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# Appellate Review of Judicial Fact-Finding

*Ellen E. Sward**

## I. INTRODUCTION

Appellate judges operate in a world not of their own making: they review cases that have already been decided. In performing that review, they are constrained by rules—standards of review—that often require substantial deference to the lower court's decision. Only when the issue before the court of appeals is a question of law is the court free to disregard what happened in the court below. The effect of standards of review is to allocate decision-making authority over questions of law primarily to appellate courts, and decision-making authority over questions of fact primarily to the trial courts. The allocation of fact-finding authority, especially, has engendered considerable debate.[1] Much of the de-

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* Professor of Law, University of Kansas School of Law. B.A. 1970, University of Cincinnati; J.D. 1979, Harvard Law School. The author thanks her colleagues Richard E. Levy, Elinor P. Schroeder, Sidney A. Shapiro, and Reginald Robinson for their comments on various drafts of this Article. Thanks also to Robert Correales, University of Kansas Class of 1991, for his able research assistance. The support of the University of Kansas General Research Fund is gratefully acknowledged.

1. *See, e.g.*, Paul D. Carrington, *The Function of the Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411 (1987); John C. Godbold, *Fact Finding by Appellate Courts—An Available and Appropriate Power*, 12 CUMB. L. REV. 365 (1982); John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409 (1981); Charles A. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). *See generally* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986).

bate is centered on the difficult distinction between fact and law, which is seen as the key to assigning tasks among the various actors in the system.[2]

The 1980s saw considerable development of the clearly erroneous standard, which applies when a trial judge is sitting without a jury. The clearly erroneous standard requires an appellate court to defer to a trial judge's fact-finding unless there is clear error.[3] There has been a flurry of recent Supreme Court cases interpreting the clearly erroneous standard, accompanied by the inevitable commentary that Supreme Court decisions engender. The Court has (1) held that the clearly erroneous standard applies to findings based on documentary evidence, a holding later codified in a 1985 amendment to Rule 52(a);[4] (2) held that the clearly erroneous standard of review does not apply to findings of "constitutional fact,"[5] but does apply to "ultimate" facts;[6] (3) suggested that mixed questions of law and fact may be subject to a less deferential standard of review;[7] and (4) generally attempted to restrain the courts of appeals in reviewing fact-finding for clear error.[8] Commentators have criticized the courts' interpretations of their responsibilities. For example, some have critized the constitutional

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2. Specifically, the jury rather than the judge is the fact-finder, though the judge declares the law. On appeal, the appellate courts are to defer to varying degrees to the fact-finding but not to the law-declaring. On the distinction between law and fact, see Francis A. Bohler, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924); James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890); Stephen A. Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CAL. L. REV. 1020 (1967).

3. The clearly erroneous standard is currently stated in FED. R. CIV. P. 52(a). Rule 52(a) states that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *Id.*

4. *See* Anderson v. City of Bessemer City, 470 U.S. 564 (1985). *Anderson* was decided before the 1985 amendment to Rule 52 took effect, but neither the Rule nor the case are the final word on the subject. Even if the clearly erroneous standard applies to documentary evidence, an appellate court may find it easier to determine that findings based on documentary evidence are clearly erroneous. This intermediate ground between strict applicability of the standard and no applicability has been termed the "gloss." *See* Wright, *supra* note 1, at 764; Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506, 517 (1963). *See infra* part III.C.2.

5. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 498-511 (1984). *See infra* part III.B.

6. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). *See infra* part III.A.

7. *See Pullman-Standard*, 456 U.S. at 286-87 n.16; *Bose*, 466 U.S. at 501. *See infra* part III.A.

8. *See* Inwood Labs, Inc. v. Ives Labs, Inc., 456 U.S. 844 (1982).

fact doctrine[9] and the Federal Circuit's alleged disregard of the clearly erroneous standard in patent cases.[10] Others have commented on the applicability of the clearly erroneous standard in specific kinds of cases.[11]

The cases and commentary that emerged from the last decade of doctrinal development help to illuminate parts of the problem. They help, for example, to categorize the various kinds of questions that appellate courts must review—law, fact, ultimate fact, constitutional fact, and mixed question. Categorization allows a rough judgment of the level of deference required—and, therefore, the allocation of authority between trial and appellate courts—for each of the categories. The cases and commentary, however, tend to focus on parts of the problem rather than on the whole. This Article will attempt a systematic analysis of the whole problem. It will examine the reasons for the allocation of authority, especially fact-finding authority, between trial and appellate courts and the values that underlie the allocation that is chosen, with a view to illuminating whether the chosen allocation is appropriate and why the allocation causes such controversy.

The thesis is that a blanket justification for allocating fact-finding authority to the trial court is difficult to find, and therefore too slippery for the appellate courts to handle cleanly. Part of the problem may be that the system concentrates on distinguishing fact and law and does not give adequate consideration to the relationship between them. Judicial law-declaring is not done in a vacuum: it is dependent upon the facts of the case before the court. Development of legal doctrine by judges takes place on a case-by-case basis, with each case presenting its own unique facts. Appellate courts, which are primarily responsible for the declara-

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9. *See* Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985).

10. *See* Edward V. Filardi, *Appellate Review of Patent Bench Trials: Is the CAFC Following Rule 52(a)?*, *in* CURRENT DEVELOPMENTS IN PATENT LAW, at 9 (PLI Course Handbook Series No. 213 (1985)); FOURTH ANNUAL JUDICIAL CONFERENCE OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT, 112 F.R.D. 439, 609-19 (1986); *see also* Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809 (1986) (court of appeals failed to mention Rule 52(a) when it found that the district court erred on a finding of obviousness); Maureen McGirr, Note, Panduit Corp. v. Dennison Manufacturing Co.: *De Novo Review and the Federal Circuit's Application of the Clearly Erroneous Standard*, 36 AM. U. L. REV. 963, 969-72 (1987).

11. *See, e.g.*, Charles R. Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases—Limiting the Reach of* Pullman-Standard v. Swint, 58 TUL. L. REV. 403 (1983); Burton Jay Rubin, *The Role of the Clearly Erroneous Standard of Federal Rule of Civil Procedure 52(a) in Reviewing Trial Court Determinations of Likelihood or No Likelihood of Confusion*, 74 TRADEMARK REP. 20 (1984) (trademarks).

tion of law, are permitted free review of questions of law, but are limited to the most restricted review of findings of fact. Because the facts are so important to the definition of the legal principle at issue, however, it is not surprising that appellate courts have found many ways to avoid the formal strictures on review of fact-finding. An examination of specific exceptions to the clearly erroneous standard shows that appellate courts are not simply ignoring their responsibilities under the clearly erroneous standard, but are trying to reconcile conflicting parts of their job.

In developing this thesis, the focus will be on fact-finding by judges, reviewable under the clearly erroneous standard, rather than on fact-finding by juries, review of which is limited by the Seventh Amendment.[12] Part II of the Article will describe the roles of appellate courts, focusing on the rationales for allocating authority between trial and appellate courts and on the sometimes conflicting values that underlie the rationales. That analysis will help to focus the tension within appellate courts over the extent of their review authority. Part III will apply the principles developed in Part II to recent cases and commentary on the clearly erroneous standard.

## II. THE ROLES OF APPELLATE COURTS

### *A. The Role of Standards of Review*

Standards of review serve to allocate decision-making responsibility among the various levels of courts in a hierarchical judicial system. A standard of review that calls for considerable deference to trial level decision-makers places primary responsibility for resolving disputes in the trial courts. By contrast, a standard of review that allows non-deferential review by appellate courts places primary decision-making authority in the appellate courts.[13]

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12. The Seventh Amendment says:

> 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.*

U.S. CONST. amend. VII (emphasis added). The Seventh Amendment does not govern bench trials, but appellate courts have developed rules that limit their review of fact-finding by trial judges. *See infra* part II.C.1.

13. Practical considerations can also affect the allocation of decision-making authority among judicial levels. For example, the United States Supreme Court can hear only about 170 full cases every year. *See* BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1989, at 179 (109th ed. 1989) [hereinafter STATISTICAL ABSTRACT]. The courts of appeals are necessarily the courts of last resort for the thousands of cases every year that cannot be resolved by the Supreme Court. Practical considerations, however, particularly cost, may limit even the number of cases that get to the appellate courts.

The system of allocation that has developed in the United States is much more complex than this capsule summary suggests. Several standards of review operate in American judicial systems.[14] The various standards allocate responsibility for different kinds of issues and the operation of the standards has generated considerable controversy. This section will present a catalog of standards of review and discuss how they operate to allocate decision-making authority.

## 1. Standards of Review

The various standards of review in civil actions occupy places along a continuum from no review at all to full review. In theory, however, most standards of review are clumped at one end of the continuum; most require substantial deference to trial court decisions. Figure 1 shows the continuum. The various standards of review are placed in order of the (theoretical) amount of deference paid to trial court decisions. Each is accompanied by an example of the kind of decision that is accorded that standard of review.

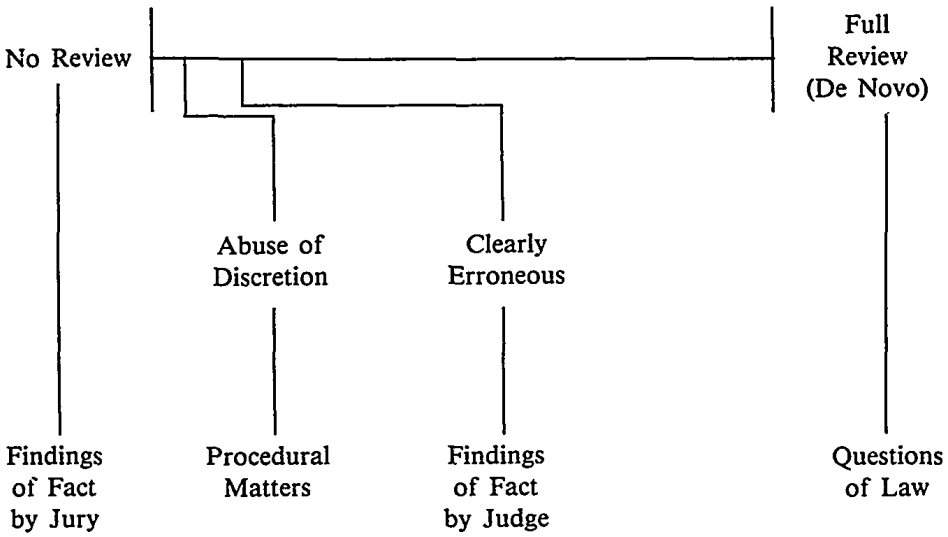


Figure 1. Continuum of Review Showing Standards of Review and the Subject Matter to Which the Standards Apply

At the extreme of complete deference is fact-finding by juries. Because the Seventh Amendment provides that facts found by

14. This Article will focus on federal courts, but similar considerations apply to state courts.

juries cannot be re-examined other than according to the rules of common law,[15] and because common-law rules in effect in 1791 did not permit appellate tribunals to review fact-finding by juries,[16] appellate courts give virtually complete deference to fact-finding by juries.[17] Review of trial court decisions on questions of law, which are accorded no deference at all, is at the opposite extreme.

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15. U.S. CONST. amend. VII.

16. *But see infra* note 17. This extreme common law deference to jury verdicts was itself rather late in developing. Early jurors were more like witnesses than fact-finders, and they were subject to a procedure known as "attaint," which charged them with perjury for reaching a wrong verdict. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 131-33 (5th ed. 1956). With the famous *Bushel's Case* in 1670, however, the jury came to be viewed as independent—an important safeguard against political oppression. *Id.* at 134-38. While attaint was still a potential threat, it was not much in use by then, so the decision in *Bushel's Case* that a jury could disregard the court's direction was significant. *See id.* at 134. For a discussion of the state of appellate procedure in England and America in the eighteenth century, see ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 38-106 (1941). *See also* LLOYD E. MOORE, THE JURY 97-116 (2d ed. 1988).

17. There is, however, substantial judicial control over jury verdicts. A trial judge can, for example, direct a verdict or grant a motion for a judgment notwithstanding the verdict (j.n.o.v.). *See* FED. R. CIV. P. 50. The directed verdict was available at common law, though its operation was more restricted than it is today. *See* Galloway v. United States, 319 U.S. 372, 396-405 (1943) (Black, J., dissenting). Technically, directed verdict and j.n.o.v. do not concern fact-finding, but rather the *legal* sufficiency of the evidence. Granting these motions is a statement by the trial judge that the evidence offered in support of the party's claim is not, as a matter of law, sufficient to support the claim. *See, e.g.*, Rhea v. Massey-Ferguson, Inc., 767 F.2d 266 (6th Cir. 1985); Dr. Franklin Perkins School v. Freeman, 741 F.2d 1503 (7th Cir. 1984); Newton v. G.F. Goodman & Son, Inc., 519 F. Supp. 1301 (N.D. Ind. 1981). Grant or denial of these motions is reviewable on appeal under the de novo standard, because the decision is a question of law, not of fact. *See, e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951); Smith v. Schweiker, 728 F.2d 1158, 1162 (8th Cir. 1984); Clark v. Heckler, 733 F.2d 65, 68 (8th Cir. 1984); Gatenby v. Altoona Aviation Corp., 407 F.2d 443, 445-46 (3d Cir. 1968); Mihalchak v. American Dredging Co., 266 F.2d 875, 877 (3d Cir.), *cert. denied*, 361 U.S. 901 (1959). A trial judge can also grant a new trial, either for error in the original trial or, more significantly, because she believes that the verdict is against the great weight of the evidence. *See* FED. R. CIV. P. 59; Coffran v. Hitchcock Clinic, 683 F.2d 5 (1st Cir. 1982); Eastern Airlines v. Union Trust Co., 239 F.2d 25, 30 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 942 (1957); Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 354 (4th Cir. 1941). In theory, this does not constitute review of the jury's fact-finding within the meaning of the Seventh Amendment, because the judge is not substituting her judgment for that of the jury, but is merely requiring that another jury consider the matter. The ultimate decision will be by a jury, not by a judge. *See* Phillip B. Scott, *Jury Nullification: An Historical Perspective on a Modern Debate*, 91 W. VA. L. REV. 389 (1988). Appellate courts can then review the judge's decision on these motions. Decisions on a motion for new trial are generally reviewed on an abuse of discretion standard, which presumably means that they are rarely overturned. *See* STEVEN A. CHILDRESS & MARTHA S. DAVIS, 1 STANDARDS OF REVIEW 325-38 (1986). *See generally* Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before Trial*, 47 VA. L. REV. 218 (1961); Louis, *supra* note 1; Wright, *supra* note 1.

The other standards of review shown on the continuum are quite deferential to the trial court decision, and therefore are shown close to the complete deference end. Of the two, the abuse of discretion standard is probably more deferential than the clearly erroneous standard.[18] The abuse of discretion standard allows trial courts to choose any of several options within a range of discretion, and the appellate court may not reverse simply because it would have chosen a different option.[19] Only when the trial court's choice is outside the range of permissible discretion can the decision be reversed.[20] The abuse of discretion standard applies to decisions on procedural issues—whether to hold separate trials,[21] whether to grant a new trial,[22] or what sanctions to apply for failing to comply with discovery requests.[23] It also applies to a trial judge's decision to grant or deny equitable relief.[24]

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18. It is difficult to place these two standards of review on the continuum, and the statement in the text may be more intuitive than scientific. The distinction between the two is difficult to draw. 1 CHILDRESS & DAVIS, *supra* note 17, at 287-94. Neither the abuse of discretion standard nor the clearly erroneous standard is susceptible of exactitude in theory or practice. *Id.* at chs. 2, 4. Both standards are, however, quite deferential in practice. *See also* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447, 2458 (1990) ("When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous."). The issue in *Cooter* was what standard of review applies to a judge's imposition of Rule 11 sanctions. The decision on Rule 11 sanctions has factual, procedural, and legal elements; perhaps this hodgepodge explains why the discussion of standard of review in *Cooter* is somewhat confused.

19. *See, e.g.*, Darnell v. City of Jasper, 730 F.2d 653, 655 (11th Cir. 1984); Mendoza v. United States, 623 F.2d 1338, 1347 (9th Cir. 1980), *cert. denied sub nom.* Sanchez v. Tucson Unified Sch. Dist. No. 1, 450 U.S. 912 (1981).

20. Reversal for abuse of discretion is rare, but it does occasionally happen. *See, e.g.*, Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981), *cert. denied*, 455 U.S. 993 (1982); Smith v. Widman Trucking & Excavating, 627 F.2d 792, 795-96 (7th Cir. 1980); Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1357 (9th Cir. 1978); Douglas v. Beneficial Fin. Co., 469 F.2d 453, 454 (9th Cir. 1972).

21. *See, e.g.*, *In re* Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982), *cert. denied sub nom.* Bryant Elec. Co. v. Kiser, 461 U.S. 929 (1983); Arnold v. Eastern Air Lines, 681 F.2d 186 (4th Cir. 1982), *cert. denied sub nom.* Aetna Cas. & Sur. Co. v. United States, 460 U.S. 1102 (1983), *reh'g granted*, 712 F.2d 899 (4th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

22. *See, e.g.*, McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1983); Spurlin v. General Motors, 528 F.2d 612 (5th Cir. 1976).

23. *See, e.g.*, Lew v. Kona Hosp., 754 F.2d 1420 (9th Cir. 1985); Tamari v. Bache & Co., 729 F.2d 469 (7th Cir. 1984). *See generally* Steven A. Childress, *A Standards of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319, 336-39 (1989).

24. *See, e.g.*, Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990); Roland Mach. Co. v. Dresser Indus., 749 F.2d 380 (7th Cir. 1984).

The clearly erroneous standard, which applies to fact-finding by a trial judge sitting without a jury,[25] is the most problematic of these standards, and the one that is the focus of this Article. Defining the clearly erroneous standard, the Supreme Court, in an early opinion, stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."[26] This standard requires considerable deference to fact-finding by a trial judge.[27] Although some examination of the evidence is required, an appellate court cannot reverse a trial judge's fact-finding simply because it would have found the facts differently.[28] Thus, of the four standards of review shown on the continuum, all are deferential to trial court decisions except the de novo standard, which applies to questions of law.[29]

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25. *See* FED. R. CIV. P. 52(a).

26. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). There might be some question about how this test differs from the substantial evidence test, which trial judges apply when considering a motion for a directed verdict or a motion for j.n.o.v. *See* 1 CHILDRESS & DAVIS, *supra* note 17, at 45-47. The substantial evidence test requires a judge to remove the fact-finding task from the jury when, though there is evidence on both sides of the issue, the evidence on one side is so inadequate as to be legally insufficient. *See, e.g.*, Maxey v. Freightliner Corp., 623 F.2d 395, 398 (5th Cir. 1980), *modified*, 727 F.2d 350 (5th Cir. 1984); Tackett v. Kidder, 616 F.2d 1050, 1053 (8th Cir. 1980); Boeing Co. v. Shipman, 411 F.2d 365, 375 n.16 (5th Cir. 1969). An example is a case in which accepting the evidence offered requires drawing an inference that is extremely unlikely. In Galloway v. United States, 319 U.S. 372 (1943), the evidence supporting plaintiff's claim of permanent mental disability beginning before 1919 consisted of inconclusive testimony about the plaintiff's condition from before 1919 through 1922, followed by a gap of eight years about which no testimony was offered, though plaintiff's wife was available and could have testified. The Court held that an inference of permanent mental disability beginning before 1919 would have had to leap too large a gap, and was legally improper. *Id.* at 385-86. The clearly erroneous standard also allows reversal when there is evidence to support the trial judge's decision, but the appellate court does not have to find the evidence legally insufficient. *See* 1 CHILDRESS & DAVIS, *supra* note 17, at 45-47. Thus, it should be easier for the appellate court to reverse a finding as clearly erroneous than for a trial judge to take a case away from the jury.

27. *See, e.g.*, Lewis v. Timco, Inc., 736 F.2d 163, 166 n.2 (5th Cir. 1984); Vaughn v. Westinghouse Elec. Co., 702 F.2d 137, 139 (8th Cir. 1983), *cert. dismissed*, 466 U.S. 521 (1984); Miller v. United States, 587 F.2d 991, 994 (9th Cir. 1978); Daniels v. Hadley Memorial Hosp., 566 F.2d 749, 756-57 (D.C. Cir. 1977); General Elec. Credit Corp. v. Robbins, 414 F.2d 208, 211 (8th Cir. 1969); Campbell v. Campbell, 170 F.2d 809, 810 (D.C. Cir. 1948).

28. *See, e.g.*, Anderson v. Bessemer City, 470 U.S. 564, 573 (1985); Martin v. United States, 586 F.2d 1206, 1211 (8th Cir. 1978); Floyd v. Segars, 572 F.2d 1018, 1022 (5th Cir. 1978). *See generally* 1 CHILDRESS & DAVIS, *supra* note 17, at 40-42.

29. While not the subject of this Article, standards of review for decisions by administrative agencies deserve a brief discussion as well. Agencies are considered to have

## 2. How Standards of Review Allocate Decision Authority

The initial decision on any issue, whether of fact, law, or procedure, is made in the trial court.[30] If there is no appeal, the trial court's ruling will be the last word on the subject in the context of that case. If there is an appeal, however, a non-deferential standard of review, such as the de novo standard, means, in theory, that the trial court's decision is irrelevant to the appellate court's consideration of the issue. If the appellate court disagrees with the trial court, the decision will be reversed. A non-deferential standard ensures that the appellate courts have an unfettered power to determine the issue. A deferential standard, such as the abuse of discretion standard, means that the trial court's decision is likely to stand even if the appellate court disagrees with it. A deferential standard limits decisional power in the appellate court in favor of the trial court.

The continuum of standards of review shown in Figure 1 demonstrates that decisions on questions of law belong squarely in the appellate courts. Appellate courts have the power to decide ques-

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expertise on the fact-finding that they do, the interpretation of the laws that they enforce, and the rules that they make to enforce the law. For that reason, courts are generally deferential to agency decisions, even as to questions of law. *See generally* RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 350-417 (Harry W. Jones ed., 1985). Nevertheless, there are a variety of standards of review for agency decisions as well, and those standards have generated considerable commentary. *See id.*; James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 VA. L. REV. 399 (1986); James T. O'Reilly, *Judicial Review of Agency Deregulation: Alternatives and Problems for the Courts*, 37 VAND. L. REV. 509 (1984); Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387 (1987); Mark V. Tushnet, *Judicial Review*, 7 HARV. J.L. & PUB. POL'Y 77 (1984).

30. In the American system, the trial courts have become the primary vehicles for meeting the individual and societal needs for fair, efficient, and peaceful resolution of disputes. *See* Louis, *supra* note 1. Many cases never get to the appellate courts, either because the cases are settled, *see* STATISTICAL ABSTRACT, *supra* note 13, at 171 (from 1970 to 1986, an average of only 6.5% of all cases filed reached trial), or because they are not appealed following the trial court's decision, *see id.* (from 1970 to 1986, there were 116,400 trials, and only 31,464 appeals). Furthermore, most cases that are appealed are affirmed on appeal. *See id.* at 179. Thus, as a practical matter, trial courts are usually ultimately responsible for the decisions on fact and law that resolve the litigants' dispute. Self-help, in the form of alternative dispute resolution, is also becoming very popular, in part because judicial dispute resolution has gotten so expensive, time-consuming, and often bitter. *See generally* CPR LEGAL PROGRAM, ADR AND THE COURTS: A MANUAL FOR JUDGES AND LAWYERS (1987); STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION (1985); RESOLVING DISPUTES WITHOUT LITIGATION (BNA Special Report 1985); John V. O'Hara, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U. PA. L. REV. 1723 (1988).

tions of law without regard for the trial court's ruling.[31] All other questions, to a considerable degree, belong in the trial court. The appellate court's power to overturn trial court fact-finding or decisions on procedural matters is seriously circumscribed. That power, in essence, exists only when the appellate court is certain of the trial court's error.

This discussion suggests that while appellate courts are popularly thought to exist to ensure that the trial court properly resolved the dispute, their role needs to be defined more particularly. There are, in fact, two roles for appellate courts: declaration of legal principles and correction of error.[32] Of these, declaration of legal principles appears to be the primary role of appellate courts. It is the error-correction role, however, that creates most of the controversy.[33]

### 3. Distinguishing Between Law and Fact

Much of the controversy over standards of review is simply definitional. In order to apply a non-deferential standard of review

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31. *See, e.g.*, State Distribs., Inc. v. Glenmore Distilleries Co., 738 F.2d 405, 412-13 (10th Cir. 1984); United States v. Cruz, 581 F.2d 535, 541 (5th Cir. 1978). The Supreme Court, of course, has the ultimate law-declaring authority, but because so few cases are considered by the Supreme Court, the law-declaring authority of middle-tier appellate courts has become much more important.

32. *See* Carrington, *supra* note 1; Louis, *supra* note 1, at 1006. Middle-tier courts have both roles. Upper-tier courts, like the United States Supreme Court, serve primarily the law-declaration role. This distinction in the roles goes back to the origins of middle-tier courts of appeals. *See* POUND, *supra* note 16, at 370-71. *See also id.* at 3 (identifying four functions: "(1) review of the process of ascertaining the facts, (2) review of the finding of the applicable law, (3) review of the application of the law to the found facts, and (4) in the common-law system, authoritative ascertainment and declaration of a legal precept for such cases as the one in hand, where none has been clearly promulgated.").

33. The error-correction role can be played even when cases are not appealed. Theoretically, as long as appellate supervision is available, trial courts will be more careful about the initial dispute resolution. *See* Andrew S. Watson, *Some Psychological Aspects of the Trial Judge's Decision-Making*, 39 MERCER L. REV. 937, 949 (1988) ("The inevitable narcissistic desire not to be reversed will influence greatly the judge's writing process. While appeals offer the possibility of personal psychological ratification, they also carry the risk of revealing 'reversible error.' "). *But see* Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 86-93 (1985) (disputing the theory).

There is controversy over the law-declaration role, of course, but it concerns whether a judicial lawmaking power exists and, if so, the extent of that power. *See, e.g.*, Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 306-07 (1988); Sol Wachtler, *Judicial Lawmaking*, 65 N.Y.U. L. REV. 1 (1990). The locus of this power, however, is not controversial. I have not found an argument that the judicial lawmaking power belongs in trial courts, though there are arguments that the real judicial power relates to fact-finding rather than lawmaking and is therefore, in fact, in the trial courts. *See, e.g.*, JEROME FRANK, COURTS ON TRIAL (1949).

to questions of law and a deferential standard of review to questions of fact, one must distinguish questions of law from questions of fact. That distinction, however, is notoriously difficult.[34] Fact and law are often intertwined, so that the issue is really a mixed question, containing elements of fact and elements of law.[35] Even if the two issues can be distinguished, legal errors may profoundly infect the fact-finding. If fact-finding was wrongly focused because of the legal error, the appellate court may send the case back to the trial judge to conduct a second trial.[36] Sometimes the fact-finding will be complete, but the trial judge will have applied the wrong legal principle, which will enable the court of appeals simply to reverse the trial court's judgment.[37] The court of appeals must sometimes make hair-splitting decisions about what kind of case is before it. The need for these decisions makes it possible, in practice, for the courts of appeals to avoid the constraints on their review power, at least in some cases.[38]

While the definitional problems are significant,[39] equally important are the practices and policies that inform the decision to use the distinction between fact and law to allocate authority between trial and appellate courts. The remainder of this Article will be

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34. *See, e.g.*, Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 13 (1922) ("Statutes should avoid reference to the distinction between law and fact as a simple one."); Weiner, *supra* note 2; Carl C. Wheaton, *Manner of Stating Cause of Action*, 20 CORNELL L.Q. 185, 209 (1934) ("[I]n a multitude of instances, no general agreement as to whether a term states law or fact, evidentiary or ultimate, seems possible."); *see also* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982); Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219-20 (5th Cir. 1954); 5A JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 52.03[2] (2d ed. 1991). *See generally* Charles M. Leibson, *Legal Malpractice Cases: Special Problems in Identifying Issues of Law and Fact and in the Use of Expert Testimony*, 75 KY. L.J. 1 (1986); Janet S. Thomas, Comment, *Likelihood of Confusion Under the Lanham Act: A Question of Fact, A Question of Law, or Both?*, 73 KY. L.J. 235 (1984).

35. *See, e.g.*, *In re* Beverly Hills Bancorp, 752 F.2d 1334 (9th Cir. 1984); Leigh v. Engle, 727 F.2d 113 (7th Cir. 1984), *cert. denied*, 489 U.S. 1078 (1989); Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107 (7th Cir. 1975); Calleros, *supra* note 11; Donald R. Price, *The Conscience of Judge and Jury: Statutory Unconscionability as a Mixed Question of Law and Fact*, 54 TEMPLE L.Q. 743 (1981); Thomas, *supra* note 34.

36. *See* Dothan Coca-Cola Bottling Co. v. United States, 745 F.2d 1400 (11th Cir. 1984); Alexander v. Youngstown Bd. of Educ., 675 F.2d 787 (6th Cir. 1982). *But see* Jennings v. General Medical Corp., 604 F.2d 1300 (10th Cir. 1979).

37. *See* Santana, Inc. v. Levi Strauss & Co., 674 F.2d 269 (4th Cir. 1982); Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir.), *rev'd*, 455 U.S. 40 (1980); Tyler v. Insurance Co. of N. Am., 539 F.2d 1072 (5th Cir. 1976).

38. Many commentators have criticized the courts of appeals for ignoring those constraints. *See, e.g.*, Filardi, *supra* note 10; Wright, *supra* note 1.

39. This Article will make no attempt to try to resolve the problem of defining fact and law. Many have tried, and most have been stymied.

devoted to exploring those practices and policies and to applying them to current issues surrounding the clearly erroneous standard.

### *B. Creative Function of Appellate Courts*

Declaring the law is the creative function of the appellate courts. It is creative because declaring the law often means making law. In common-law systems, legal rules evolved through creative judicial lawmaking. Even when statutes or rules are at issue, judicial declaration of the statute's meaning as applied to a particular case plays a major role in our understanding of what the law is.[40]

#### 1. History and Current Rules

In some sense, the de novo standard is the oldest standard of review we use. Review of judicial decisions around the time of the Norman Conquest was achieved by accusing the original decision-maker of issuing a false judgment.[41] This apparently required an independent review of the original decision. At that time, however, no distinction was made between fact and law; the basis for the falsity of the judgment was not specified.[42] It seems that at the time there were no more deferential standards of review, and even the jury was subject to accusations of false judgment through the procedure known as attaint.[43] The jury's independence was not established until 1670.[44] Once the jury's independence was established, and once the jury was given responsibility for fact-finding

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40. There is a great deal of literature on the role of judges in lawmaking and in the interpretation of texts. *See, e.g.*, G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Charles D. Breitel, *The Lawmakers*, 65 COLUM L. REV. 749 (1965); Roger J. Traynor, *Statutes Revolving in Common-Law Orbits*, 17 CATH. U. L. REV. 401 (1968); Sol Wachtler, *supra* note 33.

41. *See* PLUCKNETT, *supra* note 16, at 93; POUND, *supra* note 16, at 25-26. This procedure can be traced to Roman law, *id.* at 7, and was prevalent in the Germanic tribes that settled England after the Romans left, *id.* at 25. The significance of the Norman Conquest is that the Conquest led to the centralization and consolidation of the common law. *See generally* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW (2d ed. 1981); PLUCKNETT, *supra* note 16; R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW (2d ed. 1988).

42. The distinction between law and fact did not become an established part of English jurisprudence until the thirteenth century. *See* PLUCKNETT, *supra* note 16, at 417-18. Even then, the division of responsibility between judge and jury continued to develop, with the distinction between law and fact becoming more critical as the jury became more independent of the judge. *See id.* at 136-38.

43. *See id.* at 131-33.

44. The independence of the jury was established with the famous *Bushel's Case*. *See id.* at 134-38.

and prevented from declaring law, the de novo standard remained only for questions of law.[45]

### 2. Rationale for the De Novo Standard

Appellate control over judicial lawmaking probably has a practical political origin. The early common-law judicial system in England was simply another creation of the king, who controlled the development of legal rights and remedies.[46] Authority over appeals from judgments had to be an important factor in maintaining that political control. As early as the reign of Henry I (1100-1135), writs of false judgment could only be brought in the king's courts, as opposed to the local courts that had existed in Anglo-Saxon England. This rule was firmly established by the Statute of Marlborough in 1267.[47] Although sovereign control over the development of legal principles might have been important in the original development of appellate procedures, it is less important when the judiciary is separate and independent from the legislative and executive branches of government.[48] Therefore, rationales must be found for the continued existence of de novo review of questions of law. Together, competence, fairness, and efficiency strongly support the use of de novo review for questions of law.

#### a. Competence

Of the three suggested rationales, competence is the weakest. It might be tempting to assert that the appellate courts are more competent to declare the law because they are better courts with better judges. There are, of course, fewer appellate than trial

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45. In equity, where there was no jury, the de novo standard was used to review decisions until, in the United States, the rules were changed to allow oral testimony in equity cases. *See infra* part II.C.1.

46. *See generally* PLUCKNETT, *supra* note 16, at 83-156; VAN CAENEGEM, *supra* note 41. The common law is generally dated from the Norman Conquest, which provided the impetus for centralization. The early Norman kings were able to achieve this centralization, in spite of a variety of local courts already in existence, in part by providing better procedures—specifically, trial by jury. *See* PLUCKNETT, *supra* note 16, at 81.

47. *See* PLUCKNETT, *supra* note 16, at 93, 156 n.2, 388.

48. This is not to say that such principles play no part in justifying the current system. Judges are part of the political establishment; they are appointed by the executive branch and confirmed by the legislature. Their views on what the laws should be have come to play an important role in determining their fitness for office, as is evident from the appointments made during the Reagan administration. Once in office, however, they are independent and cannot be removed simply because the executive branch or the legislature disagrees with their decisions.

judges, and that might make it likely that appellate judges as a group have stronger credentials than trial judges.[49] Nevertheless, there is a wide range of quality and experience at all levels, and any given trial judge may be more qualified to declare the law than any given appellate judge. Nor does experience necessarily make appellate judges better law-declarers than trial judges. All questions of law are decided initially in the trial courts, so trial and appellate courts are equally experienced at deciding legal issues. Indeed, trial judges likely have more experience because so many cases are not appealed, even when the case turns on a question of law. Appellate judges, on the other hand, may be able to devote more time and energy to analyzing questions of law because that is their primary task. The quality of their experience, if not the quantity, may make them better suited to resolving questions of law. It may be true that appellate judges are more competent to declare law, but if so, the advantage is slight. It is necessary, then, to look at concepts other than competence to justify the allocation of law-declaring authority to the appellate courts.

b. Fairness

The fairness ideal behind allocating lawmaking authority to appellate courts is the ideal of uniform legal principles: similar acts should have similar legal consequences throughout the country. If each trial-level court were considered a primary lawmaking body, the differences in the interpretation of federal law from one location to another would be much greater than they are.[50] But

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49. In the federal system, there are 572 authorized positions for trial judges and 179 authorized positions for appellate judges. *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 201, 104 Stat. 5089, 5098-5104. Trial judges receive an annual salary of $125,100, while appellate judges receive $132,700. JOHN CLEMENTS, TAYLOR'S ENCYCLOPEDIA OF GOVERNMENT OFFICIALS: FEDERAL AND STATE 281 (1991-92). The American Bar Association rates judicial nominees, but it appears that there is little difference in evaluating trial and appellate nominees. *See* STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3-4 (ABA 1988). On selection of federal judges, see SENATE COMM. ON JUDICIARY, HEARINGS ON THE SELECTION AND CONFIRMATION OF FEDERAL JUDGES, 96th Cong., 1st Sess. Serial No. 96-21 (1979); Elliot E. Slotnick, *Federal Appellate Judge Selection: Recruitment Changes and Unanswered Questions*, 6 JUST. SYS. J. 283 (1981); Lawrence E. Walsh, *The Attraction and Selection of Good District Court Judges*, 39 WASH. & LEE L. REV. 33 (1982). For an argument that special—and higher—qualifications need to be imposed on nominees for the Federal Circuit, see *Report Concerning the Nomination of Judges to the Court of Appeals for the Federal Circuit*, 70 J. PAT. & TRADEMARK OFF. SOC'Y 599 (1988).

50. Perfect uniformity is, of course, impossible to achieve. In some instances, federal law borrows from state law, meaning there will be regional variations even if federal law is interpreted uniformly. *See, e.g.*, 11 U.S.C. § 522(b) (1988) (bankruptcy exemptions). In

under common-law rules of precedent,[51] appellate court decisions are binding authority in regions comprising many trial court districts and can enhance uniformity in the interpretation of federal laws over a broader geographical range.[52]

c. Efficiency

Federal law is applicable throughout the country, and it is not only fairer but more efficient to have higher level courts interpreting that law. Higher level courts have a broader scope of authority, and an issue of legal interpretation can be resolved with just one case in an appellate court.[53] There is no need for repeated litigation in dozens of trial-level courts. Once an appellate court decides an issue of law, all trial courts within the appellate circuit

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1982, differences among the circuits in the interpretation of federal patent law prompted Congress to create the United States Court of Appeals for the Federal Circuit, to which all patent appeals are now routed. *See* 28 U.S.C. § 1295 (1988). *See generally* Ellen E. Sward, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 AM. U.L. REV. 385 (1984). Congress recently requested the Federal Judicial Center to conduct a study of the number and frequency of intercircuit conflicts in interpreting the law and report back to Congress by January 1, 1992. *See* Judicial Improvements Act of 1990, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 301, 104 Stat. 5089, 5104.

51. *See generally* James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution and the Supreme Court*, 66 B.U. L. REV. 345 (1986); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1986).

52. The Supreme Court, of course, is the ultimate arbiter of federal law. Uniformity is best guaranteed when it speaks. But the Supreme Court can hear only about 170 cases a year. *See* STATISTICAL ABSTRACT, *supra* note 13, at 179 (1989). In the absence of a Supreme Court decision, appellate courts, because of their broad regional authority, help to make the process fairer. Widespread uniformity in the interpretation of law does not guarantee uniformity in outcome. Fact-finding is still an inexact science, and often determines the outcome of cases. *See, e.g.*, FRANK, *supra* note 33, at 14-36.

53. This does not always occur, of course. Sometimes an interpretation of law will raise additional issues, or will itself be ambiguous. More litigation may then be required. Supreme Court opinions often create more work for lower courts and legislatures that struggle to understand and apply the Court's pronouncement. For example, the Supreme Court's 1986 decision that criminal restitution obligations were not dischargeable in a case under Chapter 7 of the Bankruptcy Code, Kelly v. Robinson, 479 U.S. 36 (1986), led to substantial subsequent litigation over whether such obligations were dischargeable in a Chapter 13 case. In 1990, the Court decided that they *were* dischargeable. *See* Pennsylvania Dep't. of Pub. Welfare v. Davenport, 110 S. Ct. 2126 (1990). Congress promptly reversed that decision by amending 11 U.S.C. § 1328 (1988) to prohibit discharge. *See* Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2685.

Notwithstanding that appellate interpretation sometimes raises additional issues, the judicial process would be much less efficient if the interpretative process occurred in each trial-level court. With broad appellate authority, interpretations of law will be binding even in those districts that have not litigated the issue. In those districts, at least, the expense of litigating the issue will be reduced, if not eliminated.

that decided the issue are bound by that interpretation.[54] Thus, appellate authority over law-declaration, coupled with rules of precedent that require lower courts to follow the appellate court's interpretation, can work a substantial savings in judicial resources.[55]

The fairness and efficiency rationales point strongly toward placing the law-declaring authority in the appellate courts. The competence rationale is not as persuasive, but given the likelihood of strong credentials and the substantial experience that appellate judges gain in declaring the law, they are at least arguably more competent to perform the task than are trial judges.

### 3. Values Underlying the Creative Function

The creative function of the courts serves the systemic need for having a means for announcing and clarifying legal principles. Legislatures are the primary lawmaking body, but they are unable to anticipate every permutation of human behavior. The pronouncements of the courts help, at the least, to fill in the gaps left in the statutes. Indeed, at its most innovative, as in the common law, the courts may substitute for the legislature altogether.[56] Thus, the courts are a lawmaking body, though their lawmaking function is circumscribed by the exigencies of the cases before them.[57] The facts that courts use to make law are not abstract or statistical, as they may be when the legislature makes law;[58] and they are defined, to a considerable extent, by the evidence and the argumentation that the parties make to the court.[59] Without the courts'

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54. Again, a distinction must be drawn between interpreting the law, which can be more efficiently done at the appellate level, and applying the interpretation to the case at hand. It would be an interpretation of law, for example, to decide that the term "employee" in a statute did not include independent contractors. On the other hand, it would be an application of the law to decide whether a particular person was an employee or an independent contractor within the meaning of that statute. The latter implicates fact-finding and requires feats of analogy and distinction, and may not be as efficiently done at the appellate level. The line between interpreting the law and interpreting the case at hand, however, can be very hazy.

55. The fairness and efficiency rationales for the present allocation of lawmaking authority in the courts are both dependent upon the hierarchical court structure and the common-law doctrine of precedent.

56. *See generally* Sward, *supra* note 33, at 306-07.

57. *See generally* FRANK, *supra* note 13; Wachtler, *supra* note 33.

58. *See* Edwin L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372-75 (1989).

59. *See* Wachtler, *supra* note 33, at 15-21; Alan Watson, *Legal Evolution and Legislation*, 1987 B.Y.U. L. REV. 353, 353. Courts of appeals cannot consider matters not raised in the trial court. *See* Singleton v. Wulff, 428 U.S. 106 (1976); Martinez v. Mathews, 544 F.2d 1233 (1976); FED. R. EVID. 103(a)(1). There is substantial debate over the proper role of judges. *See* Sward, *supra* note 33, at 306 n.23.

creative function, however, society may find it more difficult to order its affairs. The creative function, therefore, fulfills a societal need.[60]

The creative function serves few individual interests and does not reflect individualistic values. The individual is interested in justice in his own case and has no more interest in the lawmaking that may come out of his case than any other citizen would have. The individual interest in justice serves primarily as a check on overzealous creative impulses. For example, a court might enunciate a new legal principle that could not have been anticipated by the parties. The individual interest in justice might induce the court, in these circumstances, to make the ruling prospective so that the parties before the court are not harmed by a retroactive pronouncement of law.[61] The courts, in contrast to the individual, have a much broader perspective and must be cognizant of the broader impact of their decisions.

### *C. Corrective Function of Appellate Courts*

While appellate courts may correct trial court errors in declaring the law or making procedural choices, this Article uses the term "corrective function" to refer to the appellate courts' role in correcting fact-finding errors.[62] The term "corrective function"

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60. The opportunity for creativity is, of course, open to all levels of courts. The trial court must take the initial leap into innovation, but it is the appellate courts that decide whether to ratify the leap. Middle-tier appellate courts are in a unique position in this respect. Often, the middle-tier appellate courts are where an issue gets thrashed out. The Supreme Court may step in only when an issue has squarely and irredeemably split the circuits. If no split develops, the consensus of appellate courts may well be the final word on the matter.

61. *See, e.g.*, Chevron Oil Co. v. Huson, 404 U.S. 97 (1971); EDGAR BODENHEIMER, JURISPRUDENCE 431 (1974); *see also* Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1 (1960). One commentator argues that justiciability rules, such as rules governing standing, are important checks on the judicial lawmaking power. *See* Wachtler, *supra* note 33, at 19-21. These rules prevent judges from making law when there is no concrete dispute before them. Judge Wachtler favors limited judicial lawmaking, which he sees as justified by the nature of law as "spring[ing] from the relations of fact which exist between things." *Id.* at 17 (quoting CARDOZO, *supra* note 40, at 122 (quoting P. VANDER EYCKEN, METHODE POSITIVE DE INTERPRETATION JURIDIQUE 401 (1907))). Judges, whose task is to adjudicate "the relations of fact which exist between things," are, then, necessarily thrust into the lawmaking role on occasion.

62. This Article will not focus on review of procedural decisions, which uses the abuse of discretion standard. Briefly, however, it can be seen that competence, fairness, and efficiency all favor limited review of a trial judge's procedural decisions. Trial judges are more competent to make such choices because they are experienced in conducting trials and because they are thrust into the middle of the case before them, giving them a perspective that the appellate judges lack. For the same reasons, it is more fair to let trial

may overstate the appellate courts' role in reviewing for error. An appellate review of a trial court's findings of fact may result in a correction of error, but an appellate court could also make an error where none had existed.[63] Fact-finding is an inexact science; perhaps that is why appellate courts exercise such caution in their review of fact-finding. Indeed, both the history of appellate review of judicial fact-finding and the rationales and values that inform such review are far more complex and ambiguous than is the case for the law-declaration role. This section will explore those issues, and contrast them with the appellate courts' law-declaration role.

### 1. History and Current Rules

Historically, the scope of an appellate court's corrective function was dependent on whether the case arose in law or equity. When the case arose in law, fact-finding was the province of the jury rather than the judge,[64] while the judge retained authority over questions of law.[65] Specifically, the jury found the facts, and its fact-finding was not subject to review on appeal; the judge declared the law, and his declaration of law was subject to de novo review on appeal.[66] In equity cases, where there was no jury, fact-finding was done by the judge on a written record.[67] Review of equity fact-finding was de novo, done without deference to the trial judge.[68] The system was relatively simple to administer. The standard of review for law cases depended on whether the issue on

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judges decide procedural issues. They can more easily make judgments about the parties' procedural strategy and about what is fair. Finally, it would be seriously inefficient to have appellate judges freely reviewing trial judges' procedural decisions, because review of procedural decisions may require that parts or all of the trial court proceedings be repeated. This repetition should be the exception rather than the rule.

63. *See* Dalton, *supra* note 33, at 73-86.

64. The distinction between fact and law was not made in the early days of jury trials in England. The focus of this Article is on American appellate procedure, but American procedure is, of course, an outgrowth of English procedure. The distinction between law and fact initially developed to identify the tasks of judge and jury. *See* PLUCKNETT, *supra* note 16, at 417-18.

65. The term "law" is being used in two different senses here. When contrasted with "fact" it refers to the principles of statutory and case law that govern the matter presented to the court. When contrasted with "equity" it refers to the system of courts and principles comprising the old English common law and its progeny, including American common law.

66. *See* W. R. CORNISH, THE JURY 126-48 (1968) (jury's role in preventing political abuse).

67. *See* Note, *supra* note 4, at 508-09.

68. POUND, *supra* note 16, at 300; Note, *supra* note 4, at 508 n.10; *see also* LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 165 (1973) (citing WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 426 (1852)).

appeal was legal or factual; review of equity cases was always de novo. The applicable standards of review, however, were generally at the extremes of the continuum in Figure 1. The appellate tribunal conducted either a full review or no review at all.

Two changes in court structure and practice caused standards of review to become more complex. First, equity courts began to hear oral testimony rather than rely strictly on a written record.[69] Because a trial judge who observed a witness was considered better able to assess the witness's credibility than was an appellate panel with just a written record of that testimony, courts of appeals developed a more deferential standard of review for equity cases in which oral testimony was part of the evidence.[70] A trial judge's fact-finding under these circumstances was not to be set aside unless clearly erroneous.[71] An assessment of the relative competence of courts to evaluate evidence is, thus, the primary force behind development of the clearly erroneous standard.

The second change was that judges were authorized to conduct bench trials in law cases as well as equity. When bench trials occurred, whether in law or equity, the appellate courts were just as deferential to judges' fact-finding as they were to juries'.[72] The denouement of these changes came in 1938, when law and equity

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69. This occurred with the adoption of the Federal Equity Rules in 1912. *See* Calleros, *supra* note 11, at 410; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 100 (1923); *see also* Note, *supra* note 4, at 509 n.16.

70. *See* POUND, *supra* note 16, at 300; Note, *supra* note 4, at 510-11; *see also* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Much has been written about the development of the clearly erroneous standard and its relationship to other standards of review, and this Article will not independently examine that history. Some articles that have delineated the history especially well include, Calleros, *supra* note 11; Charles E. Clark & Ferdinand F. Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190 (1937); Note, *supra* note 4; Susan R. Petito, Note, *Federal Rule of Civil Procedure 52(a) and the Scope of Appellate Fact Review: Has Application of the Clearly Erroneous Rule Been Clearly Erroneous?*, 52 ST. JOHN'S L. REV. 68 (1978). Appellate review itself has a long history, *see* POUND, *supra* note 16, and the applicable standard of review is best understood in light of that history.

71. *See* Dower v. Richards, 151 U.S. 658 (1894); Zeckendorf v. Johnson, 123 U.S. 617 (1887); Colby v. Riggs Nat'l Bank, 92 F.2d 183 (D.C. Cir. 1937); Note, *supra* note 4, at 510-11. The clearly erroneous standard, therefore, originated judicially. It did not appear as a written rule until promulgation of the Federal Rules of Civil Procedure in 1938. *See* FED. R. CIV. P. 52(a). *See generally* William Wirt Blume, *Review of Facts in Non-Jury Cases*, 20 J. AM. JUD. SOC'Y 68 (1936); Clark & Stone, *supra* note 70.

72. The original authorization by Congress for bench trials in law cases occurred in 1865. *See* Act of March 3, 1865, ch. 86, § 4, 13 Stat. 501. The 1865 statute provided that bench trials in law cases would have the same effect as trial by jury. *Id.* Thus, review of the judges' verdicts would be virtually unreviewable as to the facts. *See* Clark & Stone, *supra* note 70, at 197-99.

were merged under the Federal Rules of Civil Procedure.[73] When that happened, a choice had to be made between the complete deference afforded judicial fact-finding in law cases and the varieties of equity review. The Supreme Court selected the clearly erroneous standard,[74] and that remains the standard of review for fact-finding in bench trials, whether the issue is legal or equitable.

### 2. Rationale for Allocation of Authority

As indicated earlier, considerations of competence, fairness, and efficiency govern allocation of fact-finding authority between the courts, just as those considerations govern allocation of law-declaring authority. As to the law-declaring authority, these considerations favor allocating authority to the appellate courts. With respect to fact-finding, however, the interaction among the various considerations is much more complex, giving rise to confusion and disagreement about the proper allocation of authority—and, therefore, the proper standard of review—for review of fact-finding.

#### a. Competence

The original justification for the clearly erroneous standard of review in American equity courts was that trial judges were more competent to weigh credibility when the evidence was based on oral testimony.[75] It is widely believed that a judge or jury with the opportunity to observe the demeanor of witnesses is more competent to judge the credibility of the witnesses than is a judge who simply reads a written record of the testimony.[76] Whether this belief is true is another question: some witnesses are good liars, and some truthful witnesses are so nervous that they give the impression of lying.[77] Even eyewitness testimony is often wrong.[78]

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73. The Supreme Court was authorized to promulgate rules of procedure for the federal courts by the Rules Enabling Act in 1934. *See* Rules Enabling Act of 1934, Pub. L. No. 73-415, ch. 651, 48 Stat. 1064. The Federal Rules of Civil Procedure took effect on September 16, 1938. *See* Henry P. Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 512 (1963). *See generally id.* at 477-517.

74. *See* Note, *supra* note 4, at 511-16. *See generally* Blume, *supra* note 71; Clark & Stone, *supra* note 70.

75. *See* Note, *supra* note 4, at 510-11.

76. *See, e.g.*, Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980); Sicola Oceanica, S.A. v. Wilmar Marine Eng. & Sales Corp., 413 F.2d 1332, 1333 (5th Cir. 1969); Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954).

77. *See, e.g.*, Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 LAW & PSYCH. REV. 83, 87-91 (1984); *see also* Robert S. Feldman & Richard D. Chesley, *Who is Lying, Who is Not: An Attributional Analysis of the Effects of Nonverbal Behavior on Judgments of Defendants' Believability*, 2 BEHAVIORAL SCI. &

Perhaps judges who gain experience in evaluating such witnesses are more likely to be right than triers of fact with little experience. It is, however, almost impossible to test the correctness of the judge's determination of a witness's credibility.[79] Thus, given the probable advantage from observing the witness, final fact-finding authority is probably best left with the trial judge, at least when credibility is an issue.

It is sometimes said that on matters of common human experience, appellate courts should defer to the fact-finder.[80] For example, when the fact-finder is asked to decide whether certain subsidiary facts justify the inference that the defendant intended to discriminate, common human experience helps the fact-finder evaluate the significance of the subsidiary facts. When the fact-finder is a jury, the appellate panel's deference to the common wisdom of six to twelve citizens may make some sense.[81] It is not clear, however, why a three-judge appellate panel should defer to a single trial judge on matters of common experience. The trial judge's personal experience may be highly uncommon. The wisdom of a panel of judges may be especially helpful in evaluating inferences from undisputed facts or from documentary evidence. That may be one reason why there was difficulty in determining the proper standard of review for findings based on indisputed facts or documentary evidence.[82]

Judges at any level may also be more competent because of their own specialization. A judge with a background in civil engineering will be more competent to evaluate the evidence relating to a bridge collapse, for example, than a judge schooled in philosophy. Traditionally, however, lawyers and judges have shied

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L. 451 (1984) (a truthful witness can also be mistaken and that may be more difficult to determine).

78. *See* Elizabeth F. Loftus, *Eyewitness Testimony and Event Perception*, 8 U. BRIDGEPORT L. REV. 7 (1987); Jacqueline Marks Bibicoff, Comment, *Seeing is Believing? The Need for Cautionary Jury Instructions on the Unreliability of Eyewitness Identification Testimony*, 11 SAN FERN. V. L. REV. 95 (1983).

79. Furthermore, the proposition suggests that a trial judge needs some experience before those distinctions can be made with confidence. This might suggest that a newly appointed trial judge is entitled to less deference on those judgments than a trial judge with years of experience. Appellate courts have never taken that view.

80. *See, e.g.*, Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984).

81. *See, e.g.*, MOORE, *supra* note 68, at 164 (quoting Devlin, "I think it must be agreed that there are some determinations in which twelve minds are better than one, however skilled, and most people would accept that the determination whether a witness is telling the truth is one of them."); Calleros, *supra* note 11, at 419.

82. *See infra* part III.C.2.

away from relying on the individual competencies of judges; if anything, too much knowledge of the subject in dispute is viewed with distrust.[83] The adversary system, to function according to its theory, requires that the fact-finder be more or less a blank slate.[84] Nevertheless, appellate judges may be tempted to more free review of fact-finding in an area where they have some particular expertise. Until recently, such particular expertise had to be largely coincidental. With the formulation of the Federal Circuit,[85] however, a federal appellate panel is in place with particular expertise in a variety of cases.[86] Judges on a specialized court may have a deeper understanding of the facts of the cases brought before them and a greater willingness to find clear error. It is not surprising that complaints have begun to surface that the Federal Circuit is ignoring the clearly erroneous standard.[87]

Competence considerations do not point clearly to one level of courts in fact-finding. Indeed, those considerations offer less guidance for fact-finding than they do for law-declaring because there are more variables with regard to fact-finding. Nevertheless, given that some allocation of resources and authority had to be made, the assignment to the trial courts of primary fact-finding authority and to the appellate courts of primary lawmaking authority is not

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83. Specialized courts, where the judges are expected to have or develop an expertise in a specific area, have long been viewed as undesirable. *See, e.g.*, COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reported in* 67 F.R.D. 195, 234 (1976); Robert E. Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U. L. REV. 1 (1987); Simon Rifkind, *A Specialized Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951). *But see* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 153-71 (1973); Ellen R. Jordan, *Specialized Courts: A Choice?*, 76 NW. U. L. REV. 745 (1981). *See generally* Sward, *supra* note 50. The principal argument against specialized courts seems to be that the judges would lack the broad perspective that is so important in judging. *See id.* This is essentially an argument that they lack the judicial equivalent of common human experience.

84. The judge in the adversary system is supposed to be a passive decision-maker who knows nothing about the dispute until the parties present their evidence to him. *See* Sward, *supra* note 33, at 312-13. Knowing nothing of the dispute may also mean knowing little or nothing about the field of human activity in which the dispute arose. If the judge knows little about that field, the parties may believe that they have a better chance of educating him.

85. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. *See generally* Sward, *supra* note 50.

86. The United States Court of Appeals for the Federal Circuit has its jurisdiction defined by subject matter rather than territory. Among other things, the Federal Circuit hears appeals from all of the district courts concerning patents, from the United States Claims Court, and from the United States Court of International Trade. *See* 28 U.S.C. § 1295 (1989). *See generally* Sward, *supra* note 50.

87. *See supra* note 10 and accompanying text.

obviously problematic. The clearly erroneous standard is simply part of the mechanism for allocating fact-finding authority to the court viewed as (usually) most competent to determine the facts. In those areas where the trial court's advantage is less clear, however, one would expect to see the appellate courts avoid the import of the clearly erroneous standard.

b. Fairness

Fairness seems to be the primary rationale for having an appellate level court that can correct errors. Perhaps because of an individualistic sense of fairness, the corrective function of appellate courts has always been prominent.[88] Indeed, in the nineteenth century in the United States, trial judges were not highly regarded,[89] and the corrective function of appellate courts was thought to be essential to the maintenance of justice.[90]

Unfortunately, fairness is not a good guide for allocating fact-finding authority between the trial and appellate courts. When the trial court errs in its resolution of a dispute, the result is substantively unfair to the litigants. When an appellate court corrects the court's error, substantive fairness is achieved. The problem is that it can be difficult to tell when a trial judge has made a fact-finding error. If the trial court was correct in the first instance, appellate "correction" will work a substantive injustice. The fairness rationale requires that there be a mechanism for correcting fact-finding errors in the trial court, but that appellate courts be prevented from "correcting" non-existent errors. Given the uncertainties about fact-finding,[91] that is an abstract ideal at best. The fairness rationale, then, does not point clearly toward either the trial court or the appellate court as the last word on fact-finding.[92]

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88. Carrington, *supra* note 1, at 417.

89. *Id.*

90. *Id.*

91. *See generally* FRANK, *supra* note 33; Dalton, *supra* note 33.

92. While not the subject of this Article, procedural fairness deserves mention as well. It is concerned not with the substantive outcome, but with whether prescribed procedures were correctly followed. Concern for procedural fairness does not mean that substantive errors are unimportant, but it reflects a judgment that substantive errors are less likely when procedures were correctly followed. Trial court decisions on procedural matters are discretionary, and are not normally set aside unless the trial judge abused his discretion. *See supra* notes 18-23 and accompanying text. To some extent, standards of review are themselves a device for ensuring procedural fairness at the appellate level. They are procedural limitations on the reach of appellate review, based on generalized considerations about what allocation of trial court and appellate court authority is most likely to produce a substantially correct outcome.

c. Efficiency

Efficiency considerations, especially when combined with competence considerations, do suggest that fact-finding belongs in the trial courts. Some fact-finding error is unavoidable, in part because it is difficult to identify with certainty those cases in which error has occurred.[93] Thus, parties are sometimes put through lengthy and expensive appeals when the original outcome was correct.[94] If no sure way exists to tell when error has been committed, there will be many unnecessary appeals; but if a sure way did exist, error could be avoided in the first place, obviating the need for appeals. It is not a perfect world. Nevertheless, efficiency considerations dictate that there be an end to litigation at some point. Standards of review that limit appellate authority over fact-finding reflect a judgment that trial courts are, in general, sufficiently competent and fair that extensive review of their fact-finding would be inefficient. It would be inefficient because it would produce little or no change in the outcome but would cost the parties and society a large expenditure of legal and judicial resources. This is probably the best rationale for limited review of trial court fact-finding, and is the one that seems to be gaining the upper hand. It is, in fact, the primary rationale for the 1985 amendment to Rule 52(a), which applies the clearly erroneous standard to fact-finding based solely on documentary evidence.

The Advisory Committee notes to the amended Rule 52(a) describe the conflict among courts and commentators over the applicability of the clearly erroneous standard to documentary evidence and assess the arguments on either side of the controversy. While noting that those favoring more searching review argue that the original rationale for the clearly erroneous standard is absent when the evidence is purely documentary,[95] the Committee advances new justifications for deferential review, based on the proper roles of the trial and appellate courts. The Committee states that:

> [The original rationale is] outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding

93. For discussions of this point from a variety of perspectives, *see, e.g.*, FRANK, *supra* note 33; Dalton, *supra* note 33. It is at least arguable that the adversarial mode of fact-finding contributes to the uncertainty. *See* Sward, *supra* note 50, at 312.

94. *See generally* Dalton, *supra* note 33. Dalton argues for limited rights of appeal, noting that the cost of unnecessary appeals, or appeals that turn a correct outcome into an erroneous one, outweighs the error correction function in many cases.

95. FED. R. CIV. P. 52(a), Advisory Committee Notes to 1985 amendment.

> function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.[96]

Thus, judicial economy requires that review of fact-finding be deferential, regardless of the nature of the evidence. This assessment implies a judgment that trial courts are usually competent and fair in their fact-finding, and therefore it might be expected that the efficiency rationale would lose force when competence or fairness do not favor the trial court.

d. Comparison with Law-Declaring Rationale

The competence, fairness, and efficiency rationales together point toward a primary appellate role in law-declaring. These same rationales, however, do not point unambiguously toward either the trial court or the appellate court in the judicial system's fact-finding role. It is probably more efficient to place the primary responsibility for fact-finding in the hands of the trial courts; but that assumes that the trial courts are generally competent to perform the fact-finding task and usually fair, both substantively (in terms of a correct outcome) and procedurally. The efficiency rationale can only be indulged when there is substantial confidence in the competence and fairness of trial courts. Any factors that erode that confidence will also undermine the efficiency rationale for allocating fact-finding authority to the trial courts.

3. Values Underlying the Corrective Function

The corrective function of appellate courts exists primarily to ensure justice for individual litigants. The appellate courts correct error that has caused injustice to an individual litigant. The wronged litigant is the person primarily concerned with error correction.[97] Individualism, then, is a strong value behind the corrective function.

There are also systemic values in ensuring that the judicial system is relatively error-free. In a democracy, a system of adjudication needs the support of the populace. To obtain that support, the system needs to be widely perceived as doing justice. Although the system should attempt to minimize error at the trial level, a system of appeals that allows for correction of any legal or factual error

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96. *Id.*

97. Both litigants, of course, may believe that they are right in their interpretation of facts.

that does occur promotes the public perception of fair adjudication.[98] If the system of appeals is flawed, and error either remains uncorrected or is compounded on appeal, the public perception of justice will deteriorate. Thus, there are sound systemic reasons both for having a system of appeals and for ensuring that appeals actually produce an increase in justice, however that is perceived by the public.[99] The systemic benefits are largely determined by individual benefits. If the system is doing justice for individuals, the system will most likely be perceived as fair and will maintain popular support.[100] Therefore, error correction is an individualistic function of appellate courts that exists to serve individual needs and that reflects individualistic values.

### *D. Tension Between the Two Functions*

The creative and corrective functions of the middle-tier appellate courts may sometimes be in conflict, in part because it can be difficult to distinguish the two functions.[101] Indeed, considerable tension exists between the two functions, and the different rules and values that govern the two functions only serve to exacerbate that tension. Both the causes and the effect of the tension need to be examined.

#### 1. Causes of the Tension

##### a. Difficulty in Distinguishing Fact from Law

When the issue before the appellate court is purely one of law, no difficulty should ensue in appellate review because the standard of review is de novo. Review of fact-finding, however, always

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98. Whether the participants in the system believe that justice is being served may or may not correspond to public perceptions. Public perception is the key to ensuring that systemic values are met. Of course, if injustice occurs on a regular basis, the sum of individual dissatisfaction will overwhelm what initially may have been favorable public perception. It is also possible that the mere existence of an appeal process, regardless of its effective functioning, helps to promote a sense of the system's fairness.

99. Whether all cases need to be appealable to satisfy this systemic need is problematic. *See* Dalton, *supra* note 33, at 93-107; *see also* Irving R. Kaufman, *Must Every Appeal Run the Gamut?—The Civil Appeals Management Plan*, 95 YALE L.J. 755 (1986) (describing plan aimed at settling appeals).

100. Popular perceptions will not always accord with individual justice. The overall impression, however, should be one of fairness.

101. The Supreme Court may also serve a corrective function, though that is much rarer. The Supreme Court is primarily a law-declarer, and any error correction that it does is incidental to its law-declaring function.

implicates the corrective function along with its ambiguous rationales.[102] Part of the tension between the corrective and the creative functions of the appellate courts is caused by the difficulty in distinguishing fact from law and the corresponding disagreement over the applicable standard of review.

A court that is sensitive to potential error in fact-finding may sometimes classify an issue as fact or law to take advantage of a more, or less, independent standard of review. This is not to suggest that the courts are attempting to undermine the trial court's fact-finding function.[103] It suggests only that a court will have difficulty when it is faced with the responsibility for deferential review of fact-finding, the responsibility for free review of lawmaking, and a highly fluid line between fact-finding and lawmaking. When an appellate court finds error, it will be easier to correct the error if it is classified as either an error of law or a mixed law-and-fact question rather than purely an error of fact.

As middle-tier appellate courts assume more lawmaking authority, these courts will likely be accused more often of stepping on the toes of the trial courts. There are two reasons for this. First, when one is already ranging somewhat freely within the record of the case to ensure that the lawmaking is correct, it is easy to range freely among the facts as well. Given the difficulty in distinguishing fact from law, one can do this without appearing to overstep the established bounds too severely. Indeed, errors in law and fact often infect one another, and such free review may seem quite appropriate.[104]

Second, when one is declaring law it is helpful to have a clear record of what the facts are. Courts declare the law in the context of specific cases, with specific facts. In the course of describing how a legal principle arises out of a particular set of facts, an appellate court could easily restate or clarify the fact-finding, or place a different emphasis on the facts that were found, elevating some and virtually ignoring others.[105] In some cases, that could border on fact-finding. Again, this does not suggest a willful undermining of the trial-level judicial process, but an effort by the courts of appeals to do the conflicting jobs assigned to them.

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102. *See supra* part II.C.2.

103. Some commentators, however, have suggested this. *See* Filiandi, *supra* note 10; *see also* Gerald L. Goettel, *Appellate Fact Finding—and Other Atrocities*, 13 LITIG. 7 (Fall 1986) (criticizing appellate interference in trial court processes generally).

104. *See* Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982).

105. See, for example, the different emphases that the majority and dissenting justices employed in Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1989).

b. Differences in Underlying Values

The tension is also caused in part by the different values that underlie the two functions. Error correction, as has been seen, serves an individualistic value, while law declaration serves a more systemic value. Individual and systemic values have long been seen as creating considerable conflict within society as a whole, including the legal system.[106] The conflict is becoming focused in the appellate courts, because the trial courts are seen primarily as the fact-finders,[107] and the Supreme Court is seen primarily as the law-declarer,[108] but the middle-tier appellate courts serve both functions. Thus, when the creative function is prominent in a particular case, requiring close scrutiny by the court of appeals, that court may also find itself paying more attention to trial court fact-finding. Similarly, when an appellate court finds that individualistic values are in particular danger of being trampled, the court might be tempted to give more play to the fairness rationale behind its corrective function than to the efficiency rationale and be quicker to step in to correct perceived error. This process of adjusting the roles of trial and appellate courts is often played out in arguments over the correct standard of review.

2. Effect of Tension Between the Two Functions

The mix of rationales and values behind the two appellate functions gives appellate courts considerable flexibility in determining the standard of review to employ. It is not surprising that they take advantage of it. The analysis presented here suggests that more extensive appellate review of fact-finding may take place in two circumstances. The first is when the rationales for allocating fact-finding authority to trial courts are not well supported by the particular case before the court, whether because the appellate court is equally or more competent than the trial court or because concerns for individual fairness overwhelm efficiency considerations. The second circumstance in which one would expect more extensive review of fact-finding is when important issues of law are to be determined in the case. This stems from difficulty in

106. *See* Sward, *supra* note 50, at 410-12.

107. *See, e.g.*, W.K.T. Distrib. Co. v. Sharp Elecs. Corp., 746 F.2d 1333 (7th Cir. 1984); Ramey Constr. Co. v. Apache Tribe of Mescalero Reservation, 673 F.2d 315 (9th Cir. 1982).

108. *See, e.g.*, Ray Forrester, *Truth in Judging: Supreme Court Opinions as Legislative Drafting*, 38 VAND. L. REV. 463 (1985); *see also* Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court's Exercise of Discretionary Review*, 44 U. PITT. L. REV. 801 (1983).

distinguishing fact from law coupled with the systemic values underlying the appellate court's law-declaring authority. Part III of this Article will demonstrate how this analysis applies to current Rule 52(a) issues.

## III. A TAXONOMY OF CURRENT CASES AND COMMENTARY

The clearly erroneous standard has provoked considerable controversy over the years. There are numerous interpretations, glosses and exceptions to the rule,[109] and some commentators think the rule is honored more in the breach.[110] Even when the appellate court purports to be following the rule, a range of interpretations has allowed widely varying outcomes, often within the same circuit.[111]

Two controversies over interpretation of the clearly erroneous standard have recently been settled, at least in theory. Some courts of appeals had held that the clearly erroneous standard did not apply to ultimate facts, as distinguished from subsidiary facts.[112] The ultimate fact is the factual conclusion, drawn from subsidiary facts, to which a legal consequence applies. For example, intent to discriminate would be an ultimate fact because if such intent is found, legal sanctions against discrimination apply automatically. Intent may, however, be inferred from numerous subsidiary facts.[113] In 1982, the United States Supreme Court rejected the ultimate fact exception to the clearly erroneous standard, holding that the standard applies to all kinds of facts, however denominated.[114]

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109. *See, e.g.*, Note, *supra* note 4; Wright, *supra* note 1.

110. *See, e.g.*, Goettel, *supra* note 103; Wright, *supra* note 1.

111. *See, e.g.*, CHILDRESS & DAVIS, *supra* note 17, at 47-50; Steven Alan Childress, *"Clearly Erroneous": Judicial Review Over District Courts in the Eighth Circuit and Beyond*, 51 Mo. L. REV. 93 (1986); Wright, *supra* note 1, at 764-71; Note, *supra* note 4, at 516-34.

112. *See, e.g.*, North River Energy Corp. v. United Mine Workers, 664 F.2d 1184, 1189-90 (11th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 686 (6th Cir. 1979); United States v. City of Chicago, 549 F.2d 415, 425 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977); Causey v. Ford Motor Co., 516 F.2d 416, 420-21 (5th Cir. 1975); Galena Oaks Corp. v. Scofield, 218 F.2d 217, 219 (5th Cir. 1954). These courts generally relied on language from Baumgartner v. United States, 322 U.S. 665, 671 (1944), which held that a finding by a trial court that a party had met the exacting " 'clear, unequivocal, and convincing' proof" standard was an ultimate fact, reviewable without regard for the clearly erroneous standard. The Court in *Pullman-Standard* said that this discussion in *Baumgartner* referred to "findings that 'clearly impl[y] the application of standards of law.' " Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n.16 (1982) (quoting *Baumgartner*, 322 U.S. at 671).

113. *See, e.g.*, *Pullman-Standard*, 456 U.S. at 285.

114. *Id.* at 287.

The second controversy also arose out of an exception to the clearly erroneous standard developed by several courts of appeals. Those courts held that the clearly erroneous standard did not apply to fact-finding based solely on documentary evidence.[115] Rule 52(a) itself refers to the deference owed to the trial judge in judging the credibility of witnesses, and when no credibility determinations are to be made, some courts of appeals thought that they were just as capable of fact-finding as the trial judge.[116] Indeed, it must be remembered that the clearly erroneous standard developed to limit appellate review of equity fact-finding when equity judges began hearing oral testimony.[117] Despite the historical pedigree for the view of those courts of appeals that refused to defer to fact-finding based on documentary evidence, the Supreme Court has twice rejected it. The Court first rejected the view in the *Anderson* case,[118] but rejected it more resoundingly when it approved a 1985 amendment to Rule 52(a), which added language to make explicit the applicability of the clearly erroneous standard to documentary evidence.[119]

Some exceptions to the clearly erroneous standard remain. The Supreme Court has held that the clearly erroneous standard does not apply to certain constitutional facts, most notably (and perhaps solely) the determination of actual malice in libel actions subject to claims of First Amendment protection.[120] The Court has also indicated that mixed questions of law and fact will not be subject to the clearly erroneous standard.[121]

It is unclear how the clearly erroneous standard will be applied in the future. Sometimes it is difficult to distinguish ultimate facts from mixed questions.[122] It may still be easier for courts of appeals

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115. *See, e.g.*, Atari, Inc. v. North Am. Philips Consumer Elec. Corp., 672 F.2d 607, 614 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982); Lydle v. United States, 635 F.2d 763, 765 n.1 (6th Cir. 1981); Swanson v. Baker Indus., Inc., 615 F.2d 479, 483 (8th Cir. 1980); Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied*, 445 U.S. 946 (1980); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979); John R. Thompson Co. v. United States, 477 F.2d 164, 167 (7th Cir. 1973).

116. *See, e.g.*, *Atari*, 672 F.2d at 614; *Lydle*, 635 F.2d at 765 n.1; *Swanson*, 615 F.2d at 483.

117. *See* Note, *supra* note 4, at 510-11.

118. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

119. *See* H.R. Doc. No. 99-63, 99th Cong., 1st Sess. 20 (1985).

120. *See* Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984); Time, Inc. v. Pape, 401 U.S. 279 (1971); New York Times Co. v. Sullivan, 376 U.S. 254 (1964). *See generally* Monaghan, *supra* note 9.

121. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n.16 (1982); *Bose*, 466 U.S. at 501.

122. *See infra* part III.A.

to find clear error when the evidence is purely documentary than when there is testimonial evidence as well.[123] No one knows if the constitutional fact doctrine will apply beyond the confines of the actual malice determination in First Amendment cases.[124] There are suggestions that the Federal Circuit is prone to ignore the clearly erroneous standard.[125] This section will examine current areas of controversy in the terms presented in Part II. When so analyzed, the precise contours of the controversy are more easily understood.

### *A. Mixed Questions of Law and Fact*

Mixed questions are generally considered subject to more extensive review than pure fact questions, though the scope of mixed-question review is decidedly unclear.[126] The first problem is to define mixed questions. The Supreme Court has suggested that they are questions in which "the reasoning by which a fact is 'formed' crosses the line between application of these ordinary principles of logic and common experience . . . into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment."[127] A useful approach in fleshing-out this definition may be to distinguish issues of ultimate fact, which the Court has held are subject to the clearly erroneous standard,[128] from mixed questions. In *Pullman-Standard v. Swint*,[129] the issue was whether a union seniority system that had disparate impact on minorities was created or maintained with intent to discriminate.[130] Resolution of the question of intent would determine the outcome of the case, but the evidence of intent was circumstantial, requiring the trial court to draw inferences from the body of circumstantial evidence developed at trial.[131] The trial court held that there was no intent to discriminate, but the Fifth Circuit

123. *See, e.g.*, Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980). *See generally* Note, *supra* note 4, at 518-20.

124. *See* Monaghan, *supra* note 9, at 264-71.

125. *See* sources cited *supra* note 11.

126. *See* Pullman-Standard v. Swint, 456 U.S. 273, 286-87 n.16 (1982); Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 501 (1984). Some efforts have been made to delineate the scope of appellate authority over mixed questions. *See, e.g.*, Calleros, *supra* note 11.

127. *Bose*, 466 U.S. at 501 n.17; *see also* Calleros, *supra* note 11, at 425.

128. *Pullman-Standard*, 456 U.S. at 287.

129. 456 U.S. 273.

130. *Id.* at 276-77.

131. *See id.* at 277-90.

reversed on the issue of intent. The Supreme Court reversed again, restoring the original trial court decision.

Intent was the ultimate fact in *Pullman-Standard*. Intent to discriminate, at least in some instances, can be determined without regard for the legal principles that might be at issue. There either is or is not an intent, for example, to refuse to hire or promote qualified women. Because refusing to hire or promote women to jobs for which they qualify is certainly illegal discrimination, a finding of such intent is a finding of intent to discriminate. Inferences of such intent from circumstantial evidence are drawn as a matter of "ordinary principles of logic and common experience."[132] In this sense, the *Pullman-Standard* Court was correct in holding that ultimate facts are facts subject to the clearly erroneous standard as are any other facts.

If there is some question, however, about the meaning of "discrimination," the question of intent to discriminate takes on legal aspects. The cases have helped define the nature and scope of discrimination.[133] If the legal definition of discrimination, however, is unclear before the case is decided, so also is the concept of intent to discriminate. One can only intend to discriminate if the result intended is discriminatory as a matter of law. Intent then becomes a mixed question of law and fact, and the appellate courts may well feel comfortable with independent review of findings of intent under these circumstances.[134] This may be what the Fifth Circuit thought it was doing in *Pullman-Standard*. The court there found that one union had acquiesced in another union's discriminatory acts, and imputed the discriminating union's intent to the accused union.[135] The accused union's intent to discriminate,

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132. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 501 n.17 (1984).

133. *See, e.g.*, Goodman v. Lukens Steel Co., 777 F.2d 113, 126-27 (3d Cir. 1985) (holding that a union's acquiescence in discrimination constitutes discrimination), *aff'd on other grounds*, 482 U.S. 656 (1987).

134. *See* Calleros, *supra* note 11, at 422. Another way to handle the matter is for the appellate court to correct legal error and remand for new findings of fact. This might be done if the fact-finding was inadequate under the new legal definition of discrimination. *See Pullman-Standard*, 456 U.S. at 291-93. For this procedure to be used, however, the separation between law and fact would have to be easy to see. A mixed question may well be one where fact shades more gradually into law.

135. *See Pullman-Standard*, 456 U.S. at 292; Swint v. Pullman-Standard, 539 F.2d 77, 93-98 (5th Cir. 1976). Each of the two unions had its own sphere of influence in the company. The seniority system was set up so that a person transferring from one department, where one union was prominent, to another department, where another union was in control, would lose seniority. This allegedly perpetuated discriminatory practices that kept blacks in low-paying, low-prestige departments.

however, depends on whether and under what circumstances such imputation is proper. This requires the court to develop a legal standard concerning imputation in a particular factual context. If the court says, for example, that imputation is sometimes proper, but not under the facts of the case before it, its decision draws a line for future reference. The line is part fact and part law. The Fifth Circuit's holding was that imputation was proper under the circumstances of *Pullman-Standard*, which would constitute a mixed question. The Supreme Court, however, said in a footnote that imputation was improper.[136] A determination that imputation is *never* proper is a legal holding. A determination that imputation is *sometimes* proper, however, requires case-by-case development to determine *when* it is proper. Each case would then present a mixed question.

The problem, then, is not as simple as the Supreme Court's language suggested. To the extent that the question to be resolved is more legal than factual, the courts would naturally tend toward independent review of mixed questions.[137] In review of pure fact-finding, any concerns that militate in favor of independent review, such as fairness concerns, are overwhelmed by the presumptive fact-finding competence of trial courts and the judicial economy or efficiency concerns that suggest deferential review. When questions of law are implicated in the fact-finding, however, competence, fairness, and efficiency considerations together point toward more independent appellate review. Society is better served by having high-level determinations of the parameters of the law, which can only be done with case-by-case determinations.[138] Those parameters are usually decided by examining the facts of individual cases.

Thus, more extensive review of mixed questions serves both individual and systemic needs. Independent review provides a greater opportunity for error correction, which is, first and foremost, an individualistic value.[139] In addition, independent review clarifies legal principles and, consequently, helps to order a larger segment of society, giving more of society's members confidence in their legal positions. Independent review of mixed questions,

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136. *Pullman-Standard*, 456 U.S. at 292 n.23.

137. See Calleros, *supra* note 11, at 425-32 for a proposal for determining when to engage in independent review.

138. This is actually part of the Supreme Court's justification for independent review of constitutional facts. *See infra* part III.B.

139. Of course, it also provides an opportunity for the appellate court to err by overturning a correct decision. Individualistic principles, however, have never guaranteed the outcome—only the opportunity.

therefore, is consistent with both the corrective and the creative functions of appellate courts.

This is not to say that it will be easy to determine when independent review is proper. Mixed questions run the gamut from those that are mostly questions of fact to those that are mostly questions of law.[140] The closer the issue is to a pure question of law, the more applicable is the analysis presented here. Conversely, the closer the issue is to a pure question of fact, the more the appellate court should adhere to principles of deferential review, such as the clearly erroneous standard for bench trials. The line is highly fluid, and it is understandable that the courts could often disagree about the proper standard of review. This area remains fraught with pitfalls.

### *B. Constitutional Fact*

The constitutional fact doctrine requires independent appellate review of fact-finding when a party claims denial of federal constitutional rights.[141] It is an explicit exception to the clearly erroneous standard.[142] The limits of the doctrine are not clear,[143] and the doctrine is controversial.[144] The constitutional fact exception to the clearly erroneous standard, however, does seem to reflect a confluence of the values that underlie both error correction and law declaration. Thus, it is not surprising that such an exception exists. Ultimately, the constitutional fact exception should probably be viewed as a special example of a mixed question.

The ultimate origins of the constitutional fact doctrine are in seventeenth-century England,[145] but in this country the doctrine germinated in review of administrative agency action.[146] When administrative agencies began to be created, they were in an ambiguous constitutional position, as they performed adjudicative functions usually reserved to the Article III courts.[147] Thus, courts

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140. *See generally* Calleros, *supra* note 11. In terms of Figure 1, *supra*, mixed questions occupy most of the continuum.

141. *See* Time, Inc. v. Pape, 401 U.S. 279, 284 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

142. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 (1984).

143. The doctrine was developed in First Amendment cases, but is not limited by its terms to such cases.

144. *See, e.g.*, Monaghan, *supra* note 9.

145. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 624 (1965).

146. *Id.*

147. On the origins of the constitutional fact doctrine, see Monaghan, *supra* note 9, at 247-63; JAFFE, *supra* note 145, at ch. 16.

reviewing agency action were sensitive to the limits on agency authority and tended to do a searching review of facts that were the premise for the agencies' jurisdiction.[148] Beginning as early as 1935, the Supreme Court authorized independent review of constitutional facts found by state courts.[149] The doctrine has recently been extended to review of judgments of inferior federal courts.[150] The constitutional fact doctrine has become quite well-accepted in the First Amendment context.[151] The leading case is *New York Times Co. v. Sullivan*,[152] in which the Court required independent appellate review of a state trial court's findings of fact on the actual malice element of libel.[153]

*New York Times* was a case that originated in the state courts. In *Bose Corp. v. Consumers Union of United States, Inc.*,[154] the Supreme Court affirmed the constitutional fact exception to the clearly erroneous standard for cases originating in the federal courts, holding that the clearly erroneous standard "does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times Co. v. Sullivan*."[155] Consumers Union had published a review of some stereo speakers manufactured by Bose, and Bose claimed that the review was defamatory in its description of the way the sound moved about the room. The trial court evidently believed that anyone of modest capability in writing could have written an accurate description of the sound; therefore, the court inferred actual malice. The First Circuit reversed, holding that it was required to make a de novo review of the finding of actual malice and, upon making that review, holding that Bose had not proved actual malice by clear and convincing evidence, as was required under the *New York Times* standard.[156]

The Supreme Court affirmed. The Court recognized that there was a conflict between the clearly erroneous standard of Rule 52

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148. *See generally* Monaghan, *supra* note 9, at 247-63.

149. *See* Norris v. Alabama, 294 U.S. 587 (1935); Monaghan, *supra* note 9, at 260.

150. *See* Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 514 (1984).

151. *See* Time, Inc. v. Pape, 401 U.S. 279 (1971); New York Times v. Sullivan, 376 U.S. 254 (1964). The doctrine may be limited to the First Amendment context, but is not so limited by its terms.

152. 376 U.S. 254.

153. *Id.* at 285.

154. 466 U.S. 485.

155. *Id.* at 514. In a footnote, the Court emphasized that the exception to the clearly erroneous standard applies only to the actual malice determination, and not to other factual determinations made by the trial court. *Id.* at 514 n.31.

156. *Id.* at 491-92.

and the duty of independent review that the constitutional fact doctrine prescribes.[157] The Court identified three relevant characteristics of the actual malice rule that suggest independent review of such determinations.[158] First, the actual malice rule itself has a common-law heritage, and so gives a large role to the judge. Second, the rule is given meaning through the evolutionary process of case-by-case adjudication. Third, because constitutional values are at stake, judges have a duty to ensure that the rule is applied correctly.[159]

This formulation of the constitutional fact doctrine is highly specific to First Amendment issues.[160] There is, therefore, some question about the current scope of the constitutional fact doctrine.[161] The doctrine could be applied to analogous issues, however, and given the fact that most legal doctrine, whether constitutional or not, is refined in case-by-case adjudication, the parameters of the doctrine could be quite broad.[162]

In terms of the analysis promulgated in Part II, it is easy to see how a constitutional fact doctrine developed. The rationales for independent appellate review of fact-finding all point to closer appellate scrutiny of such fact-finding, and both the creative and the corrective functions—with their corresponding underlying values—are implicated. While the Supreme Court did not justify the constitutional fact doctrine in those terms, its language hints at the same kinds of considerations described in this Article.

At first blush, it may seem that there is little difference in the various courts' competence to decide questions of constitutional fact. Whether a party acted with actual malice presents the same analytical problems to both trial and appellate judges. Indeed, to some extent the question is analogous to the question of whether an employer intended to discriminate: there either is actual malice

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157. *Id.* at 514.

158. *Id.* at 501-02.

159. *Id.* Monaghan argues that the Court was only "serious" about the third rationale, because the first two could open the constitutional fact doctrine to extremely broad interpretation. *See* Monaghan, *supra* note 9, at 242-43.

160. This is one of Professor Monaghan's criticisms. He observes that "by fastening the demand for independent judgment to special First Amendment considerations, the Court seemingly bypasses the need to face more systemic considerations." Monaghan, *supra* note 9, at 243-44.

161. The constitutional fact doctrine has always been closely related to the First Amendment. It was first applied to review of trial court decisions (as opposed to administrative agency decisions) in the First Amendment context, and has always been firmly anchored there. *See* Monaghan, *supra* note 9, at 264-71.

162. This is the gist of Professor Monaghan's argument that the Supreme Court could not have been serious about the first two characteristics of constitutional fact that allegedly justify independent review. *See supra* note 159.

(or intent to discriminate) or there is not. Thus, the actual malice issue sounds more like an ultimate fact than a mixed question. There are two factors, however, that may move the actual malice determination toward the mixed question realm. First, there is an element of definition in the question. Just as the court must sometimes decide what it means to discriminate before intent can be determined, the court may also have to decide what state of mind can be defined as actual malice. There are degrees of malice, and the degree of malice that the writer shows must be balanced against the constitutional right to freedom of speech. That balance implicates legal—indeed, constitutional—standards. Second, actual malice is subject to an enhanced standard of proof at trial. Actual malice must be proved by clear and convincing evidence. There may well be some legal content to the definition of the clear and convincing standard.[163] If so, the question whether a plaintiff has proven actual malice would be partly a question of law. Thus, there is a law-declaring content to the actual malice issue. The presumption of competence in favor of trial courts is diminished in the face of such legal content.

In addition, the concern for individual justice—fairness—is probably heightened when a constitutional right is at stake. The Supreme Court suggested as much in emphasizing the importance of the actual malice determination for its constitutional significance.[164] If fairness is a strong concern, it may overwhelm any concern for efficiency that would otherwise counsel leaving the actual malice determination principally to the trial court. Furthermore, efficiency concerns may point to independent appellate review of the actual malice determination apart from any fairness considerations. To the extent that there is a law-declaring element in defining actual malice, efficiency concerns point to independent appellate review because of the systemic need to clarify the law.[165]

When a constitutional fact issue has legal content of the kind described here, constitutional fact-finding may indeed require more extensive appellate review. Not only is there strong support for such review in each of the considerations that underlie allocation of judicial authority, but such review is supported by both individualistic and systemic values. Constitutional rights such as freedom of the press offer significant protection to the individual and to individualistic values that our society cherishes. Independent appellate review helps to assure individual citizens that those rights are being protected. Moreover, independent appellate review also

163. *See infra* part III.C.
164. New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).
165. *See supra* part II.B.2.c.

advances the systemic need to clarify the law. Thus, a constitutional fact exception to the clearly erroneous standard may well be justified, though not necessarily for the reasons given in the Supreme Court's opinion in *Bose*. Indeed, the justification sounds much like that offered for mixed questions generally, and constitutional facts should probably be viewed as a species of mixed question rather than a genus in its own right.

### *C. Pure Fact-Finding*

The creative function implicates some societal or systemic concerns that provide an impetus for independent review. When the issue is purely one of fact, however, there are no competing societal interests and one would expect considerable deference to the trial judge's fact-finding. Nevertheless, there are several areas in which pure fact-finding has not been given deferential review, and those need to be explored. They include findings in which the trial court standard of proof was higher than a preponderance, findings based on documentary evidence, and findings of generalist courts being reviewed by specialist appellate courts.

#### 1. Effect of Burden of Proof at Trial

Some kinds of factual issues may have a higher than normal burden of proof at trial. These include fraud[166] and the actual malice determination in libel cases,[167] both of which must be established by clear and convincing evidence. Although the courts do not usually state explicitly that the burden of proof at trial affects the standard of review that they will use, appellate review does seem to be less deferential when the trial-court burden of proof was greater than a preponderance.[168] Often there are other factors in these cases favoring less deferential review, such as the presence of a constitutional fact issue or a mixed question, and those factors may mask the effect of the trial-court burden of proof. There may be, however, good reasons for being less deferential when the burden of proof was higher at trial.

Burdens of proof tend to be higher in the trial courts when the issue is important, such as a constitutional right,[169] or when the

166. *See, e.g.*, Barnett v. Life Ins. Co., 562 F.2d 15, 19 (10th Cir. 1977); FDIC v. American Bank Trust Shares, Inc., 460 F. Supp. 549, 555 (D.S.C. 1978), *aff'd*, 629 F.2d 951 (4th Cir. 1980).

167. *See* Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); Bose Corp. v. Consumer's Union of United States, Inc., 466 U.S. 485, 511 (1984).

168. *See Bose*, 466 U.S. at 510-11; Baumgartner v. United States, 322 U.S. 665, 671 (1944).

169. *See, e.g., Bose*, 466 U.S. at 511 (First Amendment rights); Santesky v. Kramer,

issue is one that can be particularly damaging to the person charged, such as fraud.[170] The individual interest in correcting errors that affect such matters is higher than in the ordinary case, and the appellate courts should be more sensitive to errors in those cases. Furthermore, apart from any legal content to a concept like actual malice, the very concept of a burden of proof has some legal content. The procedure for directed verdict and judgment notwithstanding the verdict in jury cases is analogous. Whether the party with the burden of proof has produced the minimum evidence necessary to provide a basis for decision on his behalf is a question of law.[171] It is a decision for the trial judge rather than the jury and can be reviewed independently on appeal.[172] Similarly, when the burden of proof is greater than a preponderance, such as clear and convincing, some content must be given to the term "clear and convincing," which can only be done by case-by-case definition.[173] Thus, the issue becomes a mixed question of law and fact, and the appellate courts may be less deferential to the trial court's fact-finding on that ground.

### 2. Findings Based on Documentary or Undisputed Evidence

There is not necessarily any legal content to findings based on documentary evidence. For years, however, many courts engaged

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455 U.S. 745, 768-70 (1982) (termination of parental rights); Chaunt v. United States, 364 U.S. 350 (1960) (denaturalization); Schneiderman v. United States, 320 U.S. 118, 125 (1943) (same); Maxwell Land-Grant Case, 121 U.S. 325, 381 (1887) (property rights arising from government land grant).

170. *See, e.g.*, National Farmers Org., Inc. v. Kinsley Bank, 731 F.2d 1464, 1472-73 (10th Cir. 1984); Brown v. Buchanan, 419 F. Supp. 199, 201-02 (E.D. Va. 1975). *See generally* J. P. McBaine, *Burden of Proof: Degrees of Belief*, 32 CAL. L. REV. 242 (1944); Note, Horner v. Flynn: *A Preponderance of Clear and Convincing Evidence*, 28 ME. L. REV. 240 (1987).

171. *See, e.g.*, Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); Griggs v. Firestone Tire & Rubber Co., 513 F.2d 851, 857 (8th Cir.), *cert. denied*, 423 U.S. 865 (1975). *See generally* 9 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 541-44 (1971).

172. Once the party with the burden of proof has produced the minimum evidence necessary to sustain a verdict, the weighing of that evidence against that produced by the opposing party is a jury function, and is generally reviewable only by motion for a new trial. *See* Lavender v. Kurn, 327 U.S. 645, 654 (1946); Galloway v. United States, 319 U.S. 372, 396-401 (1943) (Black, J., dissenting).

173. The Supreme Court recently applied the directed verdict standard to summary judgment questions, holding that a summary judgment could be granted if the evidence offered by the party with the burden of proof was legally insufficient. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986). The Court also held that, in making that decision, the trial judge could take into account whether the burden of proof was higher than a "preponderance." *See* Anderson v. Liberty Lobby, 477 U.S. 242 (1986). Because summary judgment is only granted as a matter of law, the *Anderson* decision is an implicit recognition of the legal content in standards of proof.

in independent review of these findings on the ground that courts of appeals were just as competent as trial courts to draw inferences from documentary evidence. That approach has generated considerable controversy.[174] The 1985 amendment to Rule 52(a) partially resolved the documentary evidence issue. Rule 52(a) explicitly states that findings of fact based on documentary evidence are subject to the clearly erroneous standard.[175]

The analysis in this Article suggests that the amendment to Rule 52(a) is sound. When the evidence is documentary, neither the trial court nor the appellate court has any special competence to judge the issues. The systemic value in judicial efficiency, however, tips the scales in favor of the trial court. Furthermore, there is no law declaration to be done that would rebalance the scales, and there are only the ordinary error-correction concerns. These factors favor deference to the trial judge.

It is still possible, of course, for courts of appeals to find it easier to overturn judicial fact-finding when the evidence is purely documentary: a finding can be more obviously clearly erroneous when the appellate court does not have to be concerned with the demeanor of the witnesses.[176] Whether the results of appeals are very different since the amendment took effect is a question of some interest, but it may be too early to make a valid assessment.[177]

### 3. Specialized Courts

Specialized courts provide an instance in which one level of court may have a special competence in a particular kind of case. When the specialized court is the appellate court, the normal principles of review may be disrupted. Indeed, there has been some recent commentary decrying the Federal Circuit's alleged failure to comply with the clearly erroneous standard.[178] The Federal Circuit was created by the Federal Courts Improvement Act of 1982,[179] and its jurisdiction, unlike that of other federal courts of

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174. *See supra* notes 79-83 and accompanying text; *see also* FED. R. CIV. P. 52(a) Advisory Committee Notes to 1985 amendment; Wright, *supra* note 1; Note, *supra* note 4.

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

176. *See* Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980); Wright, *supra* note 1, at 764; Note, *supra* note 4, at 516-17. This may give appellate courts an opportunity to correct likely, but not clear, error involving findings based on documentary evidence. It is more likely to occur when the individual interest in fairness seems to call for exercise of the appellate courts' corrective function.

177. The Rule has been in effect for about five years as of this writing. Although many cases involving Rule 52(a) have been decided in those four years, relatively few of them involve purely documentary evidence. *See* WEST FEDERAL DIGEST, Federal Courts key no. 854 (five cases).

178. *See* sources cited *supra* note 11.

179. Pub. L. No. 97-164, 96 Stat. 25 (1982). *See generally* Sward, *supra* note 50.

appeals, is defined by subject matter.[180] One of the most significant aspects of the court, and the impetus for its formation, is its jurisdiction over all patent appeals.[181] While trials of patent issues are still held in the various generalized district courts, patent appeals from all the district courts are heard in the Federal Circuit.[182] The main reason for this experiment was that the various regional circuits had interpreted patent law so differently that there was little uniformity in the law,[183] which resulted in considerable forum shopping.[184] Thus, a prime motivation for the formation of the Federal Circuit was the need for uniform law declaration. One effect, however, has been to create an appellate court that is likely to be expert in the evaluation of factual issues as well.

There are, therefore, at least two reasons to expect less deference to fact-finding in the Federal Circuit. First, with respect to patents, especially, the Federal Circuit is the court with the expert judges. It would be fortuitous to find a trial court judge with patent expertise, but the judges of the Federal Circuit are expected to develop such expertise.[185] Thus, the appellate court in patent cases may be viewed as more competent to determine complex factual issues, and will be more willing to undertake independent review, by whatever name.[186] Indeed, the Federal Circuit may see itself as more capable of performing the error correction function in patent and other cases than would a generalized appellate court with no special expertise.

A second reason to expect less deference to fact-finding in the Federal Circuit is that performance of the law-declaring function will necessarily involve the court in the evaluation of mixed questions of law and fact. As the court works through and resolves the conflicts from the other circuits, it will redefine the scope of patent law. It will do so on a case-by-case basis, with the facts in each case helping in the redefinition process. Because there are often good reasons for independent review of mixed questions,[187] and because the line defining such questions is so fluid, one might

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179. Pub. L. No. 97-164, 96 Stat. 25 (1982). *See generally* Sward, *supra* note 50.

180. *See* 28 U.S.C. § 1295 (1988). *See generally* Sward, *supra* note 50, at 389-91.

181. *See* Sward, *supra* note 50, at 387-88.

182. *See* 28 U.S.C. § 1295.

183. *See* Sward, *supra* note 50, at 387-88.

184. *See id.* For an example of a case where differences in interpretations of patent law apparently led to extreme forum shopping, see Hoffman v. Blaski, 363 U.S. 335 (1960).

185. *See* Sward, *supra* note 50, at 397-98.

186. *See, e.g.*, Dennison Mfg. Co. v. Panduit Corp., 475 U.S. 809, 811 (1986) (court of appeals failed to mention Rule 52(a) in holding that the district court had erred on a finding of obviousness).

187. *See supra* part II.A.

expect more independent review in the Federal Circuit and more controversy over that review.

More independent review of fact-finding by the Federal Circuit may, therefore, be consistent with the analysis presented in this Article. The individual values behind error correction are satisfied because the court with the expertise, or competence, is closely scrutinizing the trial court's fact-finding. Systemic values are also satisfied. The Federal Circuit's purpose was to declare uniform patent law, and to the extent that this task is related to fact-finding, more extensive review of fact-finding is to be expected. Furthermore, the efficiency expectations that are created by setting up a specialized appellate court are different from those in the ordinary case, in which the supposed competence is divided between the trial and appellate courts simply on the basis of abstract fact-finding or law-declaring functions. When the appellate court has substantive expertise, the losing party will be more likely to appeal, in hopes that the appellate court will examine the trial court's fact-finding more closely and, perhaps, overturn fact-finding that a less specialized panel would have let stand. Thus, deferential review by an expert court may not be as effective at discouraging appeals as it is when the appellate court has no particular expertise.

## IV. SUMMARY AND CONCLUSION

The controversy over the scope and proper application of the clearly erroneous standard is more understandable when analyzed in the terms presented in Part II of this Article. Indeed, this framework might provide some guidance on when more independent appellate review of trial-court fact-finding is appropriate. There is, however, no clear line separating when an appellate court should be deferential and when it should be independent. Each case presents its own unique balance of the factors considered here.

The analysis began with an identification of the two functions of an appellate court: creative and corrective. The creative function involves the declaration of law and the corrective function involves the correction of fact-finding error. The allocation of primary judicial authority to trial or appellate courts as to the law-declaring and the fact-finding functions is one of the effects of a standard of review. That allocation is based on considerations of competence, fairness, and efficiency. As to the law-declaring function, these considerations point clearly toward allocating authority to the appellate courts. As to the fact-finding function, the three factors, taken together, do not point clearly in either direction. Recently, the efficiency considerations have become paramount, and because they point toward the trial court as the primary fact-

finder, some efforts have been made to cut back on the appellate courts' corrective authority. The 1985 amendment to Rule 52(a) is a prime example of this.

The creative and corrective functions also reflect different underlying values. The corrective function reflects a strong value in individual justice and the opportunity of the individual to seek that justice. The creative function is concerned less with the individual than with the needs of society as a whole. In declaring and clarifying legal principles, it creates order in society and helps members of society to order their affairs. The creative function has come to be seen as the primary function of appellate courts, with the corrective function relegated to a subsidiary role. To some extent, this reflects an overburdened judiciary, trying to allocate authority in a way that the system can handle. It may, however, also reflect some adjustment in societal values.

It is not, however, easy to delimit the creative and corrective functions, and the result is controversy. This Article suggests that there are two circumstances when such controversy may develop. One is when the creative function is implicated in the fact-finding. Mixed questions and constitutional facts are examples of this. The other circumstance is when the justifications for allocating fact-finding to the trial court—competence, fairness, and efficiency—are particularly ambiguous. Appeals to specialized appellate courts are an example of this. Appeals based on documentary evidence may be another, because the fairness considerations may be easier for an appellate court to see, and the court thus may be tempted to "correct" a trial court's fact-finding error that is merely likely, but not clearly, erroneous. The appellate courts may continue to do this, holding that clear error is easier to see when the evidence in the case is documentary.

If this analysis is correct, complaints by courts and commentators about over-reacting appellate courts will not resolve the "problem" of independent appellate review of fact-finding. Indeed, there may be sound justifications for flexibility in determining when independent appellate review is appropriate.