmaking due to expert testimony.[189] Other studies suggest that claims of juries' susceptibility to undue influence by expert testimony are unfounded.[190]

Perhaps there was a different reason why the Supreme Court assigned judges rather than juries this factfinding authority. The Court may have wanted to give judges an effective means to dispose of frivolous lawsuits.[191] By conducting a pretrial hearing on crucial evidence admissibility, a trial judge may control whether a case proceeds forward.[192] Although court management and efficiency are legitimate concerns, they do not justify manipulating interpretations of evidence rules or reconstruction of the traditional province of the jury. The *Daubert* revolution undermines the Seventh

184 *See* 2 Encyclopedia of American Civil Liberties 875 (Paul Finkelman ed., 2013) (discussing the history and purpose of the right to a trial by jury).

185 Such cases are ones that typically require additional expertise such as patent, bankruptcy, or tax litigation.

186 James Madison Replies, *supra* note 1, at 612 (emphasis added).

187 *See* Imwinkelried, *supra* note 90, at 616; *see also* Schauer & Spellman, *supra* note 125, at 14 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).

188 *See* Special Comm. on Jury Comprehension, Am. Bar Ass'n, Jury Comprehension in Complex Cases 40–43 (1989).

189 *Id.*

190 *See* Schauer & Spellman, *supra* note 125, at 14–16 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).

191 *See* Faigman, *supra* note 92, at 909–10 ("The more likely purpose for *Daubert* and its progeny is more pedestrian. . . . [The *Daubert* revolution] was meant to serve a greater agenda than simply an evidentiary one. It was meant to serve the managerial power of trial courts to control their dockets."); *see also* Kanner & Casey, *supra* note 152, at 299 (noting that judges have a strong incentive to dispose of cases through a *Daubert* hearing in order to manage their dockets).

192 *See* Faigman, *supra* note 92, at 910.

Amendment[193] by allowing judges the discretion and opportunity to prevent jury trials.[194]

3. Judicial Activism and Policy-Driven Judges

The framework outlined in *Daubert* gives great discretion to the district court judge.[195] The Court in *Daubert* maintained that there was not a definitive checklist of requirements for satisfying the reliability standard to admit expert testimony.[196] Rather, the inquiry into reliability of an expert's methods is a flexible one.[197] The standard of review for the appellate court of a district court's *Daubert* ruling is an abuse of discretion standard.[198] Such a highly deferential standard of review means that the likelihood of an appellate court reversing the district court's decision is small.[199] Research indicates the affirmance rate for *Daubert* hearings is approximately ninety percent.[200] Given these circumstances, careful judges can be fairly certain that their *Daubert* rulings will not be overturned. Such deference gives trial judges more opportunity to insert their policy opinions into their decisions.

The judicial autonomy allowed under *Daubert* also permits wide variations among judges interpreting and implementing its principle in different contexts.[201] Such wide discretion given to judges from *Daubert* allows courts to develop localized understandings of admissibility.[202] This judicial autonomy allows policy considerations to influence judges. Instead, judges should use clear and impartial rules of admissibility. On the other hand, some federal judges who disagree with the *Daubert* revolution have simply refused to

193 *Compare* U.S. CONST. 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 re-examined in any Court of the United States, than according to the rules of the common law."), *with* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) ("We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations."), *and* Kanner & Casey, *supra* note 152, at 291–92 (discussing how *Daubert* undermines the Seventh Amendment).

194 *See* Kanner & Casey, *supra* note 152, at 291–92, 299.

195 *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139–43 (1997) (holding that a trial court judge has broad discretion in admitting or excluding testimony); Watkins v. Telsmith, Inc., 121 F.3d 984, 988 (5th Cir. 1997) (noting that district courts enjoy wide latitude in determining the admissibility of expert testimony); Harvey Brown, *Procedural Issues Under* Daubert, 36 HOUS. L. REV. 1133, 1158 (1999) (noting that trial judges have broad discretion regarding expert testimony).

196 *Daubert*, 509 U.S. at 593.

197 *Id.* at 594.

198 *See Joiner*, 522 U.S. at 141.

199 *See* Gagnon v. Teledyne Princeton, Inc., 437 F.3d 188, 191 (1st Cir. 2006) (describing the abuse of discretion standard as "highly deferential" (quoting Delany v. Matesanz, 264 F.3d 7, 13–14 (1st Cir. 2001)).

200 *See* Robinson, *supra* note 136, at 63.

201 *See id.* at 64.

202 *See* Bernstein, *supra* note 29, at 28 (discussing judicial resistance to the new standards of expert testimony by lower courts).

apply the new standards.[203] This behavior from judges also results in inconsistent standards of admissibility among the lower courts.[204]

Recent studies on judicial behavior suggest that judges attempt to advance a variety of goals, ranging from enhancing their policy preferences to adhering to precedent.[205] The true motivation of a judge's opinion is difficult to discern. Allowing judges too much discretion will empower them to act on policy considerations in areas where it may be inappropriate.

With the increase in scientific and technological innovations affecting innumerable areas of contemporary life, experts are playing a crucial role in much litigation. Judges deciding the reliability and validity of expert methods are in control of substantial numbers of cases, and opportunities for value judgments abound. For instance, in *Kitzmiller v. Dover Area School District*,[206] parents brought a suit against a school challenging the constitutionality of the school's policy on teaching intelligent design in a biology class.[207] The court held that the policy was a violation of the Establishment Clause by endorsing religion[208] and that intelligent design theory was not a science.[209] The judge used the *Daubert* factors to make a policy judgment about intelligent design.[210] Additionally, judges may be required to answer questions on reliability of expert testimony over controversial topics such as stem-cell research, cloning, birth control,[211] or abortion.[212] The judge's determination of the expert's testimony over these controversial topics allows them to make policy judgments on the underlying subject matter.[213]

The Supreme Court's instruction that the *Daubert* standard should be a flexible inquiry is proper.[214] The problem is that this flexible inquiry is only allowed by the judge, not the jury.[215] Therefore, judges are permitted to

203 *Id.* at 29.

204 *Id.* at 69 ("The Supreme Court could step in . . . to reign in wayward circuits. But . . . has allowed lower court judges significant latitude to ignore Rule 702.").

205 *See* LAWRENCE BAUM, THE PUZZLE OF JUDICIAL BEHAVIOR 15–16 (1997); Robinson, *supra* note 136, at 75.

206 400 F. Supp. 2d 707 (M.D. Pa. 2005).

207 *Id.* at 707–11.

208 *Id.* at 765.

209 *Id.* at 743–46.

210 *See* Megan Dillhoff, Note, *Science, Law, and Truth: Defining the Scope of the* Daubert *Trilogy*, 86 NOTRE DAME L. REV. 1289, 1316–17 (2011) (arguing that the judge overstepped his bounds when he decided that intelligent design was not a science when the case did not require him to make such a decision).

211 *See* Jones v. United States, 933 F. Supp. 894 (N.D. Cal. 1996).

212 *See* Hill v. Mills, 26 So. 3d 322, 325 (Miss. 2010).

213 In another similar example, a Michigan judge excluded an Ivy League law student as an expert witness from a trial regarding a gay marriage ban. *Michigan's Witness in Gay Marriage Trial Barred*, MYFOXDETROIT.COM (Mar. 03, 2014, 12:23 PM), http://www.myfoxdetroit.com/story/24867957/michigans-witnesses-next-in-gay-marriage-trial.

214 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594 (1993).

215 *See id.* at 597 ("We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.").

insert policy considerations into their rulings. Since questions of expert testimony are primarily questions of fact, they are within the purview of jury decisionmaking.[216] This recent change, requiring judges to answer questions of fact, encroaches upon the rights of the jury, affects the ultimate outcome of the case, and allows for more judicial activism.

IV. PROPOSED SOLUTIONS TO RESOLVE THE FLAWS OF *DAUBERT*'S PROGENY

A. Juries, Not Judges, Should Be the "Gatekeepers"

The guidelines for laying the foundation of expert testimony outlined in *Daubert* should remain—but juries, not judges, should be the "gatekeepers." After juries play this "gatekeeping" role, they can then proceed to deciding the ultimate issue in the case and whether to take the expert testimony into consideration. If the judge acts as a gatekeeper to expert evidence, and allows the evidence in, then by the time the evidence gets to the jury it already has the judge's stamp of approval.[217] This could make it more likely that any expert evidence that gets in will be given the benefit of the doubt.[218] Instead, the jury should critically analyze and scrutinize the evidence.[219] On the other hand, if the judge excludes the expert evidence, then a trial is unlikely to occur at all, and will instead be disposed of through summary judgment.[220]

Having juries act as gatekeepers may also keep judges from overextending their judicial power, as Chief Justice Rehnquist feared would happen as a result of *Daubert*.[221] Rehnquist dissented in part in *Daubert*, warning that this new standard for judges may enable them to overextend the reach of their power.[222] He advised that judges should "proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp."[223] The Chief Justice's fears in *Daubert* are now a reality. The framework proposed in this Note aims to properly cabin the judicial role to its traditional form: judges decide questions of law regarding expert testimony, and juries decide questions of fact.

---

216 *See, e.g.*, Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that judges decide questions of law while juries decide questions of fact).

217 *See* N.J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 PSYCHOL. PUB. POL'Y & L. 1, 13 (2009) ("When judges allow expert testimony to reach the jury, they are implicitly lending credence to the testimony, increasing its persuasiveness.").

218 *See id.*

219 *See id.*

220 *See, e.g.*, cases cited *supra* note 87.

221 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 600–01 (1993) (Rehnquist, J., concurring in part and dissenting in part).

222 *Id.* at 598–601.

223 *Id.* at 599.

1. Juries Decide Questions of Fact

Since research shows that neither judges nor juries are particularly well-qualified to decide complex questions regarding expert testimony,[224] we should defer to juries on questions of fact and judges on questions of law.[225] This means that juries would decide whether an expert's methods are *reliable* as required by *Daubert*[226] and Rule 702.[227] Judges, however, would decide questions of law regarding expert testimony, such as if enough foundation was laid to establish the witness's qualifications as an expert.[228]

Although Federal Rule of Evidence 104 does assign the court the task of deciding any preliminary questions about whether a witness is qualified,[229] the reliability of expert methods is not a preliminary question that the court *must* decide in the absence of the jury. The circumstances when the court must conduct a preliminary hearing apart from the jury under Rule 104(c) are: (1) if it involves the admissibility of a confession; (2) if a defendant in a criminal case is a witness and so requests; or (3) if justice so requires.[230] As discussed earlier in this Note,[231] the argument that "justice so requires" judges, and not juries, to decide expert testimony questions of fact lacks support.[232]

Allowing juries to continue their traditional role of deciding questions of fact restores the proper balance of authority between judges and juries. Typically, the proper balance of authority is found in juries deciding questions of fact and judges deciding questions of law.[233] The *Daubert* revolution has

224 *See* Gatowski et al., *supra* note 168, at 442.

225 *See* Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that judges decide questions of law while juries decide questions of fact); *see also* United States v. Sliker, 751 F.2d 477, 497–98 (2d Cir. 1984) ("[T]he maxim that fact-finding is for the jury carries considerable force. Leaving too much for the judge to decide would 'greatly restrict[ ] and in some cases virtually destroy[ ]' the functioning of the jury as a trier of fact." (alteration in original) (quoting FED. R. EVID. 104(b) advisory committee's note)).

226 *Daubert*, 509 U.S. at 589 (commanding the trial judge to ensure that any and all scientific testimony or evidence admitted is not only relevant, but also reliable).

227 FED. R. EVID. 702(c) (requiring expert testimony to be a "product of reliable principles and methods").

228 *See* FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified."); Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999) (citing *Daubert*, 509 U.S. at 592 n.10) (noting that the proponent of expert evidence must satisfy the preponderance of the evidence threshold).

229 FED. R. EVID. 104(a) ("The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.").

230 FED. R. EVID. 104(c).

231 *See supra* Section II.C.

232 *See* Schauer & Spellman, *supra* note 125, at 14 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).

233 *Compare* Harrington, *supra* note 85, at 401–02 (discussing the development of the fact-finding function of the jury), *with* Sparf v. United States, 156 U.S. 51, 183 (1895) (Gray & Shiras, JJ., dissenting) (juries should decide every question of fact, but are prohibited from deciding questions of law), *and* AMAR & HIRSCH, *supra* note 37, at 98–100 (allowing juries to decide questions of law would usurp the powers of the court); *see also* FED. R. EVID.

usurped the power of juries by taking away their fact-finding function.[234] The standards for expert evidence admissibility should return to our legal system's traditional role of juries acting as fact-finders.[235]

2. Jury Instructions

Since judges have been charged with this "gatekeeping" function for over two decades, some courts may resist the method presented in this Note, since juries may not properly understand the *Daubert* factors.[236] Nonetheless, jury instructions can easily ameliorate this concern.

Many jurisdictions vary on the type of instructions appropriate for expert evidence.[237] Given that *Daubert* resulted in varied and localized standards of admissibility,[238] this lack of uniformity is not surprising. Furthermore, when expert testimony has a high propensity to mislead the jury, some courts give juries limiting instructions on how to evaluate the evidence.[239] Such a solution would also work with analyzing reliability under the *Daubert* factors.

Judges can instruct juries to consider the *Daubert* factors when evaluating the reliability of the expert's methods. Many courts already adopt this approach for preliminary questions regarding other forms of evidence. For example, some courts allow juries to decide preliminary questions of fact for hearsay evidence regarding co-conspirators' declarations.[240] Other courts allow juries to hear dying declarations, with instructions to consider the preliminary question of whether the declarant had a reasonable expectation of death, as required to be admitted as a hearsay exception.[241]

---

104 advisory committee's note ("If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed.").

234 *See* Harrington, *supra* note 85, at 401–02 (discussing the development of the fact-finding function of the jury).

235 *See Sparf*, 156 U.S. at 183 (defendants have a "right to have the jury decide *every* matter of fact involved in that issue" (emphasis added)); Malone & Zwier, *supra* note 113, at 118–19 (arguing that the reliability of methodology presents questions of fact, not questions of law); Wright & Williams, *supra* note 76, at 472 (fact-finding is still exclusively within the jury's purview).

236 *See generally* Bernstein, *supra* note 29, at 28 (discussing judicial resistance to the new standards of expert testimony by lower courts).

237 *See* KEVIN F. O'MALLEY ET AL., 1A FEDERAL JURY PRACTICE AND INSTRUCTIONS § 14:01 (6th ed. 2014).

238 *See* Bernstein, *supra* note 29, at 28 (discussing how judges apply varied standards of admissibility regarding expert testimony).

239 *See* United States v. Rodebaugh, 561 F.3d 864, 868–69 (8th Cir. 2009) (ruling that the admission of expert evidence did not warrant reversal since the jury was not substantially impacted since the judge gave the jury a limiting instruction on how to evaluate expert testimony).

240 *See* United States v. Monaco, 702 F.2d 860, 878 (11th Cir. 1983).

241 *See* Conway v. State, 171 So. 16, 17 (Miss. 1936); State v. Dotson, 123 S.E. 463, 463–64 (W. Va. 1924).

Jury instructions are also used for preliminary questions regarding authentication,[242] relevance,[243] and lay opinion testimony.[244] Some scholars have argued that expert opinion evidence is not substantially different from lay opinion evidence to warrant differential treatment.[245] As such, judges should instruct juries on how to evaluate expert evidence, similar to how judges instruct juries on preliminary questions involving other forms of evidence. With this method, judges would act more as "guides" to expert testimony than "gatekeepers" by ensuring that juries critically evaluate any expert evidence heard in court.

B. Alternative Solution: The Clear and Convincing Standard

The rules of evidence present a higher standard for admission of expert testimony than other forms of evidence.[246] Although admission of expert testimony has additional requirements, the proponent of the evidence must meet his or her burden of proof by the same preponderance of the evidence threshold as most other forms of evidence.[247] The preponderance of the evidence threshold is the lowest burden, where the proponent simply has to meet the "more likely than not" standard.[248] On the other hand, some courts hold that other forms of evidence that have a high propensity for misuse or misapplication should be governed by the higher "clear and convinc-

242 *See* United States v. Cambindo Valencia, 609 F.2d 603, 640 (2d Cir. 1979) (instructing the jury that it must judge worth of testimony of witness in determining if tape was authentic); United States v. Rizzo, 492 F.2d 443, 448 (2d Cir. 1974) (holding that the jury was properly instructed on authentication issue that the government had to prove that the voice on the tape was the defendant's).

243 *See* United States v. James, 590 F.2d 575, 579 (5th Cir. 1979) (explaining that the jury decides preliminary questions as to conditional relevancy of evidence).

244 *See* United States v. Novaton, 271 F.3d 968, 1009 (11th Cir. 2001) ("[T]he district court instructed the jury that the agents were not expert witnesses and that the jurors should independently determine the meaning of the statements.").

245 *See* Schauer & Spellman, *supra* note 125, at 11–26.

246 *See* Brief of the American Medical Association, American Medical Association/Specialty Society Medical Liability Project et al. as Amici Curiae in Support of Respondent at 9, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (No. 92-102) ("While the lower courts have universally agreed that expert scientific testimony must satisfy a higher threshold standard than mere relevance, they differ in defining that higher standard of admissibility.").

247 *See* Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999) ("The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence." (citing *Daubert*, 509 U.S. at 592 n.10)); *cf.* Schauer & Spellman, *supra* note 125, at 10 (noting that the higher threshold for scientific and expert evidence presupposes that it is even more flawed than direct evidence).

248 *See* Heartland Fed. Sav. & Loan Ass'n v. Brisco Enters. (*In re* Briscoe Enters.), 994 F.2d 1160, 1164 (5th Cir. 1993) ("The two options are proof by a preponderance of the evidence or by clear and convincing evidence. 'Preponderance' means that it is more likely than not. 'Clear and convincing' is a higher standard and requires a high probability of success.").

ing" threshold for admissibility.[249] Courts often apply the higher clear and convincing threshold for admissibility to character evidence, given the prejudicial effect it may have on the trier of fact.[250]

The desire to have experts satisfy a higher standard with additional requirements is justified in a culture of class actions[251] and mass tort litigation when their testimony may have a strong impact on society. However, diminishing the jury's decisional authority is an infringement upon a venerable institution with profound implications for self-governance. A trial court's gatekeeping duty requires that the proponent of the expert witness proves by a preponderance of the evidence that its expert's opinions are both relevant and reliable.[252] This standard applies to both pretrial *Daubert* hearings[253] as well as expert testimony offered during trial.[254]

Conducting a voir dire of the witness at the time of trial[255] would be more appropriate than a *Daubert* hearing prior to trial. This way, the outcome of the entire trial is not as dependent upon the judge's evaluation of the expert testimony. Furthermore, a plaintiff will then get to present at least some evidence to a jury. However, given that courts may be hesitant to initially give back to juries their original fact-finding authority for expert testimony,[256] a more practical approach may be to require the pretrial *Daubert*

249 *See* United States v. McPartlin, 595 F.2d 1321, 1344 (7th Cir. 1979) (noting that "there must be clear and convincing evidence of the [character evidence] to justify its admissibility").

250 *See id.* at 1343; *see also* Reyes v. Missouri Pac. R.R., 589 F.2d 791, 795 (5th Cir. 1979) (noting a principle purpose behind the exclusion of character evidence is the prejudicial effect that it can have on the trier of fact).

251 *See* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 913 (1998) (describing class actions as the most dramatic change in civil procedure over the past couple decades).

252 *See* FED. R. EVID. 702; *see also* Friend v. Time Mfg. Co., 422 F. Supp. 2d 1079, 1080 (D. Ariz. 2005) (noting the trial court's gatekeeping duties include evaluating whether expert testimony is relevant and reliable under the preponderance of the evidence threshold).

253 *See* Defendant's Reply to Government's Disclosure of Intent to Use Expert Testimony, Facts and Data Underlying Expert's Opinion and Request to Disallow Such Expert at Trial or Allow a Daubert/Kumho Hearing as to the Alleged Expert at 4, United States v. Williams, No. 3:05-CR-260-SLB-TMP (N.D. Ala. 2005), 2005 WL 6410893 (citing Daubert v. Merrell Dow Pharm., Inc., 507 U.S. 509 (1993)).

254 *See, e.g.*, Bourjaily v. United States, 483 U.S. 171, 175–76 (1987) (noting the preponderance of the evidence threshold for admissibility determinations that hinge on primarily factual questions); Oddi v. Ford Motor Co., 234 F.3d 136, 144 (3rd Cir. 2000) (proponent of expert testimony must satisfy preponderance of the evidence threshold); Squires v. Goodwin, 829 F. Supp. 2d 1041, 1048 (D. Colo. 2011) ("The proponent of expert testimony has the burden of establishing the admissibility of the expert's opinions under Rule 702 by a preponderance of the evidence.").

255 *See* Navarro v. Soaring Helmet Corp., 429 F. App'x 395, 397 (5th Cir. 2011) (excluding expert testimony after voir dire on the third day of trial).

256 *See* Bernstein, *supra* note 29, at 28 (discussing judicial resistance to the new standards of expert testimony by lower courts).

challenger to carry the burden instead, and to meet a higher clear and convincing threshold that the expert's methods are unreliable.

The benefit of this approach is two-fold: (1) judges will have less discretion to implement policy judgments, and (2) litigants will be less likely to abuse the *Daubert* challenge. The current preponderance of the evidence standard for *Daubert* challenges[257] allows for significant judicial discretion.[258] Furthermore, the appellate standard of review for a district court's *Daubert* ruling is an abuse of discretion standard.[259] Such a deferential standard means that the likelihood of appellate court reversal of judges' decisions is small.[260] Therefore, judges are granted significant discretion with abundant opportunities to insert their policy preferences in their opinions, since they can be fairly certain that their *Daubert* rulings will not be overturned. Requiring this higher clear and convincing standard for pretrial *Daubert* challengers may help minimize a judge's discretion in his or her *Daubert* rulings,[261] thus restricting judicial activism and policymaking.

Furthermore, with the higher standard proposed in this Note, litigants will be less likely to abuse *Daubert* motions unless there is good cause to challenge the expert testimony. In *Kumho Tire Co. v. Carmichael*,[262] the Court noted that trial judges should avoid unnecessary reliability proceedings and require appropriate proceedings where "cause" arises.[263] However, the practical effects of *Daubert* have run far beyond what the Court intended or what Rule 702 requires. Pretrial challenges to expert evidence have increased substantially since *Daubert*.[264] This has in turn resulted in a significant decrease

257 *See, e.g.*, Moore v. Napolitano, 926 F. Supp. 2d 8, 17 (D.D.C. 2013) (stating that the proponent of expert evidence bears the burden to prove that the expert is reliable by a preponderance of the evidence); Nat'l Bank of Commerce v. Dow Chem. Co., 965 F. Supp. 1490, 1497 (E.D. Ark. 1996) (noting that the proponent "must establish by a preponderance of the evidence that their expert testimony meets the *Daubert* standards of scientific reliability").

258 *See, e.g.*, Gen. Elec. Co. v. Joiner, 522 U.S. 136, 139–43 (1997) (holding that a trial court judge has broad discretion in admitting or excluding testimony); Watkins v. Telsmith, Inc., 121 F.3d 984, 988 (5th Cir. 1997) (noting that district courts enjoy wide latitude in determining the admissibility of expert testimony); Brown, *supra* note 196, at 1158 (noting trial judges have broad discretion regarding expert testimony).

259 *See Joiner*, 522 U.S. at 139.

260 *See* Gagnon v. Teledyne Princeton, Inc., 437 F.3d 188, 191 (1st Cir. 2006) (describing the abuse of discretion standard as "highly deferential" (quoting Delany v. Matesanz, 264 F.3d 7, 13–14 (1st Cir. 2001)).

261 For example, the District of Columbia Circuit noted in *Crawford-El v. Britton*, 93 F.3d 813, 820–21 (D.C. Cir. 1996), *vacated*, 523 U.S. 574 (1998), that Federal Rule of Civil Procedure 56(f) expressly grants the trial judge broad discretion to order discovery prior to summary judgment which would be stripped from the judge if the party had to meet the "clear and convincing" threshold.

262 526 U.S. 137 (1999).

263 *Id.* at 152.

264 *See* Flores et al., *supra* note 89, at 563 (noting the empirical implications of *Daubert* resulting in an increase in preliminary evidentiary hearings on expert evidence).

in trials.[265] Yet, the committee's note to Rule 702 clarifies that the intent of *Daubert* was not to provide an automatic challenge to all expert testimony.[266]

The current standard of expert admissibility allows judges to dispose of cases too easily after a *Daubert* hearing. Taking away juries' authority and giving it to judges allows judges the opportunity to prevent jury trials, thus undermining the Seventh Amendment and infringing on the rights of the jury.[267] Requiring pretrial *Daubert* challengers to meet a higher standard will at least be a step in the right direction.

C. Criticism and Concerns with This Framework

Although the framework proposed in this Note provides for restoration of responsibilities for judges and juries, there are still concerns that should be addressed. First, this framework may result in a less "efficient" docket than *Daubert*'s criteria would yield. When court dockets are densely populated, cases may be disposed of on the merits without a *Daubert* hearing. In fact, many courts have stated that judges do not need to conduct a *Daubert* hearing, and the expert evidence may be excluded if the record is already well established.[268] Additionally, there are other ways to dispose of a case when it lacks merit without having the judge infringe upon the jury's authority.

Summary judgment is one way cases are often disposed of without a trial. Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[269] Reliability of expert testimony is a material fact that should require the jury to answer the questions it raises.[270] This framework still allows for the court to be efficient in its caseload management while not encroaching on the jury's role.

Another criticism of this approach is that juries may not be competent to decide questions of fact regarding expert testimony, and may give improper weight to unreliable expert testimony.[271] As mentioned above, the same worry attends to judges.[272] Moreover, the claims of juror overvaluation of

265 *See* Refo, *supra* note 19, at 2.

266 FED. R. EVID. 702 advisory committee's note.

267 *See* Kanner & Casey, *supra* note 152, at 291–92 (discussing how *Daubert* undermines the Seventh Amendment).

268 *See, e.g.*, Miller v. Baker Implement Co., 439 F.3d 407, 412 (8th Cir. 2006) (finding that the trial judge did not abuse discretion in excluding the plaintiff's expert testimony without a *Daubert* hearing).

269 FED. R. CIV. P. 56(a).

270 *See* Malone & Zwier, *supra* note 113, at 118–19 (arguing that the reliability of methodology presents questions of fact, not questions of law).

271 *See* Imwinkelried, *supra* note 90, at 616 (arguing the policy favors that judges making the determination of validity of scientific testimony because jurors may not understand it and are unlikely to disregard unreliable evidence during deliberations).

272 *See* Gatowski et al., *supra* note 168, at 442.

expert testimony are unsupported.[273] If judges are no better equipped for the task than juries, reassigning the responsibility from juries to judges is further unjustified.

Even if neither judges nor juries are deemed perfectly equipped for the task of deciding these questions, it is not clear that there are preferable alternatives. Perhaps expert testimony could be weighed by a panel of experts in the relevant field. However, the costs, time, and complexity presented by this alterative would be substantial. And adding yet more experts only reintroduces questions of qualification and method that would—once again—need court supervision and adjudication.

The proper balance is found in the historic assignment of fact questions to juries and legal questions to judges, even if the subject matter is complex.

Conclusion

As this Note has argued, juries, not judges, should be the "gatekeepers" of expert evidence. This would restore the balance of power between them. However, the recommended factors for laying foundation for reliability in *Daubert* should still remain. Juries should make the ultimate decision on reliability, since this primarily entails questions of fact. This framework will also prevent judges from inserting their policy-based opinions into their *Daubert* rulings. As a result, cases will be more likely to make it to juries for them to decide the reliability of expert testimony, as well as the ultimate outcome of the case. Many cases, like *Valente v. Textron Inc.*, are frequently being disposed of after *Daubert* hearings decided solely by judges.

The court's decision in *Valente v. Textron, Inc.* to exclude the plaintiff's expert testimony might have been appropriate considering the surrounding factors.[274] But whatever the right result, it should have come from the jury. The problem with *Daubert* is that it transfers authority from juries to judges. This transfer of authority encroaches upon the power of the people. Although this may seem to some only a minor encroachment on the jury's decisionmaking power, we must remember James Madison's warning that "there are more instances of the abridgement of freedom of the people, by gradual and silent encroachments by those in power, than by violent and sudden usurpations."[275]

273 *See* Schauer & Spellman, *supra* note 125, at 14–16 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).

274 931 F. Supp. 2d 409, 419, 429 (E.D.N.Y. 2013). The expert testified that his conclusions were drawn to a reasonable degree of scientific certainty, but the evidence was still excluded because the court found various factors, such as a known error rate, were missing. *Id.*

275 James Madison Replies, *supra* note 1, at 612.