Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery

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Recommended Citation
Steven Alan Childress, Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery, 47 SMU L. Rev. 271 (1994)
https://scholar.smu.edu/smulr/vol47/iss2/4

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JUDICIAL REVIEW AND DIVERSITY JURISDICTION: SOLVING AN IRREPRESSIBLE ERIE MYSTERY?

Steven Alan Childress*

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I. INTRODUCTION

FROM Elvis’ army days until the Beatles’ invasion of America — from Ike to LBJ — the United States Supreme Court appeared concerned with, but baffled by, one recurring issue of federal/state choice-of-law. While the Warren Court was revolutionizing the federal/state balance in the area of civil rights, it also showed interest in the apparently more mundane question of whether state law provides the standard for federal trial and appellate courts to review a jury verdict in an action based on diversity jurisdiction.

It was a classic problem of choice-of-law under Erie Railroad Co. v. Tompkins.1 The circuits were split on the issue, some applying a federal standard of review, others looking to the state jury review test in those cases in which state law provided the rule of decision.2 In response, during the 1958-1964 period the Supreme Court at least twice faced the issue3 (once after granting certiorari on it),4 but could never seem to answer it — or even deal with it. Instead, the Court repeatedly found other grounds by which to resolve the case before it, while still leaving open the jury review issue5 or otherwise passing up the chance to resolve it,6 leaving lower courts in disarray.7

The Court played this game of chicken while it had no apparent trouble reaching decision after decision in the more blatantly controversial areas of political, civil, and personal rights.8 It was the most dramatic of times, it

1. 304 U.S. 64 (1938) (denying general federal common law, requiring application of state law in diversity cases, but apparently allowing federal courts to determine and apply their own procedures).
3. Mercer v. Theriot, 377 U.S. 152, 155-56 (1964) (per curiam) (issue fully briefed and argued); Dick, 359 U.S. at 444-45 (noting that an “important question” is “lurking” of “whether it is proper to apply a state or federal test of sufficiency of evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship”).
4. See Mercer, 377 U.S. at 156 (Harlan, J., dissenting).
5. Id. (majority opinion) (“The evidence was sufficient under any standard which might be appropriate — state or federal.”); Dick, 359 U.S. at 445 (“But the question is not properly here for decision because, in the briefs and arguments in this Court, both parties assumed that the North Dakota standard applied.”).
was the most mundane of times — yet the Court seemed to more easily resolve the day's hot issues.

To be sure, in 1965 the Court did provide general *Erie* guidance in *Hanna v. Plumer*. That decision, and especially its language, could be seen as an inspiration for lower courts to address anew the circuit conflict on the particular standard of review issue which the Supreme Court had avoided. Today, nearly thirty years later, *Hanna* is still seen as an important contribution to the development of *Erie* doctrine. Yet the Court did not purport to resolve the baffling jury review issue, and since then has not expressly returned to this particular *Erie* question of review over jury verdicts in diversity cases.

After *Hanna*, many lower courts indeed revisited the issue. For example, the Sixth Circuit's call to arms, or at least a call to question, was clear and swift. In 1968, the court said that "recent developments would make a review of our position appropriate." In fact, twice in the past quarter century the Sixth Circuit has openly called into question its use of state standards to review jury verdicts in diversity actions. This has prompted several bouts of scholarly speculation over a perceived imminent change in the circuit's application of state law in such cases.

Yet despite the court's public hand-wringing, the commentators' predictions of change, and a growing majority of other circuits that found federal standards to be applicable, the Sixth Circuit in fact refused to abandon its state-standard rule. Today the rule survives intact, a testament to a failed prediction. Likewise, other circuits which, after *Hanna*, acknowledged the continued vitality of the state-standard rule "is open to question"; *Lones*, 398 F.2d at 919 (6th Cir. 1968) (noting open issue after *Hanna*), cert. denied, 393 U.S. 1063 (1969); *Planters Mfg. Co. v. Protection Mut. Ins. Co.*, 380 F.2d 869, 870-71 (5th Cir.) (examining issue and circuit split after then-recent Supreme Court cases), cert. denied, 389 U.S. 930 (1967).


9. 380 U.S. 460 (1965) (applying federal rule allowing substituted service of process despite conflicting state rule). Of course, *Hanna* — authored by the Chief Justice himself — can be seen as broadening federal rulemaking power in a variety of ways consistent with the federal-expansive Warren Court agenda in other areas of the law.


12. *Lones*, 398 F.2d at 919 (citing *Hanna*).

13. *Gold*, 641 F.2d at 434 n.3 (the "continued vitality" of the state-standard rule "is open to question"); *Lones*, 398 F.2d at 919 (stating that *Hanna* places state-standard rule in doubt).

14. See, e.g., infra notes 237, 259, and 297, noting sources which underdate the conflicting case law on this issue. Some sources treat the issue as fully resolved, despite the conflicting case law. See, e.g., Michael E. Tigar, *Federal Appeals: Jurisdiction and Practice* § 5.03, at 133 (1987).

15. See infra text accompanying notes 184-93.

16. *Gold*, 641 F.2d at 434 n.3; *Lones*, 398 F.2d at 919.

17. See infra note 230.
edged the circuit split on this issue have either held to their guns, applying a state standard of review despite Hanna's leanings, or refused to decide the issue at all, preferring to moot the dilemma in case after case by applying both a federal and state standard to review the verdict at hand. In still other courts, the issue is unsettled in light of an apparent split even within the circuit as to the appropriate review.

The disarray continues, with few opinions providing any more analysis than a citation to an older case which in turn has not fully considered the problem. The state-standard rule is like the weather: everyone talks about it but no one does anything about it. The impact, like the weather, is fickle: the courts' choice of review rules, though making incremental or no difference where state law is similar, can significantly affect the review process in particular cases.

Federal courts today are faced with even more reasons to adopt a uniform federal standard in all challenges to a civil jury verdict. This article analyzes this long-questioned but still-surviving diversity dilemma. Unlike the weather, something can be done: the issue should be properly predicted and finally resolved. The mystery is solved when interpreted from the clouds of recent Supreme Court decisions on other issues, as well as the 1991 amendment to Rule 50 of the Federal Rules of Civil Procedure. Both developments subtly support the application of federal law.

Moreover, when considered in the theoretical light of the allocation of decisionmaking power between the judge and the jury in the federal system,
such a uniform federal rule finds ample support in the historic policies and modern theories behind Erie's allocation of decisionmaking power between state and federal bodies.\textsuperscript{25} At the intersection of both such institutional allocations of judicial authority, the Erie jury review issue requires a uniform rule in at least two senses: uniform among and within the reviewing courts, and uniform as to other standards of review which raise similar issues of state/federal assignment of power.\textsuperscript{26} This dual allocation is further supported by the proper allocation of decisionmaking authority between trial and appellate courts,\textsuperscript{27} in effect forming $x, y, z$ axes whose three-dimensional point of intersection justifies the final adoption of a federal jury review process.

This article first discusses the various procedural contexts in which judicial review issues may arise within diversity and other state-law actions, including review over dismissals, jury instructions, summary judgments, non-jury trials, new trial motions, and damages (part II). After demonstrating that nearly all courts in nearly all such contexts correctly apply a federal rule of review (and further criticizing the notable but aberrant exceptions), the article then examines the more problematic context of review over civil juries for sufficiency of the evidence (part III). The article analyzes this issue in light of recent cases and rules, as well as a more theoretically satisfying allocation of decisionmaking authority at the intersection of three dichotomies (part IV): judge and jury, trial and appeal, and state and federal courts.

II. JUDICIAL REVIEW OVER CIVIL LITIGATION DECISIONS

A. LITIGATION CONTEXTS, SANCTIONS, DISMISSALS, AND JURY INSTRUCTIONS

Many standards of review over litigation decisions are routinely and uncontroversially provided by federal law, not state rules.\textsuperscript{28} For example, the Supreme Court has applied, in a recent diversity case in which the state rule differed, its federally-developed rule to review the propriety and amount of sanctions under the "inherent power" doctrine.\textsuperscript{29} Similarly, the Court has held that an Alabama statute that imposed an additional 10% damages on a monetary judgment if an appeal is affirmed does not displace Rule 38 of the

\textsuperscript{25} See infra text accompanying notes 385-95 and 430-32.

\textsuperscript{26} See infra text accompanying notes 410-29.

\textsuperscript{27} See infra text accompanying notes 433-37.

\textsuperscript{28} For a helpful survey of other federal rules, and their applicability in diversity cases, see Darrell N. Braman & Mark D. Neumann, The Still Unrepressed Myth of Erie, 18 U. BALT. L. REV. 403, 414-67 (1989). The present article considers judicial review issues which may or may not involve the application at trial of a particular federal rule, and therefore there is little overlap with such general surveys.

\textsuperscript{29} Chambers v. NASCO, Inc., 111 S. Ct. 2123, 2136-38 (1991) (upholding award of $996,644 in a Louisiana case, and specifically finding federal power controls; review is for abuse). By contrast, Louisiana law allows fee shifting only by contract or statute, with no general exception for bad faith practice. See Quealy v. Paine, Webber, Jackson, & Curtis, Inc., 475 So. 2d 756 (La. 1985).
Federal Rules of Appellate Procedure in a diversity case.\textsuperscript{30} Review of sanctions, then, is uniformly a federal matter.\textsuperscript{31}

In testing the propriety of a dismissal for failure to state a claim on which relief may be granted, it is clear that all federal courts apply Rule 12(b)(6) of the Federal Rules of Civil Procedure, as well as its federal procedures and review rules,\textsuperscript{32} including the established \textit{de novo} appellate review the trial court's disposition is given.\textsuperscript{33} In all such cases, the uniform federal procedure requires that the district court considering a motion under Rule 12(b)(6) should not grant it unless it appears to a certainty that the plaintiff would not be entitled to recover under any state of facts which could be proved in support of his claim.\textsuperscript{34} The appellate court reviews under the same federal standard.\textsuperscript{35}

Likewise, federal law governs the dismissal for other defects under Rule 12,\textsuperscript{36} the related pleading requirements of Rule 8,\textsuperscript{37} and the review given to


\textsuperscript{31} See, \textit{e.g.}, Mellon Bank Corp. v. First Union Real Estate \& Mortgage Inv., 951 F.2d 1399 (3d Cir. 1991) (diversity case applying and reviewing under federal Rule 11); Automatic Liquid Packaging, Inc. v. Dominik, 909 F.2d 1001 (7th Cir. 1990) (same); Chapman & Cole v. Itel Container Int'l, 865 F.2d 676 (5th Cir.) (same), \textit{cert. denied}, 493 U.S. 872 (1989); \textit{In re} Yagman, 796 F.2d 1165 (9th Cir. 1986) (same), \textit{cert. denied}, 484 U.S. 963 (1987).

\textsuperscript{32} See, \textit{e.g.}, \textit{Mellon Bank Corp. v. First Union Real Estate \& Mortgage Inv.,} 951 F.2d 1399 (3d Cir. 1991) (diversity case applying and reviewing under federal Rule 11); \textit{Automatic Liquid Packaging, Inc. v. Dominik,} 909 F.2d 1001 (7th Cir. 1990) (same); Chapman & Cole v. Itel Container Int'l, 865 F.2d 676 (5th Cir.) (same), cert. denied, 493 U.S. 872 (1989); \textit{In re} Yagman, 796 F.2d 1165 (9th Cir. 1986) (same), cert. denied, 484 U.S. 963 (1987).

\textsuperscript{33} See \textit{Chambers,} 111 S. Ct. at 2136-38 (distinguishing fee shifting on merits); \textit{LaRoche Indus., Inc. v. AIG Risk Mgmt., Inc.,} 959 F.2d 189, 193 (11th Cir. 1992) (applying Georgia law on fees and costs; using Georgia review test even on j.n.o.v.); \textit{Cates v. Sears, Roebuck \& Co.,} 928 F.2d 679, 687-90 (5th Cir. 1991) (discussing \textit{Erie} issue on attorney and witness fees; state law controls yet review is for abuse).

\textsuperscript{34} See, \textit{e.g.}, Hospital Bldg. Co. v. Trustees of Rex Hosp., 425 U.S. 738, 742 (1976) (holding federal rule, not state practice, applies); see, \textit{e.g.}, \textit{Boone v. Carlsbad Bancorporation, Inc.,} 972 F.2d 1545, 1551 (10th Cir. 1992) (diversity case applying Rule 12(b)(6) without discussion); \textit{Citibank, N.A. v. K.H. Corp.,} 968 F.2d 1489, 1490 (2d Cir. 1992) (same).

\textsuperscript{35} See \textit{Scheuer v. Rhodes,} 416 U.S. 232, 236 (1974) (appellee review generally described); \textit{Boone,} 972 F.2d at 1551 (diversity case).


\textsuperscript{37} See also \textit{Hanna v. Plumer,} 380 U.S. 460, 461-64 (1965) (service of process rules given by federal law).
most evidentiary rulings,\textsuperscript{38} including the interpretation and review of controversial rules related to expert testimony.\textsuperscript{39}

Involuntary dismissal for failure to raise sufficient proof in a nonjury trial, formerly governed by Rule 41(b), is now treated as a judgment on partial findings under Rule 52(c).\textsuperscript{40} Since this motion serves as a vehicle for the trial court to find facts during a bench trial,\textsuperscript{41} it raises the same \textit{Erie} issue — does the \textit{clearly erroneous} rule apply, or state law? — as does the usual non-jury verdict context.\textsuperscript{42}

The method of instructing the jury presents one of the more settled contexts in which a federal standard of review is nearly always chosen. The form of jury instruction is considered a procedural point.\textsuperscript{43} The federal courts in diversity cases therefore usually look to federal law in framing instructions at trial and in reviewing charge form on appeal,\textsuperscript{44} even in the Sixth, Seventh, and Eighth Circuits,\textsuperscript{45} which have a history of looking to state law for the standard governing review of jury verdicts on a motion for judgment n.o.v.\textsuperscript{46}

Thus, in all courts, the federal method of objecting to erroneous instructions controls.\textsuperscript{47} Federal law apparently provides the rule concerning

\begin{enumerate}
\item \textit{Fed. R. Civ. P. 52(c)} (1991) (replacing and broadening Rule 41(b) dismissal for "no right to relief").
\item See \textit{Fed. R. Civ. P. 52} Advisory Committee Notes, 1991 Amend. (indicating Rule 52(c) judgment is a decision on the merits reviewed by the \textit{clearly erroneous} rule and requiring factfinding as always under Rule 52(a)).
\item See \textit{infra} note 72.
\item \textit{E.g.}, Ulmer v. Associated Dry Goods Corp., 823 F.2d 1278 (8th Cir. 1987); Stineman v. Fontbonne College, 664 F.2d 1082 (8th Cir. 1981); McNamara v. Dionne, 298 F.2d 352 (2d Cir. 1962); see \textit{S A JAMES W. MOORE & JO D. LUCAS, MOORE'S FEDERAL PRACTICE \S 51.02-1 (2d ed. 1991)} (federal method and manner of instruction controls in diversity cases).
\item \textit{E.g.}, Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502, 514 (2d Cir. 1989); Seltzer v. Chesley, 512 F.2d 1030, 1035 (9th Cir. 1975); Reyes v. Wyeth Labs., 498 F.2d 1264, 1289 (5th Cir.), \textit{cert. denied}, 419 U.S. 1096 (1974); Smith v. Mill Creek Court, Inc., 457 F.2d 589, 592 (10th Cir. 1972).
\item \textit{E.g.}, Ulmer v. Associated Dry Goods Corp., 823 F.2d 1278, 1284 n.3 (8th Cir. 1987) (procedures on jury charge are federal law in diversity cases); Porter v. C.A. Dawson & Co., 703 F.2d 290 (8th Cir. 1983) (federal jury charge form controls); \textit{In re Air Crash Disaster Near Chicago}, 701 F.2d 1189 (7th Cir.) (same), \textit{cert. denied}, 464 U.S. 866 (1983); Lones v. Detroit, T. & I. R.R., 398 F.2d 914 (6th Cir. 1968) (same), \textit{cert. denied}, 393 U.S. 1063 (1969).
\item See \textit{infra} notes 211-56, 271-81 and accompanying text, comparing the sufficiency review rule for these courts.
\item \textit{See e.g.}, Starr v. J. Hacker Co., 688 F.2d 78, 80-81 (8th Cir. 1982); Platis v. Stockwell, 630 F.2d 1202, 1205 (7th Cir. 1980); Stewart v. Ford Motor Co., 553 F.2d 130, 139 n.9 (D.C. Cir. 1977); Batesole v. Stratford, 505 F.2d 804, 807 (6th Cir. 1974).
\end{enumerate}
whether the appellate court affirms if one of two theories accepted by the jury was correctly submitted, as well as the use of special verdicts and the trial judge's power to summarize and comment on the evidence.

This federal review process is stated generally among the circuits as one for abuse of discretion. As long as the jury is not prejudiced or confused, variations in language are ignored. Even as to content, the reviewing court considers "the charge as a whole, viewing it in the light of the allegations of the complaint, the evidence, and the arguments of counsel," and "[i]f, viewed in that light, the jury instructions are comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury, the charge will be deemed adequate."

The only real Erie dilemma is distinguishing between charge form and content in applying this settled review rule in a particular case. When state law defines the contested right or action, state law of course governs the substance of the charge. (This may mean, for example, that state law man-

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48. Royal Typewriter Co. v. Xerographic Supplies, 719 F.2d 1092, 1098-99 (11th Cir. 1983). The court in Royal reasoned from its rule on jury review, not jury charge, so it may be that the "two-issue rule" will be used in those courts that apply state sufficiency tests. Cf. Braun v. Flynt, 731 F.2d 1205, 1206 (5th Cir.) (on rehearing) (apparently citing Texas law on proper combination of jury instructions), cert. denied, 469 U.S. 883 (1984). See generally William V. Dorsey, III, Broad-Form Submission of Jury Questions and the Standard of Review, 46 SMU L. REV. 601 (1992) (discussing generally the appellate review of jury instructions and its misleading abuse of discretion standard); id. at 634-37 (discussing federal and Texas cases on review of broad-form jury instructions and harmless error).


51. E.g., Benigni v. City of Hemet, 879 F.2d 473, 479 (9th Cir. 1989) (stating general rule that formulation of jury instructions is matter of district court discretion, reviewed for abuse); Dobbs v. Gulf Oil Co., 759 F.2d 1213 (5th Cir. 1985) (use of special verdict reviewed for abuse of discretion); Martinez v. Union Pac. R.R., 714 F.2d 1028, 1032 (10th Cir. 1983) (court has discretion over format, frame, and number of special interrogatories). However, some courts add that a failure to submit a proper jury instruction is a legal question reviewed de novo.


All circuits follow a related rule that erroneous instructions are not reversible if the verdict would have been justified by a directed verdict. E.g., L & S Ent. Co. v. Great Am. Ins. Co., 454 F.2d 457 (7th Cir. 1971); Maryland Cas. Co. v. Dondlinger & Sons Constr. Co., 420 F.2d 1368 (8th Cir. 1970). Thus, even appeal of a jury charge can indirectly bring up the unsettled Erie context of directed verdicts discussed below in part III.


54. Scheib v. Williams-McWilliams Co., 628 F.2d 509, 511 (5th Cir. 1980).

55. E.g., Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99 (4th Cir. 1991) (distinguishing substantive state law in jury charge from federal jury review of punitive damages); Schleier v. Kaiser Found. Health Plan, 876 F.2d 174 (D.C. Cir. 1989); Wright & Miller, supra note
dates the issues of material fact that are to be covered in special verdicts.\textsuperscript{56} The actual content of jury instructions presents, then, a question of substantive law rather than standard of review, and legal errors objected to are freely reversed if prejudicial. Yet the process and review of jury instructions must always be understood as an exercise in federal rule-application.

The \textit{Erie} issue becomes stickier when one turns to judicial review over verdicts or other factfinding processes and results which occur in various contexts in federal courts. Blanket statements about the applicability of federal tests no longer apply so confidently. Even here, however, the most unsettled context involves review over the sufficiency of the evidence to support a jury verdict. After analyzing the other contexts in which verdict or factfinding review may arise (in rough order from most readily resolved and understood to more complex), this article develops the particular jury review issue which has given the federal courts such fits over the years.

\textbf{B. Review of Summary Judgments}

Summary judgment is appropriate under Rule 56 if the full record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."\textsuperscript{57} Although the motion traditionally was seen as a disfavored procedure,\textsuperscript{58} it has resurfaced in use and reputation over the past decade,\textsuperscript{59} as prompted in 1986 by a trilogy of Supreme Court cases.\textsuperscript{60}

On appeal, the review standard is \textit{de novo}\textsuperscript{61} since the appellate court applies the same Rule 56 test as does the trial court.\textsuperscript{62} That test is also presented as the standard of review, in effect, for both courts, because it

\begin{itemize}
  \item \textsuperscript{56} See Martinez v. Union Pac. R.R., 714 F.2d at 1032. It is less clear, however, whether federal courts ignore a state rule that governs whether a jury must be told the legal effect of its answers. See, e.g., Martin v. Texaco, Inc., 726 F.2d 207 (5th Cir. 1984) (allowing and discussing jury instruction); \textit{JAMES M. FISCHER, FEDERAL TRIAL PROCEDURE HANDBOOK} § 11.8 (1985) (discussing whether a jury must be told the legal consequences of its answers).
  \item \textsuperscript{61} \textit{E.g.}, Hawaiian Life Ins. Co. v. Laygo, 884 F.2d 1300, 1302 (9th Cir. 1989); Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989); Degan v. Ford Motor Co., 869 F.2d 889, 892 (5th Cir. 1989); Casper v. Commissioner, 805 F.2d 902, 904 (10th Cir. 1986); Thrasher v. State Farm Fire & Cas. Ins. Co., 734 F.2d 637, 638 (11th Cir. 1984).
  \item \textsuperscript{62} \textit{E.g.}, Degan, 869 F.2d at 892; Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 598 (D.C. Cir. 1988), \textit{cert. denied}, 489 U.S. 1010 (1989); Thrasher, 734 F.2d at 638; First Jersey Nat'l
controls whether entry and affirmance of the motion is proper.\textsuperscript{63} But independent review necessarily follows since the sufficiency of the evidence is viewed as a question of law.\textsuperscript{64}

For both trial and appellate courts, the \textit{Erie} question is the same: does the federal rule (and its twin review rules which follow) apply in state-law cases? The answer is straightforward in all courts. Courts apply the federal Rule 56 test and procedure in diversity cases,\textsuperscript{65} even in circuits which would otherwise apply a state test on post-trial jury review.\textsuperscript{66} This was apparently true (though not discussed) in two of the 1986 Supreme Court cases themselves.\textsuperscript{67}

Of course, the legal issues underlying the motion, including presumably the materiality of a fact, are creatures of state law in such cases.\textsuperscript{68} As the Court noted, "the materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs."\textsuperscript{69} Moreover, to the extent burdens and standards of proof are now considered within the application of the federal summary judgment analysis, those burdens are likely found in state substantive law for that cause of action.\textsuperscript{70}

\begin{footnotes}
\item[63.] See generally Steven A. Childress, \textit{Federal Summary Judgments on Appeal: Review and Jurisdiction}, 9 \textit{FIFTH CIR. RPTR.} 513 (Feb. 1992) (clarifying Rule 56 test and review on appeal, and criticizing courts using \textit{abuse of discretion} test for denials of motion).
\item[64.] \textit{See Anderson}, 477 U.S. at 249-52.
\item[66.] \textit{See Lewis Refrigeration Co. v. Sawyer Fruit, Veg. & Cold Storage Co.,} 709 F.2d 427, 430 n.3 (6th Cir. 1983) (specifically distinguishing use of state review rule on j.n.o.v.); Schultz v. Newsweek, Inc., 668 F.2d 911, 917 (6th Cir. 1982) (same); Fitzsimmons v. Best, 528 F.2d 692, 693 (7th Cir. 1976).
\item[67.] \textit{See infra} notes 319-24 and accompanying text.
\item[68.] \textit{See West}, 868 F.2d at 350 (noting California insurance law provides substance); Clark v. ABC, 684 F.2d 1208, 1212 (6th Cir. 1982) ("In determining whether there exists a genuine issue as to a material fact, we apply the substantive [libel] law of Michigan."); \textit{cert. denied}, 460 U.S. 1040 (1983).
\item[69.] \textit{Anderson}, 477 U.S. at 248 (apparently applying local law of libel).
\item[70.] \textit{See id.; Celotex Corp. v. Catrett,} 477 U.S. 317 (1986); \textit{see also infra} notes 402-03 and accompanying text. \textit{But cf.} Braman & Neumann, supra note 28, at 466-67 (arguing that burden of proof rules are procedural under Rules Enabling Act and therefore need not apply if in conflict with Rule 56). Most commentators assume that burdens of proof and presumptions are substantive at least for Rules of Decision Act purposes and therefore apply in diversity cases. \textit{E.g.,} Ely, supra note 11, at 714. And even courts which apply federal rules to review juries bow to state burdens of proof. \textit{See infra} notes 204-06.
\end{footnotes}
C. Review of Factfinding in Nonjury Trials

Rule 52(a) requires a federal district court, acting as a finder of fact, to separate and spell out its factual findings and conclusions of law. The rule also provides a standard to review the result: findings of fact "shall not be set aside unless clearly erroneous."\(^{71}\) Rule 52, as applied broadly in many courts, also sets the standard for factfinding and clearly erroneous review in many situations incidental to the classic bench trial,\(^{72}\) including preliminary injunctions, civil contempt hearings, advisory juries, habeas hearings, and masters' reports.\(^{73}\)

The clearly erroneous standard is not supposed to be as exacting or deferential as a jury review standard of reasonableness or substantial evidence.\(^{74}\) Appellate courts simply "hesitate less" to reverse a trial judge's findings.\(^{75}\) Nevertheless, the standard requires substantial deference,\(^{76}\) perhaps more so in recent years.\(^{77}\) It has been defined by the Court as allowing reversal when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."\(^{78}\) This now means that: "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed

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71. FED. R. CIV. P. 52(a).

72. A Rule 52(c) judgment on partial findings (whenever it is entered) is a decision on the merits. It is reviewed by the clearly erroneous standard as well. FED. R. CIV. P. 52(a). Its name is consistent with the 1991 amendment to Rule 50(a), which allows judgment "as a matter of law" during trial in jury cases. See FED. R. CIV. P. 52 Advisory Committee Notes, 1991 Amend. Although this may imply that Rule 52(c) likewise provides a procedure limited to the legal insufficiency of the evidence, in the nonjury context it allows the court to go ahead and find facts and resolve evidentiary conflicts, unlike Rule 50(a). See Continental Cas. Co. v. DHL Servs., Inc., 752 F.2d 353, 355-56 (8th Cir. 1985) (discussing Rule 41(b) review); 1 STEVEN A. CHILDERSS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW §§ 2.01, 5.06 (2d ed. 1992) (analyzing factfinding discretion of new Rule 52(c), and distinguishing new Rule 50).

73. See Steven A. Childress, "Clearly Erroneous": Judicial Review Over District Courts in the Eighth Circuit and Beyond, 51 Mo. L. Rev. 93, 100-07 (1986) (reviewing various extensions of applicability beyond bench trials).


75. United States v. Aluminum Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945) (Learned Hand, J.).


the evidence differently."79

Review of findings made by a district court sitting in diversity should be a settled issue in favor of applying the federal Rule 52(a) standard, even though state law provides the substance of the action. Rule 52 is an express procedural rule,80 and the standard of review it prescribes defines the power distribution among federal courts.81

The applicability of Rule 52 in diversity actions is in fact rarely discussed in the cases, apparently because the Erie issue under Rule 52 is not as controversial as for jury review in the directed verdict and new trial contexts, in which express dispute in the authorities has been fierce.82 Most state-law cases just cite the clearly erroneous rule without discussion.83 This assumption needs little authority to convince, though a few cases are helpful in specifically holding that the test is provided by federal, not state, procedures.84

This nearly uniform rule is further supported by U.S. Supreme Court cases, arising at trial under diversity jurisdiction, which discuss the applicability of clearly erroneous deference. None even hints that a state review rule would ordinarily apply.

For example, neither Bose Corp. v. Consumers Union of United States, Inc.85 nor Salve Regina College v. Russell86 — both diversity cases — raises any claim that Rule 52(a) is inapplicable because the action applies state law. Both instead find its deference inapplicable for larger reasons: in Bose, the issue of defamation “actual malice” is one of constitutional fact, reviewed without the strictures of a clearly erroneous rule in order to protect First Amendment interests,87 while in Salve Regina, appellate courts must have free review over all errors of law, even if they arise from state or local law.88 Indeed, the Salve Regina Court contrasted de novo review over legal conclusions with Rule 52(a)’s “deference to the unchallenged superiority of the

81. See Donovan v. Penn Shipping Co., 429 U.S. 648, 649 (1977) (indicating in remittitur context that relationship between judge and jury is matter of federal law); see also infra notes 385-91 and accompanying text.
82. See infra note 154. The jury review contexts may be considered less settled because they traditionally did not fall under a standard specified in the federal rules. Nevertheless, the authorities generally do not extend their Erie analyses to Rule 52 actions or address the cases below that ignore the clear error rule in nonjury trials.
84. E.g., In re American Cas. Co., 851 F.2d 794, 798 (6th Cir. 1988) (citing Hanna); Grenier v. Harley, 250 F.2d 539, 542 (9th Cir. 1957). Note that American Casualty Co. inconsistently seems to apply a state damages rule. See infra note 100.
86. 499 U.S. 225 (1991). The Court found de novo review to apply to determinations of state law made in federal district court. Id. at 239.
87. Bose, 466 U.S. at 509-11.
88. Salve Regina, 499 U.S. at 231-32.
district court's factfinding ability," and added: "Nothing about the exercise of diversity jurisdiction alters these functional components of decisionmaking . . . ."89 In both cases it is clear the analysis applies generally and has nothing to do with the diversity context,90 and both are routinely cited outside their specific contexts. It is apparent, then, that the Supreme Court, like so many lower courts, treats the applicability of Rule 52 and its review standard in diversity appeals as a non-issue. There is no reason not to, and it would appear gratuitous for the Court to belabor the obvious: the federal rule controls.

Similarly, in Citibank, N.A. v. Wells Fargo Asia Ltd.,91 the Court reviewed the Second Circuit's own review of a choice-of-law determination made by the district court. The Court found that the district court's findings as to the parties' agreement were not clearly erroneous under Rule 52(a) and thus reversed the court of appeals.92 Again no distinction was made, even though the finding may have hinged on New York contract law.93 Indeed, in later proceedings the Second Circuit acknowledged that the choice-of-law issue considered state law and that jurisdiction was based in part on diversity,94 yet made no distinction as to the proper review rule.

On the other hand, occasional lower court cases have noted a possible open issue as to which test applies.95 Others apply a state standard without discussing why. One Tenth Circuit case, for example, cites the New Mexico jury standard in reviewing a diversity bench trial96 — an aberration especially ironic since the Tenth Circuit more consistently applies the federal jury test when reviewing jury verdicts97 supposedly a more controversial context.

The Sixth Circuit once applied Florida's jury test to review a judge's damages calculation, compounding its error by saying: "The rule is no different when a judge acts as the finder of fact, as the District Court did here."98 Of

89. Id. at 233.
90. In Salve Regina, to be sure, there would be no claim (to reject) of deference on state law if it were not a diversity case, but the Court's conclusion that errors of law are freely reversed applies in all cases; the Court was merely extending the usual nondiversity review rule to diversity cases too, see 499 U.S. at 233-34, so the case hardly supports a distinction for diversity cases.
92. Id. at 670-72 (applying mistake test).
93. See id. at 673-74 (remanding but refusing to specify whether federal common law preempts New York law here).
95. See Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169, 173 n.1 (8th Cir. 1971) (Minnesota courts review judge just like jury, while federal review test for judges is instead clear error — though here either judge or jury test upholds findings.).
96. Madrid v. Mine Safety Appliance Co., 486 F.2d 856, 858 (10th Cir. 1973); see also Stoody Co. v. Royer, 374 F.2d 672, 681 (10th Cir. 1967).
97. See infra note 188 and accompanying text.
98. Downs v. United States, 522 F.2d 990, 1006 (6th Cir. 1975); see also Early v. United States, 474 F.2d 756, 759 (9th Cir. 1973) (applying Alaska test). Although both Downs and Early are damages appeals under the Federal Tort Claims Act (28 U.S.C. § 1346(b)) rather than diversity cases, they seem to make the same error of reviewing under state law as do the similar diversity cases, despite the general rule that FTCA findings, including damages, must
course it is; Rule 52 was designed specifically for review of judges. The
Erie error was repeated in a later case.

The Seventh Circuit has declined to review at all the district court's refusal to award punitive damages available under Wisconsin law. Although Wisconsin state courts defer completely to such a refusal in jury trials, the federal appellate reviewing role, as opposed to sheer legal availability of such damages, is more appropriately specified by a federal process and review rule.

Any inconsistency regarding state tests for nonjury trials arises most often either in reviewing damages, when perhaps the court is confusing the sharper debate over review of new trial on damages, or in characterizing an issue as law or fact for Rule 52 review, a chore readily confused with the directed verdict debate over whether an issue must be submitted to a jury. Yet to the extent the issue is analogized to the right to a jury trial on a given issue, the Supreme Court has nonetheless made clear in other contexts that the jury-right issue is federal.

Further, a disproportionate number of such state-test cases were authored by district judges sitting by designation. This is noted not because district judges are generally more prone to error but rather because reflexive resort to state phrasings is, to a district court, both common habit and usually correct at trial, as contrasted with a nonjury appeal standard. Trial tests are often state substance.

At any rate, these and similar state-law-in-passing cases are not cited again for their state review tests, so that they stand relatively alone even in...
their own circuits.\textsuperscript{109} In addition, they often seem harmless on their own terms when state standards are similar to federal ones in nonjury trials.\textsuperscript{110} Even when confusion is understandable or harmless, it is likely that future courts will settle the Rule 52 debate properly in favor of the federal test, either by continuing to apply Rule 52 without comment or by disavowing the occasional case which ignores the federal clearly erroneous rule. The aberrant cases, in any event, hardly support the conclusion that there is a real conflict in the courts over the use of a federal review rule in nonjury cases.

D. REVIEW OF MOTIONS FOR NEW TRIAL

Rule 59 authorizes a district court to grant a new trial to either party on any or all issues, usually in a jury trial.\textsuperscript{111} In such cases, the judge may order a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States."\textsuperscript{112} Motions for new trial are commonly based on such grounds as legal error (e.g., in instructions or evidence calls; improper conduct of judge, attorney, or juror; new evidence; unfair surprise; and verdict contrary to the evidence.\textsuperscript{113}

The trial court's decision is generally committed to its discretion.\textsuperscript{114} How the abuse of discretion standard plays out in each context depends in turn on the circumstances of each case, the type of alleged error underlying the motion, and the traditional applications to that context.\textsuperscript{115} For example, courts have indicated that the standard actually varies as between grants or denials

\textsuperscript{109} See, e.g., Hoskie v. United States, 666 F.2d 1353, 1357 (10th Cir. 1981) (not citing Madrid or Royer).


\textsuperscript{111} FED. R. CIV. P. 59. Rule 59(a) provides that the motion can also be granted in nonjury trials (on grounds for rehearings in former equity practice). In such cases the court's decision to change its mind may be treated as discretionary, but ultimately the findings are reviewed for clear error under Rule 52(a); the federal rule clearly applies. See supra notes 71-94. This discussion applies to the motion's far more common application in jury trials.

\textsuperscript{112} FED. R. CIV. P. 59(a)(1). The court's power to order a new trial despite a jury verdict has been found consistent with the Seventh Amendment. See 6A MOORE & LUCAS, supra note 43, ¶ 59.04[2].

\textsuperscript{113} See, e.g., Munn v. Algee, 924 F.2d 568, 571 & n.2 (5th Cir.) (admission of irrelevant evidence; argument; proof of damages; weight of evidence), cert. denied, 112 S. Ct. 277 (1991); Coursey v. Broadhurst, 888 F.2d 338, 343 (5th Cir. 1989) (denying mistrial on improper argument); Warner v. Transamerica Ins. Co., 739 F.2d 1347, 1353 (8th Cir. 1984) (new evidence); Conway v. Chemical Leaman Tank Lines, Inc., 687 F.2d 108 (5th Cir. 1982) (unfair surprise).

\textsuperscript{114} E.g., Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940); Ryan v. McDonough Power Equip., Inc., 734 F.2d 385, 387 (8th Cir. 1984); Bunch v. United States, 680 F.2d 1271, 1282 (9th Cir. 1982).

of the motion, and as between such grounds as weight of the evidence and improper argument.

New trial based on the lack of evidentiary support, also reviewed on the whole record for some form of abuse, actually places both the district and circuit courts into a review posture. Review involves the weight of the evidence, not really its sufficiency (a term of art for judgment as a matter of law, directed verdict, or j.n.o.v.). Both types of motions are similar in that they permit review, at least indirectly, of the factual basis of the verdict. Nevertheless, their respective Erie rules have varied openly in the circuits.

In most circuits, the new trial motion has invoked federal procedures and standards in diversity cases, though such courts have had occasional notable instances of reciting state tests, usually by ignoring the more settled application of federal standards.

The federal-standard rule is applied even in some circuits which apply state jury tests on jury sufficiency of the evidence motions. Such a dichot-

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116. See Hewitt v. B.F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir. 1984); Conway, 687 F.2d at 112 & n.4 (abuse test generally, but review is somewhat broader over grants); Massey v. Gulf Oil Corp., 508 F.2d 92, 95 (5th Cir.) (when judge confirms jury, all factors press in favor of affirming denial), cert. denied, 423 U.S. 838 (1975).

117. Massey, 508 F.2d at 95 (closer scrutiny over new trial granted on weight of evidence than when judge finds a pernicious influence had intruded into case).


119. Appellate review is for the judge's abuse, tested by whether the jury's verdict is contrary to the "great weight of the evidence," while the district court reviews the jury more directly using a great weight or similar test. For Erie purposes, the cases do not draw a distinction based on which form or level of review is at issue.

120. See infra notes 419-21 and accompanying text. In what they review, the two seem somewhat closer than new trial motions based on no evidentiary grounds, though the difference in review is that of law versus discretion.

121. E.g., Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992); Mercado v. Ahmed, 974 F.2d 863, 866 (7th Cir. 1992); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 107 (4th Cir. 1991); Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 986 & n.2 (5th Cir. 1989); Westbrook v. General Tire & Rubber Co., 754 F.2d 1233, 1238 (5th Cir. 1985); Lowe v. General Motors Corp., 624 F.2d 1373, 1383 (5th Cir. 1980); see Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345-46 (9th Cir. 1978) (discussing), 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2802 (1973) (citing cases).

122. See, e.g., Roboserve, Ltd. v. Tom's Foods, Inc., 940 F.2d 1441, 1446-47 (11th Cir. 1991) (court "look[s] to Georgia law to determine whether the verdict is excessive," though federal law provides review of new trial for such excessiveness; cites abuse of discretion test); In re Air Crash Disaster Near New Orleans on July 9, 1982, 767 F.2d 1151, 1165-67 (5th Cir. 1985) (Tate, J., dissenting) (criticizing majority opinion for apparently comparing state cases' awards; court should reject outright the contention that state law provides a review test in federal court since cases are settled).

123. See, e.g., McKinzie v. Fleming, 588 F.2d 165, 167 (5th Cir. 1979); Givens v. Lederle, 556 F.2d 1341, 1344 (5th Cir. 1977).

omy is presented as not really as inconsistent as it might seem,\textsuperscript{125} even when both raise issues of the level of evidence needed to approve a verdict. Review of jury verdicts on a motion for sufficiency of the evidence poses a question of law, so it may sound more substantive and state-generated than does the traditional federal discretion given for new trial motions; further, new trial goes to the fairness and acceptability of the proceedings, even with claims about the weight of the evidence, so it may seem more "procedural" than the legal sufficiency of a claim. The distinction is not wholly convincing.\textsuperscript{126} At any rate, some courts attempt an apparent compromise by reciting both state and federal new trial language or applying the federal test while finding the state test to be "instructive."\textsuperscript{127}

The Eighth Circuit employs the federal standard and adds that, in applying it, the district court "should consider, among all other factors, the result that would be reached in the state's courts" under the state's own test.\textsuperscript{128} A few Eighth Circuit cases say, however, that while the procedural standards of a new trial motion are specified by federal law, state law controls on the issue of whether the amount of the verdict is excessive.\textsuperscript{129} The latter language appears to be a minor aberration from the more consistent recitation of a federal test, or a federal test informed by state factors, and is at any rate no longer viable under more recent Supreme Court precedent.\textsuperscript{130}

In 1989, in \textit{Browning-Ferris Industries v. Kelco Disposal, Inc.},\textsuperscript{131} the Supreme Court addressed the \textit{Erie} issue of which test controls review of a jury award under Rule 59. The Court held that such a damages review is controlled by federal law, while state law governs factors the jury may consider (apparently considered by the court in then reviewing the new trial decision): "In reviewing an award of punitive damages, the role of the District Court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered."\textsuperscript{132}

At bottom, however, appellate review in federal courts is by an \textit{abuse of}

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\textsuperscript{125} See generally Abernathy, 704 F.2d at 970-71 (arguing for possible reconciliation of circuit's rules on jury review), discussed \textit{infra} in text accompanying notes 216-20.

\textsuperscript{126} See \textit{infra} notes 417-22 and accompanying text.

\textsuperscript{127} E.g., Humble v. Mountain State Constr. Co., 441 F.2d 816, 820 (6th Cir. 1971). A similarly vague "neutral" principle is criticized \textit{infra} text accompanying notes 279-81.

\textsuperscript{128} Novak v. Gramm, 469 F.2d 430, 434 (8th Cir. 1972) (that result is "only one of the guides" on appeal in deciding whether the judge abused discretion). Later Eighth Circuit cases continue this approach. See, e.g., Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401 (8th Cir. 1976); \textit{see also} Martell v. Boardwalk Enters., Inc., 748 F.2d 740, 750 (2d Cir. 1984) (highest award places substantive limit on federal court).

\textsuperscript{129} See, e.g., Morrow v. Greyhound Lines, Inc., 541 F.2d 713, 721 (8th Cir. 1976).

\textsuperscript{130} It seems more consistent with the circuit's approach to sufficiency review. \textit{See infra} text accompanying note 273.

\textsuperscript{131} 492 U.S. 257 (1989).

\textsuperscript{132} \textit{Id.} at 279; \textit{see also} O'Gilvie v. International Playtex, Inc., 821 F.2d 1438, 1448 (10th Cir. 1987) (applying similar analysis), \textit{cert. denied}, 486 U.S. 1032 (1988).
discretion standard, which accords "considerable deference to a district court's decision not to order a new trial." 133

In this context the role of state law is not wholly absent, since it may "trickle up" to be part of the jury's factfinding package that is then reviewed under federal law. But the Court's approach and reasoning 134 does seem to reject those lower court cases which placed a greater reliance on state practice (or just applied a state test). Even the Eighth Circuit's interjection of a state's "result" as one "factor" on appeal may overstate state law's influence, giving it more weight in the appellate balancing process than simply allowing it to set wide perimeters. 135

Although the specific complaint in Browning-Ferris was the excessiveness of punitive damages awarded by the jury, this issue arose by way of a new trial/remittitur process, 136 and the Court did not purport to limit its holding to new trial on damages as such. 137 It is thus apparent that similar analysis would be used as to more general new trial motions. If any difference surfaces, it would probably be to remove the state factors as influencing in any way the review of verdicts contrary to the evidence, in line with earlier cases which had not discussed state law in any way as to such a review process. At the least the case does not support grounding the review in state law.

Courts of appeals should generally look to the federal standard on review of all new trial motions. By analogy to Browning-Ferris, the federal review process may in some contexts take into account the defining limits of parallel state practice, but the review test is not state law. The most difficult question remaining from Browning-Ferris and related cases specifying the limits of punitive damages generally 138 is not really about review but rather jury instruction in the first instance: the federal courts now must decide the extent to which federal juries must be charged as to state law on damages, in order to promote their legitimate consideration of such "factors" 139 and to allow meaningful constitutional jury decisionmaking about damages. 140 Even if

133. Browning-Ferris, 492 U.S. at 280 (footnote omitted).
134. The Court drew on precedent about appellate review broader than new trial. See infra text accompanying note 316.
135. Some lower court cases now focus the role of state law on the federal jury charge, see infra note 140, such that it affects appellate review only through that conduit.
136. See infra text accompanying notes 142-52.
137. See Browning-Ferris, 492 U.S. at 279 (broadly discussing new trial review). Indeed, all of the Court's stated policies and justifications apply even more readily to the general new trial context; over the years the harder question has been the interweaving of state law on damages, see supra notes 105 and 129, whereas verdicts contrary to the evidence have more uncontroversially received review by a federal test.
138. See, e.g., Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (verdict's alleged excessiveness does not present a Fourteenth Amendment due process problem since meaningful standard of review exists in Alabama to ensure proper judicial oversight). Haslip is not clear how meaningful or independent that review must be. However, a majority of the Court now apparently believes that traditional reasonableness review over punitive damages will suffice to justify the award of very high punitive damages as against a procedural due process challenge. See TXO Productions Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993).
139. See Browning-Ferris, 492 U.S. at 279 (quoted above).
140. See generally Johnson v. Hugo's Skateway, 974 F.2d 1408 (4th Cir. 1992) (en banc), discussed infra at text accompanying notes 199-203.
the Court is not entirely clear how the state's factors are considered and has not spelled out all the implications of its rulings, it has purported to settle the appellate review standard for new trials: review of any such decision is overwhelmingly federal.\footnote{141}

E. NEW TRIAL ON DAMAGES AND REMITTITUR

Similar review rules apply when a jury's assessment of damages is reviewed through a new trial motion. This may be done, in federal courts, by seeking a complete new trial on damages or by seeking remittitur. The latter is in fact a form of relief ordered on a conditional new trial motion, in which the judge effectively reduces the damage award by ordering a new trial unless the award winner accepts a reduced amount.\footnote{142} Both forms, then, in effect focus on the weight of the evidence (here, evidence about damages) and are governed by similar procedures and standards.

The federal trial judge therefore is said to have “discretion” to grant or deny a motion for new trial based on the excessiveness or inadequacy of the verdict award, or to order remittitur, much like a review for whether a decision is based on insufficient evidentiary support. Assuming the trial court's damages decision may be reviewed at all,\footnote{143} it will not be reversed absent an abuse of discretion.\footnote{144} The courts assess the jury's verdict under several phrasings, all indicating restraint on review of the jury,\footnote{145} and often several such tests — plus language of passion, prejudice, or arbitrariness — are recited in a single opinion to set up review.\footnote{146}

\footnote{141. \textit{E.g.}, Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99 (4th Cir. 1991) (contrasting jury charge as state law).
\footnote{142. In the federal courts the issue usually is one of excessive verdicts — as remedied by the conditional \textit{remittitur} vehicle — since \textit{additur}, for inadequate damages, is held to violate the Seventh Amendment. \textit{See} Dimick v. Schiedt, 293 U.S. 474, 486-87 (1935); Hawkes v. Ayers, 537 F.2d 836, 837 (5th Cir. 1976). Additur is used in some states and in federal non-jury trials. Remittitur may be ordered by either a trial judge or an appellate court. \textit{Springborn v. American Commercial Barge Lines}, 767 F.2d 89, 96 n.20 (5th Cir. 1985).
\footnote{143. The question technically is still open. \textit{See} \textit{Browning-Ferris}, 492 U.S. at 279 n.25 (Court has not expressly held that courts may review a denial; unnecessary again to reach question); \textit{Comment}, \textit{Remittitur Review: Constitutionality and Efficiency in Liquidated and Unliquidated Damage Cases}, 43 U. CHI. L. REV. 376 (1976). But most courts do assume this power. \textit{Sam's Style Shop v. Cosmos Broadcasting Corp.}, 694 F.2d 998, 1005 & n.16 (5th Cir. 1982) (all courts now recognize some power to review size of verdicts though Supreme Court has skirted issue); \textit{6A Moore & Lucas, supra note 43, § 59.08[6]} (surveying cases on former unreviewability); \textit{11 Wright & Miller, supra note 121, § 2820, at 131 (1973) (discussing abandonment of no review rule).}
\footnote{145. \textit{See} \textit{Sam's Style Shop}, 694 F.2d at 1006 (surveying tests courts have used to evaluate awards and judge's discretion; the panel then found abuse by any of the tests in the judge's denial of motion and thus ordered conditional new trial); \textit{Solomon Dehydrating Co. v. Guyton}, 294 F.2d 439, 447-48 (5th Cir.) (per Blackmun, J.), \textit{cert. denied}, 368 U.S. 929 (1961).
\footnote{146. \textit{See} \textit{6A Moore & Lucas, supra note 43, § 59.08[6]} (collecting cases).}
A related confusion of contexts\textsuperscript{147} causes blending in the language of review, as well as a misfocus on the precise \textit{Erie} issue up for consideration.\textsuperscript{148} It is not clear, for example, that the definition for \textit{abuse of discretion} in this context ought to be equated with the jury sufficiency of the evidence test, especially since new trial is considered discretionary and more easily obtained, theoretically, than a flat reversal of the jury.\textsuperscript{149} Even so, the contexts involve similar enough review processes, if not the same standard, so that any \textit{Erie} issue might be decided uniformly. The \textit{Browning-Ferris} Court is now clear, at any rate, that trial and appellate court consideration of new trial awards, however redefined, is to be performed under federal law.

Moreover, settling a conflict in the circuits, the Supreme Court in 1977 held that a party that accepts remittitur may not challenge the reduction on appeal.\textsuperscript{150} This appellate waiver rule, the Court specifically held, applies even in diversity cases.\textsuperscript{151} Its \textit{Erie} reasoning has been interpreted to speak to appellate review broadly, and not simply its scope of review context.\textsuperscript{152}

\section*{III. REVIEW OF JURY VERDICTS}

In the above litigation settings, most of the inconsistencies within and among circuits are not deep and abiding. Following the Supreme Court's direct rulings and unquestioned applications, federal law should control all review aspects of jury instructions, summary judgments, nonjury trials, and various new trial motions. Most circuits had already adopted this position, if they focused on it at all. The contrary state-rule cases tend to be rejected or ignored by later courts, or they will undoubtedly do so in light of recent Supreme Court direction. Such cases and circuit positions, though glaring and at times repeated, are on hindsight minor hiccups, and in some instances can be classified as isolated errors and aberrations.\textsuperscript{153}

Not so with judicial review of juries, where circuit disagreement is deliberate. Jury review is also the context where the choice of a review rule may have the most impact.\textsuperscript{154} Thus, the circuit conflicts are neither isolated nor

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\item \textsuperscript{148} See supra text accompanying notes 105 and 129.
\item \textsuperscript{149} See infra text accompanying notes 417-22.
\item \textsuperscript{150} Donovan v. Penn Shipping Co., 429 U.S. 648, 648-50 (1977) (issue not reviewable even if given under protest).
\item \textsuperscript{151} \textit{Id.} at 649-50; see, e.g., Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1133 (7th Cir. 1985), \textit{cert. denied}, 475 U.S. 1094 (1986). Some states do not follow \textit{Penn Shipping}, \textit{e.g.}, Life Ins. Co. of Miss. v. Allen, 518 So. 2d 1189, 1194 (Miss. 1987).
\item \textsuperscript{152} See infra text accompanying notes 310-18.
\item \textsuperscript{153} The possible exception is the state-rule cases on new trials, which may have been deliberate and settled. They should be re-examined, at any rate, under \textit{Browning-Ferris}. It is also clear that the state/federal issue of what jury instructions to give in certain contexts will become complicated under \textit{Haslip}.
\item \textsuperscript{154} See Planters Mfg. Co. v. Protection Mut. Ins. Co., 380 F.2d 869, 878 (5th Cir.) (emphasizing clear differences in state standards in deciding particular cases), \textit{cert. denied}, 389 U.S. 930 (1967); Arms v. State Farm Fire & Cas. Co., 731 F.2d 1245, 1248-51 (6th Cir. 1984) (state jury test seems decisive in reversing directed verdict); see also Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari) (general choice of jury-review test “will often be influential, if not dispositive,” so circuit split “is of far
harmless.

There remains, then, the most problematic *Erie* issue in judicial review: the standard for sufficiency of the evidence for a jury to reach a verdict or make a finding of fact.\(^{155}\) Sufficiency must be contrasted with an allegation that a verdict or finding is against the weight of the evidence and thus justifies a new trial.\(^{156}\) Instead, sufficiency is raised at trial through a motion for *judgment as a matter of law* under Rule 50,\(^{157}\) a two-step procedure formerly named *directed verdict* and *judgment n.o.v.*\(^{158}\) and is challenged on appeal by way of review over the district judge's decision on the motion made below for judgment as a matter of law. Before this article analyzes the applicability of a federal test in diversity cases, a brief review of that general test is in order, to bring the diversity rule into sharper relief.

**A. THE JURY TEST FOR SUFFICIENCY OF THE EVIDENCE**

The trial judge may only direct a verdict, grant judgment n.o.v., or grant judgment as a matter of law if there is no sufficient evidentiary basis for the jury to decide otherwise; the appellate court may affirm the trial judge's decision only if the evidence likewise fails to support a contrary jury verdict.\(^{159}\) Whether the evidence is "sufficient" must be made by some threshold measure of acceptability, as applied to whatever part of the record is to be reviewed for its sufficiency by that measure. Both inquiries — the test of review and the materials reviewed — combine to define the relevant standard of review.\(^{160}\) In the typical civil jury trial, the first aspect of the standard used to test the jury's decision is some form of a *reasonable jury* measure,\(^{161}\) stated in a variety of ways.\(^{162}\) In assessing the evidence, all rea-

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\(^{155}\) Federal juries may make specific findings of fact short of a general verdict through the district court's use of alternative verdict practices, such as interrogatories. The choice and process of such special interrogatories and alternatives, as well as the test for review, is prescribed by federal law. See [*supra* text accompanying notes 43-54].

\(^{156}\) See [*supra* text accompanying notes 43-54].

\(^{157}\) *FED. R. CIV. P. 50*.

\(^{158}\) The two steps and their stern rules of timing and specificity required to challenge evidentiary sufficiency are in fact strengthened by the 1991 amendment to Rule 50, as described in Steven A. Childress, *Judgment as a Matter of Law: A Pretense of Consistency, A Return to Technicality* (1994) (unpublished manuscript available from author).

\(^{159}\) See, e.g., *FED. R. CIV. P. 50*; Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (en banc).

\(^{160}\) See generally 1 *CHILDRESS & DAVIS, supra* note 72, § 1.01 (analyzing two aspects of a standard of review: the test applied, and the materials to which it is applied).

\(^{161}\) See, e.g., Ellison v. Conoco, Inc., 950 F.2d 1196, 1203 (5th Cir. 1992), cert. denied, 113 S. Ct. 3003 (1993); *FED. R. CIV. P. 50* (1991) (adopting test long articulated in cases: "no legally sufficient evidentiary basis for a reasonable jury to have found for that party . . . .").

\(^{162}\) Courts use different versions, all apparently meaning much the same thing. Such forms include "reasonable juror," "reasonable man," "reasonable conflict," "reasonable minds," and "one reasonable conclusion." See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982) (variations may be semantic lapses); Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc) (discussing phrasings); 1 *CHILDRESS & DAVIS, supra* note 72, § 3.01 (collecting various phrasings).
Reasonable inferences must be taken as resolved in favor of the nonmoving party or the jury’s verdict. Less settled is the proper set of materials reviewed: the test is applied to a part or all of the record, depending on the circuit in which the case arises.

The appellate court’s review, in turn, is de novo: no deference is given to the trial court’s ruling whether it granted or denied the jury motion. Thus, the same actual standard is applied to test the jury itself—a reasonableness measure acting on some set of evidence—with the trial court’s intermediate decision virtually taken out of the appellate review process. The appellate standard technically is de novo, but its usual review over the federal jury is deferential in exactly the same way as the trial judge’s review. The reasonableness test, then, is seen as the standard of review (at least, review of the jury) both at trial and on appeal, whatever portion of the record to which the test is applied.

The reasonableness test itself, again in the usual jury case, is often restated in terms of requiring “substantial evidence” to support a verdict, as contrasted with an any evidence or complete absence measure no longer seen as providing the proper test in typical federal cases. The latter, more stringent test remains in Jones Act and Federal Employers’ Liability Act jury

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163. E.g., Turner v. Purina Mills, Inc., 989 F.2d 1419, 1421 (5th Cir. 1993); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1193 (7th Cir. 1992); Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992); Santiago-Negron v. Castro-Davila, 865 F.2d 431, 445 (1st Cir. 1989); DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982).

164. E.g., Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari) (collecting cases on circuit conflict on the jury review standard generally); 1 CHILDRESS & DAVIS, supra note 72, § 3.03 (analyzing conflicting circuit standards, especially as to what body of evidence is reviewed under the test).

165. E.g., Tobin v. Astra Pharm. Prods., Inc., 993 F.2d 528, 540 (6th Cir.), cert. denied, 114 S. Ct. 304 (1993); Romero, 979 F.2d at 1449 (de novo since same standard as district court); Allison, 979 F.2d at 1195; Trzcinski v. American Casualty Co., 953 F.2d 307, 313, 315 (7th Cir. 1992); Chrysler Capital Corp. v. Lavender, 934 F.2d 290, 293 (11th Cir. 1991); Proteus Books Ltd. v. Cherry Lane Music Co., 873 F.2d 502, 508 (2d Cir. 1989).


168. In general cases, then, the principal unsettled issue is whether the courts look to the whole record in reviewing the jury, or only to that part which supports its decision. This issue certainly may be intertwined with the applicable test itself, so that partial-record courts may be more likely to apply a more minimal threshold of sufficient evidence. See 1 CHILDRESS & DAVIS, supra note 72, § 3.03.

169. E.g., DeMaine v. Bank One, Akron, N.A., 904 F.2d 219, 220 (4th Cir. 1990); Venegas v. Wagner, 831 F.2d 1514, 1517 (9th Cir. 1987); Koch v. Secretary of Dept. of HEW, 590 F.2d 260, 261 (8th Cir. 1978) (“the essential question”); Boeing Co., 411 F.2d at 370 (discussing consistency of substantial evidence with reasonableness test).

170. See Cooper, supra note 7, at 924-27; 9 WRIGHT & MILLER, supra note 49, §§ 2524 n.30, 2529 n.43; 1 CHILDRESS & DAVIS, supra note 72, § 3.03.

cases. It is also used in some states (at least in certain contexts), notably Wisconsin, North Carolina, Georgia, and Tennessee. Texas courts often use the language of no evidence, but by this — in most procedural contexts — they apparently mean "legally insufficient evidence," which in many instances works out to be much like a federal reasonableness standard, even so, some aspects of review under Texas law (especially a requirement that the reviewing court look only to the nonmovant's evidence


The reasonableness test does not apply the same (if at all) in Jones Act and F.E.L.A. cases; the standard of review changes in order to promote the policies of these statutory protection schemes. A jury verdict on negligence for the plaintiff must be upheld against a defendant's motion if any evidence, here called "slight evidence," supports it. See Robin v. Wilson Bros. Drilling, 719 F.2d 96, 98 (5th Cir. 1983); Johnson v. Bryant, 671 F.2d 1276, 1279 (11th Cir. 1982); Robert Force, Allocation of Risk and Standard of Care Under the Jones Act: "Slight Negligence," "Slight Care?", 25 J. MAR. L. & COM. — (forthcoming 1994) (examining implications of rule to jury charge).

The usual reasonableness standard may, however, apply when a plaintiff's motion seeking an instructed verdict in his favor is reviewed. See Springborn v. American Commercial Barge Lines, 767 F.2d 89, 99-100 (5th Cir. 1985) (settling question for circuit); Steven A. Childress & Martha S. Davis, Federal Standards of Review - FELA and Jones Act Cases, 4 MAR. L. REP. 178. (1992) (examining Jones Act review and exceptions for seaworthiness claims and plaintiffs' motions). This article, at any rate, focuses on the reasonableness test used in general civil litigation.

173. See Allison, 979 F.2d at 1193-96 (reciting Wisconsin directed verdict test of "no credible evidence" or "any evidence," and noting distinction for j.n.o.v. test, which does not permit sufficiency review at all) (citing Kolpin v. Pioneer Power & Light Co., 469 N.W.2d 595 (Wis. 1991)).

174. See DeMaine, 904 F.2d at 220 (contrasting North Carolina scintilla decisions).

175. See LaRoche Indus., Inc. v. AIG Risk Mgmt., Inc., 959 F.2d 189, 193 (11th Cir. 1992) (describing Georgia law on jury award of attorneys' fees: "absolutely no evidence").


177. E.g., Porterfield v. Brinegar, 719 S.W.2d 558, 559 (Tex. 1986) ("The trial court may properly withdraw a case from the jury and instruct a verdict only if there is no evidence to support a material issue."); Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752, 755 (Tex. 1970) (reviewing no evidence point of error and affirming instructed verdict issued at close of plaintiff's case, even though "the question of whether there is more than a scintilla of evidence to support the finding of a vital fact is close"); see also Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 986 n.2 (5th Cir. 1989) (noting counsel's argument under Texas law that verdict can be overturned only if no evidence supports it).

178. See Seideneck, 451 S.W.2d at 755 (stating that perhaps there is a "glimmer of evidence to support the plaintiff's position" but "when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, such evidence is in legal effect no evidence" not supporting a verdict) (citing Joske v. Irvine, 44 S.W.2d 1059, 1062 (1898) (any evidence test is "much quoted and often misunderstood;" but test is "not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury," and that does not include mere surmise)); Jones, 870 F.2d at 986 n.2 (stating that counsel mischaracterizes Texas rule as scintilla test, at least in the procedural context raised here); see also Porterfield, 719 S.W.2d at 559 (test is whether "there is any evidence of probative force to raise a fact issue"); Sterner v. Marathon Oil Co., 767 S.W.2d 686, 690 (Tex. 1989) (reviewing general test for sufficiency of the evidence); William Powers, Jr. & Jack Ratliff, Another Look at "No Evidence" and "Insufficient Evidence", 69 TEX. L. REV. 515 (1991) (thoughtfully analyzing intricate Texas law in this area); W. Wendall Hall, Standards of Appellate Review in Civil Appeals, 21 ST. MARY'S L.J. 865, 899-900, 906-08 (1990) (discussing Texas
and reasonable inferences, without review of the whole record) are effectively more deferential than the typical federal test, so Texas nonetheless should be included with other states whose review analysis may vary significantly from, and at times apply more strictly than, federal practice. (Louisiana, by contrast, is said to have the power of independent review over jury findings of fact in civil cases, and other states may adopt more scrutiny over damage awards in order to address a growing concern that awards are too high.)

Whatever the "usual" federal standard to review civil juries — and whether that standard is as settled as commentators and the 1991 amendment to Rule 50 make it seem — the issue remains whether that general

sufficiency review, sorting out procedural contexts which raise different applications of it, and helpfully providing illustrations of jury review process and inferences).

As such sources indicate, the Texas tests are far more complex than simply a scintilla rule — despite use of no evidence as the stated scope or standard of review — and are still obviously misunderstood.

179. See, e.g., $56,700 in U.S. Currency v. State, 730 S.W.2d 659, 661-62 (Tex. 1987) (in considering no evidence point of error, the court must consider only the supporting evidence and inferences and disregard contrary evidence and inferences; further, when circumstantial evidence gives rise to equally probable inferences, neither fact is proved, and here no more than a scintilla supports necessary finding); Porterfield, 719 S.W.2d at 559 (in applying test of "any evidence of probative force," court must consider all evidence in light favoring verdict, "discarding all the contrary evidence and inferences"); Seidenbeck, 451 S.W.2d at 756 (Smith, J., dissenting) (criticizing majority for not properly invoking rule that requires appeal to consider only evidence and reasonable inferences favorable to plaintiff); Hall, supra note 178, at 907-08 (discussing application of one side only rule and other differences from federal review). In turn, appellate review may vary according to which party had the burden of proof on this issue. See id at 906-08.

180. Arceneaux v. Domingue, 365 So. 2d 1330, 1333 (La. 1979) ("In Louisiana courts of appeal have full and complete jurisdiction to review facts."). This is more a direction as to the scope of review, including the appellate court's power to enter its own findings of fact, since Louisiana courts are still instructed to give deference to juries (under a standard of manifest error, which is less strict than reasonableness review). See id. at 1333-34; Lirette v. State Farm Ins. Co., 563 So. 2d 850, 852-53 (La. 1990). See generally David W. Robertson, Appellate Review of Facts in Louisiana Civil Cases, 21 LA. L. REV. 402 (1961).

181. Cf. Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) (describing Alabama review of punitive damage awards, which considers independent criteria of review and even consideration of new evidence). Some states have responded to Haslip by giving their appellate courts more independent review of punitive damages, presumably to avoid the Court's due process questions. See, e.g., Mattison v. Dallas Carrier Corp., 947 F.2d 95, 100, 106 (4th Cir. 1991) (describing changes to South Carolina post-verdict review after Haslip). It is not clear that such appellate scrutiny is required, in light of the newer opinions in TXO Production Corp. v. Allied Resources Corp., 113 S. Ct. 2711 (1993).

182. In a forthcoming article, I argue that the jury test is still unsettled, a reality belied by both recent commentary and the advisory notes to the 1991 amendment. Although most courts do seem to use a substantial evidence measure (in applying the universally accepted reasonableness review), there is still some question in a firm minority of courts as to whether the judges should examine both sides of the evidence in applying the reasonableness threshold. See Steven A. Childress, Judgment as a Matter of Law: A Pretense of Consistency, A Return to Technicality (1994) (unpublished manuscript available from author).

Nevertheless, for purposes of the Erie rule analyzed in this article, it suffices to note the existence of this diverse treatment within the circuits without resolving the split. Here, the issue is whether each circuit's general federal test will apply the same in its diversity cases (not what its federal test exactly is), even if that general application may subtly differ among circuits.

Portions of the following analysis in part III are developed and expanded from 1 CHILDRESS & DAVIS, supra note 72, § 3.08.
test will also apply, or be applied in the same manner, in cases arising under state law. On that issue, the circuits are openly in conflict, though it is clear in all courts that Erie means that state law, of course, provides the substantive rules and legal tests, controlling federal judges and juries.\textsuperscript{183}

\textbf{B. The Majority Rule: Federal Standards Apply}

A majority of courts today, after early inconsistency in some circuits,\textsuperscript{184} expressly apply their federal sufficiency test of \textit{reasonableness} discussed above even in diversity and other state law cases, both at trial and on appeal. This application is now firmly settled in the Fourth,\textsuperscript{185} Fifth,\textsuperscript{186} Ninth,\textsuperscript{187} Tenth,\textsuperscript{188} and Eleventh\textsuperscript{189} Circuits.


\textsuperscript{184} \textit{See generally} Boeing Co. v. Shipman, 411 F.2d 365, 368-69 & nn.2-4 (5th Cir. 1969) (en banc) (discussing inconsistent cases within and among circuits); Wrenchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1067-68 (4th Cir. 1969) (same); Evans v. S.J. Groves & Sons Co., 315 F.2d 335, 342 (2d Cir. 1963) (same); Cooper, \textit{supra} note 7, at 973-74 & n.212 (lack of Court guidance has predictably led to splits among and within circuits).


\textsuperscript{186} Thrash v. State Farm Fire & Cas. Co., 992 F.2d 1354, 1356 (5th Cir. 1993); Ayres v. Sears, Roebuck & Co., 789 F.2d 1173, 1175 (5th Cir. 1986); McCandless v. Beech Aircraft Corp., 779 F.2d 220, 223 (5th Cir. 1985), \textit{vacated on other grounds}, 798 F.2d 163 (1986); Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1143 (5th Cir. 1985); Foster v. Ford Motor Co., 616 F.2d 1304, 1307 (5th Cir. 1980); Coastal Plains Feeders v. Hartford Fire Ins. Co., 545 F.2d 448, 453 (5th Cir. 1977); \textit{see also} Ellison v. Conoco, Inc., 950 F.2d 1196, 1203 n.8 (5th Cir. 1992) (stating that Louisiana law applies in action under Outer Continental Shelf Lands Act, 43 U.S.C. § 1331, but sufficiency test is federal; cites diversity cases), \textit{cert. denied}, 113 S. Ct. 3003 (1993); Jones v. Wal-Mart Stores, Inc., 870 F.2d 982, 986 & n.2 (5th Cir. 1989) (discussing sufficiency of evidence diversity rule in new trial context).

\textsuperscript{187} Miller v. Republic Nat'l Life Ins. Co., 789 F.2d 1336, 1340 (9th Cir. 1986); Bank of Cal., N.A. v. Opie, 663 F.2d 977, 979 (9th Cir. 1981); \textit{see} Sankovich v. Life Ins. Co. of N. Am., 638 F.2d 136 (9th Cir. 1981) (noting that Ninth Circuit uses federal test for sufficiency of evidence, such as \textit{j.n.o.v.} and directed verdict, in diversity cases; here applied in summary judgment context); Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345 & nn.2-3 (9th Cir. 1978) (finding Arizona test used substantially similar, and noting circuit conflict and prior inconsistent Ninth Circuit cases, court looks to federal test of sufficiency of evidence; here, discussed in summary judgment context).

\textsuperscript{188} Orth v. Emerson Elec. Co., 980 F.2d 632, 635 (10th Cir. 1992); Romero v. International Harvester Co., 979 F.2d 1444, 1449 (10th Cir. 1992); McKinney v. Gannett Co., 817 F.2d 659, 663 (10th Cir. 1987); Peterson v. Hager, 724 F.2d 851, 853 (10th Cir. 1984) (on rehearing); Hidalgo Properties v. Wachovia Mortgage Co., 617 F.2d 196, 198 (10th Cir. 1980); Yazzie v. Sullivan, 561 F.2d 183, 188 (10th Cir. 1977); Oldenburg v. Clark, 489 F.2d 839, 841 (10th Cir. 1974) (jury review and new trial motion).

\textsuperscript{189} Jones v. Miles Labs., Inc., 887 F.2d 1576, 1578 (11th Cir. 1989); Miles v. Tennessee River Pulp & Paper Co., 862 F.2d 1525, 1527-28 (11th Cir. 1989); Federal Kempler Life Assurance Co. v. First Nat'l Bank, 712 F.2d 459, 464 (11th Cir. 1983); Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982). \textit{But cf} LaRoche Indus., Inc. v. AIG Risk Mgmt., Inc., 959 F.2d 189, 193 (11th Cir. 1992) (using Georgia review test over award of attorneys' fees even though issue is framed as review of \textit{j.n.o.v.} motion).
The federal-test rule applies similarly in the District of Columbia, though often there the local law is federal district law anyway. Although the Rules of Decision Act does not require the circuit to follow Erie, the court has long held that Erie's principles are to be followed analogously by federal courts hearing diversity claims in the district. Nevertheless, it is apparent that a jury review test will be provided by federal, not district, law.

The Fifth Circuit's occasional justification for the majority rule is illustrative: any effort to interweave state sufficiency rules into jury review "must be rejected as attempts to apply state procedural rules to the judge-jury relationship in federal court." The court thus clarifies: "What they needed to prove to make a jury case is, of course, to be measured by [state] substantive law. Whether they proved such a case is a matter of federal procedural law . . . " In fact, that court met en banc to resolve the Erie issue in a landmark case, Boeing Co. v. Shipman, famous more for establishing the substantial evidence test and whole-record review generally in civil cases, replacing a scintilla or complete absence standard sometimes used previously in that circuit.

Likewise, the Fourth Circuit is clear that a federal court sitting in diversity "must also apply the Federal Rules of Civil Procedure and, therefore, must review the jury verdict under standards established by" Rule 50(b) and its substantial evidence test. This is so even though its judges recently met en banc to consider the proper instructions to be given a federal jury in deciding state-law punitive damages, and disagreed strongly about that issue. The majority found that, consistent with Erie, state review standards and the factors used to guide review of punitive damage awards (though not applying on appeal in federal court) must be incorporated into the jury charge used to inform the federal jury of the limits of its discretion under

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190. See Wilson v. Good Humor Corp., 757 F.2d 1293, 1298 (D.C. Cir. 1985) (applying federal test). Of course, the D.C. Circuit may not face diversity issues in the usual way of the state-based courts, but it interprets district law, see id. at 1301 n.6, and at times the D.C. Circuit is even asked to interpret state law. E.g., Waters v. American Auto Ins. Co., 363 F.2d 684, 689 (D.C. Cir. 1966) (refusing to defer to other federal court interpretation).

191. See Poole v. Kelly, 954 F.2d 760, 762-63 (D.C. Cir. 1992) ("under prevailing principles of federal-local law, the district court basically sits as a local court").

192. Id. at 763 (quoting Steorts v. American Airlines, 647 F.2d 194, 196 (D.C. Cir. 1981)).

193. See Wilson, 757 F.2d at 1298 (D.C. Cir. 1985). See generally Association of Am. R.Rs. v. ICC, 600 F.2d 989, 995-96 (D.C. Cir. 1979) (generally state substantive law creates underlying rights and duties, while federal law governs evidence, pleading, and practice).

194. Owens v. International Paper Co., 528 F.2d 606, 611 (5th Cir. 1976). Such policy arguments are analyzed infra text accompanying notes 385-95. Usually the majority courts merely recite their rule without further explanation, just as minority state-test courts tend simply to cite their cases without really analyzing the underlying Erie dilemma.

195. Owens, 528 F.2d at 609 (emphasis in original) (affirming directed verdict); accord Fitzgerald v. Manning, 679 F.2d 341, 346 n.1 (4th Cir. 1982).

196. 411 F.2d 365, 368-70 & nn.2-4 (5th Cir. 1969) (en banc).

197. See id. at 370-73.


Dissenting judges criticized this hybrid-charge remedy as too creative or usurpatious under *Erie*, and it may be that in other courts its manipulation of charge substance will be found to violate *Erie* or at least presents an enigmatic loophole from the reasoning in *Pacific Mutual Life Insurance Co. v. Haslip*. Nevertheless, apparently there is no question that post-trial review of the verdict, on damages and more broadly, is controlled by federal tests and the Seventh Amendment.

In all these courts, state law is said to provide the underlying cause of action and the substance of the parties' arguments, including such tricky issues — arguably similar to review standards — as the standard of proof at trial and doctrines like *res ipsa loquitur*. As the Fifth Circuit has distinguished, federal standards are used to test the insufficiency of the evidence in relation to the verdict, but the court refers to state law in diversity cases for the *kind* of evidence that must be produced to support the verdict. How-

200. *Id.* at 1415-18.
201. *Id.* at 1421 (Murnaghan, J., dissenting) (noting that *Haslip* does not “convert” factors for excessiveness review, “traditionally reserved for the court,” into “a jury question”); *id.* at 1424 (stating that the majority wrongly imposes “what are essentially federal jury instructions on state punitive damages”); *id.* (Luttig, J., dissenting in part) (stating that the majority wrongly constitutionalizes Alabama law and imposes it on Virginia); *id.* at 1433 (Hamilton, J., dissenting) (noting the court's substitution of federal law for Virginia punitive damages law, leaving different jury charge in state and federal courts, in violation of *Erie*).
202. 499 U.S. 1 (1991). *Haslip* may inevitably raise this anomaly since it referred to Alabama's freer review of awards as supporting its acceptability against due process complaints, yet federal review is controlled by the Seventh Amendment. See *Mattison*, 947 F.2d at 99 (discussing). On the other hand, *Haslip* may support the minority rule using state jury standards precisely because the anomaly is avoided by using state-rule review in federal courts in states which, like Alabama, provide acceptably intrusive review. That possibility (though at this point a rare combination) may nonetheless violate *Browning-Ferris*, as analyzed infra text accompanying notes 312-17. See also supra note 138 (discussing *Haslip*'s progeny).
204. E.g., *Romero v. International Harvester Co.*, 979 F.2d 1444, 1449 (10th Cir. 1992) (noting that Colorado provides substantive law but not standard to review jury); *Coursey v. Broadhurst*, 888 F.2d 338, 344 (5th Cir. 1989) (recognizing Mississippi law on methods of setting damages to personal property); *Peterson v. Hager*, 724 F.2d 851, 854 (10th Cir. 1984) (on rehearing) (discussing how to set crop damages in negligence); *Montgomery Indus., Int'l, Inc. v. Thomas Constr. Co.*, 620 F.2d 91 (5th Cir. 1980) (questioning whether facts were contract estoppel); *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345 (9th Cir. 1978) (noting elements of cause of action); *Reitan v. Travelers Indem. Co.*, 267 F.2d 66, 69 (7th Cir. 1959) (recognizing causal negligence).
205. See, e.g., *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1324 (11th Cir. 1982) (discussing *res ipsa* and burden of proof); *De Marines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1200 (3d Cir. 1978) (discussing burden of proof); see also *Warner v. Transamerica Ins. Co.*, 739 F.2d 1347, 1351 n.6 (8th Cir. 1984) (noting burden of proof, presumptions, and privileges arguably are state law, but evidence rules are federal law).
Part of the confusion over a diversity standard of review may stem from unclear mixing of jury sufficiency questions with similar ones of state law, like whether a certain issue is decided by jury trial. See infra note 304. It is also clear that a standard of review is *not* a standard of proof. See infra text accompanying notes 396-98.
206. *Ayres v. Sears, Roebuck & Co.*, 789 F.2d 1173, 1175 (5th Cir. 1986); *McCandless v. Beech Aircraft Corp.*, 779 F.2d 220, 223 (5th Cir. 1985), *vacated on other grounds*, 798 F.2d 163 (1986); see also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (“it is the substantive law’s identification of which facts are critical and which facts are irrelevant that governs” materiality).
ever, other special rules dealing with inferences\textsuperscript{207} are a sub-application of the jury sufficiency test and should be governed by federal rules.\textsuperscript{208}

C. MINORITY RULE: APPLICATION OF STATE STANDARDS

In contrast to the majority rule, the Sixth and Seventh Circuits — joined at times and less consistently by the First Circuit — apply the relevant state jury standard to review evidentiary sufficiency. The Second, Third, and Eighth Circuits also have a troubled history of applying or at least discussing a state review test, but more recently their positions are better described as continually "mooting" the issue by applying both federal and state standards in each case.\textsuperscript{209} The Federal Circuit presents a quirk of procedure and an inconsistent history for which a federal rule is the most logical resolution.\textsuperscript{210}

I. The Seventh Circuit: "Tension" in the Court

As stated, the Seventh Circuit has expressly used a state standard of review for sufficiency of the evidence in many jury cases.\textsuperscript{211} These state-standard opinions usually do not discuss older precedent applying a federal test in that court\textsuperscript{212} and are generally recognized as providing a settled state rule

\textsuperscript{207} For example, some states follow a prohibition against pyramiding inferences (piling one on another to arrive at a conclusion) or a rule that says that equally probable inferences even if reasonable must be resolved against the party with the burden of proof. See 1 CHILDRIDGE & DAVIS, supra note 72, § 3.05 (discussing general applicability in federal courts). Such rules, whether accepted or not (most federal courts don't), are simply part of the larger package of review for sufficiency of the evidence. \textit{Id.; see Anderson}, 477 U.S. at 247-57 (describing general sufficiency review process, including presumably review of inferences within it, even while explicitly and separately discussing use of burdens and standards of proof); cf. \textit{Cooper}, supra note 7, at 983-86 (describing inferences and \textit{res ipsa loquitur} as bound up in sufficiency review and therefore applying state test). For Texas law on inferences, see supra note 179.

\textsuperscript{208} Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1324 (11th Cir. 1982); Wretched v. S.J. Groves & Sons Co., 405 F.2d 1061, 1067-68 (4th Cir. 1969); Equitable Life Assurance Soc'y v. Fry, 386 F.2d 239, 245 (5th Cir. 1967).

\textsuperscript{209} See infra text accompanying notes 268-98.

\textsuperscript{210} See infra text accompanying notes 261-67.

\textsuperscript{211} E.g., Dolder v. Township of Martinton, 998 F.2d 499, 501 (7th Cir. 1993) (applying Illinois test and reversing grant of j.n.o.v.); Allison v. Ticor Title Ins. Co., 979 F.2d 1187, 1193-95 (7th Cir. 1992) (Wisconsin tests); Ross v. Black & Decker, Inc., 977 F.2d 1178, 1182 (7th Cir. 1993), cert. denied, 113 S. Ct. 1274 (1993); Hawco of Am., Ltd. v. Sumitomo Corp. of Am., 971 F.2d 1332, 1341 (7th Cir. 1992); Trzcinski v. American Casualty Co., 953 F.2d 307, 313 (7th Cir. 1992); A. Kush & Assoc. v. American States Ins. Co., 927 F.2d 929, 938, 942 (7th Cir. 1991) (applying Illinois law); Amplicon Leasing v. Coachmen Indus., Inc., 910 F.2d 468, 470 (7th Cir. 1990) (California test); Certain Underwriters of Lloyd's v. General Accident Ins. Co., 909 F.2d 228, 233 (7th Cir. 1990); Fort Howard Paper Co. v. Standard Havens, Inc., 901 F.2d 1373, 1382 (7th Cir. 1990) (Wisconsin law); Goldman v. Fadell, 844 F.2d 1297, 1301 (7th Cir. 1988) (citing cases); Mele v. Sherman Hosp., 838 F.2d 923, 924 (7th Cir. 1988); Spesco, Inc. v. General Elec. Co., 719 F.2d 233, 237 (7th Cir. 1983); Kuziw v. Lake Eng'g Co., 586 F.2d 33, 35 (7th Cir. 1978) (using circular Illinois test that overturns jury only when such a finding could never stand); Kudelka v. American Hoist & Derrick Co., 541 F.2d 651 (7th Cir. 1976); Pittsburgh-Des Moines Steel Co. v. Brookhaven Manor Water Co., 532 F.2d 572 (7th Cir. 1976); Lorance v. Marion Power Shovel Co., 520 F.2d 737 (7th Cir. 1975); Risse v. Woodward, 491 F.2d 1170 (7th Cir. 1974).

\textsuperscript{212} See, e.g., Gudgel v. Southern Shippers, Inc., 387 F.2d 723, 725 (7th Cir. 1967); Reitan v. Travelers Indem. Co., 267 F.2d 66, 69 (7th Cir. 1959). In fact, in 1971 the court was seen as settled in favor of federal review. See Cooper, supra note 7, at 974 n.212.
in the circuit.\textsuperscript{213}

On the other hand, it is the established rule in the Seventh Circuit that motions for new trial (including those based on the weight of the evidence) are reviewed under its federal test,\textsuperscript{214} despite the similarity of those evidentiary inquiries.\textsuperscript{215} In \textit{Abernathy v. Superior Hardwoods, Inc.},\textsuperscript{216} Judge Posner, even while reaffirming the state-standard jury sufficiency test in the face of the federal new trial rule, characterized this dichotomy as leaving the court "in some tension."\textsuperscript{217} Although noting that past opinions tend to ignore both contrary law and possible criticisms, Judge Posner stated that the position "nevertheless can be defended, and maybe even reconciled . . . ."\textsuperscript{218} To this end, he urged that a directed verdict motion perhaps \textit{defines} the plaintiff's substantive rights and is not just jury control: "it goes to liability, not just to amount of damages, and it determines the defendant's right to judgment and not just to a new trial];\textsuperscript{219} moreover, since excessiveness review goes only one way ("against plaintiffs"), a federal test may "impart a systemic bias" prompting forum-shopping.\textsuperscript{220} In any event, in 1983 the court again noted a possible conflict between these similar review contexts but still deferred to a state sufficiency test, finding no need to reconsider the issue or to resolve any inconsistency within the circuit.\textsuperscript{221}

After its public statements of doubt appeared, the court has over the last decade continued to apply its state-test rule consistently in a series of cases involving sufficiency of the evidence.\textsuperscript{222} Remarkably, these routine applications nearly always fail to discuss developing Supreme Court precedent that implies that a federal sufficiency test is applicable or to otherwise urge modern reconsideration of the rule. One panel that did note developing Supreme Court precedent simply read it wrong: it actually \textit{contrasted} the

\textsuperscript{213} See, e.g., \textit{Wright}, supra note 11, § 92, at 609 n.21.
\textsuperscript{214} \textit{E.g.}, \textit{Allison}, 979 F.2d at 1196; \textit{Ross}, 977 F.2d at 1182; \textit{Mercado} v. \textit{Ahmed}, 974 F.2d 863, 866 (7th Cir. 1992); \textit{Cook} v. \textit{Hoppin}, 783 F.2d 684, 687-88 (7th Cir. 1986); \textit{Huff} v. \textit{White Motor Corp.}, 609 F.2d 286, 295 (7th Cir. 1979); \textit{Galarstv. \textit{Johnson}}, 504 F.2d 1198, 1200 n.1 (7th Cir. 1974). The Seventh Circuit also finds that jury charge form and manner are federally prescribed.
\textsuperscript{215} See infra text accompanying notes 417-22.
\textsuperscript{216} 704 F.2d 963 (7th Cir. 1983).
\textsuperscript{217} \textit{Id.} at 970. The court cites the Seventh Circuit's federal test for new trial motions and compares its sufficiency test, calling them related but noting differences. See \textit{id.} at 970-71.
\textsuperscript{218} \textit{Id.} at 971.
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.} Still, the court noted that the difference is one of degree only, and likely not outcome-determinative. \textit{Id.} Note that Judge Posner's "systemic bias" argument appears to apply only (or mostly) to excessiveness review, not sufficiency, so it serves better as a reason to apply state law on new trial for damages than as a justification for distinguishing new trial as federal law from sufficiency as state law. If so, it does not appear consistent with his goal to possibly "reconcile" the circuit and in fact \textit{justifies} a federal sufficiency rule since both parties may raise that issue. The "bias" argument, to the extent it is an \textit{analogy} to review of damages for excessiveness, has also been implicitly answered by the Supreme Court's later holding that such review is federal law. See supra notes 131-37.
\textsuperscript{221} Robison v. \textit{Lescrenier}, 721 F.2d 1101, 1103 & n.1 (7th Cir. 1983) (Coffey, J.); see also \textit{Davlan} v. \textit{Otis Elevator Co.}, 816 F.2d 287, 289 (7th Cir. 1987) (contrasting state sufficiency test and federal new trial test); \textit{Wassell} v. \textit{Adams}, 865 F.2d 849, 854 (7th Cir. 1989) (same).
\textsuperscript{222} See supra note 211.
\textsuperscript{223} The recent Supreme Court cases are discussed infra text accompanying notes 310-33.
Court's rule that jury review considers evidentiary burdens as involving "federal" law, distinguishing the applicable Illinois review rule. However, the cited "federal" case, Anderson v. Liberty Lobby, Inc.,224 is federal only because it was itself treated as a typical diversity case and hardly supports a distinction as to diversity cases!225

Most of the circuit's applications also ignore its previously-noted tension regarding the federal new trial test. If both such motions are at issue, recent cases tend to recite each rule separately and without discussion of any dichotomy or of a need to reexamine the entire question.226

This is so even though use of the state test may be determinative, especially in diversity actions borrowing state law from jurisdictions which still apply a scintilla or complete absence rule.227 The issue nonetheless may be avoided in many appeals because the most commonly used standard — the Illinois test of allowing the jury to render a verdict unless all the evidence, viewed favorably to a verdict, "so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand"228 — sounds similar enough to any federal test the circuit would otherwise employ.229

2. The Sixth Circuit: Constant Hand-Wringing

The Sixth Circuit has been relatively consistent and straightforward, applying a state standard of sufficiency review in a long line of cases.230 In

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225. See infra note 322.
226. See, e.g., Allison, 979 F.2d at 1196 (containing separate section that applies federal new trial test without relating to opinion's long discussion of state sufficiency test); Ross, 977 F.2d at 1182 (stating both reviews consecutively without noting possible inconsistency).
227. See, e.g., Allison, 979 F.2d at 1193-96 (applying Wisconsin any evidence standard; limited review test appears decisive). See generally supra notes 173-79.
1981, in \textit{Gold v. National Savings Bank},\textsuperscript{231} the court reviewed its "well settled" rule in light of contrary circuits and then-recent Supreme Court language,\textsuperscript{232} especially the Court's 1977 decision in \textit{Donovan v. Penn Shipping Co.},\textsuperscript{233} in which the Court applied a federal rule of waiver on appeal.\textsuperscript{234}

Nevertheless, the \textit{Gold} court found no need to reconsider its position since the facts in that case satisfied the panel that the jury's verdict had to be reversed either as unreasonable or due to a complete absence of evidence, as Tennessee would require.\textsuperscript{235} The court added, however, that the "continued vitality" of the state-standard rule "is open to question."\textsuperscript{236}

Given this background, it might seem that the Sixth Circuit over the last decade has been a prime candidate to join the majority's federal-test rule. It was all too easy to jump from the 1981 query to the conclusion that a change in the Sixth Circuit policy was necessarily imminent, as an eminent commentator did.\textsuperscript{237} Yet it should be recalled that the court thirteen years earlier had also noted that "recent developments would make a review of our position appropriate"\textsuperscript{238} but there too left the question open.\textsuperscript{239} After 1968, likewise, the court did not develop the internal conflict found in other circuits or abandon its questioned rule.

The public soul-searching in \textit{Gold}, then, was merely "deja vu all over again," to phrase a coin. More fundamentally, since its later caution in 1981, the court has still consistently applied a state test as its "well established" rule,\textsuperscript{240} usually without discussion — including routine applications in unpublished opinions\textsuperscript{241} and opinions handed down recently,\textsuperscript{242} even after further Supreme Court decisions and rule amendments instructive on the issue.\textsuperscript{243}

In addition to ignoring recent precedent, the Sixth Circuit's position may not be entirely consistent with the circuit's application, in reviewing a new trial motion, of a federal test\textsuperscript{244} (sometimes with state tests said to be "in-

\begin{itemize}
\item \textsuperscript{231} 641 F.2d 430 (6th Cir.), cert. denied, 454 U.S. 826 (1981).
\item \textsuperscript{232} \textit{Gold}, 641 F.2d at 434 & n.3.
\item \textsuperscript{233} 429 U.S. 648 (1977).
\item \textsuperscript{234} \textit{See infra} text accompanying notes 310-11.
\item \textsuperscript{235} \textit{Gold}, 641 F.2d at 434 & n.3.
\item \textsuperscript{236} \textit{Id.} at 434 n.3.
\item \textsuperscript{237} \textit{See WRIGHT}, supra note 11, § 92, at 609 n.21 (suggesting Seventh Circuit may be the last stronghold of the state-test rule; cites \textit{Gold} to indicate Sixth Circuit reexamination of issue).
\item \textsuperscript{238} Lones v. Detroit, T. & I. R.R., 398 F.2d 914, 919 (6th Cir. 1968), cert. denied, 393 U.S. 1063 (1969). The recent development was \textit{Hanna}. \textit{See supra} note 12.
\item \textsuperscript{239} \textit{See Lones}, 398 F.2d at 919.
\item \textsuperscript{240} \textit{Arms v. State Farm Fire \\& Casualty Co.}, 731 F.2d 1245, 1248 n.2 (6th Cir. 1984).
\item \textsuperscript{241} \textit{See, e.g., J.C. Bradford Futures, Inc. v. Dahlonega Mint, Inc.}, 907 F.2d 150 (6th Cir. 1990) (table); \textit{Hannah v. Norfolk \\& Western Ry.}, 762 F.2d 1007 (6th Cir. 1985) (table) (applying Michigan law).
\item \textsuperscript{242} \textit{See supra} note 230.
\item \textsuperscript{243} These courts generally do not discuss \textit{Anderson} and \textit{Browning-Ferris} or the amendment to Rule 50, examined \textit{infra} text accompanying notes 312-55.
\item \textsuperscript{244} \textit{E.g., Tobin v. Astra Pharm. Prods., Inc.}, 993 F.2d 528, 541-42 (6th Cir.), cert. denied, 114 S. Ct. 304 (1993); \textit{J.C. Wyckoff \\& Assocs. v. Standard Fire Ins. Co.}, 936 F.2d 1474, 1487 n.20 (6th Cir. 1991) (though noting similarity of Michigan test; no contrast drawn to earlier
structive"\footnote{245}). Unlike the Seventh Circuit, however, this dichotomy has not been so obviously in tension since panels of this court find the state review law to be at least relevant or comparable to a new trial motion. Yet by and large the Sixth Circuit does distinguish without much analysis the circuit's federal rules on new trial\footnote{246} and on summary judgment.\footnote{247}

The jury review rule is nonetheless important. To be sure, many Sixth Circuit cases do apply an almost identical Michigan test.\footnote{248} Yet because circuit cases may apply Tennessee law which provides the stricter complete absence jury review standard,\footnote{249} the use of a state standard may influence or control several actions and appeals in that court. The impact may also be felt when panels apply Kentucky's jury test of clearly erroneous,\footnote{250} which presumably has less deference than reasonableness review.\footnote{251}

An example in which the choice of the test seemed to control the final result is \textit{Finch v. Monumental Life Insurance Co.},\footnote{252} in which the court applied a state's “any material evidence” test to review a jury verdict in favor of a life insurance beneficiary.\footnote{253} The insured had failed to pay his premium, but his widow testified that he regularly did so when he received a notice. The insurer sent four such notices to several people in its files; the insured was in its files; notices were mailed; but no direct proof was offered that notice was specifically sent to or received by the insured. This raised a sufficient inference that he did not receive notice, so the judgment entered on the verdict was affirmed.\footnote{254} As the dissent countered, the insured had just written the insurer a threat to “discontinue coverage” after a 30% rate hike, yet the jury’s finding assumed that he did not do so but instead failed to receive four separate notices sent in four batches to a file of names which included the insured’s (and others did receive them).\footnote{255} The inference that all four letters were misdirected was “a truly extraordinary coincidence,”\footnote{256} said the

\footnote{245. See, e.g., Humble v. Mountain States Constr. Co., 441 F.2d 816 (6th Cir. 1971).}
\footnote{246. See generally Arms v. State Farm Fire & Casualty Co., 731 F.2d 1245, 1248 n.2 (6th Cir. 1984) (“worth noting” that federal test used on new trial review).}
\footnote{247. See Lewis Refrigeration Co. v. Sawyer Fruit, Veg. & Cold Storage Co., 709 F.2d 427, 430 n.3 (6th Cir. 1983) (specifically distinguishing use of state review rule on j.n.o.v. from federal summary judgment test).}
\footnote{249. See, e.g., Gold v. National Savings Bank, 641 F.2d 430, 434 & n.3 (6th Cir.) (discussing and applying Tennessee law), cert. denied, 454 U.S. 826 (1981); see also supra note 176.}
\footnote{250. See, e.g., Nilson-Newey & Co. v. Ballou, 839 F.2d 1171, 1176 n.1 (6th Cir. 1988) (describing and applying Kentucky clear error test).}
\footnote{251. See supra note 74 and accompanying text.}
\footnote{252. 820 F.2d 1426 (6th Cir. 1987).}
\footnote{253. Id. at 1430 (citing Tennessee law).}
\footnote{254. Id. at 1430-31 (affirming denial of j.n.o.v.).}
\footnote{255. See id. at 1433-34 (Nelson, J., dissenting).}
\footnote{256. Id. at 1433 (adding that jury inference was speculation).}
dissent, not sufficient to support a plaintiff's verdict. Nevertheless, that might be the inevitable result of no evidence review, on such facts, where the usual federal review would demand reversal.

3. The First Circuit: Off-and-On State Tests

The First Circuit has somewhat less consistently applied the state standard of sufficiency in diversity cases, though in practice the tests recited tend to sound like a federal reasonableness standard. These cases nonetheless defer directly to a state standard, at least in passing, without also citing a federal test or otherwise mooting the issue. Thus the circuit must be included within the list of courts that expressly employ state law review, even though its commitment to the rule appears weak and intermittent: some panels simply recite without comment a general test, which appears to be a federal one, in diversity cases.

4. The Federal Circuit: Possible Federal Test?

The Federal Circuit, for reasons of procedure and its peculiar subject-based jurisdiction, is even more difficult to nail down on this issue — if it is to be confronted at all. The court, citing policies of comity and district court uniformity, makes itself bound by the procedural law of the geographic circuit in which a case arises. In the context of that controversial rule, it has described jury review for sufficiency of the evidence as proce-

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258. See DeMedeiros, 709 F.2d at 737 (finding that under Massachusetts test, question is whether any circumstances permit a rational inference to be drawn for plaintiff).

259. But cf. Wright, supra note 11, § 92, at 609 n.21 (noting that the Seventh Circuit may stand alone).

260. See, e.g., Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124-25 (1st Cir. 1992) (using reasonable person test and citing First Circuit precedent, though earlier this court had thoughtfully considered Erie issue of whether jury trial exists and found the question to be federal).

261. The issue may not be confronted often because such appeals by definition involve federal claims. The circuit has set up its own procedures to avoid winding up with jurisdiction over the kinds of non-patent and non-trademark claims which would be typified by diversity claims. See generally Atari, Inc. v. JS&A Group, Inc., 747 F.2d 1422, 1427-28 (Fed. Cir. 1984) (en banc) (discussing problem of jurisdiction when patent claims accompany claims based on other law). Research has not disclosed any cases performing sufficiency review over explicitly state-based claims. Nevertheless, given the tension and uncertainty as to jurisdiction inherent in this specialized court, see id. at 1441 (two concurring judges regret foray into difficult and far-ranging issues involving court's specialized jurisdiction and use of regional law), diversity claims may in future cases supplement patent and trademark appeals, so the court would have to address whether the state-law claims are reviewed under state law.

ducal, not substantive. This reasoning causes the court to apply another court’s standard of jury review in many cases, though other cases with no explanation of a possible inconsistency simply recite a general, federal review test which looks to be provided by Federal Circuit precedent.

More fundamentally, this characterization in effect hints that jury review is procedural under *Erie* and therefore controlled by federal law. Yet ironically the effect of that pronouncement may not be to federalize jury review uniformly in the Federal Circuit but rather to require the court to apply a circuit’s own rule as to whether the jury test is itself state or federal. Thus, the court may in occasional cases find itself to be controlled, in cases appealed from district courts within a certain minority of geographic circuits, by a circuit rule which applies a state jury standard. At this time, the circuit should be described as probably applying a federal-test rule like the majority of circuits, with a possibility of applying a state test in a minority of its own cases arising out of district courts that apply the minority *Erie* rule.

Such a result, it should be noted, would strain both the comity sought by the court and its use of procedural law from the geographic circuit at issue: the only reason to defer to the circuit is that sufficiency is considered procedural, yet the only reason that circuit might use a state test is that it considers sufficiency to be substantive. If the issue is considered fully and this paradox acknowledged frankly, the court will apply a uniform federal test in all cases to avoid the problem.

**D. THE “NEUTRAL” APPROACH: DON’T DECIDE ANYTHING**

Several courts repeatedly “moot” the diversity issue by reviewing the jury motion under both a federal and a state test, finding no real inconsistency in language or application. These courts tend to expressly apply both tests. (Even some circuits discussed above with fairly settled rules sometimes apply dual review standards so as not to re-raise the issue.)

Many states do apply a similar *reasonableness* test, but the avoidance

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264. E.g., *Tolomatic, Inc.*, 945 F.2d at 1549 & n.2 (applying Tenth Circuit jury procedures and test but finding no significant difference from Federal Circuit test); *Maxness*, 891 F.2d at 892 (using Eleventh Circuit test on j.n.o.v.); *Sjolund*, 847 F.2d at 1576 (using Ninth Circuit test); see *Braun Inc. v. Dynamics Corp. of Am.*, 975 F.2d 815, 819 & n.4 (Fed. Cir. 1992); *Wahpeton Canvas Co. v. Frontier, Inc.*, 870 F.2d 1546, 1552 n.8 (Fed. Cir. 1989).


266. Thus, if the Federal Circuit defers to the geographic circuit’s characterization of the issue, it would have to apply its own federal test rather than that circuit’s federal or state test.

267. Cf. *Sjolund*, 847 F.2d at 1576 (applying Ninth Circuit test since j.n.o.v. review is “procedural question not specifically provided for in any statute or rule”). Now that Rule 50(a) provides its own standard, the court may cite it to resolve its conflict in favor of a blanket Federal Circuit test.

strategy is more difficult where the forum state would apply a mere scintilla or any evidence test269 or uses other rules inconsistent with federal review.270 Even with such conflicts, however, some courts will prefer to review the facts twice under two separate tests rather than to resolve the question of which test is binding on the federal court.

One much-mooting court is the Eighth Circuit, which despite some cases applying a federal test271 often finds a way to avoid the issue by deferring to a state test but holding the same result under federal review.272 These courts, then, follow a rule that “where state and federal tests for sufficiency of the evidence are similar and neither party has raised the issue, we would look to state law as controlling.”273 (This oft-cited rule may have its origins in a 1960 opinion by then-Judge Blackmun on this “provocative question” which merely did what the Supreme Court had done the year before—avoid.274) Other panels simply apply the state standard with no comparison to federal law,275 thus treating the issue as if it were settled that state law controls and leaving an obvious conflict within the circuit that most panels won’t touch.

The usual mooting cases are not clear as to what the Eighth Circuit should do where the federal test is not similar, but presumably the state law would control in that situation as well, at least until the court reconsider its position. Nor do these cases explain what the circuit would do if a litigant actually raised the issue— which may be an unrealistic expectation given the typical, smarter appellate strategy to argue the result under both tests if either can support the desired result. Nor do they explain why a conflicting


270. E.g., Finch v. Monumental Life Ins. Co., 820 F.2d 1426 (6th Cir. 1987) (applying state rules on burden of proof and pyramiding inferences); Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1323-24 (11th Cir. 1982) (rejecting prohibition of pyramided inferences); see also supra note 207.


272. E.g., City Nat’l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1314 (8th Cir. 1991); Bastow v. General Motors Corp., 844 F.2d 506, 508 (8th Cir. 1988) (finding Iowa test is “substantially the same”); Carper v. State Farm Mut. Ins. Co., 758 F.2d 337, 340 (8th Cir. 1985) (same); DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982) (finding Arkansas test similar); McIntyre v. Everest & Jennings, Inc., 575 F.2d 155, 158 (8th Cir.) (finding Missouri test similar), cert. denied, 439 U.S. 848 (1978); Schneider v. Chrysler Motors Corp., 401 F.2d 549 (8th Cir. 1968) (finding Nebraska test similar).

273. Garoogian v. Medlock, 592 F.2d 997, 999 n.3 (8th Cir. 1979) (quoted in DeWitt v. Brown, 669 F.2d 516, 523 (8th Cir. 1982)); Gisriel v. Quinn-Moore Oil Corp., 517 F.2d 699, 701 n.6 (8th Cir. 1975) (citing cases); accord Carper, 758 F.2d at 340; Sowles v. Urschel Labs., Inc., 595 F.2d 1361, 1364 (8th Cir. 1979).

274. See Hanson v. Ford Motor Co., 278 F.2d 586, 589 (8th Cir. 1960) (applying Minnesota test here since parties have not raised point and test is similar, as in Dick). Yet nothing in Hanson signaled that this “disposition” should be continued for thirty-four years as a circuit “rule.”

275. See St. Paul Fire & Marine Ins. Co. v. Salvador Beauty College, Inc., 930 F.2d 1329, 1332 (8th Cir. 1991) (applying Iowa test); Yeldell v. Tutt, 913 F.2d 533, 539-40 (8th Cir. 1990); Glass Design Imports, Inc. v. Import Specialties, 867 F.2d 1139, 1142 (8th Cir. 1989); see also Hanson, 278 F.2d at 589 n.1 (citing earlier cases applying only state law).
circuit position on the standard of review should not be addressed sua sponte by the court.276

This comparativist strategy is sometimes called a "neutral position,"277 though that adjective makes the approach sound better than it really is since it never resolves anything beyond the facts at hand and may force the courts to double their energies if two tests are involved. Sometimes the reasoning becomes almost absurdly redundant or complicated, as when one Sixth Circuit case determined that a jury was neither unreasonable nor clearly erroneous.278

Apparently the Eighth Circuit believes it need not decide the issue since in so many cases the state standard is "like" the federal one.279 Perhaps so, but it may be true only in the sense that Madonna is like a virgin, when the applicable state standard is either clear error or any evidence. The avoidance strategy is at best unnecessary given recent law280 and is at worst inefficient, confusing, and misleading. It forces litigants to redouble their efforts and pages. It is perhaps consistent only with the confusion which this circuit has sometimes had regarding other issues of standards of review.281 This is not a very good compromise.

This dual strategy is also used in many cases in the Second Circuit282 and Third Circuit.283 For example, the Second Circuit in 1989 again noted that it is not settled whether federal or state law governs sufficiency of the evidence and, as in many cited cases, declined to resolve the issue "since there appears to be no material difference between the two standards, at least as

276. Cf. United States v. Vontsteen, 950 F.2d 1086, 1091 (5th Cir.) (en banc) (standard of review often affects outcome and should be briefed by parties; if they fail to do so, court should decide issue sua sponte, citing Sixth and Ninth Circuits), cert. denied, 112 S. Ct. 3039 (1992); FED. R. APP. P. 28(a)(5), (b) (as amended effective Dec. 1, 1993) (explaining that litigants now must brief the "applicable standard of review" for each issue).


278. See Moskowitz v. Peariso, 458 F.2d 240, 244-45 (6th Cir. 1972) (citing Kentucky cases on both tests).

279. See, e.g., City Nat'l Bank v. Unique Structures, Inc., 929 F.2d 1308, 1314 (8th Cir. 1991) (stating that the "test under the law of Arkansas, in any event, is similar to the federal test").

280. See infra text accompanying notes 310-55.

281. See Childress, supra note 73, at 111-15 & nn.129, 140, 146, 152 (criticizing circuit's use of substantial evidence in bench trials); id. at 120-21, 164 (analyzing circuit's freer review in documentary cases); id. at 160 (noting mixing of damages procedures and discretionary review). This is not to deny that other circuits have had similar problems.


applied here.”284 (That hardly seems true where the state test uses fair preponderance of the evidence review,285 which evokes a new trial test and its discretionary elements.286) These courts tend to say that they defer to a state test, though perhaps more accurately “deferral” here means to defer the issue to a later panel or the en banc court.287

The Third Circuit, despite cases citing a state standard alone,288 has appeared to be pushing toward applying its federal standard. For example, the court has cited without discussion, in some important diversity appeals, a general review test which certainly looks federal.289 In one such case, the en banc court in 1979 cited for its test a diversity case which likewise recites a general test without explicit reference to state law.290

More significantly, in another Third Circuit case Judge Aldisert offered reasoned dicta supporting a federal test.291 Although this 1969 decision appears to avoid the issue by noting the similarity of federal and state standards, the clear import of the opinion is that the circuit is moving toward its federal standard, and his best arguments support that position. The court noted that early state-test cases had been largely replaced by recent cases using a federal test, or deferring to a state test where the difference is not decisive.292

However, since both this extensive discussion and the court’s subliminal application of the federal test in 1979, the circuit has deferred to a state test where it would not appear to be decisive,293 apparently again to avoid facing the issue squarely. In a related vein, the court has explicitly held that it applies a state rule preventing the waiver of an immunity defense which would be waived if the normal federal prerequisites of a Rule 50 motion were enforced,294 an issue of Rule 50 review arguably more procedural than the

285. This was done with little explanation in Billiar, 623 F.2d at 248, in which the court deferred since the New York test was “virtually identical.”
286. See supra notes 118-20, distinguishing new trial review. The circuit clearly distinguished the standards in Bevevino v. Saydjari, 574 F.2d 676 (2d Cir. 1978).
287. See Denneny, 407 F.2d at 439 (stating that since tests are “substantially similar,” “we defer the choice of action urged upon us by the parties”).
292. Id. at 438.
293. See Blair v. Manhattan Life Ins. Co., 692 F.2d 296, 304 n.1 (3d Cir. 1982) (Garth, J., dissenting on other grounds).
294. Simmons v. City of Philadelphia, 947 F.2d 1042, 1085-86 (3d Cir. 1991), cert. denied, 112 S. Ct. 1671 (1992). Yet elsewhere the court seems to apply a federal standard for evidentiary sufficiency. See id. at 1067. For its state waiver rule, the court does not discuss or distin-
rule's review standard. A more recent panel, by some contrast, stated flatly (but without much support) that it "applies the federal standard for judging the sufficiency of the evidence in diversity actions," yet nevertheless noted that Pennsylvania law is similar.296 This federal-rule case may be treated as if it restates a rule that has always existed,297 but the number of cases which are contrary, or moot the issue by citing a state test too, signifies that it would be premature to consider the Third Circuit as having truly resolved its internal split. At this time it is still fairly described as a dual-strategy court.

In all of these circuits, what looks like a practice of judicial conservatism — avoid, moot, defer — is in reality problematic and inefficient. Although the strategy may be consistent (albeit anachronistic) with Hanna's apparent direction to apply state and federal law where there is no conflict,298 it often affects analysis where consistency is not so easily found and it fails to recognize other cases within the same court which are flatly contradictory. And even where it makes no difference in outcome, it is an affirmative political statement that another judicial body's law applies — an act of deference not justified by precedent or policy. It is better described as a state of denial.

E. THE SUPREME COURT: AVOIDANCE AND GUIDANCE

The circuits have taken these various positions long after the Supreme Court in 1959 expressly recognized the dilemma, in Dick v. New York Life Insurance Co.299 In that case the Court, like many lower courts, felt no need to resolve the conflict since the tests available were similar.300 Again the Court mooted the issue five years later in Mercer v. Theriot,301 this time after taking certiorari to address the conflict.

Even before the Court faced and avoided the problem, it had anticipated it. In 1958, in Byrd v. Blue Ridge Rural Electrical Cooperative,302 the Court — noting "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts"303 — found that federal law controls whether a particular issue should be submitted to the jury or judge,
assuming sufficient evidence exists to support a jury trial on the issue if it is triable to a jury.\textsuperscript{304} But that Court reserved the sufficiency issue, noted its own inconsistencies, and provided dicta implying that sufficiency is state substance: it footnoted a reference to a 1940 case which it characterized as having established that state standards apply for sufficiency “to raise a jury question.”\textsuperscript{305}

By leaving the question open in \textit{Dick} and \textit{Mercer}, the Court did implicitly clarify that the cited 1940 case had not really settled the issue by its dicta on state jury review since no directed verdict question was before the earlier Court.\textsuperscript{306} That new forms of analysis would apply to this particular issue was also foreshadowed by \textit{Hanna v. Plumer},\textsuperscript{307} in which the Court made \textit{Erie} analysis more flexible and refined\textsuperscript{308} in the course of deciding to apply a federal rule allowing substituted service of process despite a conflicting state rule. At any rate, the sufficiency issue was regarded as difficult.\textsuperscript{309}

More recently, the Court has provided language in similar contexts that would appear to support use of a federal test in the sufficiency situation too. In 1977, in \textit{Donovan v. Penn Shipping Co.},\textsuperscript{310} it held that a federal rule would control in remittitur situations, requiring that one accepted at trial would preclude review of the issue on appeal. Echoing \textit{Byrd}, the Court specified: “The proper role of the trial and appellate courts in the federal system in reviewing the size of jury verdicts is . . . a matter of federal law.”\textsuperscript{311}

In 1989, the Court extended this ruling in \textit{Browning-Ferris Industries v. Kelco Disposal, Inc.}\textsuperscript{312} In finding that new trial motions on damages are subject to an \textit{abuse of discretion} standard,\textsuperscript{313} the Court held that in a diversity case federal law governs “those issues involving the proper review of the jury award” in federal courts,\textsuperscript{314} even though state law controls “the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount.”\textsuperscript{315}

\textsuperscript{304} Id. The Court cited at length (and apparently reaffirmed) a pre-\textit{Erie} decision that held that federal law governs to allow a judge to take an issue from the jury, because it is the \textit{kind} of issue which may be decided by a judge, despite a contrary state rule. \textit{See} Herron v. Southern Pac. Co., 283 U.S. 91 (1931). \textit{But cf} Comment, Arizona Constitutional Law Derailed in Federal Diversity Court: A Reevaluation of Herron v. Southern Pacific Co., 16 \textit{Ariz. L. Rev.} 208 (1974).

\textsuperscript{305} \textit{Byrd}, 356 U.S. at 540 n.15 (citing Stoner v. New York Life Ins. Co., 311 U.S. 464 (1940)).

\textsuperscript{306} Cooper, \textit{supra} note 7, at 973 & n.210; \textit{see} \textit{Wright}, \textit{supra} note 11, § 92, at 608 (“It is hard to believe that Stoner held what the Court later said it held.”).

\textsuperscript{307} 380 U.S. 460 (1965).

\textsuperscript{308} \textit{See infra} text accompanying notes 368-71.

\textsuperscript{309} The Court’s past reluctance may have stemmed less from indecision as to the implications of \textit{Erie} — the Court then was answering such questions left and right — than from an unwillingness to pin down the general federal test itself. \textit{See supra} note 182, discussing the difficulty generally.

\textsuperscript{310} 429 U.S. 648 (1977).

\textsuperscript{311} \textit{Id}. at 649.

\textsuperscript{312} 492 U.S. 257 (1989).

\textsuperscript{313} \textit{See id}. at 276-80. The Court was reviewing a $6 million punitive damage award for its possible excessiveness under the Constitution.

\textsuperscript{314} \textit{Id}. at 278 (citing \textit{Penn Shipping}).

\textsuperscript{315} \textit{Id}. Once the award is found to be within the confines set by state law, review is made
A federal rule precluding review, in *Penn Shipping*, now had supported — with merely a citation — something of a federal review standard in this context. Because Rule 59 (governing new trials) no more provides a review test than did Rule 50 (traditionally governing directed verdicts and j.n.o.v.), *Browning-Ferris* supports the assumption that federal law will provide the standard to review a jury verdict in either of these contexts. And because many of the same *Erie* policies would seem to apply for sufficiency review as well as damages, it is not a big jump from either *Penn Shipping* or *Browning-Ferris* for lower courts to conclude that the propriety of a jury verdict, as well as its preclusion or size, is a federal matter.

In 1986, the Court may have even more subtly decided the issue or at least implied the result, in two landmark cases handed down the same day, in which the Court refined summary judgment law: *Anderson v. Liberty Lobby, Inc.* and *Celotex Corp. v. Catrett.* Both cases were treated as diversity cases, both applied federal summary judgment law extensively, and both fashioned summary judgment rules by analogy to federal directed verdict standards under Rule 50(a). No mention was made of any controversy over state standards in diversity cases, and in fact the Court discussed the "run-of-the-mill civil case," presumably including diversity cases, to support its analogy to what look like broad federal rules of jury review.

by a federal standard of review. *Id.* The Second Circuit had been unclear which standard it used but was affirmed nonetheless on a federal abuse of discretion test, applied in light of the broad range of factors Vermont law allows juries to consider. *Id.* at 280.

316. The Court thus ignored, perhaps deliberately and as precedent for the *Erie* issue, the fundamental differences between a scope of review (which issues are properly addressed on appeal, e.g., waiver by failure to properly object below) and the standard of review (how that review if allowed will be made, how much deference will be given on the issue, and considering what materials). See J. Dickson Phillips, The Appellate Review Function: Scope of Review, 47 LAW & CONTEMP. PROBS. 1, 1 (1984) (clearly distinguishing).

317. Courts less controversially apply federal tests on new trial motions, and that context has been distinguished as more readily federal, even in courts (like the Seventh Circuit) which use state standards on legal sufficiency of the evidence. See supra text accompanying notes 214-21. The analogy is not complete, but both do involve "review of the jury" in a broad sense, and *Browning-Ferris* gave no hint it was distinguishing jury review writ large. Of course, it did not purport to decide the much-mooted sufficiency issue, either.

318. See infra text accompanying notes 417-24.

319. See supra note 59.


322. See *Anderson*, 477 U.S. at 250-56; *Celotex*, 477 U.S. at 322-23. Although both came from the District of Columbia, they apply local D.C. substantive law without hesitation and otherwise treat the cases as diversity actions. The Court in *Anderson* explicitly describes it as a "diversity libel action." *Anderson*, 477 U.S. at 245. More generally, a federal court hearing a case from the District of Columbia is held to apply *Erie* rules even though it is not a state. See supra note 192. Even if an argument could be made that the Court's use of D.C. cases avoids the *Erie* issue because such cases are not required to follow *Erie*, it is doubtful that Justice White would have used the term diversity if he meant to limit the sweeping analysis to federal question cases.

More on point, the Court rejected a *scintilla* rule for both summary judgments and directed verdicts without any noted hesitation for diversity cases which arise in states using the *scintilla* test.

To the extent summary judgment is analogous to jury review — and the Court indeed expressly made them more “mirror”-like — federal courts may similarly decide to apply federal jury standards in all cases (though in 1986 it was possible again to distinguish summary judgments as arguably more controlled by federal rule). And the Court treated summary judgment as a question of law for testing the sufficiency of the evidence with no distinction drawn from the mid-trial or post-trial sufficiency process. Yet even if the analogy fails, the Court has spoken directly to broad jury tests and expressly made them applicable to the directed verdict, a procedure obviously provided by federal law even in a diversity case.

The Court provided a similar description of Rule 50(a) review very recently, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* In reviewing the admissibility of expert testimony under Rule 702 of the Federal Rules of Evidence, Justice Blackmun cautioned that other protective procedures are available to ensure against misuse of junk science. Such “conventional devices, rather than wholesale exclusion,” include summary judgment and judgment as a matter of law; the trial court “remains free to direct a judgment, Fed.Rule Civ.Proc. 50(a) . . .” Significantly, *Daubert* is expressly a diversity case cites diversity cases to illustrate this power and generally makes no distinction for diversity cases in its evidentiary analysis or its comparison to sufficiency reviews such as Rule 50.

Even if none of these cases actually fashioned a holding as to jury review for sufficiency, in the aggregate they leave little doubt how the Court now

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324. *See Anderson*, 477 U.S. at 251-52 (majority opinion). All the cited cases are federal law cases, though many are pre-1938 cases which would not raise an *Erie* concern. *See also Daubert v. Merrell Dow Pharm., Inc.*, 113 S. Ct. 2786, 2798 (1993) (diversity case describing review of a *scintilla* of evidence as applying similarly to summary judgments and to Rule 50 judgments as a matter of law).


326. Even so, Rule 56 no more provides the controlling *reasonableness* test than did former Rule 50. It was read into Rule 56's *genuine issue* by the Court, and only by paralleling federal jury review generally.


328. *See also supra* note 89 and accompanying text, in which the *Salve Regina* Court characterized diversity jurisdiction as not affecting a wide array of review situations.


330. *Id.* at 2798 (majority opinion).

331. *Id.*

332. *Id.* at 2791 (removal by diversity).

333. *Id.* at 2798 (citations omitted).
views that process. They may be read to foreclose the minority position on all forms of jury review.

F. THE 1991 AMENDMENT TO RULE 50 AND THE SEVENTH AMENDMENT

Although directed verdicts traditionally have not had the advantage of having their review test specified by a federal rule, unlike Rule 52's clearly erroneous rule, they do spell out a relationship between judge and jury, and among courts, in a way that can be seen as procedural even if it does affect how the merits are finally viewed.

More significantly, Rule 50(a) as amended in 1991 now actually specifies that evidence must be a "legally sufficient... basis" such as to allow "a reasonable jury to have found" for a party on an issue. Rule 50 is thus interpreted as including the standard of review within the rule itself. This language may encourage courts to find sufficiency to be now more a procedural-rule issue, where federal law controls. After all, review of findings by judges after nonjury diversity trials is held to be specified by federal law, in part because there is a federal rule on point. Likewise, in the minority courts, retention of a state standard for sufficiency review has at times been justified by the lack of a federal rule on point. That missing link is no longer really absent.

Of course, careful judges and academics will recognize that placing a re-


335. FED. R. CIV. P. 52(a). The more settled use of a federal test for diversity nonjury trials is discussed supra in text accompanying notes 80-94.

336. See infra notes 385-95 and accompanying text.

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

338. See FED. R. CIV. P. 50(a) Advisory Committee Notes, 1991 Amend. (subdivision (a)(1) "articulates the standard for the granting of a motion for judgment as a matter of law," as taken from "long-standing case law").

Elsewhere I do argue that the amended rule, despite its advisory notes, does not clarify the standard of review or resolve the circuit conflict over what the reasonableness test means. See Steven A. Childress, Judgment as a Matter of Law: A Pretense of Consistency, A Return to Technicity (1994) (unpublished manuscript available from author). Nevertheless, it cannot be denied that the drafters intended to place the standard of review within the new rule. That rule "provides" a review test within it as much as do Rule 56 for summary judgments and Rule 52 for nonjury trials — two contexts in which the applicable review language must be interpreted and applied in later cases as well. See Edward H. Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 NOTRE DAME L. REV. 645 (1988) (Rule 52's strength is its flexibility as applied).

339. See supra note 80 and accompanying text.

340. See, e.g., Boynton v. TRW, Inc., 858 F.2d 1178, 1186 (6th Cir. 1988) (en banc) (stating, as one reason to apply state sufficiency test, that Rule 50 did not set out a review standard); see also Cooper, supra note 7, at 983 n.238 ("Rule 50 [then, in 1971] lacked standard within it," so Hanna's mandate to use federal rules "does not affect the present problem").
view standard into the rule does not quite resolve the *Erie* question — it just changes it (perhaps from an exclusively Rules of Decision Act problem to principally a Rules Enabling Act one). Now the first inquiry should be whether the specified standard is so substantive that its inclusion in a federal rule offends the limits of the Enabling Act, and that is where Hanna's language of "arguably procedural" better fits; the rulemaking is acceptable because it is rationally classified as procedural. (This answers any Tenth Amendment problems as well.) And then it is acceptable under the Rules of Decision Act, to the extent that inquiry remains necessary, because it does not violate *Erie*'s central concerns, including forum-shopping and inequitable administration of the laws. But the location of the standard within the rule certainly bolsters the case for treating the issue as procedural and implicitly resolved, especially in the way courts really do apply this aspect of Hanna. Even critics of courts which fail to sort out the various *Erie* inquiries recognize that, after Hanna, a Federal Rule of Civil Procedure found valid under the Enabling Act likely controls over conflicting state law.

Perhaps the federal courts have always had their jury review standard specified by another federal "law" — the Seventh Amendment — without really acknowledging it. That provision limits the federal court power to review civil juries since "[n]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of

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343. See generally Kane, supra note 11, at 675-76 (carefully distinguishing inquiries about "substantive" by which statute is involved).
344. See id. at 675.
345. See Hanna, 380 U.S. at 472. Actually the arguably procedural term is Justice Harlan's characterization of the majority's approach, id. at 476, but it seems accurate. In fact, the test appears in the section regarding the rule's constitutionality and thus is criticized in its use as an interpretation of Enabling Act cases. Ely, supra note 11, at 719-20 (proposing that Enabling Act inquiry be given more analysis and weight than courts tend to do, even if federal rule is on point, but noting Hanna's unhelpfulness).
347. See infra text accompanying notes 368-84.
348. See, e.g., Gelfand & Abrams, supra note 23, at 980 (policy of preventing forum-shopping generally outbalances a competing policy-based common law rule, but yields to specific Federal Rule based on statutory authority); cf. Ely, supra note 11, at 697 (caricaturing understanding of Hanna — its "hard-hearted rendition" that a rule "even arguably procedural is to be applied in a diversity action," despite state law — but citing several sources using that approach).
349. E.g., Kane, supra note 11, at 675. Some deference to state interests was maintained by requiring scrutiny into whether the laws actually clash; if they do not, then courts may consider whether *Erie*'s policies under the Rules of Decision Act require application of state law. Id. Indeed, a strong presumption exists that rules put through the enabling process are procedural. Id. at 678; see also Braman & Neumann, supra note 28, at 443 (under Enabling Act, if state rule is procedural, specific federal rule applies).
350. E.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 92 (3d Cir. 1992) (judge findings "need a stronger evidentiary base" than jury verdicts do because jury sanctity is protected by amendment); Mattison v. Dallas Carrier Corp., 947 F.2d 95, 99 & n.1 (4th Cir. 1991) (though does not apply to states); WRIGHT, supra note 11, § 95, at 643 (cases announcing sufficiency rule refer to jury function and Seventh Amendment).
the common law.”351 To be sure, this does not provide or even authorize a specific standard of review,352 but courts today routinely present their standard of review as an application of the Seventh Amendment353 and justify strict Rule 50 procedures in part by reference to the limited power to grant j.n.o.v. implied by the amendment.354 The circuits may have had the key to the federal-rule dilemma in their own backyard all along, though rarely saying so,355 such that the Erie issue should have been resolved long before the Supreme Court spoke and Rule 50 changed. Dorothy could have clicked her heels on first leaving Munchkin Land and avoided the messy roadtrip, but she had to want it badly enough. Likewise, state-rule courts desiring change may need recent sources to justify it, since the Seventh Amendment was there every time they reconfirmed a state rule. Perhaps the recent law will spur these courts to realize that they finally need a change badly enough.

G. WILL THE STATE-LAW AND “NEUTRAL” COURTS, OR EVEN THE SUPREME COURT, DECIDE?

Given this impressive body of doctrine — especially the amending of Rule 50 and recent Supreme Court guidance touching on the issue if not deciding it outright — the minority position, as a matter of doctrinal consistency at least, can no longer stand.

Perhaps the Court itself will in an appropriate case grant certiorari to resolve the circuit conflict in favor of a federal test, using its own precedent and rule change to sanction the majority view.356 Indeed, the Court has increasingly granted certiorari on standards of review issues in many contexts.357 Yet the circuits should not hold their breaths for an imminent reconciliation by the Court on this issue, especially since it has been so easy to

351. U.S. CONST. amend. VII.
352. See Cooper, supra note 7, at 976-78, 990 (arguing that since Seventh Amendment does not sanctify a particular standard, it does not mandate a federal test in diversity cases).
353. See, e.g., Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969) (patently unreasonable verdicts do not merit constitutional protection, so courts may review verdicts for sufficiency as a question of law consistent with Seventh Amendment); Wretchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1065-66 (4th Cir. 1969) (review rule has Seventh Amendment interplay); see also FED. R. CIV. P. 50(a) Advisory Committee Notes, 1991 Amend. (jury review is only “to assure enforcement of the controlling law and is not an intrusion on any responsibility for the factual determinations conferred on the jury by the Seventh Amendment”); In re Air Crash Disaster Near New Orleans on July 9, 1982, 767 F.2d 1151, 1165-66 (Tate, J., dissenting); Cooper, supra note 7, at 978 & n.220 (collecting sources which argue that federal test follows from application of Seventh Amendment in all federal cases).
354. See FED. R. CIV. P. 50(a) Advisory Committee Notes, 1991 Amend. (noting constitutional issue but preferring to rest timing rules on policy of allowing parties to cure defects).
356. Compare, for example, Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari), in which the Court was urged to resolve the broader circuit conflict on the jury review standard generally. Although that case involved federal antitrust law without state law questions, perhaps the Court in ending the circuit split would have stated a test generally applicable in all federal cases.
357. See, e.g., 1 CHILDRESS & DAVIS, supra note 72, § 1.02.
avoid in lower courts and has been avoided by the Court itself for thirty-five years. Moreover, the general context of civil jury review is one place where the Court has itself openly divided on whether the matter should be heard at all, and the majority said no over Justice White's lone dissent. Justice White is now retired, and few others on the Court have maintained comparable attention to circuit consistency on standards of review issues.

Will the current Court have the energy to revisit a question for which the parties likely will not urge an outcome-determinative position in their petitions? Probably not. One might speculate that Justice Ginsburg will not really replace Justice White in terms of his apparent interest about the jury review issue, especially as it relates to the related *Erie* problem. Justice Ginsburg has sat on the D.C. Circuit, which has had a consistent federal rule and has seen no need to revisit the issue; given that perspective, the *Erie* issue may look relatively routine and uneventful. It may be that the Court will find its internal voice urging reconciliation only in a newer appointment arising from a circuit, such as the Eighth, which has had to spend years of judicial energy in avoiding the problem or applying ever-changing state standards.

Nevertheless, any minority panel otherwise now skeptical of a state-standard rule probably does not need to hold its breath. To the extent these circuits wish to change or cement their review rule in favor of federal law, they can do so by en banc resolution, as the Fifth Circuit in *Boeing* did in part on the *Erie* issue itself.

Even that drastic remedy — and en banc resolution is increasingly unlikely for busy courts — is not required; these circuits' panels themselves may choose a uniform federal rule whatever their mixed precedent on point. This is so, despite a rule of *panel stare decisis* normally used in such

358. See supra note 356.


361. In other contexts, courts have met en banc to resolve conflicts on standards of review issues. See, e.g., *Thomas v. Capitol Sec. Servs., Inc.*, 836 F.2d 866 (5th Cir. 1988) (en banc) (review of Rule 11 sanctions order); *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc) (no deference to district court on state law); see also supra note 276.


363. The term, better described as *interpanel accord*, requires each circuit panel to defer to previous panels' rulings on law within the circuit, subject to en banc modification. No deference need be given sister circuits. See 1 *CHILDRESS & DAVIS*, supra note 72, § 6.02; *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); Richard Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 *Yale L.J.* 677 (1984).
courts,\textsuperscript{364} because all courts recognize that panels need not defer to cases decided before an intervening change in governing case law or amendments to applicable rules.\textsuperscript{365} In this context, both Supreme Court precedent and the 1991 amendment to Rule 50, even if not precisely on point,\textsuperscript{366} act as sufficient fodder for a panel to reexamine and alter its own precedent in light of that intervening authority.

That the minority circuits should indeed adopt a settled test, and choose their federal one, is supported not only by the intervening law but also by \textit{Erie} theory and policies. If the state-standard rule was wrong all along for such reasons — but previously could not be changed under \textit{stare decisis}\textsuperscript{367} — its change may now be triggered by use of the intervening authority, even if the position chosen is justified more satisfyingly and less technically by considering the modern scope and goals of \textit{Erie}.

\textbf{IV. \textit{Erie} Theory: Allocation of Authority to Decide}

\textbf{A. Traditional \textit{Erie} Policies and Modern Guidelines}

Using traditional \textit{Erie} analysis as it has developed under \textit{Hanna},\textsuperscript{368} it appears that the issue is necessarily federal. \textit{Hanna} loosened \textit{Erie}'s apparently tight reins by rejecting "application of any automatic, 'litmus paper' criterion,"\textsuperscript{369} instead emphasizing the twin principles of outcome determination and the deterrence of forum shopping that underlie \textit{Erie}.\textsuperscript{370} Lower courts, in turn, stress these factors in sorting out federal/state dilemmas.\textsuperscript{371}

Use of federal review does not appear to be outcome-determinative in any
sense the courts actually employ, as one state-rule court has nearly conceded.\textsuperscript{372} Of course, the review test may make a difference in a particular case, but for this factor the courts tend to focus on the necessary and inevitable impact across nearly all such cases.\textsuperscript{373} As many sources note, the impact of “outcome determination” has lessened since \textit{Hanna} because it would mean little if read to its extreme:\textsuperscript{374} “It is difficult to conceive of any rule of procedure that cannot have a significant effect on the outcome of a case.”\textsuperscript{375}

In most jury review cases, the test’s impact is slight or none, allowing many courts to moot the \textit{Erie} issue itself.\textsuperscript{376} Any change in outcome only occurs after some part of the trial has occurred and varies on the facts of each trial — hardly a predictable or generic effect (unlike a statute of limitations). On appeal, the review process is even further removed and less immediate. Thus, it should not be found to step over \textit{Hanna’s} policy that a state rule not be ignored if it would “make so important a difference to the character or result of the litigation that failure to enforce it would unfairly discriminate against citizens of the forum state . . .”.\textsuperscript{377} Nor does the choice seem to broadly implicate the inequitable administration of justice\textsuperscript{378} since most versions of jury review are long-standing, find support in ample precedent, are similar, or lead to similar results.

The other strong concern is forum-shopping. Here, it does not seem likely that lawyers even in states with a different review test will choose a federal forum just because they will want a verdict more easily overturned on review.\textsuperscript{379} Such a choice would defy the optimism and immediacy of trials because it would assume a focus on post-trial remedies to an anticipated failure of proof or strategy at trial.\textsuperscript{380} The fear that at trial a strategic factor

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\textsuperscript{372}See Abernathy v. Superior Hardwoods, Inc., 704 F.2d 963, 971 (7th Cir. 1983).

\textsuperscript{373}See Wrenchford v. S.J. Groves & Sons Co., 405 F.2d 1061, 1066 (4th Cir. 1969) (federal test applies since outcome-determinative test is neither inflexible nor universal); Fleming James et al., Civil Procedure § 2.37, at 128-30 (4th ed. 1992) (\textit{Byrd} and later cases mean that outcome-determination in strict sense is not controlling).

\textsuperscript{374}See, e.g., Hansen v. Harris, 619 F.2d 942, 962 n.8 (2d Cir. 1980), rev’d on other grounds, 450 U.S. 785 (1981); cf. Ely, supra note 11, at 717-18 (describing common view that \textit{Byrd} qualified an extreme description of outcome-determination, and \textit{Hanna} further refined and indeed “rejuvenated” it).

\textsuperscript{375}Hansen, 619 F.2d at 962 (quoting Charles A. Wright, Law of the Federal Courts 273 (3d ed. 1976)).

\textsuperscript{376}See, e.g., supra notes 268, 274, 296, and 300.

\textsuperscript{377}See \textit{Hanna}, 380 U.S. at 468 n.9.

\textsuperscript{378}See generally id. at 468; see also Herbert v. Wal-Mart Stores, 911 F.2d 1044, 1047 (5th Cir. 1990) (\textit{Hanna} means courts look to twin aims of \textit{Erie}: avoiding forum-shopping and the inequitable administration of the laws); Cates v. Sears, Roebuck & Co., 928 F.2d 679, 687 (5th Cir. 1991) (same).

\textsuperscript{379}Plaintiff motions are especially unlikely. See 1 Childress & Davis, supra note 72, § 3.06.

\textsuperscript{380}Judge Posner has argued that jury review may have a disproportionate and systemic
will be present is more realistic for issues that are bound up with the state issues raised, like trial burdens. For sufficiency, however, it is hard to believe that application of the state rule "would have so important an effect upon the fortunes of one or both of the litigants that failure to enforce it would be likely to cause a plaintiff to choose the federal court," as Hanna requires.381 (Nor does the choice of law seem to "substantially affect those primary decisions respecting human conduct which our constitutional system leaves to state regulation."–382) Forum-shopping seems far more likely to occur where summary judgment practice differs,383 yet that is an area where it is established that federal practice governs federal courts.384

Beyond these two factors, courts often ask whether an overriding federal interest exists.385 On this front, use of a federal standard is supported by the oft-cited sanctity of the judge/jury relationship in federal courts:386 one "essential characteristic" of the federal system "is the manner in which, in civil common-law actions, it distributes trial functions between the judge and the jury . . . ."387 Thus, there is "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts."–388 In similar contexts, the Court has described this relationship as an inherently federal one justifying federal review rules;389 on the sufficiency issue itself, some majority courts likewise cite this relationship as inherently procedural, requiring a federal review rule.390 A balancing of federal interests,391 then, has

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381. Hanna, 380 U.S. at 468 n.9.

382. This test is from Hanna, 380 U.S. at 475 (Harlan, J., concurring). See Wrenchford, 405 F.2d at 1065-66 (sufficiency rule "plays no role in the ordering of the affairs of anyone"); Cooper, supra note 7, at 982 (though arguing for state law on some aspects of review, notes that "it is extremely difficult to conjure up a situation in which disregard of state directed verdict standards would interfere with private planning of private activity").


384. See supra text accompanying notes 66-67.

385. See, e.g., Jarvis v. Johnson, 688 F.2d 740 (3d Cir. 1982) (Erie analysis asks, inter alia, whether any overriding federal interest is served); Walko Corp. v. Burger Chef Sys., Inc., 554 F.2d 1165 (D.C. Cir. 1977).

386. See generally 5A MOORE & LUCAS, supra note 43, ¶ 50.06, at 69.


388. Id. at 538.


391. There exists something of an academic debate over the extent to which Byrd policy-balancing in its broadest brush survived Hanna and when it rightly is invoked. Compare Ely, supra note 11, at 717 n.130 (arguing, at least for Rules of Decision Act issue, that "there is no place in the analysis for the sort of balancing of federal and state interests contemplated by the Byrd opinion") with Richard Bourne, Federal Common Law and the Erie-Byrd Rule, 12 U. BALT. L. REV. 426, 464-68 (1982) (criticizing Ely for failing to acknowledge the continued viability of Byrd balancing) and Kane, supra note 11, at 675-76 & n.32 (Byrd balancing was refined and given a framework by Hanna, which applies a general policy inquiry). Resolution
evolved in favor of promoting judge/jury symbiosis.

The relationship is especially protected when one concentrates on the exact issue presented by pure sufficiency review — legal reasonableness of the jury — rather than on similar but decoy issues, such as trial burdens and res ipsa loquitur. The "similar" issues arguably do affect substantive interests in that they intertwine sufficiency in a factual sense with state law issues that incorporate the primary rights and duties of the parties. By contrast, standards of review measure the extent to which these rights and duties are satisfied in the same way that any procedure sets up a process to determine rights and duties.

More to the point, review for sufficiency (even more than the underlying law, burdens, and presumptions) by definition specifies the relationship between a judge and jury: that's all that it is about. Standards of review in general are now understood as, at a minimum, a system of allocating decisionmaking authority within the judicial system. That is no less so when the allocation is between the two actors judge and jury; indeed, sufficiency review, in its modern understanding, is the paradigm of distributing power between them.

The Supreme Court has recently made clear that trial burdens and other standards of proof are not the same as review standards, in that the latter "describe, not a degree of certainty that some fact has been proven in the first instance, but a degree of certainty that a factfinder in the first instance made a mistake in concluding that fact had been proved under the applicable standard of proof." That state-law burdens and presumptions must always be kept distinct from jury sufficiency, even as to the Erie issue raised here, is illustrated by the Court's analysis in Dick. In deciding that state presumptions must be followed, the Court simultaneously found no need to

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392. See, e.g., Association of Am. R.Rs. v. ICC, 600 F.2d 989, 995-96 (D.C. Cir. 1979) (substantive law creates underlying rights and duties).

393. See Louis, supra note 394, at 1027-29 (law-fact classification also controls assignment of power between judge and jury); Johnson v. Hugo's Skateway, 974 F.2d 1408, 1416 (4th Cir. 1992) (en banc) (describing allocation between judge and jury as necessarily procedural).


decide whether state directed verdict practice also controls.\textsuperscript{398}

Some of the inconsistency in the cases and commentators, then, may stem
from failing to carefully distinguish similar-sounding review issues from true
sufficiency review. Burdens and presumptions are part of the substantive
package in a way that is simply not shared by the review test itself, even to
the extent the test necessarily includes application of trial burdens and pre-
sumptions as part of the substantive law reviewed. The Court in \textit{Anderson}\textsuperscript{399} incorporated local standards of proof into the jury review test itself
without hinting that the review test thereby becomes state law. Indeed, the
measure of sufficiency appears generically federal in such a diversity case at
the same time the burden is applied as part of the test.\textsuperscript{400} As some courts
have clarified: "\textit{What} they [the plaintiffs] needed to prove to make a jury
case is, of course, to be measured by [state] substantive law. \textit{Whether} they
proved such a case is a matter of federal procedural law . . ."\textsuperscript{401} Even
though "\textit{what}" is proved now considers substantive burdens and presump-
tions, the "\textit{whether}" should be no less procedural.

Looked at in another way, the Supreme Court, by recently incorporating
standards of proof into the total review-standard package, has effectively de-
flccted the most powerful justification which could have been used by the
minority circuits. Perhaps the state-standard rule could be supported, at
least as to some aspects of sufficiency review, by arguing that standards of
proof are state substance so that a federal review test would ignore that im-
portant point by failing to give the state burden its proper due.\textsuperscript{402} Now,
however, the Court has included that "\textit{due}" (whether the substance of the
burden comes from state law, constitutional privilege, etc.) \textit{within} the stan-
dard of review itself by making sure review is understood to build the burden
into the review process. If that makes an erstwhile-federal test more state-
like in those \textit{applications}, so be it.\textsuperscript{403} The critics get to be "right all along."
But the measure of sufficiency in its most controversial aspects (\textit{any evidence}
test? look to one side of the evidence only?) is decidedly answered by federal
precedent. Thus, the minority courts seeing state substance within suffi-
ciency review can now clearly sort out and maintain the substance (e.g.,
standards of proof) while newly recognizing the issue to be governed by a
federal process.

\textsuperscript{398} \textit{Id.} at 445-46; see Cooper, supra note 7, at 983-84 & n.242 (Dick illustrates that the
Court is not "overwhelmed by the analogy to burden of proof rules and presumptions" though
the author accepts similarity).

\textsuperscript{399} \textit{Anderson v. Liberty Lobby}, Inc., 477 U.S. 242 (1986).

\textsuperscript{400} See supra text accompanying notes 320-28. Compare \textit{infra} note 404.

\textsuperscript{401} \textit{Owens v. International Paper Co.}, 528 F.2d 606, 609 (5th Cir. 1976) (emphasis in

\textsuperscript{402} See Cooper, supra note 7, at 976, 983-90 (arguing for deference to state law on this
and similar aspects of sufficiency review). A related argument is that, to the extent review
standards, like trial burdens, define how this state applies its substantive law, perhaps they
should not be disembodied from that substance. Now it is clear that trial standards and bur-
dens are embodied \textit{within} federal review.

\textsuperscript{403} Cf. \textit{Celotex Corp. v. Catrett}, 477 U.S. 317, 327 (1986) (after correcting summary judg-
ment standard, asking whether showing would suffice to carry respondent's burden at trial,
Court remands in deference to circuit's "superior knowledge of local law").
The confusion may also reflect a mixing of the question of whether the evidence suffices generally and factually with whether a certain issue is the kind that is legally submitted to a jury, which is arguably more a substantive issue. Even so, the Court has indicated that the jury-right issue is itself provided by federal law, and this rule is recognized even in courts which apply state sufficiency rules. If a substantive/procedural distinction is to be urged, it would seem to apply more powerfully to the jury-right problem — while the sufficiency issue, as a measure and a process, seems less substantive.

Even to the extent the tests for rejecting a verdict as legally insufficient seem substantive, that label over the years has become less decisive on many Erie-type issues. The courts today find more help in looking to the underlying principles of Erie and its progeny than in falling back on amorphous characterizations. This returns the inquiry to outcome, forum-shopping, and federal interests — all supporting the application of federal law.

B. Uniformity

One policy that Erie's progeny often invokes is a concern about uniformity, apparently of both substantive law and, to some extent, outcome. These issues are answered by applying the traditional and modern Erie analysis considered above. But a different set of policies favoring uniformity within federal practice actually supports applying a federal test of sufficiency.

Admittedly, Erie was not primarily about uniformity within federal courts. Instead, it emphasized the evil of forum-shopping between a state and federal court — though that concern seems most obviously to apply to a Rules of Decision Act problem rather than a Rules Enabling Act one, where federal uniformity may be valued. At any rate, federal uniformity is still a factor to be generally considered and a policy worth promoting.

404. See generally 1 CHILDRESS & DAVIS, supra note 72, § 3.09 (arguing that the question of whether issue is "legal" and therefore not submitted is a matter of substantive law, not standard of review).
405. See supra notes 6 and 304; see also Pinehurst, Inc. v. Schlamowitz, 351 F.2d 509, 513 n.7 (4th Cir. 1965) (law-fact classification is federal, under Byrd).
407. See Abernathy, 704 F.2d at 971 (sufficiency review intertwines with substantive law and thus justifies use of state rule); Boeing Co. v. Shipman, 411 F.2d 365, 368 (5th Cir. 1969) (en banc) (federal test controls though arguably substantive).
408. See Gelfand & Abrams, supra note 23, at 941 ("[c]oncentrating on what is procedure and what is substance, however, emphasized the evil of forum-shopping between a state and federal court — though that concern seems most obviously to apply to a Rules of Decision Act problem rather than a Rules Enabling Act one, where federal uniformity may be valued. At any rate, federal uniformity is still a factor to be generally considered and a policy worth promoting.

410. See Ely, supra note 11, at 715 n.125 (Erie chose vertical uniformity over horizontal uniformity as its primary goal).
411. See id. ("Rules of Decision Act had made a choice").
412. See Braman & Neumann, supra note 28, at 412 (one interpretation of Byrd requires courts to weigh outcome-effect against "federal interests in promoting a uniform and efficient
even if it is not controlling. It appears to be a legitimate value involved in the weighing of federal interests that \textit{Byrd} requires: in addition to the usual federal interest in protecting the judge/jury allocation, federal uniformity promotes the fair and efficient administration of justice.

At the very least, policies of uniformity serve as a good justification to adopt federal review if it is allowed, even if the \textit{Erie} analysis which allows it focuses on different factors. Moreover, \textit{Erie} is often read as a decision crucially about predictability,\footnote{See, e.g., Henry M. Hart, Jr., \textit{The Relations Between State and Federal Law}, 54 \textit{COLUM. L. REV.} 489, 513-15 (1954); cf. Ely, \textit{ supra} note 11, at 715 n.125 (arguing that such a common reading is overdone since some disuniformity is inevitable).} and a more uniform federal rule — especially abandoning the “neutral” rule — necessarily promotes such a federal policy. Thus, use of a federal rule is supported, however decisively, by four forms of federal uniformity.

First, the circuits should be uniform among themselves in their choice-of-law rule on this issue. That the circuit split exists and persists serves no useful purpose. It is even wasteful to the extent it encourages courts to redouble their decisionmaking effort in each case.\footnote{See supra text accompanying notes 277-81.} If courts could conceivably worry about forum-shopping along the state/federal hierarchy, they could similarly dread conscious decisions to select a specific federal forum, if jurisdiction and venue allow, which has a desired standard of review: the plaintiff seeking eventual \textit{any evidence} affirmation would choose a federal forum applying a strict state test, or at least avoid a federal court among \textit{federal courts} which would apply the less-generous general federal test. Not likely? Probably human conduct is not so foresightful, but that is why the traditional forum-shopping factor was not realistically a problem in the first place. If indeed it is, perhaps the same could be said for federal forum-shoppers.

Second, and more significantly, resolution of the choice-of-law issue should be uniform as to the different review postures that arise in litigation. No good reason exists for having state standards of review specified for some types of review while federal review is prescribed in other contexts within the same court (and sometimes in the same case). The \textit{Erie} problems would appear to be the same, yet have uncontroversially been resolved in favor of federal law in so many other litigation settings.\footnote{See supra note 153. Majority courts often support their federal review rule by analogizing to other review situations. \textit{E.g.}, Neely v. St. Paul Fire & Marine Ins. Co., 584 F.2d 341, 345 & nn.2-3 (9th Cir. 1978) (discussing j.n.o.v. rule in summary judgment context); Oldenburg v. Clark, 489 F.2d 839, 841 (10th Cir. 1974) (j.n.o.v. review and new trial motion).} Can it be denied that decisions on summary judgment have similar, if not worse, odds of outcome-determination and forum-shopping? Is factfinding of a judge after a bench trial so different for its \textit{Erie} evils? Most courts and sources simply do not
draw the comparison, though generally it should be recognized that the review process is similar (with varying levels of deference and scrutiny defined by the standard of review).\textsuperscript{416}

One contrast that is occasionally drawn is between new trial and sufficiency reviews in those courts that apply state j.n.o.v. review.\textsuperscript{417} These efforts to distinguish the two contexts appear rare and half-hearted at best,\textsuperscript{418} and seem to focus on possible outcome-determination or forum-shopping differences.\textsuperscript{419} Perhaps the minority courts could focus instead on a more fundamental distinction between the two types of motions — between law and discretion: the appellate court defers to a trial court’s discretion to grant or deny new trial, while the legal sufficiency of the evidence must be reviewed with no real interim contribution by the trial court.\textsuperscript{420}

But while it is true that sufficiency is by definition a question of law, that label is more a convenience necessary to avoid Seventh Amendment problems than it is a true description of the process. Jury review for sufficiency is at bottom a review of the facts and evidence supporting a verdict — the process is steeped in the record — and only its defining threshold uses (must use) the term question of law. In other words, a verdict is “legally” insufficient because the record support fails. While that process is stricter and less discretionary than is new trial review, it cannot be seen as defining any less the relationship between a federal court and its jury. Moreover, such motions are very often brought together and are thought to frame similar inquiries, but with different thresholds and remedies.\textsuperscript{421} And the Court in other contexts has recited general federal review over questions equally about the sufficiency of a verdict as a matter of law.\textsuperscript{422} Interestingly, this more realistic distinction between such motions is not generally used to justify a different \textit{Erie} choice, possibly because upon examination it too seems like a distinction without a difference.

The Supreme Court increasingly seems to support a more uniform approach to the \textit{Erie} issue for standards of review (even if the standards ther-
selves necessarily diverge by context). It has discussed summary judgment practice by citing directed verdict cases (without a distinction for diversity cases). It has stated even more broadly, in applying a uniform de novo review over district court decisions about state law, "Nothing about the exercise of diversity jurisdiction alters these functional components of decision-making...." Likewise, nothing about the functional components of decisionmaking should alter the Erie choice of law.

Third, the courts need to establish uniformity among appellate issues generally. Appellate review is a package of three parts: timing (jurisdiction), scope of review (what issues are addressed), and standard of review (how they are addressed). No good reason exists to distinguish these for Erie purposes, especially since all are part of the broader process of appellate review and again seem to raise similar Erie concerns. The Court has already made an effortless leap between them by citing its federalized remittitur waiver rule in order to justify a federal new trial standard of review. Similarly, the Court has expressly applied federal, not state, law on the jurisdictional issue of appealability and timing — with no mention of any concerns or qualifications which would distinguish scope or standards of review. Placing all appellate issues into one box for Erie purposes allows the courts to develop a consistent practice in all phases of what is most accurately described as three aspects of one institutional function and allocation of authority.

Finally, courts should have a uniform Erie stance regarding all jury procedures specified by Rule 50. It is relatively settled that the rule's preservation and waiver aspects apply in federal court despite state leniency. Yet these aspects are only marginally more "procedural" (and certainly more outcome-determinative) than are the standards of review aspects now also embedded in Rule 50.

Four versions of federal uniformity, then, suggest that jury review fall into line. Indeed, to rule otherwise is to isolate jury sufficiency review as the only

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423. See supra text accompanying notes 322-24.
426. See supra text accompanying notes 315-16. The scope of review on appeal has long been a matter of federal law. See 5A MOORE & LUCAS, supra note 43, ¶ 50.06, at 69.
429. See Simmons, 947 F.2d at 1085-86 (applying state rule against waiver due to effect on outcome). By contrast, the panel apparently treated sufficiency review as federal. See supra note 294.
appellate review issue, the only jury issue, and the only standard of review issue which is not federal law — and only in some circuits.

C. ALLOCATION OF ADJUDICATIVE DECISIONMAKING AUTHORITY

Ultimately appellate and review authority, along with its shadowing *Erie* question, must be about the proper allocation of institutional roles, power, and respect. By this measure, the context of sufficiency review — though the one engendering the most controversy — is paradoxically the best paradigm of federal decisionmaking. It invokes three separate and important relationships.

First, sufficiency review defines the oft-invoked relationship between judge and jury — perhaps more so than in other contexts where that factor seems determinative. The waiver rule in *Penn Shipping*, for example, is really about reviewability, and as such only defines the relationship between a district court (offering remittitur in its discretion) and its appellate court, yet the Court echoes the judge/jury analysis to make its point.\(^{430}\) In *Browning-Ferris*, the Court’s consideration of remittitur may look like review of the jury, but technically it is a review of the judge’s review of the jury. At least for the district court considering sufficiency, review of the jury is more direct.\(^{431}\) Thus, the discretion given a district court on new trial, rather than justifying a distinction for *Erie* purposes, actually defines the judge/jury relationship less than it does a trial/appellate assignment of decisionmaking authority.\(^{432}\)

Second, that trial/appellate relationship (which most review cases really address) is indeed important. Yet it is no less absent in sufficiency review, which defines both the trial judge’s evidentiary review and the appellate court’s response to both judge and jury.\(^{433}\) That the trial court’s initial decision is effectively taken out of the appellate review does not deny the trial/appellate allocation — indeed it defines it, it is the appellate review standard. Even direct review by the trial judge has overtones of “appellate” authority because the court is acting in a reviewing capacity.\(^{434}\) Some contexts that are directly about appeals — for example, *Salve Regina*’s assignment of lawmaking power to the appellate court — are missing the judge/jury relationship deemed so federal yet are no more defining of the appellate role than is Rule 50.\(^{435}\) Using a policy analysis which focused on

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\(^{430}\) See supra text accompanying notes 310-11.

\(^{431}\) Even on appeal, sufficiency review is more direct in the sense that it is *de novo*, while new trial review must consider two different decisionmakers below.

\(^{432}\) The trial judge’s own review of the jury is discretionary but limited, and the limitation is a federal matter under *Browning-Ferris*. Sufficiency review is simply more limited.

\(^{433}\) See supra text accompanying notes 165-68.

\(^{434}\) See generally 1 CHILDRESS & DAVIS, supra note 72, § 1.04 (erstwhile trial courts act as appellate-like reviewers in many ways). This dual role is more blatant in administrative law but similar. Cf. Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 113 S. Ct. 2264, 2280 (1993) (under statute, arbitrator is both a reviewing body and a factfinder).

\(^{435}\) Indeed, Rule 50 mentions various appellate procedures every bit as much as does Rule 52, especially after 1991.
the institutional competencies and roles of district and circuit judges, that Court found the appellate courts to be "structurally suited to the collaborative juridical process that promotes decisional accuracy."\(^{436}\) Similar analysis (though with a different outcome: deference) must inform the assignment of power to juries.\(^{437}\)

Third, modern courts considering the impact of \textit{Erie} on difficult choice-of-law issues cannot escape falling back on some view, articulated or not, of the proper allocation of decisionmaking authority within a federal/state system.\(^{438}\) In that light, the crucial federal/state relationship is not hindered by application of a federal review rule. That relationship has been worked out — roughly and confusingly, to be sure — over years of case law interpreting \textit{Erie}. \textit{Hanna} especially must be seen as allowing significant rulemaking authority to Congress and the federal courts,\(^{439}\) and nothing in the balance that has evolved since then denies a proper place for federal court decisionmaking. Indeed, all indications are that the institutional allocations within federal courts \textit{and} among state and federal courts (the latter through \textit{Erie} and its progeny) justify a uniform federal review process.

The particular sufficiency issue has been avoided so long and so often, possibly because it so starkly becomes a decision about a similar assignment of roles within the federal system itself. Yet therein lies the theoretical, policy, and precedential solution to this long-standing \textit{Erie} problem. Jury review for sufficiency of the evidence is about the only litigation context that leans to the federal end of three accepted continua, to an extent not even found in more settled settings.

\section*{V. CONCLUSION}

The applicable judicial review in diversity cases is not as settled as commentators tend to paint it, although a majority of federal courts use a federal test while others note that there is no real conflict in application. A state-standard rule, applied consistently or sporadically in at least five circuits and infecting sporadic cases in others, was once titillating but now belongs in Jurassic Park. The better view seems to be that federal standards should define the propriety of a federal jury's action, though not its substance, and

\footnotesize{\cite{436} Salve Regina, 499 U.S. at 225. Thus, de novo review “best serves the dual goals of doctrinal coherence and economy of judicial administration.” \textit{Id.} at 231. Chief Justice Rehnquist in dissent analogized to Supreme Court cases giving deference, using a policy analysis of allocation of resources and urging “intuitively sensible deference.” \textit{Id.} at 242.

\cite{437} See supra notes 394-95; see also Martin B. Louis, \textit{Discretion or Law: Appellate Review of Determinations that Rule 11 Has Been Violated or that Nonmutual Issue Preclusion Will Be Imposed Offensively}, 68 N.C. L. REV. 733 (1990) (arguing that courts should use analysis, not labels, to resolve review problems, which are determined by promoting optimal judicial decisionmaking); Miller v. Fenton, 474 U.S. 104 (1985) (using policy/institutional analysis to allocate mixed law-fact questions).


\cite{439} Cf. Ely, supra note 11, at 697 (describing common perception that “\textit{Hanna} therefore may not be \textit{Erie}, but it seems to be the law”).}
that those courts which tend to avoid the issue might use recent Supreme Court pronouncements to fix their test in one predictable spot.

Even so, recent cases decided after further Supreme Court guidance tend to simply repeat earlier positions on this controversial issue, merely citing a case which cites a case.440 Usually the state-review courts do so with no analysis of Erie's principles and goals as applied in modern courts, and even without discussing whether recent precedent forces a change in their time-worn rule.

Instead, these courts should reconsider the issue in light of recent case law, rules changes, and the policies and theories driving Erie-type decisions today. All of these point to choosing a uniform federal rule of review — and especially choosing to choose, once and for all. It is true that "federalism is not a tidy concept,"441 but it need not be as messy, in this respect at least, as it remains.

440. See, e.g., supra notes 194, 223, and 243; see also Braman & Neumann, supra note 28, at 472 ("Stare decisis often plays a role by binding later courts to earlier versions of incorrect analyses.") (footnote omitted).
441. WRIGHT, supra note 11, § 56, at 364.