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

Krista M. Pikus*

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

—James Madison, 1788

INTRODUCTION

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

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

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

1 James Madison Replies to Patrick Henry, Defending the Taxing Power and Explaining Federalism, June 6, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION 611, 612 (Bernard Bailyn ed., 1993) [hereinafter James Madison Replies].
3 Id.
4 Id.
5 Id. at 429.
6 Id. at 414.
7 Id.
8 Id. at 413.
a jury. Nevertheless, Valente had his “day in court” when the judge conducted a hearing on the reliability of his expert evidence. But that “day in court” consisted of findings made solely by a judge, not by a jury.

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

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

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9 Id. at 440 (granting defendant’s motion for summary judgment after a Daubert hearing excluding testimony of plaintiff’s experts).
10 See id.
11 See id.
12 See Encyclopedia of American Civil Liberties 875–77 (Paul Finkelman ed., 2013) (discussing the history and purpose of the right to a trial by jury).
14 See State ex rel. Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1084–87 (Ohio 1999) (discussing the right to a jury trial as an aspect of the separation of powers doctrine).
16 See U.S. Const.
17 Id. pmbl.
20 See id.
21 See id.
23 See id. at 18–21.
making power away from the jury and placing it into the hands of the judge.24

The implication of reduced jury authority is evident in the recent case, Value v. Textron, Inc.,25 discussed above. The judge granted summary judgment for the defense after he excluded Valente’s expert evidence following a Daubert26 hearing on the reliability of the methods the expert used in arriving at his conclusions.27 Since Daubert and its progeny reformed the standards on expert evidence,28 every case involving an expert witness requires the judge to adjudicate the reliability of the expert’s methods.29 The Daubert hearing in Value v. Textron, Inc. was thus not before a jury, but only the judge.30 Valente appealed his case to the Second Circuit asserting that the judge abused his discretion in excluding the expert evidence.31 The Second Circuit held that the judge’s thoughtful and thorough explanation for excluding the evidence demonstrated that he acted within his discretion.32

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

24 See Adam Liptak, Cases Keep Flowing In, but the Jury Pool Is Idle, N.Y. Times, Apr. 30, 2007, http://www.nytimes.com/2007/04/30/us/30bar.html?pagewanted=all&_r=0 (recognizing arguments from legal scholars that summary judgment violates the Seventh Amendment because it takes the jury’s power to decide and gives it to the judge).
27 Valente, 931 F. Supp. 2d at 414.
29 See David E. Bernstein, The Misbegotten Judicial Resistance to the Daubert Revolution, 89 NOTRE DAME L. REV. 27, 27 (2013) (noting that “by 2000 all expert testimony needed to pass a reliability test before it could be deemed admissible”). If the opponent of the expert evidence fails to object on Daubert grounds and requests a ruling on that evidence in a timely manner, the opponent may waive his right to object. See, e.g., Macsenti v. Becker, 237 F.3d 1223, 1233 (10th Cir. 2001); Questar Pipeline Co. v. Grynberg, 201 F.3d 1277, 1289–90 (10th Cir. 2000).
30 See Valente, 931 F. Supp. 2d at 413.
31 Valente v. Textron, Inc., 559 F. App’x 11, 12 (2d Cir. 2014).
32 Id. at 14.
33 See infra Section IV.A.
34 See Fed. R. Evid. 104(a) (“The court must decide any preliminary question about whether a witness is qualified . . . .”); see also Mathis v. Exxon Corp., 302 F.3d 448, 459 (5th Cir. 2002) (“Whether [the witness] is qualified to testify as an expert is a question of law.” (citing Fed. R. Evid. 104(a)))).
35 Compare Sparf v. United States, 156 U.S. 51, 183 (1895) (“[Defendants have a] right to have the jury decide every matter of fact involved in that issue.” (emphasis added)), with 43 WILLIAM C. FLANAGAN & HARRY P. CARROLL, MASSACHUSETTS PRACTICE SERIES: TRIAL PRACTICE § 17.17 (2d ed. 2013) (“In order to qualify, a witness as an expert the proponent
This Note urges restoration of the proper balance of power between judges and juries regarding expert evidence. Our justice system has steadily moved away from letting juries decide important questions of fact and toward putting the decisionmaking power into the hands of judges. The recent developments in evidence law, requiring judges to act as the “gatekeepers” of expert evidence, present significant obstacles for plaintiffs attempting to get cases to a jury. This newer standard in expert evidence is a violation of the foundational precept in American jurisprudence that the people should be the sovereign, not the judge.

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

I. HISTORY AND JURISPRUDENCE OF JURY DECISIONMAKING IN AMERICA

One of the central tenets in American jurisprudence is the right to a trial by jury. This right to be tried by the people became a symbol of the overthrown power of the king. The Framers saw this right as such a critical
aspect of ensuring equality and justice that it appears multiple times in the Bill of Rights. The Fifth Amendment states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.” The Sixth Amendment similarly states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury.” Additionally, the Seventh Amendment proclaims, “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”

A. Development of the Right to Serve on a Jury

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

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

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

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

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

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

45 100 U.S. 303 (1879).

46 *Id.* at 312.

47 *Id.* at 307–08.

48 100 U.S. 313 (1879).

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


51 *Id.* at 80.


53 See Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that women cannot be systematically excluded from jury panels from which petit juries are drawn).
appreciated today. However, the opposite has occurred. Courts have given
to judges much of the decisionmaking power originally held by juries.54 The
importance of the right to a trial by jury and allowing the people to act as the
fact-finder, however, remains a critical safeguard of the foundational
precepts of our Constitution.

B. Jurisprudential Theories of Jury Decisionmaking

Our system of government is based on the idea that the people are sovereign.55 The idea of popular sovereignty is demonstrated by the structure of
our Constitution in Articles I and II, which provide that the people elect representatives for the legislature56 and elect a President.57 The President
then nominates individuals for the Supreme Court that must be confirmed
by the Senate.58 Jury service is another mechanism of popular sovereignty, as
people sit on juries.59 The right to a trial by jury of one’s peers is an integral
part of our legal system.60

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

54 See Amar & Hirsch, supra note 37, at 92 (arguing that juries are empowered to do
much more than answer questions of fact, but much of that power has been usurped by the
judge); see also Eric Schnapper, Judges Against Juries—Appellate Review of Federal Civil Jury
Verdicts, 1989 Wis. L. Rev. 237, 345 (observing that judges now also have the power to
reduce jury verdicts).
55 See Amar & Hirsch, supra note 37, at 7 (noting that one of the first principles of
American jurisprudence is that the people are sovereign); Edmund S. Morgan, Inventing
the People 235–88 (1988) (discussing the concept of popular sovereignty in American jurisprudence); Kurt T. Lash, The Original Meaning of an Omission: The Tenth Amendment,
Popular Sovereignty, and “Expressly” Delegated Power, 83 Notre Dame L. Rev. 1889, 1910
(2008) (same); Michael A. Dawson, Note, Popular Sovereignty, Double Jeopardy, and the Dual
Sovereignty Doctrine, 102 Yale L.J. 281, 282–84 (1992) (discussing the history and exercise of
popular sovereignty in America).
56 U.S. Const. art. I.
57 Id. art. II, § 1.
58 Id. § 2.
59 See Amar & Hirsch, supra note 37, at 58 (discussing the political power in jury ser-
vice and how it acts as a mechanism of popular sovereignty).
60 See generally Singer, supra note 18.
61 See Amar & Hirsch, supra note 37, at xiv–xv (noting that juries act as a check on
governmental power); Paul Butler, Op-Ed., Jurors Need to Know That They Can Say No, N.Y.
.html?_r=0 (noting that Supreme Court Justice Antonin Scalia mentioned at a Senate hear-
ing that juries could ignore the law and provide a strong check on governmental power).
1998) (discussing Madison’s view on the importance of separation of powers).
inition of tyranny.” Safeguards are put in place so that each branch acts as a check and balance on the other branches. The power of judicial review implied in Article III of the Constitution is one example of the principle of checks and balances.

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

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

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

63 The Federalist No. 47 (James Madison).
65 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (recognizing the implied power of judicial review to invalidate unconstitutional laws).
66 See Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 628 (1993) (“Judicial review can be and is used to check the actions of wayward majorities.”).
68 Id. at 16–23.
69 See id. But see Or Bassok, The Two Countermajoritarian Difficulties, 31 St. Louis U. Pub. L. Rev. 333, 362–66 (2012) (discussing a second countermajoritarian difficulty when Justices strike down statutes that are supported by the majority according to public opinion polls).
70 See, e.g., Friedman, supra note 66, at 627–28 (discussing how judicial review operates as a check on the other branches of government).
71 Id.
72 Id.
73 See Butler, supra note 61 (“Supreme Court justice Antonin Scalia, asked at a Senate hearing about the role of juries in checking governmental power, seemed open to the notion that jurors ‘can ignore the law’ if the law ‘is producing a terrible result.’”).
74 See, e.g., Pierce v. Underwood, 487 U.S. 552, 558 (1988) (“For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for ‘abuse of discretion’”).
75 Id. at 557–63.
When juries make decisions, instead of judges, it reaffirms the idea that the power properly lies with the people. On the other hand, when judges have a vast majority of the decisionmaking power, the judge is the “sovereign” instead of the people. Instead, there should be a balance of decisionmaking power between judges and juries. Recently, though, this power has become unbalanced as the decisionmaking power is steadily being taken away from juries and put into the hands of judges.

C. Taking the Decisionmaking Power Away from the Jury

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

Our legal system has long accepted the concept of judges deciding questions of law while juries decide questions of fact. One of the primary purposes of a jury is to prevent one person (the judge) from being a sovereign.
Instead, the people are sovereign.\textsuperscript{84} Giving questions of fact to juries and questions of law to judges balances the power between them.\textsuperscript{85}

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

II. Development of Expert Evidence Jurisprudence

For the past twenty years, courts have debated the standard governing the introduction and evaluation of expert evidence.\textsuperscript{90} Generally, courts have

\begin{itemize}
  \item \textsuperscript{84} See generally H.L.A. Hart, \textit{The Concept of Law} 50–71 (3d ed. 2012) (discussing who and what the sovereign is).
  \item \textsuperscript{85} Compare Matthew P. Harrington, \textit{The Law-Finding Function of the American Jury}, 1999 Wis. L. Rev. 377, 401–02 (1999) (discussing the development of the fact-finding function of the jury), with Sparf, 156 U.S. at 183 (Gray & Shiras, JJ., dissenting) (asserting that defendants in a criminal case have the right to have juries decide every question of fact) and Amar & Hirs, \textit{supra} note 37, at 99–100 (positing that allowing juries to decide questions of law would usurp the powers of the court).
  \item \textsuperscript{88} See 3B GREING & BLINKA, \textit{supra} note 35, § 907.02:25 (“[Wisconsin law on expert evidence] requires a range of findings that \textit{mixes questions of fact and law}, namely, the witness’s qualifications, the helpfulness of the testimony, whether the opinion is sufficiently supported by facts and data, the reliability of the witness’s principles and methods, and whether the witness applied them in a reliable manner.” (emphasis added)): \textit{cf.} Sparf, 156 U.S. at 183 (Gray & Shiras, JJ., dissenting) (asserting that defendants have a “right to have a jury decide every matter of \textit{fact} involved in that issue” (emphasis added)).
  \item \textsuperscript{90} See, e.g., Daniel E. Fisher, Daubert v. Merrell Dow Pharmaceuticals: The Supreme Court Gives Federal Judges the Keys to the Gate of Admissibility of Expert Scientific Testimony, 39 S.D.
shifted the authority to assess expert testimony from juries to judges. What was intended to give district courts more flexibility in managing their dockets has resulted in giving judges more power to decide the ultimate issues in the case. This Section presents an overview of the evolution of standards in expert evidence.

A. The Frye Standard

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

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

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

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

95 Id. at 1013.

96 Id. at 1013–14.

97 Id.

98 Id. at 1014.

99 Id.

100 Id. (emphasis added).

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

### B. The Federal Rules of Evidence (1975)

In 1975, Congress adopted the Federal Rules of Evidence.\(^{104}\) Rule 702, which governs the admissibility of expert testimony, originally stated “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”\(^{105}\) The adoption of the Federal Rules of Evidence did not specifically address whether the *Frye* general acceptance standard still prevailed.\(^{106}\) Without explicit acknowledgment of the validity of *Frye* in the federal rules, courts varied on its application.\(^{107}\)

Interpretation of the Federal Rules of Evidence standard for expert testimony was altered again in 1993 when the Supreme Court heard *Daubert v. Merrell Dow Pharmaceuticals*.\(^{108}\)

### C. The Daubert Trilogy

Standards for admissibility of expert testimony changed dramatically when the Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals*.\(^{109}\) The Supreme Court decided two other significant cases addressing expert

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

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


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

\(^{107}\) See *Fisher*, supra note 90, at 152.

\(^{108}\) 509 U.S. 379.

\(^{109}\) Id.
testimony admissibility after Daubert: General Electric Co. v. Joiner\textsuperscript{110} and Kumho Tire Co. v. Carmichael.\textsuperscript{111} These three cases are collectively referred to as the “Daubert Trilogy.” The standards elaborated in this trilogy of cases placed the judge in a significantly more active role,\textsuperscript{112} deciding not only questions of law regarding expert testimony, but also questions of fact.\textsuperscript{113}

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

The committee’s note on the year 2000 amendments to the Federal Rules of Evidence report that “in Daubert the Court charged trial judges with the responsibility of acting as gatekeepers”;\textsuperscript{119} however, the Federal Rules of Evidence themselves did not provide this specific command.\textsuperscript{120} In fact, some scholars note that the Federal Rules of Evidence themselves appear to commit the jury to the determination of scientific validity, but policy considerations have favored the judge making such determination instead.\textsuperscript{121} Federal Rule of Evidence 104 does assign the court the task of deciding any preliminary questions on whether a witness is qualified, a privilege exists, or evidence is admissible.\textsuperscript{122} Expert evidence is not necessarily a preliminary question and is not the type that the court must decide in the absence of the

\textsuperscript{110} 522 U.S. 136 (1997).
\textsuperscript{111} 526 U.S. 137 (1999).
\textsuperscript{112} See Daubert, 509 U.S. at 597 (noting the more active gatekeeping role for judges).
\textsuperscript{114} Daubert, 509 U.S. at 587–90.
\textsuperscript{115} Id. at 579.
\textsuperscript{116} Id. at 588.
\textsuperscript{117} Id. at 597.
\textsuperscript{118} Id. (emphasis added).
\textsuperscript{120} Fed. R. Evm. 702 advisory committee’s note.
\textsuperscript{121} See Imwinkelried, supra note 90, at 616 (arguing that Federal Rules of Evidence 104(b) and 901(b)(9) appear to commit the jury to the determination of scientific validity but policy considerations favor the judge making this determination).
\textsuperscript{122} See id.
\textsuperscript{123} See Fed. R. Evm. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.”).
jury. Rule 104(c) specifies guidelines for when the court must conduct a preliminary hearing apart from the jury. The types of preliminary questions for the judge to decide without a jury are: (1) if the admissibility of a confession is involved; (2) if a defendant in a criminal case is a witness and so requests; or (3) if justice so requires. The argument that “justice so requires” a judge, and not the jury, to decide expert testimony questions lacks support.

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

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

124 Fed. R. Evid. 104(c).
125 See Frederick Schauer & Barbara A. Spellman, Is Expert Evidence Really Different?, 89 Notre Dame L. Rev. 1, 14 (2013) (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).
127 Id. at 594.
128 Id. at 593.
129 Id.
130 Id. at 594.
131 Id.
132 Id. at 597 (“We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.”).
134 Id. at 146.
135 Id. at 142 (citation omitted).
137 931 F. Supp. 2d 409 (E.D.N.Y. 2013) (granting the defense’s motion for summary judgment after the judge excluded the plaintiff’s expert’s testimony as a result of a Daubert hearing).
138 See supra text accompanying notes 2–11.
In 1999, the Supreme Court expanded trial judges’ authority further. In *Kumho Tire Co. v. Carmichael*, the Court held that the *Daubert* standard applies to expert testimony based on technical or other specialized knowledge, not simply expert scientific testimony. Therefore, all expert evidence before a federal court must meet the *Daubert* standard for admissibility.

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

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

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

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140 *Id.* at 158.
141 *See* Bernstein, *supra* note 29, at 27 (noting that “by 2000 all expert testimony needed to pass a reliability test before it could be deemed admissible”).
142 Fed. R. Evid. 702 (“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.”).
143 *Id.*
145 In addition to the year 2000 amendments, the Federal Rules of Evidence were “restyled” in 2012, but no substantive changes were made. For further discussion on the reasoning behind the amendments and the restyled Federal Rules of Evidence, see *The Restyled Rules*, *supra* note 144.
gatekeepers.146 Furthermore, the committee notes emphasize that the Daubert precedent is not supposed to replace the traditional role of the jury—nor is it “intended to provide an excuse for an automatic challenge to the testimony of every expert.”147 The committee reviewed relevant caselaw and noted that “the rejection of expert testimony is the exception rather than the rule.”148 The committee quoted federal precedent stating that “the trial court’s role as gatekeeper is not intended to serve as a replacement for the adversary system.”149 Yet, evidence demonstrates that Daubert and its progeny have done just that.150

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

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

146 Fed. R. Evid. 702 advisory committee’s note.
147 Id.
148 Id.
149 Id. (quoting United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)).
150 See Flores et al., supra note 89, at 561–63 (noting the empirical implications of Daubert resulting in a decrease of trials and increase in preliminary evidentiary hearings on expert evidence); see also Mara Hatfield, Putting Daubert In Proper Perspective, Law360 (Aug. 01, 2013) http://www.law360.com/articles/460776/putting-daubert-in-proper-perspective (“While the role of gatekeeper was set up to eliminate reliance on a bright-line rule requiring general acceptance, the defense bar has turned the role into a chance to convince a judge that a certain study is unreliable merely because it is contradicted.”).
151 See Flores et al., supra note 89, at 561–63 (noting the empirical implications of Daubert resulting in a decrease of trials and increase in preliminary evidentiary hearings on expert evidence).
153 For example, in North Dakota, the expert’s qualification is a matter for the trial court’s discretion—but the judge has no discretion to determine the strength of the testimony and generally allows the expert’s testimony to be admitted into evidence. See, e.g., Myer v. Rygg, 630 N.W.2d 62, 69 (N.D. 2001) (“[O]rdinarily weakness in an expert’s opinion affects credibility, not admissibility. The trial court decides the qualifications of the witness to express an opinion on a given topic, but it is the trier of fact whose job it is to decide the expert witness’s credibility and the weight to be given to the testimony.” (citations omitted)); see also The Restyled Rules, supra note 144, at 1508 & n.86 (discussing amendments to Arizona’s rules of evidence and recognizing the overemphasis on the judge’s role as a gatekeeper).
154 See The Restyled Rules, supra note 144, at 1508 (“[W]e think there’s been some overemphasis on this notion of gatekeeping, of keeping away from the jury an expert fully qualified just because [the judge] think[s] [the expert’s] opinion is not a good one.”).
A. Empirical Implications

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

B. Jurisprudential Implications of the Daubert Trilogy

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

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

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

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155 See supra text accompanying notes 2–11.
156 See, e.g., cases cited supra note 87.
157 See Flores et al., supra note 89, at 563.
158 See id.
159 Id.
160 See id.
161 See Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993) (“We are confident that federal judges possess the capacity to undertake this review.”).
162 Id. at 597.
163 See Schauer & Spellman, supra note 125, at 13–14 (“The concern is that non-expert triers of fact will consistently overvalue expert testimony beyond its intrinsic epistemic worth.”).
164 See, e.g., Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that judges decide questions of law while juries decide questions of fact).
165 See Amar & Hirschl, supra note 37, at 98–100 (allowing juries to decide questions of law would usurp the powers of the court).
the case) is a question of fact, not a question of law. See Malone & Zwier, supra note 113, at 118 (arguing that the reliability of methodology presents questions of fact, not questions of law).

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

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

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

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

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


169 Id. at 452.

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

171 See Fed. R. Evid. 702(a) (“[T]he expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.”).

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


174 See Faigman, supra note 92, at 909–10 (“The more likely purpose for Daubert and its progeny is more pedestrian. . . . [The Daubert revolution] was meant to serve a greater agenda than simply an evidentiary one. It was meant to serve the managerial power of trial courts to control their dockets.”); see also Kanner & Casey, supra note 152, at 299 (noting that judges have a strong incentive to dispose of cases through a Daubert hearing in order
decrease in trials since Daubert,\textsuperscript{175} it seems the Court achieved this goal—
though at a cost. The jury’s fact-finding role on critical questions substan-
tially diminished. This is not the requirement or purpose of Rule 702.\textsuperscript{176} Daubert and its progeny changed the adversarial system by reducing the right to trial by jury.\textsuperscript{177}

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

America was founded on the principles of popular sovereignty.\textsuperscript{178} Popular sovereignty is the idea that rather than having one individual ruler or monarch, the people have the authority and are the “sovereign.”\textsuperscript{179} The government gets their authority through the people’s consent which is manifested through the election process.\textsuperscript{180}

The selection of judges presents a unique situation for the idea of popu-
lar sovereignty. Federal judges are nominated by the President and con-
firmed by the Senate.\textsuperscript{181} The selection of state judges, however, varies. Some states have an election process while others have an appointment process.\textsuperscript{182}

The dilemma of who decides a case is critical because whoever has the decisionmaking power is essentially in the role of a “sovereign.”\textsuperscript{183} The right to a trial by jury is a fundamental right in our nation to ensure that the power
to manage their dockets); cf. Hatfield, supra note 150 (“While the role of gatekeeper was set up to eliminate reliance on a bright-line rule requiring general acceptance, the defense bar has turned the role into a chance to convince a judge that a certain study is unreliable merely because it is contradicted.”) (emphasis added)).

\textsuperscript{175} Refo, supra note 19, at 2.

\textsuperscript{176} See Fed. R. Evid. 702 advisory committee’s note; see also United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996) (noting that the judge’s role as a “gatekeeper” was not intended to replace the adversary system).

\textsuperscript{177} See Kanner & Casey, supra note 152, at 315 (“Daubert has severely crippled the plain-
tiff’s right to a jury trial and has had an effect opposite of that which the Supreme Court intended.”).

\textsuperscript{178} See Lash, supra note 55, at 1938–50.

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

\textsuperscript{180} See Lash, supra note 55, at 1938–50.

\textsuperscript{181} U.S. Const. art. III.

\textsuperscript{182} Compare Orrin W. Johnson & Laura Johnson Urbis, Judicial Selection in Texas: A Gath-
ison of Systems, 69 J. Kan. B. Ass’n 32 (2000) (discussing the bifurcated judicial selection system in Kansas where supreme court and court of appeals judges are selected through a nonpartisan commission system, and district court judges are selected by either a nonparti-
san commission system or partisan election).

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

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

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

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

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\textsuperscript{184} See 2 Encyclopedia of American Civil Liberties 875 (Paul Finkelman ed., 2013) (discussing the history and purpose of the right to a trial by jury).
\textsuperscript{185} Such cases are ones that typically require additional expertise such as patent, bankruptcy, or tax litigation.
\textsuperscript{186} James Madison Replies, supra note 1, at 612 (emphasis added).
\textsuperscript{187} See Imwinkelried, supra note 90, at 616; see also Schauer & Spellman, supra note 125, at 14 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).
\textsuperscript{188} See Special Comm. on Jury Comprehension, Am. Bar Ass’n, Jury Comprehension in Complex Cases 40–45 (1989).
\textsuperscript{189} Id.
\textsuperscript{190} See Schauer & Spellman, supra note 125, at 14–16 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).
\textsuperscript{191} See Faigman, supra note 92, at 909–10 (“The more likely purpose for \textit{Daubert} and its progeny is more pedestrian. . . . [The \textit{Daubert} revolution] was meant to serve a greater agenda than simply an evidentiary one. It was meant to serve the managerial power of trial courts to control their dockets.”); see also Kanner & Casey, supra note 132, at 299 (noting that judges have a strong incentive to dispose of cases through a \textit{Daubert} hearing in order to manage their dockets).
\textsuperscript{192} See Faigman, supra note 92, at 910.
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Amendment\(^{193}\) by allowing judges the discretion and opportunity to prevent jury trials.\(^{194}\)

3. Judicial Activism and Policy-Driven Judges

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

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

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\(^{193}\) Compare U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”), with *Daubert* v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993) (“We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.”), and Kanner & Casey, supra note 152, at 291–92 (discussing how *Daubert* undermines the Seventh Amendment).

\(^{194}\) See Kanner & Casey, supra note 152, at 291–92, 299.


\(^{196}\) See Joiner, supra note 136, at 63.

\(^{197}\) Id. at 594.

\(^{198}\) See *Daubert*, 509 U.S. at 593.

\(^{199}\) See Robinson, supra note 136, at 63.

\(^{200}\) See id. at 64.

\(^{201}\) See Bernstein, supra note 29, at 28 (discussing judicial resistance to the new standards of expert testimony by lower courts).
apply the new standards.203 This behavior from judges also results in inconsistent standards of admissibility among the lower courts.204

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

With the increase in scientific and technological innovations affecting innumerable areas of contemporary life, experts are playing a crucial role in much litigation. Judges deciding the reliability and validity of expert methods are in control of substantial numbers of cases, and opportunities for value judgments abound. For instance, in Kitzmiller v. Dover Area School District,206 parents brought a suit against a school challenging the constitutionality of the school’s policy on teaching intelligent design in a biology class.207 The court held that the policy was a violation of the Establishment Clause by endorsing religion208 and that intelligent design theory was not a science.209 The judge used the Daubert factors to make a policy judgment about intelligent design.210 Additionally, judges may be required to answer questions on reliability of expert testimony over controversial topics such as stem-cell research, cloning, birth control,211 or abortion.212 The judge’s determination of the expert’s testimony over these controversial topics allows them to make policy judgments on the underlying subject matter.213

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

203 Id. at 29.
204 Id. at 69 (“The Supreme Court could step in . . . to reign in wayward circuits. But . . . has allowed lower court judges significant latitude to ignore Rule 702.”).
205 See Lawrence Baum, The Puzzle of Judicial Behavior 15–16 (1997); Robinson, supra note 136, at 75.
207 Id. at 707–11.
208 Id. at 765.
209 Id. at 743–46.
210 See Megan Dillhoff, Note, Science, Law, and Truth: Defining the Scope of the Daubert Trilogy, 86 Notre Dame L. Rev. 1289, 1316–17 (2011) (arguing that the judge overstepped his bounds when he decided that intelligent design was not a science when the case did not require him to make such a decision).
212 See Hill v. Mills, 26 So. 3d 322, 325 (Miss. 2010).
215 See id. at 597 (“We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.”).
insert policy considerations into their rulings. Since questions of expert testimony are primarily questions of fact, they are within the purview of jury decisionmaking.\footnote{See, e.g., Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that judges decide questions of law while juries decide questions of fact).} This recent change, requiring judges to answer questions of fact, encroaches upon the rights of the jury, affects the ultimate outcome of the case, and allows for more judicial activism.

IV. Proposed Solutions to Resolve the Flaws of Daubert’s Progeny

A. Juries, Not Judges, Should Be the “Gatekeepers”

The guidelines for laying the foundation of expert testimony outlined in Daubert should remain—but juries, not judges, should be the “gatekeepers.” After juries play this “gatekeeping” role, they can then proceed to deciding the ultimate issue in the case and whether to take the expert testimony into consideration. If the judge acts as a gatekeeper to expert evidence, and allows the evidence in, then by the time the evidence gets to the jury it already has the judge’s stamp of approval.\footnote{See N.J. Schweitzer & Michael J. Saks, The Gatekeeper Effect: The Impact of Judges’ Admissibility Decisions on the Persuasiveness of Expert Testimony, 15 PSYCHOL. PUB. POL’Y & L. 1, 13 (2009) (“When judges allow expert testimony to reach the jury, they are implicitly lending credence to the testimony, increasing its persuasiveness.”).} This could make it more likely that any expert evidence that gets in will be given the benefit of the doubt.\footnote{See id.} Instead, the jury should critically analyze and scrutinize the evidence.\footnote{See id.} On the other hand, if the judge excludes the expert evidence, then a trial is unlikely to occur at all, and will instead be disposed of through summary judgment.\footnote{See, e.g., cases cited supra note 87.}

Having juries act as gatekeepers may also keep judges from overextending their judicial power, as Chief Justice Rehnquist feared would happen as a result of Daubert.\footnote{Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 600–01 (1993) (Rehnquist, J., concurring in part and dissenting in part).} Rehnquist dissented in part in Daubert, warning that this new standard for judges may enable them to overextend the reach of their power.\footnote{Id. at 598–601.} He advised that judges should “proceed with great caution in deciding more than we have to, because our reach can so easily exceed our grasp.”\footnote{Id. at 599.} The Chief Justice’s fears in Daubert are now a reality. The framework proposed in this Note aims to properly cabin the judicial role to its traditional form: judges decide questions of law regarding expert testimony, and juries decide questions of fact.
1. Juries Decide Questions of Fact

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

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

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

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224 See Gatowski et al., supra note 168, at 442.
225 See Sparf v. United States, 156 U.S. 51, 89 (1895) (noting that judges decide questions of law while juries decide questions of fact); see also United States v. Sliker, 751 F.2d 477, 497–98 (2d Cir. 1984) (“[T]he maxim that fact-finding is for the jury carries considerable force. Leaving too much for the judge to decide would ‘greatly restrict[] and in some cases virtually destroy[]’ the functioning of the jury as a trier of fact.” (alteration in original) (quoting Fed. R. Evid. 104(b) advisory committee’s note)).
226 Daubert, 509 U.S. at 589 (commanding the trial judge to ensure that any and all scientific testimony or evidence admitted is not only relevant, but also reliable).
227 Fed. R. Evid. 702(c) (requiring expert testimony to be a “product of reliable principles and methods”).
228 See Fed. R. Evid. 104(a) (“The court must decide any preliminary question about whether a witness is qualified.”); Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999) (citing Daubert, 509 U.S. at 592 n.10) (noting that the proponent of expert evidence must satisfy the preponderance of the evidence threshold).
229 Fed. R. Evid. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.”).
230 Fed. R. Evid. 104(c).
231 See supra Section II.C.
232 See Schauer & Spellman, supra note 125, at 14 (discussing a substantial body of research that casts doubt on the claim that jurors overvalue expert testimony).
233 Compare Harrington, supra note 85, at 401–02 (discussing the development of the fact-finding function of the jury), with Sparf v. United States, 156 U.S. 51, 183 (1895) (Gray & Shiras, JJ., dissenting) (juries should decide every question of fact, but are prohibited from deciding questions of law), and Amar & Hirsc, supra note 37, at 98–100 (allowing juries to decide questions of law would usurp the powers of the court); see also Fed. R. Evid.
usurped the power of juries by taking away their fact-finding function.\textsuperscript{234} The standards for expert evidence admissibility should return to our legal system’s traditional role of juries acting as fact-finders.\textsuperscript{235}

2. Jury Instructions

Since judges have been charged with this “gatekeeping” function for over two decades, some courts may resist the method presented in this Note, since juries may not properly understand the \textit{Daubert} factors.\textsuperscript{236} Nonetheless, jury instructions can easily ameliorate this concern.

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

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

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\item[104] advisory committee’s note (“If preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed.”).
\item[234] See Harrington, \textit{supra} note 85, at 401–02 (discussing the development of the fact-finding function of the jury).
\item[235] See \textit{Sparf}, 156 U.S. at 183 (defendants have a “right to have the jury decide every matter of fact involved in that issue” (emphasis added)); Malone & Zwier, \textit{supra} note 115, at 118–19 (arguing that the reliability of methodology presents questions of fact, not questions of law); Wright & Williams, \textit{supra} note 76, at 472 (fact-finding is still exclusively within the jury’s purview).
\item[236] See generally Bernstein, \textit{supra} note 29, at 28 (discussing judicial resistance to the new standards of expert testimony by lower courts).
\item[237] See \textit{Kevin F. O’Malley et al., IA Federal Jury Practice And Instructions § 14:01 (6th ed. 2014)}.
\item[238] See Bernstein, \textit{supra} note 29, at 28 (discussing how judges apply varied standards of admissibility regarding expert testimony).
\item[239] See United States v. Rodebaugh, 561 F.3d 864, 868–69 (8th Cir. 2009) (ruling that the admission of expert evidence did not warrant reversal since the jury was not substantially impacted since the judge gave the jury a limiting instruction on how to evaluate expert testimony).
\item[240] See United States v. Monaco, 702 F.2d 860, 878 (11th Cir. 1983).
\item[241] See Conway v. State, 171 So. 16, 17 (Miss. 1936); State v. Dotson, 123 S.E. 463, 463–64 (W. Va. 1924).
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Jury instructions are also used for preliminary questions regarding authentication,242 relevance,243 and lay opinion testimony.244 Some scholars have argued that expert opinion evidence is not substantially different from lay opinion evidence to warrant differential treatment.245 As such, judges should instruct juries on how to evaluate expert evidence, similar to how judges instruct juries on preliminary questions involving other forms of evidence. With this method, judges would act more as “guides” to expert testimony than “gatekeepers” by ensuring that juries critically evaluate any expert evidence heard in court.

B. Alternative Solution: The Clear and Convincing Standard

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

242 See United States v. Cambindo Valencia, 609 F.2d 603, 640 (2d Cir. 1979) (instructing the jury that it must judge worth of testimony of witness in determining if tape was authentic); United States v. Rizzo, 492 F.2d 443, 448 (2d Cir. 1974) (holding that the jury was properly instructed on authentication issue that the government had to prove that the voice on the tape was the defendant’s).
243 See United States v. James, 590 F.2d 575, 579 (5th Cir. 1979) (explaining that the jury decides preliminary questions as to conditional relevancy of evidence).
244 See United States v. Novaton, 271 F.3d 968, 1009 (11th Cir. 2001) (“[T]he district court instructed the jury that the agents were not expert witnesses and that the jurors should independently determine the meaning of the statements.”).
246 See Brief of the American Medical Association, American Medical Association/Specialty Society Medical Liability Project et al. as Amici Curiae in Support of Respondent at 9, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (No. 92-102) (“While the lower courts have universally agreed that expert scientific testimony must satisfy a higher threshold standard than mere relevance, they differ in defining that higher standard of admissibility.”).
247 See Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999) (“The burden of laying the proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence.” (citing Daubert, 509 U.S. at 592 n.10)); cf. Schauer & Spellman, supra note 125, at 10 (noting that the higher threshold for scientific and expert evidence presupposes that it is even more flawed than direct evidence).
248 See Heartland Fed. Sav. & Loan Ass’n v. Brisco Enters. (In re Briscoe Enters.), 994 F.2d 1160, 1164 (5th Cir. 1993) (“The two options are proof by a preponderance of the evidence or by clear and convincing evidence. ‘Preponderance’ means that it is more likely than not. ‘Clear and convincing’ is a higher standard and requires a high probability of success.”).
Courts often apply the higher clear and convincing threshold for admissibility to character evidence, given the prejudicial effect it may have on the trier of fact. The desire to have experts satisfy a higher standard with additional requirements is justified in a culture of class actions and mass tort litigation when their testimony may have a strong impact on society. However, diminishing the jury’s decisional authority is an infringement upon a venerable institution with profound implications for self-governance. A trial court’s gatekeeping duty requires that the proponent of the expert witness proves by a preponderance of the evidence that its expert’s opinions are both relevant and reliable. This standard applies to both pretrial Daubert hearings as well as expert testimony offered during trial.

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

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

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

251 See David L. Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L. Rev. 913, 915 (1998) (describing class actions as the most dramatic change in civil procedure over the past couple decades).


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

256 See Bernstein, supra note 29, at 28 (discussing judicial resistance to the new standards of expert testimony by lower courts).
challenger to carry the burden instead, and to meet a higher clear and convincing threshold that the expert’s methods are unreliable.

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

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


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

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

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

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


263 Id. at 152.

264 See Flores et al., supra note 89, at 563 (noting the empirical implications of Daubert resulting in an increase in preliminary evidentiary hearings on expert evidence).
in trials. Yet, the committee’s note to Rule 702 clarifies that the intent of _Daubert_ was not to provide an automatic challenge to all expert testimony.

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

**C. Criticism and Concerns with This Framework**

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

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

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

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265 See Refo, supra note 19, at 2.
266 Fed. R. Evid. 702 advisory committee’s note.
267 See Kanner & Casey, supra note 152, at 291–92 (discussing how _Daubert_ undermines the Seventh Amendment).
268 See, e.g., Miller v. Baker Implement Co., 439 F.3d 407, 412 (8th Cir. 2006) (finding that the trial judge did not abuse discretion in excluding the plaintiff’s expert testimony without a _Daubert_ hearing).
270 See Malone & Zwier, supra note 113, at 118–19 (arguing that the reliability of methodology presents questions of fact, not questions of law).
271 See Imwinkelried, supra note 90, at 616 (arguing the policy favors that judges making the determination of validity of scientific testimony because jurors may not understand it and are unlikely to disregard unreliable evidence during deliberations).
272 See Gatowski et al., supra note 168, at 442.
expert testimony are unsupported. If judges are no better equipped for the
task than juries, reassigning the responsibility from juries to judges is
further unjustified.

Even if neither judges nor juries are deemed perfectly equipped for the
task of deciding these questions, it is not clear that there are preferable alter-

natives. Perhaps expert testimony could be weighed by a panel of experts in
the relevant field. However, the costs, time, and complexity presented by this
alternative would be substantial. And adding yet more experts only rein-

troduces questions of qualification and method that would—once again—
need court supervision and adjudication.

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

CONCLUSION

As this Note has argued, juries, not judges, should be the “gatekeepers”
of expert evidence. This would restore the balance of power between them.
However, the recommended factors for laying foundation for reliability in
Daubert should still remain. Juries should make the ultimate decision on reli-

ability, since this primarily entails questions of fact. This framework will also
prevent judges from inserting their policy-based opinions into their Daubert
rulings. As a result, cases will be more likely to make it to juries for them to
decide the reliability of expert testimony, as well as the ultimate outcome of
the case. Many cases, like Valente v. Textron Inc., are frequently being dis-

posed of after Daubert hearings decided solely by judges.

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

273 See Schauer & Spellman, supra note 125, at 14–16 (discussing a substantial body of
research that casts doubt on the claim that jurors overvalue expert testimony).
274 931 F. Supp. 2d 409, 419, 429 (E.D.N.Y. 2013). The expert testified that his conclu-
sions were drawn to a reasonable degree of scientific certainty, but the evidence was still
excluded because the court found various factors, such as a known error rate, were miss-
ing. Id.
275 James Madison Replies, supra note 1, at 612.