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TAKING JURY VERDICTS SERIOUSLY

Steven Alan Childress*

JURORS may not know it, but they live in a fishbowl. To be sure, they probably *think* they do, in the sense that they notice people watching them in the courtroom. Yet they likely do not perceive how much their decision-making process or product—before, after, and outside of trial—is scrutinized by others, including many people they never meet. Elaborate pre-trial procedures and motions, plus rules of evidence applied *in limine* or during trial, filter this process. Next, mid-trial and post-trial motions for new trial and judgment as a matter of law seek to overturn their decision, actual or potential (depending on important rules of timing).¹ Much of the trial battle is engaged without a jury around, but it is usually *about* the jury anyway.

The Supreme Court of the United States, in two cases last year, focused on one aspect of this filtering and control system in civil cases: *judgment as a matter of law* under Rule 50(a) of Federal Rules of Civil Procedure.² In the first case, *Weisgram v. Marley Co.*,³ the Court warned that the appellate court on review does not consider evidence decidedly *in* the record, which should not be there because it was erroneously admitted in the first place. Many courts, including the U.S. Court of Appeals for the Fifth Circuit, had limited their appellate relief in such situations to ordering a new trial, not directing the entry of judgment—or even had reviewed the record intact, including the stray evidence.⁴ Instead, the *Weisgram* Court reaffirmed appellate authority to direct entry of judgment.

* Professor of Law, Tulane Law School. B.A., University of Alabama; J.D., Harvard Law School; M.A., Ph.D. (Jurisprudence & Social Policy), University of California at Berkeley.

1. See generally *Taylor Publ'g Co. v. Jostens Inc.*, 216 F.3d 465 (5th Cir. 2000) (discussing timing and preservation rules in appeals of motions made during trial); 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* §§ 3.13-3.15 (3d ed. 1999) (discussing trial and post-trial motions for relief from a jury verdict and their intricate requirements of proper timing and preservation of error). Although improper preservation of the sufficiency-of-the-evidence issue may lead to waiver, careful litigants recognize that there is no reason to depend on the kindness of strangers in the appellate court if the sufficiency challenge is properly made and timed below. See *id.*, § 3.16, at 119-23.

2. FED. R. CIV. P. 50(a), as amended in 1991. The rule formerly termed such motions as ones for *directed verdict* or *judgment notwithstanding the verdict*. Now both such motions are properly termed as seeking *judgment as a matter of law* whether brought during trial or after.

3. 528 U.S. 440 (2000).

4. See, e.g., *Dixon v. Int'l Harvester Co.*, 754 F.2d 573, 580 (5th Cir. 1985); *Sumitomo Bank v. Prod. Promotions, Inc.*, 717 F.2d 215, 218 (5th Cir. 1983); *Midcontinent Broad. Co. v. N. Cent. Airlines, Inc.*, 471 F.2d 357, 358 (8th Cir. 1973).

ment as a matter of law, albeit on review that considers the record *minus* the improperly admitted evidence.⁵ The question is whether the remaining and proper evidence suffices to constitute a submissible case.⁶ The opinion resolved a circuit conflict on this unusual situation.⁷

The second case dealt with an even more fundamental issue of jury review: whether appellate review is made on the whole record developed at trial, or is applied only to that part of the record that supports the jury's finding. The case may be known more for its impact on employment discrimination cases, yet it actually carried a far broader message, as Professor Dorsaneo's article thoughtfully observes.⁸ In *Reeves v. Sanderson Plumbing Products, Inc.*,⁹ the Court arguably rejected some circuits' use under Rule 50(a) of a one-side-only perspective while reviewing the sufficiency of the evidence to support a civil jury verdict. I write "arguably" because Professor Dorsaneo disagrees with an interpretation of *Reeves*, by me and some other sources,¹⁰ that concludes that the Court has indeed adopted whole-record review on appeal of civil jury verdicts.

There is no dispute that the *Reeves* Court explicitly reviewed the broad issue of what body of evidence the federal circuit court should use in performing its review function. Earlier Supreme Court precedent, which had seemed to review only the evidence supporting the verdict, was found to create less inconsistency with later whole-record language than one might think: "[o]n closer examination, this conflict seems more semantic than real."¹¹ Citing recent summary judgment cases and its "mir-

5. *Weisgram*, 528 U.S. at 453-56.

6. *Id.* at 457. Nevertheless, there may be situations in which the appellate court still exercises its recognized discretion to remand for a new trial rather than direct entry of judgment. The *Weisgram* rule would seem unfair, for example, where a plaintiff reasonably relied on the admission of evidence in resting its case and it is clear, even on appeal, that bolstering evidence would have been forthcoming at trial. However, reliance alone is not enough to defeat the appellate authority to conclude that the excised record requires judgment as a matter of law. *See id.* at 454-55. In this case, the Eighth Circuit did not abuse its discretion in deciding to direct the entry of judgment rather than remanding for a new trial or further proceedings. *Id.* at 456.

7. *See id.* at 446 & n.2 (describing circuit split and noting Court granted *certiorari* to resolve it).

8. *See generally* William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695 (2001) (discussing vital importance of Reexamination Clause and general issue of jury review, as well as serious recent attention by Court itself).

9. 530 U.S. 133 (2000) (majority opinion of O'Connor, J.). The Court specifically granted *certiorari* to address the circuit split about the proper Rule 50 standard of review to be applied to employment discrimination cases based on "pretext." *Id.* at 140-41. Justice Ginsburg, in her concurring opinion, apparently agreed with the majority's generalized civil review rule (making it unanimous) but clarified her view of the discrimination burden-shifting procedure. *See id.* at 154-55 (Ginsburg, J., concurring).

10. *See* Dorsaneo, *supra* note 8, at 1695 & n.40 (citing academic [mis]readings of *Reeves*).

11. *Reeves*, 530 U.S. at 150. The Court found that *Wilkerson* and like cases—which had said that "in passing upon" the jury issue "we need look only to the evidence and reasonable inferences which tend to support" the verdict—have been clarified to simply "refer[] to the evidence to which the trial court should give credence, not the evidence that the court should review." *Id.* (emphasis in original) (citations to *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949) omitted). While this technical reading of older cases is a stretch—the Court's policy then usually favored a hands-off approach to juries in tort cases—a

rored” status to Rule 50 jury motions, the Court stated: “It therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record.”¹² Obviously, I stop there and conclude that a general whole-record approach, as followed previously in the majority of courts and exemplified in the *Boeing* decision from the Fifth Circuit,¹³ is now settled law on review of jury verdicts just as it is applied in deciding or reviewing a summary judgment motion.¹⁴ Ultimately, the approach was found to apply to employment discrimination cases involving allegations of employer “pretext,” and was improperly applied by the Fifth Circuit in the *Reeves* case itself, requiring reversal on its facts.¹⁵

If the Court had stopped there, we would all agree that the rule of whole-record review is settled, unwavering, and unqualified. I wish that the Court had, and I find its further foray into fact-finding—relied upon heavily by Professor Dorsaneo and discussed further below—to be puzzling and problematic. Indeed, I had already criticized the Court for short-shifting the entire issue and failing to dig into a coherent rationale for the standard it apparently adopted.¹⁶ If it had explained its rationale, I concluded, the Court could have more fully justified its adoption of whole-record review, just as it previously had in the contexts of adminis-

whole-record rule is certainly consistent with recent cases on summary judgment, the amended Rule 50, and language from other Court opinions. Indeed, most courts and commentators had read *Wilkinson* as limited to the FELA or Jones Act context, though apparently this Court wanted to avoid confirming its application in such cases and did not use that distinction. See generally CHILDRESS & DAVIS, *supra* note 1, § 3.07, at 51-52.

12. *Reeves*, 530 U.S. at 150.

13. See *id.* at 149-50 (citing and apparently endorsing *Boeing* for its rule “that review extends to the entire record”). The Fifth Circuit’s flagship whole-record review case is the oft-cited opinion in *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc) (since then, partly overturned on other [application to maritime cases at trial] grounds).

14. See *Reeves*, 530 U.S. at 150 (the whole-record standard for summary judgment “mirrors” that under Rule 50, so “[i]t therefore follows that, in entertaining a motion for judgment as a matter of law, the court should review *all of the evidence* in the record”) (emphasis added). See also Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 699 n.441 (2001) (historical and policy examination of jury decision-making and control devices notes, parenthetically, that *Reeves* is “applying whole-record approach in a federal question case”).

15. *Reeves*, 530 U.S. at 151-54. The larger circuit split was mainly about the application of whole-record review in such discrimination cases, since many courts (including the Fifth Circuit) that use whole-record review had trouble applying it—or found it applied differently—to “pretext” cases in light of *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502 (1993). After setting out its Rule 50 review rule, the *Reeves* Court found that the Fifth Circuit misapplied it to the facts: “Applying this standard here, it is apparent that respondent was not entitled to judgment as a matter of law.” *Reeves*, 530 U.S. at 151. The Fifth Circuit’s decision entering judgment for the employer was reversed.

16. Steven Alan Childress, *Jury Verdicts: The Whole Greater Than Pieces*, 53 SMU L. REV. 1539, 1543 (2000) (arguing that *Reeves* rightly imposed whole-record review but did not offer sufficient explanation). I noted that Professor Dorsaneo had given much more careful attention to the review issue and policies than had the Supreme Court. See *id.* at 1543-44 (citing William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 SMU L. REV. 1497 (2000)). I am even more convinced of that assessment given the ambiguity understandably engendered by Justice O’Connor’s opinion.

trative law, criminal appeals, and civil bench-trial review.¹⁷

But wait. There's more. (Appellate court operators are standing by.) The *Reeves* Court, admittedly, did not stop there. It reiterated that in applying whole-record review, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."¹⁸ Such language by itself is not confusing; indeed, it is standard fare in a variety of Supreme Court and circuit court cases¹⁹ and an important reminder that jury review is severely limited. However, the Court then added that, although the reviewer's eye is on the entire body of evidence,

it must disregard all evidence favorable to the moving party that the jury is not required to believe. . . . That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses."²⁰

Such language, borrowed from the classic Wright and Miller treatise, is thus presented as an application of, not a departure from, the whole-record rule.²¹

Admittedly, such additional language is less than clear when compared to its earlier, more forceful statement of "all of the evidence" review. It allows one to argue, as Professor Dorsaneo does, that it truly qualifies and changes what would otherwise be an unrelenting whole-record rule. Nevertheless, I argue that the Court meant for this language to be, at most, one application of its broader whole-record rule rather than a true limitation on it.

The language is curious on several levels. *First*, it simply may be inconsistent with a firm whole-record rule. Professor Dorsaneo provides a detailed analysis of how such language, essentially, cannot coexist with a true whole-record rule.²² He then takes the language very seriously, as the opinion's "most critical language."²³ Yet even if the language should

17. See Childress, *supra* note 16, at 1543-44. My policy and precedential arguments in favor of a whole-record rule are summarized in the previous Commentary, which particularly explores themes of symmetrical decision-making (the jury viewed the whole record, so should reviewers) and overwhelming evidence (a scintilla of evidence may be unreasonable when swamped by contrary evidence). See *id.* at 1541-42. They are not repeated here. This Commentary instead considers whether the *Reeves* opinion requires the approach suggested by Professor Dorsaneo or, rather, a more universal whole-record rule as I originally claimed.

18. *Reeves*, 530 U.S. at 150.

19. See generally CHILDRESS & DAVIS, *supra* note 1, § 3.02, at 10 (collecting cases).

20. *Id.* at 151 (citing 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2529, at 299, 300 (2d ed. 1995)).

21. See *Reeves*, 530 U.S. at 151 ("although the court should review the record as a whole, it must disregard. . ."). Likewise, its caution to draw inferences in favor of the verdict winner is explicitly an *application* of whole-record review. See *id.* at 150 ("[i]n doing so"—i.e., in "review[ing] all of the evidence"—the "court must draw" inferences favoring the jury's finding and avoid weighing the evidence or assessing credibility).

22. See Dorsaneo, *supra* note 8, at 1702.

23. *Id.*

theoretically work out differently in some cases (and thus the Court should have been more careful and realized it was speaking somewhat in two voices), it is not clear at all that the language is fatally inconsistent in most actual review situations. It could be read (and should be, I add) as a more forceful reminder of the prohibition against revisiting credibility calls; it is then an example of the kind of situation in which applying whole-record review remains highly deferential to the jury's resolution of true factual disputes. The Court may be merely, but not clearly, stating that "contradicted" testimony is by definition a conflict in *credibility* to be resolved for the nonmovant verdict-winner—without meaning to hold that the movant can only win with disinterested witnesses.

One could then say that any inconsistency, not realized by the Court, must be resolved in favor of its clear direction to review "all of the evidence." One could say that it adds unhelpful or unclear dicta, to be totally ignored. But I need not say that. I argue that the quotation from Wright and Miller acts, at most, as a caution for a certain type of case involving special problems of credibility rather than a general modification of the whole-record rule. The usual case, then, should apply whole-record review realistically without qualification or reference to the added language. I thus take the language seriously as far it goes, for the kind of appeal that comes down to credibility calls. It still leaves intact, for me, a generic statement that the Court has adopted whole-record review. This view therefore denies that it is the critical language in this opinion, even if it seems inconsistent in some contexts with the general whole-record mandate.

Second, it is the kind of cautionary language about disinterested witnesses and uncontradicted evidence that is often cited in Second Circuit decisions.²⁴ Such lower court cases, then, could be cast as creating a distinct "middle-ground approach" between whole-record review and one-side-only review.²⁵ But the *Reeves* Court offers such language from the treatise rather than from any of the Second Circuit cases which openly use it to limit review. Justice O'Connor's opinion never mentions that the

24. *E.g.*, *Bigelow v. Agway, Inc.*, 506 F.2d 551, 554 (2d Cir. 1974); *Simblest v. Maynard*, 427 F.2d 1, 5 n.3 (2d Cir. 1970). The First and Third Circuits have also presented such language in their jury review rules. *Layne v. Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981); *Inventive Music, Ltd. v. Cohen*, 617 F.2d 29, 33 (3d Cir. 1980). But for the First Circuit, it may sometimes be a rule that favors the movant rather than a limit on review: the court is warned that it cannot ignore uncontradicted evidence offered by the movant. *See Santiago-Negron v. Castro-Davila*, 865 F.2d 431, 445 (1st Cir. 1989). Even in the Second Circuit, the rule may have evolved into one of whole-record review plus a reminder to look to uncontradicted evidence. *See Nat'l Auto Brokers Corp. v. Gen. Motors Corp.*, 572 F.2d 953, 956 (2d Cir. 1978) (citing *Boeing*). Yet some cases simply recite whole-record review. *See Epoch Prod. Corp. v. Killiam Shows, Inc.*, 522 F.2d 737, 742-43 (2d Cir. 1975) (entire record), *cert. denied*, 424 U.S. 955 (1976).

25. For example, that is how this position was described by Justice White, in cataloging a three-way circuit conflict on this issue and urging the Court to address it. *See Schwimmer v. Sony Corp. of Am.*, 459 U.S. 1007, 1009 (1982) (White, J., dissenting). *See generally* CHILDRESS & DAVIS, *supra* note 1, § 3.03, at 27-28 (collecting cases on circuit conflict and characterization of Second Circuit approach). *Reeves* addressed the issue, finally, but not as a three-way split.

circuit split has traditionally been seen to include any compromise position, notably omitting the Second Circuit's rule.

This is curious if the Court meant to adopt it as a serious compromise approach. The fact that it borrowed from a treatise rather than circuit law implies, to me, that it—most likely—simply failed to recognize the circuit split and the Second Circuit rule (i.e., that it unwittingly used potentially inconsistent language, as argued above). Or, possibly, that it considered the Second Circuit as a separate approach and rejected it. Either way, the whole-record rule goes fundamentally unaltered and at most is garnished by some additional language from academics cautioning care in application—not a blatant adoption of a lower court position that takes the language so seriously as to make it circuit *law*.

This is especially true to the extent that the middle-ground approach is seen as only an *academic* debate, rather than a circuit option from which to choose. To the extent the Court cites scholars and ignores cases for much the same point, it may be signaling its recognition that the language warns against weighing evidence but does not state a distinct review analysis. This view is bolstered by noting that Wright and Miller themselves, in other places, do not consistently present their qualifying language of “uncontradicted evidence” as denying a general whole-record rule.²⁶ It could be said, then, that the Court's cited source itself does not own up to the potential inconsistency between its suggested language and the more general rejection of *any evidence* standard to test a jury's finding. It is hardly a bedrock of academic support for the one selected position on which the Court quotes it.

Third, it is curious that the Court reduces to a mere “semantic” ploy a review rule that is applied in many older cases falling under the protective statutory schemes of the FELA or Jones Act.²⁷ Rather than simply distinguishing the one-side-only precedent as limited to such statutory review, the Court appears to make a universal whole-record rule. If so, it may fundamentally change the way such statutory cases are reviewed in the future; their jurisprudential basis for stricter review may now reduce to a semantic misunderstanding and be cast as consistent with whole-record, not extremely deferential, review.

Although Professor Dorsaneo sees this distinction as causing some of the misreadings of *Reeves* he finds,²⁸ I read it as expressing or foreshadowing the Court's new skepticism of that line of precedent, with its case-

26. Compare CHARLES A. WRIGHT, THE LAW OF FEDERAL COURTS § 95, at 685-86 (5th ed. 1994) (apparently endorses using the FELA test generally and cites cases so using it), with 9A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 252-54, 266 (2d ed. 1995) (rule requiring affirmance if *any evidence* supports the verdict is not, and should not be, followed), and § 2529, at 299-300 (reciting and recommending “uncontradicted” qualification from *Simblest* and other Second Circuit cases).

27. See *Reeves*, 530 U.S. at 150 (“On closer examination, this conflict seems more semantic than real.”), discussed *supra* note 11.

28. See Dorsaneo, *supra* note 8, at 1703 (noting confusion stems from the “semantic” point).

law tradition of “slight negligence.”²⁹ Certainly lower courts and state cases are beginning to re-think and reject the lower “slight negligence” burden, placed on statutorily covered tort victims, which seemed to apply from the older Supreme Court cases.³⁰ Indeed, *Reeves* may be the signal that the Supreme Court itself (understandably of concern, perhaps, to Professor Dorsaneo) will revisit and ultimately reject the Jones Act and FELA tradition of difference. At the least, the Court’s wavering on the strength of traditional FELA-type review may mean that there is an open question whether one-side-only review survives in such contexts.³¹ Perhaps the Justices just want to avoid the issue, as it percolates in lower courts, for now. Nevertheless, it is a doubtful indication that any form of one-side-only review is to be borrowed *from* those schemes *into* the general civil jury review.

Fourth, the Court’s added language is curious in that it is apparently unnecessary to its ultimate reversal of the Fifth Circuit’s decision.³² The actual application of this review performed on the facts in *Reeves* belies a general rule that the appellate review can only consider those pieces of the evidence which support the verdict or, if otherwise, are uncontroverted. Instead, the Court appears to sift through “all of the evidence” in the record, or at least both sides of it, as foreshadowed in its summary of the standard. At bottom, the qualifying language—if not simply dicta—does not seem “critical” in its application to the actual case under review.

Fifth, to the extent that the Court’s added language relates to this employment case’s facts at all, it harkens back to the opinion’s introductory discussion about inferring a fact from a disbelief in the witness presenting it—a quite different issue from whole-record review. Without reconciling or discussing its apparent contrary position in other cases,³³ Justice

29. See generally CHILDRESS & DAVIS, *supra* note 1, § 3.07, at 52-55 (examining Jones Act/FELA tradition of affirming plaintiff verdicts on “slight negligence” as well as recent developments in lower courts reexamining that test).

30. See, e.g., *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (en banc) and *Vendetto v. Sonat Offshore Drilling Co.*, 725 So. 2d 474 (La. 1999), cert. denied, 527 U.S. 1023 (1999) (both rejecting slight negligence).

31. The Court may have (unwittingly, perhaps) called into question this strict review application in such federal protection cases. The Court discusses *Wilkerson v. McCarthy* and like one-side-only cases without noting or distinguishing (and thus retaining) their special status as falling under the FELA or Jones Act. See *Reeves*, 530 U.S. at 150. It can be argued that the easier rationale for *Reeves* would have been simply to distinguish (as many courts and commentators do) the older strict cases as limited to their statutory context. In so doing, the Court would have reaffirmed the strict standard in such cases. By not doing so, the Court leaves open the argument that the distinction no longer holds and that *Wilkerson* must be read more into line with modern whole-record review in non-statutory contexts (generating one general federal standard).

32. See, e.g., *Reeves*, 530 U.S. at 151-54 (applying standard of review to facts of case and finding that the Fifth Circuit erred in ignoring disputed evidence). Specifically, the lower court “disregarded critical evidence favorable to” the nonmovant, rather than any assessment of the *movant’s* disinterested witnesses or uncontradicted testimony. See *id.* at 152.

33. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986) (stating in jury [summary judgment] context that one generally cannot draw a contrary conclusion merely from discredited testimony); *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 512 (1984) (stating same, in context of bench trial review of factfindings).

O'Connor stated, on jury review:

In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the [firing] explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the fact finder is entitled to consider a party's dishonesty about a material fact as "affirmative evidence of guilt."³⁴

On the facts of the case, such an inference helped the Court to conclude that the plaintiff had record evidence, including the reality itself that the defendant's offered explanation was pretextual, to support a verdict finding discrimination.³⁵ At any rate, the additional review language may fit more naturally into the difficult area of what *kind* of inference a fact finder may affirmatively make from the disbelief of a witness, rather than as some general restriction on the *amount* and *body* of evidence within the review scope.

Sixth, an interpretation of *Reeves* that overvalues its add-on language would underplay the reality that the recent Supreme Court has a reputation for cutting back the jury trial right and for increasingly empowering the appellate review of juries, as Professor Dorsaneo apparently recognizes and understandably laments.³⁶ In his cited area of summary judgment, for example, there is no doubt that the Court in 1986 sent a powerful message of structural change away from jury decision-making and toward pre-trial dispute resolution by federal district judges.³⁷ This trend may not constitute a virulent disdain for the civil jury, but it is an unlikely foundation on which to believe that the *Reeves* Court meant to re-empower the jury through some version of one-side-only deference. Even less likely does it, in turn, alter the summary judgment standard away from the whole-record rule undeniably established in that context

34. *Reeves*, 530 U.S. at 147 (quoting the habeas case of *Wright v. West*, 505 U.S. 277, 296 (1992)). The Court added that discrimination may then be the most likely inference. *See id.* at 147-148.

35. *Id.* at 153.

36. *See, e.g.*, Dorsaneo, *supra* note 8, at 1697 & n.10 (jury right is recognized as being endangered by some recent developments), 1730 (discussing the *de novo* review recently given a finding on the constitutionality of punitive damages). In many other areas of the modern civil jury—including the expansion of pre-trial practice, the growing requirement of mandatory arbitration in commercial and employment cases, recent limitations on admitting scientific evidence, the definition of what patent issues are "law" not for the jury, and the empowering of appellate discretion as reaffirmed in *Weisgram*—this Court cannot fairly be predicted to *bolster* the protection of jury findings. Indeed, that usurpative trend has probably evolved over a long time span. *See generally* Margaret L. Moses, *What the Jury Must Hear: the Supreme Court's Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183 (2000) (noting some ways in which jury rights have been restricted over time); Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33 (juries have lost power via formal jury control devices). *Cf.* Woolhandler & Collins, *supra* note 14 (examining the judge/jury issue in federal courts and their application when state interests arise, but disputing the usual views of modern judges and scholars that the power of the jury has diminished over an extended time).

37. *See, e.g.*, Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988); Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987).

fifteen years ago.³⁸

Finally, in the “early returns,” the Fifth Circuit apparently read *Reeves* as supporting its traditional whole-record review.³⁹ That Court’s additional language is quoted, but merely as “principles for courts to follow in reviewing all of the evidence in the record.”⁴⁰ This citation does not deny the strength of Professor Dorsaneo’s analysis, of course, because any such case could simply be based on the misreading he perceives and the underappreciation of the qualifying *Reeves* language that he criticizes. Nevertheless, it at least illustrates, along with the more general trend in the Supreme Court away from strict deference to the jury (as on punitive damages), that the reading of *Reeves* he provides is something of an exercise in understandable, but wishful, thinking.

These various curiosities, in total, make it an arguable inference that the Supreme Court meant much of significance by adding a quotation from Wright and Miller that is itself of questionable consistency with the stated whole-record standard, with the case’s facts as resolved, and with perhaps their treatise itself. The Court does take jury verdicts seriously, as it should, and demonstrates that to us by reversing the Fifth Circuit’s intrusive application. Yet perhaps not all of the opinion’s language should be taken so strictly. In sum, Professor Dorsaneo and I differ both in the faith with which we accord the *Reeves* Court’s purpose, as well as in how literally we would read its undeniable but awkward language applying the stated jury test.

The bottom line appears, to me, to be a review for reasonableness of the jury’s decision: one that requires the appellate court to credit the witness and reasonable inferences favoring the verdict but one that is not limited exclusively to reviewing only that evidence—or even only that evidence plus unimpeached contrary evidence. By this view, the “middle-ground” tradition of some courts is rejected, as is the acknowledged one-side-only approach; a general whole-record review is endorsed, despite the puzzling language added. Review does assume the evidence and its inferences in the light most favorable to the jury’s verdict, but that test applies to the record viewed in its entirety.

38. See *Reeves*, 530 U.S. at 150 (drawing on “the analogous context of summary judgment,” where review is “taken as a whole”). This application of the “mirror” of summary judgment makes it unlikely, to me, that the Court will then use *Reeves* to revisit the hard-fought terrain of summary judgment law.

39. *Smith v. Louisville Ladder Co.*, 237 F.3d 515, 527 & n.5 (5th Cir. 2001) (*Reeves* “conclude[s],” in a standard that “closely resembles” that of *Boeing*, that “the court should review all of the evidence in the record”).

40. *Id.* at 527.

