Rethinking the Additur Question in Federal Courts

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RETHINKING THE ADDITUR QUESTION IN FEDERAL COURTS

INTRODUCTION

The right to trial by jury is an essential characteristic of the federal court system protected under the Seventh Amendment to the Constitution of the United States of America. Unfortunately, today jury trials are significantly burdensome on litigants, attorneys, and the court system as a whole. As technological advances and new social issues inevitably alter the judicial system’s landscape, consideration for efficient administration of justice is important in deciphering the scope of the right to trial by jury.

1 See U.S. Const. amend. VII. The Seventh Amendment, in its entirety, reads:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.


2 See Jay Tidmarsh, Looking Forward, 1 SEDONA CONF. J. 1, 2 (2000) (“One of the fundamental features of the modern litigation landscape is that trials take longer. This means that they cost clients more, they consume more attorney and judicial resources, and they tax the endurance and comprehension of judges and jurors alike.”); Fleming James, Jr., Remedies for Excessiveness or Inadequacy of Verdicts: New Trial on Some or All Issues, Remittitur and Additur, 1 DUQ. L. REV. 143, 152 (1963) (“[N]ew trials are costly and time consuming and thereby impose a burden on parties and society.”).

3 See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS, reprinted in 166 F.R.D. 49, 61 (1995) (stating judicial power includes responsibility to administer justice “justly, speedily, and economically”); Austin Wakeman Scott, Trial by Jury and the Reform of Civil Procedure, 31 HARV. L. REV. 669, 690 (1918) (arguing functional division between judge and jury must adjust according to administrative needs). In its preface to recommendations on rules and procedures in the federal courts, the Long Range Plan states:

[It] is clear that growing court caseloads, limited resources, emerging technology, and a changing population will require changes, as yet unclear, in the way justice is delivered. Given this uncertainty, as well as the lack of relevant data to show the impact of many possible changes, the federal courts must embrace careful experimentation and innovation as they and Congress shape the future of the justice system.

LONG RANGE PLAN, 166 F.D.R. at 117. “Rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure,
Thus, procedural innovations that alleviate the burdens of modern trials are encouraged and considered constitutional, provided they do not undermine the Seventh Amendment’s fundamental purpose. One such innovation is remittitur, which is a procedural alternative to granting a new trial when a defendant seeks one based on the excessiveness of the verdict. Remittitur avoids the need for a subsequent trial by conditioning a grant of the defendant’s motion for new trial on the plaintiff’s refusal to remit an amount necessary to cure an excessive award.

No such opportunity exists for plaintiffs seeking similar relief from inadequate verdicts because the use of additur, remittitur’s procedural counterpart, is banned in federal courts.

The impermissibility of additur and permissibility of remittitur are based on the Supreme Court’s determination in Dimick v. Schiedt that judicially increasing a verdict award violates the Seventh Amendment’s right to trial by jury, while decreasing the verdict does not. In contrast, many state jurisdictions, unshackled by the Court’s interpretation of the Seventh Amendment, find that their own constitutional protections of the fairness in administration, and a just, speedy, and inexpensive determination of litigation. Id. at 118.

4 See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331-32, 336-37 (1979) (determining that collateral estoppel neither increases litigation nor violates Seventh Amendment); Galloway v. United States, 319 U.S. 372, 389-90 (1943) (holding directed verdict procedure does not violate Seventh Amendment); Gasoline Prods. Co. v. Champlain Ref. Co., 283 U.S. 494, 497-98 (1931) (holding constitutional command of Seventh Amendment permits partial new trial); Fid. & Deposit Co. of Md. v. United States, 187 U.S. 315, 320 (1902) (holding summary judgment prevents use of pleadings to delay just recovery without violating Seventh Amendment). See generally Edith Guild Henderson, The Background of the Seventh Amendment, 80 HARV. L. REV. 289, 299-320 (1966) (examining patterns of civil practice leading up to ratification of Seventh Amendment). Henderson concludes that because there was such diversity of civil practice among the states prior to 1790, the Seventh Amendment must be interpreted as “imposing any but the most general limitations on the Court’s power to make . . . procedural changes.” Id. at 337.


7 See Dimick v. Schiedt, 293 U.S. 474, 482, 487 (1935) (holding Seventh Amendment forbids federal courts from increasing amount of damages awarded by jury); see also Earl, 917 F.2d at 1331 (noting additur impermissible although it avoids new trial under same theory as remittitur).

8 293 U.S. 474 (1935).

9 Id. at 486-87 (stating additur compels plaintiff to forgo constitutional right to jury verdict). The Court in Dimick characterized remittitur as consistent with the Seventh Amendment since it decreases damages to an amount included in the jury verdict. Id.

10 See Pearson v. Yewdall, 95 U.S. 294, 296 (1877) (holding Seventh Amendment limits powers of federal government only).
right to trial by jury permit both additur and remittitur. The acceptance and application of additur in state jurisdictions reflects the incongruity and inefficiency in proscribing one device and not the other. Furthermore, the specious reasoning and disputed historical foundations on which that proscription is premised continue to invite questions of why the ban on additur persists through seventy-five years of federal jurisprudence and whether it should continue today.

This Note will argue that additur, like remittitur, is consistent with the right to trial by jury. Part II briefly discusses the fundamental mechanics and procedural effects of additur and remittitur. Part III considers additur and remittitur’s historical development. Part III(A) discusses the common law precedents leading up to the Dimick decision. Part III(B) examines the Dimick decision and Part III(C) examines additur’s treatment in various state jurisdictions where it is employed. Part IV reviews the current treatment of additur in federal courts and subsequent Supreme Court decisions that potentially affect the Dimick decision. Finally, Part V argues that the asymmetrical treatment of additur and remittitur in federal court is erroneous and that proscribing additur is counterproductive. Specifically, this Note analyzes objections to the historical foundations and reasoning used to distinguish additur from

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12 See e.g., Freeman, 401 N.E.2d at 111 (“There is no relevant analytic difference between remittitur and additur.”); Drummond, 542 P.2d at 208 (“There is no essential difference between the procedures appropriate for remittitur and additur.”); Carney, 683 A.2d at 55 (“There is no reasoned basis to distinguish remittitur from additur as a matter of simple logic.”).

13 See Irene Deaville Sann, Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives, 38 CASE W. RES. L. REV. 157, 198-218 (1988) (arguing ban on additur requires elimination of current remittitur practice in federal courts). “[A]dditur is probably no less constitutional than remittitur, and an additur-type procedure should be available to plaintiffs to the same extent that a remittitur-type procedure is available to defendants.” Id. at 218; Leo Carlin, Remittiturs and Additurs, 49 W. VA. L. REV. 1, 18-19 (1942) (questioning validity of assumption that juries approve lesser amounts included in excessive verdicts); see also Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 433 n.16 (1996) (suggesting Dimick dissent invites rethinking additur’s constitutionality).

14 See infra notes 87-93 and accompanying text.

15 See infra Part II.

16 See infra Part III.

17 See infra Part III.A.

18 See infra Part III.B-C.

19 See infra Part IV.

20 See infra Part V.
remittitur in the Dimick decision. This Note concludes that additur, as a modern procedural device, is consistent with the principals of the right to trial by jury and its continued proscription only inhibits productive evolution of the civil jury in federal courts. Accordingly, this Note urges reconsideration of the constitutionality of additur in federal courts.

FUNDAMENTAL MECHANICS OF ADDITUR AND REMITTITUR

The remittitur procedure in federal courts derives from the trial court’s authority to grant a new trial. Remittitur occurs in circumstances where the defendant moves for a new trial alleging that a jury verdict is legally impermissible because the amount of damages awarded is excessive. If the trial court finds the verdict amount is so excessive as to be contrary to the evidence presented at trial, it may order a completely new trial or a partial new trial limited to the proper assessment of damages. Provided the sole defect in the verdict is excessiveness, the remittitur procedure enables the court to condition denial of the defendant’s motion for new trial upon the plaintiff’s consent to remit the portion of the verdict deemed excessive. Thus, remittitur provides the parties with an

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21 See infra notes 70-85 and accompanying text (examining rationales used to support different treatment of additur and remittitur).
22 See infra Part VI.
23 See infra Part VI.
24 See Fed. R. Civ. P. 59(a)(1)(A) (“The court may, on motion, grant a new trial . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court[.]”), Mooney v. Henderson Portion Pack Co., 339 F.2d 64, 66 (6th Cir. 1964) (“The principle of remittitur is ancillary to this right of the trial judge to grant a new trial because of the excessiveness of the jury verdict.”).
26 See id. §§ 2807, 2814 (detailing court’s power to grant relief from excessive or inadequate verdicts); see also Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 497-98 (1931) (holding partial new trial limited to damages issue does not violate Seventh Amendment). A court should not order a partial new trial nor remittitur if the excessive verdict is the result of passion or prejudice because liability determinations may have likewise been infected by prejudice. See Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Moquin, 283 U.S. 520, 521 (1931) (“[N]o verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one.”); Dossett v. First State Bank, 399 F.3d 940, 946-47 (8th Cir. 2005) (“It is ‘generally inappropriate,’ however, to order only a partial new trial on the issue of damages when the district court concludes the damages award was motivated by passion and prejudice.” (quoting Sanford v. Crittenden Mem’l Hosp., 141 F.3d 882, 885 (8th Cir. 1998))). But see Donovan v. Penn Shipping Co., 556 F.2d 536, 539 (2d Cir. 1977) (Feinberg, J., dissenting) (criticizing “common formulation” for remittitur), aff’d per curiam, 429 U.S. 648 (1977).
27 Wright, Miller & Kane, supra note 25, § 2815; See Earl v. Bouchard Transp. Co., 917
alternative to enduring a new trial.\textsuperscript{28}

Similarly, additur operates where the amount of damages awarded by the jury is legally impermissible, but in connection with a plaintiff’s motion for new trial based on the allegation that the amount is inadequate.\textsuperscript{29} If the trial court finds the verdict amount so inadequate as to be contrary to the evidence presented at trial, it can grant a complete or partial new trial.\textsuperscript{30} In federal court, this relief is the only form available, even where the sole ground for granting a new trial is the verdict’s inadequacy.\textsuperscript{31} In numerous states, alternative relief is available through additur.\textsuperscript{32} In practice, this procedure operates by the trial judge conditioning denial of the plaintiff’s motion upon the defendant consenting to an increase in damages by an amount deemed necessary to cure the inadequacy of the jury verdict.\textsuperscript{33} Thus, additur, like remittitur, avoids the need for a subsequent trial.\textsuperscript{34}

\textsuperscript{28} See \textit{WRIGHT, MILLER \& KANE}, supra note 25, \S 2815; see also Seltzner v. RDK Corp., 756 F.2d 51, 52 (7th Cir. 1985) (per curiam) (holding plaintiff’s refusal to accept remittitur operates as order for new trial); Evans v. Calmar S.S. Co., 534 F.2d 519, 522 (2d Cir. 1976) (“[R]emittitur frequently provides the means for ending the case by acceptance of the remittitur and payment of the judgment. The trouble and expense of a new trial are therefore eliminated.”).

\textsuperscript{29} See generally Albert C. Bender, \textit{Additur The Power of the Trial Court to Deny a New Trial on the Condition that Damages be Increased}, 3 CAL. W. L. REV. 1, 1-2 (1967) (describing typical situations involving employment of additur and remittitur); Carlin, supra note 13, at 1 (same).

\textsuperscript{30} See \textit{FED. R. CIV. P.} P. 59(a)(1) (authorizing grant of new trial “on all or some of the issues”); \textit{WRIGHT, MILLER \& KANE}, supra note 25, \S 2807 (detailing court’s authority relative to jury’s damage award).

\textsuperscript{31} See \textit{infra} notes 41-51 and accompanying text (discussing proscription of additur in federal courts).

\textsuperscript{32} See \textit{infra} notes 53-62 and accompanying text (discussing state courts’ treatment of additur).

\textsuperscript{33} See \textit{WRIGHT, MILLER \& KANE}, supra note 25, \S 2816 (outlining additur procedure used in state courts).

\textsuperscript{34} See Jehl v. S. Pac. Co., 427 P.2d 988, 995 (Cal. 1967) (en banc) (“Like its fraternal twin remittitur ... [additur] promotes economy and efficiency in judicial proceedings.”).
HISTORICAL DEVELOPMENT OF ADDITUR AND REMITTITUR

Common Law Origins

Since both remittitur and additur are procedural corollaries of new trial motions, the historical development of each is grounded in the trial court’s power to remedy defects in a jury verdict by granting a new trial. However, the common law practice of granting a new trial for excessive damages emerged separately and earlier than the new trial remedy for inadequate damages. At the time the Federal Constitution was adopted in 1791, English trial courts made little use of remittitur and the additur procedure was nonexistent. Remittitur and additur each developed later

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35 See Jeffrey Cole, Comment, Additur Procedural Boon or Constitutional Calamity, 17 DEPAUL L. REV. 175, 181 (1967) (“This power [to grant a conditional new trial] emanated both as a necessary antecedent and inevitable consequence from [the courts’] common law discretionary power to set aside an excessive or inadequate verdict.”).

36 See Wood v. Gunston, (1655) 82 Eng. Rep. 867 (K.B.) 867 (setting aside jury verdict on grounds of excessive damages); Bender, supra note 29, at 5 (“Apparently, a new trial on the ground of inadequacy of damages was not granted in an action for personal injury in England until 1879.”). The disparate historical treatment of inadequate and excessive damages is partially attributable to the ancient procedure for obtaining a new jury trial, the attaint, which was limited to remediing excessive verdicts. See id.; Cole, supra note 35, at 178 (describing historical treatment of inadequate damages by courts).

37 See, e.g., Dimick v. Schiedt, 293 U.S. 474, 495 (1935) (Stone, J., dissenting) (“Remittitur had received some recognition in the English courts. But in no recorded case does it appear that any English judge had considered the possibility of denying a new trial where the defendant had consented to increase the amount of recovery.” (citations omitted)); Sunray Oil Corp. v. Allbritton, 187 F.2d 475, 477-83 (5th Cir. 1951) (Holmes, J., dissenting) (noting new trial motions were made to appellate, not trial court prior to Seventh Amendment); Dorsey v. Barba, 240 P.2d 604, 610-11 (Cal. 1952) (Traynor, J., concurring and dissenting) (interpreting pre-constitutional cases as reflecting judicial reluctance to grant new trials for excessive damages), overruled by Jehl v. S. Pac. Co., 427 P.2d 988 (Cal. 1967).

At the time of the American Revolution, the jury’s determination of the amount of damages in contract actions and in certain tort actions involving property was subject to judicial supervision through the granting of new trials; in tort actions involving interests in personality, however, the courts rarely interfered with the amount of the jury’s verdict. Thus, in 1764, in a case involving trespass and false imprisonment, the Court of Common Pleas reviewed the earlier decisions and, in a unanimous opinion, said: ‘We are now come to the case in 1 Stra. 691, Chambers v. Robinson, which seems to be the only case where ever a new trial was granted merely for the excessiveness of damages only. . . . [T]here is not one single case (that is law) in all the books to be found, where the Court has granted a new trial for excessive damages in actions for torts.’

Id. (citations omitted) (quoting Beardmore v. Carrington, (1764) 95 Eng. Rep. 790 (K.B.) 793); see also Freeman v. Wood, 401 N.E.2d 108, 110 & n.8 (Mass. 1980) (citing cases with detailed discussions on historical background of remittiturs and additurs); Michael H. Cardozo, Note and
in American jurisprudence during the nineteenth and twentieth century. The leading case on remittitur is an 1822 decision by Justice Story in which he found the procedure constitutionally permissible, albeit hesitantly. Judicial use of additur, however, did not appear in an unadulterated form until almost the end of the nineteenth century.

**Treatment in Federal Courts: Dimick v. Schiedt**

In 1935, for the first and only time, the Supreme Court of the United States directly considered the constitutional validity of additur in *Dimick v. Schiedt*. The Court, in a five-to-four decision, condemned additur as an unconstitutional reexamination of the jury verdict in violation of the plaintiff’s Seventh Amendment rights. Although the case involved only an additur order by the district court judge, the inescapable analogy to remittitur, along with a century’s worth of remittitur use in federal courts, compelled the Court to also address the constitutionality of remittitur. With significant deference to stare decisis, the majority begrudgingly surmised that remittitur was constitutionally permissible. Remittitur was

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39 Blunt v. Little, 3 F. Cas. 760, 761-62 (C.C.D. Mass. 1822) (No. 1578) (holding trial court may forgo new trial for excessive damages if plaintiff willfully remits excess). Prefacing his approval of remittitur, Justice Story stated “I have the greatest hesitation in interfering with the verdict, and in so doing, I believe that I go to the very limits of the law.” *Id.* at 762. Despite Justice Story’s hesitation, by 1889, remittitur practice progressed to the point that its constitutionality was nearly self-evident. *See* Ark. Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74 (1889) (“The [remittitur] practice . . . is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury.”).

40 *See generally* Volker v. First Nat’l Bank, 42 N.W. 732, 733 (Neb. 1889) (affirming additur order involving trial court’s assessment of proper amount of unascertainable or unliquidated damages); Carr v. Miner, 1866 WL 4664, at *8 (III. April, 1866) (approving additur as remedy for jury miscalculation of liquidated damages).

41 *Id.* at 474 (1935).

42 *Id.* at 486-87 (concluding that conditioning denial of new trial on defendant’s consent deprives plaintiff of constitutional right).

43 *Id.* at 482 (“We could well rest this opinion upon that conclusion, were it not for the contention that our federal courts from a very early day have upheld the authority of a trial court to deny a motion for new trial because damages were found to be excessive . . .”). The Court notoriously suggests that remittitur likewise violates the Seventh Amendment. *Id.* at 484; *see also* Thomas, *supra* note 27, at 790 (arguing constitutionality of remittitur undecided because discussion in *Dimick* technically dicta).

44 *Dimick*, 293 U.S. at 484-85 (speculating that remittitur violates Seventh Amendment). In light of *Blunt v. Little* and the ensuing hundred years of remittitur’s acceptance and application in
distinguished from additur on two grounds: first, remittitur, not additur, was recognized at common law prior to adoption of the Constitution, and, second, remittitur judicially decreases a verdict to an amount already passed on by the jury, whereas additur is a "bald addition of something which in no sense can be said to be included in the verdict." The dissent in *Dimick*, authored by Justice Stone and joined by Justices Brandeis and Cardozo, vigorously refutes the majority's historical arguments, maintaining that proper historical and textual analysis of the Seventh Amendment suggests that its only purpose was "to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution." Justice Stone considered this a constitutional guarantee that parties have the benefits of submitting factual issues to a jury, but not a blueprint for how these benefits must be obtained. Thus interpreted, the Seventh Amendment does not proscribe federal courts, the majority speculates that "the doctrine would not be reconsidered or disturbed at this late day." *Id.* at 458; see also *Remittitur Practice*, supra note 6, at 301 (inferring from Court's deference that reconsideration of remittitur's constitutionality is unlikely). The dubious manner in which the Court recognizes remittitur evokes the inconsistency in its analysis. See *Carney v. Preston*, 683 A.2d 47, 51 (Del. Super. Ct. 1996) ("[S]ince the Court majority viewed the additur question as whether 'a doubtful [remittitur] precedent [should be] extended by mere analogy,' the Court was forced to come up with a reason which grudgingly permitted remittitur while condemning additur." (alterations in original) (quoting *Dimick*, 293 U.S. at 486)).

*Dimick*, 293 U.S. at 484-85 ("[T]he doctrine . . . finds some support in the practice of the English courts prior to the adoption of the Constitution . . . .").

Justice Stone reasons that, since the framers intended the Constitution "to endure for unnumbered generations," it follows that the Seventh Amendment is necessarily "concerned with substance and not with form." *Id.* at 490. He also notes that the immediate question of constitutionality necessitates an
any particular procedure for dealing with legal defects in jury verdicts. Justice Stone, therefore, regarded searching among “the legal scrap heap of a century and a half ago” for remnants of the additur and remittitur procedures as unproductive. Adopting this more flexible interpretation of the Seventh Amendment, under which the Court had already approved other modern post-verdict procedures, the dissent concludes that neither additur nor remittitur intruded upon the jury’s essential function.

understated focus on the practical effects of additur. Id. at 489-90. He briefly acknowledges the advantages and general acceptance of the procedure before responding to the majority’s decision:

I address myself to the question of power without stopping to comment on the generally recognized advantages of the practice as a means of securing substantial justice and bringing the litigation to a more speedy and economical conclusion than would be possible by a new trial to a jury, or the extent to which that or analogous practice has been adopted and found useful in the courts of the several states.

Id. at 490.

See Tull v. United States, 481 U.S. 412, 421 (1987) (holding Seventh Amendment not violated by judicial determination of civil penalty amount); Dimick, 293 U.S. at 490.

The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law.

Tull, 481 U.S. at 419 (emphasis omitted) (quoting Hepner v. United States, 213 U.S. 103, 115 (1909)).

Dimick, 293 U.S. at 495 (Stone, J., dissenting). The dissent argues that the majority’s rigid historical approach required “deny[ing] any possibility of change, development, or improvement,” which was contrary to the fundamental common law principle of “capacity for growth and development” and “adaptability.” Id. at 495-96.

Id. at 491-95 (arguing constitutional implications same for additur and remittitur). Justice Stone identified a number of prior decisions where the Court found modern post-verdict procedures, such as directed verdict and partial new trials, to not infringe on the parties’ Seventh Amendment rights. Id. at 491 (citing cases approving procedures unknown at common law). The constitutional test gleaned from those decisions was whether or not a procedure “left unimpaired the function of the jury to decide issues of fact.” See id. at 492. He argues that if the trial court’s discretionary power to deny a plaintiff’s motion for new trial on grounds of inadequacy does not encroach upon the jury’s function, neither does exercising that discretion in light of a defendant’s consent to additur. Id. Reasoning that the authority to rule damages as inadequate or excessive logically includes the authority to assess what the proper verdict should be, he found “[t]he fact that in one case the recovery is less than the amount of the verdict, and that in the other it is greater, would seem to be without significance.” Id. at 493-94. See generally Bernadette Meyler, Towards a Common Law Originalism, 59 STAN. L. REV. 551, 593-600 (2006) (demonstrating advantages of more flexible interpretation of common law through Seventh Amendment analysis).
Treatment in State Courts

*Dimick* does not preclude state courts from issuing additur orders because the Seventh Amendment restricts the federal government only. Hence, when analyzing additur’s constitutionality under their respective state constitutions and comparable provisions protecting the right to jury trial, state courts are often persuaded by the aforementioned reasoning of the dissent in *Dimick*. As a result, the highest courts of numerous jurisdictions have held that additur does not infringe on a plaintiff’s constitutional right to jury determination of damages. Notably, the Supreme Court of California, in a widely cited decision endorsing additur, went so far as to overrule its prior decision that explicitly adopted the majority’s reasoning in *Dimick*. Other jurisdictions with decisions in line with *Dimick* have enacted statutes on additur which, at least, temper the

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52 See Pearson v. Yewdall, 95 U.S. 294, 296 (1877) (holding Seventh Amendment applicable only to courts of United States); Walker v. Sauvenet, 92 U.S. 90, 92-93 (1875) (holding Seventh Amendment not incorporated into due process clause of Fourteenth Amendment). In *Pearson*, the plaintiff claimed that the compensation for his property being taken for public use was inadequate, but failed to make the city of Philadelphia a party in the suit. *Pearson*, 95 U.S. at 294-95. In denying the plaintiff leave to amend the claim, the Court stated that the Pennsylvania statute providing the cause of action contained “ample provision... for an inquiry as to damages before a competent court” and “[t]o grant the amendment would, in our opinion, lead only to unnecessary delay and expense.” *Id.* at 296.

53 See Carney v. Preston, 683 A.2d 47, 55 (Del. Super. Ct. 1996) (finding that reasoning of Justice Stone necessarily prevails over the majority); Caudle v. Swanson, 103 S.E.2d 357, 365 (N.C. 1958) (“The dissenting opinion of Mr. Justice Stone in the Dimick case [is] a convincing and closely reasoned opinion supported by ample authority, and concurred in by three eminent jurors...”); Genzel v. Halvorson, 80 N.W.2d 854, 859 (Minn. 1957) (“[W]e think that the better authority [was] expressed by Mr. Justice Stone’s dissent in Dimick v. Schiedt...”); Markota v. E. Ohio Gas Co., 97 N.E.2d 13, 18 (Ohio 1951) (arguing *Dimick* majority unconvincingly “dodges” inconsistencies pointed out by dissent). But see Supinger v. Stakes, 495 S.E.2d 813, 816 (Va. 1998) (“[W]e find the reasoning in *Dimick* v. Schiedt persuasive.” (citation omitted)). Although the court in *Supinger* agreed with the majority in *Dimick* that an additur award is an amount not assessed by the jury, the court approved an additur process that operates on the plaintiff’s consent. *Id.* at 817. Moreover, the court in *Supinger*, as Justice Stone did in his *Dimick* dissent, qualifies its analysis in light of the practical benefits of additur: “This conclusion is not meant to disparage or discourage the laudable goal of judicial efficiency that the utilization of additur promotes. Rather, this decision is limited to what procedure is necessary to render the additur process constitutionally sound.” *Id.*

54 Freeman v. Wood, 401 N.E.2d 108, 110-12 (Mass. 1980) (holding additur permissible under State Constitution); Genzel, 80 N.W.2d at 859 (same); Drummond v. Mid-West Growers Coop. Corp., 542 P.2d 198, 205-08 (Nev. 1975) (same); Fisch v. Manger, 130 A.2d 815, 823 (N.J. 1957) (same); Caudle, 103 S.E.2d at 366 (same); see also Markota, 97 N.E.2d at 18-19 (reasoning arguments sustaining constitutionality of remittitur apply equally to additur).

55 Jehl v. S. Pac. Co., 427 P.2d 988, 993 (Cal. 1967) (finding right to jury trial not impaired by additur). The *Jehl* court, while focusing on a constitutional analysis, emphasized that practical considerations including costs and time must factor in to its decision. *Id.* at 993 n.9.
authority of those decisions. There are states currently prohibiting additur based on high court decisions that accept the reasoning of the Dimick court, but they are an arguable minority.

The precise mechanics of and enthusiasm for additur vary amongst jurisdictions that use the procedure. Massachusetts not only permits additur and remittitur, but strongly endorses the procedures by statutorily requiring their use before partial new trials on damages can commence.

56 See ITT Hartford Ins. Co. v. Owens, 816 So. 2d 572, 579 (Fla. 2002) (Wells, C. J., concurring in part and dissenting in part) (emphasizing Florida refused to recognize additur until statute authorized it); Dedaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 903-04 (Miss. 2007) (acknowledging decisions finding additur unconstitutional prior to enactment of statute authorizing procedure); cf. Adams v. Wright, 403 So. 2d 391, 394 (Fla. 1981) (finding additur statute not in conflict with procedural rules for granting new trial). In Owens, Chief Justice Wells stated:

[Prior to the enactment of these statutes, judges had no power to increase a jury's award of damages by additurs, which perforce did not then exist in Florida. In Bennett v. Jacksonville Expressway Auth., 131 So. 2d 740 (Fla. 1961), our supreme court flatly held that: "[a]lthough we have referred to the additur ordered by the trial judge as indicating the extent to which he considered the verdict unjust, we do not recognize his authority to effectuate an increase in the verdict of the jury.

Owens, 816 So. 2d at 579 (Wells, C. J., concurring in part and dissenting in part) (second alteration in original) (quoting Beauvais v. Edell, 760 So. 2d 262, 266-67 (Fla. 2000) (Farmer, J., concurring)).

57 Dixon v. Prothro, 840 P.2d 491, 496 (Kan. 1992) (holding additur after second trial on damages violated plaintiff's constitutional rights); Bohrer v. Clark, 590 P.2d 117, 121-22 (Mont. 1978) (finding trial court without authority to increase verdict conditionally or otherwise).

58 See David Baldus et al., Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harm and Punitive Damages, 80 IOWA L. REV. 1109, 1128 (1995) (noting constitutional claims that additur intrudes on jury discretion "have been almost uniformly rejected"); Sann, supra note 13, at 165-67 ("Although the frequency of use of these devices varies from jurisdiction to jurisdiction, the remittitur device has been and continues to be employed in every federal circuit, and most state courts use one or both devices.")

59 Compare Miller v. Chicago Ins. Co., 320 So. 2d 134, 140-41 (La. 1975) (holding cross appeal of additur or remittitur permitted only where other party appeals), Baudanza v. Comcast, Inc., 912 N.E.2d 458, 460 (Mass. 2009) (holding no appeal available to party accepting additur or remittitur), with Dixon, 840 P.2d at 496 (limiting additur to where answers to special questions in verdict require general verdict be increased), Dedaux, 947 So. 2d at 908-09 (interpreting statute as requiring consent of both parties to additur or remittitur), Allsup's Convenience Stores, Inc. v. N. River Ins. Co., 976 P.2d 1, 19-20 (N.M. 1998) (allowing plaintiff to accept remittitur "under protest" and appeal).

60 See MASS. R. CIV. P. 59(a) (identifying grounds on which new trial may be granted). The rule reads in relevant part:

A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive. A new trial shall not be granted solely on the ground that the damages are inadequate until the defendant has first been given an
State courts plainly recognize that, regardless of how the procedures are employed, the benefit of avoiding costs and delay is equally provided through additur as through remittitur. Therefore, from a policy standpoint, the interest of judicial economy is best served by employing both procedures.

CURRENT STATUS OF ADDITUR (AND REMITTITUR) IN FEDERAL COURTS

Despite the Court’s tenuous reasoning and dubious historical support, Dimick remains valid law and additur continues to be prohibited in federal courts. Remittitur, meanwhile, has evolved into a significant and widely utilized procedural device. Nevertheless, more recent Supreme Court's opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable.

Id.

61 See Baudanza, 912 N.E.2d at 463 (“[A]dditur and remittitur serve the beneficial goal of securing substantial justice between the parties without the burdensome costs, delays and harassments of new trials,” (citing Freeman v. Wood, 401 N.E.2d 108, 111 (Mass. 1980) (quoting Fisch v. Manger, 130 A.2d 815, 818 (N.J. 1957))); Drummond v. Mid-West Growers Coop. Corp., 542 P.2d 198, 207 & n.8 (Nev. 1975) (likening additur to other post-trial procedures that efficiently and inexpensively correct verdicts); Dalton v. Herold, 934 P.2d 649, 650 (Utah 1997) (“The objective of an additur or a remittitur is to avoid the delay and expense of an appeal or a new trial.” (internal quotation marks omitted)). Another practical benefit of both additur and remittitur is that each allows the parties to evade the uncertainty of a new trial by providing a definite figure on damages. Baudanza, 912 N.E.2d at 463.

62 See Carney v. Preston, 683 A.2d 47, 54 (Del. Super. Ct. 1996) (“As a matter of policy, even opponents have admitted outlawing the practices ‘[runs] counter . . . to practical convenience in doing substantial justice and saving expense.’” (alteration in original) (quoting Schiedt v. Dimick, 70 F.2d 558, 564 (1st Cir. 1934), aff’d, 293 U.S. 494 (1935))); Freeman, 401 N.E.2d at 111 (viewing legislative endorsement of additur and remittitur relevant in determining constitutionality); Genzel v. Halvorson, 80 N.W.2d 854, 859 (Minn. 1957) (“A reasonable appraisal of [right to jury trial] in the light of recognized practice in this state, compels the conclusion that the practice of using additur is in the interest of the sound administration of justice . . . .”); Graham v. Whitaker, 321 S.E.2d 40, 44-45 (S.C. 1984) (finding additur appropriately promotes interest of judicial economy).

63 See Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1331 (2d Cir. 1990) (“To this day, the Court has not questioned the asymmetric treatment by federal courts of the doctrines of remittitur and additur, despite vigorous criticism of the rule.”).

64 See generally Snyder, supra note 38, at 322 (responding to debates over remittitur’s constitutionality). Snyder acknowledges that the “flawed majority opinion” in Dimick has invited commentary urging a ban on remittitur in federal courts, but notes the following:

[S]ince Dimick, the use of remittitur has increased continuously to the present day. In fact, remittitur has become so pervasive in American law that one modern treatise remarked that declaring remittitur unconstitutional would cause a judicial uprooting of precedent akin to that effected by Erie-Tompkins. Over the last 175 years, remittitur
Court decisions endorse the flexible Seventh Amendment analysis adopted in Justice Stone’s dissent and some are at least in tension with the Dimick decision. Justice Ginsburg, in a footnote to her opinion in *Gasperini v. Center for Humanities, Inc.*, pointedly remarks that the Dimick dissent invites “rethinking of the additur question.” Subsequent lower court decisions reflect how that may have cast doubt on the impermissibility of additur in federal courts. Federal district courts today continue to face inadequate verdicts, in spite of the Court’s inclinations, and the proscription of additur can translate into an impractical depletion of their procedural repertoire.

has evolved from a sparingly-used procedural device into an all-purpose effort to limit the power of juries, reduce exorbitant damage awards, and promote judicial economy.

Id. at 322-23 (internal quotations marks omitted).

56 See *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 436 n.20 (1996) (identifying modern trial procedures that would not exist if Seventh Amendment’s meaning fixed at 1791); *Tull v. United States*, 481 U.S. 412, 421 (1987) (stating Seventh Amendment analysis should not focus on finding historical evidence); *Galloway v. United States*, 319 U.S. 372, 392 (1943) (“The Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements ... ”); see generally Kenneth S. Klein, *Is Ashcroft v. Iqbal the Death (Finally) of the “Historical Test” for Interpreting the Seventh Amendment?*, 88 Neb. L. Rev. 467, 478-81 (2010) (arguing recent decision on pleading standards compels Court address viability of traditional Seventh Amendment analysis).

57 See *Tull*, 481 U.S. at 426 n.9 (“Nothing in the Amendment’s language suggests that the right to a jury trial extends to the remedy phase of a civil trial.”).


59 Id. at 433 n.16.

Inviting rethinking of the additur question on a later day, Justice Stone, joined by Chief Justice Hughes and Justices Brandeis and Cardozo, found nothing in the history or language of the Seventh Amendment forcing the “incongruous position” that “a federal trial court may deny a motion for a new trial where the plaintiff consents to decrease the judgment to a proper amount,” but may not condition denial of the motion on “the defendant’s consent to a comparable increase in the recovery.”

**Id.** (quoting Dimick v. Schiedt, 293 U.S. 474, 495 (1935) (Stone, J., dissenting)).


61 See Brooks v. Youngert, No. 4:03 CV 137, 2006 WL 3759810, at *8 n.2 (W.D. Mich. Dec. 19, 2006) (“[T]he Court finds that the jury’s actual damages award simply flies in the face of the evidence presented at trial. Were it within the Court’s power, it would increase the amount of actual damages awarded to Plaintiff to achieve a ratio satisfactory to Defendants.”); *Peebles v. Circuit City Stores, Inc.*, No. 01 Civ. 10195(CSH), 2003 WL 21976402, at *13 (S.D.N.Y. Aug. 19, 2003) (“Additur as an alternative remedy lies beyond the Court’s power. But it is perfectly apparent that plaintiff is entitled to a new trial on damages.” (citation omitted)); *Fox v. City Univ. of N.Y.*, No. 94 Civ. 4398(CSH), 1999 WL 33875, at *10-11 (S.D.N.Y. Jan. 26, 1999)
ANALYSIS

Seventh Amendment Protection and Dimick

The distinction between additur and remittitur set forth by the majority in Dimick is largely criticized by commentators and courts. It is commonly regarded as strained rationale for inconsistent treatment of like procedures and dissonance with past constitutional analysis. Some commentators even speculate that it is fabricated justification for advancing a conservative political agenda in vogue during that era.

Regardless of the majority’s underlying interests, its argument that the jury, by announcing a particular damage amount, tacitly approves lesser amounts and rejects larger amounts as untenable. It relies on an erroneous inference that the amount awarded by the final verdict is an accumulation of jury deliberations over all other amounts. In reality, the jury returns a verdict without details on deliberations and both increasing

(acknowledging additur as appropriate but unavailable remedy).

It follows that, even in a diversity case presenting only state law claims, a federal trial judge cannot make an order of additur, even though his state court colleague could. The reality is that, unless and until the Supreme Court overrules Dimick v. Schiedt, a state statute... cannot trump the United States Constitution.

Fox, 1999 WL 33875, at *11.

71 See Carlin, supra note 13, at 29 (“The commentators seem to be agreed that the minority is correct in rejecting the validity of the majority’s attempted differentiation ....”); Sann, supra note 13, at 178 (“The dissenters in Dimick had the better position both in logic and in constitutional analysis.”); Snyder, supra note 38, at 322 (arguing subsequent Supreme Court decisions and scholars’ works legitimize dissent); see also supra note 53 and accompanying text (discussing persuasive impact of Dimick dissent’s criticisms of majority).

72 See Carlin, supra note 13, at 27-29 (criticizing reasoning of Dimick as specious justification for distinguishing remittitur from additur). Carlin argues that the mere approval of remittitur, a “practice which the whole tenor of its opinion shows that its conscience repudiates,” casts doubt on the reasoning used by the Dimick majority. Id. at 28.

73 See Bender, supra note 29, at 12 n.60 (“It is somewhat ironic that the validity of additur was decided in 1935, during a controversial period in the judicial history of the United States Supreme Court.”); Cole, supra note 35, at 183-85 (arguing Dimick decision influenced by political mood of “era of inverterate conservatism and of a Court with a parochial scope”).

74 See Bender, supra note 29, at 32 (“[T]he logical distinction between remittitur and additur drawn by the United States Supreme Court in Dimick is non-existent.”); Sann, supra note 13, at 175 (“A distinction between remittitur and additur on grounds that a remittitur-reduced verdict is included in the jury verdict while an additur-increased verdict is not so included is specious.”); Cole, supra note 35, at 184 (“[T]he problem is only the additur which retains all that was contained in a jury’s verdict, and in both additur and remittitur something is taken away from the litigant who is relying on the verdict.”).

75 See Carlin, supra note 13, at 18 (“[T]o assume that the jury found the reduced amount... is to make a false application of the mathematical formula that the whole includes the part.”).
and decreasing the awarded amount deviates from that lone verdict. Moreover, predicating remittitur on the divisibility of a factual finding within the verdict more logically leads to the irreconcilable conclusion that the procedure encroaches on the province of the jury as deciders of fact.

As an outgrowth of the court’s power to overturn verdicts as excessive, remittitur must be considered as addressing a legal deficiency in the verdict as opposed to mathematically manipulating the substance of the jury’s factual determinations; as an outgrowth of the court’s corresponding power to overturn inadequate verdicts, additur should likewise be analyzed as a procedural approach to a legal question. The distinction is nuanced but important: remittitur operates to remedy *excessiveness*, not to delete *excess*, while additur operates to remedy *inadequacy*, not to fill a *deficit*.

Evaluating the procedures otherwise ignores the accepted and necessary legal fiction that unreasonable factual conclusions by a jury are questions of law. Thus, remittitur does not retain a portion of the verdict nor does additur bestow approval on an amount presumably rejected by the jury—neither can be persuasively conceptualized in terms of assumptions about the verdict. In both procedures, the judge’s suggested adjustment is

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76 See Sann, *supra* note 13, at 176 (“The jury does not provide a ‘range’ of appropriate jury-found verdicts, with its announced verdict being the maximum in the range ” (emphasis added)).
77 See Thomas, *supra* note 27, at 784-89 (arguing remittitur operates to unconstitutionally contract jury’s role as fact-finder).
78 See James, *supra* note 2, at 154 (reasoning proper analysis of additur should focus on relationship between jury and superintending role of court). “In both cases [remittitur and additur], then, the jury may be said to have exercised their judgment in fixing the amount subject only to the court’s ruling on the legal question.”

[W]hen a judge grants a new trial he determines the verdict of a jury is legally inadequate or excessive and there is implicit in that decision the “power to determine, as a matter of law, the upper and lower limits within which recovery by a plaintiff will be permitted . . . .” This is the level of abstraction at which the legal principle set forth at common law should be gleaned; this is the level where the common law distinguishes the role of the trial judge from the role of the jury, the question of law from the question of fact. Remittitur and additur do not change the dividing line; they merely make available procedural tools respectful of the delineation.

80 See *id.* at 55 (reasoning that unreasonable factual conclusions by jury become legal questions justifying judicial control of verdicts). “A factual determination beyond the limits of reasonable judgment is at law a question of law. This fiction or something strongly akin thereto must be confessed to uphold remittitur and additur.”
81 See Markota v. E. Ohio Gas Co., 97 N.E.2d 13, 19 (Ohio 1951) (“[I]t would appear easier to uphold the additur practice because, under it, all that the jury did is sustained. However, under each practice, the departure from what the jury actually did is consented to by the party prejudiced by such departure.”); Carlin, *supra* note 13, at 18 (“If the jury had actually found, as a
properly dictated by the evidence, not the improper verdict. That amount is finalized by the consent of the adversely affected party.

The rigid historical analysis employed by the Dimick majority is also questionable. While English common-law up to 1791 is relevant, modern Supreme Court decisions demonstrate that proper Seventh Amendment analysis is not confined to the eighteenth century. Thus, the predominant focus in determining additur’s constitutionality should be on its relation to the fundamentals of the right to jury trial and not on common law antecedents.

Parties are not required to invoke their Seventh Amendment rights and may resolve claims without a jury trial. The Seventh Amendment gives each litigant the right to choose whether a jury will decide the factual disputes involved in that case. When parties waive this right they are not sanctioning the use of procedures that would otherwise be unconstitutional, but instead forgoing a substantive right. The benefit afforded by invoking

measure of recovery; that the plaintiff was entitled to recover the reduced amount, its verdict would have been for that amount without the excess.

See Jehl v. S. Pac. Co., 427 P.2d 988, 995 (Cal. 1967) (“If the court decides to order an additur, it should set the amount that it determines from the evidence to be fair and reasonable.”); Dedeaux v. Pellerin Laundry, Inc., 947 So. 2d 900, 908 (Miss. 2007) (“[I]n arriving at the appropriate amount of the additur or remittitur, the trial judge should not be bound by . . . having to consider the amount which should be added or subtracted from the jury’s verdict to make it legal and no more.” (internal quotation marks omitted)).

See Dimick, 293 U.S. at 494 (Stone, J., dissenting) (“[I]n neither does the jury return a verdict for the amount actually recovered, and in both the amount of recovery was fixed, not by the verdict, but by the consent of the party resisting the motion for a new trial.”).

See id. at 496 (arguing majority’s overreliance on history inconsistent with common law principles).

See Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 436 n.20 (1996) (noting procedures not found at common law that comply with Seventh Amendment); Tull v. United States, 481 U.S. 412, 421 (1987) (“We need not rest our conclusion on what has been called an ‘abstruse historical’ search for the nearest 18th-century analog’); see also Klein, supra note 65, at 483 (“The contemporary Supreme Court rejects as essentially absurd an approach of constitutional interpretation binding future generations to the precise meaning of [the term ‘common law’] as it was defined in the eighteenth century.”).

See Tull, 481 U.S. at 421 n.6 (identifying predominant Seventh Amendment considerations as “nature of the cause of action and the remedy”). “We reiterate our previously expressed view that characterizing the relief sought is ‘[m]ore important’ than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial.” Id. at 421 (quoting Curtis v. Loether, 415 U.S. 189, 196 (1974)).

See Fed. R. Civ. P. 38(d) (“A party waives a jury trial unless its demand is properly served and filed. A proper demand may be withdrawn only if the parties consent.”).

See Fed. R. Civ. P. 38(c) (“In its demand, a party may specify the issues that it wishes to have tried by a jury . . . .”).

See Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931) (“[T]he Seventh Amendment does not exact the retention of old forms of procedure.”); Markota v. E. Ohio Gas Co., 97 N.E.2d 13, 18 (Ohio 1951) (“[T]he defendant can waive that right [to jury trial] which he
that right is that the party avoids the potential abuses which can arise from consolidating decision-making power into a potentially corrupt, partial or incompetent individual. Maintaining focus on the substantive consequences of a procedure, as opposed to its technicalities, is of paramount importance in adhering to the underlying purpose of the Seventh Amendment. The constitutionality of any trial procedure must, therefore, turn on its relation to the parties’ right to utilize a jury as the decider of disputed facts. Where a post-verdict procedure renders circumstances that are more advantageous to a party than those rendered by the jury, that party has ostensibly avoided abuses at the hands of a lone decision maker.

**Constitutionality of Additur**

The essential function of both additur and remittitur is to cure legally unsupportable verdict amounts. If the procedures’ constitutional implications parallel each other, as is urged, the arguments sustaining remittitur should correspondingly sustain additur. To find otherwise would imply that the plaintiff has a greater right to jury trial than the

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90 See Scott, supra note 3, at 676-78 (explaining guiding principle of right to jury trial). The original value of right to a jury trial was its function “as a means of preventing oppression by the Crown” and later as a means to “limit the powers of . . . judges.” Id. at 676-77. See also Klein, supra note 65, at 489-90 (speculating flexible Seventh Amendment interpretation highlights jury’s core value as embodiment of citizenry in courtroom).

91 See Gasoline Prods., 283 U.S. at 498 (“[T]he Constitution is concerned, not with form, but with substance.”).

92 See Tull v. United States, 481 U.S. 412, 425-26 (1987) (finding jury assessment of civil penalties not fundamental to preservation of right to jury trial); Henderson, supra note 4, at 336 (“[T]he Seventh Amendment preserves the substance of the common law trial by jury and particularly the jury’s power to decide serious questions of fact, while allowing rational modifications of procedure in the interests of efficiency.”). In Tull, the Court stated:

The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the “substance of the common-law right of trial by jury.” Is a jury role necessary for that purpose? We do not think so.

*Tull*, 481 U.S. at 425-26 (citation omitted).

93 See Cole, supra note 35, at 185 (“[I]f constitutionality is to be, in the final analysis, partially predicated on benefit, then additur as well as remittitur is seen to be clearly consonant with the right to trial by jury.”).

94 See *Dimick v. Schiedt*, 293 U.S. 474, 494 (1935) (Stone, J., dissenting) (finding reasoning sustaining authority to order remittitur “equally applicable” to additur).
Although the additur amount is judicially crafted, the actual amount of the judgment requires the defendant’s consent. An argument that the defendant’s Seventh Amendment rights have been violated is unpersuasive because the defendant is free to invoke his right to a jury trial by rejecting an additur. The plaintiff is not prejudiced because an appropriately ordered additur leaves her in a more advantageous position than the jury did; her damages are increased, and liability and other factual determinations in the verdict remain undisturbed. Moreover, the plaintiff’s right to appeal the propriety of the additur order assures that the additur order was made within “Seventh Amendment constraints.”

96 See Freeman v. Wood, 401 N.E.2d 108, 111-12 (Mass. 1980) (arguing incongruent constitutional treatment of additur and remittitur engenders unfairness); Markota v. E. Ohio Gas Co., 97 N.E.2d 13, 19 (Ohio 1951) (“To say that the arguments sustaining the remittitur practice are sound while the corresponding arguments advanced to sustain the additur practice are not sound, necessarily leads to the absurd conclusion that a plaintiff has a greater right to a jury verdict...”).

97 Dimick, 293 U.S. at 494 (Stone, J., dissenting) (“[I]n both [remittitur and additur] the amount of recovery was fixed, not by the verdict, but by the consent of the party resisting the motion for a new trial.”).

98 See id. (stating defendant lacks constitutional objections after formally consenting to additur); see also Genzel v. Halvorson, 80 N.W.2d 854, 858 (Minn. 1957) (citing cases where constitutional analysis of additur unnecessary because defendants refused consent to increased verdict).

99 See Dimick, 293 U.S. at 494 (Stone, J., dissenting) (“The plaintiff has suffered no denial of a right because the court, staying its hand, has left the verdict undisturbed, as it lawfully might have done if the defendant had refused to pay more than the verdict.”); cf. Earl v. Bouchard Transp. Co., 917 F.2d 1320, 1329 (2d Cir. 1990) (finding defendant unprejudiced by remittitur order).

100 See Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 435 (1996) (“[A]ppellate review [of district court’s denial of new trial] for abuse of discretion is reconcilable with the Seventh Amendment as a control necessary and proper to the fair administration of justice...”); cf. Ark. Valley Land & Cattle Co. v. Mann, 130 U.S. 69, 74 (1889) (stating defendant faced with remittitur retains opportunity to argue on appeal for complete new trial); Earl, 917 F.2d at 1327-30 (evaluating defendant’s appeal of remittitur amount).

It should be remembered, however, that, regardless of whether a plaintiff “elects” the remittitur or “elects” to have a second trial, the plaintiff is made worse off and the defendant is made better off relative to the situation where the jury verdict is permitted to stand. Thus, although it has been said that a defendant in these circumstances “has no option,” it does not follow that a defendant is therefore entitled to special consideration. Moreover, the defendant does have an option. If the plaintiff accepts
Practical Effects of Additur and Remittitur

Additur and remittitur each reduce the ever-increasing strain on judicial resources by reducing the total amount of trials, one of the most costly and time consuming court proceedings. Of course, constitutional protections cannot be circumvented to conserve resources, but where justice can be administered in accordance with those protections, judicial economy and efficiency are interests that cannot be ignored. Moreover, those interests are vital to the maintenance of constitutional protection for civil juries. Such is the case with the Supreme Court’s approval of other procedures unknown at common law that have been deemed compatible with the Seventh Amendment, and with state courts’ approval of additur.

Additur and remittitur orders, from a procedural perspective, are tantamount to judicially orchestrated settlements between the parties, rather than reexaminations of the jury’s factual determinations. In both procedures, each party may voluntarily abandon rights—the right to reject the suggested amount and the right to appeal the order—in exchange for efficiency and finality. In this way, additur and remittitur orders do not

the remitted award, the defendant can appeal . . . .

Id. at 1329.

101 See supra notes 29-34 and accompanying text (detailing procedural effects of remittitur and additur).
102 See Henderson, supra note 4, at 336-37 (“The whole thrust of the history of jury practice, both before and after 1790, has been toward rationality of decision and economy of motion in the courtroom.”).
103 See Freeman v. Wood, 401 N.E.2d 108, 110 (Mass. 1980) (observing modern procedural innovations sustain right to jury trial); Meyler, supra note 51, at 599 (arguing flexible interpretation of contours of Seventh Amendment rights best preserves those rights over time); Scott, supra note 3, at 691 (“If the ancient institution of trial by jury is to survive . . . it must be something more than a bulwark against tyranny and corruption: it must be an efficient instrument in the administration of justice.”).
104 See supra note 65 and accompanying text (approving constitutionality of modern procedures).
105 See Freeman, 401 N.E.2d at 110 (“[I]f it were not for such changes, the institution itself might not have survived; a flexibility or capacity for accommodation is perhaps the secret of its long life.”).
106 See Evans v. Calmar S.S. Co., 534 F.2d 519, 522 (2d Cir. 1976) (holding acceptance of remittitur “was the equivalent to a settlement of the action”); see also Dalton v. Herold, 934 P.2d 649, 650 (Utah 1997) (“[A] proper acceptance of remittitur or additur is analogous to a settlement agreement.”); Graham v. Whitaker, 321 S.E.2d 40, 45 (S.C. 1984) (“In actuality the import of a new trial nisi additur or nisi remittitur is a suggestion on the part of the judge of a settlement figure.”); Sann, supra note 13, at 220-21 (suggesting alternative form of “post-trial settlement” where parties determine damages amount instead of judge).
supplant the jury function, but instead operate outside the jury’s exclusive province to avoid continued litigation. 108 Even where an appeal is heard and denied, the burdens on judicial economy and party resources are typically less than that involved with enduring another trial. 109

CONCLUSION

The logical and historical foundation for the proscription of additur in federal courts is tenuous at best. Moreover, such asymmetrical treatment of additur and remittitur is unsustainable because it implies that a plaintiff has a greater right to jury trial than a defendant. Additur’s constitutionality must be considered in relation to the underlying purpose of the Seventh Amendment.

Constitutional protection for trial by jury originated as an institutional safeguard against unjust abuse by removing the power to decide serious factual disputes from the hands of one individual. However, the continued vitality of trials as an effective means of administering justice requires that judicial economy and efficiency be advanced where constitutionally permissible. Thus, innovative procedural devices that promote judicial economy must be evaluated with regard to their substantive effects on the safeguards inherent in jury trials as opposed to additur or remittitur, a party in effect agrees to promote judicial efficiency by binding himself to a fixed quantum.”); Allsup’s Convenience Stores, Inc. v. N. River Ins. Co., 976 P.2d 1, 6 (N.M. 1998) (“[The] procedure generally has the effect of facilitating settlement, thereby enhancing judicial economy. . . . finality and repose are achieved because the “risks of a verdict less than the amount to which the remittitur order has reduced the plaintiff’s recovery are . . . calculated to induce most reasonable plaintiffs to accept the remittitur . . . .” (citation omitted)).

108 See Dimick v. Schiedt, 293 U.S. 474, 492 (1935) (Stone, J., dissenting) (arguing additur operates outside province of jury). A trial judge with the discretionary power to deny a plaintiff’s motion for new trial does not abuse that discretion nor prejudice the plaintiff merely “because the exercise of the judge’s discretion was affected by his knowledge of the fact that a proper recovery had been assured to the plaintiff by the consent of the defendant.” Id.; see also Carney v. Preston, 683 A.2d 47, 56-57 (Del. Super. Ct. 1996) (“In fixing the damages, instead of directing a new trial, the Court does not usurp the providence of a jury so much as when it sets aside a verdict and directs a new trial, which the Court always has the power to do upon proper grounds.”).


While some cost is undeniably involved in appealing a remittitur order, the incremental expense is relatively small in view of the fact that the parties will undoubtedly have already prepared and submitted memoranda of law to the district court. Whatever effort is required to revise these papers is, moreover, overshadowed by the possible return if the jury verdict is reinstated.

Id. at 537 n.2.
Additur and remittitur each assure that the plaintiff receives a legally supportable amount of damages, that factual disputes are resolved by the jury, and that neither party is unfairly prejudiced by a lone individual. Both extinguish the need for a subsequent trial without eroding the original trial’s safeguard against prejudicial exercise of individual discretion. The procedures are tantamount to judicially orchestrated settlements between the parties in light of the verdict as opposed to reexaminations of the jury verdict. Additur, like remittitur, operates within Seventh Amendment constraints to increase the efficiency of judicial administration in the federal courts. Therefore, reconsideration of the constitutionality of additur is urged.

Joseph R. Posner