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Universal De Novo Review

Chad M. Oldfather*

Introduction

The idea that appellate courts owe no deference to the legal rulings of lower courts is as unexamined as it is familiar. The concept of de novo review is one that every lawyer encounters early in the course of her legal education. Moreover, she learns that the use of de novo review is universal—that every time an appellate court reviews a legal determination made by a trial court, it considers the question anew, and accords no deference to the lower court’s decision. This bit of learning seems typically to be accompanied by a vague suggestion that the practice is due to expertise, specialization, or some other competence advantage that appellate judges and courts enjoy relative to their trial-level counterparts.¹ Whatever its basis, the idea has become an accepted truth, one of those things that every lawyer knows and has known for so long that we regard it as an unalterable feature of the legal landscape.²

On reflection, however, the practice is somewhat puzzling. Surely the standard explanations are, at best, incomplete. Whatever advantages appellate courts might generally have over trial courts, it seems unlikely that they would hold across every legal question that might arise in every case. What is more, the notion of universal de novo review stands in tension with a whole host of reform efforts and

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¹ See, e.g., RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE § 14.7 (2006) (“This intrusive review is appropriate because the determination of what the law is, is not something on which the trial court would have especial expertise It is a dry question of research, which the appellate court may actually be better equipped than the trial court to perform.”); see also ALLAN IDES & CHRISTOPHER N. MAY, CIVIL PROCEDURE 1056–57 (2d ed. 2006) (implying that the standard is based on competence, despite similar training in the law among district and appellate court judges). Other introductory texts attribute the de novo standard to the need to ensure uniformity. See, e.g., THOMAS D. ROWE, JR. ET AL., CIVIL PROCEDURE 300 (2004) (stating that de novo review of questions of law “reflects the importance of attempting to assure uniformity in the definition of generally applicable legal standards”).

² As Professor Caminker noted in concluding his analysis of why lower courts are bound to follow precedent, “Familiarity dulls curiosity.” Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 873 (1994).

other developments in the judicial process literature over the past decade or so. Universal de novo review provides appellate courts with a broad warrant to engage in lawmaking.³ Yet the trend has been to suggest that courts ought to make *less* law. Scholars have argued in favor of decisional minimalism, pursuant to which courts ought to decide cases on the narrowest available grounds.⁴ They have argued that appellate courts should exercise their “passive virtues” to avoid making law in certain situations.⁵ Still others have suggested that intermediate appellate courts should be given the power to control their dockets through a mechanism of discretionary review.⁶ Meanwhile, appellate courts have embraced the issuance of “unpublished” opinions, one of the chief features of which is that they have no precedential effect.⁷ And then there is *Bush v. Gore*,⁸ for better or worse the poster child for the proposition that courts might sometimes find it appropriate to resolve questions of law but not to make law,⁹ and, by virtue of the controversy surrounding it, for the notion that any such power ought to be somehow constrained.¹⁰

All of this suggests the need to gain a better understanding not merely of de novo review, but also of the universality of its application. After all, when coupled with the doctrine of precedent and the

³ See generally Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613, 658 (1999) (“[D]e novo review actually gives the courts a greater role in lawmaking than does deferential review.”).

⁴ See generally CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 4 (1999) (“Decisional minimalism has two attractive features. First, it is likely to reduce the burdens of judicial decision Second, and more fundamentally, minimalism is likely to make judicial errors less frequent and (above all) less damaging.”).

⁵ See *infra* text accompanying notes 180–84.

⁶ See generally DANIEL J. MEADOR ET AL., APPELLATE COURTS 1040–50 (2d ed. 2006) (reprinting and commenting on Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151, 1155–58 (1981); Bernard G. Barrow, *The Discretionary Appeal: A Cost Effective Tool of Appellate Justice*, 11 GEO. MASON L. REV. 31 (1988); and DANIEL J. MEADOR, APPELLATE COURTS: STAFF AND PROCESS IN THE CRISIS OF VOLUME 168–71 (1974)).

⁷ There has been an enormous amount of commentary concerning the use of unpublished opinions over the past decade. For a small sampling, see Martha Dragich Pearson, *Citation of Unpublished Opinions as Precedent*, 55 HASTINGS L.J. 1235, 1275–93 (2004); Michael B.W. Sinclair, *Anastasoff Versus Hart: The Constitutionality and Wisdom of Denying Precedential Authority to Circuit Court Decisions*, 64 U. PITT. L. REV. 695, 705–10 (2003); Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 IND. L. REV. 399, 402–04 (2002).

⁸ *Bush v. Gore*, 531 U.S. 98 (2000).

⁹ See *id.* at 109 (“Our consideration is limited to the present circumstances.”).

¹⁰ See generally RICHARD L. PACELLE, JR., THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS 9–31 (2002) (describing the issues raised by judicial policymaking in light of *Bush v. Gore*).

understanding that courts must decide the disputes that come before them,¹¹ universal de novo review amounts to a requirement that courts make law in all cases presenting contested legal issues. If, as the developments outlined in the preceding paragraph suggest, there is reason to believe that such an obligation is not desirable, then perhaps curtailing the universality of de novo review provides another avenue for achieving that end. We might instead authorize appellate courts to engage in deference—something of a *Chevron* doctrine¹² for trial courts—in certain circumstances.

This Article's aim is to enhance our understanding of the practice of de novo review, with special emphasis on four subsidiary questions. First, how might the practice of de novo review be justified? Does institutional competence provide the answer, or must we look more broadly? Second, do those justifications support the universal implementation of de novo review? Put another way, assuming there are good reasons for appellate courts to engage in de novo review of some portion of the legal determinations that come before them, do those reasons support such review of every legal issue confronted on appeal? Third, if the answer to the second question falls somewhere short of a resounding yes, might it make sense to do away with universal de novo review? Fourth and finally, assuming that we might want to reserve de novo review for certain types of cases or questions (or, to reverse the presumption, that we might want to except certain types of cases or questions from de novo review), how might we go about doing it?

The analysis, which focuses on possible consequentialist rationales for the practice, reveals that the notion of universal de novo review is nowhere near so easily warranted as our intuitions would suggest,¹³ that there is no single coherent justification for the practice, and that any serious effort to articulate a justification requires reliance on a cluster of reasons that, while they do not collectively amount to a complete justification, might nonetheless suffice to provide a rule-consequentialist account. It also reveals that there are potentially serious

¹¹ For an analysis of the nature of this “duty to decide,” see Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 161–80 (2005).

¹² The *Chevron* doctrine, arising out of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–44, 864–66 (1984), requires courts in certain circumstances to defer to agency interpretations of their governing statutes and is rooted in considerations of institutional competence and separation of powers. See, e.g., Note, *The Two Faces of Chevron*, 120 HARV. L. REV. 1562, 1562 (2007).

¹³ See *infra* Part II.

costs associated with universal de novo review.¹⁴ Because it effectively obligates courts to make law in every case presenting legal issues, it will lead to the creation of law in cases where it is inadvisable to do so, and thus lead to the creation of “bad” law. This could occur because the case before the court is factually atypical and thus not representative of the range of situations over which the rule formulated by the court will apply, because the parties fail to provide the court with the inputs it needs to engage in effective lawmaking, or because the court itself lacks the requisite legal or factual expertise to formulate an appropriate rule of law.

Changes over the past half century in the context in which judging occurs have made these concerns more acute. Appellate caseloads have skyrocketed,¹⁵ leaving judges with less time for each case and thereby reducing any competence advantage that may have stemmed from appellate judges’ ability to engage in less hurried contemplation. Accompanying procedural modifications have made it easier, and probably more tempting, for a court inclined to “duck” a difficult issue to do so. Evidence suggests that courts have taken advantage of these opportunities.¹⁶ While such avoidance may be normatively desirable for the reasons just referenced, the lack of doctrinally sanctioned channels for its exercise means that it presently can only take place via subterfuge.¹⁷ Thus, it is worth exploring the formulation of a mechanism to govern the exercise of appellate deference to the legal determinations of lower courts.

The remainder of the Article proceeds as follows. Part I first gives further definition to the inquiry and then attempts to provide a comprehensive review of the justifications for de novo review, accompanied in each instance by a critique of the particular justification under consideration. The analysis reveals that the primary justifications fall into two general categories. The first has to do with the institutional competence of appellate courts to resolve contested legal issues. The second includes reasons for de novo review that stem from systemic needs rather than from an assumption that appellate courts will necessarily generate better law. Part II assesses the justifications as a whole, considering whether universal de novo review can be justified on either act-consequentialist or rule-consequentialist grounds, and concluding that the latter presents the only plausible

¹⁴ See *infra* Part II.B.

¹⁵ See *infra* notes 79–81 and accompanying text.

¹⁶ See *infra* notes 169–71 and accompanying text.

¹⁷ See *infra* notes 172–76 and accompanying text.

source of justification. Finally, Part III considers the possibility of deference. Even if we conclude that universal de novo review could be justified on rule-consequentialist grounds, we might determine that a readily administrable rule of non-universal review would generate an even greater net benefit. Although the Article does not attempt to articulate the content of such a rule in great detail, it does outline some of its basic components. These include a limitation to cases of first impression in which the appellate court has a basis for believing that it is at a lawmaking disadvantage.

I. The Underpinnings of De Novo Review

Assessment of the practice of de novo review requires first an understanding of the institutional arrangements and related norms that underlie the practice. This Part begins by defining the inquiry more specifically and follows with a brief overview of the functions of appellate review. Finally, it reveals some of the jurisprudential assumptions that are implicit in the practice of universal de novo review. All of this is undertaken with an eye toward more fully understanding the practice, which in turn supports a more informed assessment of its appropriateness.

A. Defining the Scope of the Inquiry

This Article analyzes what I will call “universal de novo review,” by which I mean the practice pursuant to which appellate courts engage in de novo review of *every* legal issue presented to them. To phrase it somewhat differently, the inquiry concerns why we expect—indeed, require—appellate courts not only to provide their own answer to questions of law without deference to a lower court, but to do so without fail. The practice is somewhat startling on its face simply because of its universality. Consider, in contrast, appellate review of factfinding or discretionary decisions made by lower courts. In these contexts the general rule is one of appellate deference.¹⁸ It is, however, only a general rule. While appellate courts typically do not scrutinize, for example, lower courts’ factual determinations, they occasionally do so.¹⁹ Indeed, in certain narrow classes of cases, appel-

¹⁸ See generally Chad M. Oldfather, *Appellate Courts, Historical Facts, and the Civil-Criminal Distinction*, 57 VAND. L. REV. 437, 444–66 (2004) (describing and critiquing justifications for deference to trial-level factfinding).

¹⁹ See *id.* at 497–98 (describing a study revealing that appellate courts frequently disregard factual determinations of the jury in sufficiency-of-the-evidence reviews).

late courts have the authority to review questions of fact de novo.²⁰ To be sure, there are plausible explanations for this asymmetry of treatment, including the possibility that it is little more than a product of appellate courts' efforts to maximize their power.²¹ Still, the contrast invites reflection on the appropriateness of this disparity.

Some definitions are in order. Despite their familiarity, neither "de novo review" nor "questions of law" is a term with clearly defined content. "De novo review" is the easier of the two to define. Also occasionally referred to as "plenary," "independent," or "free" review,²² the core idea is that the appellate court owes no formal deference to the reasoning or conclusions of the court below.²³ This is not to suggest that the appeals court should not take the lower court's reasoning into account,²⁴ that it is free to ignore precedent,²⁵ or that it may properly reassess a case from top to bottom.²⁶ Instead, the appellate court provides its own answer to the question under consideration, the contours of which will be limited by the principles just listed

²⁰ The primary example involves questions of "constitutional fact." See generally Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); see also generally Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427 (2001) (defining and critiquing the version of the constitutional fact doctrine applied by the Supreme Court).

²¹ See Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 778–79 (1957) (discussing power maximization and concluding that it is a result of decisions purportedly in the public interest, not hunger for power).

²² See 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 2.14 (3d ed. 1999); see also MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 15 (2d ed. 2006) ("De novo review is sometimes referred to as plenary review because it allows the court to give a full, or plenary, review to the findings below.").

²³ See 1 CHILDRESS & DAVIS, *supra* note 22, § 2.14 ("This [appellate] role is more accurately described as one of *no particular deference*."); BEAZLEY, *supra* note 22, at 15 ("When courts apply the de novo standard, they look at the legal questions as if no one had yet decided them, giving no deference to legal findings made below. When this standard is applied, the reviewing court is willing to substitute its judgment for that of the trial court or the intermediate court of appeals.").

²⁴ See *Salve Regina Coll. v. Russell*, 499 U.S. 225, 232 (1991) ("Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review."); cf. 1 CHILDRESS & DAVIS, *supra* note 22, § 2.14 ("Even de novo review, then, seems to call for specific and aggressive allegation of error by the appellant, who must also keep in mind that free review is not strict scrutiny and will lack the skepticism built into that constitutional review test.").

²⁵ See 1 CHILDRESS & DAVIS, *supra* note 22, § 2.14 ("[T]he appellate court is acting within a body of established law binding on it under principles of judicial hierarchy, *stare decisis*, and sometimes *law of the case*.").

²⁶ See *id.* ("When the appeals court has full review of a legal issue, it has no license to venture freely into other issues of fact or the case as a whole.").

as well as the state of the record.²⁷ The point is not that the court is unconstrained, just that it is not constrained by the lower court's analysis of that question.²⁸ Thus, de novo review stands in contrast to more limited standards of review, such as for abuse of discretion, where the reviewing court's role is restricted to determining whether the lower court's ruling fell within some zone of permissibility.²⁹

As noted, de novo review is typically associated with the review of legal questions. While this characterization is largely accurate, it is misleading. It implicitly suggests that all legal questions are equivalent. In reality, the line between questions of "fact" and questions of "law" is to a significant degree illusory.³⁰ It is better to imagine a spectrum running from questions of "historical fact" on the one end to questions about the content of a legal rule on the other,³¹ with

²⁷ See *id.* ("[W]hat is meant [by de novo review] is merely appellate power, ability, and competency to come to a different conclusion on the record as determined below."); see also, e.g., *Watzek v. Walker*, 485 P.2d 3, 6 (Ariz. Ct. App. 1971) ("This Court on appeal will normally not disturb a trial court judgment if there is any reasonable evidence supporting it. Yet, in reviewing questions of law, we are not bound by the findings of the trial court but are free to draw our own legal conclusions from the evidence presented." (citations omitted)). In this sense it is distinct from trial de novo as an appeal mechanism. See MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 37 (1981) ("[W]e find many other legal systems that use or have used trial de novo at [sic] the standard mode of appeal. Where appeal is by trial de novo, the appellate court simply hears the whole case all over again. Trial de novo is found in most nonliterate societies, no doubt in large part because of the difficulty of preserving trial court findings of fact to serve as a basis for appellate decision." (citation omitted)).

²⁸ See HARRY T. EDWARDS & LINDA A. ELLIOTT, *FEDERAL COURTS STANDARDS OF REVIEW* 24 (2007) ("[D]e novo review requires nothing more of an appellate court than that it decide legal issues as would the first level decisionmaker It adds nothing of its own to the appellate process, but rather simply mandates that an appellate court apply the substantive standards governing resolution of the legal question at issue.").

²⁹ The content of the abuse of discretion standard—to the extent it is even appropriate to speak of a single standard in this context—is considerably more elusive than that of de novo review. See generally 1 CHILDRESS & DAVIS, *supra* note 22, § 4.21 (discussing how the abuse of discretion standard "appears to differ *between* contexts"). Still, the standard entails at least some deference to the trial judge, which implies a range of affirmable rulings, rather than a single one. See *id.* ("It is clear, of course, that the abuse of discretion phrase is meant to insulate the judge's choice from appellate second-guessing. It also should be clarified that in most cases the appellate court may not treat the phrase as equal to *an error of law* if that is meant to imply free review; surely some deference is due under an expression of abuse of discretion, and if indeed independent review is appropriate in certain situations, courts might then say that an abuse test is not applicable there.").

³⁰ See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 349 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("Some critics have concluded that 'law' cannot be distinguished analytically from 'fact.'"); MEADOR ET AL., *supra* note 6, at 223 ("The distinction [between questions of law and questions of fact] has bedeviled the courts for decades. There are, of course, some clear-cut situations. But in many instances there is no bright line, and decisions are difficult to reconcile.").

³¹ 1 CHILDRESS & DAVIS, *supra* note 22, § 2.13 ("To be sure, at its outer limit the line is

a large zone involving the application of legal rules to particular factual situations in the middle.³² Some portion of the cases in this middle zone are characterized as mixed questions of law and fact and are often subject to de novo review.³³ For example, the Supreme Court has charged appellate courts with the responsibility to review punitive damage awards de novo,³⁴ and has created a somewhat vaguely de-

both clear and uncontroversial: when the appeals court is examining a 'purely legal' conclusion, such as whether the First Amendment can broadly protect gestures or applies to the states, it is not hard to recognize the court acting in a law-making role The other end also may be neat: what Alice did yesterday is regarded as a pure fact and is usually delegated to the trial court."); see also EDWARDS & ELLIOTT, *supra* note 28, at 7 (articulating further the spectrum spanning from legal precepts to historical facts).

³² See 1 CHILDRESS & DAVIS, *supra* note 22, § 2.13 ("In spite of some clarity at wicks' ends, the area in between these 'pure' examples gets increasingly sticky, and the courts cannot resolve the tricky differences by bare citation to the general rule of appellate lawmaking or by pointing to the ubiquitous but quixotic law-fact distinction. An error of law can involve anything from simple reliance on an overturned case, to a complex mix of the evidence at hand with the effort to state some substance and guidance that will apply beyond the facts of the particular case. The latter mission may be considered lawmaking, but it is not undoubtedly so, and the appellate court in its action may be either just doing its job or usurping the trial judge's job."); EDWARDS & ELLIOTT, *supra* note 28, at 8 ("As the labels suggest, mixed findings or mixed questions generally defy ready categorization as either law or fact. Consequently, the fact/law paradigm falters as a method for determining whether appellate review should be *de novo* or deferential.").

³³ See BEAZLEY, *supra* note 22, at 15 ("Courts apply the de novo standard not only to questions of law, but also to mixed questions of law and fact. A mixed question of law and fact is often characterized as a question about whether certain agreed-upon facts meet a legal standard."). Standards of review relating to mixed questions differ from one jurisdiction to the next, and not for any apparent philosophical or jurisprudential reasoning. At least one commentator has argued that "[t]here seems to be no rhyme or reason" to the jurisdictional variations. See Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 107 (2005). Others offer explanations grounded in practical and policy considerations. See, e.g., Ornelas v. United States, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting) (noting that when a mixed question is presented on appeal, the standard of review "depend[s] upon essentially practical considerations"); Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 COLUM. L. REV. 888, 905 (1998) (examining three instances of mixed questions and concluding that the court considered "the choice of the standard of review [to be] a policy question"). Some courts and commentators have attempted to articulate guidelines for allocating review authority, such as by considering whether the question at issue is "primarily" or "essentially" a question of fact or law and by considering who (judge or jury) is better situated to make the determination. Warner, *supra*, at 107, 109–11. Still other courts have adopted a process of bifurcated review, pursuant to which the appellate court defers to the trial court's resolution of the factual aspects of the issue while allowing for independent review of its legal aspects. 1 CHILDRESS & DAVIS, *supra* note 22, § 2.18 (explaining the "split inquiry" and citing two examples: Price v. Wainwright, 759 F.2d 1549, 1551 (11th Cir. 1985), and United States v. McConney, 728 F.2d 1195, 1200–01 (9th Cir. 1984) (en banc)).

³⁴ See generally 1 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 4:47 (3d ed. 1997) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), as providing "guideposts" for de novo appellate review of punitive damage awards and, as examples of the application of the standards, Cont'l Trend Res., Inc. v. Oxy USA, Inc., 101 F.3d 634 (10th Cir. 1996), Lee v. Ed-

finer category of “constitutional fact” issues which are likewise to be reviewed anew by appellate courts.³⁵ These situations are interesting, and the justifications for de novo review of such questions overlap to a large degree with what follows in this Article. For the sake of clarity, however, this Article’s analysis will focus on the review of pure legal issues. Thus, it posits an appellate court presented with an issue that requires it to determine the content of a legal standard. While the analysis that follows undoubtedly has implications for the practice of de novo review more generally, it may not apply in all its particulars.

B. *The Institutional Functions of Appellate Courts*

Appellate courts serve two primary institutional functions—the correction of error in the initial proceedings,³⁶ and the development of the law.³⁷ Under most accounts, error correction is the historic basis

wards, 101 F.3d 805 (2d Cir. 1996), *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513 (D. Utah 1996), and *Rush v. Scott Specialty Gases, Inc.*, 930 F. Supp. 194 (E.D. Pa. 1996)).

³⁵ See generally 1 CHILDRESS & DAVIS, *supra* note 22, § 2.19 (describing the history and uncertain application of the constitutional fact category); see also generally Monaghan, *supra* note 20, at 238 (describing presuppositions behind constitutional fact review and arguing “that constitutional fact review at the appellate level is a matter for judicial (and legislative) discretion”). Generally speaking, constitutional facts are those that implicate constitutional rights and are to be reviewed de novo in order to ensure the policy objective, among others, of uniform and effective application of the Constitution. See 1 CHILDRESS & DAVIS, *supra* note 22, § 2.19 (“[F]actfindings on decisive constitutional questions should be, for party protection and constitutional integrity, left for independent appellate review.”). For example, in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 502 (1984), the Court stated that “the constitutional values protected by the [actual malice] rule make it imperative that judges . . . make sure that it is correctly applied.”

³⁶ Professor Meador has described this function as requiring the court “[t]o correct error in the trial proceedings and to insure justice under law to the litigants.” MEADOR ET AL., *supra* note 6, at 2. Professor Meador noted, however, the diminishing dominance of the error-correction function in the modern court: “This is the historic basis for the intervention of an upper court. Though still central to the mission of an appellate system, it is no longer viewed as the sole or even (in the eyes of some) as the primary purpose.” *Id.* Elsewhere, Meador, along with Professors Carrington and Rosenberg, have observed that “[t]he traditional appeal calls for an examination of the rulings below to assure that they are correct, or at least within the range of error the law for sufficient reasons allows the primary decisionmaker.” PAUL D. CARRINGTON, DANIEL J. MEADOR & MAURICE ROSENBERG, *JUSTICE ON APPEAL* 2 (1976). In addition, they emphasize the role of the appeal mechanism in assuring trial judges that their correct decisions will be endorsed by the larger system and providing similar assurances to the parties and the public. *Id.*

³⁷ According to Professor Meador, the lawmaking function requires a court “[t]o enunciate and harmonize the decisional law of the jurisdiction.” MEADOR ET AL., *supra* note 6, at 2. This function now occupies a more prominent place both because legal realism undercut the classic view of courts finding, rather than creating, law, and because the complexity of modern society requires more law, and more refined law, than legislatures are capable of providing. See *id.* Meador identifies additional functions, including the supervision of trial courts and further-

for appellate review.³⁸ Although the precise nature of review for error remains surprisingly underdeveloped, fulfillment of this function is typically conceived of as involving a focus on ensuring justice between the immediate parties to the appeal.³⁹ Thus, reversal by an appellate court is appropriate in such situations as where a trial court has exceeded the bounds of its discretion, issued a verdict contrary to the evidence, or applied an inappropriate rule.⁴⁰ Somewhat less tangibly, the availability and processes of appellate review provide psychological cover for the adjudicative process by spreading decisional responsibility among different judges and over a relatively long period of time.⁴¹ More generally, an appellate court's correction of an error in any given case tends to foster an environment in which fewer errors are committed in the first instance.⁴²

The law declaration function, as its name implies, involves the articulation and refinement of legal standards through the process of case-by-case adjudication. Prior to the Legal Realist movement, when courts were viewed as engaged in the tasks of finding and declaring, rather than making, law, this function was regarded as, at best, secondary.⁴³ Now, however, most view it as at least the equal of, if not

ance of the perception of systemic legitimacy. *See id.* at 2–3; *see also* ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE § 1.10 (1983) (arguing that “[d]oing justice” in both “the individual case” and “in the context of the entire legal system” ought to be regarded as a function of appellate courts).

³⁸ *See* MEADOR ET AL., *supra* note 6, at 2. *But see* Wright, *supra* note 21, at 779 (“The controversial question is whether appellate courts have a second function, that of ensuring that justice is done in a particular case.”).

³⁹ *See* generally Chad M. Oldfather, The Concept of Error in Civil Appeals (Oct. 16, 2008) (unpublished manuscript, on file with author), for a discussion of the nature of review for error and a more complete treatment of conceptions of the error correction function.

⁴⁰ *See, e.g.,* Commonwealth v. Craft, 669 A.2d 394, 398 (Pa. Super. Ct. 1995) (Johnson, J., concurring) (“As an error-correcting court, we are generally limited to determining whether the trial judge has committed either an abuse of discretion or an error of law in the handling and disposition of a case.”).

⁴¹ *See* MEADOR ET AL., *supra* note 6, at 3 (“[A]n appeal spreads responsibility, thereby making difficult or sensitive decisions more liveable for the decision makers and the mistakes more tolerable for all concerned.”); *see also* SHAPIRO, *supra* note 27, at 49 (“For appeal allows the loser to continue to assert his rightness in the abstract without attacking the legitimacy of the legal system or refusing to obey the trial court.”).

⁴² *See* ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 3 (1941) (“That hasty, unfair or erroneous action may be reversed by a court of review holds back the impulsive, impels caution, constrains fairness and moves tribunals to keep to the best of their ability in the straight path.”).

⁴³ *See* MEADOR ET AL., *supra* note 6, at 2 (“A recognition of [law making] as a purpose of appellate review is a product of modern legal realism. Under the earlier view of courts as simply finding and declaring the law, this would have been perceived as merely a by-product or an incidental feature of appellate adjudication.”); *see also* Paul D. Carrington, *The Function of the*

primary to, error correction as a responsibility of an appellate court.⁴⁴ Its exercise likewise leads to a reduction in errors by trial courts, but via a process of rule refinement. As a body of law develops over a series of cases, it should ideally tend toward greater clarity and certainty, such that an individual trial court can feel more confident that it is applying the law in an appropriate manner, and that trial courts throughout a jurisdiction will do so in a manner consistent with one another.

Both of these institutional functions are implicated when a court reviews a legal issue *de novo*, though not always to the same extent. A litigant arguing on appeal that the trial court got the law wrong will, in general, be primarily concerned with having what it perceives to be an error corrected.⁴⁵ Unless it is a repeat player, it will not be as concerned with convincing the appellate court to adopt a particular formulation of the governing legal standard as with achieving a favorable result. Still, the party's arguments will often, if not always, push the court to exercise its law declaration function, because those arguments will serve as a claim that the court should endorse or, in cases of first impression, formulate a legal standard different from that applied by the trial court.⁴⁶ In turn, because the court's endorsement or formulation of a standard will serve as precedent in future cases, the court's efforts at error correction will often—or, depending on one's perspective, always⁴⁷—result in the creation of law.

It bears noting that universal *de novo* review is not a necessary consequence of the exercise of either of these appellate functions. Imagine a regime in which appellate courts reviewed questions of law

Civil Appeal: A Late-Century View, 38 S.C. L. REV. 411, 416 (1987) (observing that at the time of the creation of the present structure of the federal judiciary “[t]he perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts” and “[n]o one thought appellate courts necessary or useful in making law or policy”).

⁴⁴ MEADOR ET AL., *supra* note 6, at 2 (“Some now think of this law enunciating function as a more important justification for appeals than the error correcting purpose.”); *see also* Wright, *supra* note 21, at 779 (“Everyone agrees, so far as I know, that one function of an appellate court is to discover and declare—or to make—the law.”).

⁴⁵ There are exceptions. Some litigants, such as public interest groups and repeat players, are often more concerned with convincing the court to articulate a favorable legal standard than with getting a particular result in the case before the court.

⁴⁶ This will not always be the case. If the appellant's argument is that the trial judge applied a manifestly incorrect legal standard, such as by rendering a decision pursuant to a case that has been overruled or a statute that has been repealed, then the claim would implicate only the error correction function.

⁴⁷ *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 222–23 (1999) (arguing that virtually every appellate judicial decision requires “a conclusion of law with precedential significance”).

under some more deferential standard, such as for abuse of discretion. An appellate court considering a lower court's application of a legal rule would still be reviewing for error. The difference would lie in the manner in which error is defined. Under a system of de novo review, a lower court's decision can be characterized as erroneous if it departs in any way from the appellate court's preferred rule.⁴⁸ Appellate reversal (and, thus, a determination of error) under a more deferential standard would typically require some greater departure from the rule than an appellate court, acting de novo, would adopt by affirming.⁴⁹ The trial court would, in effect, be given greater latitude to depart from the appellate court's ideal formulation of the law before its ruling would be deemed erroneous. In similar fashion, an appellate decision rendered pursuant to some more deferential standard could still create law in a sense consistent with the law declaration function. Such law would, of course, almost necessarily be more limited in its reach than law created pursuant to a regime of de novo review. Even so, an appellate ruling on whether a trial court's formulation of a legal standard fell within its permitted zone of discretion would tell us something about where the boundaries of that zone are located, thereby limiting or expanding the authority of future trial judges.

C. *Jurisprudential Assumptions*

Any legal practice rests on certain understandings regarding the nature of law and the capacities of the relevant actors in resolving legal questions. The goal of this Subsection is to identify some of the more prominent jurisprudential assumptions underlying universal de novo review, with an eye toward informing the assessment of the prac-

⁴⁸ This is not to suggest that trial court departures from the appellate court's preferred rule will always be deemed erroneous in the sense that they will result in a reversal of the trial court's decision. "Harmless error" will not result in reversal, but nonetheless remains error. *See Chapman v. California*, 386 U.S. 18, 22 (1967) ("We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."); FED. R. CIV. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

⁴⁹ In the Seventh Circuit, one formulation of the abuse of discretion standard famously requires that to be overturned the decision under review must "strike [the reviewing court] as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988). Of course, appellate review for abuse of discretion "must vary with the nature of the lower court decision." *Lawson Prods., Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1437 (7th Cir. 1986). "[T]he variety of matters committed to the discretion of district judges means that the standard is necessarily variable." EDWARDS & ELLIOT, *supra* note 28, at 67.

tice performed later in this Article. Those assumptions include the following: (1) that there are correct answers to legal questions; (2) that those answers are ascertainable; (3) that those answers are articulable; and (4) that appellate courts are relatively more competent than trial courts at ascertaining and articulating those answers. This list is not exhaustive,⁵⁰ but rather is intended simply to expose and highlight the assumptions underlying the most commonly offered justifications for de novo review.

1. *That There Are Correct Answers to Legal Questions*

On its face, the practice of universal de novo review suggests an understanding of law as determinate, in the sense that there are correct answers to legal questions—not just to some, many, or most legal questions, but rather to all legal questions.⁵¹ This conclusion seemingly follows from the notion that an appellate court reviewing a trial court's determination of a question of law is engaged in a process of error correction. Whenever such a court resolves the question in a manner different from the trial court, it has at least implicitly concluded that the trial court's resolution of the question was erroneous. That, in turn, suggests the existence of a "correct" legal answer for the trial court to have gotten wrong.⁵² Recall, too, that error correction is

⁵⁰ As William Lucy has pointed out, the list of things we expect from adjudication is long—including "impartiality, consistency, predictability, fairness, justice, rationality and legitimacy"—and exceedingly difficult to accommodate. William Lucy, *Adjudication*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 206, 206 (Jules Coleman & Scott Shapiro eds., 2002). Any judicial practice will rest on some set of understandings with respect to each of these expectations, which in turn "brings into play many of the central questions of ancient and contemporary legal and political philosophy." *Id.* at 207.

⁵¹ See KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 24 (1960) ("The deciding is done under an ideology which in older days amounted to a faith that there is and can be only one single right answer. This underlies such ideas as 'finding the law' and 'the true' rule, and 'the' just decision.").

⁵² I have in mind here something close to full determinacy, which, as Larry Solum defines it, holds "with respect to a given case if and only if the set of legally acceptable outcomes contains one and only one member." Lawrence B. Solum, *Indeterminacy*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 488, 490 (Dennis Patterson ed., 1999). This includes both metaphysic and epistemic components—the former relating to whether there is law, the latter relating to whether it is knowable. See *id.* at 498 (discussing Ken Kress, *A Preface to Epistemological Indeterminacy*, 85 NW. U. L. REV. 134 (1990)). As Dan Coenen has observed, the doctrine of de novo review appears based on an understanding that law is determinate in both senses. See Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 911–12 (1989) ("This accepted approach to the appellate process apparently rests on a shared understanding that law exists, that the 'duty' of judges is 'to say what the law is,' and that doctrinal coherence and fairness for similarly situated litigants demands consistent application of legal rules. The rule of

the initial purpose for which appellate review was designed.⁵³ This implies that the practice of de novo review arose out of a world view in which all legal questions have correct answers.⁵⁴ Such an understanding is consistent with the traditional story in which inhabitants of the pre-Realist legal world conceived of law as a “brooding omnipresence” whose answers were to be discovered rather than created.⁵⁵

Nowadays, we are all Realists, as the saying goes,⁵⁶ and so the question becomes whether the practice of universal de novo review can accommodate a conception of law that acknowledges the existence of indeterminacy. Seemingly it can.⁵⁷ To speak of a correct answer in this context is not necessarily to refer to an answer that is correct in some objective sense. The existence of such an answer would surely be consistent with the regime we are describing. But we

de novo review, whatever its source, runs deep in our history; independent appellate inquiry into questions of law has marked our republic’s legal system from its earliest days.” (citations omitted)).

⁵³ See *supra* note 38 and accompanying text.

⁵⁴ As Paul Carrington has observed:

A chief concern [in 1891 when the Evarts Act was adopted] seems to have been a mistrust of the professionalism of the judiciary and of the capacity of individual judges to apply correctly law that was presumed clear and, thus, amenable to application

Such a legal system required an effective appellate system for one reason: The perceived role of the appellate court was to correct the errors of the trial court in applying the law to the facts.

Carrington, *supra* note 43, at 416; see also *id.* at 423–24 (discussing the formalist assumptions predominant in 1925).

⁵⁵ See, e.g., Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 660 (1999) (describing case law arguments in “the debate over formalism,” in particular “the suggestion, central to legal realism, that the decision how to read ambiguities in law involves no brooding omnipresence in the sky but is an emphatically human judgment about policy or principle”). Of course, as Michael Steven Green points out, this story contains elements of caricature. See Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1984–85 (2005).

⁵⁶ See, e.g., Green, *supra* note 55, at 1917 (noting that the assertion that we are all Realists has been repeated so often “that it has become a cliché to call it a ‘cliché’”); see also Solum, *supra* note 52, at 501 (“[T]he indeterminacy debate has made it clear that almost no one defends a strong formalist claim that the law determines every aspect of the outcome of every case If the claim that the law is radically indeterminate turns out to be silly, it is also the case that the strong formalist claim that the outcomes of cases are completely determined by the law is just as implausible.”).

⁵⁷ Indeed, the fact that law declaration is now regarded as one of the twin functions of appellate courts stands as evidence of broad acceptance of the proposition that law is “underdeterminate.” Per Solum: “The law is *underdeterminate* with respect to a given case if and only if the set of legally acceptable outcomes is a non-identical subset of the set of all possible results.” Solum, *supra* note 52, at 490. This stands in contrast to indeterminacy, which holds “with respect to a given case if the set of legally acceptable outcomes is identical with the set of all possible results.” *Id.*

can soften the assumption somewhat and still maintain consistency. We might mean “correct” in a sense more akin to “less wrong.” It may not be, on this view, that we believe that appellate courts have access to the single, best answer, but rather that they will reach a better answer (however “better” is to be measured) than will a trial judge. Here, too, an appellate panel can plausibly be described as engaging in error correction when it reverses a trial court ruling.

There are, to be sure, possible explanations for universal *de novo* review that do not depend on an assumption that legal questions always have correct answers in either of these senses. Instead, as we will explore below,⁵⁸ it might be that other considerations—such as the desirability of finality and consistency, or the simple need to have some institution that satisfies the demand for law—make it prudent to act as though there were correct answers to all legal questions even if we might actually believe otherwise. This is a variant of the familiar reasoning that it is often more important to have a question decided than to have it decided correctly.⁵⁹

Note, however, the consequences of such an approach. If we resort to a justification of universal *de novo* review that does not rely on the existence of correct answers across the run of issues, we concede the ability to justify review in those cases on the ground of error correction. For example, if there simply were no law governing the question before the trial court, then in at least some subset of such cases—call them the “hard cases”⁶⁰—it would not be meaningful to speak of that ruling as having been “erroneous.”⁶¹ Thus, if we take at face

⁵⁸ See *infra* Part II.

⁵⁹ See, e.g., *Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724 (1865) (“It is almost as important that the law should be settled permanently, as that it should be settled correctly.”).

⁶⁰ Commentators have offered various formulations of what might make a case “hard.” Solum suggests that a hard case is one in which “the outcome is underdetermined by the law in a manner such that the judge must choose among legally acceptable outcomes in a way that changes who will be perceived as the ‘winner’ and who the ‘loser.’” Solum, *supra* note 52, at 490. Frederick Schauer enumerates various types of cases that might fall into the category, including those where applicable rules provide no answer, where the rules provide an answer that conflicts with the rules’ underlying purposes, where applicable rules provide contradictory answers, and where the rules provide a clear answer that is consistent with their purpose yet still difficult to accept. Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 415 (1985). I take no position regarding whether the notion of error correction is inappropriate in the context of every such case. I do contend that the notion of error correction probably does not make sense with respect to, at the very least, some substantial subset of such cases.

⁶¹ Judge Richard Posner suggests that this dynamic will be present across an even larger segment of cases:

There is almost always a zone of reasonableness within which a decision either way can be defended persuasively, or at least plausibly, using the resources of judicial

value the assertion that one of the purposes of appellate review is to ensure that the trial judge applied the correct rules, then in at least some portion of the cases in which there were no rules it will be meaningless to speak of fulfilling the error correction function.⁶²

Relaxing the nature of the correctness assumption has another consequence, namely that fulfillment of the error correction function does not necessarily entail de novo review. In a world in which there is a single, correct answer to legal questions, an appellate court must “find” that answer, then reverse the trial court unless the trial court’s answer was more or less identical to that found by the appellate court. But suppose we adopt our relaxed conception of correctness. Then imagine a statute, the text of which points one way and the purpose of which points another, such that there is no clearly correct answer to the question of its applicability. A trial court that chose to apply the statute based on some extraneous factor, such as the economic status of the defendant, would have committed error. The same could be said of a court that reached a permissible result through, say, an evident (and expressed) misreading of the statute. Note, however, that appropriate resolution of such a case from the error-correction perspective does not require de novo review. In these situations appellate intervention would be justified under even a less intrusive standard, whether that be “abuse of discretion,” “clearly erroneous,” or some other formulation. Notably, application of those standards would not require reversal where the trial court’s resolution of the issue, while not identical to the appellate court’s, was within some range of adequate correctness.

This latter point suggests that even though we may all be Realists, the practice of universal de novo review reflects a continuing affinity for, or at least comfort with, the suggestion that legal questions do have correct answers. Indeed, as many commentators have noted, appellate courts in practice certainly act as though there are correct answers to legal questions. It is a common observation that appellate

rhetoric. But the zone can be narrow or wide—narrow when formalist analysis provides a satisfactory solution, wide when it does not. Within the zone, a decision cannot be labeled “right” or “wrong”; truth just is not in the picture.

Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1053 (2006).

⁶² One could articulate a rule-consequentialist justification for error correction akin to that developed below in Part II.B, in which fulfillment of the institutional error correction function would not depend on appellate courts having the ability or opportunity to correct error in all instances. The possibility of such a justification does not of course detract from the point that review in such cases does not itself involve error correction.

judicial opinions are written in such a way as to depict their conclusions as inevitable.⁶³ Karl Llewellyn referred to this as the “single right answer” style of judicial opinion.⁶⁴ Only rarely do courts openly admit to resolving a legal question on grounds other than its manifest correctness.⁶⁵

2. *That the Answers to Legal Questions Are Ascertainable*

Even if we posit the existence of correct answers to all legal questions, it does not follow that appellate courts should engage in *de novo* review. It must also be the case that courts are able to reason their way (or otherwise get to) those correct answers. Thus, universal *de novo* review also appears to rest on the assumption that the answers to legal questions are ascertainable.⁶⁶ This, too, follows from the proposition that error correction is one of the institutional functions of appellate courts. Reaching the conclusion that a lower court’s resolution of an issue is erroneous requires not only the existence of a right answer, but also of the capacity to determine what that answer is.

Despite its superficial plausibility, this will often be an unrealistic assumption. Consider, for example, a question regarding the appropriate interpretation of a statute. Assume that it is a settled principle in the jurisdiction that the correct interpretation of a statute is that which conforms to the intent of the legislature that passed it. Even if

⁶³ See Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 *RUTGERS L.J.* 1, 11 (1998) (“Opinions are overstated, rigid, seemingly inevitable. The rhetorical style is that of closure. The judge is depicted as having little choice in the matter: the decisions are strongly constrained by the legal materials.” (citations omitted)).

⁶⁴ See LLEWELLYN, *supra* note 51, at 26.

⁶⁵ Perhaps the most prominent example of relatively recent vintage is the “joint opinion” in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845–46 (1992), in which Justices O’Connor, Souter, and Kennedy voted to uphold “the essential holding of *Roe v. Wade*” “[a]fter considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis* . . .”

⁶⁶ Thanks to Larry Solum for suggesting this term. The notion that I am after is akin to what Ken Kress has called “epistemological indeterminacy.” See Kress, *supra* note 52, at 138–39. As Kress draws the distinction:

Metaphysical indeterminacy speaks to whether *there is* law; epistemic indeterminacy, to whether the law *can be known*. We might say that the question of abortion in a particular jurisdiction is metaphysically (or ontologically) determinate (at some particular time) if there is a right answer to the question whether a woman has a right to an abortion in that jurisdiction. It might nevertheless be epistemically indeterminate whether women have that right, because the right answer is not demonstrable, or because there is no method for determining the right answer, or because there is great controversy among lawyers or other persons about what that right answer is.

Id.

we further assume that the question at hand is one as to which the legislature can meaningfully be regarded as having an intent,⁶⁷ a court might not be able to determine what that intent was.⁶⁸ There might be no evidence relating to legislative intent on the particular point, or the evidence might be ambiguous.⁶⁹ Either way, something stands between the court and the correct resolution. We will explore another possible ascertainability problem in greater detail below, namely that the nature of case-by-case adjudication will often lead to situations where a court can ascertain the correct result for the case before it, but not for the larger range of cases of which it is a part.⁷⁰

Of course, just as we saw with respect to the assumption that there are right answers to legal questions, it may be the case that the ascertainability assumption is a useful fiction, grounded in the idea that other institutional and systemic considerations make it desirable to act as though courts can always ascertain the correct answers. Those considerations will likewise include the need for finality and consistency. Here again, though, a failure of the ascertainability assumption to hold across all cases presenting questions of law leads us to a situation where we cannot rely on error correction to justify the practice. From that perspective, though it might be the case that a trial court got a legal question wrong, the lack of an appellate court's ability to accurately ascertain that fact would render the court unable to fulfill its error correction mission.

3. *That Legal Rules Are Articulable*

Viewed in light of the institutional functions of appellate courts, universal de novo review rests on an apparent understanding that legal rules are articulable.⁷¹ This holds with respect to both the trial and appellate courts' efforts to articulate the law. In reviewing a trial court's ruling on a legal issue, an appellate court necessarily focuses

⁶⁷ Thus, the situation I posit is distinct from one where the legislature could not have foreseen that the precise question presented would arise, such as where the question concerns the applicability of a statute passed in the first half of the nineteenth century to a situation involving automobiles. In that situation, again assuming that legislative intent is the established guidepost for the analysis, it would arguably be more appropriate to regard the question as one without a correct answer.

⁶⁸ For a discussion of the problems associated with such a determination, see Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. Rev. 1023, 1025–32 (1998).

⁶⁹ See *id.* at 1026–27.

⁷⁰ See *infra* Part II.A.3.

⁷¹ For a discussion touching on the articulability of legal rules, see Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1318–39 (2008).

on the trial judge's statements regarding what the law is. In doing so, it assumes that the law, as determined by the trial judge, corresponds to the words the trial judge used to describe it. This, in turn, depends on the further assumption that the legal standard on which the trial judge relied is capable of being more or less fully expressed in words. In all, an appellate court's reversal of a trial judge's legal ruling amounts to the assertion that the trial judge's version of the law, as embodied in the words the judge used to describe that version, is erroneous.

In making that assertion, of course, the appellate court is simultaneously exercising its second function, that of declaring the law. This, too, depends on an assumption of articulability. Put another way, the use of *de novo* review in service of the law declaration function depends on courts' ability to articulate legal rules in sufficient detail or with sufficient clarity that those rules will adequately bind future courts to decide in a manner consistent with the present decision.⁷² If this were not so—that is, if a court's declaration of law in Case 1 could not meaningfully constrain the decisions of courts in Cases 2, 3, or 4—then there would be little point to the law declaration function. As explored in greater detail below, the ability of the court in Case 1 to articulate law—to create precedent—that binds future courts is necessary in order for rule of law arguments for *de novo* review to work. In other words, if one of the reasons for universal *de novo* review is to ensure that like cases are treated alike, and assuming law constrains to some meaningful degree, then it is desirable to have appellate courts engage in *de novo* review on a universal basis because *de novo* review gives courts the greatest ability to give content to a legal standard. That is, more deferential standards of review allow an appellate court to say nothing more precise than that the lower-level decisionmaker's formulation of a rule was within some permissible zone of correctness, which may not allow for the same degree of control over future decisionmakers. If, in contrast, a court articulating a rule in Case 1 cannot thereby impose considerable limits on subsequent courts, then not only does it become difficult to suggest that error correction is something other than a simple assertion of power (rather than a device to

⁷² This is not always a substantial demand in the sense that it requires a lot in the way of detail. Vague, inarticulable concepts can be law. The notion of reasonableness, for example, is a legal standard that depends for its content on a host of intuitive judgments. "Articulability" does not always equate to "precise articulability" or "comprehensive articulability"—the court can have a loose or vague standard in mind (such as reasonableness), but if it is unable to convey adequately that standard in words, then the same problems arise.

ensure adherence to the rule of law), but there would be little point to the law declaration function.

4. *That Appellate Courts Enjoy Advantages Relative to Trial Courts when It Comes to Resolving Questions of Law*

A final assumption underlying the practice of universal de novo review, and the one most often addressed in prior discussions, is that appellate courts are advantaged relative to their trial-level counterparts when it comes to addressing questions of law. Upon examination, this assumption turns out to rest on a number of subsidiary assumptions falling into two categories. The first is that appellate courts are better at answering legal questions than trial courts. Here, the focus is on institutional competence. The second is that universal de novo review serves systemic ends. The arguments in this category are directed more toward the functional advantages that flow from placing plenary legal authority in appellate courts. This Subsection considers the various justifications that have been offered for universal de novo review of legal questions. The discussion is limited to consequentialist justifications, which figure most prominently in the limited literature on the topic, and I accordingly do not consider constitutional or other formalist bases for the practice.⁷³

a. *Competence-Based Justifications*

The most commonly offered justifications for de novo review arise out of an understanding that appellate judges—or, at the very least, appellate courts—are somehow better at “doing law” than trial judges. On this view, de novo review of legal determinations serves

⁷³ One could, for example, imagine an originalist defense of the practice akin to the argument Judge Richard Arnold made against the practice of issuing nonprecedential opinions. See Arnold, *supra* note 47, at 225–26. Arnold argued that the original understanding of the phrase “judicial power” as used in Article III of the Constitution compels the conclusion that virtually every decision rendered by an appellate court includes some conclusion of law that has, and ought to be accorded, precedential significance. *Id.* at 226. For a brief time, Arnold’s arguments had the force of law in the Eighth Circuit. See *Anastasoff v. United States*, 223 F.3d 898, 899 (8th Cir.), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc). A parallel argument that the “judicial power” in the case of appellate courts necessarily includes de novo review of every legal question presented seems plausible, though not without problems. The judicial systems in the states as they existed at the framing of the Constitution were very different from the federal system created in the Judiciary Act of 1789, which in turn became the model for state judiciaries. See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789*, at 5–6, 35–38 (Wythe Holt & L. H. LaRue eds., 1990) (discussing the differences among the systems). In similar fashion, one might argue that any right to an appeal includes only a right to error correction and not a right to law declaration.

both the error correction function (because appellate judges and courts are well positioned to determine what the law is and thus to spot and remedy lower courts' legal mistakes) and law declaration function (because appellate judges and courts are most skilled at formulating legal standards and therefore best charged with responsibility for doing so). There are three frequently offered competence-based justifications.

i. Three Heads Are Better than One

The first justification builds off the intuition that there is strength in numbers and maintains that we can expect appellate courts to be better at reaching answers to legal questions simply because there are more judicial minds devoted to the task.⁷⁴ Such an effect could operate in two different ways. It could be a product of the deliberative process in multimember courts. On this view, the need to secure two votes in order to form a majority requires the judges to exchange viewpoints and information regarding the issues presented, and, perhaps more significantly, requires them to take the viewpoint of at least one other person into serious consideration.⁷⁵ Thus, it is the interaction among the members of the higher court that provides the advantage. Alternatively, the advantage might simply be a function of probability, in the sense that if at least two out of three judges agree on a conclusion, that conclusion is much less likely to deviate from the "correct" or, perhaps more appropriately, socially acceptable range of outcomes than is a decision rendered by a single judge.⁷⁶

⁷⁴ See FRANK M. COFFIN, *THE WAYS OF A JUDGE* 58 (1980) (arguing that an appellate court's "only claim to superior judgment lies in numbers"); William W. Schwarzer, *Defining Standards of Review*, in *THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* 100, 101-02 (Cynthia Harrison & Russell R. Wheeler eds., 1989) (arguing that the "claim to superior judgment . . . lies in numbers, three heads usually being better than one").

⁷⁵ See Caminker, *supra* note 2, at 846-47; Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 *HOFSTRA L. REV.* 297, 300 (1986); Wilfred Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 *FORDHAM L. REV.* 369, 385 (1984).

⁷⁶ See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *YALE L.J.* 82, 97-98 (1986). This holds if we assume that the probability of each judge on a panel reaching the "correct" outcome is greater than chance. *Id.* at 97. Relying on the Condorcet Jury Theorem, Kornhauser and Sager ask us to imagine a jar filled with marbles of only two colors (black and white), and to consider each judge's decision to be a draw of a single marble. *Id.* at 97-98. If the marbles are distributed in proportion to the probability of an individual judge reaching the correct outcome (with white marbles corresponding to the correct outcome and black marbles corresponding to an incorrect outcome), then the more draws (i.e., votes), the more likely the majority of draws will be white (i.e., reflect the correct outcome). *Id.* For a thorough analysis of the appropriateness and limitations of applying the theorem in this context, see Adrian

Of course, the proper operation of either of these mechanisms depends on the fulfillment of certain predicate conditions. Any advantage derived from interaction requires that there be meaningful interaction amongst the judges. This may once have been true; for example, in the Learned Hand era of appellate adjudication, judges might have enjoyed not merely additional time to engage in solitary reflection regarding their cases, but also the opportunity to discuss and debate the appropriate resolution with their colleagues.⁷⁷ Nowadays, however, such interaction rarely occurs.⁷⁸ The last several decades have instead witnessed appellate courts at both the federal and state levels grappling with the “crisis of volume”—the fact that caseloads have risen at a rate that far outpaces increases in the number of judges.⁷⁹ It may be that a small portion of cases receive something akin to the idealized appellate treatment.⁸⁰ Most do not.⁸¹

In addition, both versions of the justification assume some minimum level of expertise from the participating judges. This includes not only general expertise in the form of knowledge about the law, but also more specific expertise in the form of knowledge about individual cases and the issues they present. If the volume-related effects identified above have also resulted in a situation in which responsibility for cases falls primarily on one member of an appellate panel, then the other members of the panel have an incentive to free ride on the case-specific expertise of their colleague.⁸² In that instance, it would not be

Vermeule, *Many-Minds Arguments in Legal Theory* 2–6 (Harvard Law Sch. Pub. Law Research, Paper No. 08-02, 2008), available at <http://ssrn.com/abstract=1087017>.

⁷⁷ See William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 278 (1996) (describing the emphasis in “the Learned Hand model” on individual contemplation and face-to-face interaction).

⁷⁸ Some contend that such interaction never did occur. See, e.g., RICHARD A. POSNER, *HOW JUDGES THINK* 2 (2008) (“The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate *collectively*) very much is the real secret.” (citation omitted)); *id.* at 34 (“Remember that judges do not engage in much collective deliberation over a case (in fact less than most juries do.)”); Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1230–31 (arguing that historical prevalence of unanimous opinions actually evidences less debate among justices); Adam J. Hirsch, *Cognitive Jurisprudence*, 76 S. CAL. L. REV. 599, 630–32 (2003) (noting multimember courts’ lack of “collegiality and deliberation” and arguing that more interaction might lead to qualitatively better lawmaking).

⁷⁹ See MEADOR ET AL., *supra* note 6, at 385–419.

⁸⁰ See Richman & Reynolds, *supra* note 77, at 296–97.

⁸¹ *Id.* at 295–96.

⁸² See RUGGERO J. ALDISERT, *OPINION WRITING* § 3.4 (1990) (commenting on practices that allow “a one-person opinion to emerge from a multi-judge court”).

the case, in any meaningful sense, that “three heads” were applied to the problem. It might also be that all the members of the panel lack the requisite general or specific expertise because the area of law or factual context in which the dispute arose is new or unfamiliar. Interaction among those who are novices with respect to a given issue seems as likely to result in worse results as in better. The statistical argument rests on the related assumption that, in the aggregate, the conclusion that most judges would reach on a given legal question will be correct or acceptable, which may not hold with respect to some esoteric subsets of the legal universe. Moreover, the statistical argument of course deals in probabilities. The fact that a three-judge panel is more likely to reach a correct or generally acceptable result does not mean that it will reach such a result in any given case. The system of course recognizes this, providing not only for an additional level of review, but also one at which the courts have even more members.

ii. Appellate Judges as Specialists in Law

The second sense in which commentators suggest that appellate courts enjoy a competence advantage in resolving legal questions has to do with expertise. The core assertion is that since appellate judges focus their efforts on law, they are likely to be better at resolving legal issues than trial judges, who must concern themselves with a much wider array of tasks.⁸³ Simply as a product of repetition and the more limited nature of their role, the argument runs, appellate judges have greater experience working with doctrine and thus are arguably more likely to have a feel for the legal landscape at a broad level, as well as to be more attentive to how a given decision would fit within the larger body of law of which it will be a part. One can imagine that the relative specialization of appellate judges might lead to resolutions of legal issues that are somehow “better” in other respects than those reached by nonspecialists, including trial court judges.⁸⁴

Yet these advantages may be overstated. At least in the federal courts, nothing about the process by which judges are selected or the terms under which they serve suggests that judges on appellate courts

⁸³ See Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 13–14 (1991) (describing the argument, but concluding that the appellate court’s competence advantage, if any, “is slight”).

⁸⁴ Viewed in this light, the analysis also suggests the possibility that the “law” specialization of appellate courts could potentially be a detriment, in much the same way that other specialized bodies are criticized for reaching suboptimal decisions in some respects.

are inherently more competent than trial judges at resolving legal issues.⁸⁵ And although it is likely that appellate judges develop an advantage through experience,⁸⁶ that is not necessarily so. As a general proposition, an issue cannot be raised on appeal unless it was first presented to the trial court,⁸⁷ and not every issue raised at the trial level is appealed. In absolute terms, then, trial judges must make more legal determinations than appellate judges, and, more generally, there is reason to believe that courts at both levels “address the same kinds of substantive legal issues in roughly comparable proportions.”⁸⁸ Even if we concede a general appellate advantage in resolving legal questions, we must remain mindful that it is merely a generalization that will not hold in every case. A trial judge in a given case may have relevant subject-matter expertise that members of the appellate panel lack. Or, in the case of new statutory schemes or the application of existing legal standards to new technologies, none of the judges may have relevant preexisting subject-matter expertise, and any general advantage enjoyed by the appellate judges in terms of crafting rules or otherwise doing pure legal analysis might be outweighed by the superior perspective enjoyed by the trial court by virtue of being closer to the facts of the case at hand.⁸⁹

iii. Appellate Courts as Structurally Advantaged

A third potential source of a competence differential between trial and appellate courts stems from the possibility that appellate courts enjoy certain advantages that are products of institutional architecture. The design of the appellate process facilitates a focus on law. In any given appeal, only a small number of issues are under consideration, as compared to the potential multitude of factual, legal, and case management issues that are before the trial court in a case. Thus, the energies not only of the judges, but also of the parties, are focused exclusively on those issues. As a consequence, the appellate

⁸⁵ See Caminker, *supra* note 2, at 845–46.

⁸⁶ *Id.* at 846 (“District courts deal primarily with case management and factfinding and have thus developed expertise in these areas. By contrast, both tiers of appellate courts deal primarily with legal issues and have thus developed a corresponding expertise. The assignment of different primary tasks and its effect on procedures and experience thus ensure that appellate court legal rulings are likely to be ‘better’ than district court rulings.” (citations omitted)).

⁸⁷ See EDWARDS & ELLIOTT, *supra* note 28, at 76.

⁸⁸ Caminker, *supra* note 2, at 846 n.117.

⁸⁹ This is not to suggest that being closer to the facts will generally position a court to make superior legal determinations. In fact, as explored in greater detail in the next subpart, the opposite is probably true.

court has the advantage of briefing that is more focused on, and therefore more developed as to, the particular issues in dispute than likely was the case in the trial court. In addition, the court often has the benefit of the trial judge's input on the question. Finally, appellate decisionmaking takes place at something of a remove from the dispute. To the appellate judge, the record is "cold"—the parties will, at most, make a brief but mute appearance at oral argument, and testimony is words on a page—which facilitates dispassionate review.⁹⁰ In general, then, we might expect that appellate courts will be better positioned to resolve legal questions than their trial-level counterparts.

But we must not overstate the extent of this advantage. At least with respect to some sorts of legal questions, there is reason to question the assumption that attention to a problem correlates with quality of resolution.⁹¹ And the parties, who are of course focused on winning a particular dispute rather than on shaping a general legal standard, will not necessarily provide the input required for ideal generation of a rule of law.⁹² Design features might result in a general appellate court advantage over trial courts when it comes to resolving legal questions and developing law, but that advantage is neither universal nor uniform. In many cases the structural advantage enjoyed by the appellate court will be slight, and its capabilities will fall far short of the norm. Indeed, the trial judge's immersion in the facts of the case may sometimes provide her with a better sense of the context in which an issue arose and is likely to arise again. In these situations the appellate court could be at a lawmaking (and, for that matter, error correction) disadvantage.

b. De Novo Review as Necessary to Satisfy Systemic Needs

A second source of justification for universal de novo review is the need for an institution that can both generate legal standards and

⁹⁰ See, e.g., Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411, 412 (2000) (observing the perceived relationship between the "cold" record and "reasoned decisionmaking"); see also LESTER BERNHARDT ORFIELD, *CRIMINAL APPEALS IN AMERICA* 85 (1939) ("The cold printed record inevitably must give an incomplete and sometimes distorted picture of the case.").

⁹¹ Cf. Oldfather, *supra* note 71, at 1312–14 (exploring the "Unconscious Thought Theory" in the context of a broader survey of psychological research, suggesting that attempts to provide written justifications for decisions may negatively affect the quality of the underlying decision).

⁹² This is one of the central critiques offered by advocates of the "public law" model of adjudication. For a brief overview, see Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 752–54 (2006).

ensure that those standards are consistently implemented. Under this approach, the practice makes sense not because appellate judges and courts are necessarily better at resolving legal questions, but rather because it seemingly follows from the nature of our judicial system. Such a justification could take the following two forms.

i. Ensuring Equality and Predictability Through Precedent

A fundamental tenet of the American legal system is that like cases should be treated alike.⁹³ This is valuable in at least two respects. The first is that we value equal treatment under law.⁹⁴ Those who are similarly situated ought to be similarly treated. The second is that uniformity promotes predictability, which, in turn, protects reliance interests and allows parties to comply with the law.⁹⁵ Only when those subject to the legal system know that they will be treated in a manner consistent with those who have preceded them can they structure their affairs with confidence.⁹⁶ That, in turn, reduces the operational costs of the legal system, because informed actors will commit fewer violations.⁹⁷ Moreover, the ability to regard prior applications of legal standards as binding on present disputes reduces the cost of adjudicating those violations that do occur as compared to a regime in which each case is determined anew.⁹⁸ In addition, consistency in the resolution of cases promotes respect for the judiciary by strengthening the perception that judicial decisions are not influenced by political or other extralegal considerations.⁹⁹

These concepts are operationalized through the mechanism of precedent, by which later courts are bound to some greater or lesser degree to follow the decisions of their predecessors. The asserted connection to universal de novo review is that the process allows for the fullest implementation of precedent. De novo review, coupled with vertical and horizontal precedent (i.e., a system where lower courts are absolutely bound by the decisions of higher courts, and higher courts are bound by their own prior decisions), serves to further the goal of equality by enabling appellate courts to formulate a rule of law that, by virtue of being binding on subsequent courts, must be consist-

⁹³ This idea can be traced back at least to Aristotle. David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1437–38 (2006).

⁹⁴ See Caminker, *supra* note 2, at 852.

⁹⁵ See *id.* at 850–51.

⁹⁶ *Id.* at 851.

⁹⁷ *Id.*

⁹⁸ See *id.* at 851–52.

⁹⁹ See *id.* at 852–53.

ently applied in all future cases. At the same time, *de novo* review allows the appellate court to ensure that any given case before it was decided in a manner consistent with past cases, because *de novo* review gives the appellate court full authority to police the trial court's interpretation and implementation of the legal standards involved. Only if we allow appellate courts to revisit thoroughly every legal determination made by lower courts can we ensure that, among other things, the same legal standard is being applied in every case to which it is applicable and that the standard adequately accounts for all of the features of a case that ought to factor into its disposition.¹⁰⁰ On this view, *de novo* review is necessary to complete fulfillment of both the error correction and law declaration functions, because only through plenary consideration can an appellate court ensure that the trial court has applied the appropriate standard in a manner consistent with past courts (i.e., error correction), while also increasing the likelihood that future courts will likewise do so (i.e., law declaration or refinement). Here, we see all of the previously identified assumptions underlying universal *de novo* review in operation. Regardless of whether there is a "correct" answer in some abstract sense the first time a court confronts a truly novel legal issue, the ideal of compliance with precedent provides at least one criterion for correctness in subsequent cases—namely, that they be decided in a manner that is consistent with past adjudication. The process likewise assumes that the appellate court will be able to identify departures from precedent—that is, that it will be able to ascertain the true content of the law and measure the standard applied by the trial court in the case before it against that standard—and that it will be able to articulate the differences, if any, in such a way as to lessen the likelihood of such departures by future courts.

As the preceding paragraph suggests, however, the analysis takes on a different cast in cases where there is no established rule of law. If a trial court makes a legal ruling on an open question, the failure by an appellate court to review that ruling, whether in a plenary sense or at all, would leave the ruling's "correctness" unverified. From that follows the possibility that the next court to confront the case would resolve the legal question in a diametrically opposed way. This sort of variance could continue until an appellate court steps in to make law. What results is undoubtedly nonuniformity, but of a different nature

¹⁰⁰ See Sward, *supra* note 83, at 14. Here we see the operationalization of the assumptions that law is both ascertainable and articulable.

than what would result from an appellate court's failure to review a case involving a nonnovel issue.

Brief consideration of relevant practices reveals that we are willing to tolerate such nonuniformity and establishes that, although ensuring uniformity and predictability are important goals, they are not unqualified.¹⁰¹ We are at least occasionally willing to tolerate nonuniform treatment along two dimensions. The most familiar example occurs when a court overrules one of its prior decisions, thereby treating litigants after the overruling differently from those who came before. A related dynamic exists where a court recognizes a new right, thereby creating a class of prospective litigants that did not previously exist and affording them treatment different from that of their similarly situated predecessors. Moreover, and most pertinent to this Article's inquiry, our system effectively precludes lawmaking and thus allows precisely the sort of nonuniformity contemplated in the preceding paragraph, with respect to the sorts of legal rulings that are unlikely to be the subject of an appeal. To take just one example, federal district court interpretations of the rules relating to discovery are unlikely to be subject to appellate review.¹⁰² The same holds with respect to most pretrial rulings that do not result in a final judgment.¹⁰³ The relative unavailability of interlocutory appeals in the federal system ensures this result.¹⁰⁴

The second dimension along which we are willing to tolerate nonuniformity is geographic. The Supreme Court has no obligation to resolve circuit splits, and as a consequence the law can differ from one part of the country to the next. Indeed, the federal structure presupposes such geographic variation and, on the view of states as "laboratories of democracy," celebrates such nonuniformity as a positive feature.¹⁰⁵

¹⁰¹ Cf. Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 425 (1995) (questioning the value of harmonization of law); Amanda Frost, *(Over)valuing Uniformity*, 94 VA. L. REV. (forthcoming 2008) (questioning the inherent and practical value of uniformity in the interpretation of law).

¹⁰² See STEPHEN C. YEAZELL, CIVIL PROCEDURE 628 (6th ed. 2004) ("Discovery and the pretrial process now dominate the procedural landscape. Most rulings entered at this stage do not immediately produce final judgments, and many will never produce final judgments because the case settles. Under such circumstances the final judgment rule does not just defer but eliminates appellate review.").

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens

ii. *Satisfying the Demand for Law*

A related, though somewhat more practical, justification for universal de novo review is that the practice provides the most expedient way to satisfy the demand for legal standards. The past half century or so has witnessed a tremendous increase in the reach of the law and the amount of legal disputation.¹⁰⁶ In some respects, this has arguably led to too much law, both in the sense that one could reasonably believe that the law has extended too far in the scope of what it governs, and as evidenced by the distinct belief that there are too many judicial decisions that, while perhaps technically creating law, fail to add meaningfully to the law in a broader sense, instead creating confusion and needless difficulty.¹⁰⁷ Whatever the merits of these complaints, there remain many areas in which, whether as a product of the increased scope of the law, technological change, or some other factor, there are many unsettled legal questions.¹⁰⁸ Here, the problem is that there is too little law rather than too much. As a result, one might argue that universal de novo review is necessary in order for appellate courts to satisfy the demand for legal standards.

Such an argument flows almost inevitably from the fact that the articulation and refinement of legal standards is simply part of the institutional function of appellate courts.¹⁰⁹ But the point here is not to rehearse the suggestions outlined above to the effect that appellate courts are especially good at doing law. It is instead to approach the question from a slightly different angle, which results in a variant of the same point. It may not be that we find the justification for de novo review located in appellate courts' attributes viewed in isolation,

choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹⁰⁶ See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 53–123 (1996) (describing and attempting to explain, based in part on the increased amount of law, the tremendous growth in caseloads in the federal courts).

¹⁰⁷ The view that such decisions are problematic is surprisingly long-lived. See John P. Borger & Chad M. Oldfather, *Anastasoff v. United States and the Debate over Unpublished Opinions*, 36 *TORT & INS. L.J.* 899, 900–04 (2001).

¹⁰⁸ See POSNER, *supra* note 106, at 166 (“Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are too few on point.”).

¹⁰⁹ Cf. *THE FEDERALIST* NO. 22, at 112 (Alexander Hamilton) (George W. Carey & James McClellan eds., 1990) (“To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest . . . [t]o settle and declare in the last resort, a uniform rule of civil justice.”).

but that we do so in comparison with the relative deficiencies of trial courts in making law.¹¹⁰ On this view, appellate courts are charged with making law not because they are somehow uniquely suited to do so, but instead because we need some institution to serve that function, and trial courts are relatively unsuited to do so.¹¹¹ After all, the uniformity and predictability benefits associated with de novo review could largely be achieved simply by giving horizontal precedential effect to district court decisions. Such a regime would not generate uniformity to quite the same geographic extent—at the federal level, there are often substantial differences in the geographic reach of rulings of individual district courts versus circuit courts. It would, however, mitigate the concern to some extent, and extending the precedential reach of decisions beyond the territorial bounds of a given district would do so to an even greater degree. Although this suggests that the bases for the rule arise to a greater extent out of considerations of competence than out of concern for uniformity and predictability, it is nonetheless true that such a regime would be operationally different from what we currently employ.

Even if we accept the claim that it is structurally appropriate to vest lawmaking authority in appellate courts, it does not follow that such authority must be implemented via de novo review. A decision rendered pursuant to some more deferential standard, such as abuse of discretion, can still create law. Of course, law generated in such a regime will almost necessarily be more limited in scope, because a court charged with responsibility for determining whether a trial judge abused her discretion will not be able to prescribe future judges' conduct quite as tightly as a court that has the authority to completely displace the trial judge's ruling with its own. But it is nonetheless the case that an appellate court in concluding that a trial judge did or did not abuse her discretion will generate a holding that can limit or expand the authority of future trial judges, and thus create law. De novo review certainly provides a relatively efficient mechanism for doing so—at least insofar as subsequent courts are willing to take an expansive view of a prior court's holding (i.e., to be receptive to attaching significance to the prior court's language rather than simply its *ratio*

¹¹⁰ See, e.g., Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1297–98 (1952) (noting that, in trial courts, “the pace is quicker, the troublesome issues have not been sorted from those which go by rote, the briefs of counsel have not reached their ultimate perfection”).

¹¹¹ But see Caminker, *supra* note 2, at 826–28 (imagining a system in which lower courts are not bound by the legal determinations of higher courts).

decidendi).¹¹² An appellate court is able to make a much stronger statement about the content of the law when it is empowered to create from scratch its own answer to the “what is the law” question, and when subsequent trial courts know that the appellate court will likewise have the ability to reconsider and reverse their decisions that do not conform with the standard articulated by the appeals court. Even so, while such an approach may be, in general, preferable, it is not necessary.

II. Questioning Universal De Novo Review

In exploring the assumptions underlying universal de novo review, the preceding Part suggested some reasons why those assumptions might not hold true. This Part takes up a more generalized analysis of the practice in consequentialist terms. Roughly stated, such an inquiry involves an assessment of whether the benefits of universal de novo review outweigh its associated costs.¹¹³ The analysis in this Part first takes up the question of whether universal de novo review might be justified on act-consequentialist grounds—that is, whether de novo review can be justified with respect to any instance in which an appellate court faces a question of law.¹¹⁴ Put another way, it considers whether it is possible to conclude that the benefits of de novo review will outweigh its costs in any and every such case. Having concluded that act-consequentialism cannot provide a justification for the universality of de novo review, it next takes up the possibility of a rule-consequentialist justification for the practice.¹¹⁵ That is, it considers whether the universality of de novo review makes sense

¹¹² In reality, it seems likely that, as Karl Llewellyn pointed out, lawyers and judges vacillate between these two views of the force of precedent as necessary to suit their purpose in a given case. See KARL NICKERSON LLEWELLYN, *THE BRAMBLE BUSH* 66–69 (1960); see also Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 12–16 (1966) (outlining various factors that will affect the extent to which a decision is given precedential effect by subsequent courts).

¹¹³ See Brad Hooker, *Rule Consequentialism*, in *STANFORD ENCYCLOPEDIA OF PHILOSOPHY* para. 1 (Edward N. Zalta ed., 2008), <http://plato.stanford.edu/archives/fall2008/entries/consequentialism-rule/> (describing rule-consequentialism as a theory by which morality of a rule is judged “solely in terms of the goodness of [its] consequences” rather than in terms of the rule itself in the abstract).

¹¹⁴ See *id.* para. 4 (describing an act-consequentialist decision procedure as requiring that, “[o]n each occasion, an agent should decide what to do by calculating which act would produce the most good”).

¹¹⁵ Under a rule-consequentialist decision procedure, “[a]t least normally, agents should decide what to do by applying rules whose acceptance will produce the best consequences” *Id.* Adrian Vermeule defines the distinction in a similar way. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 5 (2006).

as a rule despite the fact that not every application of the rule is optimal. Rule-consequentialism, we will see, provides a more promising—though ultimately questionable—basis for the practice.

A. *The Failure of an Act-Consequentialist Justification*

As the discussion in the preceding Part revealed, even if we accept the existence of correct answers to legal questions, none of the remaining assumptions underlying universal de novo review will hold in every case. That is, even if we posit the existence of a correct answer to any given legal question, that answer may not be either ascertainable or articulable for reasons having to do with some generalized shortcomings of language, cognition, or the ability to resolve questions of historical fact, or for reasons particular to the specific court confronting the issues. Thus, none of the justifications standing alone can provide the basis for universal de novo review. For the practice to make sense in act-consequentialist terms, then, it must be the case that at least one of this cluster of justifications holds in every case, and that no major negative consequences will result from plenary appellate review. The former seems unlikely and, as this Part demonstrates, the latter is unrealistic.

Any implementation of de novo review in cases presenting novel legal issues involves an act of lawmaking. Resolution of such an issue necessarily results in precedent that will bind future courts.¹¹⁶ The primary affirmative critique of universal de novo review is that it will lead appellate courts to make affirmatively bad law because the practice effectively forces courts to issue precedential decisions in cases where it would be inadvisable to do so. Intermediate appellate courts

¹¹⁶ Of course, the effects outlined in this Section will vary somewhat depending upon just how much present courts are constrained by past decisions. Some have suggested that stare decisis does not, or at least should not, provide much of a constraint at all. See, e.g., Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1166 n.3 (2008) (enumerating works in which Paulsen has questioned the doctrine of stare decisis in constitutional law). If we were to do away with precedent as any sort of formal constraint on judicial decisionmaking (with it still providing some amount of logical constraint), then we are left with error-correction-based rationales for de novo review, which are in turn rooted in the assumptions about institutional competence that I have called into question above, and which counsel against universal de novo review. On the other hand, if we have a strong doctrine of stare decisis, pursuant to which precedents clearly bind and are difficult to dislodge, then the resulting high costs of an erroneous initial decision likewise counsel against universal de novo review. Viewed from this angle, then, probably the strongest case for universal de novo review occurs where the binding nature of precedent is somewhere in the middle, such that bad precedents are relatively easy to distinguish or overrule.

occupy a position in the world pursuant to which they have mandatory jurisdiction, an obligation to correct errors made at the trial level, and the power to bind themselves and all the trial courts within their jurisdiction by their pronouncements.¹¹⁷ But, as demonstrated above, features of a particular case, or of the appellate panel confronting that case, will, at least occasionally, render it an inappropriate vehicle for the creation or refinement of a legal standard that will necessarily govern future cases. It is not so much that legal rules generated in these situations will fail to produce equality and predictability, though one can imagine that happening if the rule is poorly crafted, but rather that the rules will be substantively worse than those that would be generated in a more appropriate case.¹¹⁸

There are at least three respects in which a given case may present an undesirable vehicle for making law. The first two follow from the discussion in the preceding Part, in that they represent failures of the mechanisms thought to provide appellate courts an advantage with respect to legal questions. First, there may be a failure of the adversary process, such that the court does not receive the input necessary to support quality lawmaking. Second, the members of the panel may lack some portion of the expertise necessary to create law in an appropriate fashion. The third is somewhat distinct, in that it stems not as much from a failure of process as from the happenstance of fact. Here, the potential problem is that the case before the court may arise from an atypical set of facts, which might in turn lead the court to make “bad” law in the sense that it will render its decision supposing the case to be more representative of the class of cases in which a prospective legal rule will apply than it really is. These potential shortcomings might also occur in combination, and undoubtedly overlap to some extent. Still, it is useful to consider them individually.

1. Failures of the Adversary Process

Our system of adjudication is fundamentally adversarial. In the classic model of the process, the judge’s role is largely reactive. As characterized by Lon Fuller, “the distinguishing characteristic of adjudication lies in the fact that it confers on the affected party a peculiar

¹¹⁷ See Jeffrey O. Cooper & Douglas A. Berman, *Passive Virtues and Casual Vices in the Federal Courts of Appeals*, 66 BROOK. L. REV. 685, 721–22 (2000).

¹¹⁸ I am going to assume that it is meaningful to talk about “better” and “worse” legal rules and resolutions of cases and will do so without staking any claim as to the identity of the criteria based on which to make the distinction. That said, the discussion that follows will necessarily touch on some ways in which a rule might be suboptimal.

form of participation in the decision, that of presenting proofs and reasoned arguments for a decision in his favor.”¹¹⁹ For Fuller, any feature of an adjudicative regime that adversely affects the significance of party participation threatens the system’s integrity.¹²⁰ As a result, Fuller contends that the judge should remain passive and strive to decide cases as completely as possible on the terms identified by the parties.¹²¹

One of the primary critiques of the classic model of adjudication is that it falsely envisions a world in which the only interests affected by any act of adjudication are those of the parties before the court. As proponents of the public law model of adjudication pointed out, many lawsuits directly affect people and institutions who are not parties and who thus do not enjoy the participatory right upon which Fuller grounded his theory.¹²² The paradigm public law case involves a claim demanding structural or institutional reform, for example of a school or prison system.¹²³ Because the parties’ interests in such cases will often not be coextensive with the interests of everyone who will be affected by the case’s resolution, commentators have called for a more proactive role for the judge.¹²⁴ In such cases, they argued, judges must actively participate in shaping the litigation, even to the point of acting “to construct a broader representational framework” by appointing masters, involving experts, and the like.¹²⁵

Despite these divergent conceptions of adjudication and the appropriate scope of the judicial role therein, even the proponents of the public law model conceded the need to credit party participation for the simple reason that the parties will have the greatest incentive—wanting to win—to provide the court with the information it needs to render a decision.¹²⁶ But the parties’ incentive to provide the court

¹¹⁹ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364 (1978).

¹²⁰ *See id.*

¹²¹ *See id.* at 385–86; *see also* STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM* 2–3 (1984) (describing arguments for a “neutral and passive decision maker”).

¹²² *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976) (noting examples of cases affecting nonparties, including cases involving school desegregation, employment discrimination, prisoners’ rights, antitrust, securities fraud, bankruptcy, union governance, consumer fraud, housing discrimination, electoral reapportionment, and environmental management).

¹²³ *See id.* For an overview of the public law model, *see* Oldfather, *supra* note 11, at 145–49.

¹²⁴ *See, e.g.,* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 26 (1979).

¹²⁵ *See id.*

¹²⁶ *See* Oldfather, *supra* note 11, at 152–53. For a thorough consideration of the signifi-

with the necessary input is subject to an important qualification. A party's incentive extends only so far as to provide the court with information that will lead the court to rule in favor of that party in the specific case before the court. This does not necessarily, or perhaps even usually, mean that the parties will provide the court with the quasi-legislative inputs that must underlie the formulation of a legal rule. Suppose, for example, that the formulation of an appropriate rule depends on an assessment of the incentives the rule will create for those who are potentially subject to it. A court's decision whether to impose a duty in tort, for example, will likely depend at least in part on an assessment of the extent to which such a duty would create incentives for certain categories of actors—manufacturers, or retailers, or landlords—to take appropriate precautions over a broad range of situations. A party might find it useful to present incentive-related arguments to the court, but its focus on winning *this* case may lead it not to do so. And even where the parties do make such arguments, there is no reason to believe they will make them with the same scope and at the same level of generality as would parties arguing solely over the formulation of a general rule with no specific dispute at stake.

The analysis in the preceding paragraph rests on an assumption that suggests another way in which the process might fail—namely, that the lawyers before the court will consistently perform to some minimum level of competence. Anyone who has seen the appellate process up close, however, knows that counsel often fall short of any such standard. Whether because of a lack of effort or skill, or because the economics of a given case simply do not support it, appellate briefs frequently fail to give the court the input necessary to support informed lawmaking.¹²⁷

In sum, the exercise of de novo review in a given case may not make sense in consequentialist terms because the adversarial process will at least occasionally provide courts with inadequate inputs based on which to make law.

2. *Failures of Judicial Expertise*

Another reason a given case might serve as a poor vehicle for lawmaking has to do with the composition of the court itself. Simply

cance of participation, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 273–305 (2004).

¹²⁷ For tongue-in-cheek support of poor appellate lawyering, with examples, see Alex Kozinski, *The Wrong Stuff*, 1992 BYU L. REV. 325, 326–33.

put, the subject matter of a case will at least occasionally lie outside the expertise of the judges on the panel. This could happen in two ways. First, the factual context out of which the dispute arises may be unfamiliar. It is no stretch to imagine, for example, an appellate panel composed entirely of judges who are unable to appreciate the nuances of a dispute that hinges on the details of some complex technology.¹²⁸ A court lacking such an appreciation could easily misstep in fashioning a legal standard that will guide the use of that technology. The second type of failure of expertise relates to the governing law itself. Some areas of the law may have become so complex that judges lacking subject-matter expertise feel uncomfortable creating law in them.¹²⁹

There is some evidence suggesting that these possibilities are not mere speculation. In a study of the Third Circuit's use of judgment orders—that is, affirmances without opinion—Professors Gulati and McCauliff concluded that the circuit's practice was consistent with the intent to avoid resolving novel and complex questions of securities law.¹³⁰ Such a practice, of course, demonstrates judicial awareness of the potential for a lack of expertise and, as explored in greater detail below, is arguably desirable.¹³¹ But prevailing conceptions of the judicial role do not allow for such avoidance as a matter of course.¹³² In most instances in which courts confront unfamiliar territory, then, they will end up making law, and a failure to appreciate either the factual or legal context in which the dispute arises will often—via

¹²⁸ Cf., e.g., Ryan S. Goldstein et al., *Specialized IP Trial Courts Around the World*, INTELL. PROP. & TECH. L.J., Oct. 2006, at 1, 1 (“The Federal Circuit, which has subject matter jurisdiction over patent, trademark, US International Trade Commission, and other cases, was formed to have the type of specialized expertise necessary to adjudicate intellectual property cases and provide guidance to lower courts through its opinions.”); see also *id.* at 3–4 (describing arguments for and against specialized courts).

¹²⁹ Cf., e.g., Mirit Eyal-Cohen, *Preventive Tax Policy: Chief Justice Roger J. Traynor's Tax Philosophy*, 59 HASTINGS L.J. 877, 879 (2008) (“When Congress established the [predecessor to the federal Tax Court] . . . it initially considered it a technical, tax expert tribunal . . .” (citation omitted)). One response to the argument that the judges on a given panel might lack the subject matter expertise to resolve a complex, specialized issue could be that such a possibility is contrary to the very nature of law. That is, that ideals such as “rule of law and not of men” presuppose a body of law that is accessible to and understandable by not only those with legal training but also to educated laypersons. On this view, there neither can nor should be questions of law that are amenable to resolution only by judges possessing an appropriate base of specialized knowledge.

¹³⁰ See Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW & CONTEMP. PROBS. 157, 162, 173–74 (1998).

¹³¹ See *infra* Part II.A.3.

¹³² See *supra* note 11 and accompanying text.

mechanisms explored in the next Subsection—lead the court to do so in a less than ideal way.

3. *Factual Atypicality*

The third sense in which de novo review may lead to the counter-productive exercise of appellate lawmaking authority arises out of an inherent feature of case-by-case lawmaking—namely, its consistent focus on a single case. Even where the parties have done their job, and the court suffers from no general deficit in expertise, the court may be led astray based on a lack of knowledge concerning the representativeness of the factual setting presented by the case before it. If a court misjudges representativeness, it will create law that does not “fit” the world to which it will apply.

Rules are necessarily based on understandings regarding how they will affect those who are governed by them, which in turn requires an appreciation of who will be governed by them and in what circumstances. Judges faced with a single dispute may not be well positioned to assess either. A court formulating a doctrine of tort law must consider how its doctrine will affect the behavior of potential plaintiffs and defendants and shape the rule accordingly. A court interpreting a statute in light of the statute’s purpose should likewise consider how effective varying interpretive possibilities will be in furthering that purpose. In so doing, the court will be engaged in “legislative factfinding”: determining “facts that transcend the litigation before the court and are relevant to legal reasoning and the fashioning of legal rules.”¹³³ To a great degree, this sort of “factfinding” involves relatively little finding of facts and a relatively large amount of speculation.¹³⁴ The underlying questions are, at least in theory, factual. Differing rules will, in application, have differing consequences. But determining what those consequences actually will be presents a largely unachievable task. As a result, a great deal of lawmaking is

¹³³ Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1468 (2007).

¹³⁴ Adrian Vermeule characterizes these sorts of questions as “‘trans-scientific’: although they are empirical in principle, they are unresolvable at acceptable cost within any reasonable time frame.” VERMEULE, *supra* note 115, at 3. Vermeule reasons:

It may be that the costs of acquiring the data needed to answer the empirical questions are prohibitive or at least greater than the benefits to be gained from choosing the best interpretive doctrine. It may also be, more simply, that the needed data cannot be obtained (or at least not obtained in full) at any cost, because uncertainty is objective and irreducible.

Id. at 158.

based on, at best, partially informed assumptions about consequences.¹³⁵

As stated so far, this problem is not unique to the judiciary. Legislatures and administrative agencies must likewise make law in the face of empirical uncertainty. What distinguishes the judiciary is that, to a significant degree, it lacks the option to decline to decide.¹³⁶ Legislatures and agencies faced with a lack of information can simply choose not to act in the hopes that time will provide the necessary factual basis on which to make law in the future. Judges, in contrast, must declare a winner in the lawsuit before them.¹³⁷ It is occasionally appropriate for a court to do so without creating law going to the merits of the suit, such as by resorting to one of the various justiciability doctrines.¹³⁸ But more often the court will have to commit to some version of the law under which the plaintiff does or does not have a claim. In those instances, a court has some discretion in deciding the case on narrow or broad grounds, and thus can exercise a certain degree of control over how much law it makes. But it cannot escape adopting some legal proposition, and in a case presenting a novel legal question, even the most minimalist of decisions¹³⁹ might require the court to commit to a relatively significant proposition. Such a commitment can have both normative and factual dimensions. Even if we assume full appreciation of the factual landscape, the court might fail to adopt the correct rule (however “correctness” is to be assessed) from a normative perspective. Alternatively, even a court with the appropriate normative orientation might lack a social scientific understanding of the world to which it must apply its normative determinations. A court completely lacking such information will “be forced to rely on [its] intuitions.”¹⁴⁰ In similar fashion, a court forced to make law on the basis of an incomplete understanding of the relevant fac-

¹³⁵ Even where apposite social science evidence exists, courts have a mixed track record of incorporating it into their decisionmaking. For an overview of the debate over courts’ use of empirical research in formulating legal rules, see Smith, *supra* note 133, at 1445–49.

¹³⁶ See Posner, *supra* note 61, at 1053 (“For the judge, the duty to decide the case and to do so, moreover, with reasonable dispatch is primary.”); see also Oldfather, *supra* note 11, at 124.

¹³⁷ See VERMEULE, *supra* note 115, at 154 (“Stalemate is not tolerable for judges who must actually choose interpretive rules on which decisions will be based today and tomorrow and the next day rather than a generation on. From the standpoint of the institutionalist judge, then, the hard question is what to do in the short run, given the absence of necessary information and the limited capacity of boundedly rational judges to absorb whatever information is present.”).

¹³⁸ For an overview of justiciability doctrines and justifications thereof, see generally Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73 (2007).

¹³⁹ See *supra* note 4 and accompanying text.

¹⁴⁰ Smith, *supra* note 133, at 1449.

tual landscape might be led astray, for the simple reason that partial information about a problem might provide a decisionmaker with a very different sense of the appropriate resolution than would complete or near complete information.¹⁴¹

Another aspect of judicial lawmaking that distinguishes it from that performed by legislatures and administrative agencies is that it occurs on a case-by-case basis. This makes it susceptible to what Professor Adrian Vermeule has called “*the distorting force of particulars*.”¹⁴² The resolution of a case based on something other than an ad hoc assessment of the equities on the facts presented involves making resort to justificatory reasons. Regardless of whether they are so identified, such reasons operate as rules—cases in which the triggers for the reasons are presented will be treated in one way, while cases in which the rules are not present will be treated differently.¹⁴³ By their very nature, rules are, of course, both over- and underinclusive—that is, a decisionmaker operating according to a rule will resolve some subset of cases differently than would a perfectly just decisionmaker resolving cases unconstrained by rules.¹⁴⁴ This creates a problem in situations where the first case—the one in which the rule does not yet exist and must be formulated by the court—is one which would be

¹⁴¹ As Vermeule points out, even relevant information about a problem can be useless, and even misleading, until the decisionmaker has gathered other pieces of information as well. VERMEULE, *supra* note 115, at 162 (“The benefit of gathering data may just as easily prove to be nil—not even helpful—until the amount of data reaches some discontinuous threshold, perhaps a very high threshold. Just as knowing only the first digit of a phone number is essentially useless, so too, if we currently know 5 percent of what we would have to know to choose between the alternative rules of statutory precedent, then we might increase our knowledge tenfold and still only know half of what we need to.”). Such a dynamic will not always exist, of course, and it will often be the case that action based on partial information is quite sensible. *See id.* at 162–63.

¹⁴² *Id.* at 38 (“The concern here is that vivid costs in particular cases may trigger cognitive failings in both theorists and judges, causing them to overreact to the specifics of particular cases while ignoring the overall systemic effects of the interpretive rules they defend or adopt.” (citation omitted)). Karl Llewellyn noted this phenomenon as well. *See* LLEWELLYN, *supra* note 51, at 43–44.

¹⁴³ As broken down by Professor Schauer, a court offering a reason for a decision takes the issue at hand to a higher level of generality and makes an implicit commitment to be bound by that reason in future situations. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 640 (1995). Because a reason, being more general than the specific question under consideration, will have implications extending beyond the specific situation under consideration, the process of giving reasons can commit the decisionmaker to decide unanticipated future cases in what may turn out to be a suboptimal fashion. *See id.* at 649, 651. Thus, the process of giving reasons limits a reason-giver’s ability to take full account of the context in which a future decision will arise, which in turn suggests that reason-giving is appropriate in contexts where abstraction and generalization are desirable, but not where particularization and contextualization are important. *See id.* at 653–54.

¹⁴⁴ *See* Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 956–58 (1995).

resolved differently under the best formulation of a rule governing the class of cases of which it is a part than it would were it adjudicated on its own merits independent of a rule. Put another way, the problem arises where the case before the court would fall within the over- or underinclusive treatment categories, such that the correct resolution under the appropriate rule would be the “wrong” result under a more particularized assessment. In such a circumstance a court will be tempted to decide the case in a manner that is consistent with a just result in the particular case and thus will be led to articulate a rule that is inappropriate for the just resolution of the larger body of future cases.

There are two dimensions to the problem. The first concerns the difficulty of assessing representativeness. The judge, as Professor Schauer puts it, is necessarily focused “on the *this-ness*” of the case before her.¹⁴⁵ While she will be mindful of the need to craft a rule to be applied to similar cases in the future, the most salient task confronting her will be the need to decide the specific case with which she is presented.¹⁴⁶ Its salience, and the relative obscurity of the fact patterns that might arise in future cases, will tend to bend the court’s resolution, and thus its rule formulation, toward the optimal approach to cases like the one before the court. Put another way, the court might be led to conclude that the immediate case is representative of the larger class of cases to which its rule will apply when it in fact is not. To a large degree, this is simply a function of human psychology.¹⁴⁷ The particulars of the immediate case will dominate the judge’s thinking, leading the judge to “make aggregate decisions that are overdependent on the particular event and that overestimate the representativeness of that event within some larger array of events.”¹⁴⁸

¹⁴⁵ Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006).

¹⁴⁶ This stands in contrast to the rulemakers who are not constrained by the need to resolve a particular dispute. See *id.* at 891.

¹⁴⁷ See Jeffrey J. Rachlinski, *Bottom-Up Versus Top-Down Lawmaking*, 73 U. CHI. L. REV. 933, 942 (2006) (noting the effects of the “availability heuristic” on judicial lawmaking). Rachlinski notes a series of other pathologies inherent in case-based rulemaking, including distortions in the rulemaker’s “sense of scale and proportion,” *id.* at 945, relative difficulties in statistical reasoning, see *id.* at 946, and increases in subjectivity, see *id.* Similarly, Adam Hirsch has explored the implications of “selective search” on the formulation of rules. See Hirsch, *supra* note 78, at 605–10. Because of the impossibility of considering all potential analyses of a problem, courts and other rulemakers focus only on what appear to be the most promising subset. The particulars of the fact pattern before the court will affect the identity of that subset, thereby potentially affecting the content of the chosen rule. See *id.* at 605–06.

¹⁴⁸ Schauer, *supra* note 145, at 895. Schauer writes:

[B]ecause judges (and other rulemakers) in their lawmaking and rulemaking capacity are necessarily engaged in a process of mapping a large array of future events

Indeed, various cognitive shortcomings may negatively affect the quality of rules produced through case-by-case adjudication even where the judge recognizes that the case before her is nonrepresentative for the simple reason that the particulars of the immediate case will exert a disproportionate sway over the judge's thought processes.¹⁴⁹

The second dimension of the problem stems from the need to decide the particular case presented. The judge's instinct will be to decide the case correctly on its own terms. A decisionmaker merely presented with an example of the sort of situation as to which he must make a rule might be able to transcend, at least to some degree, the sway of the particulars.¹⁵⁰ One who must actually decide the case, in contrast, is less likely to sacrifice justice in the individual case in order to fashion a decisional rule that will result in more just results across the run of cases.¹⁵¹

Of course, to some degree our system anticipates these problems and provides several mechanisms by which lawmaking that turns out to have been inappropriate can be corrected.¹⁵² Decisions from an

that will be governed by the rules they make, the risk is that judges who have a particular case before them to decide will systematically overestimate the extent to which those future events will resemble the one they are now most immediately confronting.

Id. at 896.

¹⁴⁹ The facts of the immediate case might be viewed as "framing" or "anchoring" the judge's thought processes. *See id.* at 896–98.

¹⁵⁰ Professor Rachlinski echoes these ideas, noting that "the pervasive message of the psychological literature on judgment and choice is that context influences decisionmaking—often more so than a decision's underlying logical structure." Rachlinski, *supra* note 147, at 940. The case-by-case approach, inherent in judicial lawmaking, leaves the decisionmaker more susceptible to being swayed by "the quirks and oddities of the individual parties" and other sympathy-generating factors than is likely to be the case with legislative lawmaking. *Id.* at 941; *see also* VERMEULE, *supra* note 115, at 38 (discussing "the distorting force of particulars").

¹⁵¹ Schauer notes that a court in such a situation could reach the wrong result in the particular case in order to generate the best rule, or choose to "make less law" than it otherwise might. *See* Schauer, *supra* note 145, at 900–01 ("More commonly, however, the power of the particular is a power with distorting emanations, with courts often announcing the decision rule that will most directly produce the correct result in the particular case even though that rule will produce erroneous outcomes in future cases."). Schauer provides a series of examples, from both the Supreme Court and lower courts, in which the power of the particular seems to have distorted the lawmaking that occurred. *See id.* at 901–04. He posits that if the problem afflicts the Supreme Court, which has a tremendous ability to screen its cases, then it is likely to be even more of a problem in the lower courts. *See id.* at 903.

¹⁵² *See* Rachlinski, *supra* note 147, at 951–55 (outlining some of the advantages of adjudication relative to legislation as a means of lawmaking, including that it is structured to enable courts to learn over time, that the judicial hierarchy allows for the correction of bad results, the existence of parallel authority, and the fact that courts approach problems from different frames).

intermediate appellate court can be reviewed en banc or by the highest court in the jurisdiction. Or the court, while not technically overruling its prior decision, can use subsequent cases to extend, limit, or otherwise modify its scope. Thus, if a panel of a circuit court in Case 1 makes what appears to be bad law from the vantage point of Case 2, 3, or 4, the parties have the opportunity to ask the full court to review the case en banc, in which case it could make appropriate adjustments to the legal determination. Other alternatives also exist, such as the possibility of Supreme Court review or legislative correction. All of those are somewhat improbable, but the mere fact of their empirical unlikelihood (especially as to en banc review) does not necessarily signify that the mechanisms are not used in appropriate situations. All of these mechanisms represent ways in which the system, in the standard phrasing, “works itself pure” over time.¹⁵³

Here, too, however, reality may fall short of the theoretical ideal. The fact that the system has the capacity for self-correction does not mean that self-correction will necessarily occur. In part this is a function of the doctrine of precedent, which to be meaningful must constrain subsequent courts to some extent.¹⁵⁴ But it is also due to selection effects—the sorts of cases necessary to trigger the appropriate corrections might not be brought because they will not appear to present strong claims under the initial articulation of the rule.¹⁵⁵ At the same time, the cases that are brought might trigger further distortion.¹⁵⁶ When a court sets forth a rule in Case 1, the content of that rule will affect which cases are subsequently litigated.¹⁵⁷ If Case 1 was

¹⁵³ See Schauer, *supra* note 145, at 906 & n.99.

¹⁵⁴ *Id.* at 909 (arguing that precedent creates “the omnipresent possibility that any mistake will be systematically more powerful than any later attempts to correct it” both because such an effect inheres in the doctrine itself and because of the effects of path dependence). As Adam Hirsch argues, in operation the constraining effects of precedent may be to a large degree a by-product of bounded rationality. Hirsch, *supra* note 78, at 612 (“In connection with case law, the abstention heuristic translates into blind adherence to precedent—or, in the vernacular of jurisprudence, *formalism*—with the same result that rules become stranded in the past.”).

¹⁵⁵ See Schauer, *supra* note 145, at 909–11 (exploring the nature of “selection effect” problems and their implications for self-correction).

¹⁵⁶ See *id.* at 906–07 (“Although a dynamic case-based rulemaking system possesses the capacity for change, it is not clear that those changes take place at the right time or that those changes are necessarily or even systematically for the better. Initially, a significant issue is the extent to which rules may be changed with excess frequency just because the cases that prompt change are thought, for the very reason we are considering here, to be more representative than they in fact are.”).

¹⁵⁷ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 17 (1984) (arguing that cases that are not “close” tend to settle, leaving more difficult cases for adjudication).

unrepresentative, or otherwise served as a suboptimal vehicle for making law, then the cases brought after it are perhaps likely to be unrepresentative, both because of the skewing effects of the rule as well as the fact that litigation tends to occur at the margins of a rule.¹⁵⁸ But the courts are likely to conclude that the cases that are litigated are representative of the situations in which the rule applies in the world for the simple reason that those are the only cases the courts will see. This, in turn, might lead to further distortion rather than to correction.¹⁵⁹

B. The Possibility of a Rule-Consequentialist Justification

We have seen that none of the justifications for de novo review, taken individually, supports its universal use. Each provides a plausible justification for de novo review of most legal issues in most cases, but none supports its use for review of every issue in every case. There will, instead, be cases in which the implementation of de novo review will have adverse consequences. In some cases, an appellate court's legal rulings will be worse than the trial court's, thus subverting the error correction function. In other cases, those rulings will be worse than those that would be issued by a different, more expert, panel of the same court hearing the case or by any panel of the court in a more appropriate case, thus subverting the law declaration function. The practice accordingly cannot be justified on act-consequentialist grounds.

Rule-consequentialism presents a more likely source of justification. Under this approach, the question is not whether any given instance of de novo review makes sense viewed individually. The analysis instead concerns whether universal de novo review makes sense in that a regime of universal de novo review will, in the aggregate, produce a greater net benefit than would some alternative regime, such as one in which appellate courts enjoyed wide discretion to review legal questions under some more deferential standard.¹⁶⁰ This could be so even though we recognize that the exercise of de novo review will have negative consequences in some cases.

¹⁵⁸ See Schauer, *supra* note 145, at 907 ("A rule that gets it right 99 percent of the time may well be a very good rule, but a process that focuses only on the remaining 1 percent may be a process influenced to believe that some of these very good rules are in need of modification.").

¹⁵⁹ See *id.* at 907–08.

¹⁶⁰ See Hooker, *supra* note 113, para. 4 ("[F]ull rule-consequentialism claims that an act is morally wrong if and only if it is forbidden by rules justified by their consequences.").

There are several reasons to think that universal de novo review makes sense in rule-consequentialist terms.¹⁶¹ Some arise out of possible information problems. A court faced with the prospect of ruling on a question of law will not often be well positioned to make a broad assessment of the consequences of doing so.¹⁶² The adjudicative process provides courts with only a limited amount of information, and obtaining the full complement of information necessary to assess the appropriateness of exercising de novo review would be costly and time-consuming in many cases. Often these costs would not be justified by the economics of a given lawsuit. Moreover, even were full information available, there would be no reason to think that courts could adequately assess it. As we have already seen, de novo review will often lead to suboptimal results because courts lack the capacity to adopt and articulate the appropriate rule to govern the case. To a large degree, that dynamic is likely a product of courts' lack of ability to reliably identify which cases present poor vehicles for lawmaking.

Of course, we face an analogous information deficit in assessing whether de novo review, applied universally, makes sense on rule-consequentialist grounds. Our confidence that such jurisprudential missteps will occur, however, does not mean that we will be able to prospectively identify and categorize the sorts of situations that are likely to be problematic. As a consequence, we might conclude that such errors are necessary costs of an institutional structure that, while imperfect, cannot realistically be improved. We do not know, and it is unlikely that we ever will know, enough to fully assess in the aggregate the net benefit or deficit associated with universal de novo review. The same holds with respect to any alternative regime. These difficulties are exacerbated by the lack of consensus on related jurisprudential issues such as the nature of legal standards, the appropriate scope of judicial decisions, the processes courts should use in deciding cases, and so on. The effects of de novo review will vary, for example, depending upon whether courts are inclined to articulate their holdings narrowly (thus making relatively little law) or broadly (thus making relatively more law). In similar fashion, we would be less concerned about the adverse consequences of lawmaking under a regime of universal de novo review were we inclined to give relatively

¹⁶¹ The set of reasons that follows in this Section parallels that identified in Hooker's essay. *Id.*

¹⁶² These limitations will, to a great degree, be the same as those identified in the preceding Section as reasons for questioning whether the exercise of de novo review is appropriate with respect to every legal question raised on appeal. See *supra* Part I.

weak effect to precedent. Our collective disagreement on these matters makes comprehensive assessment of the various possible regimes practically impossible.

The impossibility of making such an overall assessment does not preclude comparative consideration of universal review versus its alternatives. Rather than attempting to determine whether universal *de novo* review makes sense in an aggregate, abstract sense, we can instead ask whether there are identifiable ways to modify the practice that avoid some of its identifiable, associated costs, as well as the imposition of significant, additional costs. Perhaps we can, in other words, conjure up a way to consistently identify cases in which the appellate determination of legal issues would be detrimental. If so, we might be able to formulate a rule for *nonuniversal* *de novo* review that we can confidently regard as preferable to the current regime.

There is reason to believe that such an inquiry will prove fruitful. The institutional landscape in which appellate review takes place has changed dramatically. Appellate courts at both the state and federal level now face caseloads that are many multiples of those faced by their counterparts of a half century ago.¹⁶³ This “crisis of volume” has resulted in many well-documented changes to the manner in which appellate judges perform their jobs.¹⁶⁴ Oral argument takes place in fewer cases, court staff play an increasingly large role in the disposition of cases, and judges in general have less time to devote to each of the cases for which they are responsible.¹⁶⁵ In combination, the effect is a reduction in effectiveness of the traditional mechanisms that once operated to discipline decisionmaking.¹⁶⁶ At the same time, the sheer

¹⁶³ See *supra* text accompanying notes 79–81.

¹⁶⁴ *Id.*

¹⁶⁵ See Oldfather, *supra* note 92, at 764–79 (outlining the various ways in which the appellate process has changed in response to increased caseloads).

¹⁶⁶ Other aspects of the changing institutional landscape may have differing sorts of implications. For example, a half century ago, Professor Wright argued against the preceding half century’s trend toward appellate courts recharacterizing issues as presenting questions of law. See Wright, *supra* note 21, at 751 (“The principal means by which appellate courts have obtained such complete control of litigation has been the transmutation of specific circumstances into questions of law. Subtle rules about presumptions and burden of proof, elaborate concepts of causation and consideration and the rest, have been devised in such a way that unless the appellate judge handling the case is a dullard, some doctrine is always at hand to achieve the ends of justice, as they appear to the appellate court.”). Wright criticized this development on the ground that it would encourage more appeals and undermine public confidence in the legal system while providing no reason to believe that appellate courts would reach “better” or “more just” decisions than trial judges. See *id.* at 779, 782.

Wright was troubled primarily by appellate resolution of issues that fall more toward the center of the fact-law spectrum, see *id.* at 778, and not the sorts of purely legal questions with

amount of law has increased.¹⁶⁷ The odds that a given judge will be unable to claim basic familiarity, let alone expertise, with the applicable legal standards in some subset of his cases have increased. Whatever the truth of the proposition that appellate judges once had the time to engage in as much consideration and reflection as was necessary to figure out an issue, judges no longer enjoy that luxury. Indeed, many observers agree that the combination of more law and judges having less time to devote to cases, and consequently less direct involvement in the disposition of the typical case, has led in general to lower-quality decisionmaking.¹⁶⁸ These same changes have also made it easier for courts to intentionally fail to confront all the issues that come before them. A court inclined to avoid deciding a particular issue has a number of mechanisms for doing so available to it. It might simply recharacterize the issue, or the important facts of the case, to make resolution more palatable.¹⁶⁹ At the same time, it might issue only an “unpublished,” nonprecedential opinion.¹⁷⁰ Or it might decide to affirm the decision via a single-line “judgment order,” in which it does not speak to the questions presented at all.¹⁷¹

There is evidence to support the conclusion that appellate courts do engage in this sort of avoidance. Anecdotally, numerous judges have acknowledged having witnessed or been a part of agreements to

which this Article is primarily concerned, *see supra* notes 30–33 and accompanying text. As a result, the analysis set forth in this Article does not squarely apply to them. Still, it is easy to imagine defending the proposition, based in part on an extension of Wright’s arguments, that appellate courts ought to have the ability to decline to engage in de novo review of such issues. *See* Wright, *supra* note 21, at 780–81. That would be consistent with the more recent trend, identified by Judge Posner and others, toward appellate courts emphasizing standards of review so as to afford greater deference to lower courts and agencies. *See* POSNER, *supra* note 106, at 176.

¹⁶⁷ *See* POSNER, *supra* note 106, at 174.

¹⁶⁸ *See* Richman & Reynolds, *supra* note 77, at 275 (“The overall quality of the work of the circuit courts has deteriorated markedly.”); Cooper & Berman, *supra* note 117, at 704–05 (“[G]iven the pressures of burgeoning dockets, the courts could not remain what they once were [T]he particular mechanisms that the courts have adopted threaten the integrity of the bench.”).

¹⁶⁹ *See, e.g.,* Carolyn Dineen King, *Challenges to Judicial Independence and the Rule of Law: A Perspective from the Circuit Courts*, 90 MARQ. L. REV. 765, 785 (2007) (discussing the ways in which a motivated panel “can produce a result that is not true to the rule of law, either because it is not faithful to the record in the case or because it does not fairly apply the existing law, without that fact being apparent to anyone other than the litigants”).

¹⁷⁰ Such opinions are of course meant for issuance only in “easy” cases that do not present the sorts of issues that a court would be inclined to dodge. *See* Cooper & Berman, *supra* note 117, at 707–09 (describing arguments for and against use of unpublished opinions).

¹⁷¹ *See* Gulati & McCauliff, *supra* note 130, at 162.

“sweep issues under the rug” pursuant to such methods.¹⁷² More systematically, Professors Gulati and McCauliff examined the Third Circuit’s use of judgment orders over a seven-year period and concluded that the court’s behavior during that period is consistent with the development of a norm pursuant to which some of the court’s most difficult cases, presenting issues of indisputable novelty, were disposed of via judgment order.¹⁷³ This suggests that, regardless of whether we deem it normatively desirable in an abstract sense to authorize appellate courts to avoid making law, it is descriptively accurate to say that such avoidance occurs.

The fact that appellate courts already engage in avoidance provides another reason for considering modifications to the rule of universal de novo review. Adherence to a rule of universal de novo review encourages a lack of candor, and at least occasionally results in some spectacular failures of candor.¹⁷⁴ The judiciary operates under a strong presumption, if not an obligation, that it will decide the cases that come before it.¹⁷⁵ Because a court cannot openly flout this presumption, any instance of avoidance will involve deception. Such deception is inherently problematic, and the reduction in effectiveness of constraints on judges only increases the concern. To the extent that courts enjoy the freedom to “get away with it,” so to speak, the rule encourages courts to act in ways that diminish their accountability and legitimacy, and, in general, are counter to the reasons we require courts to justify their decisions.¹⁷⁶

These changes in the context in which appellate courts operate have led prior commentators to recommend reforms designed to alleviate some of the problems referenced here. Most of these proposals have focused on lessening appellate workloads by providing expeditious ways for courts to dispose of “easy” cases presenting neither novel nor difficult questions.¹⁷⁷ The now-prevalent use of non-

¹⁷² See Arnold, *supra* note 47, at 223 (suggesting that courts face the temptation to use unpublished opinions to sweep difficulties under the rug); POSNER, *supra* note 106, at 165 (same); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1374 (1995) (same).

¹⁷³ See Gulati & McCauliff, *supra* note 130, at 162, 184.

¹⁷⁴ For an overview of the literature relating to judicial candor, see Oldfather, *supra* note 11, at 155–60 nn.144–79.

¹⁷⁵ See generally Oldfather, *supra* note 11 (exploring in detail this presumption).

¹⁷⁶ See Gulati & McCauliff, *supra* note 130, at 192–96 (arguing that the widespread use of judgment orders has numerous “secondary effects,” including increases in strategic behavior and decreases in accountability and legitimacy, that potentially outweigh any benefits arising out of efficiency or related considerations).

¹⁷⁷ See Oldfather, *supra* note 92, at 746 (noting that most reform proposals aimed at ad-

precedential, “unpublished” opinions provides the most prominent example.¹⁷⁸ But there are others. Most closely analogous to what I consider here, some have suggested that intermediate appellate courts, or at least the federal circuit courts, be given discretionary control over their dockets.¹⁷⁹ Here again, however, the animating principle is that there are too many “easy” cases, and that requiring courts to expend time and effort processing them distracts courts from dealing with the more difficult cases that deserve their attention.

Yet some have suggested that appellate courts ought to have the ability to pass on some portion of the more difficult cases that come before them. Professors Cooper and Berman, having outlined “the institutional realities that confront the courts of appeals,”¹⁸⁰ which parallel those discussed above, argued that when an appellate court “is forced to confront a consequential legal issue in a less-than-ideal context, the case for consciously avoiding the issuance of a firm and conclusive legal decision becomes especially compelling.”¹⁸¹ Their prescription is that courts operate in a manner consistent with Alexander Bickel’s “passive virtues” by using the various devices already available to them to avoid engaging in premature lawmaking, such as waiver doctrines, nonprecedential opinions, and the resolution of multiple-issue appeals on grounds involving settled law.¹⁸² Professor Schauer has also argued that courts ought to have and exercise flexibility in approaching cases presenting novel legal issues, suggesting that justiciability doctrines ought to be relaxed, advisory opinions ought to be less disfavored, and that courts with discretionary review should delay deciding such issues until they have had an appropriate opportunity to assess the factual landscape over which their decisions will apply.¹⁸³ He likewise encourages courts without discretionary jurisdiction to employ such delaying mechanisms as are available to them, including deciding cases without issuing opinions and basing their decisions on narrow grounds until they have acquired sufficient experience to formulate a rule.¹⁸⁴

addressing problems created by the crisis of volume are designed to do so by restoring lost time to judges).

¹⁷⁸ See sources cited *supra* note 7.

¹⁷⁹ See *supra* note 6 and accompanying text.

¹⁸⁰ Cooper & Berman, *supra* note 117, at 730–32.

¹⁸¹ *Id.* at 723.

¹⁸² See *id.* at 730, 733–35, 738–41.

¹⁸³ See Schauer, *supra* note 145, at 914–15.

¹⁸⁴ See *id.* at 915–16.

These critiques are powerful. Although they are not pitched so as to do so, their premises call into question a consequentialist justification for universal de novo review. The critiques fall short, however, in failing to confront the root of the problem, which is that the practice of universal de novo review has created the expectation, and consequently a sense of obligation, that appellate courts must always resolve legal questions in a plenary fashion. While resort to the passive virtues would alleviate some of the problems that we have identified, it would do so in a largely ad hoc way. These devices of avoidance will not be available in every case in which a court might wish to use them. Perhaps more troubling is the clandestine way in which these techniques would operate. Courts relying on the passive virtues to avoid infelicitous lawmaking will leave outside observers with no basis for assessing whether they are doing so only in those cases in which we want them to do so, rather than in some other set of cases that the courts find it inconvenient to decide. As a result, judicial resort to the passive virtues will often seem deceptive to the outside observer.

To this point, we have seen that a rule-consequentialist justification for universal de novo review is subject to, at the very least, skepticism. Although they are not couched in such terminology, the arguments for appellate exercise of the passive virtues rest on premises that suggest not only that appellate lawmaking will often be inadvisable, but also that we might be able to identify the situations in which that dynamic is likely to hold. If we are able to make such an identification, we might, in turn, alter the rule of universal de novo review. The next Part takes up that task.

III. The Possibility of Deference

Our search for a class of cases that we might exclude from the reach of de novo review begins with the identification of those in which the functions of appellate review are least satisfied. If we can identify those cases in which appellate review of legal questions serves neither the error correction nor law declaration functions, or does so only to a small degree, we will have identified a class of cases in which the benefits of de novo review are minimal. From there, we can broaden the inquiry to consider whether dispensing with de novo review would be workable in practice.

The analysis in the preceding Part supports such an exercise. If we accept the proposition that there are “hard” questions of law as to which no clearly correct answer exists, then it seems to follow that an appellate court’s failure to provide answers to such questions will not

equate to a failure to fulfill the error correction function. This is simply because, as long as the trial court's resolution of the question falls within some appropriately defined zone of reasonableness, it cannot be characterized as erroneous.¹⁸⁵ Some portion of those cases will also satisfy our second criterion—namely, that appellate review would not advance the law declaration function. This would be so not because a court could not make law, but rather because the cases in question will present bad vehicles for lawmaking. Whether due to factual atypicality or a shortcoming in the court's expertise, the exercise of de novo review in such cases is likely to generate bad law.¹⁸⁶ In this sense, we might regard law declaration as error creation.¹⁸⁷

This Part undertakes an exploration of what a regime incorporating appellate deference to certain types of trial court legal rulings might look like. Assuming we can reliably identify those cases in which de novo review runs counter to the consequentialist calculus, we might in its place institute some form of more deferential review. Counterintuitive and unnatural as this may seem, it is not unprecedented. The most familiar situation in which courts defer to another decisionmaker on legal questions is the *Chevron* doctrine in administrative law, pursuant to which courts defer to agency interpretations of their governing statutes.¹⁸⁸ Another example is the historic and perhaps still somewhat viable deference appellate courts give to district court decisions relating to state law issues in diversity cases.¹⁸⁹ A third, less obvious example occurs in the context of appellate review of jury instructions.¹⁹⁰ Despite the legal nature of what is at stake, trial judges enjoy a range of discretion in formulating jury instructions. “Usually, an attack on the judge's various choices in charging the jury

¹⁸⁵ See Gulati & McCauliff, *supra* note 130, at 175 (suggesting that an appellate court's failure to decide an issue in a hard case does not deny litigants their right to error correction).

¹⁸⁶ See *id.* at 176 n.89 (“A limited amount of time and a complex issue from an unfamiliar area can provide a recipe for disaster.” (citing Frank H. Easterbrook, *What's So Special About Judges*, 61 U. COLO. L. REV. 773, 780 (1990))).

¹⁸⁷ We might also think of these situations as resulting in error creation in a more localized sense. Trial courts are generally understood to have a greater familiarity with the facts and equities of a case. At least insofar as one is focused on the error correction function of appeals, it seems appropriate to conclude that district courts will often possess an expertise advantage that, while it is not likely to extend so far as to position a district court to be better able to articulate a general rule of law, might well suffice to enable the district court to be better positioned to reach a result that is more consistent with the governing legal principles, or more “just” on its facts, than an appellate court.

¹⁸⁸ See *supra* note 12 and accompanying text.

¹⁸⁹ See Jonathan Remy Nash, *Resuscitating Deference to Lower Federal Court Judges' Interpretations of State Law*, 77 S. CAL. L. REV. 975, 976 (2004); Coenen, *supra* note 52, at 899.

¹⁹⁰ Thanks to my colleague Michael McChrystal for drawing my attention to this parallel.

will not work without clear misstatement of the law, real confusion, or a departure from established form or substance”¹⁹¹ In sum, appellate “review of jury instructions is not a search for utopia or an exercise in technicalities” as would be the case were they subject to full de novo review.¹⁹²

In the first two of these instances the rationale for deference depends in part on the conclusion that the prior decisionmaker possesses a relevant type of expertise that provides it with an advantage relative to the appellate court. In the *Chevron* context, the agency is thought to have an expertise advantage stemming from its greater familiarity with the statute and with the subject matter of its institutional charge and mission.¹⁹³ In the state law context, district court judges located in the state whose law is at issue are understood to have an advantage arising from their greater familiarity not only with the substantive law of the state, but with the processes and “moods” that will affect the evolution of that law going forward.¹⁹⁴ Because the business of a federal court in a diversity case is to apply the law of the state in the manner in which it believes the courts of that state would do so, this familiarity suggests that district courts will, on the whole, do a better job of making that prediction than their appellate counterparts, who are likely to lack that sort of knowledge. Deference in the context of reviewing jury instructions presents a different dynamic.¹⁹⁵ The grant

¹⁹¹ 1 CHILDRESS & DAVIS, *supra* note 22, § 4.23.

¹⁹² *Id.*

¹⁹³ *See supra* note 12.

¹⁹⁴ The justification for this “rule of deference” was that district court judges sitting in the state the law of which was at issue would have greater expertise in its determination. *See* Coenen, *supra* note 52, at 904–05. Professor Coenen questioned the legitimacy of this practice, basing his arguments in large part on the justifications for universal de novo review, including notions of appellate court specialization and collaboration. *See id.* at 920–31. The Supreme Court followed Coenen’s recommendations and renounced deference in 1991 in *Salve Regina College v. Russell*, 499 U.S. 225, 231–32 (1991). However, Professor Nash suggests that the Court has engaged in this sort of deference since *Salve Regina* and further contends that such deference is appropriate. *See* Nash, *supra* note 189, at 991–95. He also explores the parallels between deference on questions of state law and *Chevron* deference. *See id.* at 1021. Elsewhere, David Frisch has argued that cases in which appellate courts are bound to apply the law of a foreign jurisdiction due to a contractual choice-of-law clause ought to engage in similar deference to a trial court’s reasonable interpretations of that law. *See* David Frisch, *Contractual Choice of Law and the Prudential Foundations of Appellate Review*, 56 VAND. L. REV. 57, 95, 111–12 (2003).

¹⁹⁵ For a thoughtful article addressing the complex relationship between deference and the impulse toward acontextual legal standards, see generally Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061 (2008). As Horwitz observes, “[i]n deferring to other actors, courts open up a space for shared legal and constitutional interpretation by other actors who may be closer to the facts on the ground.” *Id.* at 1066.

of discretion to trial judges there cannot be grounded in presumed expertise, but must instead stem from a more pragmatic assessment that the exercise of tighter control would generate costs (largely in the form of retrials) in excess of its benefits in terms of accuracy and consistency. Thus, it stands as a small exception to universal de novo review justified by the same sort of analysis undertaken on a larger scale in this Article.

To be workable, of course, any regime of deference requires a mechanism for identifying the cases in which deference is appropriate. We might think that, if one of the primary triggers for deference is nonrepresentativeness, no such mechanism will be available. One of the key points in the critique of de novo review is that it will occasionally lead courts to make bad law because they are not good at assessing representativeness.¹⁹⁶ If we cannot rely on courts to assess representativeness for purposes of lawmaking, then one can reasonably question how we can rely on courts to do so for purposes of deciding to defer. This is a significant point, and it may not be entirely answerable. Still, there are several partial responses. First, making representativeness doctrinally relevant is likely in itself to make judges more sensitive to the possibility of nonrepresentativeness and its negative consequences for lawmaking effectiveness.¹⁹⁷ Second, making representativeness doctrinally relevant would provide the parties with an incentive to present the court with arguments bearing on the point. If, in other words, one of the legally sanctioned options available to the court is to decline to decide based on nonrepresentativeness, then one of the parties will have an incentive to argue that the case is representative and the other will not, and as a result, the court's judgment on the question will be considerably more informed than is the case under the current regime. Third, and relatedly, making representativeness relevant would create a role for and provide likely incentives for amici to participate meaningfully in the process.

Providing incentives for the parties to argue about representativeness could have broader jurisprudential effects as well. One of the primary critiques of the adversarial process as embraced by the classic model of adjudication is that it often leaves the court without input

¹⁹⁶ See *supra* Part II.A.3.

¹⁹⁷ As I have argued elsewhere, judicial opinions can be viewed as a species of informational regulation. The literature in that area suggests that simply making a point doctrinally relevant will raise its salience, which will in turn lead courts to take it into account in their decisionmaking. Cf. Oldfather, *supra* note 92, at 792–93 (arguing that opinion formats, such as one with a paragraph for the claim to jurisdiction, make judges less likely to make mistakes).

from and information regarding the potential effects of a decision on those who are likely to be affected but who are not parties.¹⁹⁸ Although briefing and other input relating to representativeness would not completely address this critique, it would likely result in improvements. These arguments become even stronger if we assume, in a manner that appears to be consistent with reality, that appellate courts actually do manage to dodge or otherwise fail to decide legal questions in hard cases on a somewhat regular basis.¹⁹⁹ One advantage of a mechanism that allows appellate courts to defer openly to district judges on questions of law is that it would provide courts with a greater ability to credit the parties' participation in the appeal,²⁰⁰ which is itself one of the fundamental values and components of legitimate adjudication in the American judicial system.²⁰¹ At the same time, open deference tied to and justified in terms of accepted guidelines for its exercise would result in greater judicial candor and thereby avoid some of the pitfalls associated with exercise of the passive virtues or other, more clandestine mechanisms of avoidance.²⁰²

Another systemic benefit of deference is that it would allow for issues to "percolate," such that the court ultimately resolving a question would have the benefit of a certain amount of experience regarding the possible rules it might adopt before it does so. The term is of course generally used in the context of the Supreme Court, which often waits until a number of circuit courts have weighed in on an issue before granting certiorari.²⁰³ The value of percolation is subject to question in general,²⁰⁴ and is perhaps even more questionable when

¹⁹⁸ See Fiss, *supra* note 124, at 25.

¹⁹⁹ See *supra* notes 172–73 and accompanying text.

²⁰⁰ I have argued elsewhere that, even though the notion of error correction is an appropriate characterization of one of the institutional functions of intermediate appellate courts, within the context of individual cases such courts ought to regard themselves as engaged in "derivative dispute resolution." Oldfather, *supra* note 39, at 6. Although the dispute will almost invariably be about whether the trial court erred, approaching the task with an understanding that one's task is to resolve a dispute will, I contend, result in a decision that is more responsive to the parties' contentions and thus more consistent with the overall aims of our adjudicative system, than that likely to be reached by a court that understands its task as mere error correction. See generally *id.*

²⁰¹ See Oldfather, *supra* note 11, at 152–53.

²⁰² See *supra* notes 169–70 and accompanying text.

²⁰³ See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 54–61 (1994) (discussing the benefits of percolation).

²⁰⁴ See *id.* at 56 ("In a mature legal system, there quite frequently exists a relatively small number of readily identifiable, plausible interpretations of precedent and sensible doctrinal constructs. In such cases, the independent judgment of inferior courts will not likely bring to the

the court allowing the percolating is a state or regional appellate court rather than the Supreme Court. Still, in the context of a case that presents a novel issue in what might not be a representative situation, there may be value in allowing the issue to arise multiple times in the trial courts so as to get a better feel for the landscape over which any rule of law will be applied. Thus, deference would allow for at least a partial answer not only to the empirical questions regarding how a proposed rule would work in application, but also to the equally empirical and perhaps more readily answerable question of whether the manner in which the issue is presented in a given case is typical of how the issue will arise more generally.

There are, of course, reasons to be concerned about possible negative effects arising out of the implementation of a mechanism allowing for deference. Perhaps the largest concern that presents itself is the fear that, given the opportunity to avoid making certain legal determinations, the courts will exercise the ability to an inappropriate degree.²⁰⁵ We might legitimately worry that creating an explicit exception to the general judicial “duty to decide,” even if highly conditioned, will erode courts’ willingness to confront difficult issues. It is not so much that we are blind to the fact that even a blanket prohibition on avoidance can be abused, but rather that we fear that authorizing even a small amount of avoidance will be taken as a license to engage in a greater amount.²⁰⁶ Moreover, any regime that provides judges with discretion will be a regime in which that discretion is differently exercised. Thus, we might expect that different courts will develop different norms concerning the ability to decline review. At least in the federal system, this could result in some circuits—those least inclined to defer—having a disproportionate influence on the development of the law.²⁰⁷ A similar effect might occur within circuits, as some judges might be more inclined to defer than their col-

Supreme Court’s attention arguments and approaches that would not otherwise present themselves either upon the Justices’ (or their clerks’) reflection, through briefing by litigants or amici curiae, or through scholarly commentary.”).

²⁰⁵ Cf. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 72–73 (1985) (addressing this concern in the context of a discretionary review system).

²⁰⁶ See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 172–73 (1982) (describing the desirability of blanket prohibitions with respect to behavior that we might sometimes be willing to tolerate, but that it appears dangerous to appear to sanction to any extent).

²⁰⁷ See Gulati & McCauliff, *supra* note 130, at 191–92 (considering such an effect in the context of the use of judgment orders to resolve hard cases). Of course, such disparities already exist because of, among other things, the circuits’ different norms with respect to the publication of opinions. See *id.*

leagues.²⁰⁸ Perhaps most troubling are likely disparities across subject areas. Judges are apt to be more comfortable with or more interested in resolving certain types of disputes, while those involving difficult, unfamiliar, or boring areas of the law are likely to get less attention by most courts and judges.²⁰⁹ As a consequence, the preceding tendencies toward disparate influence by specific courts and judges might be amplified.²¹⁰

Another potential objection to deference is that it would adversely affect the perceived legitimacy of the judicial system. Imagine, to invoke the scenario most likely to trigger legitimacy-based objections, that the court in Case 1 elects to defer to the trial court on the grounds that the panel lacks the appropriate level of subject-matter expertise to formulate a rule of law. What happens when Case 2 presents the same issue? If there is any overlap between the panels in Case 1 and Case 2, then one of the parties in Case 2 will argue that there is something untoward about a situation where Judge X claims competence to decide the issue in Case 2 when she was part of a panel that disavowed that competence in Case 1. A similar objection might arise in cases where deference is based on nonrepresentativeness. A subsequent litigant could similarly assert that a court unable to assess representativeness in the first case ought not do so in the second. Both situations present the possibility that the issue will be resolved differently by the appeals court in Case 2 than by the trial court in Case 1.

There are, however, several responses to these arguments. With respect to the decisions relating to competence or representativeness, the judges in the second case will have more information available to them than the judges in the first. Perhaps it will consist only of information relating to the second case. But the interim might also have witnessed cases in other courts, the resolution of which will provide a sort of expertise (in the form of other courts' analyses) and additional data points on which to assess representativeness.

²⁰⁸ See *id.* at 188–89. Gulati and McCauliff speculate that such an effect might not be altogether bad, as those judges who are less inclined to defer might also be those who are more likely to generate good law. See *id.* at 189.

²⁰⁹ See *id.* at 189–91.

²¹⁰ Any such disparity needs to be considered relative to the baseline created by present practices. At present, Gulati and McCauliff suggest, there are disparities in the frequency with which certain subject matters come before the courts that are a product of litigant behavior. See *id.* Because society's "haves" will have greater resources and better lawyers, the issues that come before the courts will disproportionately fall within subject areas of law affecting that segment of the population. See *id.*

More generally, one can question whether this sort of perceived inconsistency is inherently troubling or instead something that seems worthy of concern because it is unfamiliar. Brief reflection reveals that we live with all sorts of situations in which courts engage in similar behavior that may only strike us as less scandalous because it is more familiar. For one, dissenting opinions are quite common. That is, we are perfectly content to tolerate open disagreement regarding the appropriate content of a rule of law. Likewise, there are occasionally cases in which the appellate court is evenly split on the appropriate outcome, with the result being that the lower court's decision is left standing.²¹¹ More generally, we are willing to tolerate the consistent existence of intercircuit and interstate nonuniformity in legal standards. These constitute examples of what we might call *institutional uncertainty*—although the individual judges all appear to hold strong views about the “correct” answer to the question presented, the court as an institution is conflicted as to what the right answer is.

Against this backdrop, it is hard to understand why we would be more troubled by *individual uncertainty*—a situation in which, either as a court or as the individual judges making up the court, judges profess to uncertainty regarding the appropriate resolution of an issue. Part of the answer may stem from a reluctance to sanction any exceptions to the understanding that courts operate under a general “duty to decide,”²¹² pursuant to which any form of avoidance is contrary to one of the fundamental components of the judicial role. Another may arise from our having a relatively stronger preference for having an answer to any given legal question, thus allowing for uniformity and predictability, relative to having the *right* answer to the question.²¹³

There is, however, another response to the legitimacy-based objections. Given the strong evidence that courts already engage in the sorts of avoidance that a mechanism of deference would enable, the question takes on a different cast. Then, assuming such behavior is undesirable, we need to ask whether there are mechanisms available that might present a realistic way to prevent it from occurring. Thus, we might explore whether there are any sorts of procedural constraints that could prevent such avoidance.²¹⁴ On the other hand, if we

²¹¹ For a dramatic example, see *United States v. Mandel*, 602 F.2d 653, 653 (4th Cir. 1979) (en banc), *aff'g per curiam* 591 F.2d 1347 (4th Cir. 1979) (affirming convictions with one claim of error denied due to an even division of votes in the en banc court).

²¹² See *supra* note 11.

²¹³ See *supra* note 59.

²¹⁴ For one such procedural mechanism, see Oldfather, *supra* note 92, at 794–801 (proposing the incorporation of “framing arguments” into judicial opinions).

conclude that some amount of avoidance is either desirable²¹⁵ or inevitable, then the question becomes whether we prefer that it take place in the open or covertly.

If we conclude that carving out exceptions to universal *de novo* review makes sense for the reasons outlined in this Article, we still face the difficult task of determining precisely how to go about doing it. Although it would be unwise to attempt here to outline a comprehensive standard, for the same reasons we have identified for skepticism regarding judicial lawmaking capabilities, we can nonetheless identify the basic components of a governing rule.

There are at least three. First, any mechanism for facilitating the avoidance of review should be structured to make the decision to defer as transparent as possible. Such transparency is critical to ensuring that the discretion to defer is exercised in an appropriate fashion.²¹⁶ Second, the deference cannot be absolute. A court's conclusion that a given case does not present an appropriate opportunity to articulate a legal standard does not preclude a determination that a trial court got the law wrong. Put another way, concluding that an appellate court need not commit to a version of what the law is does not mean that we should relieve the court of all responsibility for determining what the law is not. The limited nature of this deference, in turn, raises the question of the precedential effect of appellate deference. The conclusion that a trial court's ruling was outside the permissible zone would of course preclude a subsequent court from adopting that position. A conclusion that the trial court's ruling was within the permissible range, in contrast, would be entitled to no precedential effect, because a subsequent appellate court exercising *de novo* review would be entitled to reach a different conclusion.

Finally, we would need to limit the situations in which deference could be exercised. At a minimum, the device should be limited to cases of first impression. If a past court has already done the work of articulating a legal standard, then we need not be concerned about the present court making an error in the formulation of a legal standard. In similar fashion, the existence of precedent mitigates any competency deficit, because the precedent itself serves as a ready-made source of expertise. There is, of course, a line-drawing problem here, in the sense that there is no foolproof way to identify a case of first impression. But the concept at least provides a guidepost for analysis.

²¹⁵ See *supra* text accompanying notes 180–84.

²¹⁶ See Oldfather, *supra* note 92, at 797–98 (outlining the virtues of transparency as a discipline on judicial behavior).

Of course, we want courts to resolve most cases of first impression. So we need to narrow the field further to include only those cases in which de novo review will likely produce costs in excess of its benefits. These are the cases that do not appear to be good vehicles for law-making. Those arising out of nonrepresentative factual settings are the most evident candidates, but we might also include those in which poor advocacy leaves the court feeling ill-equipped to make law. Somewhat more controversially, we could allow courts to decline to decide questions of law where they perceive themselves to be at a competency disadvantage (e.g., “we don’t know much about tax law”).²¹⁷ Or the appellate court might perceive itself to be at a situational disadvantage, such as believing that the trial court got the right answer for reasons that the appellate court cannot fully articulate.²¹⁸

Conclusion

Despite its familiarity and intuitive appeal, universal de novo review proves surprisingly difficult to justify. As we have seen, its purported justifications do not extend so far as to cover the whole range of cases to which the doctrine applies. What is more, by effectively forcing courts to make law in cases that are not good vehicles for doing so, it often leads courts to make “bad” law or to avoid making law by engaging in clandestine forms of avoidance. When coupled with changes to the environment in which judging takes place, this suggests that we ought to take seriously the possibility of allowing appellate courts to openly defer to trial court legal determinations where the dangers of bad lawmaking are most prevalent. Properly constructed, a regime incorporating a mechanism for deference holds the promise of enhancing both lawmaking quality and judicial candor.

²¹⁷ This category is potentially dangerous and would need to be somewhat tightly constructed for the simple reason that there are likely to be some areas of law, such as perhaps tax, in which most or even all the judges on a court lack both expertise and interest. In those situations the risk would be that the court would never make any law in such subjects. There would accordingly need to be something like a rule of necessity that applied to such situations, pursuant to which a panel could pass on an issue only where there are other judges on the court who possess the relevant expertise. But even that might not be satisfactory, since the whole idea runs counter to the notion that generalist judges are a desirable feature of our legal system.

²¹⁸ There are two variables here—not only do we need to be looking for the sorts of cases where we have reason to believe that appellate courts cannot do as good a job as they normally would, we also need to be mindful of the possibility that those are not also the sorts of cases where we might expect district courts to do worse as well.