Mass Tort Litigation and the Seventh Amendment Reexamination Clause[1]

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I. Introduction

The Seventh Amendment Reexamination Clause provides that "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." [FN1] In 1995, Judge Richard Posner injected the Reexamination Clause into the mass tort debate in his decision in Rhone-Poulenc Rorer, Inc. [FN2] There, in the midst of a broad attack on the use of nationwide class suits, he argued that the Reexamination Clause imposes crippling limits on the use of bifurcation to resolve mass tort disputes. [FN3] Specifically, he argued that certification of an issue class [FN4] would lead to a risk of reexamination because one jury would decide whether the defendant was negligent and other juries would decide an overlapping issue—the allocation of fault between the defendant and a particular plaintiff. [FN5]

The argument against certification of issue classes based on the Reexamination Clause has emerged as a significant stumbling block to the aggregate resolution of mass tort cases, [FN6] but it has received surprisingly little attention in the academic literature. While other aspects of Rhone-Poulenc have been the subject of vigorous criticism, [FN7] most critics in the academy and on the bench have not addressed the reexamination argument. [FN8] I do so in this paper and conclude that the Reexamination Clause should not pose a serious obstacle to the use of issue classes.

The argument that the Reexamination Clause limits the certification of issue classes is not new. The Fifth Circuit has long held that the Seventh Amendment prohibits the certification of an issue class if certification would result in the separate trial of overlapping issues. [FN9] The Manual for Complex Litigation and a number of courts besides the Seventh

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Circuit have apparently followed the Fifth Circuit's lead. [FN10] But the conclusion that the Reexamination Clause limits the use of issue classes is particularly troublesome when applied to the mass tort context, as Judge Posner did in Rhone-Poulenc.

While it is often possible to adjudicate claims involving mass economic harm without employing the issue class, this often cannot be done with mass torts, unless controversial aggregation techniques are used. [FN11] Mass economic harm cases—the cases in which the reexamination argument was developed—have been characterized as "upstream cases(,) that is, cases where the harm is alleged to be some uniform course of conduct by the defendant, from which everything else follows." [FN12] In stark contrast, mass tort cases typically require that close attention be paid to the individual claims of plaintiffs at some stage of the litigation. Thus, efforts to certify classes to resolve mass tort claims in their entirety are often doomed because such suits would be unmanageable. If the parties and the courts are to enjoy the benefits of class aggregation in the mass tort context without sacrificing the right to adjudicate individual issues, the availability of the issue class is essential. [FN13] Invocation of the Reexamination Clause to control the use of issue classes has the pernicious effect of shifting the class certification inquiry from a search for the fairest way of resolving a mass tort to a mechanical analysis that ignores the purposes of the Reexamination Clause. Thus, it is particularly important to examine whether there is any basis for concluding that the Reexamination Clause imposes insuperable obstacles to the use of issue classes.

I argue below that the Reexamination Clause imposes no such obstacles. I do not contend that the use of issue classes is always constitutional. I agree that bifurcation violates the Seventh Amendment whenever it leads to "confusion and uncertainty," [FN14] a possibility that should be considered case-by-case before overlapping issues are separated for trial. Nor do I argue that bifurcation of overlapping issues is desirable in every case in which it would not lead to confusion and uncertainty. I simply reject the view that the Reexamination Clause imposes an inflexible rule forbidding the separate trial of overlapping issues.

I make my argument in two parts. In Part II, I discuss the appropriate framework for interpreting the Reexamination Clause. Then, in Part III, I consider Rhone-Poulenc and the Fifth Circuit's recent decision in Castano v. American Tobacco Co. [FN15] I argue that neither a sound understanding of the Reexamination Clause nor Supreme Court precedent supports the Fifth and Seventh Circuits' analyses.

II. Interpreting the Reexamination Clause

A. The Traditional and Modern Interpretations of the Clause

The traditional view has been that the Reexamination Clause should be read statically, [FN16] that is, to constitutionalize those rules of reexamination bequeathed by the English common law of 1791, [FN17] except for those rules deemed rules of "form." [FN18] Those holding the traditional view tend to adhere closely to the rules of English common law of 1791 and are reluctant to treat the English rules as mere rules of form. By contrast, those holding the modern view argue that the Reexamination Clause should be read in a more open-ended fashion. [FN19] While recognizing the distinction between rules

of "substance" and rules of "form," adherents of the modern view have tended to regard specific English common-law rules as matters of form not binding on modern courts.

The choice between the static and dynamic approaches bears on the permissibility of bifurcating overlapping issues. For reasons discussed below, the rule set forth in Rhone-Poulenc and Castano cannot be premised on the English common law of 1791. [FN20] Thus, if the Reexamination Clause must read statically, Rhone-Poulenc and Castano are clearly wrong.

The traditional view was most emphatically stated by the Supreme Court in Dimick v. Schiedt, a case that construed the Seventh Amendment as a whole. [FN21] There, the respondent argued that a procedural device known as additur was unconstitutional because it was unknown at common law in 1791. [FN22] The Court closely examined the old English cases to determine whether the cases authorized additur. Concluding that the cases did not, the Court found additur unconstitutional. Faced with the argument that common-law rules could evolve over time, the Court held, over a vigorous dissent by Justice Stone, that the Seventh Amendment adopted the rules of common law in force in 1791. [FN23] In rejecting the possibility that the common law referred to in the Amendment was "susceptible of growth and adaptation to new circumstances," the Court did not attempt to understand how the Founding Fathers conceived of the rules of common law. Rather, it simply reasoned that "(t)o effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." [FN24]

Despite Dimick's emphatic language, the Court has moved beyond the static test in defining the constitutionally protected boundaries of the jury's province under the Seventh Amendment Trial-by-Jury Clause. [FN25] Indeed, there appears to be no principled way to return to the static test without radically altering the terrain of federal civil litigation. The static approach, for example, cannot explain the Court's approval of modern procedural devices that allow the courts to determine sufficiency of evidence. [FN26] If summary judgment and directed verdict are considered mere matters of "form," even though they greatly affect the substantive power enjoyed by a jury vis-à-vis the federal judiciary, then many other issues must also involve mere matters of form. [FN27] Thus, unless the Court is prepared to forbid the use of summary judgment or directed verdict, there is no principled basis for concluding that the Trial-by-Jury Clause incorporates the English common law of jury trial procedure.

At least until the Court's recent decision in Gasperini v. Center for Humanities, [FN28] however, it was unclear whether the Court would continue to apply the static approach exemplified in Dimick to questions under the Reexamination Clause. This uncertainty resulted in part from suggestions by the Court that the static interpretation of the Reexamination Clause remained good law, even as the static approach became obsolete for some issues under the Trial-by-Jury Clause. In Colgrove v. Battin, [FN29] for example, the Court concluded that the Framers did not intend to "equate the constitutional and common-law characteristics of the jury," [FN30] but suggested in dicta that the Reexamination Clause would be interpreted differently. [FN31]

The Court resolved the uncertainty by rejecting a static approach to the Reexamination Clause in Gasperini. [FN32] In an opinion expressly inviting reconsideration of Dimick, the majority rejected bondage to the common-law rules of 1791. [FN33] Justice Ginsburg, writing for the Court, dismissed in a footnote the dissent's argument that the Reexamination Clause should be interpreted statically:

> If the meaning of the Seventh Amendment were fixed at 1791, our civil juries would remain, as they unquestionably were at common law, "twelve good men and true. . . ." Procedures we have regarded as compatible with the Seventh Amendment, although not in conformity with practice at common law when the Amendment was adopted, include new trials restricted to the determination of damages . . . and Federal Rule of Civil Procedure 50(b)'s motion for judgment as a matter of law. [FN34]

The Court's analysis is significant in two respects. First, the Court relied on the dynamic interpretation it had previously given to the Trial-by-Jury Clause to support its interpretation of the Reexamination Clause. In so doing, the Court endorsed the view that the same interpretive approach should be applied to both Clauses of the Seventh Amendment, thereby rejecting the dissent's argument that the Reexamination Clause was more susceptible to a static interpretation than the Trial-by-Jury Clause. [FN35] Second, the Court did not even bother to consider whether the practice at issue in Gasperini was consistent with the form or detail of English practice in 1791. The Court's silence on this question is particularly conspicuous in view of the vigorous historical debate between Justice Stevens, who agreed with the Court on the Reexamination issue, and Justice Scalia, who disagreed. [FN36] The majority's refusal to address history presumably does not mean that history is irrelevant to the interpretation of the Clause. [FN37] Rather, the Court appears to have concluded that any historical practice that stands in the way of some type of appellate review of damage awards must give way in the interests of the "fair administration of justice." [FN38] In short, Gasperini requires a dynamic interpretation of the Reexamination Clause.

In his dissent, Justice Scalia argued that "the content of (the common law) was familiar and fixed" [FN39] in 1791 and complained that the Court "abandon(ed) any pretense at faithfulness to the common law." [FN40] As I discuss in Parts B and C below, however, the historical evidence in fact casts doubt on the proposition that the Founders specifically intended the reference to the common law to freeze the Clause in time. Thus, there is no reason to insist upon a static reading of the Reexamination Clause.

B. The Purposes of the Reexamination Clause

1. The Constitution of 1787

The original Constitution did not expressly guarantee a jury trial in civil actions. Indeed, Article III of the Constitution appeared to leave open the possibility that facts could be retried by the Supreme Court sitting without a jury. This is because Article III, Section 2 gave the Supreme Court "appellate

Jurisdiction, both as to Law and Fact." [FN41] This grant of power sounds innocuous to a modern ear, but as Professor Wilfred Ritz has noted,

(t)he "appeal" was the method of superior court review in civil-law jurisdictions, jurisdictions that did not use the jury (such as admiralty). An appeal would, in such a system, open the way to a consideration of the whole case by the superior court. An appeal might have been taken either before or after an initial trial in the inferior court. When it was taken after the initial trial the result is that there was a second trial, de novo, in the superior court. On appeals both facts and law were open for consideration, either as an initial proposition or by reconsideration. [FN42]

This form of appeal was not limited solely to civil law jurisdictions. At the time the Constitution was ratified, a statutory appeal in the New England states permitted removal of a case after judgment for a retrial by jury in a superior court. [FN43] Article III, Section 2 of the Constitution arguably authorized similar retrials in federal court. Indeed, because the original Constitution did not have an express civil jury trial provision, Section 2 of the Judicial Article could fairly be read as authorizing the Supreme Court to retry civil cases without a jury. In fact, Professor Wythe Holt has argued that the Framers intended such a reading. [FN44]

2. The Concerns of the Anti-Federalists

Whatever the original intent of the Framers, it became clear during the ratification debates that the right to jury trial would have to be protected. [FN45] As the historian Jack Rakove has noted, the Anti-Federalists, who were opposed to the ratification of the Constitution altogether, attained as great a consensus on the threat posed by Article III to jury trial as they found on any other issue. [FN46] Some Anti-Federalists went so far as to argue that the Constitution abolished the civil jury trial. [FN47] In response, Federalists gave assurances that Congress could protect the right to a jury trial. Alexander Hamilton, for example, wrote:

If . . . the reëxamination of a fact once determined by a jury, should in any case be admitted under the proposed Constitution, it may be so regulated as to be done by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court.

But it does not follow that the reëxamination of a fact once ascertained by a jury, will be permitted in the Supreme Court. . . .

. . . .

. . . The legislature of the United States would certainly have full power to provide, that in appeals to the Supreme Court there should be no reëxamination of facts where they had been tried in the original causes by juries. [FN48]

These assurances, however, did not lessen the call by Anti-Federalists for constitutional guarantees. [FN49]

The alarm of the Anti-Federalists was not limited to concern that jury trials might be abolished altogether. The Supreme Court's appellate authority over law and fact remained unacceptable to Anti-Federalists even if retrials in the Supreme Court were by jury. Anti-Federalists cherished juries in large part because of the protection they provided against central authority. [FN50] Trial by jury in the Supreme Court would vitiate that protection. Under such a scheme, final authority to render verdicts would shift from local juries to District of Columbia juries sympathetic to federal authority and detached from local concerns.

The perceived need for protection against central authority had an intensely practical as well as an ideological dimension. Anti-Federalists feared the federal courts would oppress local debtors on behalf of out-of-state creditors. [FN51] The fact that retrials on appeal in the Supreme Court might be by jury provided little comfort. As Professor Wolfram has explained, "the last resort for the hounded debtor was a hopefully sympathetic jury in his local federal court." [FN52] In addition, Anti-Federalists were concerned about the cost of retrying cases in the capital. [FN53] For these reasons, the Anti-Federalists sought not only to preserve the right to jury trial, but to ensure that no retrials whatsoever would take place in the Supreme Court.

While the Anti-Federalists were unsuccessful in preventing the ratification of the Constitution, the Seventh Amendment was promptly added to the Constitution in 1791. The "legislative history" of the Clause is sparse, [FN54] but there is no doubt that the concerns of the Anti-Federalists were addressed by the Reexamination Clause. The Clause provides that "no fact tried by a jury, shall otherwise be reexamined in any Court of the United States, than according to the rules of common law." [FN55] The rules of common law in effect in 1791 clearly prohibited retrials de novo on appeal. [FN56]

C. The Argument for a Dynamic Reading of the Clause

If the Reexamination Clause simply forbade de novo review of facts tried by a jury, the Clause would have little relevance to modern civil procedure. No one argues today that findings of fact by a jury should be subject to de novo review on appeal. The Clause remains important because its text, specifically its incorporation of the "rules of common law," arguably sweeps more broadly than the reasons for which the Clause was ratified. Put another way, the text of the Reexamination Clause has the potential to constitutionalize vast areas of civil procedure, including the law of preclusion. For that reason, it is critically important to determine whether the reference to "common law" in the Clause should be read statically or dynamically.

In Gasperini, Justice Scalia relied on Dimick and Justice Story's opinion in United States v. Wonson [FN57] to support his view that the Reexamination Clause should be interpreted statically. [FN58] Neither case, however, provides firm support for Justice Scalia's argument. Dimick, for example,

stated that all of the Seventh Amendment must be given a static interpretation. [FN59] That dictum, of course, is no longer good law. The Court no longer insists on a static interpretation of the Trial-by-Jury Clause. [FN60] Wonson is similarly unhelpful. Justice Scalia quoted Wonson's conclusion that "the common law here alluded to . . . is the common law of England" to support his view that the rules of common law have a fixed historical meaning. [FN61] Justice Scalia, however, misunderstood Justice Story's point: The Reexamination Clause did not incorporate the common law of the particular state in which the federal court happened to sit, but a more general common law. [FN62] While Wonson went on to proclaim that "the invariable usage settled by the decisions of ages" prohibited the court from reexamining the jury verdict, [FN63] there is nothing in the opinion stating that the rules of common law cannot be modified, if necessary. The case simply established that the reference to "common law" in the Clause points the federal courts to a single source of law, the common law of England, which as I discuss below was subject to modification in light of local conditions. [FN64]

The conclusion that this static approach best accords with the Founders' understanding of the common law, however, does have some historical support. While not addressing the reexamination question, the distinguished legal historian Morton Horwitz has argued that

> (t)he (Revolutionary Generation) had little difficulty in conceiving of the common law as a known and determinate body of legal doctrine . . . .
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> . . . The persistent appeals to the common law in the constitutional struggles leading up to the American Revolution "created a regard for its virtues that seems almost mystical." As a result, by the end of the eighteenth century, lawyers regarded the "concept of the common law as a body of principles," which "encouraged uninhibited use of English precedents by the legal profession in the federal courts." [FN65]

But the static approach oversimplifies the Founding Generation's understanding of common law in an important way. The Founders understood that the common law of England had not been imported whole into the United States. [FN66] That is not to say that the Founders believed common-law principles to be malleable. It was not the principles of common law that had changed, [FN67] but the applicability of those principles in light of local conditions. As Senator Oliver Ellsworth stated during the secret Senate debates on the Judiciary Act of 1789, "The Common Law of England in some Instances (has been) found inapplicable to the Circumstances of some of the States." [FN68]

This understanding found support in the influential work of William Blackstone. [FN69] Blackstone recognized that were the common law applicable to the Colonies, it could not be uniformly applied there and in England because the local conditions were different. [FN70]

It is not a great leap from the conclusion that the English common law could not be fully applied in the United States to the conclusion that the common law should evolve over time to reflect local conditions. To be sure, there may have been a consensus at the time the Seventh Amendment was written that the underlying principles of common law that were applicable in America were timeless.

[FN71] But even if this consensus existed, it may have no bearing on whether limits on reexamination were understood to be subject to evolution. [FN72]

There is reason to believe that some in the Founding Generation understood, at least as a descriptive matter, that the rules if not the principles of common law had evolved over time. [FN73] The Founding Generation was familiar with Blackstone, whose influential Commentaries recognized that the common law had changed over time, [FN74] and with Lord Mansfield, who was contemporaneously engaged in common-law reform as Lord Chief Justice of the King's Bench between 1756 and 1788. [FN75] Some in the Founding Generation clearly welcomed the possibility of evolution. Justice James Wilson, for example, once charged a jury that "(t)he expanding and accommodating genius of the common law" permits the courts to apply "easily and aptly its maxims and rules . . . in new situations and emergencies." [FN76] Others despised the evolutionary potential of the common law. Thomas Jefferson, for example, bitterly criticized Lord Mansfield: "While 'the object of former judges ha(d) been to render the law more & more certain,' Jefferson wrote in 1785, Mansfield had sought 'to render it more uncertain under pretense of rendering it more reasonable.'" [FN77] Implicit in Jefferson's disapproval, however, was a recognition that the common law had changed under Lord Mansfield. Indeed, Jefferson recognized that judges had overturned "settled rules" of common law in previous historical periods as well. [FN78]

Despite the evidence that some members of the Founding Generation understood that the rules of common law changed over time, the extent to which this understanding was widely shared and consciously acted upon by the Framers of the Reexamination Clause, is unclear. We have almost no direct evidence of the Framers' intent. [FN79] It seems hard to believe, however, that those who framed the Seventh Amendment were unaware that the rules of common-law procedure had undergone significant change in England. Had they intended to rule out the possibility that the rules of reexamination would change over time, it is difficult to understand why they would have incorporated the "rules of common law," when those rules had proven malleable over time.

There were other ways the Clause could have been drafted. The evolutionary potential of the common law, for example, could have been cabined through codification. [FN80] The Reexamination Clause could have been drafted to require, for example, that appellate review of suits at common law proceed only by writ of error. [FN81] Alternatively, it would have been easy to refer explicitly to those common-law rules in force at the time of ratification. [FN82] This latter option would have made clear the Framers' intent to freeze the rules of reexamination. The Framers chose neither approach. Thus, the very structure of the Reexamination Clause suggests the possibility that the Framers intended to permit further common-law development.

The Anti-Federalists may well have preferred to disable the courts as well as Congress from varying the rules of reexamination. Because the Federalists were "solidly" in control of the First Congress, [FN83] however, Anti-Federalists were in no position to impose their will. [FN84] By receiving the English common-law rules of reexamination, the Framers may have addressed the biggest fear of the Anti-Federalists (the concern over legislative abuse), [FN85] while intentionally keeping alive the judiciary's ability to adjust the rules of reexamination over time, if necessary.

While it is impossible to know for sure what the Framers intended, the above analysis suggests that there is no basis for confidence that the Reexamination Clause is more susceptible to a static reading than the Trial-by-Jury Clause. In the absence of such evidence, it makes sense to read the Clauses together because in some respects the Clauses are two sides of the same coin. The Trial-by-Jury Clause protects the jury's decisionmaking authority vis-à-vis the courts before a verdict is rendered. The Reexamination Clause protects the jury's decision after it has been rendered. Indeed, although the presence of both Clauses in the Constitution has obscured the point, the Trial-by-Jury Clause is sufficiently broad to provide protection against any reexamination that would usurp the province of the jury. [FN86] For these reasons, it would make little sense to read the Reexamination Clause more restrictively than the Trial-by-Jury Clause. Because it is settled that the right to a jury trial does not require a trial in accordance with common-law rules of civil procedure in effect in 1791, [FN87] the Reexamination Clause similarly should not be read to require review of jury verdicts in accordance with the common-law rules of 1791.

D. Applying the Dynamic Approach

There are two different ways the Reexamination Clause can be read dynamically. First, the Clause might be read to do no more than establish a jurisdictional principle, that is to reserve to the federal courts alone-as opposed to Congress-the power to set the rules of reexamination. Under this view, the Clause would have no bearing on the content of the rules themselves. While this reading arguably conforms to the text of the Clause, it has no support in either caselaw or history. Gasperini leaves no doubt that the Supreme Court believes that the Clause imposes limits on the courts as well as Congress. [FN88] Moreover, the controversy that led to ratification of the Reexamination Clause was precipitated by concern over the possibility that the courts would have the power to retry de novo cases on appeal, a substantive rather than a jurisdictional issue. [FN89] Any interpretation that would treat the Reexamination Clause as purely jurisdictional would fail to give sufficient weight to the substantive nature of the Founding Generation's concerns.

For these reasons, the Reexamination Clause is best understood as a source of authority for courts to articulate those norms concerning reexamination that are sufficiently fundamental to override contrary considerations. [FN90] In articulating such norms, courts must give due consideration to history, but need not attempt to replicate rigidly the balance of power that existed between local juries and the federal judiciary in 1791. [FN91]

III. The Issue Class and the Reexamination Clause

In this Part, I analyze whether the separate trial of overlapping issues by different juries is consistent with a dynamic reading of the Clause. I conclude that the Reexamination Clause—read properly—does not forbid the separate trial of overlapping issues.

A. Rhone-Poulenc and Castano

A number of courts have applied the Reexamination Clause to determine whether issues may be separated for trial before different juries. [FN92] I focus on the Seventh Circuit's decision in Rhone-Poulenc and the Fifth Circuit's decision in Castano because they provide the most comprehensive explanation available of this approach. [FN93]

In Rhone-Poulenc a nationwide class of hemophiliacs infected with HIV sued drug companies on the ground that the companies negligently had failed to guard against the possibility that blood solids manufactured by the companies had been contaminated with HIV. [FN94] The district court certified an issue class to determine whether the companies had been negligent. [FN95] It was contemplated that if the companies were found negligent in the class trial, the negligence finding would be used as an estoppel in the individual suits that would address any other relevant issues. [FN96]

The Seventh Circuit granted a writ of mandamus ordering the district court to decertify the class, in part because the court concluded that the bifurcation plan violated the Reexamination Clause. Judge Posner, writing for a panel of the court, held that a trial judge

must not divide issues between separate trials in such a way that the same issue is reexamined by different juries .... The right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial) and not reexamined by another finder of fact. [FN97]

Because the issue of defendant's negligence overlapped with the issue of comparative negligence, the court concluded that the bifurcation plan was "inconsistent with the principle that the findings of one jury are not to be reexamined by a second or third or nth jury." [FN98] The court expressed concern over the possibility that later juries might consider the same facts as the first jury but reach different conclusions. "How the resulting inconsistency between juries could be prevented," the court complained, "escapes us." [FN99]

The court's conclusion that negligence and comparative negligence issues inevitably overlap is undeniable, at least as a theoretical matter. [FN100] Juries deciding comparative negligence are permitted to consider the seriousness of defendants' conduct. [FN101] Because the egregiousness of defendants' conduct often cannot properly be evaluated on the basis of a special verdict rendered by an earlier jury, a later jury considering comparative negligence probably would have to hear evidence of defendant's negligence. [FN102] For that reason, when separate juries try the issues of negligence and comparative negligence, overlap between the issues will often be inevitable. [FN103] Put another way, negligence is a "crossover" issue—an issue on which evidence will have to be presented in both phases of a bifurcated proceeding. [FN104] Thus, there is no question that trials of negligence and comparative negligence issues to separate juries will violate the legal standard enunciated by the Seventh Circuit.

The Fifth Circuit similarly has concluded that separate trials of negligence and comparative negligence violate the Reexamination Clause. In Castano, the Fifth Circuit ordered decertification of a

nationwide class suit against cigarette manufacturers, in part on the ground that severing the issue of the manufacturers' negligence from the comparative negligence of the smokers would violate the Reexamination Clause. [FN105] Quoting the Reexamination Clause in support, the Fifth Circuit held that

(t)he Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues. Thus, (the) Constitution allows bifurcation of issues that are so separable that the second jury will not be called upon to reconsider findings of fact by the first .... [FN106]

The court concluded that severing the manufacturers' negligence from the issue of comparative negligence would create an unacceptable risk of reexamination:

There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury. [FN107]

While some of Castano's language may be read to suggest that the risk of reexamination simply creates an obstacle to satisfying the requirements of Rule 23 of the Federal Rules of Civil Procedure, [FN108] the opinion as a whole supports Rhone-Poulenc's conclusion that the very act of bifurcating overlapping issues may, by itself, violate the Reexamination Clause. [FN109]

Rhone-Poulenc and Castano state that the Seventh Amendment prohibits a second jury from "reexamin(ing)" [FN110] or "reconsidering" [FN111] a factual issue already decided by another jury. Although these terms are somewhat ambiguous, [FN112] an earlier Fifth Circuit decision stated that the right involved is the right to have only one jury "decide" an issue of fact. [FN113] This right could be understood to forbid a court from giving effect to findings of a later jury that are inconsistent with those of an earlier jury, an application of preclusion law. [FN114] Yet, the Fifth and Seventh Circuits go further by forbidding the very use of bifurcation in certain circumstances.

Because the Fifth and Seventh Circuits' discussions of the Reexamination Clause are remarkably sketchy, the underlying justification for the courts' constitutional holding is far from clear. One possible reading of the decisions is that the Reexamination Clause prohibits a trial structure that creates a risk that different juries will render inconsistent findings. [FN115] This reading in effect would broaden significantly the law of preclusion in the bifurcation context. Preclusion law traditionally presumes a jury will follow instructions to give the findings of an earlier jury preclusive effect and provides a remedy only if the jury fails to do so.

A second possible reading of the Fifth and Seventh Circuit decisions would treat the prohibition against "reexamining" or "reconsidering" facts found by an earlier jury as intended to provide protection against more than inconsistent findings. The quoted terms are broad enough to prevent a simple inquiry into an issue decided by an earlier jury, even if the purpose of the inquiry is not to confirm or reject the earlier finding. [FN116] If, for example, the issues of negligence and comparative negligence are separated, a later jury deciding the issue of comparative negligence would be unable to do so without also reexamining—that is, inquiring into—the negligence of the defendant. [FN117] This sort of reexamination of the same

issue is arguably unfair in two separate ways. First, the later jury may decide the case in a manner that is inconsistent with the undisclosed reasoning of the first jury. Second, the need to re-present evidence on the same issue in both parts of a bifurcated proceeding arguably imposes a constitutionally unreasonable burden on the parties.

Although it is hard to imagine a situation in which the two readings of the Clause sketched above would point in different directions, the concerns of the rationales are distinct. The first focuses on the traditional concern of preclusion law: ensuring that the authoritative findings of an earlier decisionmaker are applied in later litigation. The second focuses instead on the apparent unfairness of multiple hearings on the same issue.

Neither rationale is premised on the English common law of 1791, nor could they be. The common law imposed rules of preclusion, but the Fifth and Seventh Circuits' analyses go beyond traditional preclusion doctrine. Nor can justification for going beyond traditional preclusion doctrine be found by examining bifurcation at common law. Bifurcation as we know it today was virtually unknown at common law. [FN118] To ask how the English common law in 1791 might have addressed the problem of overlapping issues in bifurcated suits is to pose an unanswerable question. The Fifth and Seventh Circuits wisely have made no effort to ask or to answer this question, implicitly relying instead on a dynamic reading of the Clause.

It is from that dynamic perspective that I consider in Parts B and C below the rationales for the Fifth and Seventh Circuits' analyses and conclude that neither rationale can withstand scrutiny. Finally, in Part D, I analyze whether Gasoline Products Co. v. Champlin Refining Co., [FN119] the Supreme Court case on which the Fifth and Seventh Circuits rely, supports their conclusion that separate trials of overlapping issues are impermissible. I conclude that Gasoline Products applies an approach far more liberal than that of the Fifth and Seventh Circuit.

B. The Preclusion Rationale

1. The Role of Preclusion Doctrine

The conclusion that preclusion doctrine is relevant to the Reexamination Clause is supported by the text, which provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law." [FN120] In other words, the text of the Clause appears to sweep within its jurisdiction all rules of reexamination applicable to facts tried by a jury, including the rules of preclusion.

Because the history and application of the Clause has almost always been focused on limiting judicial power to review verdicts through post trial motions and appeal, the conclusion that preclusion doctrine falls within the Clause may initially appear implausible, notwithstanding the literal wording of the

text. Indeed, the Clause is so pervasively associated with the problem of verdict review that it generally does not even figure in discussions of the constitutional bases of preclusion law. [FN121]

There can be no question, however, that the Reexamination Clause must constitutionalize some rules of preclusion if it is not to be rendered toothless. It is easy to overlook this point because modern day preclusion rules sweep far more broadly than the Constitution requires. In the absence of a constitutional floor, however, the law of preclusion could be rewritten to permit a losing party to circumvent limits on appellate or trial court review by filing another lawsuit. [FN122] For that reason, the Reexamination Clause must be read to mandate those preclusion rules necessary to avoid evasion of limits on the review of verdicts.

The rules of direct estoppel fit this description. The rules are designed to prevent a party from relitigating facts decided between the same parties on the same cause of action. [FN123] In other words, the rules of direct estoppel provide a minimum level of preclusion below which the federal procedural system may not fall without running afoul of the Reexamination Clause. For that reason, direct estoppel rules have constitutional stature.

Because claim preclusion typically sweeps far more broadly than direct estoppel, there is rarely a need to apply the rules of direct estoppel. [FN124] Thus, the Reexamination Clause typically lurks in the background when preclusion issues arise. The rules of claim preclusion are not always applicable in the bifurcation context, however. Take, for example, a bifurcated case in which the defendant loses the liability phase. Because there is no final judgment on the claim as a whole, it is direct estoppel rather than claim preclusion that would forbid relitigation of the liability issue. [FN125] In the absence of direct-estoppel rules in this context, a later jury could, without violating any legal obligations, turn the second stage of the bifurcated proceeding into the functional equivalent of a retrial de novo of the liability issue. For that reason, there can be no question that the Reexamination Clause mandates application of direct estoppel rules against a defendant who loses in the first stage of a bifurcated proceeding. [FN126]

2. The Unwarranted Extension of Preclusion Doctrine

Rhone-Poulenc and Castano may be read to express concern that bifurcation of overlapping issues improperly affects the finality of jury decisions. When, for example, separate trials of negligence and comparative negligence are permitted, the jury deciding comparative negligence must hear evidence of defendant's negligence to render a proper decision. Providing such evidence, however, creates a risk that the later jury will fail to credit the negligence finding of the earlier jury. One way to prevent this sort of jury misconduct is to forbid the use of bifurcation when separate juries would need to hear evidence on the "same issue." Under this reading of the Fifth and Seventh Circuits' decisions, negligence and comparative negligence could not be tried separately because both juries would hear evidence on the same issue—negligence. [FN127]

This reading would represent an extraordinary extension of preclusion law. We do not normally require that a party be protected against an amorphous risk that a state actor—in this case the jury—will violate its legal obligations. [FN128] Preclusion law is no exception in this respect. The preclusive effect of factual findings typically is ensured by instructing the second jury that it must accept the findings of an earlier jury on a decided issue. A remedy is provided only if the jury clearly fails to do so. [FN129]

It might be argued that the structural protection provided by the Fifth and Seventh Circuit is appropriate in the bifurcation context. When a jury fails to give preclusive effect to an earlier finding in a bifurcated proceeding, a policy against reexamination embedded in the Constitution as well as in the ordinary law of preclusion is implicated. [FN130] This argument cannot withstand scrutiny, however. It assumes that a later jury cannot be trusted to give preclusive effect to the findings of an earlier jury, but no basis for this assumption exists. If the first jury renders a sufficiently detailed verdict, later juries can be instructed to apply the first jury's findings. Assume, for example, that the plaintiffs in Rhone-Poulenc had prevailed on what Judge Posner dismissively called the "serendipity theory" [FN131] of negligence. A later jury then could have been instructed that by failing to take appropriate precautions against the contamination of blood products with Hepatitis B, defendants were legally responsible for the HIV contamination. [FN132] Assuming that the evidence of defendant's negligence is presented again to allow the jury to apportion fault between the parties, [FN133] it is hard to see why such an instruction would receive any less respect from a jury than any other instruction by the court. [FN134] Indeed, the instruction is more likely to be followed than many other instructions. To begin with, the instruction should be easier to understand and apply than instructions that set forth abstract standards of law. [FN135] Moreover, an instruction characterizing the relevant facts is likely to be well-received by jurors because it makes their task significantly easier.

In any event, the law presumes almost without exception that a jury will follow its instructions. [FN136] The minimal risk of inconsistent findings between different stages of bifurcated proceedings clearly does not overcome the weight traditionally given to this presumption. In Richardson v. Marsh, [FN137] the Court indicated that the presumption could be overcome only when "'the risk that the jury will not, or cannot, follow instructions is so great and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.'" [FN138] The Court has found these requirements to be satisfied in only two narrowly drawn circumstances. [FN139] Each involved a criminal prosecution, in which the stakes for a defendant are high. Moreover, each of the cases in which an exception to the presumption was recognized involved instances in which the court asked a jury to ignore damaging information it had received about a criminal defendant. [FN140] By contrast, there is no reason to believe that a jury would have difficulty crediting the findings of an earlier jury. [FN141]

Indeed, this presumption has been applied in comparative negligence cases brought in state courts in situations when it would be far more difficult for a juror to comply with such instructions than in the bifurcation context. Several state courts, for example, have expressed confidence that, in deciding comparative negligence, a juror can faithfully apply a previous finding that defendant was negligent even when the juror dissented from the negligence finding. [FN142] In short, the risk of inconsistent findings

does not justify the Fifth and Seventh Circuits' refusal to permit the separate trial of overlapping issues. [FN143]

C. The Nonpreclusion Rationales

1. The Risk of Inconsistency

The risk of inconsistency is not limited to the possibility that later juries will not be faithful to the findings of the first jury. Even if we could be certain that a later jury would follow its instructions, a risk of inconsistency between juries would exist with respect to matters on which the first jury did not disclose its reasoning. If the first jury were to find a defendant negligent without specifying the reasoning on which it relied, a later jury might rely on different reasoning in allocating fault between the parties. For example, a jury that finds a defendant negligent based on the view that the defendant was going one mile over the speed limit might allocate fault very differently from a jury that believes the defendant was going twenty miles over the speed limit. Thus, differences in the way in which juries understand the same case may have a material effect on the outcome of the case, even if later juries give preclusive effect to the findings of the first jury.

This sort of inconsistency does not trigger the Reexamination Clause, however. As I discuss above, the primary purpose of the Clause was to limit review of jury verdicts. This purpose can be achieved in the bifurcation context by requiring that the formal findings of a jury be given estoppel effect. Provided later juries respect the rules of direct estoppel, the second phase of a bifurcated proceeding cannot be used to evade limits on review. If, for example, later juries respect their obligation to give preclusive effect to a class jury's finding that a defendant was negligent, bifurcation cannot give the defendant an opportunity to obtain review of the class verdict by a later jury.

The fact that the class jury may think the defendant was very negligent and later juries may think the defendant was only slightly negligent changes nothing. This is because the review process is focused solely on the formal findings of a jury. A court reviewing a jury verdict through posttrial motions or on appeal asks whether, under the relevant standard of review, there is enough evidence in the record to support the jury's findings. How the jury actually reasoned its way to a finding typically is of no relevance to the decision and, indeed, is protected from disclosure in most cases by Federal Rule of Evidence 606(b). [FN144] For these reasons, it is fully consistent with limitations on the review of verdicts for a second jury in a bifurcated proceeding to do no more than apply the formal findings of the first jury.

This conclusion may not be dispositive, however. While the primary purpose of the Reexamination Clause is to limit review of jury verdicts, the Supreme Court has construed the Clause somewhat more broadly. The Court has stated that the Clause should be construed to prevent an "indirect impairment" of the right to a jury trial. [FN145] Thus, to the extent that a second jury's reexamination of facts would impair the right to a jury trial, the Reexamination Clause arguably has been violated.

If the constitutional right to a trial by jury means the right to a verdict based on the unanimous reasoning of the jury, bifurcation of overlapping issues would impair the right to a jury trial whenever the first jury's conclusions on material facts were not disclosed. [FN146] When the first jury does not disclose its reasoning process, there is no guarantee that a later jury will apply the same reasoning to the facts of the case.

It is hard to see, however, why a defendant should escape liability when all the members of the jury agree that the defendant is liable. [FN147] Because the primary function of the civil jury is to assess liability rather than tell a story, such a rule would seem to lose the forest for the trees. [FN148] Although a number of state courts have concluded that unanimity as to reasoning is not required, [FN149] there is a dearth of federal authority on the issue. What little federal authority exists, however, supports the common-sense view that as long as the jury agrees on the findings that it is asked to make, each juror may agree to the findings for different reasons. In Schad v. Arizona, [FN150] for example, a plurality of the Court endorsed the view that in criminal cases, "as in litigation generally, 'different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line. Plainly, there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.'" [FN151] Moreover, at least one federal court has held expressly in a civil case that, while a verdict must be unanimous, jurors need not be unanimous in their reasoning. [FN152] Nor does the standard treatise on jury instructions in federal court include an instruction requiring juror unanimity with respect to the jury's reasoning. [FN153] In an article written as an academic, Justice Ginsburg went even further, arguing that even when a jury is asked to return a special verdict, unanimity should be required only with respect to "ultimate issues." [FN154] In short, there is no reason to believe that a litigant may insist that jurors follow the same reasoning in reaching a verdict. [FN155]

It could be argued that this conclusion does not apply to bifurcated proceedings because the decisionmaking process is materially different in such cases. When jurors in an ordinary proceeding are unable to agree on the facts demonstrating negligence, for example, they also may be unable to agree on related issues like the allocation of comparative negligence. In other words, material differences in jurors' understanding of the evidence may result in a hung jury. By contrast, material differences in the understanding of evidence by separate juries in bifurcated proceedings would not force the later jury to hang.

There is no reason to view this difference between ordinary and bifurcated proceedings as a distinction of constitutional import. As long as a reasonable jury may rely on different views of the evidence, there is nothing unfair about allowing a later jury to decide matters not formally resolved by the first jury. Because a later jury is as capable of evaluating the evidence presented to it as is the first jury, a later jury's evaluation of the evidence is as likely to be as accurate as the first jury's evaluation.

Moreover, provided the parties are permitted to litigate fully unresolved matters before the later jury, there is no reason to give special status to the undisclosed reasoning of the first jury. While the Reexamination Clause gives special status to the first jury in some circumstances, it does so only to effectuate the policies of the Clause. We treat the formal findings of the first jury as final, for example, to

comply with a constitutional policy of limiting the review of verdicts. In the absence of a requirement that a jury be unanimous as to its reasoning, the Clause provides no basis for requiring that special status be given to the reasoning of the first jury. [FN156] Thus, the mere fact that the first jury happened to deliberate first is insufficient to support the conclusion that the first jury's reasoning is entitled to constitutional protection.

While the Reexamination Clause does not forbid a policy that would require the first jury to return a special verdict disclosing in full the jury's reasoning process, such a requirement would be impractical. As I discuss below, the first jury in a bifurcated proceeding must provide sufficient guidance to allow later juries to implement the first jury's formal findings without confusion or uncertainty. [FN157] For example, when a plaintiff proposes alternative theories of negligence it may be necessary to ask the first jury to indicate the theory or theories on which it relied to find the defendant negligent. To require significantly more than this, however, is probably not desirable because it would significantly increase the possibility that the first jury would be unable to reach a verdict and would make the task of later juries considerably more difficult. [FN158] For that reason, it is likely that later juries will often need to inquire into issues decided by an earlier jury. It is to this kind of inquiry that I turn now.

2. Inquiries into Previously Decided Issues

The Reexamination Clause generally forbids the retrial of issues that have been determined by a valid jury verdict. [FN159] In this part, I address a different issue: does the Reexamination Clause prohibit a jury in the second phase of a bifurcated proceeding from rehearing evidence on an issue that has been decided by an earlier jury? This is an important question because, in the absence of an exhaustively detailed special verdict, overlapping issues can be fairly tried in a bifurcated proceeding only if a later jury is allowed to inquire into issues decided by the first jury. [FN160] In a comparative negligence case, for example, a second jury would be unable to decide the comparative negligence issue without hearing evidence on the previously adjudicated negligence issue. [FN161] I do not mean to suggest that the first trial will have to be repeated in its entirety. If the special verdict forms are properly drafted, negligence theories rejected by the first jury presumably would be excluded from the consideration of later juries. There is no question, however, that substantial repetition would be required.

There is no support for the view that inquiring into an issue decided by an earlier jury violates the Reexamination Clause, especially if the purpose of the inquiry is not to confirm or reject the earlier finding. [FN162] If the Clause is understood to apply only to an impairment of the right to a jury trial, the mere fact that a later jury rehears the evidence presented on an issue cannot violate the Reexamination Clause. Read dynamically, however, the reference to "common law" in the Clause arguably is broad enough to permit the courts to fashion and enforce a fundamental norm against the wasteful rehearing of evidence.

I have serious doubts that reading the reference to "common law" in this way would be appropriate. Because the Reexamination Clause was intended to limit the scope of the review of verdicts, it appears that the Clause's reference to "common law" at most was intended to permit appropriate adjustments in the balance of power between local juries and the federal judiciary. While the Clause

mandates certain rules of direct estoppel to avoid evasion of limits on the review of verdicts, [FN163] a rule prohibiting later juries from rehearing evidence on issues presented to the first jury would serve no such purpose. For that reason, an approach properly tethered to the purposes of the Founders would not conclude that simply inquiring into an issue decided by a previous jury is a violation of the Reexamination Clause. [FN164]

Even if the Reexamination Clause were read as a warrant for judicial lawmaking separate and apart from its purposes, there still would be no basis for concluding that an inquiry by a later jury into facts tried by an earlier jury would be prohibited under the Clause. It is not reexamination per se that is troublesome, but its consequences, which may include the loss of finality and the burdening of litigants or the court system. [FN165]

I accept the proposition that at some point the burdens imposed on a litigant may be so unreasonable as to implicate the Constitution. The Seventh Circuit so recognized in Continental Can Co., U.S.A. v. Marshall, [FN166] in the course of holding that governmental harassment of a private party through litigation violated the Due Process Clause: "(T)he Government cannot, without violating due process, needlessly require a party to undergo the burdens of litigation. . . . 'The Government is not a ringmaster for whom individuals and corporations must jump through a hoop at their own expense each time it commands.'" [FN167] Because every governmental command inevitably imposes burden and expense on someone, however, the Constitution—including the Reexamination Clause—at most could require only that litigation procedures not be so unreasonably burdensome in light of their objectives as to be fundamentally unfair. [FN168]

Courts have sometimes assumed that bifurcation of overlapping issues is wasteful. [FN169] But there is no basis for concluding that the burden inherent in requiring parties to present evidence more than once raises an issue of constitutional dimension. Federal courts often use general verdicts, for example, even though a general verdict for the defense may result in retrial of the same issue in a later case. [FN170] Similarly, federal courts have refused to grant preclusive effect to an alternative finding of fact not confirmed on appeal, [FN171] even though this rule may result in another trial of the same issue by another jury. Bifurcation in the face of overlapping issues similarly cannot be characterized as imposing a constitutionally unreasonable burden on litigants.

To begin with, if the court approves bifurcation in the face of crossover issues, the parties in essence trade the risk of repetition should the plaintiffs win the class trial for the end of litigation and significantly reduced costs should the defendants win the class trial. The more likely a defendant is to win the class trial on common issues, the more likely that bifurcation will prove economical. [FN172] Even when plaintiffs win the class trial, the benefits of bifurcation may outweigh the costs. When, for example, the case pivots on the class issue, resolution of that issue may facilitate settlement of the entire litigation, resulting in significantly reduced costs of litigation. [FN173] Thus, even when overlapping issues are involved, bifurcation may save both the parties and the courts time and money if used in a discriminating fashion.

Bifurcation serves a second important purpose. Even when the amounts at stake are large enough to make it feasible for plaintiffs to bring individual suits, the defendant may enjoy a strategic advantage in resources that plaintiffs can overcome only through collective action. [FN174] Without certification of an issue class, collective action on the part of plaintiffs becomes significantly more difficult. [FN175] Because suits should be resolved on the merits rather than as a result of disparities in wealth, certification of a Federal Rule 23(c)(4)(A) issue class may promote justice, even if certification may make the litigation as a whole more expensive should the defendant lose the class trial. [FN176]

The issue class promotes the integrity of the fact-finding process in yet another way. Under the principles of offensive collateral estoppel, a defendant who loses the first in a series of suits involving the "same issue" may be bound by adverse findings on that issue in later suits. [FN177] This rule may lead to anomalous results when the first suit is atypical in a way that may affect the jury's verdict. For example, an unusually sympathetic plaintiff in the first suit tried to judgment may skew a jury's decision on common issues in a way that may benefit all future plaintiffs to the detriment of the defendant. [FN178] Whether or not one sees a legitimate role for jury sympathy in the trial of a case, there can be no justification for giving these sympathies effect beyond the specific case a jury hears. The use of an issue class to resolve common issues may avoid giving the case of an unusually sympathetic plaintiff undue weight in the resolution of a mass tort and makes it more likely that jury decisions on common issues will not be affected by irrelevant factors. [FN179] While defendants typically prefer to assume the risk of collateral estoppel rather than face collective action by plaintiffs, [FN180] the procedural system has a separate and distinct interest in the integrity of its fact-finding process.

In short, bifurcation in the face of crossover issues may serve a reasonable purpose, even if certification of an issue class creates a risk that the litigation as a whole will be more expensive than it would be otherwise. Because the Constitution has never been interpreted to forbid the imposition of cost and inconvenience on parties when there is a reasonable basis for doing so, the Fifth and Seventh Circuits' interpretation of the Reexamination Clause cannot properly be based on the cost or inconvenience that results from the rehearing of evidence on an issue that has been decided by an earlier jury.

D. The Argument from Precedent

1. The Misreading of Gasoline Products

I have sought to demonstrate that the Fifth and Seventh Circuits' analyses do not accord with first principles. The Fifth and Seventh Circuits, however, make little effort to defend their conclusions on first principles. Rather, the decisions rely heavily on the assertion that Gasoline Products holds that the separate trial of overlapping issues violates the Seventh Amendment. [FN181] I turn therefore to an analysis of Gasoline Products and conclude that the Fifth and Seventh Circuits' reliance on that decision is misplaced. Gasoline Products did not decide that overlapping issues could not be tried separately, as the Fifth and Seventh Circuits assume in Rhone-Poulenc and Castano. [FN182]

In Gasoline Products, the First Circuit set aside in part the verdict on a contract counterclaim because the trial court had mischarged the jury on damages. The counterclaim defendant, Gasoline Products Company, sought review by the Court, arguing that limiting a new trial to damages alone would violate its right to a jury trial. The Court rejected the argument that a verdict cannot be set aside in part, holding expressly that the Seventh Amendment does not always require a unitary trial of a claim. [FN183] The Court nonetheless refused to permit a retrial limited to damages because damages were not "separable" from other issues, meaning that the issues could not be tried separately without "injustice." [FN184] As the Court put it, "the question of damages on the counterclaim (was) so interwoven with that of liability that the former (could not) be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." [FN185] Thus, the Court ordered a new trial as to all the issues.

One might be inclined to think that overlapping issues by definition are not separable. [FN186] However, as even the Fifth Circuit has recognized outside the highly charged class action context, that is not what Gasoline Products stands for. [FN187] A close reading of Gasoline Products confirms that the Court did not define "separable" to mean "without overlap." Issues are separable, that is not "interwoven," if they can be tried separately without "confusion and uncertainty." [FN188] As the Second Circuit has stated, the Court's "concern (in Gasoline Products) was with the ability of the second jury to function under the limitations imposed by the (First Circuit)." [FN189] Thus, the proper focus is on the jury's ability to decide the case fairly. From this perspective, the Court's invocation of the Seventh Amendment can be viewed as a specialized application of a general due process concern for the accuracy of the decisionmaking process. [FN190] In other words, the Seventh Amendment's Trial-by-Jury Clause requires that a jury not be denied information needed to reach a just verdict.

It could be argued that the separate trial of overlapping issues inevitably results in confusion and uncertainty. The risk of confusion and uncertainty can be avoided, however, when later juries are provided with the information they need to understand and apply the findings of the first jury. [FN191] In a comparative negligence case, this may mean that evidence on the theories of negligence adopted by the first jury may have to be presented a second time. Circuit courts have permitted retrials limited to comparative negligence in such circumstances. [FN192] In Akermanis v. Sea-Land Service, Inc., [FN193] for example, the Second Circuit held that the district court could limit retrial to the question of comparative negligence, on the condition that the parties would be allowed to introduce the evidence of negligence on retrial for purposes of allocating fault between the parties. [FN194]

As such cases illustrate, the legal standard enunciated in Gasoline Products provides no support for the view that the case forbids the separate trial of overlapping issues in all cases. It could be argued, however, that Gasoline Products is premised on the background assumption that the reasoning behind a valid verdict controls later litigation. [FN195] Because exhaustively detailed special verdicts would make the separate trial of overlapping issues impractical, [FN196] this assumption, if given credence, would have virtually the same effect as interpreting Gasoline Products to forbid the separate trial of overlapping issues in all cases. [FN197]

The argument that the Court relied on this assumption might be based on the Court's conclusion that there would be a risk of confusion and uncertainty in a partial retrial because the second jury would not have been authorized to decide a number of open issues:

> The verdict on the counterclaim may be taken to have established the existence of a contract and its breach. Nevertheless, upon the new trial, the jury cannot fix the amount of damages unless also advised of the terms of the contract; and the dates of formation and breach may be material, since it will be open to petitioner to insist upon the duty of respondent to minimize damages.
>
> ....
>
> ... But the present verdict ... cannot be taken as establishing any of these material facts. [FN198]

While ambiguous, the quotation does not provide much support for an argument that the Court assumed that the undisclosed reasoning of a jury is binding. If the Court had done so, there is every reason to believe that the Court would have articulated the assumption in the form of a rule. After all, a statement that the reasoning behind a jury verdict is binding would have provided at least as illuminating an explanation of the Court's decision to vacate the verdict in its entirety as the Court's "confusion and uncertainty" standard. Further, it seems unlikely that the Court would have relied sub silentio on an assumption that was far from settled. Indeed, the conclusion that the jurors must be unanimous in their reasoning had been frequently questioned in the state courts but had never been addressed by the Supreme Court. [FN199]

It is far more plausible to conclude that the Court assumed that the matters identified in the above quotation were outside the scope of the First Circuit's retrial order. In essence, the Court appears to have narrowly construed the order as permitting a retrial only of matters infected by the erroneous instructions. [FN200] While this seems like an amazingly narrow interpretation of the First Circuit's order, this is exactly how a similar order appears to have been construed in Norfolk Southern Railroad Co. v. Ferebee, [FN201] a case on which Gasoline Products relied. [FN202]

For these reasons, it seems implausible that the Court assumed that the undisclosed reasoning of a jury is entitled to deference. Putting aside this implausible assumption, there appears to be no basis for concluding that Gasoline Products forbids the separate trial of overlapping issues in all cases. Thus, Rhone-Poulenc and Castano find no support in Supreme Court precedent for a per se ban on the separate trial of overlapping issues.

2. The Relevance of Gasoline Products

I have argued above that neither the standard enunciated by Gasoline Products nor the Court's background assumptions forbid the separate trial of overlapping issues. But that does not mean that Gasoline Products is irrelevant. Even if the Court had read the First Circuit's order more generously, for example, a complete retrial of the case would have been required under the circumstances. In view of the disagreement between the parties as to the very terms of the contract, the general verdict returned by the

first jury could not provide the second jury with adequate guidance. In a complex case like Gasoline Products, a verdict that simply states that the defendant breached the contract cannot assist a later jury in deciding, for example, how the contract has been breached. This would pose a serious problem if the second jury were unable to conceptualize a breach. [FN203] If the jury nonetheless sought to obey its instructions despite its inability to see a breach, the resulting "confusion and uncertainty" could easily lead to an arbitrary verdict, [FN204] precisely the outcome the Gasoline Products Court was determined to avoid.

In other words, Gasoline Products's confusion and uncertainty standard requires that separate trials of overlapping issues be properly structured. The opportunity to structure the case to address the needs of a later jury was not available in Gasoline Products because neither the parties nor the trial court foresaw that a later jury would need guidance from the first. A well thought-out bifurcated proceeding, by contrast, should be able to avoid the sort of problem that would have made a limited retrial in Gasoline Products unfair. Put another way, if the special verdict form is drafted properly to reveal the basis of the first jury's findings and essential evidence is re-presented to later juries, the mere fact of overlap should not prevent later juries from deciding the case in a fair manner. [FN205]

In Rhone-Poulenc, for example, a later jury could have been instructed on the basis of a properly drafted special verdict that defendant's failure to guard against the contamination of its blood products by Hepatitis B should be deemed negligent. Because such an instruction can be easily grasped and applied, there might have been no need to ask more detailed questions of the first jury on the question of negligence. Of course, if a party had believed that greater specificity on the negligence question in the first phase of the bifurcated proceeding would avoid "confusion and uncertainty" in the second phase, that party could have argued for a more detailed special verdict form. In the second phase of the proceedings, juries could have been advised of the first jury's findings and could have been permitted to rehear evidence on defendant's negligence for the purpose of comparing defendant's negligence against any negligence by the plaintiff. Structured in this way, there is no reason to believe that later juries would have faced a risk of "confusion or uncertainty," the only relevant concern expressed by Gasoline Products. [FN206]

IV. Conclusion

I have sought to show that the separate trial of overlapping issues does not necessarily violate the Seventh Amendment Reexamination Clause. The Clause requires only that later juries respect the formal findings of the first jury. Within these broad parameters, the Clause does not prohibit later juries from independently evaluating evidence on a previously decided issue in order to decide a related issue. For that reason, the Clause allows a jury charged with deciding the issue of comparative negligence to rehear evidence presented to an earlier jury on the defendant's negligence, provided the later jury understands that the formal findings of the earlier jury are binding.

Gasoline Products imposes an additional requirement under the Trial-by-Jury Clause. The formal findings of the first jury must be in a form that a later jury can easily grasp and apply. It is not enough, for example, for the first jury to return a verdict of negligence. If later juries are to apply the first jury's verdict without perplexity, the verdict must be specific enough to explain, at least in a broad outline, how the defendant was negligent. Otherwise, the parties face an unacceptable risk that a later jury will be unable to render a reasoned verdict. Provided the needs of later juries are considered when the court and parties draft the first verdict, however, later juries should be able to render an appropriate verdict.

In short, the mechanical approach championed by the Fifth and Seventh Circuits cannot withstand scrutiny. The separate trial of overlapping issues may not always be desirable. But there is no sound basis for concluding that the convocation of a second jury in such circumstances will necessarily lead to violation of the Seventh Amendment. Reliance on the Seventh Amendment Reexamination Clause thus obscures the real issue: Will certification of an issue class assist in the fair and accurate determination of a particular controversy?

[FN1]. U.S. Const. amend. VII, cl. 2. The Seventh Amendment, of course, also protects the right to a jury trial. U.S. Const. amend. VII, cl. 1 ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .").

[FN2]. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).

[FN3]. I use the term "bifurcation" in this Article to refer to separate trials by different juries of one or more issues relevant to a single claim.

[FN4]. An issue class is a class certified to adjudicate specific issues rather than entire claims. See Fed. R. Civ. P. 23(c)(4)(A) ("When appropriate . . . an action may be brought or maintained as a class action with respect to particular issues."); Manual for Complex Litigation § 30.17 (3d ed. 1995). The certification of an issue class typically means that the litigation will be tried in at least two phases; that is, after the class issues are tried, the remaining issues in the litigation will be addressed by different juries in individual follow-on suits.

[FN5]. Judge Posner also concluded that the negligence and proximate cause issues overlapped. Infra note 98.

[FN6]. See, e.g., Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (holding that the risk of a second jury reevaluating the defendant tobacco company's fault was too great); Rhone-Poulenc, 51 F.3d at 1293; Arch v. American Tobacco Co., Inc., 175 F.R.D. 469 (E.D. Pa. 1997) (following the reasoning in Castano that bifurcation of issues would violate the Seventh Amendment); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 96 (W.D. Mo. 1997) (deciding that using separate juries might violate the Seventh Amendment because issues are too "intertwined"). The argument is equally applicable to any form of bifurcation that involves the separate trial by different juries of two or more issues relevant to a claim. See, e.g., In re Dow Corning Corp., 211 B.R. 545, 588 (Bankr. E.D. Mich. 1997) (considering the

reexamination problem outside the issue class context). Federal Rule of Civil Procedure 42(b) permits such bifurcation, without regard to certification of an issue class:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any number of claims . . . or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution . . . .
>
> Fed. R. Civ. P. 42(b).

[FN7]. See In re Telectronics Pacing Sys., Inc., 168 F.R.D. 203, 210 (S.D. Ohio 1996) (questioning Judge Posner's faith in the jury system); In re Copley Pharm., Inc., 161 F.R.D. 456, 460 (D. Wyo. 1995) ("(This) Court declines Copley's invitation to follow the Seventh Circuit's application of economic justice to the Federal Rules of Civil Procedure."); Geoffrey C. Hazard et al., Pleading and Procedure: State and Federal Cases and Materials 60, 73 (7th ed. Supp. 1997) (criticizing Judge Posner's use of mandamus and citing Michael Orey, Posner's Bearish Dissent, The Am. Law., May 1995, at 73); Heather M. Johnson, Note, Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions, 64 Fordham L. Rev. 2329, 2373-79 (1996) (arguing in favor of class certification); Recent Case, Class Actions-Class Certification of Mass Torts-Seventh Circuit Overturns Rule 23(b)(3) Certification of a Plaintiff Class of Hemophiliacs-In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), cert. denied 116 S. Ct. 184 (1995), 109 Harv. L. Rev. 870, 871-74 (1996) (criticizing decertification of the class, the inquiry into merits, and the use of mandamus); see also 18 Class Action Rep. 161, 178-79, 181-82 (1995) (criticizing the use of mandamus and discussion of negligence law); 18 Class Action Rep. 670, 695-97 (1995) (criticizing Rhone-Poulenc as the "worst" class certification decision).

[FN8]. Professor John Coffee is a notable exception to the relative silence that has greeted this portion of Judge Posner's opinion, but Professor Coffee does not purport to analyze in any depth Judge Posner's holding in this respect. See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1440 (1995) (stating that "(t)his Seventh Amendment objection seems a weak argument" and suggesting that, if a limited class were certified after a finding that plaintiffs had a probability of success, "it seems doubtful that even the Seventh Circuit would find a Seventh Amendment violation"); see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (9th Cir. 1996) ("This (Seventh Amendment) concern of the Rhone-Poulenc court may not be fully in line with the law of this circuit. . . .").

[FN9]. See infra note 93 (describing such Fifth Circuit decisions).

[FN10]. Manual for Complex Litigation, supra note 4, § 30.17 n.704 (citing Alabama v. Blue Bird Body Co., 573 F.2d 309 (5th Cir. 1978), the seminal Fifth Circuit decision); see infra note 92 (collecting citations).

[FN11]. Some courts have permitted individual issues to be resolved through statistical sampling techniques. E.g., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996). While individual issues in mass tort dispute cases can be resolved by sampling, use of this method is highly controversial. See, e.g., In re

Chevron U.S.A., Inc., 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring) ("I have serious doubts about the procedure even where, as here, (the defendant) agreed to use of a statistically sound bellwether trial process."); Hilao, 103 F.3d at 787, 788 (Rymer, J., concurring and dissenting in part) (stating that the use of statistical sampling to resolve individual damage claims "leaves me 'with a profound disquiet'") (quoting In re Fibreboard, 893 F.2d 706, 710 (5th Cir. 1990)). Indeed, the Fifth Circuit recently rejected the use of statistical sampling techniques in a mass tort case. Cimino v. Raymark Indus., Inc., Nos. 93-4452 through 93-4611, 1998 WL 48017 (5th Cir. Aug. 17, 1998) (rejecting use of the technique in a mass tort case). For academic discussion of statistical sampling techniques in the mass tort context, see, for example, Robert G. Bone, Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity, 46 Vand. L. Rev. 561 (1993); Michael J. Saks & Peter David Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 Stan. L. Rev. 815 (1992).

[FN12]. Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 832 (1997).

[FN13]. It may be possible to resolve some mass torts without adjudication by certifying a class for purposes of settlement. In Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997), the Court addressed the appropriateness of settlement classes for the first time. The impact that Windsor will have on the certification of such classes is unclear. Whatever the fate of the settlement class, however, the availability of the issue class remains important. The possibility that a suit will be tried is essential to insuring a fair settlement. See Issacharoff, supra note 12, at 812 ("The lawyer who has entered into negotiations on the basis of a settlement class that could never have been tried is in a weak position to hold out.").

[FN14]. E.g., Arthur Young & Co. v. U.S. Dist. Court, 549 F.2d 686 (9th Cir. 1977) (affirming bifurcation plan after applying Gasoline Products's confusion and uncertainty standard); cf. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 501 (1931) (holding that a partial new trial is permissible when it would not lead to confusion and uncertainty).

[FN15]. 84 F.3d 734 (5th Cir. 1996).

[FN16]. I follow Professor Charles Wolfram, among others, in my use of terms "static" and "dynamic" to refer to possible interpretations of the reference to "common law" in the Seventh Amendment. See Charles W. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 744-45 (1973); see also Jack Friedenthal et al., Civil Procedure 489 (2d ed. 1993) ("(I)t is now clear that proper Seventh Amendment analysis requires application of a dynamic concept . . . .").

[FN17]. See, e.g., Gasperini v. Center for Humanities, 518 U.S. 415, 451-52 (1996) (Scalia, J., dissenting) ("The content of that law was familiar and fixed."); Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The right to trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted."); Dimick v. Schiedt, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional

provision in 1791.") (citing Thompson v. Utah, 170 U.S. 343, 350 (1898); Patton v. United States, 281 U.S. 276, 288 (1930)).

[FN18]. See Redman, 295 U.S. at 657 (1935) (stating that the aim of the Seventh Amendment "is to preserve the substance of the common-law right to trial by jury, as distinguished from mere matters of form or procedure"); Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897) (holding that the Seventh Amendment's "aim is not to preserve mere matters of form and procedure but substance of right").

[FN19]. See Dimick, 293 U.S. at 490 (Stone, J., dissenting) ("There is nothing in (the Seventh Amendment's) history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution."); Douglas Laycock, Due Process and Separation of Powers: The Effort to Make the Due Process Clause Nonjusticiable, 60 Tex. L. Rev. 875, 894 (1982) ("To incorporate a frozen common law is to incorporate a contradiction in terms."); Wolfram, supra note 16, at 736 (arguing that by 1791 "a commonly understood concept of 'common law' had become that of a process characterized by occasional flexibility and capacity for growth in order to respond to changing social pressures rather than that of a fixed and immutable body of unchanging rules"); see also infra note 34 and accompanying text (quoting footnote in which the Gasperini Court rejected a static interpretation of the Reexamination Clause).

[FN20]. See infra note 118 and accompanying text (noting that bifurcation was virtually unknown at common law).

[FN21]. Dimick, 293 U.S. at 474.

[FN22]. Additur permits a court to condition a new trial on defendant's failure to consent to an increase in damages when plaintiff complains that the jury's damages award is inadequate. See Fleming James, Jr. et al., Civil Procedure 400-01 (4th ed. 1992).

[FN23]. Dimick, 293 U.S at 476 ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.") (citing Thompson v. Utah, 170 U.S. 343, 350 (1898); Patton v. United States, 281 U.S. 276, 288 (1930)).

[FN24]. Id. at 487.

[FN25]. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322, 337 (1979) (quoting Galloway v. United States, 319 U.S. 372 (1943)); Galloway, 319 U.S. at 392 ("The more logical conclusion . . . is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements . . . ."); see also Colgrove v. Battin, 413 U.S. 149 (1973) (rejecting the argument that a civil jury of six would be unable to properly perform the functions of a jury). See generally Roger W. Kirst, Judicial Control of Punitive Damage Verdicts: A Seventh Amendment Perspective, 48 SMU L. Rev. 63 (1994) (discussing the Supreme Court's evolving interpretation of the Seventh Amendment).

[FN26]. See Galloway, 319 U.S. at 388-96 (approving directed verdict); Fidelity & Deposit Co. of Md. v. United States, 187 U.S. 315 (1902) (approving summary judgment).

[FN27]. As Justice Black noted with respect to directed verdict motions:

This new device contained potentialities for judicial control of the jury which had not existed in the demurrer to the evidence.... (D)emurring to the evidence was risky business; for in doing so the party not only admitted the truth of all the testimony against him but also all reasonable inferences which might be drawn from it.... Imposition of this risk was no mere technicality; for by making withdrawal of a case from the jury dangerous to the moving litigant's cause, the early law went far to assure that facts would never be examined except by a jury.

Galloway, 319 U.S. at 402-03 (Black, J., dissenting); see also Parklane, 439 U.S. at 346 (Rehnquist, J., dissenting) ("(T)o sanction creation of procedural devices which limit the province of the jury to a greater degree than permitted at common law in 1791 is in direct contravention of the Seventh Amendment.").

[FN28]. 518 U.S. 415 (1996).

[FN29]. 413 U.S. 149 (1973).

[FN30]. Id. at 156 (quoting Williams v. Florida, 399 U.S. 78, 99 (1970)).

[FN31]. Id. at 152 n.6 ("The reference to 'common law' contained in the second clause of the Seventh Amendment is irrelevant to our present inquiry because it deals exclusively with the prohibition contained in that clause against the indirect impairment of the right of trial by jury through judicial re-examination of fact findings of a jury other than as permitted in 1791."). Similarly, in Parklane Hosiery Co. v. Shore, the Court stated that Dimick was irrelevant because the issue in Parklane did not involve reexamination of facts decided by a jury. See Parklane, 439 U.S. at 336 & n.23 (arguing that Dimick's static approach was not controlling because Dimick involved the Reexamination Clause). Justice Rehnquist protested in dissent that Dimick was in fact relevant. See id. at 345 n.12 (Rehnquist, J., dissenting) ("There is no intimation in (Dimick) that the first clause should be treated any differently from the second.").

[FN32]. The Court held that the Reexamination Clause does not prohibit an appellate court from reversing a denial of a new trial motion based on the award of excessive damages, provided the trial court abused its discretion in denying the motion. Gasperini, 518 U.S. at 436 (holding that "(n)othing in the Seventh Amendment... precludes appellate review of the trial judge's denial of a motion to set aside (a jury verdict) as excessive") (citing Grunenthal v. Long Island R.R. Co., 393 U.S. 156, 164 (1968)).

[FN33]. See Gasperini, 518 U.S. at 433 n.16 (noting that Justice Stone's dissent "invit(ed) rethinking of the additur question on a later day").

[FN34]. Id. at 436 n.20.

[FN35]. See id. at 461 (Scalia, J., dissenting) ("(T)here is of course no comparison between the specificity of the command of the Reexamination Clause and the specificity of the command that there be a 'jury.'"); see also Richard H. Field et al., Civil Procedure 738 n.c (6th ed. 1990) (noting that one might "read the Seventh Amendment's language to permit pursuit of policy in much of jury practice, but nevertheless impose a stricter historical test under its re-examination clause").

[FN36]. Compare Gasperini, 518 U.S. at 443-44 (Stevens, J., dissenting) (arguing that the Court at Westminster that granted new trials at common law was an appellate tribunal), with id. at 455-57 (Scalia, J., dissenting) (arguing the contrary). This issue has long been the subject of debate. See, e.g., 11 Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 2819 (2d ed. 1995) (outlining the evolution of the debate); William Blume, Review of Facts in Jury Cases-The Seventh Amendment, 20 J. Am. Jud. Soc. 130 (1936) (arguing that appellate review of grant or denial of new trial motion is not prohibited by the Seventh Amendment); William Riddell, New Trial at the Common Law, 26 Yale L.J. 49 (1916) (arguing that under English common law a new trial could not be granted by the trial judge, but only by the "Court above").

[FN37]. See Gasperini, 518 U.S. at 432-33 ("In keeping with the historic understanding, the re-examination clause does not inhibit the authority of trial judges to grant new trials 'for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States.'") (quoting Fed. R. Civ. P. 59(a)) (emphasis added).

[FN38]. Id. at 435; cf. Richard H. Fallon et al., Hart & Wechsler's The Federal Courts and The Federal System 602 (1996) (noting that "in practice, the Seventh Amendment has not proven to be an important limit on Supreme Court review"); Paul Carrington, The Seventh Amendment: Some Bicentennial Reflections, 1990 U. Chi. Legal F. 33, 46 ("Even a federal civil jury may not deny due process of law by rendering a verdict unsupported by evidence.").

[FN39]. Gasperini, 518 U.S. at 451-52 (Scalia, J., dissenting).

[FN40]. Id. at 461.

[FN41]. U.S. Const. art. III, § 2, cl. 2.

[FN42]. Wilfred J. Ritz, Rewriting The Judiciary Act of 1789, at 67 (1990); see also id. at 7 (noting that "appeal" was used in equity).

[FN43]. See United States v. Wonson, 28 F. Cas. 745, 748 (C.C.D. Mass. 1812) (No. 16,750) (noting possibility of retrial by jury on appeal in Massachusetts, New Hampshire, and Rhode Island); Julius Goebel, Jr., History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 28-29 (1971) (noting that in New England colonies a second trial by jury could be had on appeal); The Federalist No. 83, at 547 (Alexander Hamilton) (E. Earle ed., 1941) (stating that in Rhode Island, Connecticut, Massachusetts and New Hampshire, "(t)here is an appeal of course from one jury to

another . . . ."); Ritz, supra note 42, at 42 ("In . . . Massachusetts, New Hampshire, and Rhode Island . . . (t)he decision . . . resulting from a trial in an inferior tribunal could be appealed to a superior tribunal where a second and entirely new trial could be had."). Hamilton also claimed that in Georgia a party was entitled to a retrial by jury on appeal. The Federalist No. 83, at 546 ("In Georgia . . . an appeal of course lies from the verdict of one jury to another."); cf. Goebel, supra, at 35 (citing Georgia statute that "stipulated an appeal to the General Court which was empowered to examine process and witnesses' depositions or to order a new trial before itself").

[FN44]. See Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421, 1465-66 (noting amendments made in the Constitutional Convention to clarify the powers of the Supreme Court). According to Professor Holt:

The members of the Convention wanted to ensure . . . that courts sitting without juries, particularly the Supreme Court hearing appeals in the manner of the civil law, would be permitted. It is clear that they hoped that the Supreme Court would be able to overturn (to repeat Madison's revealing words) "improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury."

Id.

[FN45]. See, e.g., Jack N. Rakove, Original Meanings 319 (1996) (noting the potency of Anti-Federalist claims about the insecurity of trial by jury); Wolfram, supra note 16, at 669 ("(T)he ratification process brought to light strongly felt popular beliefs about government and its relationship to the person in the street and the importance of the civil jury in preserving that relationship.").

[FN46]. See Rakove, supra note 45, at 319-21 (discussing concerns raised by Anti-Federalists).

[FN47]. See id. at 321 (noting that in the most severe analyses, the Supreme Court's appellate authority "amounted to an effort to replace the common-law birthright of Americans with the dread civil law of Continental Europe"); see also The Federalist No. 81, at 530 (Alexander Hamilton) (E. Earle ed., 1941) (arguing that grant to the Supreme Court of appellate jurisdiction both as to law and fact does not abolish trial by jury); The Federalist No. 83, supra note 43, at 538 (refuting argument that trial by jury was abolished by the fact that the Constitution guaranteed trial by jury only in criminal cases).

[FN48]. The Federalist No. 81, supra note 47, at 531-33.

[FN49]. See Rakove, supra note 45, at 322 ("When Federalists insisted that Congress had to be trusted to fashion arrangements for civil juries, they only encouraged their adversaries to regard it as the institution against which rights had most to be protected.").

[FN50]. See id. at 151 ("Anti-Federalists expressed . . . animus (toward the corrupting and expansive properties of power) most strongly when they examined those provisions of the Constitution that lay closest to the subjects on which generations of Anglo-American whigs had declaimed: the vital role of the jury in protecting local and customary rights against arbitrary acts of central power . . . .")

(emphasis added); Wolfram, supra note 16, at 705-08 (noting that Anti-Federalists viewed the ability of juries to frustrate unwise legislative and administrative policies as a justification for the jury).

[FN51]. See Holt, supra note 44, at 1468 ("(T)he oppression of debtors . . . and of poor people in general was also a constant theme of opposition to the proposed judiciary."); Wolfram, supra note 16, at 679 ("A state-by-state examination of the surviving records of the debates in the state ratification process reveals that . . . concern for local debtors faced with the threat of suit in a federal court, without a jury, was one of the chief motivations for opposition to the Constitution.").

[FN52]. Wolfram, supra note 16, at 678.

[FN53]. As Professor Holt described the problem:

A poor man who obtained judgment upon a jury verdict in a federal trial court or even in the state courts could be forced to retry the case in the Supreme Court, possibly at a distance of 500 miles, . . ., and "he must bring his witnesses where he is not known, where a new evidence may be brought against him, of which he never heard before . . . ."

Holt, supra note 44, at 1469; see Ritz, supra note 42, at 6 ("At the very least (retrials in the national capital) would prove burdensome; at the worst, it would enable the rich litigant to abuse the poor litigant."); see also Wolfram, supra note 16, at 679-87 (collecting citations to the ratification debates).

[FN54]. See Edith Henderson, The Background of the Seventh Amendment, 80 Harv. L. Rev. 289, 291 (1966) ("We have almost no direct evidence concerning the intention of the framers of the seventh amendment itself."); see also Wolfram, supra note 16, at 726-30 ("The skeletal nature of the record that has been uncovered hardly affords reassurance in its 'interpretation.'").

[FN55]. U.S. Const. amend. VII.

[FN56]. The writ of error historically had been used to review the judgments of common-law courts. See generally Goebel, supra note 43, at 19-25 (comparing the appellate devices in English and American courts); Erwin C. Surrency, History Of The Federal Courts 201-03 (1987) (charting the historical development of appellate review). The writ of error did not permit retrials de novo on appeal and indeed was more restrictive than modern appellate mechanisms. Id.

[FN57]. 28 F.Cas. 745 (C.C.D. Mass. 1812) (No. 16,750).

[FN58]. See Gasperini v. Center for Humanities, 518 U.S. 415, 451-52 (1996) (Scalia, J., dissenting) ("The content of (the rules of the common law) was familiar and fixed.").

[FN59]. See Dimick v. Schiedt, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.") (citing Thompson v. Utah, 170 U.S. 343, 350 (1898); Patton v. United States, 281 U.S. 276, 288 (1930)).

[FN60]. See supra notes 25-27 and accompanying text (explaining how the static interpretation has been discarded and why there is no principled way to return to it).

[FN61]. The Supreme Court fell into a similar error in Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (quoting Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935)), where the Court cited Wonson for the proposition that "since Justice Story's day, United States v. Wonson . . ., we have understood that '(t)he right of trial by jury thus preserved is the right which existed under the English common law when the Amendment was adopted.'" One reads Wonson in vain for confirmation that Justice Story believed the references to the common law in the Seventh Amendment mandated application of the English common law of 1791. See Wolfram, supra note 16, at 734 ("Justice Story did not purport to read the (Seventh) amendment statically.").

[FN62]. In Wonson, the U.S. Attorney for the District of Massachusetts sought a retrial after removing a suit from state court. Justice Story, sitting as a Circuit Justice in the Circuit Court for the District of Massachusetts, decided that the Reexamination Clause prohibited a retrial of a suit removed from state court. Because Massachusetts procedure permitted retrial, Justice Story's interpretation of the Reexamination Clause turned on whether it incorporated the law of the state in which the federal court sat or the common law of England. Justice Story concluded that the common law referred to in the Reexamination Clause was the common law of England. Wonson, 28 F. Cas. at 750 ("Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence.").

Justice Story's position was later endorsed by the Supreme Court in Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (holding that the Seventh Amendment incorporates English common law and prohibits the retrial of facts previously tried by a jury); see also The Justices v. Murray, 76 U.S. (9 Wall.) 274 (1869) (holding that the Seventh Amendment's prohibition on the retrial of facts applies to cases tried by jury in state court and transferred or reviewed in federal court). Some modern commentators have suggested that Justice Story was wrong. See, e.g., Wolfram, supra note 16, at 721 ("The historical materials furnish very little justification for . . . reference to the English common law."). Professor Wolfram, for example, has argued that as an historical matter the Seventh Amendment was intended to incorporate state law. Id. at 732 n.275 ("The reference to 'common law' in the text of the seventh amendment . . . would be read to refer in an undifferentiated and general way to the 'law' of the state in which the federal court sat."); id. at 732-34 (arguing that state law incorporation is "the theory best supported by the historical materials"); see also Akhil Amar, Forward: Lord Camden Meets Federalism-Using State Constitutions to Counter Federal Abuses, 27 Rutgers L.J. 845, 852 (1996) (arguing that "the Seventh Amendment might be a kind of Erie-rule for the procedural issue of jury trial, requiring federal courts, at a minimum, to follow state jury rules"). I assume in this Article that the courts will adhere to the settled understanding that "common law" as used in the Reexamination Clause does not refer to state common law.

[FN63]. Wonson, 28 F. Cas. at 750.

[FN64]. See infra nores 66-70 and accompanying text (arguing that the Founders understood that the applicability of common law principles varied with local conditions).

[FN65]. Morton J. Horwitz, The Transformation of American Law 1780-1860, at 4-5, 8 (1977) ("The equation of common law with a fixed, customary standard meant that judges conceived of their role as merely that of discovering and applying preexisting legal rules."); cf. William E. Nelson, The Americanization of the Common Law 19 (1975) ("Americans of the pre-Revolutionary period expected their judges to be automatons who mechanically applied immutable rules of law to the facts of each case.").

[FN66]. See Horwitz, supra note 65, at 5 ("Americans always insisted on the right to receive only those common law principles which accorded with colonial conditions . . . .").

[FN67]. See, e.g., Larry Kramer, The Lawmaking Powers of the Federal Courts, 12 Pace L. Rev. 263, 281 (1992) ("The common law was said to be based on principles derived from 'maxims and customs . . . of higher antiquity than memory or history can reach.' These principles were not made by judges, but were forged through practice and tradition and 'discovered' by the judges who formally articulated them.") (quoting 1 Sir William Blackstone, Commentaries on the Laws of England § 3, at 67 (Univ. of Chicago Press 1979) (1765)).

[FN68]. Manuscript Notes of Senator Pierce Butler (June 23, 1789) (unpublished manuscript contained in the Pierce Butler Papers, on file with the Pennsylvania Historical Society), quoted in William Casto, The Erie Doctrine and the Structure of Constitutional Revolutions, 62 Tul. L. Rev. 907, 937 (1988).

[FN69]. For a discussion of Blackstone's influence on the Revolutionary Generation, see Dennis R. Nolan, Sir William Blackstone and the New American Republic: A Study of Intellectual Impact, 51 N.Y.U. L. Rev. 731, 747 (1976). See also Casto, supra note 68, at 914 ("The English colonists brought the common law with them to America, and the sheer elegance, wonderful organization, and virtual monopoly of the Commentaries made Blackstone's work an unquestioned paradigm for early American attorneys."); Ritz, supra note 42, at 32 ("The single English work that was most familiar to Americans in 1787-89 must have been Blackstone's Commentaries.").

[FN70]. 1 Sir William Blackstone, Commentaries on the Laws of England 108 (Univ. of Chicago Press 1979). ("Such colonists carry with them only so much of the English law, as is applicable to their own situation and the condition of an infant colony . . . . (A) multitude of . . . provisions are neither necessary() nor convenient for them, and therefore are not in force."). James Wilson, a framer of the United States Constitution and later an Associate Justice of the United State Supreme Court, cited Blackstone with approval on this point in his lectures on law. James Wilson, The Works of James Wilson 529 (James DeWitt Andrews ed., Callaghan and Company 1896); see Shannon C. Stimson, The American Revolution in Law 129 (1990) (discussing Wilson's views on the differences between English and American law).

[FN71]. See Morton J. Horwitz, Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism, 107 Harv. L. Rev. 30, 48-49 (1993) (arguing that while the common law was viewed in England as capable of evolution by the time of the American Revolution, American lawyers of the Framers' day were "firmly wedded" to "Whig originalism"). Professor Horwitz further noted that

"Whig doctrine was . . . dependent primarily on static conceptions either of an ancient constitution derived from immemorial custom or of a long past Anglo-Saxon golden age that provided the standard by which the common law could return to its original purity." Id. at 45; see also Stimson, supra note 70, at 77 ("(C)olonial lawyers such as (John) Adams persisted in supporting their legal arguments by reference to the 'general principles' of Englishmen's common law rights, rather than resort to the technical 'niceties' of that law . . . .").

[FN72]. The Reexamination Clause as originally proposed provided: "(N)or shall any fact triable by jury, according to the course of common law, be otherwise re-examinable than may consist with the principles of common law." See Goebel, supra note 43, at 431 (quoting I Annals of Congress 452). The substitution of "rules" for "principles" in the Clause was not explained.

[FN73]. See Kramer, supra note 67, at 281-82 ("The task of a common law court was . . . to mold these principles to the exigencies of the day, to preserve their essence by fitting them to evolving social customs . . . ."). To the extent common law rules were viewed as fixed and determinate by the Revolutionary Generation, this characterization may have reflected the fact that the law had changed very slowly in mid-eighteenth century America. See Nelson, supra note 65, at 19. Professor Nelson has written:

Men who were practicing law in the 1760s, unlike lawyers of today, did not witness the courts handing down decisions that frequently modified-either explicitly or implicitly-existing law or otherwise made new law . . . . Nor could mid-eighteenth century lawyers remember a period when law had changed rapidly as a result of statute or judicial decision; the last such period in Massachusetts had been at the beginning of the eighteenth century.

Id.

[FN74]. See, e.g., Albert W. Alschuler, Rediscovering Blackstone, 145 U. Pa. L. Rev. 1, 37-43 (1996) (arguing that Blackstone understood that the common law had changed over time and would continue to do so); Wolfram, supra note 16, at 736 n.289 (noting Blackstone's image of the common law as an English castle made over into a more modern house).

[FN75]. For a general discussion of Lord Mansfield's time on the King's Bench, see C.H.S. Fifoot, Lord Mansfield 46, 118 (1936); Edmund Heward, Lord Mansfield 45-64, 99-110, 176 (1979).

[FN76]. Charge to the Grand Jury for the District of Massachusetts (June 7, 1793), reprinted in Federal Gazette (Philadelphia), June 25, 1793, quoted in Stewart Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1237 (1985).

[FN77]. Horwitz, supra note 65, at 18; see also Forrest McDonald, Novus Ordo Seclorum 85 (1985) ("Judges were what Americans distrusted, and Mansfield was one of the reasons for this distrust.").

[FN78]. See Horwitz, supra note 65, at 18 ("'No period of English law of what ever length it be taken, can be produced wherein so many of it's (sic) settled rules have been reversed as during the time of (Lord Mansfield).'") (quoting Jefferson).

[FN79]. See supra note 54 and accompanying text (noting the lack of legislative history concerning the Reexamination Clause).

[FN80]. See Horwitz, supra note 65, at 18 ("What underlay these demands for codification was a new conviction that much of the English common law itself was a product of the whim of judges.").

[FN81]. See supra note 56 (noting that the method for reviewing common-law judgments was the writ of error). The Judiciary Act of 1789 adopted the writ as the method of review for common-law judgments. Judiciary Act of 1789, ch. 20 § § 22, 25; 1 Stat. 73.

[FN82]. Cf. Horwitz, supra note 65, at 18 (noting that in his work on the codification of Virginia law, Jefferson was "prepared to limit common law reception to rules existing in the thirteenth century, if not before!").

[FN83]. Wolfram, supra note 16, at 725 n.248 (citing Robert Allen Rutland, Birth of Bill of Rights 1776-1791, at 191, 198 (1955)).

[FN84]. Indeed, the evidence indicates that the Federalist James Madison was the driving force behind the Bill of Rights. As Professor Rakove has explained:

By the time the First Congress mustered a quorum in April 1789, it was not evident that action on amendments was imperative. Most Federalists had grown indifferent to the question, nor were former Anti-Federalists now sitting in Congress any more insistent, largely because they knew that the substantive changes they desired in the Constitution lay beyond their reach. Nearly all Madison's colleagues in Congress thought the entire subject could be deferred.... But Madison insisted that Congress had to act sooner, not later, and the amendments it eventually submitted to the states in September 1789 followed closely the proposals he introduced in June. Madison was not merely one participant among many or even primus inter pares; he was the key actor.

Rakove, supra note 45, at 330-31; see also id. at 330 ("Contrary to the usual story, the concessions that Federalist leaders offered to secure ratification in such closely divided states as Massachusetts, Virginia, and New York did not establish a binding contract to provide a bill of rights.").

[FN85]. See Rakove, supra note 45, at 322-23. Professor Rakove has written:

The most important aspect of the criticism of Article III, however, was that it located the danger to rights not in the courts per se but in Congress....

....

A bill of rights was required less to guide judges in the administration of justice than to prevent Congress from voiding the common law procedures that Americans venerated.

Id.

[FN86]. The Reexamination Clause may be somewhat broader, however, because it was intended to forbid retrial de novo by jury on appeal. Such a procedure arguably is consistent with trial by jury.

[FN87]. See supra notes 25-27 and accompanying text (discussing cases interpreting the Trial-by-Jury Clause).

[FN88]. See Gasperini v. Center for Humanities, 518 U.S. 415, 432 (1996) ("The Seventh Amendment . . . controls the allocation of authority to review verdicts . . . ."); id. at 435 ("(A)ppellate review for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice . . . .").

[FN89]. See supra notes 45-56 and accompanying text (discussing the origins of the Reexamination Clause).

[FN90]. The Reexamination Clause cannot plausibly be read to give constitutional status to all current rules of reexamination applicable to facts tried by a jury. As I discuss below, relatively few rules of reexamination are needed to implement the fundamental purpose of the Reexamination Clause, that is, ensuring the proper balance of power between the federal judiciary and local juries. See infra notes 121-26 and accompanying text (discussing the role of the preclusion doctrine in Reexamination Clause Analysis). For that reason, the Court's long-standing refusal to incorporate matters of detail into the Seventh Amendment has been a wise interpretive strategy. See, e.g., Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897) (holding that the Seventh Amendment "aim is not to preserve mere matters of form and procedure but substance of right").

[FN91]. See supra notes 37-38 and accompanying text (noting Gasperini's emphasis on "the fair administration of justice").

[FN92]. See, e.g., In re Paoli, 113 F.3d 444, 452 (3d Cir. 1997) ("The Seventh Amendment requires that, when a court bifurcates a case, it must 'divide between separate trials in such a way that the same issue is not reexamined by different juries.'") (quoting In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995)); Arch v. American Tobacco Co., 175 F.R.D. 469, 486, 493-94 (E.D. Pa. 1997) (relying on Castano and Rhone-Poulenc to deny class certification based in part on the Reexamination Clause); Smith v. Brown & Williamson, 174 F.R.D. 90, 96 n.7 (W.D. Mo. 1997) ("Utilizing a separate jury may also violate the Seventh Amendment because the issues of the parties' relative fault are too intertwined to permit separation."); EEOC v. McDonnell Douglas Corp., 960 F. Supp. 203, 204-05 (E.D. Mo. 1996) (citing Rhone-Poulenc on reexamination).

[FN93]. Although my discussion focuses on Rhone-Poulenc and Castano, these mass tort cases were not the first to analyze bifurcation using concepts derived from the Reexamination Clause. The Fifth Circuit has been the most consistent in holding that separate trials of overlapping issues violates principles underlying the Reexamination Clause, beginning with its seminal decision in Alabama v. Blue Bird Body Co., 573 F.2d 309, 318-19 (5th Cir. 1978). There, the Fifth Circuit, purporting to rely on the Supreme Court's decision in Gasoline Products v. Champlin, 283 U.S. 494 (1931), held that the Seventh Amendment "limitation on the use of bifurcation is a recognition of the fact that inherent in the Seventh Amendment guarantee of a trial by jury is the general right of a litigant to have only one jury pass on a

common issue of fact.'" McDaniel v. Anheuser-Busch, Inc., 987 F.2d 298, 305 (5th Cir. 1993) (quoting Blue Bird, 573 F.2d at 318-19) (emphasis added); see also Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1025 (5th Cir. 1983) ("That right to jury trial includes the right to have a single issue decided one time by a single jury.").

The Fifth Circuit stated in McDaniel that "(t)his rule has an additional, pragmatic basis-if two juries were allowed to pass on an issue involving the same factual and legal elements, the verdicts rendered by those juries could be inconsistent, producing intolerably anomalous results." 987 F.2d at 305 (citing Blue Bird, 573 F.2d at 318); see also Blue Bird, 573 F.2d at 318 (opining that Gasoline Products's insistence that issues be "separable" was "dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions the verdicts rendered by each jury could be inconsistent"); In re Plywood Antitrust Litig., 655 F.2d 627, 636 (5th Cir. 1981) (quoting Blue Bird, 573 F.2d at 318).

The Fifth Circuit cases discussed in this footnote ambiguously refer to the "guarantee of a trial by jury," Blue Bird, 573 F.2d at 318, or the "right to a jury trial," Greenhaw, 721 F.2d at 1025, and do not specifically cite to the Reexamination Clause. The reason for this ambivalence may be that Gasoline Products never refers to reexamination. The supposed "right" to have only one jury pass on a common issue of fact, however, clearly implicates the scope of lawful reexamination of facts tried by a jury.

[FN94]. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294 (7th Cir. 1995)

[FN95]. Id.

[FN96]. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 424 (N.D. Ill. 1994).

[FN97]. Rhone-Poulenc, 51 F.3d at 1303. In support of its holding, the Seventh Circuit cited the Supreme Court's decision in Gasoline Products and the Fifth Circuit's decisions in McDaniel and Blue Bird. As I argue below, Gasoline Products provides no support for a reexamination analysis. See infra Part III.D (discussing Gasoline Products).

[FN98]. Rhone-Poulenc, 51 F.3d at 1303. The court also noted that the issues of negligence and proximate cause overlapped. Referring to the plaintiffs' theory that defendants were liable for failing to protect their products from contamination by Hepatitis B, an omission that also rendered the product susceptible to HIV, the court wrote: "A second or subsequent jury might find that the defendants' failure to take precautions against infection with Hepatitis could not be thought the proximate cause of plaintiffs' infection with HIV, a different and unknown bloodborne virus." Id. at 1303.

[FN99]. Id.

[FN100]. The court did not consider whether, as a practical matter, there was any real possibility that plaintiffs could be found comparatively negligent for using defendants' blood products.

[FN101]. See Victor E. Schwartz, Comparative Negligence § 17-1 (1994) (describing how juries in most comparative negligence systems must apportion fault between the two parties, raising issues as to defendant's fault).

[FN102]. See infra notes 191-94 and accompanying text (suggesting that a second jury could be limited to the comparative negligence question but be presented with the first jury's theory of negligence).

[FN103]. To simplify the analysis, I focus primarily on the negligence/comparative negligence paradigm. Negligence and proximate cause also overlap, as do other issues in the law. For an excellent discussion of this latter point grounded in products liability law, see generally James A. Henderson Jr. et al., Optimal Issue Separation in Modern Products Liability Litigation, 73 Tex. L. Rev. 1653 (1995).

[FN104]. See Albert P. Bedecarré, Rule 42(b) Bifurcation at an Extreme: Polyfurcation of Liability Issues in Environmental Tort Cases, 17 B.C. Envtl. Aff. L. Rev. 123, 163 (1989) (defining "crossover" issues).

[FN105]. Although elements of other claims were also subject to bifurcation in Castano, the Fifth Circuit's reexamination analysis focused on the negligence claim. Castano v. American Tobacco Co., 84 F3d 734, 750-51 (5th Cir. 1996).

[FN106]. Id. at 750.

[FN107]. Id. at 751.

[FN108]. See id. ("The risk of such reevaluation is so great that class treatment can hardly be said to be superior to individual adjudication."). In order to certify a class suit under Rule 23(b)(3), a court must find that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

[FN109]. Castano, 84 F3d at 750 ("Another factor weighing heavily in favor of individual trials is the risk that in order to make this class action manageable, the court will be forced to bifurcate issues in violation of the Seventh Amendment.").

[FN110]. In re Rhone-Poulenc Rorer, Inc., 51 F3d 1293, 1303 (7th Cir. 1995) (stating that judges "must not divide issues between separate trials in such a way that the same issue is reexamined by different juries").

[FN111]. Castano, 84 F3d at 750. Blue Bird, the seminal Fifth Circuit case uses yet another formulation: "only one jury may 'pass' on a common issue of fact." Alabama v. Blue Bird Body Co., 573 F2d 309, 318 (5th Cir. 1978).

[FN112]. See infra note 116 and accompanying text (defining the terms "examine" and "consider").

[FN113]. See Greenhaw v. Lubbock County Beverage Ass'n, 721 F.2d 1019, 1025 (5th Cir. 1983) ("That right to jury trial includes the right to have a single issue decided one time by a single jury.").

[FN114]. See infra notes 120-26 and accompanying text (discussing the proper role of preclusion doctrine). In appropriate circumstances, a determination may be given preclusive effect even if it has not been incorporated in a final judgment. 18 Wright & Miller, supra note 36, § 4434; cf. Rhone-Poulenc, 51 F.3d at 1303 (noting that a jury verdict may be given preclusive effect to avoid reexamination by another jury).

[FN115]. Because there is always a "risk" that a jury will ignore its instructions, including an instruction to give a previous finding preclusive effect, Rhone-Poulenc and Castano presumably should not be read to mean that any risk of reexamination gives rise to a constitutional violation. I assume the decisions focus on the heightened risk of inconsistency inherent in a trial structure that gives a second jury information needed to reach an independent conclusion about an issue decided authoritatively by an earlier jury.

[FN116]. See Merriam-Webster's Collegiate Dictionary 403 (10th ed. 1993) (defining "examine" as meaning "to inquire into carefully: investigate"); id. at 246 (defining "consider" as meaning "to think of es(pecially) with regard to taking some action").

[FN117]. See infra notes 191-94 and accompanying text (explaining why a subsequent case concerning only comparative negligence must include presentation of the evidence and theories of negligence adopted by the previous jury).

[FN118]. See Note, Original Separate Trials on Issues of Damages and Liability, 48 Va. L. Rev. 99, 101-02 (1962) ("Seldom were the issues concerning the basic elements of plaintiff's case such as defendant's liability and consequent damages split into two separate suits at common law.").

[FN119]. 283 U.S. 494 (1931).

[FN120]. U.S. Const. amend. VII, cl. 2.

[FN121]. See, e.g., Allan D. Vestal, Res Judicata/Preclusion 429-60 (1969) (noting that constitutional doctrines of full faith and credit, due process, right to jury trial, and equal protection affect preclusion doctrine); 18 Wright & Miller, supra note 36, § 4403 (discussing the policies and sources of res judicata).

[FN122]. Because the Supreme Court's original jurisdiction is limited, see U.S. Const. art. III, § 2, cl. 2 (giving the Supreme Court original jurisdiction only in "all cases affecting Ambassadors, other

Public Ministers and Consults, and those in which a State shall be a Party. . . "), rules of preclusion are not needed to prevent the Supreme Court from circumventing limitations on the scope of appellate review. The Reexamination Clause, however, is not directed solely at the Supreme Court. Concern about reexamination during the ratification debates focused on the Supreme Court rather than inferior federal courts. See supra notes 49-53 and accompanying text (discussing the Anti-Federalists' concern about retrials in the Supreme Court). But the Reexamination Clause applies to "any court of the United States." U.S. Const. amend. VII, cl. 2. Because Congress may grant inferior federal courts concurrent jurisdiction with state courts, U.S. Const. art. III, § 2, cl. 1, the Reexamination Clause must require that some rules of preclusion be respected if the Clause is to achieve its purposes. The Full Faith and Credit Clause provides no assistance because that Clause does not bind the federal courts. See U.S. Const. art. IV, § 1 ("Full faith and credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.").

[FN123]. See Restatement (Second) of Judgments § 27 (1980) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."); Friedenthal et al., supra note 16, at 610 ("An issue is precluded by direct estoppel when the prior judgment invoked as an estoppel and the present suit are both on the same cause of action."). I recognize that the constitutional boundaries of direct estoppel depend in large part on how broadly the concept of "same cause of action" is understood. This potentially nettlesome issue need not be addressed here because no matter how narrowly the terms are defined, the same cause of action will always be implicated in both phases of a bifurcated proceeding.

[FN124]. See Friedenthal et al., supra note 16, at 611 ("Since subsequent suits on claims that already have been decided usually are extinguished entirely by res judicata, examples of direct estoppel are very few.").

[FN125]. Judge Posner in Rhone-Poulenc appears to assume that the results of an issue class would have collateral rather than direct estoppel effect. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297 (7th Cir. 1995) ("If the special verdict found negligence, individual members of the class would then file individual tort suits in state and federal district courts around the nation and would use the special verdict, in conjunction with the doctrine of collateral estoppel, to block relitigation of the issue of negligence."). It may be more precise to refer to the estoppel as "direct" because a class trial would adjudicate a part of each individual claim. Later follow-on trials would adjudicate the same claims. Nothing, however, turns on this difference in terminology.

[FN126]. See, e.g., In re Lower Lake Erie Iron Ore Antitrust Litig., 998 F.2d 1144, 1183 (3d Cir. 1993) ("Since the jury found that Wills had suffered damage to its property by the conspiracy, in order not to violate the Seventh Amendment, the role of the second jury should have been limited to determining the amount of damages Wills incurred from acts taken in furtherance of the conspiracy."); O'Hagan v. Soto, 565 F. Supp. 422, 428 (S.D.N.Y. 1983) (ordering a second partial retrial on Seventh Amendment grounds because jury in first retrial ignored instruction that it was required, at a minimum, to return an

award of nominal damages); id. at 429 ("For seventh amendment purposes, this court sees no viable distinction between the case where a court disturbs a jury's findings and where another jury, acting beyond the limited purpose for which it was convened, invades the findings of a first jury.").

[FN127]. For some purposes, negligence and comparative negligence arguably are part of the same issue because

(t)he questions regarding the causal negligence of the parties and the apportionment of that causal negligence are not independent of one another, but are integrally related in determining ultimate liability.... And when reached, (the) function (of apportionment) is to give further definition to causal negligence for purposes of imposing liability.

Ferguson v. Northern States Power Co., 239 N.W.2d 190, 196 (Minn. 1976); cf. Williams v. James, 552 A.2d 153, 159 (N.J. 1989) (noting that plaintiff's analysis of negligence and comparative negligence "treats two questions as 'one issue,' obscur(ing) the fact that each question involves some factual elements that are different and can be determined separately").

Treating negligence and comparative negligence as the "same issue" would be inconsistent with the text and purposes of the Reexamination Clause, however. The Clause applies to "facts," not "issues" tried by a jury. To be sure, when a jury renders a verdict at a high level of generality, there may be no practical distinction between the two. When, for example, a jury finds a defendant not negligent, that finding of fact may fairly preclude assertions of negligence based on theories not presented to the jury. Cf. Restatement (Second) of Judgments § 27 cmt. c (1980) (defining the term "issue" for purposes of issue preclusion). It makes no difference that the plaintiff in the first suit argued that the defendant was going too fast and in the second suit argued that the defendant did not have his eyes on the road. But a finding of fact should not be defined to include matters that are not fairly within its meaning. A factual finding that a defendant is negligent, for example, simply cannot be read fairly to encompass the issue of comparative negligence. Put another way, that a defendant is negligent implies nothing about whether a plaintiff is comparatively negligent. Moreover, viewing logically related issues like negligence and comparative negligence as part of the "same issue" would not implement the purposes of the Reexamination Clause. The Reexamination Clause incorporates only those preclusion rules needed to avoid evasion of limitations on verdict review. See supra notes 121-126 and accompanying text (noting the limited role of the Reexamination Clause in preclusion doctrine).

[FN128]. Cf. Benson v. Superior Court Dep't of the Trial Court of Mass., 663 F.2d 355, 360 (1st Cir. 1981) ("Until it becomes evident that the government is attempting to encroach on appellants' right to be free from double jeopardy, there is no case or controversy that can be brought before this court.").

[FN129]. See, e.g., supra note 126 (citing examples of cases that provide relief when a jury ignores its instruction to give the finding of an ealier jury preclusive effect). Nor was the rule at common law different. For an historical discussion of the English rules of preclusion at common law, see Vestal, supra note 121, at 28-42; Robert Wyness Millar, The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law, 39 Mich. L. Rev. 238 (1940).

[FN130]. See supra Part III.B.1 (discussing the extent to which preclusion rules are incorporated in the Reexamination Clause).

[FN131]. In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1301 (7th Cir. 1995).

[FN132]. A number of federal and state courts have followed this kind of procedure in comparative negligence cases. See infra notes 191-94 and accompanying text (discussing cases where a retrial was limited to the comparative negligence issue and the jury was allowed to hear evidence on the negligence issue).

[FN133]. For discussion of this issue, see infra notes 191-94 and accompanying text.

[FN134]. See J. Alexander Tanford, The Law and Psychology of Jury Instructions, 69 Neb. L. Rev. 71 (1990) (examining jury responses to instructions given by judges).

[FN135]. Id. at 79-80.

[FN136]. See, e.g., Richardson v. Marsh, 481 U.S. 200, 206 (1987) (noting "the almost invariable assumption of the law that jurors follow their instructions"); Tennessee v. Street, 471 U.S. 409, 415 (1985) (endorsing the "'crucial assumption'... that the jurors followed 'the instructions given them by the trial judge'") (quoting Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983) (citations omitted)).

[FN137]. 481 U.S. 200 (1987).

[FN138]. Id. at 207 (quoting Bruton v. United States, 391 U.S. 123, 135-36 (1968)).

[FN139]. See Bruton, 391 U.S. at 137 ("Despite the concededly clear instructions to the jury to disregard (codefendant's) inadmissible hearsay evidence inculpating petitioner, ... we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination."); Jackson v. Denno, 378 U.S. 368 (1964) (holding that voluntariness of a confession by a criminal defendant cannot be left to the jury to determine in the first instance); cf. Gacy v. Welborn, 994 F.2d 305 (7th Cir. 1993) (refusing in a death penalty case to permit empirical challenge to comprehensibility of jury instructions on the ground that a jury is presumed to understand and follow its instructions).

[FN140]. Tanford, supra note 134, at 76-77.

[FN141]. See supra notes 133-35 and accompanying text (arguing that there is no reason to believe a jury would disregard a court instruction about a prior jury's findings than other instructions given by the same court).

[FN142]. The California Supreme Court has commented in this vein: "(W)e cannot assume that a juror will ignore his sworn duties. 'It is more proper to assume that when a juror is outvoted on an issue

... he will accept the outcome and continue to deliberate with other jurors honestly and conscientiously to decide the remaining issues.'" Juarez v. Superior Court of Los Angeles County, 647 P.2d 128, 133 (Cal. 1982) (quoting Ward v. Weekes, 258 A.2d 379, 381 (N.J. Super. Ct. App. Div. 1969)); see also Williams v. James, 552 A.2d 153, 159 (N.J. 1989) (noting, in circumstances similar to those in Juarez, "the capacity of jurors to engage in fair and honest deliberations notwithstanding inconsistent positions even as to facts that are identical"). The task faced by such jurors is far more difficult than that faced by later juries in bifurcated proceedings. Jurors in those proceedings can be instructed that defendant was negligent before they have had an opportunity to form an opinion on the matter. Cf. Juarez, 647 P.2d at 136 (Richardson, J., dissenting) ("(I)t does not seem to me realistic to assume that a juror who concludes that a party is not culpable would be able conscientiously to apportion financial responsibility to that party."); Williams, 552 A.2d at 161 (Clifford J., dissenting) (criticizing the court's rule as requiring "mental gyrations").

[FN143]. To the extent the Fifth and Seventh Circuits rely on the preclusion rationale, it is unclear why defendants should have standing to challenge certification of an issue class based on the Reexamination Clause. Because there is no second phase to the litigation when the defendant wins the class trial, it is plaintiffs-not defendants-who typically should have reason to be concerned that a later jury may ignore its instructions. A plaintiff might conceivably win the class trial only to have a later jury improperly nullify the first jury's verdict. By contrast, if the defendant wins the class trial, a later jury will never have the opportunity to nullify the defendant's victory. A more complete analysis of the standing issue is beyond the scope of this paper.

[FN144]. See James et al., supra note 22, at 388 ("There is general agreement that the mental processes of jurors will not be investigated, nor the effect of those processes on the decision."); see also Fed. R. Evid. 606(b) ("Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the jury to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith....").

[FN145]. See Baltimore & Caroline Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) ("The (Seventh) Amendment not only preserves (the) right (to jury trial,) but discloses a studied purpose to protect it from indirect impairment through possible enlargements of the power of reëxamination existing under the common law.").

[FN146]. To simplify the discussion, I assume that the Seventh Amendment requires a unanimous verdict. See Friedenthal et al., supra note 16, at 528-30 (noting that whether the Seventh Amendment still requires a unanimous verdict has not been decided). A unanimity requirement, however, is not essential to my argument. The argument easily can be reformulated to grant litigants the right to a verdict based on the reasoning of the requisite number of jurors needed to reach a verdict.

[FN147]. But see infra note 155 (describing an instance in which differences in reasoning among jurors may matter).

[FN148]. Cf. Chicago & N.W. Ry. v. Dunleavy, 22 N.E. 15, 18 (Ill. 1889) ("However natural the curiosity parties may have to know the precise course of reasoning by which jurors may arrive at verdicts either for or against them, they have no right . . . to require them to give their views upon each item of evidence, and thus practically subject them to a cross-examination as to the entire case."); Holden v. Missouri Pac. R.R., 84 S.W. 133, 138 (Mo. App. 1904) ("The action was based on negligence, not on the way in which it was committed.").

[FN149]. The Illinois Supreme Court explained the reasons for not requiring unanimity of reasoning as follows:

The common law requires that verdicts shall be the declaration of the unanimous judgment of the 12 jurors. Upon all matters which they are required to find, they must be agreed. But it has never been held that they must all reach their conclusions in the same way and by the same method of reasoning.

Dunleavy, 22 N.E. at 17; see also Arkansas M.R. Co. v. Canman, 13 S.W. 280, 282 (Ark. 1890) ("It is not necessary that a jury . . . concur in a single view of a transaction or occurrence disclosed by the evidence."); Stoner v. Williams, 54 Cal. Rptr. 2d 243, 252 (Ct. App. 1996) ("(W)e conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved."); Ipsen v. Ruess, 41 N.W.2d 658, 664 (Iowa 1950) ("Unanimity of the conclusion . . . is all that is required."); Cleveland v. Wong, 701 P.2d 1301, 1309 (Kan. 1985) ("Unanimity upon the specific negligent act or omission is not required.") (overruling Barker v. Railway, 132 P. 156 (Kan. 1913)); Brogan v. Union Traction Co., 86 S.E. 753, 756 (W. Va. 1915) ("While jurors must all agree upon all matters which they are required to find, they are not required to reach their conclusions by the same method of reasoning."). But see Parrott v. Thacher, 26 Mass. (1 Pick.) 426, 431-32 (Mass. 1830) ("(I)f it appears that (the jurors) did not agree upon either of the grounds, I do not see how their verdict can stand, unanimity being required."); Russell v. Oregon R. & Navigation Co., 102 P. 619, 624 (Or. 1909) (citing Parrott for the proposition that "a good verdict should be based upon some ground upon which all the jurors agree"). See generally, Hayden J. Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues, 36 Okla. L. Rev. 473, 516-23 (1983) (discussing case law addressing patchwork verdicts).

[FN150]. 501 U.S. 624 (1991).

[FN151]. Id. at 631-32 (plurality opinion) (quoting McKoy v. North Carolina, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring)); cf. id. at 649 (Scalia, J., concurring) ("As the plurality observes, it has long been the general rule that when a single crime can be committed in various ways, jurors need not agree upon the mode of commission.").

[FN152]. See Condliff v. Zucker, 336 F. Supp. 921, 922 (W.D. Pa. 1972) (holding that general verdict was valid even though some jurors found for defendant on ground that defendant was not negligent and others had done so on the ground that plaintiff was contributorily negligent).

[FN153]. See Edward J. Devitt et al., Federal Jury Practice and Instructions (4th ed. 1992).

[FN154]. See Ruth B. Ginsburg, Special Findings and Jury Unanimity in the Federal Courts, 65 Colum. L. Rev. 256, 268 (1965) ("If each juror subscribes to at least one of the independent particulars, but no particular is subscribed to by all, it seems improbable that the jury would-and out of tune with common-sense notions of justice that the jury should-report itself 'hung' rather than proceed to decision.").

[FN155]. It seems clear that some differences in reasoning may be unacceptable. See, e.g., Trubitt, supra note 149, at 514 ("If plaintiff brings actions in libel and false imprisonment, and six jurors think he should recover for libel and the other six for false imprisonment, surely plaintiff should recover nothing."). As a practical matter, this sort of problem does not arise in the context of an issue class because juries return special verdicts. For that reason, I have focused on the sort of case likely to arise in an issue class: whether, for example, jurors may rely on different understandings of defendant's negligence to find for the plaintiff.

[FN156]. It could be argued that Gasoline Products held otherwise. I discuss and reject as unpersuasive this reading of Gasoline Products in my discussion of the case. See infra notes 195-202 and accompanying text.

[FN157]. See infra Part III.D.2 (discussing what Gasoline Products requires).

[FN158]. See Chicago & N.W. Ry. v. Dunleavy, 22 N.E. 15, 18 (Ill. 1889) (noting that the use of very detailed special verdicts would "tend to embarrass and obstruct the administration of justice").

[FN159]. See supra notes 120-26 and accompanying text (discussing the extent to which the Reexamination Clause incorporates rules of preclusion).

[FN160]. See discussion infra Part III.D.2 (advocating, in light of Gasoline Products, a structure under which the separate trials of overlapping issues may properly occur).

[FN161]. See infra notes 191-94 and accompanying text (noting the necessity that a second jury hear evidence about the negligence issue in the previous proceeding).

[FN162]. As a practical matter, acceptance of this view most likely would require a unitary trial. See supra notes 157-58 and accompanying text (arguing that requiring a special verdict disclosing first jury's reasoning in full would be impractical).

[FN163]. See supra Part III.B.1 (discussing the extent to which the Reexamination Clause incorporates the rules of preclusion).

[FN164]. Cf. Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1247-48 (1995) ("Thus one might . . . read requirements like that of 'equal protection of the laws' as referring to general principles that call for elaboration over time in a way that . . . perhaps even . . . some highly specific rights-protecting provisions such as, for example, the Seventh Amendment cannot be read . . . .").

[FN165]. As I discuss above, separate trials of overlapping issues do not implicate finality concerns in a constitutionally meaningful way. See supra notes 128-56 and accompanying text.

[FN166]. 603 F.2d 590 (7th Cir. 1979).

[FN167]. Id. at 597 (quoting United States v. American Honda Motor Co., 273 F. Supp. 810, 820 (N.D. Ill. 1967)). In Continental Can, the Seventh Circuit upheld an injunction barring the Secretary of Labor from prosecuting certain OSHA violations against the company. The appeals court concluded that the refusal of the Occupational Safety and Health Review Commission to apply collateral estoppel constituted harassment in violation of the Due Process Clause. While the characterization of the conduct at issue as harassment provides a firm basis for limiting the case to instances where an improper governmental motive can be shown, the language quoted in the text can be read more broadly to forbid imposition of constitutionally unreasonable litigation burdens by any state actor.

[FN168]. Such a standard would not necessarily be enforceable only under the Due Process Clause. The Court has treated other Clauses in the Constitution as addressing concerns parallel to those addressed by the Due Process Clause. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818-19 (1985) (stating that the Full Faith and Credit and Due Process Clauses impose the same constitutional requirements on choice of law).

[FN169]. See, e.g., Castano v. American Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996) ("It may be that comparative negligence will be raised in the individual trials, and the evidence presented at the class trial will have to be repeated.... The net result may be a waste, not a savings, of judicial resources."); see also Bedecarré, supra note 104, at 163-64 (arguing that bifurcation "should not be ordered when there are significant cross-over issues that must be retried in later phases."). But see infra note 172 and accompanying text (noting that bifurcation may serve judicial economy even when crossover issues must be reheard).

[FN170]. When a general verdict is rendered for a defendant, it may be impossible to determine the basis of the verdict. In an action for trespass, for example, a general verdict would not reveal that the jury found for the defendant because the plaintiff did not have lawful possession of the property. For that reason, if the plaintiff were to bring suit against a defendant based on another alleged act of trespass, ownership would have to be relitigated all over again.

[FN171]. See, e.g., Peabody Coal Co. v. Spese, 117 F.3d 1001, 1007 (7th Cir. 1997) ("(H)oldings in the alternative, either of which would independently be sufficient to support a result, are not conclusive in subsequent litigation with respect to either issue standing alone."); Borst v. Chevron Corp., 36 F.3d 1308, 1314 n.11 (5th Cir. 1994) ("The federal decisions agree that once an appellate court has affirmed on one ground and passed over another, preclusion does not attach to the ground omitted from its decision.") (quoting 18 Wright & Miller, supra note 36, § 4421). See generally Restatement (Second) of Judgments § 27 cmts. i, o (1982) (illustrating alternative determinations by a court of first instance and the effect of affirmance or reversal of alternative determinations in an appellate court, respectively).

[FN172]. Similarly, bifurcation may prove economical if the defendant is able to narrow the issues by partially prevailing in the class trial.

[FN173]. Cf. In re Dow Corning, 211 B.R. 545, 584 (Bankr. E.D. Mich. 1997) (noting that a victory for plaintiff on the general causation issue "while not dispositive would likely have a favorable impact on settlement prospects").

[FN174]. See In re Copley Pharm., Inc., 161 F.R.D. 456, 466 (D. Wyo. 1995) ("(T)o permit the defendant to contest liability with each claimant in a single separate suit would, in many cases, give defendants an advantage which would almost be equivalent to closing the door of justice to small claimants.") (quoting Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941)); David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 Ind. L.J. 561, 570 (1987) ("(T)he case-by-case, individualized processing of the mass tort claims that are filed confers a strategic edge upon defendant firms."); id. at 571 (describing the strategic advantages enjoyed by defendants); Johnson, supra note 7, at 2368 ("Defendants . . . may spread their litigation costs over the entire class of mass product liability claims.").

[FN175]. The Castano court noted that other means may be used to achieve collective action. The court suggested, for example, that "(t)he class is represented by a consortium of well-financed plaintiffs' lawyers who, over time, can develop the expertise and specialized knowledge to beat the tobacco companies at their own game." Castano v. American Tobacco Co., 84 F.3d 734, 747 n.25 (5th Cir. 1995) (emphasis added). This approach unjustifiably sacrifices the interests of early plaintiffs. The court more persuasively suggested that "(c)ourts can also overcome the defendant's alleged advantages through coordination or consolidation of cases for discovery and other pretrial matters." Id. It seems clear, however, that the class suit provides the more effective means for overcoming a defendant's strategic advantage. Consolidation and coordination can be used only with respect to cases already in federal court. The class device sweeps more broadly, simultaneously providing the benefits of aggregation to those who have not yet filed suit and creating a larger financial base for the plaintiffs' side.

[FN176]. But cf. In re American Med. Sys., Inc., 75 F.3d 1069, 1087 (6th Cir. 1996) (finding that trial court's recognition of defendants' strategic edge as a basis for certification constituted an impermissibly "strong bias in favor of class certification").

[FN177]. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-31 (1979) (discussing requirements for use of offensive collateral estoppel).

[FN178]. See Jack Ratliff, Offensive Collateral Estoppel and the Option Effect, 67 Tex. L. Rev. 63, 89 (1988) ("Although most practitioners understand that some feature of the case that is supposedly 'irrelevant' to liability-the severity of plaintiff's injuries, for example-may well determine liability in a close case, the rules governing collateral estoppel take no account of the phenomenon."); id. at 91 (noting that a nun likely will receive a more sympathetic hearing from a jury in a negligence case than a convict).

[FN179]. Id. at 89-90 (noting that class actions "generally avoid the spillover effect by requiring that the claim be 'typical' and the plaintiff fairly representative of the class"). Use of the class device or some other means of aggregation may also focus the jury's attention on the broad impact that its verdict will have.

[FN180]. The risk of nonmutual offensive collateral estoppel is rather low for most mass tort defendants in part because issue preclusion is available to a plaintiff only if there are no judgments on the identical issue in favor of the defendant. See Parklane, 439 U.S. at 330 ("Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant."); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 345-46 (5th Cir. 1982) (concluding that inconsistent verdicts make offensive collateral estoppel inappropriate). The odds are strongly in favor of mass tort defendants in early cases. As Professor McGovern has noted:

> The cyclical theory of mass tort litigation contemplates an initial stage in the litigation during which there are inherent advantages for the defendant. . . . During this initial stage of the cycle, the defendant tends to win the cases it chooses to try and is often able to settle lawsuits quietly with little impact on other cases.

Francis E. McGovern, An Analysis of Mass Torts for Judges, 73 Tex. L. Rev. 1821, 1842 (1995). For an overview of the difficulties of applying issue preclusion in mass tort cases, see Linda S. Mullenix, Mass Tort Litigation: Cases and Materials 415-38 (1996).

[FN181]. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (citing Gasoline Products in support of the proposition that separate trials of overlapping issues would violate the Seventh Amendment); Castano v. American Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996) (citing Gasoline Products for the proposition that the issues must be distinct and separable to allow bifurcation). Although Gasoline Products considered the scope of a new trial on remand, see infra notes 183-85 and accompanying text, it is commonly understood that the reasoning of the case applies to bifurcation as well. 9 Wright & Miller, supra note 36, § 2391, at 514.

[FN182]. If Gasoline Products held that overlapping issues could not be tried separately, the Reexamination Clause would seem to be the only available rationale for such a holding in light of the fact that the Gasoline Products Court specifically rejected the view that the Seventh Amendment always requires the unitary trial of a cause of action. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498-99 (1931).

[FN183]. Id. at 498. By rejecting the traditional rule that erroneous verdicts must be set aside in their entirety, the Court eliminated reexamination of issues that had been correctly decided. The Court, however, did not opine that this result was compelled by the Reexamination Clause, but simply concluded that the Seventh Amendment does not "require that an issue once correctly determined . . . be tried a second time." Id.

[FN184]. Id. at 500.

[FN185]. Id.; see also Gasoline Prods., 283 U.S. at 500 ("Where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.").

[FN186]. See, e.g., Castano, 84 F.3d at 750 (arguing that the "Constitution allows bifurcation of issues that are so separable that a second jury will not be called upon to reconsider findings of fact by the first").

[FN187]. See Brooks v. Great Lakes Dredge-Dock Co., 754 F.2d 539, 541 (5th Cir. 1985) (finding, in Jones Act case, that "the issue of contributory negligence is distinct and separable from the issue() of (defendant's) negligence..."). Although cases decided under the Jones Act, 46 U.S.C. app. § 688 (1994), confusingly refer to "contributory negligence," courts in such cases apply a comparative negligence analysis. See Schwartz, supra note 101, § 1-4(a) (noting that "Congress incorporated the principle of pure comparative negligence in the Jones Act in 1920"). For other federal cases outside the Fifth Circuit that find negligence and comparative negligence issues distinct and separable, see Akermanis v. Sea-Land Service, Inc., 688 F.2d 898 (2d Cir. 1982) (permitting retrial limited to comparative negligence); In re New York Asbestos Litigation, 155 F.R.D. 61 (S.D.N.Y. 1994) (limiting retrial to proximate cause and comparative negligence); and compare Warshany v. Supermarkets General Corp., 391 A.2d 1271, 1274 (N.J. Super. Ct. Law Div. 1978) (concluding that "causal negligence and apportionment are 'fairly separable' in the concept of comparative negligence law").

[FN188]. Gasoline Prods., 283 U.S. at 500. That "interwoven" issues are not necessarily overlapping issues is evident from a close reading of Gasoline Products. Gasoline Products, for example, cites Simmons v. Fish for the proposition that an issue must be separable if it is to be tried separately. Id. (citing Simmons v. Fish, 210 Mass. 563 (Mass. 1912)). In Simmons, the Massachusetts Supreme Court had held that a retrial limited to damages could not be ordered when it appeared that the first jury had improperly entered a compromise verdict. Id. at 572-73. Thus, the lack of separability in Simmons resulted from the possible misconduct of the jury rather than the inherent nature of the issues.

[FN189]. Crane v. Consolidated Rail Corp., 731 F.2d 1042, 1049 (2d Cir. 1984) (discussing Gasoline Products); see also id. at 1050 ("Clearly a jury retrying only the issue of comparative fault would not have faced the insuperable difficulties that would have confronted a jury attempting to try only the issue of damages in the Gasoline Products case-the point to which the cautionary language of that opinion was addressed."); Bedecarré, supra note 104, at 129 ("The (Gasoline Products) Court focused... on avoiding confusion of the trier of fact due to incomplete information.").

[FN190]. See supra note 168 (discussing the Court's treatment of various Clauses in the Constitution as encompassing concerns similar to those of the Due Process Clause).

[FN191]. See infra Part III.D.2 (advocating special verdict forms toward this end).

[FN192]. See, e.g., Akermanis, 688 F.2d at 907 (holding that the trial judge has discretion to narrow retrial to the question of contributory negligence); Trejo v. Denver & Rio Grande W. R.R., 568 F.2d 181 (10th Cir. 1977) (ordering a retrial of the damage issue due to trial court's erroneous jury instruction); Cromling v. Pittsburgh & Lake Erie R.R. Co., 327 F.2d 142 (3d Cir. 1963) (limiting retrial to the damages issue in the interest of justice).

[FN193]. 688 F.2d 898 (2d Cir. 1982).

[FN194]. The Second Circuit stated:

(T)he jury would be told that defendant's negligence has already been determined and that their task is only to determine whether the plaintiff was (comparatively) negligent and, if so, to determine what percentage of responsibility for the accident is attributable to the plaintiff's (comparative) negligence. The parties would, of course, be entitled to present all evidence relevant to the fault of both parties in order for the jury to make an apportionment of fault.

Id. at 907 n.6; see also Trejo, 568 F.2d at 185 (authorizing a similar procedure); Cromling, 327 F.2d at 152-53 (same); In re New York Asbestos Litig., 155 F.R.D. 61, 66 (S.D.N.Y. 1994) (limiting new trial to proximate cause and comparative negligence, but noting that "(b)oth parties will be entitled to present all evidence relevant to the fault of all adjudged tort-feasors in order for the jury to make an apportionment of (defendant's) fault"); cf. O'Kelly v. Willig Freight Lines, 136 Cal. Rptr. 171, 173 (Cal. Ct. App. 1977) (granting partial retrial limited to the issue of apportionment although "(i)t is true that, in order to make a proper allocation of damage, the jury on the new trial will have to hear, and weigh, anew, all of the evidence dealing with the conduct of the parties. . ."); Warshany v. Supermarkets Gen. Corp., 391 A.2d 1271, 1274 (N.J. Super. Ct. Law Div. 1978) ("On retrial, the jury's finding of causal negligence stands, but the parties are permitted to introduce any evidence relevant to a determination of apportionment.") (citing Firkus v. Rombalski, 130 N.W.2d 835 (Wis. 1964)); Caldwell v. Piggly-Wiggly Madison Co., 145 N.W.2d 745, 752 (Wis. 1966) ("In the retrial of the case. . . . (t)he finding of causal negligence will stand, but evidence may be introduced for the purpose of determining the apportionment."). Cf. generally Schwartz, supra note 101, § 17-1(d) (discussing various guidelines for comparison of fault by juries).

[FN195]. See supra notes 146 and accompanying text (explaining the argument that a later jury must follow the reasoning of an earlier jury).

[FN196]. See supra note 158 and accompanying text (discussing practical difficulties resulting from exhaustively detailed special verdicts).

[FN197]. Cf. supra text accompanying note 157 (arguing that first jury in bifurcated proceeding need only provide sufficient guidance to second jury to avoid confusion and uncertainty).

[FN198]. Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 499-500 (1931).

[FN199]. See supra notes 149-55 and accompanying text (discussing relevant authority).

[FN200]. I do not mean to suggest that the First Circuit purposefully entered a retrial order that made it impossible to try the case fairly. The First Circuit previously had shown an acute awareness that a partial retrial limited to damages could be unfair. See American Locomotive Co. v. Harris, 239 F.234, 240 (1st Cir. 1917) ("To justify an appellate court in limiting the issues on a new trial to the question of damages, it should clearly appear that all questions in respect to liability have been considered and passed upon by the jury."). A close reading of the First Circuit's decision in Gasoline Products suggests that the First Circuit believed the jury verdict resolved far more than the Supreme Court perceived it resolved. 39 F.2d 521 (1930).

[FN201]. 238 U.S. 269 (1915).

[FN202]. Gasoline Prods., 283 U.S. at 500 (citing Ferebee for the proposition that "(w)here the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice").

In Ferebee, the North Carolina Supreme Court had remanded a case under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 (1994) (amended version of Act of Apr. 22, 1908, ch. 149, § 1, 35 Stat. 65), for a new trial on damages only. On retrial, the defendant sought to present evidence that plaintiff had been negligent in order to reduce the damages award. Ferebee, 238 U.S. at 272. The trial court

refused to submit to the jury the question as to how much should be deducted from the damages sustained because of the plaintiff's contributory negligence, for the reason that the Supreme Court of North Carolina had granted a new trial to assess damages and had thereby excluded the issue of contributory negligence from the case.

Id. at 272. Although the Court confusingly referred to "contributory negligence," comparative negligence principles apply in FELA cases. See Schwarz, supra note 101, § 1-4(a) (noting that the Federal Employers' Liability Act adopted the principles of comparative negligence).

On appeal, the United States Supreme Court concluded:

(D)amages and contributory negligence are so blended and interwoven, and the conduct of the plaintiff at the time of the accident is so important a matter in the assessment of damages, that the instances would be rare in which it would be proper to submit to a jury the question of damages without also permitting them to consider the conduct of the plaintiff at the time of the inquiry.

Ferebee, 238 U.S. at 273. The Supreme Court nonetheless affirmed because the special verdict returned in the first trial had established that Ferebee was not negligent, "so that it was possible, on the second trial, to award damages without considering the conduct of the plaintiff or retrying the question of contributory negligence." Id. at 273.

[FN203]. The counterclaim defendant could not be required to provide a jury with much guidance in this regard. It is one thing to force a party to accept the formal findings of a previous jury when making arguments to a later jury. It is yet another to expect that party to specify how it might be liable. While tactical considerations in a given case may usually persuade a party to provide that sort of assistance

to the jury, I see no basis for requiring a party to forego a defense on any matter that has not been determined by the earlier verdict. Put another way, while a party may be unable to argue that it did not breach the contract in the face of a contrary jury verdict, it is under no obligation to concede any of the specific acts allegedly constituting the breach, unless the verdict identifies the specific breaches.

[FN204]. Cf. Juarez v. Superior Court of Los Angeles County, 647 P.2d 128, 136 (Cal. 1982) (Richardson, J., dissenting) ("His perception of a legal compulsion upon him to affix some responsibility upon a party whom he concludes is not responsible at all is more likely to cause that juror to assign to such a party an arbitrary proportion of the total liability.").

[FN205]. See supra notes 192-94 and accompanying text (illustrating this point in the context of separate trials of negligence and comparative negligence issues).

[FN206]. My discussion of Gasoline Products focuses on whether the separate trial of overlapping issues inevitably creates a risk of confusion and uncertainty in the second phase of a bifurcated proceeding. Bifurcation may lead to confusion in other ways. For an impassioned argument that bifurcation of general and specific causation in particularly technical cases may confuse lay jurors in the first phase of proceedings, see Bedecarré, supra note 104, at 151-63. The possibility of confusion and uncertainty in the first phase of the litigation is beyond the scope of this paper.