APPELLATE COURTS AND CIVIL JURIES

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In federal civil litigation, decisionmaking power is shared by juries, trial courts, and appellate courts. This Article examines an unresolved tension in the different doctrines that allocate authority among these institutions, one that has led to confusion surrounding the relationship between appellate courts and civil juries. At base, the current uncertainty stems from a longstanding lack of clarity regarding the distinction between matters of law and matters of fact. The high-stakes Oracle-Google litigation—which is now before the Supreme Court—exemplifies this. In that case, the Federal Circuit reasoned that an appellate court may assert de novo review over a jury's verdict simply by characterizing a particular issue as legal rather than factual. But this approach misperceives the approach demanded by Rule 50 of the Federal Rules of Civil Procedure, which permits judicial override of a jury's verdict only when "a reasonable jury would not have a legally sufficient evidentiary basis" to reach such a verdict.

Rule 50's reasonable-jury standard does not permit de novo review of a jury's verdict on a particular issue. Rather, it requires deference to the jury's conclusion on that issue unless the reviewing court can explain why principles of substantive law or other aspects of the trial record render that verdict unreasonable. This deferential standard of review faithfully implements the text and structure of the Federal Rules and respects the jury's role in our federal system. Yet, it also preserves appellate courts' ability to provide meaningful clarification that will guide future decisionmakers.

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INTRODUCTION

In federal civil litigation, decisionmaking power is shared by juries, trial courts, and appellate courts. Numerous frameworks allocate authority among these institutions. One is the Seventh Amendment, which "preserve[s]" the "right of trial by jury" in "suits at common law."[1] A second is the doctrine for deciding whether an appellate court should review a trial judge's ruling on a particular issue deferentially or de novo.[2] Although the Supreme Court's jurisprudence in these two areas is not immune from criticism, the Court has given them sustained attention over the years and has developed a set of inquiries to help resolve them.[3]

Still, a third component of this system—appellate review of civil jury verdicts—has escaped careful scrutiny. And it has generated considerable confusion, in part because of its uncertain relationship to the first two frameworks. At some level, this confusion is understandable. All three of these frameworks implicate the distinction between matters of law and matters of fact[4]—a distinction that the Supreme Court itself has recognized as "vexing" and "elusive."[5] Properly understood, however, appellate review of jury verdicts requires a different approach than either the initial Seventh Amendment test or the framework for selecting the standard of appellate review for rulings by trial judges.

An excellent example of the current uncertainty is *Google LLC v. Oracle America, Inc.*,[6] which the Supreme Court will decide this Term. In that case, the jury found in favor of Google on its fair use defense to

1. 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 . . . .").

2. *See infra* notes 29–42 and accompanying text.

3. *See infra* Parts I.A & I.B.

4. *See infra* notes 77–79 and accompanying text.

5. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law."); *Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."); *see also infra* notes 28, 97–98 and accompanying text.

6. No. 18-956, 140 S. Ct. 520 (2019) (granting certiorari).

Oracle's copyright claim.[7] The Federal Circuit reversed, concluding that it could review the jury's fair use verdict de novo.[8] The Federal Circuit's reasoning, however, conflated the three distinct frameworks for allocating authority among juries, trial courts, and appellate courts.[9] The Federal Circuit focused on how to characterize the issue of copyright fair use—was it more on the "legal" or "factual" end of the spectrum? That may have been an appropriate analytical framework for purposes of the Seventh Amendment's jury trial guarantee or for determining the standard of review that an appellate court applies to rulings by trial judges. But it is the wrong approach for deciding the proper level of intensity for appellate review of a jury verdict.

This Article examines and clarifies the standard of appellate review for issues on which a civil jury has rendered a verdict. Once a jury has spoken on an issue, it does not matter whether that issue should have been treated as a "legal" one, for which there was no right to a jury trial in the first instance. And it does not matter whether that issue should have been treated as a "legal" one, for which a trial *judge's* ruling would be reviewed de novo on appeal. Rather, the standard of review is set by the Federal Rules of Civil Procedure—specifically, Rule 50's standard for "judgment as a matter of law."[10] Rule 50 allows a trial judge to override the jury's verdict only when "a reasonable jury would not have a legally sufficient evidentiary basis" to reach that verdict.[11] And the appellate court's review is similarly constrained by the Rule 50 standard.[12]

As this Article explains, Rule 50's references to judgment "as a matter of law" and to "legal sufficien[cy]" do not mirror the analysis that federal courts deploy when distinguishing between law and fact for purposes of either the initial entitlement to a jury trial or the selection of the standard of appellate review that applies to a trial judge's decision. Most significantly, Rule 50 does not invite courts to make an issue-specific judgment regarding whether a judge or a jury is institutionally "better positioned" or "better suited" to decide the outcome of a particular issue. Rather, Rule 50 requires deference to the jury's conclusion on a particular issue unless that conclusion is unreasonable. This deference is required even if the appellate court would have found that the Seventh Amendment did not guarantee a right to a jury trial in the first instance. The parties'

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7. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1185 (Fed. Cir. 2018), *cert. granted*, No. 18-956, 140 S. Ct. 520 (2019). For a positive and normative account of the fair use defense in copyright law, see generally Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009). *See also* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549 (2008).

8. *Oracle*, 886 F.3d at 1193.

9. *See id.* at 1191–96 (discussed *infra* Part II.A).

10. FED. R. CIV. P. 50(a)(1).

11. *Id.*

12. *See infra* notes 139–143 and accompanying text.

consent to a jury trial subjects that jury's verdict to the Rule 50 framework, including its deferential "reasonable jury" standard.[13]

The jury plays an important role in the federal civil justice system.[14] A proper understanding of the judiciary's authority to review and displace jury verdicts is therefore crucial to the faithful implementation of that system. That said, Rule 50's deferential standard is not insurmountable. Using the Oracle-Google litigation as an example, there may be substantive principles of copyright law that compel a judgment for Oracle.[15] Or there may be particular aspects of the trial record that render the jury's verdict for Google unreasonable.[16] An appellate court can and should make these inquiries in the context of Rule 50's deferential standard—whether the case involves copyright law or any other issue. But it is not sufficient for an appellate court merely to find that it would have reached a different conclusion than the jury if that court had been adjudicating the issue in the first instance. As to that ultimate conclusion—what is sometimes called a "mixed question of law and fact"[17]—Rule 50 requires deferential appellate review.[18]

The principal argument in favor of de novo appellate review of jury verdicts is that de novo review is needed to facilitate appellate courts' ability to clarify the law.[19] But this misperceives the relationship between standards of review and law clarification. Rule 50's reasonable jury standard fully permits appellate courts to refine the substantive law in a particular area in a way that renders only one outcome supportable "as a

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13. *See infra* notes 117–119 and accompanying text.

14. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–89 (1991) (describing Founding era views of the civil and criminal jury); Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1522 (2003) (noting that "review of empirical evidence about the functioning of the civil jury indicates that the problems with the civil jury are overstated" and that "[c]ivil jury verdicts appear to be sound; civil jury verdicts are generally in line with the weight of the evidence, and there is a high rate of agreement with legal experts such as trial judges"); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 306 (2013) (calling "trial before a jury" the "gold standard" for civil litigation); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 381 (1982) (describing how "limits placed on federal judges by the adversarial system comported with the views of those who drafted the Constitution," who sought "to vest substantial adjudicatory power in the people" by giving "a principal role to the jury in both civil and criminal trials").

15. *See infra* notes 152–155 and accompanying text.

16. *See infra* notes 176–179 and accompanying text.

17. *See infra* notes 109–110 and accompanying text.

18. *See infra* Part II.C.

19. *See, e.g.*, *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1193 (Fed. Cir. 2018) (explaining that de novo review of "whether a use is fair in one case will help guide resolution of that question in all future cases"), *cert. granted*, No. 18-956, 140 S. Ct. 520 (2019).

matter of law."[20] It also fully permits an appellate court to define a party's evidentiary burden of production with respect to a particular issue.[21] Rule 50 simply requires the appellate court to earn its ability to second-guess the jury by providing the sort of legal clarification that would benefit courts and litigants going forward—for example, by explaining why particular aspects of a given record require a particular result or by developing generalizable principles that compel a particular result when certain conditions are present. Accordingly, proper application of Rule 50 preserves appellate courts' ability to provide meaningful clarification that will guide future decisionmakers.[22]

There are, however, two areas of uncertainty regarding appellate review of jury verdicts. One is whether an appellate court should apply a deferential standard of review to the *trial court's* ruling on a Rule 50 motion. This issue *does* implicate the Court's framework for selecting the standard of appellate review for trial court rulings. Although the conventional wisdom is that an appellate court should apply de novo review to the trial court's Rule 50 decision,[23] a careful analysis of the factors that inform the selection of standards of appellate review reveals a surprisingly strong argument that deferential review is appropriate in light of the trial court's first-hand familiarity with the evidentiary record.[24] In addition, courts have yet to consider the possible role of the Seventh Amendment with respect to appellate review of a trial judge's Rule 50 ruling. The authority of appellate courts to displace not only a jury's verdict but also the trial court's decision *not* to displace a jury's verdict is a fairly recent development by the Seventh Amendment's historical standards. In analogous contexts, the Supreme Court has insisted on deferential appellate review to mitigate those Seventh Amendment concerns.[25]

A second area of uncertainty stems from Supreme Court decisions suggesting independent appellate review of jury verdicts involving some constitutional claims and defenses, specifically in First Amendment cases. There is some ambiguity surrounding this case law—including whether the Court contemplates truly de novo review of the jury's ultimate conclusion or simply an independent assessment of Rule 50's basic inquiry into whether the evidence is sufficient for a reasonable jury to reach a

20. FED. R. CIV. P. 50(a)(1); *see also infra* notes 152–153 and accompanying text.

21. *See infra* note 137–138 and accompanying text.

22. *See infra* Part III.

23. *See infra* note 184 and accompanying text.

24. *See infra* notes 189–194 and accompanying text.

25. *See infra* notes 201–209 and accompanying text (discussing Justice Ginsburg's majority opinion in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996)).

particular conclusion.[26] Assuming that some constitutional issues do warrant pure de novo review, the Court has yet to explain how this case law fits with Rule 50. This Article explains why the best justification for de novo review is that, in some narrow situations, the constitutional provision itself—say, the First Amendment—mandates a certain set of appellate procedures to bolster its substantive protections. That is, the Constitution may hierarchically override Rule 50 in particular contexts. But the Court's case law in this area does not empower appellate courts to disregard Rule 50's reasonable-jury standard simply by characterizing a particular issue as legal rather than factual.[27]

This Article proceeds as follows: Part I summarizes three areas where the distinction between law and fact allocates decisionmaking authority among appellate judges, trial judges, and juries. Part II describes how some courts have mistakenly conflated these three distinct frameworks to support de novo appellate review of jury verdicts. It then explains that, under a proper understanding of Rule 50, an appellate court must defer to the jury's conclusion about an issue unless no "reasonable jury" could have reached that conclusion. Part III critically analyzes—and rejects—the argument made by some courts that de novo review of jury verdicts is necessary to enable appellate courts to clarify the law. Finally, Part IV identifies some areas of uncertainty that present interesting questions going forward but do not undermine the general rule that Rule 50 requires deferential review of jury verdicts. These include whether an appellate court must deferentially review the trial judge's ruling on the verdict-loser's initial Rule 50 motion and the possibility of more searching appellate review of jury verdicts regarding certain constitutional issues.

I. LAW, FACT, AND THE ALLOCATION OF INSTITUTIONAL AUTHORITY

The line between issues of law and issues of fact has long played a role in allocating decisionmaking authority among juries, trial courts, and appellate courts.[28] This Part summarizes three frameworks that are informed by the law-fact distinction: selecting the standard of appellate review for a particular ruling by a trial judge, the right to a jury trial on a particular issue, and the grounds for displacing the jury's decisionmaking role—either by overturning a jury's verdict or resolving a case before it

26. *See infra* notes 229–231 and accompanying text.

27. *See infra* notes 232–237 and accompanying text.

28. *See, e.g.*, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003); Walter Wheeler Cook, *Statements of Fact in Pleading under the Codes*, 21 COLUM. L. REV. 416 (1921); Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545 (1899); Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867 (1966).

goes to the jury. This foundation is important because, as this Article explains, some courts have conflated these distinct frameworks in deciding the proper approach to appellate review of jury verdicts.

A. Appellate Courts and Trial Courts: Standards of Appellate Review

Over the last several decades, the Supreme Court has issued a long line of decisions on how to select the standard of appellate review for a given issue.[29] It has developed a framework for deciding whether appellate courts should review a particular trial court ruling de novo,[30] for clear error,[31] or for abuse of discretion.[32] Notably, this case law addresses appellate review of decisions by lower court judges—not juries.

One of the Court's most incisive discussions of the framework for choosing standards of appellate review came in its 2018 *U.S. Bank* decision.[33] Justice Kagan's opinion distinguished between three components of any given lower court ruling: "the first purely legal, the next purely factual, the last a combination of the other two."[34] The first of these—the "legal test" or the "standard" that governs a particular issue—is an "unalloyed legal . . . question" that an appellate court reviews de novo, "without the slightest deference."[35] In the second category are questions of "'basic' or 'historical' fact," which address "who did what, when or where, how or why."[36] Such factual questions are subject to

29. *See generally* HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW, § I.D (3d ed. 2018); Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 2–3 (2020) [hereinafter Steinman, *Standards of Appellate Review*]. Recent Supreme Court decisions in this line include *Monasky v. Taglieri*, 140 S. Ct. 719, 730–31 (2020); *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965–68 (2018); *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1166–70 (2017); *Halo Elec., Inc. v. Pulse Elec., Inc.*, 136 S. Ct. 1923, 1934–36 (2016); and *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 836–40 (2015).

30. *E.g.*, *Ornelas v. United States*, 517 U.S. 690, 695–700 (1996) (holding that a de novo standard applies to a district court's decision whether reasonable suspicion or probable cause existed for purposes of the Fourth Amendment).

31. *E.g.*, *Monasky*, 140 S. Ct. at 730–31 (holding that a clear-error standard applies to the district court's determination of a child's "habitual-residence" for purposes of the Hague Convention on the Civil Aspects of International Child Abduction).

32. *E.g.*, *McLane*, 137 S. Ct. at 1167 (holding that an abuse-of-discretion standard applies to a district court's decision whether to enforce an EEOC subpoena).

33. *U.S. Bank*, 138 S. Ct. at 965–68.

34. *Id.* at 965.

35. *Id.*

36. *Id.* at 966; *see also* Monaghan, *supra* note 28, at 235 (describing "[f]act identification" as "a case-specific inquiry into *what happened here*" including "who, when, what, and where").

deferential review.[37] The final component is "the so-called 'mixed question' of law and fact"—that is, "whether the historical facts found satisfy the legal test chosen."[38] The standard of appellate review for such mixed questions varies depending on the particular issue; the court should examine "the nature of the mixed question" and inquire whether a trial court or an appellate court is "better suited to resolve it."[39]

Although such mixed questions are, by their nature, a hybrid of pure legal and pure factual issues, the methodology for selecting the standard of appellate review harkens once again to the distinction between law and fact. It depends on whether answering the particular mixed question "entails primarily legal or factual work."[40] A question that will "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard" should typically be reviewed de novo.[41] But a deferential standard should apply to questions that will "immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[42] But again, this framework governs appellate review of rulings made by trial judges; it does not address jury verdicts.

B. The Initial Jury Trial Right

The Seventh Amendment is the starting point for deciding whether a party has a right to a jury decision on a particular issue. It provides that "[i]n Suits at common law, where the value in controversy shall exceed

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37. *See U.S. Bank*, 138 S. Ct. at 966 (citing FED. R. CIV. P. 52(a)(6) ("By well-settled rule, such factual findings are reviewable only for clear error—in other words, with a serious thumb on the scale for the [lower] court.")).

38. *Id.*

39. *Id.*; *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1166–67 (2017) ("[W]e ask whether, 'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" (quoting *Pierce v. Underwood*, 487 U.S. 552, 559–60 (1988))).

40. *U.S. Bank*, 138 S. Ct. at 967; *see also Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020) ("[T]he appropriate standard of appellate review for a mixed question 'depends . . . on whether answering it entails primarily legal or factual work.'" (quoting *U.S. Bank*, 138 S. Ct. at 967)).

41. *U.S. Bank*, 138 S. Ct. at 967.

42. *Id.* (quoting *Pierce*, 487 U.S. at 561–62). For constitutional issues, however, the Court has indicated that such "case-specific factual issues" might merit de novo review. *Id.* at 967 n.4 ("In the constitutional realm . . . we have often held that the role of appellate courts 'in marking out the limits of a standard through the process of case-by-case adjudication' favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." (quoting *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984)). For a discussion on the extent to which constitutional issues warrant a different approach to selecting standards of appellate review, see *infra* Part IV.B.

twenty dollars, the right of trial by jury shall be preserved . . . ."[43] The Federal Rules of Civil Procedure implement the Seventh Amendment's jury trial right: Rule 38 instructs that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution . . . is preserved to the parties inviolate."[44]

Because the text of the Seventh Amendment "preserve[s]" the common law right to a jury trial, the Supreme Court has typically embraced a "historical test."[45] That is, the Court's Seventh Amendment jurisprudence ostensibly seeks to replicate the jury trial right that existed under the English common law in 1791, when the Seventh Amendment was adopted.[46] The hard question is how precise that replication must be: "The aim of the amendment . . . is to preserve the substance of the common-law right of trial by jury, as distinguished from mere matters of form or procedure . . . ."[47]

To decide whether a particular issue is subject to the Seventh Amendment's jury trial right under this historical test, the first step is to determine whether the cause of action "either was tried at law at the time of the founding or is at least analogous to one that was."[48] If so, a court

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43. U.S. CONST. amend. VII. Another part of the Seventh Amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." *Id.* The Reexamination Clause—discussed *infra* notes 144–150 and accompanying text—has also been analyzed through a historical lens. *See Gasperini v. Center for Humans., Inc.*, 518 U.S. 415, 432–33 (1996) (applying the Seventh Amendment's Reexamination Clause "[i]n keeping with the historic understanding"); *see also infra* notes 200–205 and accompanying text (discussing *Gasperini*'s Seventh Amendment reasoning).

44. FED. R. CIV. P. 38(a).

45. *E.g.*, *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376 (1996) (noting "our longstanding adherence to this 'historical test'") (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640–43 (1973)).

46. *See Balt. & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657 (1935) ("The right of trial by jury thus preserved is the right which existed under the English common law when the amendment was adopted."); *see also Curtis v. Loether*, 415 U.S. 189, 193 (1974) ("[T]he thrust of the Amendment was to preserve the right to jury trial as it existed in 1791.").

47. *Balt. & Carolina Line*, 295 U.S. at 657; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336 (1979) (rejecting the petitioners' "rigid" interpretation of the Seventh Amendment and noting that "many procedural devices developed since 1791 that have diminished the civil jury's historic domain" were nonetheless found to be constitutional).

48. *Markman*, 517 U.S. at 376; *see also Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 348 (1998) ("The Seventh Amendment thus applies not only to common-law causes of action, but also to 'actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty.'" (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989)); *Tull v. United States*, 481 U.S. 412, 417–18 (1987) ("First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of

must consider "whether the particular trial decision must fall to the jury in order to preserve the substance of the common-law right as it existed in 1791."[49] As to that critical inquiry, the Supreme Court has identified several approaches. It has noted "the distinction between substance and procedure," by which a jury trial right exists as to substance but not procedure.[50] It has also noted "the line . . . between issues of fact and law," where a jury trial resolves factual issues but not legal issues.[51] It has sought to find the most suitable historical analog for the particular issue, "comparing the modern practice to earlier ones whose allocation to court or jury we do know" and "seeking the best analogy we can draw between an old and the new."[52] And it has looked explicitly to "functional considerations," inquiring whether judges or juries are "better positioned" to decide the issue.[53]

Because this framework assesses the initial entitlement to a jury trial on an issue-by-issue basis, a single case might contain some issues for which there is a right to a jury trial and other issues for which there is not. If so, the case can still be adjudicated in a single trial, "with the jury rendering a verdict on the jury issues and the trial judge making findings on the nonjury issues."[54]

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law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." (citations omitted)).

49. *Markman*, 517 U.S. at 376.

50. *Id.* at 378.

51. *Id.*; *see also Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) ("Is the question of agency disapproval primarily one of *fact*, normally for juries to decide, or is it a question of *law*, normally for a judge to decide without a jury?" (emphasis added)); Weiner, *supra* note 28, at 1867 ("The categories of 'questions of law' and 'questions of fact' have been the traditional touchstones by which courts have purported to allocate decision-making between judge and jury."). *But cf. Markman*, 517 U.S. at 384 n.10 ("Because we conclude that our precedent supports classifying the question as one for the court, we need not decide either the extent to which the Seventh Amendment can be said to have crystallized a law/fact distinction.").

52. *Markman*, 517 U.S. at 378 (calling this "the sounder course, when available"); *see also Parklane Hosiery*, 439 U.S. at 333 ("At common law, a litigant was not entitled to have a jury determine issues that had been previously adjudicated by a chancellor in equity.").

53. *Markman*, 517 U.S. at 388 ("Where history and precedent provide no clear answers, functional considerations also play their part in the choice between judge and jury . . . . [T]he fact/law distinction at times has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." (internal citation omitted)); *see also Merck Sharp & Dohme*, 139 S. Ct. at 1680 (holding that judges, rather than juries, should decide agency preemption because judges are "better equipped," "better positioned," and "better suited" to make that decision); *Hana Fin., Inc. v. Hana Bank*, 574 U.S. 418, 422 (2015) ("Application of a test that relies upon an ordinary consumer's understanding of the impression that a mark conveys falls comfortably within the ken of a jury.").

54. 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2337 (4th ed. Supp. 2020).

C. Displacing the Jury

Even when parties are entitled to a jury trial, procedures exist that allow the trial judge to displace the jury's decisionmaking role. One example is summary judgment. Rule 56 permits a trial judge to render summary judgment before trial—based on pretrial discovery and other materials—when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[55] The jury's role can also be displaced by motions to dismiss at the pleading stage,[56] particularly in the wake of the Supreme Court's decisions in *Twombly* and *Iqbal*.[57]

When a case does reach trial, however, the key procedural device is judgment as a matter of law under Rule 50. This rule allows the judge to resolve an issue against a party if she finds that, based on the trial record, "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[58] The judge may then direct the entry of "judgment as a matter of law" against that party if its claim or defense depends on that issue.[59] The judge may grant judgment as a matter of law before submitting the case to the jury, or she may do so after the jury renders its verdict (if the jury decides against the moving party).[60]

This standard gives significant deference to the jury's decisionmaking role.[61] As long as a "reasonable jury" could make a

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

56. FED. R. CIV. P. 12(b)(6) (authorizing a motion to dismiss for "failure to state a claim upon which relief can be granted").

57. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007); Miller, *supra* note 14, at 335 (arguing that *Twombly* and *Iqbal* permit a judge to "evaluate the merits of the plaintiff's case on the basis of a single document—the complaint—without having the benefit of . . . anything remotely approximating a trial or the input of a jury"); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1294 (2010) (noting that "[i]f a plaintiff seeking judicial redress is unable to provide an adequate 'statement of the claim' at the pleadings phase, then that claim is effectively stillborn . . . [with] no ability to present evidence to a judge or jury").

58. FED. R. CIV. P. 50(a)(1)(A).

59. FED. R. CIV. P. 50(a)(1)(B).

60. FED. R. CIV. P. 50(a)(2), (b). Under Rule 50's two-step structure, a party must make a motion for judgment as a matter of law "before the case is submitted to the jury." FED. R. CIV. P. 50(a)(2). If the trial judge grants the motion at that point, she will enter judgment and the case will not go to the jury. But if the trial judge does not grant that initial motion, "the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." FED. R. CIV. P. 50(b). The party may then "file a renewed motion for judgment as a matter of law" after the jury's verdict. *Id.* The standard by which the trial court evaluates a motion for judgment as a matter of law is the same at each stage. *See* 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524 (3d ed. 2008).

61. 9B WRIGHT & MILLER, *supra* note 60, § 2524 ("Since granting a judgment as a matter of law deprives the party opposing the motion of a determination of the facts by a jury, it is understandable that it is to be granted cautiously and sparingly by the trial

particular finding, the judge cannot grant judgment as a matter of law to the contrary. The Supreme Court has explained that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[62] That is, the court "must view the evidence most favorably to the party against whom the motion for judgment as a matter of law is made."[63] Because this deferential standard tests only the legal sufficiency of the evidence and requires the judge to sustain any verdict that is reasonable in light of that evidence, the Supreme Court has found it to comply with the Seventh Amendment, even though it gives judges some authority to displace jury verdicts.[64]

The structure of the Federal Rules of Civil Procedure has important ramifications for appellate review. Following a jury trial, the appellate court does not engage in direct "review" of the jury's verdict. Rather, the appellate court reviews the trial *judge*'s ruling on the losing party's unsuccessful Rule 50 motion for judgment as a matter of law.[65] Indeed, the Supreme Court has made clear that a trial court Rule 50 motion is an absolute prerequisite for appealing the legal sufficiency of the jury's verdict.[66]

In the early years of the Federal Rules, there was some uncertainty about whether an appellate court reviewing a trial court's *denial* of a Rule

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judge, and the judicial decisions reflect that proposition. . . . The fundamental principle is that there must be a minimum of judicial interference with the proper functioning and legitimate province of the jury.").

62. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *see also* 9B WRIGHT & MILLER, *supra* note 60, § 2528 ("It is well settled in the case law that the party against whom a motion for judgment as a matter of law under Rule 50 is made must be given the benefit of every legitimate inference that can be drawn from the evidence.").

63. 9B WRIGHT & MILLER, *supra* note 60, § 2524.

64. *See Neely v. Martin K. Eby Const. Co.*, 386 U.S. 317, 321 (1967) ("[I]t is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial."); *Galloway v. United States*, 319 U.S. 372, 393 (1943) (holding that the Seventh Amendment does not deprive litigants of "the right to challenge the legal sufficiency of the opposing case"); 9B WRIGHT & MILLER, *supra* note 60, § 2522 ("The constitutionality of Federal Rule 50 is thoroughly settled. . . . [T]he standard for a judgment as a matter of law only deprives the losing party of the possibility of an unreasonable verdict, a possibility not protected by the Constitution."). *But see* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 167–73 (2007) (criticizing the Supreme Court's case law upholding the constitutionality of judgment as a matter of law).

65. Supreme Court case law frames the relevant question on appeal as whether the Rule 50 motion should have been granted. *See Neely*, 386 U.S. at 326 (noting an appellate court's authority to "direct[] entry of judgment for a verdict loser whose proper request for judgment *n. o. v.* had been wrongly denied by the District Court"); *Reeves*, 530 U.S. at 148–54 (examining the appellate court's reversal of a judgment based on a jury's verdict in terms of whether the Rule 50 standard was met).

66. *See Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400–01, 402 n.4 (2006).

50 motion had the power to direct judgment in favor of the moving party—and thereby to override both the jury's verdict and the trial court's Rule 50 ruling.[67] But in 1967, the Supreme Court's decision in *Neely v. Martin K. Eby Construction Co.*[68] recognized this authority. As the Court would later explain: "[I]n *Neely*, the Court . . . ruled definitively that if a motion for judgment as a matter of law is erroneously denied by the district court, the appellate court does have the power to order the entry of judgment for the moving party."[69] The Supreme Court also found that such an order by the appellate court comported with the Seventh Amendment.[70]

To be clear, this Article does not focus on procedures that allow courts merely to *avoid* a finding made by a jury by ordering a new trial. Rule 59, for example, permits a trial court to grant a new trial[71] in light of problems that occurred during the trial,[72] newly discovered evidence,[73] or even the judge's belief that the verdict is "against the weight of the evidence."[74] This "against the weight of the evidence" standard gives a trial court more authority to second-guess a jury verdict than the standard

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67. *See, e.g.*, Martin B. Louis, *Post-Verdict Rulings on the Sufficiency of the Evidence:* Neely v. Martin K. Eby Construction Co. *Revisited*, 1975 WIS. L. REV. 503, 511–15 (describing the Court's pre-1967 decisions indicating skepticism regarding appellate direction of judgment as a matter of law); *see also* FED. R. CIV. P. 50 advisory committee's note to 1963 amendment (noting that "problems" relating to appeals of a trial court's denial of a Rule 50 motion "have not been fully canvassed in the decisions and the procedure is in some respects still in a formative stage").

68. 386 U.S. 317, 326 (1967) (rejecting "an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal").

69. *Weisgram v. Marley Co.*, 528 U.S. 440, 449 (2000) (citing *Neely*, 386 U.S. at 326). In 2007, Rule 50 was amended to recognize explicitly the appellate court's authority to direct entry of judgment on review of a trial court's Rule 50 motion. *See* FED. R. CIV. P. 50(e).

70. *See Weisgram*, 528 U.S. at 450 ("As far as the Seventh Amendment's right to jury trial is concerned . . . there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does."). Judicial displacement of the jury's verdict—whether by the trial court or the appellate court—may implicate not only the Seventh Amendment's "right of trial by jury," but also the Seventh Amendment's Reexamination Clause, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. The Reexamination Clause is discussed in more detail *infra* notes 144–150 and accompanying text.

71. *See* FED. R. CIV. P. 59(a).

72. *See, e.g., Perez-Perez v. Popular Leasing Rental, Inc.*, 993 F.2d 281, 283 (1st Cir. 1993) ("Rule 59 provides that a new trial may be granted in a jury action for any reason for which new trials were granted at common law. The rule creates the opportunity to correct a broad panoply of errors, in order to prevent injustice.").

73. *See, e.g., Compass Tech., Inc. v. Tseng Lab'ys, Inc.*, 71 F.3d 1125, 1130–31 (3d Cir. 1995).

74. *E.g., Gasperini v. Center for Humans., Inc.*, 518 U.S. 415, 433 (1996) (quoting *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 540 (1958)).

for granting judgment as a matter of law.[75] An appellate court also has the authority to order a new trial when necessary to correct errors made during the trial court proceedings.[76] These situations are beyond the scope of this Article, however, because they do not permit complete *displacement* of the jury's decision with a contrary ruling by a court; any new trial would lead to a new verdict by a new jury.

* * *

The three frameworks discussed above all speak—at least in part—about the distinction between law and fact. The Supreme Court's approach to selecting standards of appellate review inquires whether the particular issue "entails primarily legal or factual work."[77] The test for deciding whether a particular issue must be decided by a jury under the Seventh Amendment considers whether the issue is one of law (which falls in the judge's realm) or one of fact (which falls in the jury's realm).[78] And even when a jury trial is held, Rule 50 provides that the judge may displace the jury's decisionmaking authority only when no "*legally* sufficient evidentiary basis" could support a contrary conclusion and therefore judgment may be entered "as a matter of *law*."[79] As the next Part will explain, however, there are important differences between these inquiries that cannot be overlooked, and a failure to appreciate these distinctions has prompted confusion about appellate review of civil jury verdicts.

II. THE PROPER APPROACH TO APPELLATE REVIEW OF CIVIL JURY VERDICTS

The three frameworks described above have generated confusion regarding the proper approach to appellate review of civil jury verdicts. This Part describes the Federal Circuit's decision in the Oracle-Google litigation, which exemplifies the improper conflation of these inquiries to justify de novo review of a jury's verdict. It then explains why the crucial

75. *See, e.g.*, 9B WRIGHT & MILLER, *supra* note 60, § 2531 (calling the "against the weight of the evidence" standard for a new trial a "much more lenient test" than the standard for judgment as a matter of law).

76. *See, e.g.*, *Simmons v. Bradshaw*, 879 F.3d 1157, 1167 (11th Cir. 2018) ("Because the jury instructions did not accurately reflect the law . . . we will reverse and order a new trial."); *Vázquez-Valentín v. Santiago-Díaz*, 459 F.3d 144, 153 (1st Cir. 2006) ("For these reasons, the exclusion of the documentary evidence was not harmless, and we must vacate the jury's verdict and remand for a new trial.").

77. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018); *see also supra* notes 40–41 and accompanying text.

78. *See supra* note 51 and accompanying text.

79. FED. R. CIV. P. 50(a) (emphasis added); *see also supra* notes 58–62 and accompanying text.

area of disagreement concerns jury verdicts regarding *mixed questions* of law and fact—that is, the application of the governing legal standard to the facts of the case. Finally, this Part argues that Rule 50's deferential "reasonable jury" standard forecloses de novo review of a jury's verdict on such a mixed question.

A. A Problematic Example

The Federal Circuit's decision in the Oracle-Google litigation—which the Supreme Court is reviewing this Term—exemplifies the wrong way to review a jury's verdict. The Federal Circuit began with the Supreme Court's jurisprudence on selecting the standard of appellate review for rulings by trial *judges*—disregarding the crucial procedural fact that it was a *jury* that rendered a verdict in Google's favor on its fair use defense.[80] The Federal Circuit did recognize that an appellate court must review "with deference" any findings relating to "relevant historical facts."[81] But it reviewed de novo the jury's conclusion about "whether the use at issue is ultimately a fair one."[82] It reasoned that fair use is a "mixed question of law and fact" under the Supreme Court's framework.[83] Looking to the considerations the Supreme Court identified in *U.S. Bank*,[84] the Federal Circuit found that "[t]he fair use question entails . . . a primarily legal exercise,"[85] and that "resolution of what any set of facts means to the fair use determination definitely does not 'resist generalization.'"[86]

The Federal Circuit's approach to the jury's verdict also incorrectly relied on the framework for deciding whether the Seventh Amendment provides a right to a jury trial on the issue of fair use. A party's fair use defense, the court said, should only be "sent to the jury" if it were proper to "treat[] the entire question of fair use as factual."[87] The Federal Circuit openly questioned, therefore, whether the jury should have been asked to render a verdict on the merits of Google's fair use defense, criticizing other courts that "have continued to accept the fact that the question of fair use

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80. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1191–93 (Fed. Cir. 2018), *cert. granted*, No. 18-956, 140 S. Ct. 520 (2019).

81. *Id.* at 1193.

82. *Id.*

83. *Id.* at 1192.

84. *See supra* notes 33–42 and accompanying text (discussing *U.S. Bank Nat. Ass'n ex rel. CWCapital Asset Management LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018)).

85. *Oracle*, 886 F.3d at 1193.

86. *Id.* (quoting *U.S. Bank*, 138 S. Ct. at 966).

87. *Id.* at 1194 ("While some courts once treated the entire question of fair use as factual, and, thus, a question to be sent to the jury, that is not the modern view.").

may go to a jury."[88] For this reason as well, the Federal Circuit declared that the jury's ultimate conclusion should be viewed as "advisory only" on appeal,[89] even though neither Google nor Oracle objected to seeking a jury verdict on Google's fair use defense.[90]

The Federal Circuit's approach fails to appreciate the distinct doctrinal frameworks at play. Put simply, it may have reached correct answers to the wrong *questions*. Perhaps the Federal Circuit is correct that the Seventh Amendment does not guarantee a jury trial on a party's fair use defense. And perhaps it is correct that an appellate court should review de novo a trial court's ruling (at a bench trial) regarding a party's fair use defense.[91] This Article takes no position on those two questions. Rather, it argues that even if the Federal Circuit *is* correct on these points, they do not resolve the standard of review that an appellate court must apply when a jury has rendered its verdict.[92]

The Federal Circuit's decision in the Oracle-Google litigation is not alone in overlooking the distinctions between these different frameworks—other federal appellate decisions have made the same mistake.[93] Some appellate courts, however, have correctly recognized their

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88. *Id.*

89. *Id.* at 1196.

90. *Id.* at 1195 (noting that "all aspects of Google's fair use defense went to the jury with neither party arguing that it should not").

91. In a 1985 decision, *Harper & Row Publishers, Inc. v. Nation Enters.*, the Supreme Court indicated without much analysis that a *judge*'s ultimate conclusion about fair use (following a bench trial) should be reviewed de novo; it wrote that "[w]here the district court has found facts sufficient to evaluate each of the statutory factors, an appellate court 'need not remand for further factfinding . . . [but] may conclude as a matter of law that [the challenged use] do[es] not qualify as a fair use of the copyrighted work.'" 471 U.S. 539, 560 (1985) (alterations in original) (quoting *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)). This decision predates the Supreme Court's more recent case law on appellate review of trial court rulings, however. *See, e.g.*, *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960 (2018). In any event—as this Article explains—the framework for selecting the standard of appellate review for trial judge rulings does not dictate the proper approach to appellate review of jury verdicts.

92. Although some scholars have questioned the Federal Circuit's decision in the Oracle-Google litigation, they have done so on the Federal Circuit's own terms—arguing, for example, that copyright fair use *is* subject to a jury trial under the Seventh Amendment and *is* subject to deferential review under the Supreme Court's framework for selecting the standard of appellate review for rulings by trial judges. *See, e.g.*, Ned Snow, *Who Decides Fair Use—Judge or Jury?*, 94 WASH. L. REV. 275, 277–79 (2019). By contrast, this Article shows that the inquiries into the initial jury trial entitlement and appellate review of trial judge rulings do not govern appellate review of a jury's verdict, which must proceed under the standard set forth in Rule 50. *See infra* Part II.C.

93. *See, e.g.*, *ABS Glob., Inc. v. Inguran, LLC*, 914 F.3d 1054, 1066–67 (7th Cir. 2019) (noting in the context of an appeal from a Rule 50 motion on the issue of whether an invention is "obvious" for purposes of patent law that "the jury does not have the last word on obviousness" because "it is the court that must resolve the ultimate legal issue"); *Phillips v. Cmty. Ins.*, 678 F.3d 513, 520 (7th Cir. 2012) (citing Supreme Court case law

obligation to apply Rule 50's reasonable jury standard.[94] The remainder of this Part clarifies the proper approach to appellate review of jury verdicts, first by showing that the key area of confusion is how to handle a jury's answer to a so-called "mixed question of law and fact,"[95] and then by explaining why Rule 50 requires deference to such jury findings.[96]

B. Three Categories, Three Frameworks

The Federal Circuit's problematic decision may reflect what the Supreme Court itself has called "the vexing nature of the distinction between questions of fact and questions of law."[97] Although commentators have wrestled with whether the concept is capable of a coherent definition,[98] Justice Kagan's recent opinion in *U.S. Bank* provides a helpful lens for exploring the factual, legal, and mixed components of any

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on appellate review of trial judge rulings to support de novo review of a jury verdict on whether an officer's use of force was reasonable under the Fourth Amendment); *Kinetic Concepts, Inc. v. Smith & Nephew, Inc.*, 688 F.3d 1342, 1356–57 (Fed. Cir. 2012) ("Because obviousness is a mixed question of law and fact, '[w]e first presume that the jury resolved the underlying factual disputes in favor of the verdict . . . . Then we examine the [ultimate] legal conclusion [of obviousness] de novo to see whether it is correct in light of the presumed jury fact findings.'" (alterations in original) (quoting *Jurgens v. McKasy*, 927 F.2d 1552, 1557 (Fed. Cir. 1991))).

94. *See, e.g.*, *MobileMedia Ideas LLC v. Apple Inc.*, 780 F.3d 1159, 1167–68 (Fed. Cir. 2015) (affirming the trial court's denial of a Rule 50 motion as to the obviousness of one patented invention because the trial record "provided the jury with a reasonable basis for finding that the claimed invention would not have been obvious to one of ordinary skill in the art at the relevant timeframe"); *Loan Modification Grp., Inc. v. Reed*, 694 F.3d 145, 149–50 (1st Cir. 2012) (noting that Rule 50 requires upholding a jury's verdict "unless the facts and inferences, viewed in the light most favorable to the verdict, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have [returned the verdict]" (alteration in original) (quoting *Borges Colón v. Román-Abreu*, 438 F.3d 1, 14 (1st Cir. 2006)) and finding that "the jury could have reasonably rejected application of the Statute of Frauds"); *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, 585 F.3d 267, 278 (6th Cir. 2009) (upholding the jury's verdict against the defendant's fair use defense because "we conclude that the result reached by the jury was not unreasonable").

95. *See infra* Part II.B.

96. *See infra* Part II.C.

97. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982).

98. *See, e.g.*, Allen & Pardo, *supra* note 28, at 1769 ("The importance of the law-fact distinction is surpassed only by its mysteriousness."); Cook, *supra* note 28, at 417 ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of fact' and 'conclusions of law.'"); Isaacs, *supra* note 28, at 11 (noting "the illusion that there is a clear and easily discernible difference between propositions of law and propositions of fact" and "the utter futility of the rough classification of questions as questions of law and of fact"); Monaghan, *supra* note 28, at 232 ("This distinction has long caused perplexity in such diverse areas as contracts, torts, and administrative law." (footnotes omitted)); Morris, *supra* note 28, at 1304 (criticizing "[t]he naive assumption that law and fact stand naturally apart"); *see also Artvale, Inc. v. Rugby Fabrics Corp.*, 363 F.2d 1002, 1005 (2d Cir. 1966) (Friendly, J.) ("The common approach seeking to dichotomize all decisions as either 'law' or 'fact' is too simplistic.").

given issue (whether that issue is copyright fair use or anything else). As this Section will show, the proper treatment of each component varies depending on the precise institutional context.

The first category Justice Kagan identified was the "legal test" or the "standard" that governs a particular issue.[99] This presents an "unalloyed legal . . . question[]," which the appellate court can always decide de novo when reviewing a trial judge's decision.[100] As for the initial jury trial right, even when the Seventh Amendment provides a right to a jury trial on an issue, the jury itself does not decide the governing legal tests or standards.[101] Rather, the judge identifies the governing standard when instructing the jury and, in doing so, resolves any dispute between the parties about those legal tests or standards.[102] Finally, any generalizable legal test or principle could also be grounds for *displacing* a jury verdict—even under Rule 50's deferential "reasonable jury" standard.[103]

In Justice Kagan's second category are questions of "'basic' or 'historical' fact"—"who did what, when or where, how or why."[104] When trial judges make such factual findings, an appellate court applies a deferential standard of review.[105] As for the initial jury trial right, it is possible for the Seventh Amendment test to place an issue completely outside the purview of the jury.[106] But when the Seventh Amendment *does* provide a right to a jury trial for a particular issue, basic factual questions underlying that issue are for the jury to decide.[107] Once a verdict is rendered—and the question is whether a court may displace that verdict—

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99. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 965 (2018).

100. *Id.*

101. *See, e.g.*, 9B WRIGHT & MILLER, *supra* note 60, § 2521 ("The federal courts follow the orthodox doctrine that questions of fact are for the jury and questions of law are for the court.").

102. *See, e.g.*, *id.* § 2506 (noting that the judge must provide an "instruction explaining the legal standards to be applied by the jurors").

103. *See, e.g.*, *id.* § 2536 (noting that appellate review of a Rule 50 motion includes "an evaluation of the legal standards applied by the jury in reaching its verdict" and that "[w]hether the legal standards are incorrect . . . presents a de novo question for the appellate court"); *see also infra* notes 152–155 and accompanying text (discussing a court's ability to identify dispositive legal standards, tests, or principles when reviewing a jury's verdict).

104. *U.S. Bank*, 138 S. Ct. at 966.

105. *Id.* (citing FED. R. CIV. P. 52(a)(6)).

106. *See supra* notes 48–53 and accompanying text; *see also, e.g.*, *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1672 (2019) ("We here determine that this question of pre-emption is one for a judge to decide, not a jury."); *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) ("We hold that the construction of a patent, including terms of art within its claim, is exclusively within the province of the court.").

107. *See, e.g.*, 9B WRIGHT & MILLER, *supra* note 60, § 2521; 9 WRIGHT & MILLER, *supra* note 54, § 2302.1 (noting the "strong federal policy favoring jury trial of fact issues").

a trial or appellate court may reach a contrary conclusion about any basic or historical facts *only* if the jury's findings are unreasonable under Rule 50's deferential standard of review.[108]

The third category is "a combination of the other two."[109] A "'mixed question' of law and fact" is "whether the historical facts found satisfy the legal test chosen"[110]—in other words, the ultimate conclusion about that particular issue in a particular case. When a trial judge decides such a mixed question, the standard of appellate review varies depending on the issue. As discussed above, the Supreme Court's framework selects the standard of review based on "the nature of the mixed question," inquiring whether a trial court or an appellate court is "better suited to resolve it," and whether answering the particular mixed question "entails primarily legal or factual work."[111]

As for the jury's role, the Seventh Amendment test may decide that there is simply no right to a jury trial for that particular issue.[112] But if the Seventh Amendment *does* provide a right to a jury trial, then the jury will typically render a verdict on that issue.[113] Courts have some discretion, however.[114] It is possible, for example, that the presence (or absence) of particular "basic or historical fact[s]"[115] necessarily dictates a particular answer to the mixed question. If so, the judge might ask the jury for a special verdict regarding those historical facts and then render judgment on the mixed question based on that special verdict.[116] The focus of this Article, however, is appellate review in cases where the jury *has* rendered a verdict on a mixed question of law and fact. When may judges *displace*

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108. *See, e.g.*, 9B WRIGHT & MILLER, *supra* note 60, § 2524 ("[T]he court cannot substitute its judgment of the evidence or the facts for that of the jury, since ascertaining the facts is within the exclusive province of the latter.").

109. *U.S. Bank*, 138 S. Ct. at 965.

110. *Id.* at 966.

111. *See supra* notes 38–42 and accompanying text.

112. *See supra* note 106.

113. *See, e.g.*, 9B WRIGHT & MILLER, *supra* note 60, § 2506 (noting that "it frequently will be necessary and desirable for the trial judge to submit to the jury mixed questions of law and fact").

114. *See, e.g.*, *id.* § 2508 ("The trial court has considerable discretion about the form of the questions posed to the jury . . . .").

115. *See supra* note 36 and accompanying text.

116. FED. R. CIV. P. 49(a)(1) ("The court may require a jury to return only a special verdict in the form of a special written finding on each issue of fact."). It is further evidence of the "vexing" nature of the law-fact distinction, *see supra* notes 28 & 97–98 and accompanying text, that Rule 49's reference to special verdicts on "issue[s] of fact" also permits special verdicts on "mixed questions of law and fact." 9B WRIGHT & MILLER, *supra* note 60, § 2506 (criticizing as "unhelpful" statements in judicial opinions "that special verdicts should be limited to questions of fact from which a legal proposition may be deduced and applied by the court" because "[i]t long has been understood that law and fact are categories that are not so neatly separated and that it frequently will be necessary and desirable for the trial judge to submit to the jury mixed questions of law and fact").

that verdict? The next Section examines the proper approach to appellate review of such mixed questions under Rule 50.

C. Rule 50 and Mixed Questions of Law and Fact

As to this key issue of how to treat "mixed questions," the Rule 50 standard is distinct from the frameworks for selecting the standard of appellate review for trial court rulings and for determining whether a jury trial right exists. Consider first the initial Seventh Amendment inquiry into whether a jury trial right exists for a particular issue. When the parties consent to a jury trial, as in the Oracle-Google litigation,[117] this is a moot point. Neither the court nor the losing party can displace the jury's verdict by simply showing that there was no Seventh Amendment jury trial right in the first instance. There are a number of reasons for this. First, Rule 39 provides that even for issues that are not "triable of right by a jury," the parties' consent to a jury trial will have "the same effect as if a jury trial had been a matter of right."[118] Even without that explicit instruction, the structure of the Federal Rules themselves prevent such displacement. Rule 50 is the sole mechanism for a trial court to render judgment contrary to a jury's verdict once that verdict is rendered.[119] Accordingly, the appellate court (as well as the trial court on the initial Rule 50 motion) can overturn a jury's verdict on a particular issue only when Rule 50's standard for judgment as a matter of law is met: it must be the case that "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[120] As discussed above, the court must draw all reasonable inferences in favor of the jury's verdict, and it may not second-guess credibility assessments that support the jury's verdict.[121]

Second, the Rule 50 standard cannot be watered down by the considerations courts might invoke to select a de novo standard of appellate review for the rulings of a trial *judge*. Under that framework, an appellate court may review a mixed question de novo when—among other things—consideration of that mixed question "entails primarily legal . . . work"[122] or the appellate court is "better positioned" or "better suited" to decide that issue.[123] But the Supreme Court developed this framework to fill a textual void; no federal rule dictates a standard of appellate review

117. *See supra* note 90 and accompanying text.

118. FED. R. CIV. P. 39(c)(2).

119. The court's power to order a new trial under Rule 59 would remain, but as discussed *supra* notes 71–76 and accompanying text, ordering a new trial does not permit the court to render *judgment* contrary to a jury's verdict.

120. FED. R. CIV. P. 50(a)(1).

121. *See supra* notes 62–63 and accompanying text.

122. *See supra* notes 40–42 and accompanying text.

123. *See supra* note 39 and accompanying text.

for a trial judge's answer to a mixed question.[124] For a jury verdict, however, Rule 50 explicitly prevents judicial displacement of that verdict unless no "reasonable jury" would have "a legally sufficient evidentiary basis" for deciding the way it did.[125] Thus, Rule 50 does not permit judicial intervention simply because the judge would rule a certain way if it were the sole adjudicator, even if that judge thinks the issue entails primarily legal work. Rather, it must be the case that no reasonable adjudicator could rule contrary to the judge's view.[126]

Accordingly, the approach reflected in the Federal Circuit's decision in the Oracle-Google litigation cannot be salvaged by deferring to the jury on any "historical facts."[127] The deference owed to the jury extends as well to "mixed question[s] of law and fact," the ultimate decision whether a particular factual scenario meets the legal standard.[128] As a textual matter, Rule 50 draws no distinction between "historical facts" and "mixed

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124. Rule 52 does require that a trial judge's "[f]indings of fact" are subject to a deferential clear-error standard of review, FED. R. CIV. P. 52(a)(6), and the Supreme Court's framework acknowledges that deference is required for questions of "'basic' or 'historical' fact"—that is, "who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018) (discussed *supra* notes 36–37 and accompanying text). But there is no such provision for reviewing a trial judge's answer to a mixed question.

125. FED. R. CIV. P. 50(a)(1).

126. The Supreme Court has made this point in the analogous context of summary judgment—which, like Rule 50, inquires whether a party "is entitled to judgment as a matter of law," FED. R. CIV. P. 56(a), and hinges on whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1976). In *TSC Industries, Inc. v. Northway, Inc.*, the Court considered the issue of materiality in a securities-fraud claim, which it recognized as "a mixed question of law and fact, involving as it does the application of a legal standard to a particular set of facts." 426 U.S. 438, 450 (1986). In reversing the grant of summary judgment, the Court noted that "the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality." *Id.* Therefore, "[o]nly if the established omissions are 'so obviously important to an investor that *reasonable minds cannot differ* on the question of materiality is the ultimate issue of materiality' appropriately resolved 'as a matter of law' by summary judgment." *Id.* (emphasis added) (quoting *Johns Hopkins Univ. v. Hutton*, 422 F.2d 1124, 1129 (4th Cir. 1970)). *See also Sexton v. Poulsen & Skousen P.C.*, 372 F. Supp. 3d 1307, 1321–22 (D. Utah 2019) ("Even where underlying objective facts are free from dispute, mixed questions of law and fact imbedded in a cause of action can only be resolved on summary judgment where 'reasonable minds cannot differ' on the answer to the mixed question.") (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. at 450); 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2725.2 (4th ed. Supp. 2020) ("[I]f the evidence presented on the motion is subject to conflicting interpretations, or reasonable people might differ as to its significance, summary judgment is improper." (footnotes omitted)).

127. *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1193 (Fed. Cir. 2018) ("[W]hether the findings relating to any relevant historical facts were correct are questions which we review with deference . . . ."), *cert. granted*, No. 18-956, 140 S. Ct. 520 (2019).

128. *See supra* notes 122–138 and accompanying text.

questions"—a "reasonable" jury verdict must be upheld, even if the reviewing court would have reached a different conclusion.[129]

The proper approach to Rule 50 is reflected in the difference between the burden of *production* and the burden of *persuasion*. Every issue that may arise in litigation is subject to a particular standard of proof.[130] The most common standard in civil cases is by a "preponderance-of-the-evidence" (also known as "more likely than not").[131] But higher standards—such as "by clear and convincing evidence" or "beyond a reasonable doubt"—exist for some issues.[132]

The burden of persuasion is the obligation to persuade the decisionmaker that the standard of proof is met.[133] Under a preponderance standard, the party with the burden of persuasion is the one who must lose "when the evidence is evenly balanced."[134] The burden of production, on the other hand, is the obligation on a particular party to come forward with "sufficient evidence to support a jury finding in his behalf—that is, enough evidence that a *reasonable jury* could find that evidence satisfied the requisite burden of persuasion."[135]

Typically, the plaintiff bears the burden of production and persuasion as to each element of her claim, and the defendant bears the burden of production and persuasion as to each element of any affirmative defense. In the Oracle-Google litigation, Google bore the burden of production and persuasion as to its fair use defense.[136] Rule 50 allows a judge to displace a jury's verdict only when a party fails to meet its burden of production—when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[137] Rule 50 does not permit a judge

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129. FED. R. CIV. P. 50(a)(1).

130. *See Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011) (The "standard of proof" is "the degree of certainty by which the factfinder must be persuaded of a factual conclusion to find in favor of the party bearing the burden of persuasion.").

131. *See, e.g.*, Edward K. Cheng, *Reconceptualizing the Burden of Proof*, 122 YALE L.J. 1254, 1256 (2013) ("As every first-year law student knows, the civil preponderance-of-the-evidence standard requires that a plaintiff establish the probability of her claim to greater than 0.5."); John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1072 (1968) (describing "the preponderance-of-the evidence test in civil cases" as "where the jury must merely be satisfied that the probability is greater than 50 percent—in other words, that it is more likely than not that the plaintiff has a right to recover").

132. *Microsoft*, 564 U.S. at 100 n.4 (citing 21B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5122 (2d ed.)).

133. *See Dir., Off. of Workers' Comp. Programs, Dep't of Lab. v. Greenwich Collieries*, 512 U.S. 267, 268 (1994).

134. *Id.* at 269, 272 (describing the burden of persuasion as "the notion that if the evidence is evenly balanced, the party that bears the burden of persuasion must lose").

135. 21B WRIGHT & GRAHAM, *supra* note 132, § 5122 (emphasis added).

136. *See, e.g.*, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (noting that "fair use is an affirmative defense").

137. FED. R. CIV. P. 50(a)(1).

to displace the jury's verdict based on her assessment of whether the party met its burden of persuasion.[138]

The same principles apply when a jury's verdict is challenged on appeal. As discussed above, the appellate court does not engage in direct review of the jury's verdict.[139] Rather, it reviews the trial judge's ruling on the verdict-loser's Rule 50 motion. Accordingly, the appellate court must view the jury's verdict through the lens of Rule 50's standard for judgment as a matter of law.[140] As a leading treatise puts it, "the appellate court should use the same standard as the district court employs under Rule 50."[141] Therefore, just as the trial court cannot engage in de novo

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138. *See, e.g.*, *Wylie v. Ford Motor Co.*, 502 F.2d 1292, 1294 (10th Cir. 1974) (noting that a trial court ruling on a Rule 50 motion "may not weigh the evidence or determine where the preponderance of evidence lies"); *Fed. Deposit Ins. Corp. v. Marine Midland Realty Credit Corp.*, 17 F.3d 715, 721 (4th Cir. 1994) (The court remanded for a jury trial because the trial court had concluded "not that a judgment as a matter of law was appropriate but rather that there is not a preponderance of the evidence that Marine breached the Participation Agreement . . . ."). Even for cases that will ultimately be resolved by a bench trial, courts have emphasized the difference between the burden of production (which a trial judge may assess at the summary judgment phase) and the burden of persuasion (which that same trial judge may assess only at trial). Indeed, a judge who commits reversible error in granting *summary judgment* for a party might still render judgment for that party at a *bench trial*, "even if the district court considers no additional evidence aside from that which was already before it at the summary judgment phase." *Minidoka Irrigation Dist. v. Dep't of Interior*, 406 F.3d 567, 575 (9th Cir. 2005) (citing *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (en banc)). This is because, at trial, "[t]he district judge will be asking a different question as he reads the evidence, not whether there is a genuine issue of material fact, but instead whether the plaintiff has proven his claim." *Id.* (brackets omitted).

139. *See supra* notes 65–66 and accompanying text.

140. One potential qualification to this point is the possibility that the appellate court should apply a deferential standard of review to the trial *judge*'s ruling on the initial Rule 50 motion. Under the prevailing view, the appellate court applies de novo review to the trial judge's Rule 50 ruling—which means that the appellate court simply applies Rule 50's deferential reasonable jury standard independently. *See infra* note 184 and accompanying text. Part IV.A of this Article, however, explores arguments that the appellate court should review the trial court's Rule 50 ruling deferentially. *See infra* notes 187–195 and accompanying text.

141. 9B WRIGHT & MILLER, *supra* note 60, § 2540; *see also id.* § 2524 ("Numerous courts in every circuit in the federal judicial system have concluded that the analysis that is employed is the same in the trial court and on appeal . . . ."); *id.* § 2536 & n.15 ("This same-standard principle is an important one and is reflected in innumerable cases as illustrated by the citations in the note below."); EDWARDS & ELLIOTT, *supra* note 29, ch. III.C (noting that appellate courts apply "the same standard as a trial judge resolving motions for judgments as a matter of law in the first instance"). In one important sense, the Supreme Court has instructed appellate courts to be *more* cautious in directing judgment contrary to the jury's verdict. Even if the Rule 50 standard is met, the appellate court must be "constantly alert" to the need for a new trial instead of directing judgment contrary to the jury's verdict, and should consider whether the trial court ought to have the initial opportunity to evaluate whether a new trial is required. *Weisgram v. Marley Co.*, 528 U.S. 440, 451 (2000).

decisionmaking in the context of a Rule 50 motion,[142] the appellate court cannot do so in the context of reviewing the trial court's denial of that motion.[143]

Although the analysis above has focused on Rule 50's requirements, judicial displacement of the jury's verdict may also be constrained by the Seventh Amendment's Reexamination Clause, which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[144] The Court has not provided much guidance on the precise role of the Reexamination Clause, but some language indicates that it provides less deference to jury verdicts than Rule 50 itself. For example, the majority opinion in *Cooper Industries v. Leatherman Tool Group*[145] stated that the Reexamination Clause did not prevent judicial override of a punitive damages award on due process grounds because "the jury's award of punitive damages does not constitute a finding of 'fact'"[146] that would fall within the clause's limits on reexamining "*fact[s]* tried by a jury."[147] Although this statement came in the narrow context of a *constitutional* challenge to a jury's punitive damages verdict—where the jury itself never rendered a verdict on the question of constitutionality[148]—the underlying logic suggests that the Reexamination Clause does not necessarily apply to a jury's ultimate conclusion in applying a particular legal standard.[149] Whatever the precise scope of the Seventh Amendment's Reexamination Clause, however, Rule 50 requires deference to a jury's ultimate

142. *See supra* notes 61–63 and accompanying text.

143. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153–54 (2000) (Because "there was sufficient evidence for the jury to find that respondent had intentionally discriminated[,] . . . [t]he District Court was . . . correct to submit the case to the jury, and the Court of Appeals erred in overturning its verdict."); 9B WRIGHT & MILLER, *supra* note 60, § 2540 ("[T]he appellate court is obliged to review denials of Rule 50 motions in the light most favorable to the verdict, reversing only if no reasonable jury could have reached the same conclusion.").

144. U.S. CONST. amend. VII.

145. 532 U.S. 424 (2001).

146. *Id.* at 437 & n.11 (rejecting the argument that "the amount of punitive damages imposed by the jury is itself a 'fact' within the meaning of the Seventh Amendment's Reexamination Clause").

147. U.S. CONST. amend. VII (emphasis added). The *Cooper Industries* Court distinguished awards for compensatory damages, noting that "the measure of actual damages suffered . . . presents a question of historical or predictive fact." 532 U.S. at 437 (quoting *Gasperini v. Center for Humans., Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting)).

148. *See infra* note 221.

149. If the jury's punitive damages award does not even constitute a "fact" to which the Reexamination Clause applies, then that clause would place no limits on the ability to reexamine such an award even if a court's basis for reexamining the award is not constitutional due process, but rather a disagreement about whether a particular amount is appropriate under the governing substantive law.

conclusion on mixed questions of law and fact—for all the reasons set out above.[150]

The deference required by Rule 50's reasonable jury standard is not absolute, of course. A court may examine whether the evidence at trial *is* sufficient to support a particular verdict; that is, the court can and should hold a party to its burden of *production* with respect to a particular issue.[151] And Rule 50 permits the court to clarify the substantive law in a particular area in a way that renders only one outcome supportable "as a matter of law."[152] In this way, Rule 50 invites appellate courts to engage in "explicit norm elaboration," which could dictate particular results for a particular set of conditions.[153] Thus, the court can refine the governing "legal test" or "standard" for an issue by declaring subsidiary rules or principles that address particular situations.[154]

To recognize such authority on appeal is not to endorse de novo review over the jury's verdict. It is rather to understand more precisely what the proper application of Rule 50's deferential "reasonable jury" standard permits.[155] Rule 50 does not permit an appellate court to review de novo a jury's verdict as to the application of the governing legal

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150. The Reexamination Clause may have greater independent relevance for new trial motions, see *supra* notes 71–76 and accompanying text, which do not implicate Rule 50, yet can set aside a particular jury's verdict. The Reexamination Clause might also dictate the preclusive effect of a jury's verdict in *future* litigation. *See, e.g.*, 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 & n.46 (3d ed. 2020) ("[T]here has been a hint that the Seventh Amendment may establish a res-judicata-like protection against reexamination of facts found by a jury.").

151. *See supra* notes 130–135 and accompanying text (describing the distinction between the burden of production and the burden of persuasion). As discussed *supra* note 141, an appellate court that provides new guidance on such matters should be sensitive to whether it should provide an opportunity for a new trial—at which the parties could present additional evidence—rather than directing judgment as a matter of law.

152. *See supra* note 103 and accompanying text (recognizing that the governing "legal standard" can be declared de novo even in the context of a Rule 50 review of a jury's verdict).

153. Monaghan, *supra* note 28, at 268 (citing OLIVER WENDELL HOLMES, THE COMMON LAW 98 (Mark DeWolfe Howe ed., 1963)) (arguing that "frequently recurring fact patterns—for example, whether a reporter must check his sources—warrant specific judicial norm elaboration rather than being left to the trier of fact under a more general standard"); *see also* Weiner, *supra* note 28, at 1883 (citing *Lotta v. City of Oakland*, 154 P.2d 25, 26 (1944)) (noting that a reviewing court could override a jury verdict regarding a party's negligence "if appellate case law establishes how a reasonably prudent man would act under the very circumstances in question").

154. *See, e.g.*, Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1794 & n.323 (2013) (describing courts' ability to declare subsidiary principles to refine what a more general standard requires).

155. *See infra* note 162 and accompanying text (discussing the Supreme Court's recognition that deferential appellate review of rulings by trial judges still permits appellate courts to correct legal errors).

standards to the facts of a case. The appellate court may displace the jury's finding regarding such a mixed question of law and fact only if that finding is unreasonable.

III. LAW CLARIFICATION AND APPELLATE REVIEW

For the reasons laid out above, appellate courts must review jury verdicts through the lens of Rule 50's "reasonable jury" standard. This Part examines—but ultimately rejects—one possible policy justification for de novo appellate review: law clarification.[156] Law clarification is, to be sure, an important function of appellate courts.[157] And it is ostensibly a feature of the framework for selecting the standard of appellate review for rulings by trial judges.[158] The Supreme Court's case law in this area, however, has overlooked some important aspects of how the standard of appellate review does—and does not—affect an appellate court's ability to clarify the law. This Part begins by critically examining the Court's discussion of law clarification in its jurisprudence on appellate review of trial court rulings. It then explains why enhancing law clarification does not justify de novo review of jury verdicts.

As discussed above, the Supreme Court has indicated that de novo review of a "mixed question of law and fact" is appropriate when answering that question will "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard."[159]

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156. *See Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179, 1193 (Fed. Cir. 2018) (observing that de novo review of "whether a use is fair in one case will help guide resolution of that question in all future cases"), *cert. granted*, No. 18-956, 140 S. Ct. 520 (2019).

157. *See, e.g.*, Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 70 (1985) (noting "the law-making function of an intermediate appellate court"); Harry T. Edwards, *The Rising Work Load and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 894 (1983) (noting that courts of appeals "are also charged with . . . contributing to the explication of federal law"); Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974) (describing appellate courts' "lawmaking function of creating and amending rules of law, not only so that they may be followed by the lower courts within the system, but also to provide guidance to lawyers and their clients as to the propriety of their behavior, their obligations, their duties, their rights, and their remedies"); Steinman, *Standards of Appellate Review*, *supra* note 29, at 11 ("An important role that appellate courts play in our system is to clarify the substantive content of the law through their decisions in particular cases."); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

158. *See supra* notes 40–42 and accompanying text; *see also* Steinman, *Standards of Appellate Review*, *supra* note 29, at 11–12 (describing how the framework for selecting the standard of appellate review for particular trial court rulings is influenced by the Court's perception of appellate courts' law-clarification function).

159. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

This premise mistakenly assumes, however, that deferential review *prevents* appellate courts from "expound[ing] on the law" or "amplifying or elaborating on a broad legal standard."[160] In fact, the Court has made clear that a deferential standard of review still requires appellate courts to independently identify and correct legal errors.[161] That is, even when an appellate court applies a "clear error" or "abuse of discretion" standard to a ruling by a trial judge, it must "correct any legal error infecting a [lower] court's decision" and "should apply de novo review" to such a legal error.[162]

Moreover, even a deferential standard requires the appellate court to determine whether each ruling being reviewed is or is not within the realm of permissible decisionmaking. Consider the Supreme Court's recent holding that an appellate court must review a trial court's decision to award enhanced damages in a patent case for abuse of discretion.[163] In reaching this conclusion, the Court praised the fact that appellate review under a deferential standard had "narrowed" the "channel of discretion."[164] Deferential review had also "given substance to the notion that there are limits to that discretion."[165] This is not at all surprising. Whether the ultimate appellate result in a given case is an affirmance, remand, or reversal, the appellate court's decision can provide meaningful guidance.

Conversely, de novo review by no means assures that the appellate court's decision *will* clarify the law. An appellate court might issue a summary decision that provides no reasoning at all.[166] Appellate courts also regularly issue unpublished opinions—which lack precedential effect[167]—on issues subject to de novo review.[168] Standing alone, a de

160. *Id.*

161. Steinman, *Standards of Appellate Review*, *supra* note 29, at 8–9 (describing appellate review of legal errors under a deferential standard of review).

162. *U.S. Bank*, 138 S. Ct. at 968 n.7; *see also McLane Co. v. EEOC*, 137 S. Ct. 1159, 1168 n.3 (2017) (noting that an abuse-of-discretion standard "does not shelter a district court that makes an error of law"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (noting that an abuse-of-discretion standard "would not preclude the appellate court's correction of a district court's legal errors").

163. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1934 (2016).

164. *Id.* at 1932 (quoting Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 772 (1982)).

165. *Id.* at 1934.

166. *See* Steinman, *Standards of Appellate Review*, *supra* note 29, at 13 & n.87 (citing examples of summary decisions by federal appellate courts).

167. *See, e.g.*, 2D CIR. R. 32.1.1(a) ("Rulings by summary order do not have precedential effect."); 9TH CIR. R. 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent . . . .").

168. *See, e.g.*, *Alvarez v. Country Mut. Ins. Co.*, No. 19-35790, 2021 WL 118863, at *1 (9th Cir. Jan. 13, 2021) (unpublished opinion) ("Reviewing de novo, we reverse."); *United States v. Moore*, No. 19-11199, 2021 WL 22163, at *2 (11th Cir. Jan. 4, 2021) (unpublished opinion) ("We review de novo whether a district court has the authority to

novo standard of appellate review does not necessarily generate law-clarifying benefits. Law clarification comes from the substance of the appellate court's reasoning, and that reasoning either will—or will not—clarify the law regardless of the standard of appellate review.

There is, of course, a difference between "explicit norm elaboration" and mere "law application."[169] In the constitutional context, the Supreme Court has endorsed the idea that de novo law application by appellate courts may be valuable because it can help to "mark[] out the limits of a standard through the process of case-by-case adjudication . . . even when answering a mixed question primarily involves plunging into a factual record."[170] For non-constitutional issues, however, the Court has explained that a deferential standard should apply when a decision will "immerse courts in case-specific factual issues" that require them to address "multifarious, fleeting, special, narrow facts that utterly *resist generalization*."[171] Even then, deferential review still permits meaningful clarification of the law. If a seemingly fact-specific inquiry *does* become subject to "generalization," then an appellate court can clarify the law in a way that connects a particular set of conditions to a particular result. Because errors of law demand appellate correction even under a deferential standard of review,[172] deferential appellate review will never prevent such "explicit norm elaboration."

This analysis gives reason to question some of the Supreme Court's logic regarding the law-clarification rationale for de novo appellate review of rulings by trial judges. But even if that premise persists as to trial-court decisions, there is no justification for transplanting it to appellate review of jury verdicts. As discussed above, the Court has written on a clean slate in developing its framework for selecting the standard of appellate review for rulings by trial judges, because no general rule or statute requires a particular standard of review for a trial judge's ultimate conclusion regarding "mixed questions of law and fact."[173] Rule 50, however,

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reduce a sentence under the First Step Act.") (citing United States v. Jones, 962 F.3d 1290, 1296 (11th Cir. 2020)).

169. Monaghan, *supra* note 28, at 236 ("By definition, when law application occurs, further explicit norm elaboration ceases.").

170. *U.S. Bank Nat'l Ass'n ex rel. CW Capital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 n.4 (2018) (citing *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984)); *see also Ornelas v. United States*, 517 U.S. 690, 695–96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213, 232 (1983)) (noting that de novo review of trial judge rulings can be desirable when a particular issue is "not readily, or even usefully, reduced to a neat set of legal rules"); *Bose*, 466 U.S. at 503 (justifying de novo review in part because the issue "cannot be fully encompassed in one infallible definition" and "[i]nevitably its outer limits will be marked out through case-by-case adjudication").

171. *U.S. Bank*, 138 S. Ct. at 967 (emphasis added).

172. *See supra* note 162 and accompanying text.

173. *See supra* notes 122–124 and accompanying text.

prevents the reviewing court from displacing a jury's verdict unless no "reasonable jury" could have reached that verdict.[174]

Even if one were not troubled by this important textual distinction, the policy argument that de novo review of jury verdicts is needed for law-clarification purposes is weak. As with other kinds of deferential review,[175] Rule 50's reasonable jury standard does not thwart the law-clarification function of appellate courts. Instead, Rule 50 permits the appellate court to clarify the substantive law in a particular area in a way that renders only one outcome supportable "as a matter of law."[176] It allows the appellate court to define a party's burden of *production* with respect to a particular issue.[177] It also lets appellate courts articulate what aspects of a trial record render a particular verdict either reasonable or unreasonable. In all these ways, deferential review of a jury's verdict still empowers appellate courts to clarify the law and any factors relevant to the law's application.[178]

As an institutional matter, requiring appellate courts to follow Rule 50's deferential standard may even enhance their law-clarification function. Deferential review creates a tangible incentive for appellate courts to clarify the law in ways that will help future courts. Rather than bestow the power of de novo review based simply on an ex ante *prediction* that resolving a particular issue would entail "legal . . . work" or "developing auxiliary legal principles,"[179] Rule 50 requires the appellate court to earn its ability to second-guess the jury by *doing* that legal work. As discussed above, the appellate court could explain why particular aspects of a given record require a particular result or develop generalizable principles that compel a particular result when certain conditions are present.[180] A de novo standard, by contrast, would give appellate courts a blank check to second-guess jury verdicts regardless of whether they do so in a way that clarifies the law.[181]

Ultimately, then, the policy question is not whether an appellate court reviewing a jury verdict *may* clarify the law when applying Rule 50's

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174. FED. R. CIV. P. 50(a)(1).

175. *See supra* notes 160–165 and accompanying text.

176. *See supra* note 153.

177. *See supra* notes 130–135 and accompanying text (describing the distinction between the burden of production and the burden of persuasion).

178. For an example that is particularly instructive regarding copyright fair use, the issue at stake in the Oracle-Google litigation, see *Balsley v. LFP, Inc.*, 691 F.3d 747, 757–61 (6th Cir. 2012) (providing a detailed examination of the substantive fair use factors when applying Rule 50's deferential standard).

179. *Oracle*, 886 F.3d at 1192 (quoting *U.S. Bank*, 138 S. Ct. at 967).

180. This discussion does not include the myriad ways appellate courts can provide legal clarification in decisions that do *not* lead to rendering judgment as a matter of law, but rather require a remand for a new trial or other proceedings in the trial court. *See supra* note 76 and accompanying text (describing an appellate court's authority to order a new trial).

181. *See supra* notes 166–168 and accompanying text.

deferential standard; it surely can. The question is instead whether the appellate court should be able to displace the jury's verdict regardless of whether it provides the sort of guidance that would justify the conclusion that no "reasonable jury" could have reached that particular conclusion. Properly understood, deferential review not only *permits* meaningful clarification, but also provides an even stronger incentive for appellate courts to provide such clarification.

IV. UNRESOLVED QUESTIONS

This Part examines two unresolved issues regarding the relationship between appellate courts and civil jury verdicts. First, what standard of review should an appellate court apply to the *trial court's* ruling on a Rule 50 motion? Second, what is the proper scope and justification of Supreme Court decisions requiring independent appellate review in some constitutional cases, specifically in the First Amendment area? To be clear, uncertainty in these areas does not undermine the general rule that Rule 50 requires deferential review of jury verdicts as to the jury's ultimate answer to a mixed question of law and fact.[182]

A. Appellate Deference to the Trial Court's Rule 50 Ruling?

An appellate court's review of a jury's verdict is, in actuality, a review of the trial court's ruling on the verdict-loser's Rule 50 motion.[183] But that prompts the question of whether the appellate court owes any deference to the trial court's application of the Rule 50 standard in light of the Supreme Court's general framework for selecting the standard of appellate review for trial court rulings. The prevailing view in the federal courts of appeals is that an appellate court should review the trial judge's Rule 50 decision de novo.[184] The Supreme Court has never explicitly decided this issue, however.

As described in Part I, the Supreme Court's case law on selecting the standard of appellate review of trial court rulings for particular issues has looked to whether a decision on that issue "entails primarily legal or

182. *See supra* Part II.C.

183. *See supra* notes 65–66 and accompanying text.

184. *See* 9B WRIGHT & MILLER, *supra* note 60, § 2536 & nn.17–19 (calling this "a question of law" for which "litigants are entitled to full review by the appellate court without special deference to the views of the trial court" and noting "a massive amount of case authority . . . that the court of appeals reviews the trial court's ruling on a Rule 50 motion for judgment as a matter of law de novo"); *see also id.* § 2540 & nn.11–12 ("As the issue is one of law, the appellate court's review is plenary."); EDWARDS & ELLIOTT, *supra* note 29, at 62 ("Appellate courts review properly preserved sufficiency challenges *de novo*, applying the same standard as a trial judge resolving motions for judgments as a matter of law in the first instance.").

factual work."[185] The Court has stated that a de novo standard should govern issues that "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," while a deferential standard should apply to issues that will "immerse courts in case-specific factual issues" involving "multifarious, fleeting, special, narrow facts that utterly resist generalization."[186] Speaking more generally, the Court has looked to whether a trial court or an appellate court is "better suited" to decide the issue.[187] When the trial court is institutionally "better positioned" than the appellate court, deferential review—such as an abuse-of-discretion or a clear-error standard—should be used.[188]

Applying this framework to appellate review of trial court Rule 50 rulings, a number of factors favor the conclusion that a trial court is better positioned than the appellate court to decide whether "a reasonable jury would not have a legally sufficient evidentiary basis" for a particular verdict.[189] The trial judge—who presided over the trial and had a first-hand view of the evidence presented[190]—would seem particularly well-positioned to evaluate whether that evidence would permit a "reasonable jury" to reach a particular verdict. Indeed, the Supreme Court has emphasized "the value of the district court's input" with respect to Rule 50 motions,[191] urging "the courts of appeals to be 'constantly alert to the trial judge's first-hand knowledge of witnesses, testimony, and issues,'"[192] and noting the trial judge's "feel of the case which no appellate printed transcript can impart."[193] Such characteristics might support deferential review of the trial court's Rule 50 ruling on the theory that the trial court is "better suited" than the appellate court to apply the Rule 50 standard to the full trial record.[194]

On the other hand, there are arguments supporting the prevailing view that de novo appellate review of a trial court's Rule 50 ruling is proper under the Supreme Court's standard-of-review selection framework. The outer boundary of what a "reasonable jury" might permissibly find can be

185. *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018).

186. *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552, 561–62 (1988)).

187. *Id.* at 966.

188. *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1166–67 (2017).

189. FED. R. CIV. P. 50(a)(1).

190. *See, e.g.*, *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) ("[T]he various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record." (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985))).

191. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 401 n.3 (2006).

192. *Id.* (quoting *Weisgram v. Marley Co.*, 528 U.S. 440, 443 (2000)).

193. *Id.* at 401 (quoting *Cone v. W. Va. Pulp & Paper Co.*, 330 U.S. 212, 216 (1947)).

194. *See supra* notes 39–42 and accompanying text.

sensibly thought of as "legal work" that justifies de novo review.[195] Indeed, Rule 50's complete *deference* to a jury's assessment of credibility and evidentiary weight effectively takes those issues off the table,[196] blunting what otherwise might be an advantage for the judge who presided over the evidence at trial.[197] Furthermore, Supreme Court decisions since *Neely* have indicated that an appellate court may reverse the "erroneous[]" denial of a Rule 50 motion.[198] Reviewing for *error*—rather than for *clear* error or abuse of discretion—is typically the language of de novo review.[199]

Even if one rejects the argument that appellate courts should—as a general matter—apply a deferential standard of review to trial court Rule 50 rulings, there is an overlooked but quite straightforward argument that the Seventh Amendment requires deferential appellate review in cases where a trial court *denies* the losing party's Rule 50 motion and enters judgment based on the jury's verdict. In *Gasperini v. Center for Humanities, Inc.*,[200] the Supreme Court observed that the Seventh Amendment controls not only "the allocation of trial functions between judge and jury," but also "the allocation of authority to review verdicts" between trial courts and appellate courts.[201] *Gasperini* addressed the standard of appellate review for a trial court's refusal to grant a new trial based on a purportedly excessive verdict, concluding that an appellate court must apply a deferential abuse-of-discretion standard.[202] Justice Ginsburg's majority opinion contrasted the power of *trial courts* to grant a new trial based on an excessive verdict, which the Seventh Amendment clearly permitted under the "historic understanding,"[203] with *appellate* review of a trial court's *denial* of such a motion for a new trial, which was "a relatively late, and less secure, development" that "was once deemed

195. *See supra* notes 40–41 and accompanying text (describing the inquiry into whether deciding a particular issue "entails primarily legal or factual work" (quoting *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018))).

196. *See supra* notes 61–63 and accompanying text.

197. *Cooper v. Harris*, 137 S. Ct. 1455, 1474 (2017) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)).

198. *E.g.*, *Weisgram v. Marley Co.*, 528 U.S. 440, 449 (2000) ("[I]f a motion for judgment as a matter of law is *erroneously* denied by the district court, the appellate court does have the power to order the entry of judgment for the moving party." (emphasis added)); *see also Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 326 (1967) (noting an appellate court's authority to enter judgment if the party's trial-level motion "had been *wrongly* denied by the District Court" (emphasis added)).

199. *See, e.g.*, *Wellpoint, Inc. v. Comm'r*, 599 F.3d 641, 645 (7th Cir. 2010) (noting the difference between "clear error" and "mere error").

200. 518 U.S. 415 (1996).

201. *Id.* at 432.

202. *Id.* at 422, 432–38.

203. *Id.* at 432–33.

inconsonant with the Seventh Amendment's Reexamination Clause."[204] Justice Ginsburg ultimately found that "appellate review for abuse of discretion is reconcilable with the Seventh Amendment" but indicated that de novo appellate review would not be.[205]

A similar concern could be raised for de novo appellate review of a trial court's denial of a Rule 50 motion. Given the eighteenth-century time horizon of the Seventh Amendment's historical inquiry,[206] one might argue that *Neely*'s 1967 endorsement of an *appellate court's* authority to direct judgment contrary to a jury's verdict[207] was the sort of "relatively late, and less secure, development" that counsels in favor of deferential review.[208] The upshot would be a sort of "double deference"[209]: the appellate court not only must examine the jury's verdict under the deferential Rule 50 standard, it also must give deference to the trial court's application of that standard in denying the losing party's Rule 50 motion.

One might critique deferential appellate review of trial court Rule 50 rulings by invoking the law-clarification concerns discussed earlier.[210] But those arguments are similarly unavailing in this context. Deferential review of a trial court's Rule 50 decision would still provide appellate courts ample opportunity to clarify the law in a given area. Even when applying a deferential standard, appellate courts may correct any errors of substantive law that the trial court commits in its Rule 50 ruling.[211] Deferential review also permits an appellate court to reverse a trial court's Rule 50 ruling that is tainted by faulty reasoning, such as considering improper factors or ignoring important ones.[212]

For these reasons, the accepted view that appellate courts should review a trial court's ruling on a Rule 50 motion de novo merits further

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204. *Id.* at 434.

205. *Id.* at 435.

206. *See supra* notes 48–49 and accompanying text.

207. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 321–22 (1967).

208. *Gasperini*, 518 U.S. at 434.

209. *Cf. McLane Co. v. EEOC*, 137 S. Ct. 1159, 1169 (2017) (considering but rejecting an argument that deferential appellate review of a district court's decision to enforce an EEOC subpoena would "set up [a] scheme of double deference").

210. *See supra* Part III (considering but rejecting the argument that de novo review of civil jury verdicts is desirable on law-clarification grounds).

211. *See supra* note 162 and accompanying text.

212. *See, e.g.*, *Horne v. Flores*, 557 U.S. 433, 455–56 (2009) (finding that shortcomings in the district court's analysis in refusing to modify an injunction under FED. R. CIV. P. 60(b)(5) constituted an abuse of discretion); *Koon v. United States*, 518 U.S. 81, 111 (1996) (finding an abuse of discretion because the district court based its decision to depart from the Sentencing Guidelines on an improper consideration); *United States v. Taylor*, 487 U.S. 326, 344 (1988) (finding an abuse of discretion because the district court "failed to consider all the factors relevant to the choice of a remedy under the [Speedy Trial] Act"); *Gemini Techs., Inc. v. Smith & Wesson Corp.*, 931 F.3d 911, 915 (9th Cir. 2019) ("The district court did not consider Gemtech's public policy argument under factor (2) [of the governing legal framework]. This failure was an abuse of discretion.").

interrogation. Even under that conventional approach, of course, an appellate court's de novo application of the Rule 50 standard still entails considerable deference to the *jury*'*s* verdict.[213] But the Supreme Court has yet to consider strong arguments that—because of either the Seventh Amendment or the trial court's relative institutional advantages—an appellate court should apply a deferential standard of review to a trial judge's Rule 50 ruling.

B. A Special Rule for Constitutional Issues?

Another unresolved issue regarding appellate review of civil jury verdicts concerns certain constitutional issues. In the First Amendment context, the Supreme Court has used language suggesting that de novo appellate review of jury verdicts may be required.[214] But there is some ambiguity surrounding the precise scope and justification for de novo review of such constitutional issues.[215] For the reasons that follow, a proper understanding of the Court's case law does not suggest an open-ended power to disregard Rule 50's reasonable jury standard based on a policy preference for judicial, rather than jury, decisionmaking. Rather, de novo review of a jury's verdict can be justified only when a particular constitutional provision *itself* mandates a certain set of appellate procedures to bolster its substantive constitutional protections.

As an initial matter, it is important to clarify that many of the Supreme Court's decisions endorsing de novo appellate review of constitutional issues do not involve juries. For example, the Court held in *Ornelas v. United States*[216] that an appellate court should review de novo a trial court's ruling on whether an officer had reasonable suspicion or probable cause for purposes of the Fourth Amendment.[217] And, in *Cooper Industries v. Leatherman Tool Group*,[218] it held that an appellate court should review de novo a trial court's ruling on whether a punitive damages award was "grossly excessive" in violation of the Due Process Clause.[219] Such decisions, however, are applications of the framework described above for determining the standard of appellate review for rulings by trial *judges*.[220] They do not address appellate review of jury verdicts.[221]

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213. *See supra* notes 58–63 & 120–138 and accompanying text.

214. *See infra* notes 222–231 and accompanying text.

215. *See, e.g.*, Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 700–01 (2013); Monaghan, *supra* note 28, at 265–67.

216. 517 U.S. 690 (1996).

217. *Id.* at 695–700.

218. 532 U.S. 424 (2001).

219. *Id. at* 431–44.

220. *See supra* Part I.A.

221. The *Cooper Industries* decision did address one aspect of the relationship between judges and juries. It held that the Seventh Amendment permitted de novo appellate

The Supreme Court has, however, endorsed independent appellate review of jury verdicts in some First Amendment cases. In *Bose Corp. v. Consumers Union of United States, Inc.*,[222] the Court emphasized that cases raising First Amendment issues require an appellate court to "'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"[223] Accordingly, a de novo standard of appellate review governs whether the defendant in a defamation action made a false statement with "actual malice," as is constitutionally required to recover damages for defamation.[224] The *Bose* majority explained that "First Amendment questions of 'constitutional fact' compel this Court's de novo review."[225]

Although the *Bose* case itself involved appellate review of a trial *judge*'s actual-malice ruling, the Supreme Court stated that "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge."[226] And four years later, the Supreme Court in *Harte-Hanks Communications, Inc. v. Connaughton*[227] directly applied *Bose* to a jury's actual-malice verdict in a defamation case.[228]

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review of the trial judge's ruling on the constitutionality of a jury's punitive damages award. *Cooper Indus.*, 532 U.S. at 437–38. In *Cooper Industries*, however, the jury was not asked to apply the constitutional due process standard that governs punitive damages awards, nor did it render any verdict on that constitutional issue. The Court held only that the trial *judge*'s ruling on constitutionality should be reviewed de novo on appeal. *Id.* at 436 ("[C]ourts of appeals should apply a *de novo* standard of review when passing on *district courts'* determinations of the constitutionality of punitive damages awards." (emphasis added)). There is typically a right to a jury trial regarding the amount of a punitive damages award, e.g., *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1202–06 (10th Cir. 2012) and *Def. Indus., Inc. v. Nw. Mut. Life Ins. Co.*, 938 F.2d 502, 507 (4th Cir. 1991), but the trial judge decides whether a punitive damages award in a particular case is "grossly excessive" in violation of the Due Process Clause, e.g., *Payne v. Jones*, 711 F.3d 85, 97 (2d Cir. 2013). Accordingly, it is not surprising that only the trial judge—not the jury—would issue a decision regarding the constitutionality of a punitive damages award. *See also supra* note 54 and accompanying text (noting that a single case might contain some issues for which there is a right to a jury trial and other issues for which there is not). The Court's reasoning in *Cooper Industries*, therefore, does not support de novo appellate review of an issue for which the jury *has* rendered a verdict.

222. 466 U.S. 485 (1984).

223. *Id. at* 499 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)).

224. *Id.* at 502.

225. *Id.* at 508 n.27.

226. *Id.* at 501.

227. 491 U.S. 657 (1989).

228. *Id.* at 659 ("We granted certiorari to consider whether the Court of Appeals' analysis was consistent with our holding in *Bose*."); *see also id.* at 668 ("The question whether the Court of Appeals gave undue weight to the jury's findings—whether it failed

For a number of reasons, however, such decisions do not indicate broad appellate authority to disregard the deferential standard of review set forth in Rule 50. First, the Court's most detailed example of "independent review" of a federal jury verdict in the First Amendment context—*Harte-Hanks*—repeatedly framed its analysis in terms of whether the evidence was "sufficient" to support an "inference" of actual malice by the speaker.[229] But independent review for sufficiency of evidence is not de novo review of the jury's verdict; it is simply de novo application of the Rule 50 standard along the lines of the prevailing approach to appellate review of a trial court's Rule 50 ruling.[230] Scholars have debated whether that is the proper understanding of the Supreme Court's approach in defamation cases,[231] but the Court has yet to address this question directly.

Assuming that some First Amendment issues do require truly de novo appellate review of jury verdicts, the Supreme Court's language indicates that the duty of independent appellate review stems from the First Amendment itself.[232] If so, it sheds no light on the ordinary application of Rule 50 by appellate courts; de novo review in the First Amendment context is simply a constitutionally-dictated standard of appellate review that displaces the system set up by the Federal Rules. This may explain

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to conduct the kind of independent review mandated by our opinion in *Bose*—requires more careful consideration.").

229. *See id.* at 681–82 ("The jury's verdict . . . derived additional support from several critical pieces of information that strongly support the *inference* that the [defendant] acted with actual malice . . . ." (emphasis added)); *id.* at 685–86 (stating that "whether the evidence in the record in a defamation case is *sufficient* to support a finding of actual malice is a question of law" and that this "rule is premised on the recognition that [j]udges, as expositors of the Constitution, have a duty to independently decide whether the evidence in the record is *sufficient* to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice" (emphasis added) (citation omitted)); *id.* at 693 ("[T]he evidence in the record in this case, when reviewed in its entirety, is 'unmistakably' *sufficient* to support a finding of actual malice." (emphasis added)).

230. *See supra* notes 195–198 and accompanying text.

231. *Compare, e.g.*, Steven Alan Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1256–57 (1996) (criticizing the view that "review may have been merely for evidentiary sufficiency"), *and* Monaghan, *supra* note 28, at 241–42 (criticizing the view that "*Bose* could be understood not as implicating the constitutional fact doctrine at all, but as resting instead on the ground that the quantum of evidence before the district judge was insufficient to permit an inference about the article writer's intent"), *with* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 864–65 (2d ed. 1988) (describing the independent review that is required in the defamation context as inquiring whether "the evidence as it stood on the record would be insufficient as a matter of law to submit the case to a jury").

232. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510 (1984) ("The requirement of independent appellate review reiterated in *New York Times Co. v. Sullivan* is a rule of federal constitutional law."); Monaghan, *supra* note 28, at 229 (observing that *Bose* required independent review "as a matter of federal constitutional law").

why—notwithstanding *Bose*'s potentially more generalizable reference to "questions of constitutional fact"[233]—there is no blanket rule of de novo appellate review for findings that implicate constitutional claims or defenses.[234] This is so even when lower court judges make the initial finding on such constitutional issues.[235]

This understanding is reinforced by the view of some (but not all) federal courts that independent appellate review in the First Amendment context applies asymmetrically. That is, some circuits hold that independent review is required only when the trial judge or jury finds speech to be *unprotected* by the First Amendment, while ordinary principles of deference govern appellate review when the speaker's claim or defense is *successful* at trial.[236] This approach would undermine the notion that federal courts may simply declare certain constitutional issues to be categorically "legal" such that a jury verdict may be reviewed de novo notwithstanding Rule 50. Rather, it suggests that the Constitution itself mandates a certain set of appellate procedures to improve the enforcement of those substantive constitutional protections.

Accordingly, these rare instances where the Supreme Court has suggested de novo appellate review of jury verdicts are best understood as narrow examples of a constitutional provision (the First Amendment) partially overriding a lower-ranked source of law (Rule 50). It is beyond the scope of this Article to catalog which constitutional provisions do or do not compel such a specialized approach to appellate review of civil jury

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233. *Bose*, 466 U.S. at 508 n.27.

234. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 176 & n.13 (1983) (deferring to lower court findings regarding the existence of a "unitary business" in assessing the constitutionality of a state's taxation of an entity's income and recognizing that "[t]his approach is, of course, quite different from the one we follow in certain other constitutional contexts." (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964))).

235. *See, e.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2132 (2020) (plurality opinion) ("We conclude, in light of the record, that the District Court's significant factual findings—both as to burdens and as to benefits—have ample evidentiary support. None is 'clearly erroneous.'"); *id.* at 2141 (Roberts, C.J., concurring) ("In my view, the District Court's work reveals no such clear error, for the reasons the plurality explains. The District Court findings therefore bind us in this case.").

236. *See, e.g.*, *Multimedia Publ'g Co. of S.C., Inc. v. Greenville-Spartanburg Airport Dist.*, 991 F.2d 154, 160 (4th Cir. 1993) ("The *Bose* requirement of independent review doesn't apply to the Commission's claim that it has been wrongly prevented from restricting speech." (citation omitted)). There is currently a circuit split on this issue. *Compare, e.g., id., and Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir. 1988) (stating that the court applies de novo review "[w]hen a district court holds a restriction on speech constitutional" but clear-error review "[w]hen the government challenges the district court's holding that the government has unconstitutionally restricted speech"), *with United States v. Friday*, 525 F.3d 938, 950 (10th Cir. 2008) ("[T]his Circuit has applied *Bose* even when First Amendment claims prevailed below, and thus taken the side of symmetry." (citation omitted)); *see also Don's Porta Signs, Inc. v. City of Clearwater*, 485 U.S. 981, 981 (1988) (White, J., dissenting from denial of certiorari) (noting a circuit split on this issue).

verdicts. But case law suggesting de novo review for certain First Amendment issues does not justify general authority for appellate courts to evade Rule 50's deferential "reasonable jury" standard based solely on an institutional preference for judicial rather than jury decisionmaking.

The proper approach to such constitutional issues would not be directly relevant in the *Google v. Oracle* case now before the Supreme Court.[237] Although some kinds of copyright claims and defenses may have First Amendment implications,[238] those at issue in the Oracle-Google litigation do not.[239] In their Federal Circuit briefing and their initial Supreme Court merits briefs, neither side in the Oracle-Google litigation invoked the First Amendment.[240] Although Oracle's recently submitted Supreme Court supplemental brief alludes for the first time to First Amendment concerns that *might* arise in the fair use context, Oracle notably does not indicate that the Oracle-Google litigation itself implicates any First Amendment rights.[241] If the Supreme Court does treat Google's fair-use defense as triggering the distinct approach it has suggested for some constitutional issues, it would have to resolve the circuit split[242] over whether that approach applies asymmetrically. Because the jury found in *favor* of Google on its fair use defense, deferential review would still be required under such an asymmetric approach.[243]

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237. *See supra* Part II.A (discussing the Oracle-Google litigation).

238. *See, e.g.*, Eugene Volokh & Brett McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431, 2431 (1998) ("Copyright law restricts speech. It restricts what writers may write, what painters may paint, what musicians may compose.").

239. Not all assertions of fair use are grounded in the First Amendment. *See* Mark A. Lemley & Eugene Volokh, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 DUKE L.J. 147, 212 (1998) ("[W]hile the First Amendment imposes certain limits on copyright law . . . [including] *some* aspects of the fair use doctrine—it does *not* constitutionalize every nuance of the Copyright Act." (emphasis added)); Amanda Reid, *Safeguarding Fair Use Through First Amendment's Asymmetric Constitutional Fact Review*, 28 WM. & MARY BILL RTS. J. 23, 25 n.17 (2019) ("Constitutional fact review requires a constitutional question. . . . Fair use must raise a constitutional question to warrant constitutional fact review.").

240. *See, e.g.*, Opening Brief and Addendum for Oracle America, Inc., *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018) (No. 17-1118), 2017 WL 679347; Brief of Defendant-Appellee/Cross-Appellant Google Inc., *Oracle Am., Inc. v. Google LLC*, 886 F.3d 1179 (Fed. Cir. 2018) (No. 17-1118), 2017 WL 2305681.

241. *See* Respondent's Supplemental Brief at 4, *Google LLC v. Oracle Am., Inc.*, 140 S. Ct. 520 (2020) (No. 18-956).

242. *See supra* note 236 and accompanying text.

243. *See* Reid, *supra* note 239, at 44 (arguing for deferential review of determinations that are in favor of fair-use claimants and for "one-way, constitutional fact review of determinations adverse to free-speech-claimants—including determinations adverse to fair-use-claimants").

CONCLUSION

The vexing distinction between law and fact has generated unexplored tensions in the distinct frameworks that govern the allocation of authority among juries, trial courts, and appellate courts. There has been particular dissonance regarding the relationship between appellate courts and civil juries. Some appellate courts have mistakenly concluded that they may disregard a jury's verdict on a particular issue as "advisory only" simply by declaring that the issue is "legal" in nature.[244]

Correctly understood, the Federal Rules of Civil Procedure permit an appellate court to replace the jury's judgment with its own only if no *reasonable* jury could have reached the verdict it did. Rule 50's threshold is not insurmountable, however. An appellate court applying the Rule 50 standard can still clarify the substantive law when reviewing a jury's verdict, and that clarification might compel the conclusion that one side is entitled to judgment as a matter of law. Similarly, an appellate court may specify the quality and quantity of evidence that is required for a party to meet its burden of production. These inquiries permit appellate courts to define what a jury may "reasonabl[y]" conclude—and thereby provide meaningful guidance to future decisionmakers—while still heeding the text and structure of the Federal Rules and respecting the civil jury's role in our federal system.

244. *See supra* Part II.A.