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ALLOCATING ADJUDICATIVE DECISION MAKING AUTHORITY BETWEEN THE TRIAL AND APPELLATE LEVELS: A UNIFIED VIEW OF THE SCOPE OF REVIEW, THE JUDGE/JURY QUESTION, AND PROCEDURAL DISCRETION

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Decisional authority is divided between trial level and appellate level decision makers largely through the distinction between law and fact. Trial level decision makers, including trial judges, juries, and agencies, take primary responsibility for questions of fact; appellate courts take primary responsibility for questions of law. It is over the application of law to historical fact, or ultimate facts, that the two levels vie for decisional power. Professor Louis reexamines the traditional distinctions in appellate review of findings of historical fact, of law, and of ultimate fact and considers with particularity appellate treatment of ultimate fact issues. Concluding that the trial level is increasingly the repository of authority over ultimate fact questions, Professor Louis considers the way in which appellate courts may use their power over questions of law to limit the trial level's power even over ultimate facts.

I. INTRODUCTION

In America appellate courts almost never decide cases de novo. Their primary function is to review for error determinations made at the trial level.¹ The intensity with which they review assigned errors is called the scope of review and is popularly governed by the familiar distinction between fact and law.² This dichotomy posits the existence of two kinds of trial level determinations: those of fact, which ordinarily are reviewed narrowly and deferentially on appeal, and those of law, which ordinarily are reviewed freely or independently on appeal.³

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1. F. JAMES & G. HAZARD, CIVIL PROCEDURE § 12.8, at 665 (3d ed. 1985).

2. See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 72 (1944); Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CALIF. L. REV. 1867, 1867-71 (1966).

3. Stern, *supra* note 2, at 72.

A finding of historical fact has been defined as "the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 546-48 (abridged student ed. 1965). Such findings, which are sometimes called historical facts, tend to answer the simple questions of who did what, when, where, how, why, or with what intent. Monaghan, *Constitutional Fact Review*, 85

Hence, fact-finding is the special province of the trial level, law declaration is the special province of the appellate level, and the distinction between fact and law is the primary means by which the trial and appellate levels divide decisional power between them.⁴

These nicely compartmentalized separations of law from fact and trial level functions from appellate functions belie more complex distinctions between the categories. The final logical step in the adjudicative decisional process is the application of the relevant general legal principles to the historical facts found.⁵ This process produces findings of ultimate fact, such as the determinations that defendant's employee was negligent and was acting within the scope of his or her employment. Ultimate facts, because they combine elements of law and fact, do not fit nicely within the law/fact dichotomy. Nevertheless, an accommodation has been achieved by classifying particular ultimate fact determinations as "fact" or "law" and reviewing them accordingly.

The existence of different trial level fact finders further complicates the distinction between trial and appellate functions. Although appellate courts generally review findings of historical fact and most findings of ultimate fact deferentially, traditionally the degree of deference has varied slightly depending on whether the factual findings were made by a jury, an agency, or a trial judge.⁶ Facially these slight variations in institutional deference are attributable to differences in the judicially or statutorily defined scope of review⁷ and, therefore, in

COLUM. L. REV. 229, 235 (1985). For example, whether defendant drove his or her car through a red light is a finding of historical fact.

Declarations of law are fact-free general principles that are applicable to all, or at least to many, disputes and not simply to the one *sub judice*. H. HART & A. SACKS, THE LEGAL PROCESS 374 (tent. ed. 1958); Weiner, *supra* note 2, at 1869. Thus, the duty defendant owes to plaintiff in operating his or her vehicle on a public street is a question of law. After the facts are found and the law declared, the final step is to make findings of ultimate fact by applying the law to the historical facts. For example, the determination that driving a vehicle through a red light constitutes negligence is a finding of ultimate fact because it requires the application of law to facts. Hart and Sacks remind us "that this three-fold process is not a simple step-one, step-two, step-three process. The law determines what facts are relevant while at the same time the facts determine what law is relevant." H. HART & A. SACKS, *supra*, at 375. Although the definitions of the three processes are clear—fact-finding involves no law, law declaration involves no facts, and law application involves a combination of the law and the facts—their application is sometimes difficult. See *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984); Monaghan, *supra*, at 232-35. For example, in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), the Supreme Court reversed the court of appeals for independently reviewing a trial level finding of no discriminatory intent under a statute. The Court held that this finding was a pure question of fact—whether defendant had an actual motive or intent to discriminate—rather than, as the court of appeals had characterized it, the ultimate fact of statutory intent. *Id.* at 283-88. Because this determination was a finding of fact, the appellate court should not have reviewed it independently. *Id.* at 289-90.

4. Stern, *supra* note 2, at 93.

5. For a discussion of the relationship between law, facts, and ultimate facts, see *id.* at 72.

6. *Id.* at 72-89.

7. Findings of fact by trial judges may not be set aside unless they are "clearly erroneous." FED. R. CIV. P. 52(a). Agency fact-findings may not be set aside if they are supported by "substantial evidence." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2)(E) (1982). Only the jury standard is judicially rather than statutorily created. Although that standard sometimes is described as a substantial evidence standard, Stern, *supra* note 2, at 73, more often today it is said that a fact may be taken from the jury by directed verdict or binding instruction or that a jury's fact-finding may be reversed on motion for judgment notwithstanding the verdict only if no reasonable or reasoning person could find the fact on the evidence presented. *Boeing Co. v. Shipman*, 411 F.2d 365, 373-74 (5th Cir. 1969) (en banc); Stern, *supra* note 2, at 73.

part to considerations of legislative intent. The slight variations, however, are also attributable to a number of historical, constitutional, institutional, and practical considerations.⁸

In the period following the New Deal, courts and commentators carefully examined these variations in institutional deference and their sources, primarily from the administrative law perspective, because of the sudden proliferation of and interest in federal administrative agencies and agency adjudication.⁹ During the same period, courts dealt with three additional aspects of the scope of review of agency adjudication. First, although federal courts typically reviewed questions of law freely, they decided at least sometimes to defer to agencies' general construction of their governing statutes, an aberration which raised still unsettled questions concerning the source, occasion for, and scope of this deference.¹⁰ Second, federal courts concluded that agency applications of statutory law to the facts of a particular adjudication should ordinarily be reviewed deferentially like questions of historical fact.¹¹ This conclusion reflected the analogous process in the judicial context whereby questions of ultimate fact going to the merits ordinarily were denominated questions of fact for the jury and, therefore, reviewed deferentially on appeal.¹² Third, the federal courts identified a limited and extremely controversial group of ultimate facts as "jurisdictional" or "constitutional" facts,¹³ which by virtue of that classification were reviewed independently like questions of law.¹⁴

The intensive scrutiny of scope of review in the administrative law context exposed some related questions in the area of appellate review of judicial proceedings that have come to the fore in recent years. For example, although the doctrine of constitutional fact arose in the context of agency adjudication, today it arises primarily in the judicial context,¹⁵ in which it raises some new and, until

8. For a discussion of the considerations bearing on the differing degrees of deference to findings of trial judges, juries, and agencies, see *infra* notes 49-63 and accompanying text; see L. JAFFE, *supra* note 3, at 595-618; Stern, *supra* note 2, at 80-89; Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1032-41 (1967).

9. See, e.g., Stern, *supra* note 2, at 70-72. Judicial review of agency adjudicative determinations is described either as statutory or nonstatutory and may be conducted by a trial or an appellate court. W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW: CASES AND COMMENTS* 917-37 (7th ed. 1979). To avoid unnecessary textual qualification, later references to review of agency adjudication will refer to statutory review by appellate courts, which is the principal federal model. See *id.* at 918.

10. *E.g.*, *Skidmore v. Swift Co.*, 323 U.S. 134 (1944); *Pittsdon Stevedoring Corp. v. Dellaventura*, 544 F.2d 35 (2d Cir. 1976); see *infra* text accompanying notes 41-42, 216-20.

11. The history of this development is reviewed in L. JAFFE, *supra* note 3, at 546-64; and Stern, *supra* note 2, at 95-109. The leading decisions were *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944); *Dobson v. Commissioner*, 320 U.S. 489 (1943); and *Gray v. Powell*, 314 U.S. 402 (1941).

12. Stern, *supra* note 2, at 110 ("probably most issues described as ultimate fact—of the application of a general rule to particular circumstances—are left to the jury"); Weiner, *supra* note 2, at 1919.

13. Jurisdictional facts are facts fundamental to the existence of an agency's statutory jurisdiction—for example, whether an act occurred in interstate commerce. Constitutional facts are facts fundamental to the existence of a constitutional right—for example, whether a confession was coerced or a film was obscene. See *infra* notes 266-92 and accompanying text.

14. L. JAFFE, *supra* note 3, at 624-33; see *infra* text accompanying notes 266-78.

15. Most constitutional fact cases today arise out of the Bill of Rights and deal with such questions as whether a film is obscene under the first amendment or whether a confession is coerced

recently, largely unexplored questions.¹⁶ Further, the scrutiny of scope of review concepts in the administrative law context led to an increase in the focus on such concepts in the judicial context. The division of mixed law/fact questions or ultimate facts between the jury and trial judge was traditionally articulated in terms of the law/fact dichotomy, the seventh amendment,¹⁷ and the relative capacities of the two rival decision makers to make these determinations.¹⁸ Largely unmentioned was the fact that the assignment of a particular mixed law/fact question to the judge or to the jury automatically determines the scope of review of that question on appeal.¹⁹

under the fifth amendment. See Strong, *Dilemmic Aspects of the Doctrine of "Constitutional Fact,"* 47 N.C.L. REV. 311, 312-13 (1969) [hereinafter cited as Strong, *Dilemmic Aspects*]; Strong, *The Persistent Doctrine of "Constitutional Fact,"* 46 N.C.L. REV. 223, 240-42 (1968) [hereinafter cited as Strong, *Persistent Doctrine*].

16. *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984); Monaghan, *supra* note 3. Until recently only Professor Strong's articles, cited *supra* note 15, closely followed this judicial flourishing of the doctrine of constitutional fact.

17. The seventh amendment to the Constitution of the United States provides the right of trial by jury in the federal courts. The amendment's applicability to ultimate facts is discussed *infra* note 19.

18. Stern, *supra* note 2, at 111 ("[A]lthough juries generally apply the law to the facts, the line dividing matters to be treated as 'fact' and 'law' for purposes of a jury trial is drawn with an eye to the relative advantages of having a particular matter determined by the court or the jury, rather than upon the basis of a consistent analysis of the factual or legal nature of the issue."); Weiner, *supra* note 2, at 1867, 1872.

19. *Loper v. Morrison*, 23 Cal. 2d 600, 145 P.2d 1 (1944); F. JAMES & G. HAZARD, *supra* note 1, § 7.10, at 338. Determining both the judge/jury allocation and the scope of appellate review of mixed fact/law questions in terms of the law/fact dichotomy may have begun as an historical accident, but this symmetrical approach properly remains the general rule today. The rule persists because the seventh amendment requires an appellate court to review facts found by juries deferentially and because most ultimate facts are not sufficiently important either to take them from the jury or to consume precious appellate time by reviewing them independently. See *infra* text accompanying notes 140-45 (free review of ultimate facts would detract from the appellate law-declaring function and would be inefficient).

Nevertheless, appellate courts have developed three alternative models whereby some mixed law/fact questions can be taken from the jury and, regardless of their trial level assignment, can be reviewed independently on appeal. In one, the constitutional fact model, an ultimate fact determinative of a constitutional right may be found initially by a jury or other fact finder, but on appeal it is reviewed freely like a question of law. *E.g.*, *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984) (actual malice determination in constitutional defamation cases); see also *infra* notes 279-92 and accompanying text (discussing more fully the doctrine of constitutional fact). In the second or "law" model, an ultimate fact analytically indistinguishable from others that are treated like questions of fact is treated like a question of law at both the trial and appellate levels and, therefore, is never decided by the jury and is freely reviewed on appeal. See *infra* notes 252-65 and accompanying text (more detailed discussion of the "law" model). For example, although reasonable care in the tort context is generally regarded as a question of fact for the jury, in the commercial law context it is often treated as a question of law for the trial judge. Weiner, *supra* note 2, at 1876, 1895-1906. Actually, this "law" approach is merely another way of referring to the fundamental judge/jury allocation question because most nonequitable mixed questions going to the merits are classified as questions of fact for the jury; the trial judge decides questions that are classified as "law." See Weiner, *supra* note 2, at 1871-76. In the third or equitable model, the trial judge replaces the jury as the fact finder on claims and defenses classified as equitable. *Katchen v. Landy*, 382 U.S. 323 (1966) (bankruptcy court, as a court of equity, is free of seventh amendment requirements); *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969) (upholding as equitable the denial of jury trial for a back pay award under Title VII of the Civil Rights Act of 1964); see *Curtis v. Loether*, 415 U.S. 189, 195 (1974) ("The cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the seventh amendment.").

All findings of fact by trial judges, whether at law or in equity, are subject to the "clearly erroneous" test of FED. R. CIV. P. 52(a). This test or scope of review is somewhat less deferential

Although the impact on the scope of review of the assignment of questions of ultimate fact to the judge or the jury was not generally discussed, surely appellate courts were aware of the consequences and often took them into account in reviewing the legal correctness of assigning a particular question to the judge or jury.²⁰ If this is so, then in effect appellate courts possess a power, albeit a limited one, to review particular ultimate facts simply by classifying them as questions of law rather than as questions of fact.²¹ This "classification" power has additional counterparts. The classification of a mixed question as one of jurisdictional or constitutional fact,²² or, in the realm of procedure and evidence, as a question of law rather than as a discretionary determination,²³ similarly results in free appellate review. Moreover, as an alternative to using this classification power, appellate courts can narrow or control trial level decisional power over the remaining questions by changing or refining the applicable legal rules.²⁴ Thus, the appellate courts potentially exercise considerable power over the ultimate fact-findings of trial level decision makers.

Scope of review, therefore, is the principal means by which adjudicative decisional power and responsibility are divided between the trial and appellate levels.²⁵ This Article begins with a reexamination of the traditional distinctions

than are the equivalent scopes of review applicable to the findings of juries and agencies. See *infra* notes 49-61 and accompanying text. Moreover, some appellate courts maintain that trial judge findings of ultimate fact are freely reviewable. See *infra* note 76. In recent years, however, the United States Supreme Court has suggested that even ultimate fact-findings by trial judges are subject to the "clearly erroneous" test. See *infra* note 77. Current efforts to take complex fact and mixed law/fact questions from the jury by means of a complexity exception to the seventh amendment or through the due process clause presumably would assign these questions to the trial judge, as is done under the equitable model. See *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980).

All three models represent limited exceptions to or exclusions from the seventh amendment, which preserves the right of jury trial as it was in 1791. *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961). At that time ultimate facts going to the merits and not subject to one of these exceptions generally were assigned to the jury. *Weiner*, *supra* note 2, at 1890-93, 1907-10. Therefore, they became "facts" within the meaning and protection of the seventh amendment. *Burcham v. J.P. Stevens & Co.*, 209 F.2d 35, 38 (4th Cir. 1954); *Weiner*, *supra* note 2, at 1889-93. There are only two possible evasions of the seventh amendment: the newly discovered "complexity exception," mentioned above, which would permit some jury questions too complex for laypersons to be decided by the trial judge, as in the equity model; and the statutory repeal-reincarnation route, whereby a claim or defense traditionally tried by a jury—like employer negligence—is abrogated and replaced by a new but different statutory one—like workmen's compensation—which is also classified as legal, equitable, or administrative. *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding statutory transfer of power to award back pay from the jury trial to agency adjudication); *U.C.C. § 2-302(1)* (1978) (declaring the expanded statutory defense of unconscionability a question of law).

20. *F. JAMES & G. HAZARD*, *supra* note 1, § 7.10, at 338.

21. See *supra* note 19.

22. *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984); see also *infra* notes 266-92 and accompanying text (introducing concepts of jurisdictional and constitutional fact).

23. See *infra* Part V.

24. See *infra* Part IV A.

25. Power is also divided between the trial and appellate levels along a time line that ordinarily forbids appellate review until a final judgment has been entered at the trial level. See *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, LAW & CONTEMP. PROBS. 13 (Spring 1984) (a general review of the final judgment rule and its exceptions in the judicial context); see also 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.01 (1958) (surveying the equivalent "exhaustion doctrine" in the administrative law context). With rare exceptions appellate courts will not consider errors not raised at the trial level or not properly appealed. Phillips, *The Appellate Review Function*:

in the scope of review of questions of law, historical fact, and ultimate fact. This reexamination finds that the major area of difficulty in determining the scope of review has centered on ultimate facts, particularly on those going to the merits of a particular case. With certain important, though relatively static, exceptions, ultimate fact questions today are classified as questions of fact and are reviewed deferentially on appeal, marking a shift in power towards the trial level. This shift has tended to blur and contract the traditional distinctions made by appellate courts among the various fact finders. In the past few years even trial judges, whose findings were traditionally reviewed less deferentially than those of juries and agencies, have become beneficiaries of the shift.²⁶

This Article then examines the various possible reasons for the shifting of power and the blurring of traditional distinctions and concludes that the driving force is the litigation explosion. Crowded appellate dockets and the temporal inability of appellate courts to immerse themselves in the record of every case have necessitated deference to most trial level determinations having a substantial factual component.²⁷ This Article next examines the power of appellate courts over the law and the various ways that power may be employed to control, to direct, and occasionally to expropriate the trial level's power over ultimate facts. This Article concludes with an examination of the significantly different allocation of decisional power between the trial and appellate levels in the realm of procedure and evidence.

II. REEXAMINATION OF THE LAW/FACT DICHOTOMY

A. *The Bifurcated Approach*

The most striking aspect of the division of decisional power is its almost total bifurcation. Power is divided between the trial and appellate levels, review is either narrow and deferential or broad and independent, and particular questions are assigned a scope of review by means of either the law/fact or the law/discretion dichotomy.²⁸ The appropriate scope of review for mixed law/fact questions under this approach is not apparent. This third or intermediate type of question might justify a third or intermediate scope of review. Instead, such questions simply are classified either as law or fact in the substantive context and as law or discretion in the procedural or evidentiary context and reviewed ac-

Scope of Reviews, LAW & CONTEMP. PROBS. 1 (Spring 1984). The identification of these exceptions, which is part of the general concept of an appellate court's scope of review, deals with the issue of what questions are open on appeal. The principal focus of this Article, however, is on the standard used in reviewing those questions.

26. See *infra* notes 27 & 51.

27. The clearest expression of this practical reason is found in *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985). Holding that the "clearly erroneous" test of FED. R. CIV. P. 52(a) applies to a trial judge's findings of historical fact not resting on credibility determinations, the Court stated: "Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of the fact determination at a huge cost in diversion of judicial resources." *Anderson*, 105 S. Ct. at 1512. This argument is also applicable to the review of ultimate facts found by trial judges. See *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

28. Mixed questions going to the merits are subject to the law/fact categorization. The law/discretion labels are used to classify mixed questions in the procedural or evidentiary context. See *infra* Part V.

cordingly.²⁹ This approach does not eliminate or explicate the underlying problem of choosing an appropriate scope of review for those questions; the choice simply is hidden within the classification process.

The process of classifying procedural and evidentiary mixed law/fact questions is very different from the seemingly analogous process of classifying substantive ones.³⁰ Once the classification has been made, however, appellate review of "fact" in the substantive context and of "discretion" in the procedural context are remarkably alike. On appeal, the question is not whether the trial level result is the better or best one but only whether it is a legally permissible one.³¹ Review, therefore, is limited to whether the applicable legal principles were identified and applied correctly and whether the findings of ultimate fact exceed the limits of reasonableness.³² The answers to these questions constitute declarations of law, which define the nature of the trial level determination and set the outer limits for particular factual situations. Within these boundaries the trial level decision maker's choice among the permissible alternatives is final. Thus, fact-finding is a form of discretionary power, and the trial level function can be described as the exercise of discretionary power³³ as defined by and within the limits set by law.

Traditionally, appellate courts were much less likely to find an abuse of discretion in the procedural or evidentiary context³⁴ than to reverse a trial level finding of ultimate fact going to the merits.³⁵ That is no longer true, or at least as true. Appellate courts today more readily find abuses of procedural discretion³⁶ and, in some substantive areas like personal injury, less readily overturn

29. Weiner, *supra* note 2, at 1874-76.

30. See *infra* notes 345-47 and accompanying text. Substantive mixed law/fact questions are normally, almost presumptively, classified as questions of fact. See *infra* text accompanying notes 72-76. Procedural mixed law/fact questions are classified by an ad hoc process under which a higher percentage of questions, particularly those tending to affect the outcome of the litigation, are classified as questions of law. See *infra* note 334.

31. See *infra* note 335.

32. See *infra* note 333.

33. See P. CARRINGTON & B. BABCOCK, *CIVIL PROCEDURE: CASES AND COMMENTS ON THE PROCESS OF ADJUDICATION* 170 (3d ed. 1983) ("Despite the system of accountability, a significant range of discretion will be left either to the judge or to the jury to react to the proof one way or the other for the purpose of deciding what transpired between the parties, and in applying the legal standard 'good faith' to those events.").

34. Traditionally, appellate courts have held that a discretionary determination will not be reversed unless it amounts to an "abuse" of discretion. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

35. Louis, *Civil Procedure (Pleading and Parties)*, *Annual Survey of North Carolina Case Law*, 45 N.C.L. REV. 823, 836-38 (1967). Questions of ultimate fact going to the merits ordinarily were denominated questions of fact for the jury and, therefore, reviewed deferentially on appeal. See *supra* note 12.

36. The trial court's discretion over an allegedly excessive award of damages was once regarded as almost absolute, but after World War II, as jury verdicts grew ever larger, appellate courts suddenly assumed the power to review. See *Grunenthal v. Long Island R.R.*, 393 U.S. 156 (1968). Federal courts now also carefully review discretionary denials of leave to amend, *Foman v. Davis*, 371 U.S. 178, 182 (1962), and grants of new trials on the ground that the verdict is against the clear weight of the evidence, e.g., *Lind v. Schenley Indus.*, 278 F.2d 79, 90-91 (3d Cir.), *cert. denied*, 364 U.S. 835 (1960). State courts were once very reluctant to find almost any trial level abuse of procedural discretion. E.g., *Consolidated Vending Co. v. Turner*, 267 N.C. 576, 148 S.E.2d 531 (1966). Those now governed by a version of the Federal Rules of Civil Procedure may shed some of this reluctance and follow the federal lead.

findings of ultimate fact³⁷ than they did a half century ago. Overall, appellate review of the two discretionary functions is coalescing, and what differences remain perhaps are more statistical³⁸ and atmospheric³⁹ than doctrinal.

B. *The Law/Fact Dichotomy—Pure Fact and Law*

The law/fact dichotomy does quite well in predicting how appellate courts will review trial level determinations of "pure" law and "pure" or historical fact.⁴⁰ The only exception to free review of questions of law is in the area of administrative law, in which appellate courts occasionally defer to agency declarations of general legal principles.⁴¹ This exception, however, has been applied principally to novel, narrow, or technical questions⁴² and can be viewed, therefore, as a form of deference to an agency's expertise rather than as a specific or inherent limitation on appellate power.

Trial level findings of "pure" or historical fact ordinarily are reviewed narrowly and deferentially on appeal.⁴³ There are two familiar exceptions to the general rule: the asserted power of federal appellate courts to review independently the historical fact basis of constitutional fact determinations⁴⁴ and the assertion of many appellate courts that findings of fact by trial judges that are not based on credibility determinations are subject to free review rather than to limited review under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a).⁴⁵ The former exception, although often asserted, has rarely been exercised,⁴⁶ and the United States Supreme Court⁴⁷ and an amendment to

37. See Cooper, *Directions for Directed Verdicts: A Compass for Federal Courts*, 55 MINN. L. REV. 903, 924-27 (1971); Twerski, *Seizing the Middle Ground Between Rule and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521, 524 (1982).

38. See *infra* notes 59 & 159 and accompanying text.

39. Courts may feel a greater latitude or freedom to reverse in one situation than in another, even though they cannot articulate the exact nature of the difference. Thus, just as courts sense but cannot articulate the exact nature of the difference between "clearly erroneous" and "substantial evidence," they also sense but cannot articulate differences in reviewing a trial judge's fact-finding involving credibility considerations and a trial judge's fact-finding based on documentary evidence. This is true even though both findings are subject to the "clearly erroneous" test of FED. R. CIV. P. 52(a). See *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985).

40. For definitions and examples of law, fact, and ultimate fact, see *supra* note 3.

41. See e.g. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (deference to administrative bulletin suggesting guidelines for interpreting federal wage and hour laws).

42. See *infra* text accompanying notes 216-20.

43. See Stern, *supra* note 2, at 72.

44. See *infra* notes 279-92 and accompanying text; see also *Payne v. Arkansas*, 356 U.S. 560, 562 (1958) (stating that although adequately supported state court findings of fact are not "this Court's concern, . . . where the claim is that the prisoner's confession is the product of coercion we are bound to make our own examination of the record to determine whether the claim is meritorious"); Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 115 (1960) ("Ordinarily, if the facts are in dispute, the Supreme Court accepts the state courts' findings on the disputed facts, though it retains freedom to review the evidence and reach different conclusions in appropriate cases."); Monaghan, *supra* note 3, at 254-59 (discussing the assertion in some early constitutional fact cases that federal courts reviewing agency adjudications were entitled to hear new evidence or all the evidence and, therefore, to make independent findings of historical fact).

45. E.g., *Orvis v. Higgins*, 180 F.2d 537, 539-40 (2d Cir. 1950).

46. Professor Strong's review of modern constitutional fact cases, Strong, *Persistent Doctrine*,

Rule 52(a)⁴⁸ have repudiated the latter.

In sum, appellate courts review almost all findings of historical fact deferentially. There are, however, historical variations in deference towards findings of fact by juries, trial judges, and agencies. The traditional understanding is that the "clearly erroneous" standard of Rule 52(a), which applies to review of trial judges' findings of fact, is less deferential than is the substantial evidence standard of section 10(e) of the Federal Administrative Procedure Act,⁴⁹ which applies to review of agency findings. Further, in recent times the substantial evidence test for agencies has been regarded as somewhat less deferential than the reasonable person standard applied by trial judges in ruling on motions for directed verdict or judgment notwithstanding the verdict.⁵⁰ These traditional understandings may well be accurate today, but the differences in the degree of deference toward the various fact finders are narrow and have narrowed even more in recent years.⁵¹ Under all three standards, appellate courts, as well as trial judges reviewing jury determinations, must reverse findings that are not supported by legally sufficient evidence⁵² and ordinarily must affirm those findings that are. Scope of review problems arise when the findings, though supported by legally sufficient evidence, are contrary to the great weight of the evidence and appear to be clearly wrong, shocking, or unjust. Such findings may be overturned under both the "clearly erroneous" test⁵³ and the administrative law substantial evidence test.⁵⁴ Although courts cannot reverse jury findings of this type on a motion for judgment notwithstanding the verdict,⁵⁵ they may set aside such findings and order a new trial on the grounds that the verdict is

supra note 15, shows no clear cut instance of the reversal of an historical fact-finding. Instead, most cases involve reversal with respect to the ultimate fact whether, for example, a confession was "coerced," *id.* at 249-61, or a film was "obscene," *id.* at 270-80.

47. *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985).

48. See JUDICIAL CONFERENCE OF THE U.S., COMM. ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 5 (August 1983) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ."). This amendment became effective on August 1, 1985. U.S.C.A., pamphlet No. 3, Sept. 1985, 585-86.

49. 5 U.S.C. § 706(2)(E) (1982) (court shall set aside findings "unsupported by substantial evidence"). For a discussion of the differing appellate deference shown under the "clearly erroneous" and substantial evidence standards, see Stern, *supra* note 2, at 80-89.

50. At one time this reasonable person standard was considered equivalent to the substantial evidence test for review of facts found by agencies. See, e.g., Stern, *supra* note 2, at 72-79. Indeed, the two phrases were often used interchangeably. *NLRB v. Columbian Co.*, 306 U.S. 292, 299-300 (1939). After World War II, however, the Supreme Court decided that substantial evidence must be found "on the whole record." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 481-91 (1951). As a result the administrative standard diverged from the jury standard and is now somewhat less deferential. See *infra* text accompanying notes 52-55; *supra* note 7.

51. See *supra* text accompanying notes 11-12; *infra* note 77.

52. See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

53. 9 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2585, at 735 (1971); Stern, *supra* note 2, at 89. The usual formulation is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

54. E.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 497 (1951).

55. F. JAMES & G. HAZARD, *supra* note 1, § 7.11, at 340-41; Stern, *supra* note 2, at 89.

against the clear weight of the evidence.⁵⁶

The differences, if any, in the weights of evidence required by the three standards for reversal are slight and incapable of precise articulation. Consequently, an appellate court determined to reverse or set aside a particular factual finding probably will not be deterred by the greater deference that theoretically must be shown to particular fact finders.⁵⁷ Perhaps statistical or other empirical evidence would confirm the widely held impression⁵⁸ that trial judge findings overall are the most vulnerable to appellate reversal, but even that conclusion would have to be discounted somewhat by the recent efforts of the United States Supreme Court to protect the findings of trial judges.⁵⁹ Moreover, such empirical evidence might also confirm the suspicion that the findings of individual trial judges and agencies with a reputation for bias or general untrustworthiness are perhaps the most vulnerable of all.⁶⁰ Finally, in the face of questionable findings, reviewing courts sometimes seem to look for other errors permitting reversal. Perhaps the easiest way to set aside a dubious jury verdict is to find an evidentiary or instructional error.⁶¹

In sum, the differences among the three scopes of review are narrow and probably cannot even be expressed doctrinally. Although these differences probably can be demonstrated empirically and obviously can be expressed in terms of the reasons and policies that purport to justify them,⁶² in practice they are principally atmospheric⁶³ and operate like the proverbial thumb on the scale.

C. *The Application of Law to Fact*

The process of law application deals with those intermediate adjudicative determinations that combine elements of fact and law and are variously known as ultimate facts, applications of law to fact, or mixed questions of fact and law.⁶⁴ Because there is no recognized intermediate scope of review, on appeal these mixed determinations must be reviewed either narrowly like questions of fact or broadly like questions of law. Even though ultimate facts are neither fact nor law,⁶⁵ courts have misleadingly persisted in expressing the treatment of ulti-

56. *Aetna Casualty & Sur. Co. v. Yeatts*, 122 F.2d 350, 359 (4th Cir. 1941).

57. Gellhorn & Robinson, *Perspectives on Administrative Law*, 75 COLUM. L. REV. 771, 780 (1975) (suggesting that reviewing courts do as they please and that the "rules governing judicial review have no more substance at the core than a seedless grape").

58. Stern, *supra* note 2, at 80-89.

59. *E.g.*, *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985) ("clearly erroneous" test applies to findings not resting on credibility determinations); *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855-59 (1982) (reinstating trial court's findings not found to be clearly erroneous); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982) (holding that intent is a question of fact subject to the "clearly erroneous" test).

60. See *infra* note 159 and accompanying text.

61. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68, 94 (1981).

62. See Stern, *supra* note 2, at 72-89 (comparing the application of these standards historically and in terms of their policy considerations).

63. See *supra* note 39.

64. See Stern, *supra* note 2, at 93-120.

65. See Weiner, *supra* note 2, at 1872-76 (suggesting that in disputes over mixed questions, the essential issue is whether the case is for the judge or the jury).

mate facts in terms of the law/fact dichotomy. It must be understood, however, that the expression reveals only the choice and not the reasons for it. More is at stake, however, than deception and obfuscation. Ultimate facts constitute, as their name implies, the final steps in the decisional process. Whether they are reviewed narrowly or freely will determine *ab initio* whether principal responsibility for their determination, and often for the outcome of the litigation, lies with the trial or the appellate level. Moreover, because the two levels have otherwise divided decisional power over pure fact and law in relatively fixed and static terms, their inevitable struggle for power must center on the process of law application and in particular on the scope of review of mixed law/fact questions.

Not surprisingly, the division of power over mixed questions has been neither simple nor consistent, even though the process of law application itself does not vary from one context or venue to another. To determine whether a party was an "employee,"⁶⁶ whether the employee acted within the "scope or course of employment,"⁶⁷ whether a reporter acted with "actual malice,"⁶⁸ whether a confession was "coerced,"⁶⁹ or whether an amendment or counterclaim arose out of the same "transaction or occurrence,"⁷⁰ trial level decision makers must apply the applicable general principles of law to the historical facts. The analytical similarity in making these determinations suggests that if they are challenged on appeal the scope of review ought to be the same. That has not been the case, however. Distinctions have been drawn among the types of mixed questions presented for review⁷¹ and among the determinations of different trial level decision makers. The overall results are approximately as follows:

1. Ultimate facts going to the merits are usually reviewed narrowly and deferentially like questions of historical fact⁷² even when the underlying historical facts are not in dispute.⁷³ Indeed, with the exception of a few specific sub-

66. *E.g.*, *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

67. *E.g.*, *O'Keefe v. Smith, Hinchman & Grylls Assocs.*, 380 U.S. 359 (1965).

68. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

69. *E.g.*, *Chambers v. Florida*, 309 U.S. 227 (1940).

70. *E.g.*, *Tiller v. Atlantic Coast Line R.R.*, 323 U.S. 574 (1945); *Moore v. New York Cotton Exch.*, 270 U.S. 593 (1926).

71. *See Monaghan, supra* note 3, at 232-35.

72. For administrative law purposes, what scope of review applies to ultimate facts going to the merits was effectively settled in the 1940s. *See, e.g.*, *NLRB v. Hearst Publications*, 322 U.S. 111, 130-32 (1944); *Dobson v. Commissioner*, 320 U.S. 489, 501-02 (1943); *Gray v. Powell*, 314 U.S. 402, 411 (1941). One commentator has written that "the administrative judgment is to be treated in the same way as a finding of fact." *Stern, supra* note 2, at 99.

73. The United States Supreme Court has often said that courts must defer to the ultimate fact-findings of juries, even though the underlying historical facts are not in dispute. *See, e.g.*, *Best v. District of Columbia*, 291 U.S. 411, 415 (1934); *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 663-64 (1873). Nevertheless, some courts of appeal still say that if the historical facts are not in dispute, the ultimate fact is a question of law. *See, e.g.*, *Carman v. Harrison*, 362 F.2d 694, 698 (8th Cir. 1966); *Burriss v. Texaco, Inc.*, 361 F.2d 169, 174 (4th Cir. 1966). The basis for this contrary view is the belief that law application is a judgmental process for which juries have no inherent advantage over appellate courts. Those who propound this view emphasize that deference is typically paid to findings of both historical and ultimate fact because both are usually concealed within the general verdict and because special procedures to separate them are very complex. When there are no historical facts in issue, however, there is no need to defer to the jury's ultimate fact-findings. This view asserts by implication the dubious proposition that appellate reexamination of a jury's ultimate fact-findings would never violate the seventh amendment. *See supra* note 19. It also ig-

stantive areas like constitutional⁷⁴ and contract or commercial law,⁷⁵ mixed questions going to the merits are almost presumptively classified as questions of fact, assigned to the jury, and reviewed narrowly on appeal from any fact finder. There is one general exception. In some state and federal courts the ultimate fact determinations of trial judges are subject to independent appellate review.⁷⁶ In a series of recent decisions, however, the United States Supreme Court has moved strongly in the opposite direction and may be prepared to hold that the ultimate fact-findings of federal trial judges are ordinarily subject to the "clearly erroneous" test of Federal Rule of Civil Procedure 52(a).⁷⁷

2. Historically, some ultimate facts going to the merits have been regarded as too sensitive or too important to be entrusted to juries. These facts have been denominated by courts or legislatures as questions of "law," taken from the jury, and subjected to free review on appeal.⁷⁸ Similarly, some mixed questions of a statutory or constitutional nature, including procedural questions, have been regarded as too important to be entrusted to the discretion of any trial level decision maker. These have been designated jurisdictional or constitutional facts and subjected to free appellate review even when they have been determined initially by a jury.⁷⁹ The doctrine of constitutional fact is flourishing today, but the doctrine of jurisdictional fact has virtually disappeared from the federal courts.⁸⁰

3. Procedural or evidentiary mixed questions that are classified as "discretionary" are subject to a narrow scope of review;⁸¹ those labeled "questions of

nores the view that the jury's knowledge of ordinary life gives it an advantage over judges in resolving many ultimate facts like negligence. See *Sioux City & Pac. R.R.*, 84 U.S. (17 Wall.) at 664.

74. In the constitutional law area, ultimate facts may be classified as "constitutional facts" and thereby reviewed independently on appeal. See *supra* note 19.

75. The desire for stability, predictability, and consistency of result apparently has persuaded many courts to classify many mixed contract or commercial law questions as "legal." See *Weiner, supra* note 2, at 1895-1906. In this way, appellate courts may exercise independent review.

76. Despite apparently contrary messages from the United States Supreme Court, e.g., *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1981); *Commissioner v. Duberstein*, 363 U.S. 278, 291-92 (1960); *McAllister v. United States*, 348 U.S. 19, 20 (1954), approximately half the federal courts of appeals, following the leadership of the Second Circuit, assert the power to review trial judge findings of ultimate fact independently rather than under the "clearly erroneous" standard of FED. R. Civ. P. 52(a). E.g., *Mamiye Bros. v. Barber S.S. Lines*, 360 F.2d 774, 776-78 (2d Cir.), *cert. denied*, 385 U.S. 835 (1966). For a general review of the problem, see *Stern, supra* note 2, at 112-20; *Weiner, supra* note 8, at 1022 (discussion of the split among the circuits and the rationale for each position); see also *infra* note 146 (citing additional cases). These courts have concluded that trial judges have no decisional advantage in finding ultimate facts. Moreover, trial judge findings of ultimate fact, unlike ultimate fact-finding by juries, see *supra* note 73, may be easily separated from findings of historical fact, to which the "clearly erroneous" standard applies.

77. FED. R. Civ. P. 52(a) ("clearly erroneous" standard). In *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949, 1959-60 (1984), the Supreme Court stated that the "clearly erroneous" standard of "Rule 52(a) applies to findings of fact, including those described as 'ultimate facts' because they may determine the outcome of litigation." This statement, however, apparently is not yet regarded as the definitive resolution of the question, even though it is consistent with other Supreme Court decisions strengthening the position of trial judges. See also cases cited *supra* note 59 (other applications of the "clearly erroneous" test).

78. See *supra* note 19.

79. See *supra* note 19; *infra* Part IV C.

80. See *infra* note 278 and accompanying text.

81. See *supra* notes 34-35 and accompanying text.

law" are subject to a free one. Unlike questions going to the merits, however, there is no implied presumption favoring narrow review of such mixed questions. Instead an ad hoc classification decision is made for each type of mixed procedural question. Although the decision is rarely explained or justified, it appears to be the result of a number of substantive considerations.⁸² Not surprisingly, this ad hoc process for classifying ultimate procedural facts achieves different results from the presumptive process employed in the realm of substantive law. Whereas the application of substantive law to historical facts is generally regarded as a discretionary trial level function, the analytically similar application of procedural rules to historical facts is more likely to be regarded as ultimately an appellate function, especially if the procedural question may affect the case's outcome or the existence of an important procedural right.⁸³

4. Through their power to declare rules of law, to reject specific trial level law-applying determinations as unreasonable, and to classify mixed questions as "legal" or as questions of constitutional or jurisdictional fact, appellate courts are able to limit, direct, or even expropriate the power of fact finders over particular ultimate facts. Each of these appellate powers is to some extent an alternative to the others, and all of them are alternatives to a general enlargement of the role of appellate courts over the law application process.⁸⁴

The process of law application provides the principal battleground upon which trial level decision makers and appellate courts vie for decisional power and suggests that in the past half century, at least with respect to questions going to the merits, trial level decision makers have won the battle. In the 1950s the United States Supreme Court confirmed the presumptive hegemony of agencies over the process of law application, a status already enjoyed by juries,⁸⁵ and today the Court is moving in the direction of giving greater deference to the ultimate fact-findings of trial judges.⁸⁶ Concurrently, the exceptions to this presumptive trial level hegemony either have shrunk or have remained relatively constant. Thus, in the federal courts the doctrine of jurisdictional fact has virtually vanished;⁸⁷ only occasionally do legislatures and courts classify new, mixed law/fact questions as questions of law,⁸⁸ and in a few sensitive, substantive law areas like contract law the role of the fact finder may be growing.⁸⁹ The doctrine of constitutional fact is the only expanding exception to trial level hegemony over law application, but its expansion seems attributable principally to substantive constitutional considerations rather than to any general desire for

82. See *infra* Part V.

83. See *infra* Part V.

84. See *infra* Part IV A.

85. See *supra* notes 11-12 and accompanying text.

86. See *supra* notes 59 & 76-77 and accompanying text.

87. See *infra* note 278 and accompanying text.

88. See *infra* text accompanying notes 261-64.

89. See Monaghan, *supra* note 3, at 232 n.21 (tracing the tension between the early principal that construction of writings is for the trial judge and the emerging principle that construction of a contract on the intent of the parties thereto is a question of fact); *infra* note 264.

appellate decisional authority.⁹⁰ Finally, there is no evidence that appellate courts are using their lawmaking power to compensate for this allocational shift in power towards the trial level. Indeed, in the past few decades they have been increasingly hesitant, particularly in negligence cases, even to hold that particular trial level findings of ultimate fact have exceeded the limits of reasonableness.⁹¹ Thus, except for constitutional law, an area in which incorrect results are less acceptable,⁹² and a few substantive law areas like contract and commercial law, in which stability, predictability, and consistency of result are highly desirable,⁹³ questions of ultimate fact going to the merits presumptively fall within the discretionary power of the trial level decision maker. Increasingly, the trial on the merits is "the 'main event' . . . rather than a tryout on the road."⁹⁴

Along with the growth in the power and responsibility of the trial level, there has been a corresponding redefinition of the appellate role. Appellate courts exercise two principal, overlapping functions: they declare the law and they supervise the results of lower level adjudication in individual cases.⁹⁵ At one time appellate judges may have viewed themselves as the guarantors of correct or at least acceptable results in all cases appealed to them and may have employed their powers, particularly their supervisory power, to achieve that end. Today, appellate judges lack the time to participate so actively in every case⁹⁶ and therefore must be content merely to prevent egregious or outrageous results.⁹⁷ Obviously, time constraints do not bar them from taking a harder look at important cases or at cases in which the trial level decision or decision maker for some reason is suspect. But the inability of appellate courts to scrutinize every case carefully is the principal reason for the growing power of the trial level over the merits of a case and for the growing tendency of appellate courts to treat all trial level decision makers essentially alike.

To explore these crucial conclusions, this Article turns now to a fuller examination of the reasons for the present triumph of the trial level over the law application process. It will then examine the lawmaking powers of the appellate courts and the ways in which these powers are or may be used to define, to limit, and occasionally to preempt the growing discretionary power of the trial level. Finally, this Article will explore the different balance of appellate and trial level

90. For discussions of constitutional considerations, see Monaghan, *supra* note 3; Strong, *Dilemmic Aspects*, *supra* note 15; Strong, *Persistent Doctrine*, *supra* note 15.

91. James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 687-88 (1949).

92. See *infra* Part IV C.

93. See Thayer, "Law" and "Fact" in Jury Trials, 4 HARV. L. REV. 147, 160-61 (1890); Weiner, *supra* note 2, at 1900-06; *infra* Part IV C.

94. *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512 (1985) (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)).

95. See ABA, STANDARDS RELATING TO COURT ORGANIZATION § 1.13 commentary at 33-35 (1974).

96. See *infra* text accompanying notes 140-44.

97. R. DIXON, SOCIAL SECURITY DISABILITY AND MASS JUSTICE 130-31 (1973) (suggesting that the law explosion leads to "an insistence that the best job possible be done at the [trial] stage . . . and to a corollary insistence that appeals be rare and confined to a correction of extreme irrationality").

power prevailing in the area of procedure and evidence in which, under the aegis of the law/discretion dichotomy, appellate courts maintain a higher level of control.

III. EXPLORING THE SHIFT OF DECISIONAL POWER TOWARDS THE TRIAL LEVEL

Because fact finders today have principal responsibility for applying the law to the facts on issues going to the merits, they tend to control the outcome of cases and to decide who or what falls within the meaning of most statutory terms.⁹⁸ Moreover, because fact-finding power is discretionary, different outcomes in the application of legal principles to identical facts are not necessarily grounds for reversal.⁹⁹ Given these consequences, the reasons for the trial level's accretion of power are of great interest and importance.

First, the shift of power to the trial level is not the outcome of the once heated debate over whether ultimate facts are analytically closer to "pure" questions of fact or of law.¹⁰⁰ That inquiry, which was wisely abandoned some years ago, probably produced more heat than light. Unfortunately, judge/jury and scope of review questions often are still resolved in these simplistic, obviously inadequate terms,¹⁰¹ even though the following suggested approach is superior:

Clarity of thought is not advanced by debating whether law application is lawmaking or fact-finding, as commentators have done. Moreover, it is meaningless to assign the task in a specific case to judge or jury simply by use of the law and fact jargon, as courts have done. A far preferable solution would be to recognize a third category [*i.e.*, law application] and to deal with it as such, not on the basis of terminology, but on the basis of policy.¹⁰²

Second, the modern result has not been imposed exogenously by legislative or constitutional command. Procedural statutes like the Federal Rules of Civil

98. *E.g.*, *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (determining who is an "employee" within the meaning of federal labor laws for collective bargaining purposes); *see also supra* notes 67 & 70 and accompanying text (examples of ultimate facts in the context of statutory terms).

99. H. HART & A. SACKS, *supra* note 3, at 1345; Weiner, *supra* note 2, at 1874. Courts may, of course, set aside internally inconsistent jury verdicts. *See, e.g.*, *Lansburgh & Bro. v. Clark*, 127 F.2d 331, 337 (D.C. Cir. 1942). Unlike juries, agencies and trial judges generally are expected to be consistent in applying the law to the facts. *See Zelenak, Should Courts Require the Internal Revenue Service to be Consistent?*, 40 TAX L. REV. 411, 412-14 (1985). Their determinations are usually so fact specific, however, that inconsistency can often be passed off as fact distinctiveness. Some inconsistency is also inevitable if different trial or administrative law judges try like or similar cases or if different panels of appellate judges review the results. Increasingly the use of nonmutual collateral estoppel is foreclosing the relitigation of ultimate facts and thereby eliminating the possibility of inconsistent findings. *See, e.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

100. *See* Weiner, *supra* note 2, at 1876.

101. *E.g.*, *Hardy v. Toler*, 288 N.C. 303, 310-11, 218 S.E.2d 342, 346-47 (1975) (application of a statutory term to facts designated as a "question of law" and taken from the jury). *But see* Artvale, Inc. v. Rugby Fabrics Corp., 363 F.2d 1002, 1005 (2d Cir. 1966) (suggesting that the law/fact dichotomy is "too simplistic").

102. Weiner, *supra* note 2, at 1876; *accord* Monaghan, *supra* note 3, at 236-38; Schotland, *Scope of Review of Administrative Action—Remarks Before the D.C. Circuit Judicial Conference*, Mar. 18, 1974, 34 FED. B.J. 54, 58 (1975).

Procedure¹⁰³ and the Administrative Procedure Act¹⁰⁴ do not directly address the allocation of authority over ultimate fact questions. The organic statutes of most federal agencies are similarly silent, but they may impliedly confer grants of discretionary power over all or most mixed questions within the assigned adjudicative jurisdiction.¹⁰⁵ Otherwise these agencies would have primary responsibility only for historical fact-findings¹⁰⁶—a waste of their supposed expertise. This theory of implied statutory power has both precedent¹⁰⁷ and logic behind it. It is a relatively modern theory, however, which was not specifically articulated in earlier judicial decisions supposedly closer in time and understanding to the original congressional view of the administrative process.¹⁰⁸ Although the theory offers a persuasive modern justification for discretionary administrative power over the process of law application, especially with respect to the newest agencies,¹⁰⁹ it cannot be regarded as the sole or original source of such agency power.

Similarly, the jury's present hegemony over the process of law application cannot be attributed principally to the seventh amendment,¹¹⁰ which has never been construed to require the automatic submission to the jury of all debatable

103. Although FED. R. CIV. P. 38(a) preserves the right to jury trial as declared by the seventh amendment, the Federal Rules otherwise are silent on these allocation questions.

104. Administrative Procedure Act § 10(e), 5 U.S.C. § 706 (1982). See generally L. JAFFE, *supra* note 3, at 569-70 (discussing the judicial power of review of administrative actions under the Administrative Procedure Act).

105. L. JAFFE, *supra* note 3, at 572-73 (rule making or order issuing agencies with specialized jurisdiction are presumptively intended by Congress to have a policy making function and to exercise discretion over the law application process); Stern, *supra* note 2, at 100, 105-07 (creation of a special agency with authority to decide a matter manifests a legislative intention that the agency, and not a court, decide that matter). The contention is especially strong if the agency has concurrent rule making authority with which to overturn an independent judicial determination that was substituted for the agency's original adjudicative determination.

106. Gray v. Powell, 314 U.S. 402, 411-12 (1941); *United States v. Louisville & N.R.R.*, 235 U.S. 314, 320-21 (1914).

107. See cases cited *supra* note 106; *NLRB v. Hearst Publications*, 322 U.S. 111, 130 (1944).

108. Compare, e.g., *FTC v. Gratz*, 253 U.S. 421, 427 (1920) ("It is for the courts, not the commission, ultimately to determine as matter of law what [the words 'unfair method of competition'] include."), with *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 314 (1934) ("While this Court has declared that it is for the courts to determine what practices or methods of competition are . . . unfair, . . . in passing on that question the determination of the Commission is of weight."); *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972) ("[L]egislative and judicial authorities alike convince us that the Federal Trade Commission does not arrogate excessive power to itself if . . . it, like a court of equity, considers values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."). These decisions show that appellate deference to the FTC's definition of the statutory term "unfair methods of competition" has developed over time and was not an original phenomenon.

109. Congressional awareness of the wide discretion courts now grant agencies over the process of law application is presumably strong evidence of an intent to grant such decisional power to newly created adjudicative agencies. Cf. *Cannon v. University of Chicago*, 441 U.S. 677, 694-98 (1979) (congressional awareness that for many years federal courts would readily imply private remedies for violations of regulatory legislation is a factor in discerning congressional intent with respect to legislation enacted during that period).

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

U.S. CONST. amend. VII.

mixed questions going to the merits.¹¹¹ Indeed, on several occasions the United States Supreme Court has eschewed the opportunity to so hold and has said only that assignment of mixed questions to the judge or jury is subject to the influence, but not necessarily the command, of the seventh amendment.¹¹² This is not to deny that many ultimate facts are "facts" within the meaning of the seventh amendment¹¹³ and therefore in theory cannot be taken from the jury. But some reassignment of ultimate fact questions to trial judges and agencies is constitutionally possible, at least by indirect methods,¹¹⁴ and many mixed questions fall into categories that have not traditionally been regarded as seventh-amendment-protected jury questions.¹¹⁵ Moreover, although most mixed questions arising from newly created statutory claims and defenses are presumptively assigned to the jury, those placed by legislatures or courts within certain exempted classifications are not so assigned, apparently without violation of the seventh amendment.¹¹⁶ These exceptions, whose scope and justifications will be dis-

111. See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536-39 (1958) (right to jury trial in diversity case resolved under *Erie* doctrine rather than under seventh amendment).

112. In *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 536-39 (1958), the question presented was whether a federal court in diversity was bound by a state decision that a particular mixed question was one of law for the court. That question was easily answered in the negative if the seventh amendment, which applies to diversity cases, *Slocum v. New York Life Ins. Co.*, 228 U.S. 364, 376-77 (1913), makes ultimate facts, like historic facts, jury questions in all cases at law. The Court specifically declined to answer the question in those terms and held that the seventh amendment exerts only an "influence." *Byrd*, 356 U.S. at 537 n.10. Subsequently, in *Simler v. Conner*, 372 U.S. 221, 222 (1963) (per curiam), the Court held that federal law determines whether a state-created right is equitable or legal for purposes of ruling on a demand for jury trial in federal court. The Court further stated that federal law decides all such right to jury trial questions. *Id.* The Court, however, did not find the seventh amendment automatically applicable to all mixed questions going to the merits. See *Weiner*, *supra* note 2, at 1920 n.265.

113. See *supra* note 19.

114. See *supra* note 19 (describing the process whereby claims or defenses triable to a jury may be statutorily repealed and replaced by new ones classified as legal, equitable, or administrative and, therefore, not tried by juries). Bald legislative attempts to circumvent the seventh amendment by simply codifying claims and defenses historically triable to a jury would presumably be met by strong claims of unconstitutionality. Cf. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (declaring Bankruptcy Act unconstitutional on analogous Article III grounds for transferring Article III jurisdiction to Article I bankruptcy court). No court, however, has yet held that an act of Congress employing this repeal-reenactment process is invalid on seventh amendment grounds. Note, *Congressional Provision for Nonjury Trial Under the Seventh Amendment*, 83 *YALE L.J.* 401, 414-15 (1973).

115. These traditional categories include ultimate facts classified as questions of law, as questions of constitutional fact, and as equitable questions. See *supra* note 19. It even has been suggested that the English common-law courts' historic right to demand in a jury trial a special verdict reciting only the jury's findings of historical facts undercuts any claim that the jury is constitutionally required to apply the law to the facts. See *Magenau v. Aetna Freight Lines*, 360 U.S. 273, 282 (1959) (Frankfurter, J., dissenting); *Weiner*, *supra* note 2, at 1920 n.265.

116. Some cases hold that the seventh amendment applies even to newly created statutory claims and defenses in actions at law. *E.g.*, *Curtis v. Loether*, 415 U.S. 189, 192-94 (1974). Nevertheless, *Curtis* and many other cases recognize a power in Congress to eliminate the jury entirely by designating a proceeding as "statutory," "administrative," "equitable," or as one involving "public rights." *Id.* at 195 (statutory rights can be enforced by administrative process); *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977) (public rights); *Pernell v. Southall Realty*, 416 U.S. 363, 383 (1974) (dictum) (administrative rights); *Katchen v. Landy*, 382 U.S. 323, 339-40 (1966) (equitable rights); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) (statutory proceeding). Although most exceptions to the jury trial right involve administrative hearings, the legal and equitable exceptions have also been used by legislatures to eliminate the jury in judicial proceedings. See *supra* note 19. For a critique of this narrow view of the seventh amendment, see *Kirst, Administrative Penalties and the Civil Jury: The Supreme Court's Assault on*

cussed below, make it very difficult to describe in general or theoretical terms the applicability of the seventh amendment to the process of law application. They do demonstrate, however, that the jury's present hegemony over the process of law application must be predicated on something more than the seventh amendment.

Although constitutional and legislative intent may have pointed the way to the modern approach to law application, that approach is as much a matter of choice as of external command. One factor that has figured in the choice is simple result orientation. Juries and some agencies are regarded as more "liberal" or responsive to the needs of certain constituencies than are appellate judges.¹¹⁷ In addition, juries supposedly ignore legal rules inconsistent with popular notions of justice or fairness.¹¹⁸ Result orientation is a two-edged sword, however, and one which proponents of the modern result may prefer not to unsheath in this time of political and economic conservatism.¹¹⁹

Another possible reason for the gravitation of law-applying powers toward the trial level is the widely held belief that agencies and juries are more competent at law application than are appellate judges and, therefore, ought to be the ones to wield such powers. Agencies supposedly draw on their experience and technical expertise,¹²⁰ juries on their greater sense of community values, customs, practices, and standards.¹²¹ Written agency opinions, however, have often revealed a decisional process that was less than expert.¹²² Furthermore, in

the Seventh Amendment, 126 U. PA. L. REV. 1281 (1978). State legislatures and courts also exercise such "legal" classification powers. *E.g.*, *Hardy v. Toler*, 288 N.C. 303, 310-11, 218 S.E.2d 342, 346-47 (classifying the statutory question of what constitutes an unfair method of competition or an unfair or deceptive act or practice as a question of law in a consumer's action for damages that otherwise is triable to the jury); N.C. GEN. STAT. § 25-2-302 (Supp. 1985) (U.C.C. § 2-302(1) (1978)) (classifying the defense of unconscionability as a question of law).

117. Juries are believed to favor individual claimants over governmental and corporate defendants, but this tendency apparently occurs less frequently than expected. *See Broeder, The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 750-51 (1959). Similarly, many agencies like the National Labor Relations Board and state workers' compensation boards were created in part to provide forums more sympathetic to working persons than courts had been. L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW* 122-23 (4th ed. 1976).

Trial judges, who as a class generally are not regarded as "liberal," are also the beneficiaries of a shift in power towards the trial level. In most cases, however, the trial judge will not be the fact finder if any party demands jury trial. Hence, liberals should not be concerned that a shift in power towards the trial level will increase the power of trial judges.

118. O. HOLMES, *Law in Science and Science in Law*, in *COLLECTED LEGAL PAPERS* 210, 237-38 (1920).

119. To counter trial level "liberalism," appellate courts could begin to take a more expansive view of their own powers. Thus, it has been suggested that rising personal injury verdicts after World War II prodded appellate courts into finding new or expanded powers of review to contain such verdicts. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 752-58 (1957).

120. For a typical judicial statement about the importance of agency expertise, see *United States v. Western Pac. R.R.*, 352 U.S. 59, 65-67 (1956).

121. *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1874).

122. In *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956), for example, the Court found that the ICC had primary jurisdiction to determine whether bombs without bursters and fuses attached were subject to the high tariff rate established for incendiary bombs. The Commission, and not the courts, supposedly knew whether the high rate reflected the danger and special handling required for such bombs and whether those without fuses and bursters required such special handling. The resulting Report of the Commission, *United States v. Western Pac. R.R.*, 309 I.C.C. 249

applying modern statutes, many of which are extremely vague and broad,¹²³ agencies must often make primary policy decisions requiring more than technical expertise.¹²⁴ Consequently, in recent years the federal courts and Congress have become more active in reviewing agency regulations, even those incorporating expert scientific or technical judgments.¹²⁵ This new judicial and congressional assertiveness in reviewing regulations may never spread to adjudication and the process of law application,¹²⁶ but it has helped to undo the myth of expertise as an inviolable shield for agency action.¹²⁷

Historically the jury has been valued as much for its disinclination to honor the law as for its skill in applying the law to the facts.¹²⁸ As the costs of employing a jury in civil cases escalate alarmingly,¹²⁹ and as the jury's supposed advantages are scrutinized ever more closely, the jury is increasingly defended not

(1959), fell far short of these expectations, arguing in effect that "a bomb is a bomb." Similarly, in *In re Maico Co.*, 50 F.T.C. 485, 488 (1953), the FTC, relying on its economic expertise, held that it would hear evidence on the economic effects of exclusive dealing contracts challenged under § 3 of the Clayton Act, even though in *Standard Oil Co. v. United States*, 337 U.S. 293, 310 (1949), the Supreme Court had excluded such evidence as "ill suited" for the consideration of courts. In subsequent exclusive dealing cases, however, the Commission arguably made little use of its economic expertise. Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 47-51 (1959).

123. In *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421 (1935), the Supreme Court announced constitutional limits on broad, undefined delegations of legislative power to agencies. These decisions have lost much of their force, and broad, relatively undefined congressional delegations of power to agencies are now commonplace. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1676-78, 1694-96 (1975) (discussing the delegation of broad discretionary power to administrative agencies and the difficulty in requiring Congress to be more specific). While some critics call for a revival of these constitutional limits on the delegation of legislative power, others recognize that Congress cannot always specify policy in detail. K. DAVIS, *DISCRETIONARY JUSTICE* 27-51 (1969); Stewart, *supra*, at 1695.

124. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1188-91 (1973); Stewart, *supra* note 123, at 1683-84, 1711-12.

125. Congressional oversight of agencies takes various forms. See generally W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 9, at 103-26 (legislative control of administrative action). Until recently the most popular new form was the legislative veto, which now has been declared unconstitutional. *INS v. Chadha*, 462 U.S. 919 (1983). Today some courts, like Congress, are taking a much more active role in reviewing administrative action. W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 9, at 343-50.

126. Rule making and adjudication are of course alternative modes of agency policy making. Aggressive judicial review of one mode, therefore, eventually may carry over to the other. On the other hand, because adjudication is otherwise more amenable to judicial control, it may escape the hard looks now being directed at rule making. See W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 9, at 343-50.

127. Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 471-75 (1954).

128. O. HOLMES, *supra* note 118, at 237; F. JAMES & G. HAZARD, *supra* note 1, § 7.4, at 305-06; Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC. 166, 170 (1929).

129. As commentators have noted:

On the average a jury trial takes considerably more time than does a court trial. Jurors must be selected and instructed, more witnesses are called to testify, final arguments are longer, and more recesses are required. The result usually is higher counsel fees, more extensive payments to experts, and increased trial costs in the form of fees for jurors and witnesses.

J. COUND, J. FRIEDENTHAL & A. MILLER, *CIVIL PROCEDURE* 764 (3d ed. 1980). The jury trial is also regarded as a serious cause of court congestion because normally it takes longer than a trial before a judge. *Id.* at 777. In most jurisdictions, the trial judge calendar is much more current than is the jury trial calendar. *Id.* at 763.

because it is a superior fact finder¹³⁰ but because it is preferable to the trial judges, who would be the jury's presumed successors in interest.¹³¹ Even if the jury does have special competence in some matters, as it might in cases such as those involving personal injury claims,¹³² the results it reaches in specific cases may also reflect its other "virtues," namely, its inclination to ignore unpopular law, to render compromise verdicts,¹³³ to redistribute the wealth of corporate and governmental defendants,¹³⁴ and in general to render a rough cut brand of justice. Indeed, it is almost ironic to speak of the jury's special competence when prospective jurors with unusual knowledge, abilities, or experience are often the first to be excused or excluded by peremptory challenge.¹³⁵ In any event the jury is routinely assigned mixed questions for which it presumably has no special competence and some complex ones for which it is arguably incompetent.¹³⁶

In sum, present domination of the law-applying process by the trial level cannot be explained in terms of the greater law-applying abilities of agencies and juries. Often, however, juries and agencies are better at law application than are judges. Should courts, then, make an ad hoc assessment of relative competence for every mixed question going to the merits, as some judges have advocated?¹³⁷ Making such an assessment accurately, openly, and candidly is never easy;¹³⁸

130. Those who advocate the use of the special verdict charge that juries do not reliably discharge their roles as fact finders. See, e.g., J. FRANK, *COURTS ON TRIAL* 141-43 (1950). Similarly, the use of juror affidavits to attack jury verdicts is both advocated and resisted because it might reveal how rarely the jury performs ideally. E.g., *Jorgensen v. York Ice Mach. Corp.*, 160 F.2d 432, 435 (2d Cir. 1947). Jerome Frank flatly asserted that jurors are incompetent fact finders. See J. FRANK, *LAW AND THE MODERN MIND* 180-81 (1930).

131. "I have too often heard practicing lawyers from our large cities insist that the one reason—and that a compelling one—for preserving jury trial is that it is our best safeguard against the corruption of judges." Howe, *Book Review*, 215 *SCI. AM.*, Sept. 1966, at 295, 298; see also *infra* notes 146-51 and accompanying text (discussing the competence of trial judges).

132. See O. HOLMES, *supra* note 118, at 236-38.

133. The jury's inclination to compromise on damages when the question of liability is disputed or doubtful is now widely recognized. *Hutton v. Fisher*, 359 F.2d 913, 920 (3d Cir. 1966) (dissenting opinion).

134. See *supra* note 117.

135. Note, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 *CONN. L. REV.* 775, 780-83 (1978); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 *HARV. L. REV.* 898, 908-09 & n.63 (1979).

136. E.g., *In re Japanese Elect. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) (holding that due process may require taking from the jury complex or technical questions beyond the understanding of laypersons).

137. *United States v. J.B. Williams Co.*, 498 F.2d 414, 430-31 (2d Cir. 1974) (Friendly, J.); *Loper v. Morrisison*, 23 Cal. 2d. 600, 611-12, 145 P.2d 1, 6-7 (1944) (Traynor, J., dissenting); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 *F.R.D.* 465, 469-75 (1984).

138. Assessments of relative competence are usually made primarily in terms of the nature of the question presented. See authorities cited *supra* note 137. Schwarzer poses three categories of questions—those peculiar to juries, those of predominantly legal content, and those that vary in the context of the case. Schwarzer, *supra* note 137. Applying such distinctions in nonparadigm situations is impossible. The results would probably vary widely and turn on the personal fondness of individual judges for the jury and its proclivities. See *supra* text accompanying notes 128-36. These proclivities are seldom evaluated openly. Thus, juries historically have not been allowed to construe the language of written contracts, supposedly because of jurors' possible illiteracy, because of the need for certainty in commercial affairs, and because of the greater familiarity of judges with commercial matters. J. THAYER, *A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW*

making it for every material element of every possible claim and defense on the merits would be endless, confusing, and uncertain. A general rule presumptively favoring either the fact finders or the appellate judges, with whatever controls and exceptions are necessary, is all that is practically possible—and is in fact what we now have. Appellate courts are constitutionally and legislatively disfavored, if not barred, from being the beneficiaries of such a presumption.¹³⁹ Moreover, in view of their crowded dockets and busy time schedules,¹⁴⁰ they probably could not efficiently provide general free review. Indeed, the impracticality of such a course in the face of the litigation explosion is arguably the dynamic source of the modern shift in power towards the trial level. To provide free review of ultimate facts, appellate courts would have to steal the necessary additional time¹⁴¹ from the law-declaring function, which has already received short shrift in this era of crowded dockets.¹⁴² Moreover, even if intermediate appellate courts assumed the brunt of the new workload, the time tradeoff would probably not be positive.¹⁴³ Intermediate appellate courts have no special com-

203-06 (1898). The obvious fear that juries sometimes might "rewrite" contracts to achieve popular justice is never even mentioned. Weiner, *supra* note 2, at 1930-33 (discussing reasons juries traditionally were not permitted to interpret written contracts).

These assessments of relative competence, even when permitted by the seventh amendment, see *supra* note 19, will always be troublesome. Not surprisingly, Dean Landis' support for this approach in the administrative context, Landis, *Administrative Policies and the Courts*, 47 YALE L.J. 519, 535 (1938), similarly has been questioned. See Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 927 (1943) ("The result is apt in no small measure to turn upon whether the reviewing court is blessed with more intellectual pride than humility, and also whether the question presented for review appeals particularly to the sympathy and interest of the court.").

139. See *supra* text accompanying notes 105-16 (suggesting that both the seventh amendment and the implied intent of recent statutes creating administrative adjudicative authority are bars to general appellate hegemony with respect to the process of law application).

140. The increasing demands on federal appellate courts are discussed in Reynolds & Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981) [hereinafter cited as Reynolds & Richman, *The Price of Reform*]; Reynolds & Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COLUM. L. REV. 1167 (1978) [hereinafter cited as Reynolds & Richman, *Non-Precedential Precedent*].

141. The general availability of free review might attract more appeals. Cf. Weiner, *supra* note 8, at 1040-41. The amount of time required for deciding a given question under free review probably also would be greater. When the scope of review is narrow, the reviewing court can sometimes confine its attention initially to the briefs and the oral argument and, absent strong signs of something arbitrary, capricious, or unreasonable, affirm immediately. When the review is free, the appellate court seeks the "right" result rather than only an acceptable one, and if the alleged error is not totally frivolous, the court may have to expend considerable additional time reviewing the record. Admittedly the review of rulings on motions for directed verdict or judgment notwithstanding the verdict, which is free, see *infra* note 349, requires appellate familiarity with the record. One suspects, however, that unless the court initially senses a wrong result, particularly in the grant of such a motion, it might affirm on the basis of the briefs or only a cursory review of the record.

142. It has been suggested that the quality of opinions decreases as the caseload increases and as time is stolen from the law-declaring role to meet the demands of the supervisory role. Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84, 98-101 (1959); accord Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 408-09 (1972).

143. These courts are created primarily to assume the brunt of the appellate caseload and, therefore, of the supervisory role, leaving the jurisdiction's highest court to employ its new, principally discretionary, jurisdiction to develop the body of the law. ABA, STANDARDS RELATING TO COURT ORGANIZATION § 1.13 commentary at 33-35 (1974). Intermediate appellate caseloads have burgeoned so dramatically in recent years, however, that these courts are hard pressed just to decide cases, let alone discharge their own law-declaring function with any degree of sophistication. This latter difficulty is especially troubling in the federal system in which the courts of appeals bear the

petence over most mixed questions and would not necessarily decide them better than would trial level fact finders. In addition, the availability of free review might attract additional or marginal appeals, and, in any event, the fact specific opinions of such courts would be readily distinguishable in subsequent cases.¹⁴⁴ In view of these considerations, free review of mixed law/fact questions is an alternative best reserved for special situations. Even without free review, ordinary cases are still subject to a variety of other appellate controls.¹⁴⁵

Despite their crowded dockets, some appellate courts continue to favor free review of ultimate facts found by trial judges.¹⁴⁶ Once it may have been excuse enough for such free review that the practice was not forbidden by constitution, statute, or considerations of relative competence.¹⁴⁷ Today, given the time demands on appellate courts, a more positive justification is required—for instance, that trial judges, unlike agencies and juries, are too often incompetent or untrustworthy fact finders. Unfortunately, such a case can be made. Attorneys everywhere aver, though usually off the record, that they would never assent to the abolition of the civil jury system because local trial judges are so often incompetent or untrustworthy.¹⁴⁸ Furthermore, trial judges sit alone, sometimes deciding matters of great importance.¹⁴⁹ Without voting colleagues to provide checks and balances, even the best trial judges will sometimes make aberrational decisions¹⁵⁰ that only free review can unfaillingly correct.¹⁵¹

principal responsibility for developing nonconstitutional federal law. To deal more effectively with their caseloads, courts of appeals have employed various devices, including more sophisticated administration, the use of three judge panels, the curtailment of oral argument time, the delegation of increased responsibilities to law clerks, and, most recently, the use of unpublished opinions. See Reynolds & Richman, *The Price of Reform*, *supra* note 140; Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 140; How well these devices will work remains to be seen. In the meantime these courts clearly have no free time, and any proposal like free review, which would increase both their caseloads and workloads, see *supra* note 141, would be unwelcome and arguably unwise.

144. The law-applying function "in the normal course is mainly for the agency because in the normal course, the decisions will have little bearing on any other decision." Schotland, *supra* note 102, at 58 (emphasis added).

145. The most important of these controls, discussed *infra* Part IV, are the power to declare the law, to set the limits of reasonableness in specific fact situations, and to classify certain determinations as subject to free review.

146. See *supra* notes 76-77. More recently the Second Circuit reaffirmed its commitment to such free review. See *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 7-9 (2d Cir. 1978). The Fourth Circuit strongly questioned its own commitment to free review, see *Famous Knitwear Corp. v. Drug Fair, Inc.*, 493 F.2d 251, 252-53 n.2 (4th Cir. 1974), and perhaps has now abandoned it. The Tenth Circuit joined the Ninth Circuit in following the "clearly erroneous" approach. See *Gilmore v. Constitution Life Ins. Co.*, 502 F.2d 1344, 1350 (10th Cir. 1974). The First Circuit remained undecided. See *Burgess v. M/V Tamano*, 564 F.2d 964, 976-77 (1st Cir. 1977). But see *Constructora Maza, Inc. v. Banco de Ponce*, 616 F.2d 573, 576 n.2 (1st Cir. 1980) (declining to follow free review approach of Second Circuit because of Supreme Court's earlier contrary decision directly on point). Many of these opinions do not discuss the question of free review in these general terms, but simply ask whether a particular mixed question is one of law or fact. This suggests an ad hoc approach, the difficulties of which are explored *supra* note 138.

147. Stern, *supra* note 2, at 80-83, 112-13; Weiner, *supra* note 8, at 1032.

148. See Howe, *supra* note 131, at 139.

149. See Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (suggesting that the trial judge exercises substantial powers in certain equitable suits of importance to the public and to the parties, like reapportionment or school desegregation cases).

150. Stern, *supra* note 2, at 81. Arguably, other lone decision makers should be similarly feared. Decisions of administrative law judges, however, generally are subject to free review by their agencies. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). Further, although some agencies

Those who oppose free appellate review of trial level findings of ultimate fact have argued that it attracts additional appeals and undermines the authority of trial judges.¹⁵² The former contention is probably correct, though the exact number of appeals so attracted is unknown and may not be large.¹⁵³ The latter contention is strained. Trial judges whose decisions are subject to free appellate review are not known to suffer morale problems and are not regarded as second class citizens. Even if they are reversed somewhat more often on appeal than are trial judges whose decisions are given greater deference, their determinations at least are not ignominiously branded as "clearly erroneous."¹⁵⁴ Moreover, free review is not an unfailing corrective for bias or error. Trial judges can still slant or stack their historical fact-findings to shield their ultimate fact-findings from reversal.¹⁵⁵ Perhaps in recognition of the potential for such "stacking," some judges advocate free review of historical fact-findings not based on disputed testimonial evidence,¹⁵⁶ in which situation the trial judge has no decisional advantage.

The alternative to general free review of trial judge findings of ultimate fact is the "clearly erroneous" standard, which is somewhat less deferential than are the standards applicable to the same findings by juries or agencies.¹⁵⁷ Moreover, the United States Supreme Court has already stated that under the "clearly erroneous" standard greater deference must be given to trial judge findings based on determinations involving the credibility of witnesses than to findings based on documentary or physical evidence.¹⁵⁸ The Court, therefore, might also be prepared to hold that under this standard findings of ultimate fact are entitled to less deference than findings of historical fact. Finally, appellate courts often take a harder look at the determinations of individual trial judges or agencies with a

are headed by single persons, ordinarily these persons consult with their staffs in making decisions. See generally Freedman, *Expertise and the Administrative Process*, 28 AD. L. REV. 363 (1976) (discussing changing public attitudes towards the administrative process).

151. Through free review an appellate court may reverse a questionable determination that is the product of suspected passion or prejudice but that on its face is not "unreasonable" or "clearly erroneous."

152. *Pendergrass v. New York Life Ins. Co.*, 181 F.2d 136, 138 (8th Cir. 1950); *Weiner, supra* note 8, at 1039-41.

153. *Weiner* attempted to compare data from the Ninth Circuit, which does not conduct free review of trial judge findings, and the Second Circuit, which does exercise free review, but the results are inconclusive. See *Weiner, supra* note 8, at 1041. Trial judge fact-findings that are narrowly reviewed yet overturned on appeal receive the "clearly erroneous" brand of FED. R. CIV. P. 52(a). See *supra* note 7.

154. *Weiner, supra* note 8, at 1040.

155. The most egregious examples of stacked or slanted findings seem to occur when trial judges adopt, without change, proposed findings submitted by the winning party, findings which the United States Supreme Court has recently described as tending to "[take] the form of conclusory statements unsupported by citation to the record" and having the "potential for overreaching and exaggeration. . . ." *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1511 (1985). Obviously, a trial judge intent on insulating a particular decision from reversal could formulate such findings, with or without the assistance of a party.

156. *Orvis v. Higgins*, 180 F.2d 537, 539-40 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950). *Contra* *Lundgren v. Freeman*, 307 F.2d 104, 113-15 (9th Cir. 1962). The *Lundgren* view that such findings are subject to the "clearly erroneous" standard of FED. R. CIV. P. 52(a) is now the law. See *supra* notes 47-48.

157. See *supra* notes 49-61 and accompanying text.

158. *Anderson v. City of Bessemer City*, 105 S. Ct. 1504, 1512-13 (1985).

reputation for untrustworthiness and at cases of unusual public importance.¹⁵⁹ Arguably, they are also free to take a hard look at any suspicious or important trial judge finding of ultimate fact.¹⁶⁰

These atmospheric variations on the "clearly erroneous" standard suggest that in practice it may not be very different from general free review, which is probably subject to equivalent inverse atmospheric variations when the case is unimportant or the trial judge's reputation is strong.¹⁶¹ Both approaches are compromises between the possible and the desirable. The "clearly erroneous" approach, however, seems preferable because it allows, at least in theory, a symmetrical appellate approach to all trial level decision makers.¹⁶² Even though "atmospheric" differences remain, this approach downplays what are increasingly unimportant historical and institutional differences among these decision makers.¹⁶³

In the past half century, federal appellate courts have confirmed the presumptive hegemony of agencies and juries over the process of law application, have begun to accord doctrinally equivalent status to trial judges, and have narrowed, eliminated, or frozen most of the exceptions to this hegemony. The accompanying shift in power towards the trial level has been dictated less by external command than by modern conditions, which include the increasing dependence on and acceptance of administrative adjudication, the explosive growth of adjudicative caseloads, and the resulting physical inability of appellate

159. W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 9, at 343-350; 5A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 52.03[1], at 52-27 (1982). Although the term "hard look" originally was used by Judge Leventhal to describe how agencies themselves should approach their duties, see *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 850-53 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), it now also describes an aggressive appellate approach in reviewing agency determinations. See also Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 729-33 (1977) (suggesting that sloppy and ill-considered decision making at EPA in its early years inspired judicial efforts to prod the agency into articulating the grounds for its actions in greater detail to facilitate close judicial review).

160. FED. R. CIV. P. 52(a) provides no basis or criterion for such a selective approach to the review of trial judge findings. Appellate judges also do not admit publicly to such selectivity. Former appellate law clerks in off-the-record conversations, however, regularly attest that both important cases and the decisions of certain notorious trial judges are scrutinized more carefully than others.

161. In *Karavos Compania Naviera S.A. v. Atlantica Export Corp.*, 588 F.2d 1, 8 (2d Cir. 1978), Judge Friendly, while defending the use of free review in the Second Circuit, said: "Perhaps in the long run we do not come out very differently than does, for example, the Fifth Circuit with its broad reading of 'findings of fact'. . . ." In the Fifth Circuit, which follows the alternative "clearly erroneous" approach, a determination based on an erroneous legal standard, which the court is apparently astute enough to find, will be reversed as a matter of law. See, e.g., *Fromberg, Inc. v. Thornhill*, 315 F.2d 407, 409 n.3 (5th Cir. 1963).

162. Weiner has collected cases in which the "clearly erroneous" test was applied to a trial judge's determination of ultimate fact because, *inter alia*, the same determination previously had been treated as a question of fact in the judge/jury context. Weiner, *supra* note 8, at 1044 nn.143-44 & 148. Similarly, in *Adams v. Davison-Paxon Co.*, 230 S.C. 532, 96 S.E.2d 566 (1957), which is discussed at length in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 535-36 (1958), the question of employment for workers' compensation purposes was classified as "legal" in the judge/jury context because it had already been designated a jurisdictional fact in the administrative context. *Adams*, 230 S.C. at 543, 96 S.E.2d at 571-72.

163. For discussion of some of these historical and institutional differences, see authorities cited *supra* note 8.

courts to guarantee the correctness of all trial level findings of ultimate fact. The resulting inclusion of the law application process within the discretionary power of the trial level, however, does not amount to total trial level control. Appellate courts may still redirect or limit trial level power through their own power to make the law.

IV. APPELLATE CONTROL OF TRIAL LEVEL DISCRETIONARY POWER THROUGH THE LAWMAKING POWER

A. *In General*

The trial level's function is to exercise discretionary power of one kind or another as defined by and within the limits set by law. The appellate function is to establish the relevant definitions and limits through the exercise of lawmaking power, carried out principally through the free review of questions of law. For discussion purposes, the lawmaking power of the appellate courts can be subdivided into three subsidiary powers: (1) the law declaration power, which is the power to declare the law and thus to impose on the trial level decision maker general rules affecting all cases that come within the rules' terms;¹⁶⁴ (2) the supervisory power, which is the power to state as a matter of law, generally through rulings on the sufficiency of the evidence, that a particular trial level finding of historical or ultimate fact exceeds the limits of the discretion conferred;¹⁶⁵ and (3) the classification power, which is the power to withdraw particular mixed law/fact questions from the discretionary power of the trial level by classifying them as questions of law or as constitutional or jurisdictional facts. Through these three powers appellate courts define the trial level's discretionary power, set the outer limits thereto in specific fact situations, and occasionally take the power for themselves.

Although these three powers are different, they can be used as complementary means to achieve the same end. In *New York Times Co. v. Sullivan*,¹⁶⁶ for example, the United States Supreme Court redefined the law of defamation, holding that public officials—and subsequently public figures¹⁶⁷—must show by clear and convincing proof¹⁶⁸ that persons charged with libel acted with *actual malice*. A trial level finding on the actual malice question also was classified as a constitutional fact and therefore as a question subject to free appellate review.¹⁶⁹

164. The many forms of the law-declaring power are set out *infra* text accompanying notes 194-202.

165. See, e.g., *Kircher v. Atchison, T. & S. F. Ry. Co.*, 32 Cal. 2d 176, 195 P.2d 427 (1948) (whether plaintiff's doubtful version of an accident was sufficient to go to the jury on the issue of negligence).

166. 376 U.S. 254, 279-80 (1964).

167. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

168. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 30 (1971); *New York Times Co.*, 376 U.S. at 285-86. Clear and convincing proof is more than a preponderance of the evidence, the civil standard, but less than proof beyond a reasonable doubt, the criminal standard. *Nader v. de Toledano*, 408 A.2d 31, 49 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980).

169. *New York Times Co.*, 376 U.S. at 284-86. The Court held that the free review of constitutional facts found by a jury would not amount to a "reexamination" within the meaning of the seventh amendment because alternative constitutional values were at stake. *Id.* at 285 n.26.

Thereafter, under the supervisory power, courts of appeals encouraged the grant of summary judgment whenever plaintiff's evidence of actual malice appeared to be legally insufficient by regularly affirming such grants.¹⁷⁰ Thus, the appellate courts declared and defined the new ultimate fact of actual malice, assumed for themselves, by classifying actual malice as a constitutional fact, the principal say in its determination, and, through a general willingness to affirm trial judge grants of summary judgment, actively supervised its assertion. Thus, the three appellate powers together were employed to narrow trial level discretionary power over defamation claims and to defeat or discourage the assertion of many of them.¹⁷¹

Of these three appellate powers, the classification power is perhaps the most drastic in that it amounts to a direct judicial assault on the prerogatives of fact finders.¹⁷² For that reason, perhaps, it is invoked very selectively, particularly in the judge/jury context, and ordinarily without fanfare or explanation other than the ambiguous statement that the question presented is one of law¹⁷³ or of constitutional or jurisdictional fact.¹⁷⁴ The failure to elaborate on why a particular ultimate fact is so classified has cloaked the judge/jury question in unnecessary confusion and mystery and has retarded understanding of when and why the exceptional classification power should be invoked.¹⁷⁵ The discussion to follow examines the sources and uses of this power and of the companion powers to declare the law and to supervise its application to the facts.

170. *E.g.*, *Fadell v. Minneapolis Star & Tribune Co.*, 557 F.2d 107 (7th Cir.), *cert. denied*, 434 U.S. 966 (1977); *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970); *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966). In *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (dictum), the Supreme Court questioned the widespread use of summary judgment when actual malice is at issue because such state of mind questions normally are regarded as inappropriate for summary disposition. This dictum has had some effect, but many lower federal courts are still granting summary judgment in these cases. See *Louis, Summary Judgment and the Actual Malice Controversy in Constitutional Defamation Cases*, 57 S. CAL. L. REV. 707, 711 (1984).

171. *Louis*, *supra* note 170, at 707-08.

172. The practical conflict between the classification power and the seventh amendment is discussed *supra* note 19.

173. In *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), for example, the Supreme Court of North Carolina held in a statutory treble damage action that what constitutes "unfair or deceptive acts or practices" within the meaning of a state version of the Federal Trade Commission Act, N.C. GEN. STAT. § 75-1.1 (1981), is never a jury question. The court offered no reason for distinguishing this ultimate fact from others routinely assigned to the jury other than to characterize it as a question of "law." *Hardy*, 288 N.C. at 310-11, 218 S.E.2d at 346-47. Although the court cited other cases holding that the question was "legal," those cases involved only the other, more commonplace appellate powers to define the statutory term and to supervise its reasonable application to specific facts. *Id.* None of them held, or even intimated, that this ultimate fact could never be decided by a jury.

174. The identification of constitutional facts is less obscure because they must relate to a constitutional right, and there are no seventh amendment problems. See *supra* note 19. The identification of jurisdictional facts was an obscure process, see *infra* note 269 and accompanying text, but the doctrine is moribund today. The doctrine created no seventh amendment problems because it was limited to administrative adjudication.

175. In *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975), the Supreme Court of North Carolina may have invoked the classification power out of fear of large treble damage awards against local businesses by juries deciding cases under the broad, elastic terms of the applicable statute. As the discussion *infra* Part IV C will indicate, this is not necessarily an invalid basis for invocation of the classification power.

B. *The Supervisory and Law-Declaring Powers*

Appellate judges supervise findings of historical fact and ultimate fact in essentially the same way—principally through challenges to the sufficiency of the evidence.¹⁷⁶ Although the reasoning process in reviewing these two kinds of determinations may be somewhat different,¹⁷⁷ the final supervisory step in each is essentially the same—the appellate conclusion that on the evidence, or on the law and the facts, the determination is or is not within the ambit of the fact finder's discretion. Such supervisory conclusions are declarations of law that are binding on lower courts in future cases;¹⁷⁸ they are highly fact specific, however, and the cases announcing them are often easily distinguished in future litigation.¹⁷⁹

Findings of ultimate fact and supervisory conclusions with respect to such findings are expressed in terms of specific statements applicable to particular fact situations.¹⁸⁰ Law declaration, however, is expressed in terms of fact-free general statements applicable to all—or at least to many—cases. Thus, it is a declaration of law to state that as a class newsboys may be “employees” within the meaning of a statute;¹⁸¹ it is an application of law to fact to say that particular newsboys are or are not employees; and it is a supervisory conclusion to say that on the law and the facts that determination is or is not reasonable.¹⁸²

The line between law application and law declaration is generally the dividing point between the duties of the jury and the duties of the trial judge and between deferential and free appellate review. The line, however, is a moving one directly responsive to the particularity with which the legal principles governing a particular ultimate fact have been elaborated. As Professor Monaghan has observed:

Law application . . . is residual in character. It involves relating the legal standard of conduct to the fact established by the evidence. If all legal propositions could be formulated in great detail, this function would be rather mechanical and require no distinctive consideration. But such is not the case. Linking the rule to the conduct is a complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment. Thus, law appli-

176. The standards applicable to the review of such findings by judges, juries, and agencies are discussed *supra* text accompanying notes 49-61.

177. Because two interacting variables are involved, law application may be somewhat more judgmental or normative, or at least less mechanical, than historical fact-finding. Monaghan, *supra* note 3, at 236.

178. See *McClam v. New York Life Ins. Co.*, 9 F. Supp. 415, 415-16 (E.D.S.C. 1935) (considering whether evidence that an insured is found dead of a self-inflicted gunshot wound, a recurring fact situation, coupled with the presumption against suicide, is legally sufficient proof of accidental death in an action on the policy).

179. 9 J. WIGMORE, EVIDENCE § 2494, at 296 (Chadbourn rev. ed.).

180. Monaghan, *supra* note 3, at 234-36.

181. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (holding as a matter of law that newsboys could be employees entitled to bargain collectively within the meaning of the Wagner Act, even though they may not have been employees or servants for tort or workers' compensation purposes). L. JAFFE, *supra* note 3, at 558-64.

182. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944) (also affirming as reasonable the NLRB's ultimate finding that the newsboys in question were employees).

cation frequently entails some attempt to elaborate the governing norm. . . . By definition, when law application occurs, further explicit norm elaboration ceases.¹⁸³

In theory an ultimate fact may be found, or its reasonableness may be assessed, without the declaration of detailed legal principles adapted to the factual peculiarities of the case.¹⁸⁴ In practice, however, that is unlikely, especially in recurring types of fact situations in which general rules often underlie, or can be derived from, the specific determinations being made. For example, in a series of cases involving proof of conspiracy through evidence of defendants' consciously parallel conduct,¹⁸⁵ appellate courts exercising the supervisory power affirmed a trial judge's finding of conspiracy,¹⁸⁶ a jury's finding of no conspiracy,¹⁸⁷ and a trial judge's grant of summary judgment for insufficient evidence of conspiracy.¹⁸⁸ Each decision also asserted, either explicitly or implicitly, a general legal principle about proof of conspiracy through evidence of consciously parallel conduct. Two of the cases asserted that consciously parallel behavior can be, but is not always, legally *sufficient* evidence of conspiracy;¹⁸⁹ one of the cases asserted that such behavior cannot be legally *conclusive* evidence of conspiracy.¹⁹⁰

Similarly, in the famous case of *The T.J. Hooper*,¹⁹¹ Judge Learned Hand, writing for the United States Court of Appeals for the Second Circuit, affirmed the trial court's ultimate fact-finding that a tugboat was unseaworthy when it left port without a radio capable of receiving weather reports, even though the custom of the industry was not to provide such equipment. This apparent supervisory affirmance, however, was grounded on the general legal principle that conformance to industry custom does not necessarily establish due care as a matter of law.¹⁹² The converse legal principle, that conformance to industry custom *is* conclusive of due care, would have eliminated all law-applying discretion on these facts and would have required a determination of seaworthiness as

183. Monaghan, *supra* note 3, at 236.

184. For example, the Supreme Court has been criticized for its decision in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), affirming as reasonable, without further explication, the application to the facts of the Labor Board's newly announced legal test for who was an "employee." L. JAFFE, *supra* note 3, at 559.

185. In such cases two or more competitors do (or refuse to do) the same thing—i.e., charge the same prices or refuse to deal with plaintiff—each with knowledge of the other's conduct. The question is whether this consciously parallel conduct is evidence of an agreement to act together, a requirement of § 1 of the Sherman Act. 15 U.S.C. § 1 (1982).

186. *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

187. *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954) (plaintiff, the party with the burden of proof, not entitled to a directed verdict or judgment notwithstanding the verdict on such evidence).

188. *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 204-05 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

189. See *Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939); *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 297 F.2d 199, 202 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

190. *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540-41 (1954).

191. 60 F.2d 737 (2d Cir. 1932).

192. *Id.* at 740.

a matter of law. Alternatively, if a trial level finding that the tug was seaworthy had been reversed as a matter of law, that supervisory conclusion could have amounted to a direct or implied legal requirement that tugs be equipped with such a radio.¹⁹³

The law-declaring power, of course, includes more than these minimal uses. It includes the recognition of new common-law claims and defenses,¹⁹⁴ the identification of the legislative purposes of new claims and defenses created by statute,¹⁹⁵ the ascertainment of the essential elements of all claims and defenses,¹⁹⁶ the development of appropriate definitions or tests for these elements,¹⁹⁷ the identification of the factors that may or may not be considered in determining the existence of an essential element,¹⁹⁸ the assignment of the appropriate weight to be given relevant factors,¹⁹⁹ the identification of the party with the burden of proof,²⁰⁰ the degree of proof required,²⁰¹ and, when appropriate, the development of presumptions or other guides to decision.²⁰² Together these facets of law declaration can be employed to elaborate the law in such detail that fact finder discretion is substantially narrowed. Appellate courts do not regularly assay such heavy-handed elaboration. In *The Common Law*, however, Oliver Wendell Holmes urged courts to act vigorously in accordance with the "fair teaching of experience."²⁰³ He believed that in recurring situations courts should use the law-declaring power both to "codify" consistent jury determinations and to resolve inconsistent ones by making choices themselves; experienced judges could sometimes elaborate the law independently because they would

193. Although the court of appeals merely affirmed the trial judge's determination, the opinion by Judge Hand implied that a contrary trial level determination would have been reversed. *Hooper*, 60 F.2d at 740. Although a reversal could have been based on the supervisory conclusion that a finding of seaworthiness was legally impermissible, Judge Hand believed in free review of the law-applying determinations of trial judges, *Weiner*, *supra* note 8, at 1027, and perhaps would have been prepared to reverse only on that basis, *i.e.*, that a finding of unseaworthiness on these facts was the better result rather than the only reasonable one.

194. *E.g.*, *Spier v. Barker*, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974) (recognizing the seat belt defense).

195. *E.g.*, *Mourning v. Family Publication Serv.*, 411 U.S. 356, 363-69 (1973) (purpose of the Truth in Lending Act); *Pinnick v. Cleary*, 360 Mass. 1, 5-10, 271 N.E.2d 592, 596-99 (1971) (Massachusetts no-fault statute).

196. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (holding that "actual malice" is an essential element of libel claims by public officers).

197. *Id.* (defining actual malice to include "reckless disregard" for the truth).

198. *E.g.*, *Standard Oil Co. (Standard Stations) v. United States*, 337 U.S. 293 (1949) (actual market effects of defendant's exclusive supply contracts need not be considered in deciding whether their effect "may be" substantially to lessen competition under § 3 of the Clayton Act).

199. *E.g.*, *NLRB v. Hearst Publications*, 322 U.S. 111, 120-22 (1944) (reversing a court of appeals for overemphasizing the factor of employer control in determining whether newsboys were employees for statutory collective bargaining purposes); *accord* *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 393 n.19 (1982) (whether a particular factor is decisive of an ultimate fact is a question of law subject to independent appellate judgment).

200. *E.g.*, *Knowles v. Gilcrest Co.*, 362 Mass. 642, 289 N.E.2d 879 (1972) (requiring bailee to prove due care for lost or destroyed articles).

201. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 285-86 (1964) (in public officer libel case, plaintiff must establish defendant's actual malice by clear and convincing proof).

202. *E.g.*, *Galbraith v. Busch*, 267 N.Y. 230, 196 N.E. 36 (1935) (no presumption of negligence when an automobile leaves the road without explanation).

203. O. HOLMES, *THE COMMON LAW* 120-24 (1881).

know the sense of the community as well as or better than would an average jury.²⁰⁴ Years later in the railroad crossing cases Justice Holmes effectively staked this theory on the famous "stop, look, and listen rule."²⁰⁵ With the rule's subsequent repudiation,²⁰⁶ Holmes' theory fell into disfavor, especially in the negligence area.²⁰⁷

The rejection of Holmes' theory was probably inevitable. Even in recurring situations like railroad crossing accidents, the possible factual variations may be too numerous²⁰⁸ to allow more legal specificity than that provided by a rebuttable presumption of negligence.²⁰⁹ A rebuttable presumption sets a standard of conduct, to be sure, but it is a standard that leaves a great deal of discretion to the fact finder. Indeed, such a presumption may be little more than an admonition to trial courts to supervise juries carefully and to grant binding instructions or directed verdicts in extreme or paradigm cases. Although that is arguably a far cry from what Justice Holmes had in mind, it requires a closer supervision of juries than is prevalent in current negligence practice.²¹⁰

Furthermore, Holmesian activism, though formulated in neutral terms, in practice could have amounted to a judicial attempt to control liberal fact finders.²¹¹ Judges tend to be more "conservative" than juries. Thus, the "codification" Holmes advocated might have tended to produce more "conservative" results. Even a relatively moderate elaboration of the law, however, would tend to produce more conservative results because its "liberal" aspects would tend to uphold results the juries would have reached anyway, whereas its "conservative" ones would tend to require their reversal.²¹² Although it is true that judges are supposed to control juries by setting limits on their exercise of discretion, under Justice Holmes' theory, the judges were allowed—perhaps even invited—to ex-

204. *Id.*

205. *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927) (holding that a person injured by a train at a railroad crossing was contributorily negligent as a matter of law if he or she failed to stop, look, and listen before entering the crossing).

206. *Pokora v. Wabash Ry.*, 292 U.S. 98, 104 (1934).

207. Courts are hesitant today to characterize even blatant conduct of a recurrent nature as negligence as a matter of law, even though many or most juries would so characterize it and even though this characterization would help to achieve consistent results. Traditionally, courts have hesitated even to instruct juries that such recurrent conduct is negligent unless it is explained or justified. See O. HOLMES, *supra* note 203, at 120-24; cf. *Spier v. Barker*, 35 N.Y.S.2d 444, 323 N.E.2d 164, 363 N.Y.2d 916 (1974) (whether failure to wear seat belts is negligence unless there is an explanation or excuse presents a jury question).

208. The original stop, look, and listen decision in *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), was criticized for this reason, even though on its facts it arguably presented a paradigm case of negligence. Note, *Aftermath of the Supreme Court's Stop, Look and Listen Rule*, 43 HARV. L. REV. 926, 927 n.5 (1930).

209. This rebuttable presumption is the equivalent of Holmes' "unless explained" approach, see *supra* note 207, which he did not even mention in *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927).

210. See *supra* note 207.

211. The stop, look, and listen decision in *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), in which the Supreme Court overturned both the jury's verdict for plaintiff and the trial judge's refusal to grant a directed verdict, was arguably such a case in that it was designed to keep personal injury cases of this type from juries.

212. James, *supra* note 91, at 687-88.

ercise the discretionary power themselves. Not surprisingly, Holmes' view was not well received in the liberal, claimant-oriented climate of recent decades.

Although today's courts are not systematically intent on narrowing fact finder discretion through continuing elaboration of the law—and perhaps are even too timid in that regard²¹³—they exercise this method of control often enough to warrant an inquiry into the circumstances that spur them into action or persuade them to refrain from action. Obviously, appellate courts are more likely to make law when they reverse trial courts, when the matter is important, and when there is no easier way to reverse. Conversely, appellate courts will tend to render only supervisory conclusions when they affirm trial courts in unimportant cases. It is difficult, however, to predict what appellate courts are likely to do in cases that fall between these two extremes.

A typical case involves the review of a finding of ultimate fact that, like the question of negligence, involves the application of a broad legal concept to the historical facts. An appellate court may simply affirm the trial level finding as "reasonable."²¹⁴ At other times, an appellate court may elaborate the law more fully and "extrude from [the broad legal concept] quite specific rules of law to guide or determine the exercises of power."²¹⁵ Sometimes such specific rules are declared initially by the trial level decision maker, thereby inviting and often compelling appellate review. Although such review is supposed to be free, sometimes appellate courts will simply accept the new rule—and its resulting application to the facts—as reasonable, especially when such a rule is declared by a policy making agency and involves a novel, difficult, technical, or subsidiary legal question.²¹⁶ The nature and propriety of this appellate deference to administrative law declaration has provoked a lively discussion among the commentators.²¹⁷ The United States Supreme Court, however, has never said categorically in such situations that it could not make an independent determination,²¹⁸ and in many other similar situations it has made an independent de-

213. In his concurring opinion in *Wilkerson v. McCarthy*, 336 U.S. 53, 65 (1949), Justice Frankfurter states that a "timid judge, like a biased judge, is intrinsically a lawless judge."

214. *NLRB v. Hearst Publications*, 322 U.S. 111 (1944).

215. L. JAFFE, *supra* note 3, at 562.

216. *E.g.*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (deference to administrative interpretations of wage and hour provisions of Fair Labor Standards Act with respect to whether employee waiting time amounts to compensable working time). Judge Friendly discussed other cases asserting the need for such deference and the controversy thus created in *Pittston Stevedoring Corp. v. Delaventura*, 544 F.2d 35 (2d Cir. 1976); *see also* S. BREYER & R. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 272-74 (2d ed. 1985) (discussing appellate deference to administrative law declaration).

217. *See* L. JAFFE, *supra* note 3, at 557-58 (suggesting that courts may, but sometimes choose not to, review such agency determinations independently); Stern, *supra* note 2, at 106-09 (arguing that Congress intended agencies to fill the interstices of the statutes they administer and that the scope of court review is thereby limited). *See generally* S. BREYER & R. STEWART, *supra* note 216, at 272-74 (discussing appellate deference to administrative law declaration).

218. *But see* *Board of Governors v. Agnew*, 329 U.S. 441, 449-51 (1947) (Rutledge, J., concurring) (criticizing the majority's free, albeit approving, review of the agency's interpretation of its statute). Arguably, courts must, or as a prudential matter should, defer to adjudicative rules declared by an agency that has parallel rule making power, because an agency can employ such rule making power to reinstate its original administrative judgment. Of course Congress has delegated lawmaking power to agencies along with prescribed rule making procedures and has not necessarily mandated analogous authority for rule making in adjudication.

termination.²¹⁹ Arguably, then, this aberrant doctrine of deference to administrative law declaration is more voluntary and prudential than mandatory, and the real question is what factors are relevant to the doctrine's invocation. It turns out that these factors are approximately the same as those that in other situations seem to persuade appellate courts simply to affirm as reasonable trial level findings of ultimate fact without attempting to elaborate the governing legal norms.²²⁰

To demonstrate the nature of these factors, it is useful to compare the decisions in two well-known pairs of labor cases. In the first pair, the United States Supreme Court held as a matter of law that both newsboys, *NLRB v. Hearst Publications*,²²¹ and foremen, *Packard Motor Car Co. v. NLRB*,²²² could be employees entitled to bargain collectively within the meaning of the national labor laws, even though newsboys are less supervised and more independent than most employees,²²³ and even though foremen, as supervisors of employees, are regarded for some purposes as part of management.²²⁴ In *Hearst* the Court also affirmed as a matter of law the National Labor Relation Board's adoption of a vague "statutory purpose" test to determine who in fact was an "employee."²²⁵ The Court declined, however, to define or to explicate this "statutory purpose" test beyond the Board's elaboration and simply accepted as reasonable the Board's finding that the newsboys in question were employees.²²⁶ In *Packard*, which was decided three years later, the Court settled the matter by finding that foremen not only could be, but were, "employees" as a matter of law.²²⁷ Thus, in *Hearst* the Labor Board was accorded wide law-applying discretion whereas in *Packard* its discretion was totally eliminated.²²⁸

On their special facts these two cases are not necessarily inconsistent. In both, the Supreme Court properly addressed questions concerning the primary purpose of the statute.²²⁹ In *Hearst*, however, the Court still faced a difficult

219. *E.g.*, *NLRB v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951) (reviewing independently and reversing the Labor Board's construction of a federal labor statute).

220. *Accord* L. JAFFE, *supra* note 3, at 546-94 (discussing cases in which appellate courts defer to administratively declared general principles and decide whether to refine existing general principles applied by agencies to novel fact decisions).

221. 322 U.S. 111 (1944).

222. 330 U.S. 485 (1947).

223. The court of appeals had found that this lack of supervision made the newsboys independent contractors. *Hearst Publications v. NLRB*, 136 F.2d 608, 612-13 (9th Cir. 1943).

224. Members of management are barred from being represented through collective bargaining. *Packard*, 330 U.S. at 493-98 (Douglas, J., dissenting).

225. The Board had rejected contentions that either state law or an essence of general common law derived from tort and workers' compensation law was controlling and had looked instead to the purposes of the Wagner Act. The Supreme Court agreed with the Board's approach. *Hearst*, 322 U.S. at 120-30.

226. *Id.* at 130-32.

227. *Packard*, 330 U.S. at 488; *accord* L. JAFFE, *supra* note 3, at 561 (also comparing *Hearst* with *Packard*).

228. The NLRB had divided and vacillated on this question in the past. *Packard*, 330 U.S. at 492. Because foremen met the other requirements for collective bargaining, the Court found as a matter of law that they qualified as "employees" within the statute. *Id.* at 487-90.

229. In *Hearst* the Court concluded that the benefits of collective bargaining should be available to persons not technically servants under common-law principles. *Hearst*, 322 U.S. at 120-30. In

mixed question that was new,²³⁰ highly fact specific,²³¹ not readily amenable to the formulation of general principles,²³² and which Congress had assigned for initial decision to an expert agency with broad adjudicative and rule making power over national labor policy. These factors justified the Supreme Court's acceptance of the agency's initial statement and application of its "statutory purpose" test as reasonable,²³³ even though this decision left for future decisions a difficult mixed question.²³⁴ By contrast, the basic question in *Packard*—whether foremen were employees—was of great national importance,²³⁵ was bound to recur in many cases without significant factual variation,²³⁶ and called for a definite resolution one way or the other. Moreover, because the question in *Packard* had divided the Board and lower courts previously,²³⁷ its definitive resolution by the Supreme Court was especially desirable.

The second pair of illustrative cases involved new provisions of the labor laws requiring the officers of unions and of national labor organizations of which the unions were affiliates to file noncommunist affidavits.²³⁸ In *NLRB v. High-*

Packard the Court concluded that these benefits should also be available to some supervisory employees. *Packard*, 330 U.S. at 488-93.

230. When the problem arises in a context so new and unsettled that the rule-makers do not yet know what factors should shape the result, the case may be a good one to leave to lower court discretion. . . . [This] permits experience to accumulate at the lowest court level before the appellate judges commit themselves to a prescribed rule.

Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 SYRACUSE L. REV. 635, 662 (1971).

231. The specifics of the arrangements between Hearst and its newsboys were quite elaborate, covering such items as street location, districting for distribution, equipment and inventory, prices, credit terms, hours, and other forms of effort expected. *Hearst*, 322 U.S. at 115-19. Thus, these newsboys could have been more or less independent than some others, and more general rules, if possible, had to await the process of case law development.

232. See *id.* at 121.

One of the "good" reasons for conferring discretion on the trial judge is the sheer impracticability of formulating a rule of decision for the matter in issue. Many questions that arise in litigation are not amenable to regulation by rule because they involve multifarious, fleeting, special, narrow facts that utterly resist generalization—at least for the time being.

Rosenberg, *supra* note 230, at 662.

233. Unsupervised trial level discretion can become the equivalent of lawlessness. Consequently, courts cannot allow agencies indefinitely to make broad undefined leaps from the facts and vague statutory requirements to otherwise unexplained results. In *Hearst*, however, the question was novel, and the NLRB apparently was not trying to mask its result in vague, conclusory language. Hence, there was no reason to criticize the Court's initial reluctance to grasp the nettle itself.

234. The Court held only that a relatively "uncontrolled" newsboy could be an "employee" for collective bargaining purposes. *Hearst*, 322 U.S. at 130-32. The Board still had to determine whether particular newsboys enjoying varying amounts of independence could be employees for such purposes. See *supra* note 231.

235. Because virtually every factory in America had foremen who might have sought union representation, it was important both to know whether they could do so and to choose a bright line test—all may or may not—that would obviate the need for particularized adjudication in each specific situation.

236. The Packard Motor Car Company had approximately 1100 foremen, divided into four distinct categories. *Packard*, 330 U.S. at 487. The Court's decision apparently made these and other factual variations among foremen legally insignificant for purposes of the Wagner Act.

237. *Packard*, 330 U.S. at 492. In the Supreme Court there were also four dissents on this important but difficult question. *Id.* at 495-97 (Douglas, J., dissenting).

238. National Labor Relation Act of 1947, Pub. L. No. 101, § 9(h), 61 Stat. 136, 146, *repealed by* Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 201(d), 73 Stat. 519, 525.

*land Park Manufacturing Co.*²³⁹ the Supreme Court overruled the National Labor Relations Board and held as a matter of law that the term "national labor organization" included federations of national unions like the Congress of Industrial Organizations (CIO). Five years later, however, in *NLRB v. Coca-Cola Bottling Co.*²⁴⁰ the Court, citing *Hearst*, deferred to the agency's narrow, technical test for who was an "officer" of a union or a labor organization; the Court held the agency finding to be "a reasonable, if indeed not a compelling, construction of the statute."²⁴¹

The appeals in both cases involved challenges to the Board's initial declaration of new rules of decision.²⁴² In *Highland Park*, as in *Packard*, the Supreme Court made an independent judgment. In *Coca-Cola*, as in *Hearst*, the Court deferred to the reasonable judgment of the Board. Once again, however, the two cases are distinguishable in terms of the factors that seem to persuade appellate courts to act aggressively. In *Highland Park* the question of the CIO's status was narrow and specific; it involved policy considerations transcending the agency's labor expertise²⁴³ and was arguably too important and too close to the heart of the original legislative intent to be fobbed off as a reasonable exercise of administrative discretion.²⁴⁴ By contrast, the question in *Coca-Cola* was less important and more technical.²⁴⁵ Additionally, the Board's narrow answer, though once again an apparent attempt to limit the reach of a distasteful statutory provision, was not, as in *Highland Park*, so obvious a challenge to the will of Congress. Furthermore, the broader, functional definition favored by the court of appeals would have required a fact specific, expert inquiry in subsequent proceedings.²⁴⁶ The agency's views on this question, therefore, were entitled to greater respect.

These cases suggest that an appellate decision to declare the law or to defer to a trial level declaration thereof is the result of a host of interrelated factors involving the nature, importance, novelty, and technicality of the question, the relative abilities of the trial and appellate levels to answer it initially or permanently, and the type of trial level decision maker involved. Another relevant

239. 341 U.S. 322 (1951).

240. 350 U.S. 264 (1956).

241. *Id.* at 269.

242. In *Highland Park* the Board had held that as a definitional matter a federation of national unions could not be a "national labor organization" within the meaning of the statute. *Highland Park*, 341 U.S. at 324. In *Coca-Cola* the Board had narrowly defined an "officer" of a union as a person designated an officer in the union's constitution, while the court of appeals applied the broader "functional test" and defined "officer" as a person who is an effective instrument of the union's policies. *Coca-Cola*, 350 U.S. at 266, 268.

243. The problem had more to do with the nation's response to the alleged communist conspiracy than with national labor policy per se. *Cf.* *Henderson v. United States*, 339 U.S. 816 (1950) (reversing ICC rule upholding race discrimination on interstate railroads).

244. If Congress had intended to rid organized labor of "reds," presumably it would not have exempted from the statute the officers of the CIO and AFL or permitted the Board and the courts to thwart its purpose. *Accord Highland Park*, 341 U.S. at 325 (noting that the congressional purpose of the Act was to eradicate adherents to the Communist Party at every level of union leadership).

245. *Coca-Cola*, 350 U.S. at 269. The contention of the court of appeals that an "officer" should be defined in a functional way, *see supra* note 242, required some understanding of union operations and of the numbers and types of persons potentially included within the concept.

246. *See supra* note 245.

factor is the appellate court's sense that the trial level decision maker is biased or interested in the outcome of the particular determination. In the famous *Sears, Roebuck & Co. v. Stiffel Co.*²⁴⁷ and *Compco Corp. v. Day-Brite Lighting, Inc.*²⁴⁸ decisions, for example, fact finder discretion under the common law of unfair competition was virtually eliminated by federal preemption, in part because the Supreme Court apparently did not trust fact finders and lower courts to apply this law wisely.²⁴⁹ Similarly, the Court has recently restated in stricter terms the minimum contacts test for state judicial jurisdiction under the due process clause.²⁵⁰ State courts are clearly interested in the outcome of these determinations and the companion choice of law determinations. Moreover, the case law regarding minimum contacts had reached the limits of due process. The stricter test the Court has developed may limit the number of case by case reviews of constitutional fact-findings that would attend a broader test allowing easy distinctions among cases.²⁵¹

C. *The Classification Power*

1. Classifying Ultimate Facts as Questions of Law

Reasonable trial level findings of ultimate fact normally are not disturbed on appeal, even though the reviewing court prefers or itself would have reached a different result. The narrow appellate review for reasonableness, in conjunction with review for all other errors of law, should guarantee just results in most cases, even though it will sanction a few wrong but "reasonable" results. For some mixed questions, however, such as those determinative of constitutional rights, even occasional wrong results are arguably unacceptable, and special procedures designed to prevent such results, like free appellate review, are justified.

Free review of mixed questions is an implicit consequence of classifying a particular ultimate fact as a question of law or as a question of constitutional or jurisdictional fact.²⁵² Under the law classification,²⁵³ courts and legislatures may classify as "legal" mixed questions going to the merits that are analytically indistinguishable from those routinely classified as questions of fact.²⁵⁴ For ex-

247. 376 U.S. 225 (1964).

248. 376 U.S. 234 (1964) (holding that federal patent law preempts state unfair competition law making it wrongful to copy the appearance of an unpatented product, unless the copy fails to disclose through labeling the identity of its manufacturer or marketer).

249. Brown, *Symposium: Product Simulation: A Right or a Wrong?*, 64 COLUM. L. REV. 1216, 1221-22 (1964) (suggesting that trial level distaste for those who practiced product simulation tended to lead to findings of liability against such persons).

250. Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on World-Wide Volkswagen Corp. v. Woodson and Rush v. Savchuk*, 58 N.C.L. REV. 407, 408-09 (1980).

251. *Id.* at 431-32. Arguably, the Court has formulated bright line constitutional tests in other areas to avoid the burden of reviewing endless findings of constitutional fact. See Strong, *Dilemmic Aspects*, *supra* note 15, at 325-33 (1969).

252. See *supra* note 19; text accompanying notes 78-80.

253. There are few detailed studies of this law classification. The traditional one is J. THAYER, *supra* note 138, at 183-262; one of the newer ones is Weiner, *supra* note 2.

254. This is not to say that mixed facts cannot be differentiated on the basis of their likely familiarity to jurors or the technical nature or complexity of their legal components. Indeed such distinctions form the basis of most attempts to classify mixed questions as law or fact. See *infra* notes 296-

ample, many common-law courts have traditionally classified as "legal" questions involving the construction and legal effect of writings,²⁵⁵ the question whether one charged with malicious prosecution acted with reasonable and probable cause,²⁵⁶ and the question whether business or commercial conduct—as opposed to everyday conduct in the negligence context—was reasonable.²⁵⁷ Today, courts and legislatures sometimes classify as "legal" ultimate facts requiring the application of technical statutory law to the facts,²⁵⁸ especially when the underlying historical facts are disputed.²⁵⁹

Yet, the law classification means more than free review. It also means the exclusion of the jury from the initial trial level determination.²⁶⁰ Indeed, this classification is simply another way of referring to one major aspect of the judge/jury problem; in actions at law those few ultimate facts classified as questions of law are for the judge, whereas the rest, which are classified as questions of fact, are for the jury.

The classification of ultimate facts as questions of law amounts to a manipulation of the law-fact doctrine to take questions from the jury or to subject the trial level's resolution of questions to free appellate review.²⁶¹ Although law classification is in theory an open-ended concept, today it is only occasionally invoked in new situations,²⁶² and its established uses, at least for questions going to the merits,²⁶³ are mostly hoary and relatively few in number.²⁶⁴ In effect it is

301 and accompanying text. Nevertheless, the existence and possible significance of such distinctions does not change the analytic nature of the process of law application, which in all cases identically requires application of the relevant law to the relevant facts.

255. See *supra* note 138.

256. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 217 (2d ed. 1977); Weiner, *supra* note 2, at 1910-16.

257. Weiner, *supra* note 2, at 1896-1906.

258. *E.g.*, Hardy v. Toler, 288 N.C. 303, 218 S.E.2d 342 (1975) (considered *supra* notes 173-75). A statutory example is U.C.C. § 2-302 (1978), which makes the defense of unconscionability a question of law.

259. Schwarzer, *supra* note 137, at 472.

260. One could argue that jury exclusion, rather than free review, is the primary purpose of the law classification in the judge/jury context. This contention cannot be resolved analytically because under the seventh amendment jury exclusion and free appellate review are constitutionally linked. See *supra* note 19. It also cannot be settled historically. Older cases and commentary tended to discuss law classification primarily in terms of jury exclusion. J. THAYER, *supra* note 138, at 202. Appellate courts may have found this justification more diplomatic than one asserting their own superiority or their general mistrust of all trial level decision makers. Today, however, invocation of the "law" classification seems to be based as much on the judiciary's desire to have the principal say on "questions of law" as on its desire to deprive the jury of any say whatsoever. F. JAMES & G. HAZARD, *supra* note 1, § 7.10, at 338; J. THAYER, *supra* note 138, at 205 n.3. Thus, the "law" classification is, in substantial part at least, a device for providing free appellate review.

261. F. JAMES & G. HAZARD, *supra* note 1, § 7.10, at 333-39.

262. *E.g.*, Hardy v. Toler, 288 N.C. 303, 310-11, 218 S.E.2d 342, 346-47 (1979) (a judicial "legal" classification described *supra* notes 173-75); U.C.C. § 2-302 (1978) (defense of unconscionability classified as a question of law). For further discussion of a possible but doubtful new federal judicial "legal" classification, see *supra* note 162.

263. Courts are much less hesitant to characterize procedural or evidentiary law-applying determinations as questions of law. See *infra* text accompanying notes 348-51.

264. F. JAMES & G. HAZARD, *supra* note 1, § 7.10, at 338, mentions only those cases that require the judge rather than the jury to decide whether the defendant in a malicious prosecution or false imprisonment action acted with reasonable and probable cause. James and Hazard also cite Thayer, who mentions a few other early examples, J. THAYER, *supra* note 138, at 209, 221-32, and

a sword that appellate judges wear but seldom actually draw. The infrequency of its use is the basis of the conclusion that juries presumptively apply the law to the facts on questions going to the merits. Thus, the initial answer to any judge/jury allocation question is that a mixed question is for the jury unless precedent or the kind of considerations set forth below strongly justify its classification as a question of law.²⁶⁵

2. Jurisdictional and Constitutional Facts

Another historical justification for free review of ultimate facts is the doctrine of jurisdictional fact. This doctrine appeared first in England in the seventeenth century.²⁶⁶ At that time claims that agencies or equivalent executive officials had exceeded their statutory jurisdiction were virtually immune from judicial review.²⁶⁷ To permit such review, the doctrine of jurisdictional fact was developed.²⁶⁸ At first limited, the doctrine was almost immediately expanded to include some ultimate facts that went as much to the merits as to the question of the agency's jurisdiction to act.²⁶⁹ Its *raison d'être* vanished once judicial review of administrative action became commonplace,²⁷⁰ but it survived by evolving into an excuse for free judicial review of some of these same questions.²⁷¹ In this form jurisdictional fact reached its zenith in America in the early twentieth century in a series of famous United States Supreme Court cases, particularly *Ohio Valley Water Co. v. Ben Avon Borough*,²⁷² *Ng Fung Ho v. White*,²⁷³ *Crowell v.*

who discusses at length the early English cases that withdrew from juries the power to construe writings. *Id.* at 203-06. Weiner discusses the wide split of authority in commercial law cases, particularly over whether the judge or jury will determine the reasonableness or timeliness of commercial conduct. Weiner, *supra* note 2, at 1896-1906. Judge Schwarzer cites a number of recent federal cases in which he asserts mixed questions have been classified as questions of law on undisputed facts, but some of these cases appear to involve supervisory rulings rather than classifications. Schwarzer, *supra* note 137, at 472; see *infra* note 296. Moreover, the expanded use of the classification power in cases involving undisputed facts is questionable. See *supra* note 73. There are signs of atrophy in the relative paucity of new law classifications, in the strength of the presumption that law-applying questions are for the fact finder, and in modern cases like *Dobson v. Masonite Corp.*, 359 F.2d 921 (5th Cir. 1966), in which the court said, albeit in the context of construing an oral contract, that "interpretation of the agreement between the parties to determine what they meant by the terms of that agreement . . . is always a question of fact." *Id.* at 923; see also Monaghan, *supra* note 3, at 232 n.21 (discussing the conflict between older authorities characterizing contract interpretation as a question of law and newer authorities characterizing it as a question of fact).

265. See *infra* Part IV C 3.

266. L. JAFFE, *supra* note 3, at 624-33.

267. *Id.*

268. *Id.* at 625-26.

269. *Id.* at 629-33; Monaghan, *supra* note 3, at 249. Thus, the term "jurisdictional fact" was not strictly limited to questions of subject matter or personal jurisdiction but potentially included any crucial fact going to the merits. For example, a compensation statute applicable to employees injured on the navigable waters of the United States was construed to contain two jurisdictional facts: whether the claimant was an employee and whether he or she was injured upon navigable waters. *Crowell v. Benson*, 285 U.S. 22 (1932). The latter question clearly is "jurisdictional." The former, however, obviously also implicates the merits.

270. L. JAFFE, *supra* note 3, at 634-35.

271. *Id.*

272. 253 U.S. 287 (1920).

273. 259 U.S. 276 (1922).

Benson,²⁷⁴ and *St. Joseph Stock Yards Co. v. United States*.²⁷⁵ In these cases, however, all of which involved constitutional questions or considerations²⁷⁶ arising out of judicial review of administrative, statutorily defined findings of ultimate fact, the jurisdictional fact doctrine in effect transformed itself into the doctrine of constitutional fact. Indeed, to the extent the concepts of constitutional and jurisdictional fact can be distinguished, the former is alive and well today,²⁷⁷ whereas in the federal courts at least, the latter is effectively gone, if not forgotten.²⁷⁸

The doctrine of constitutional fact applies to ultimate facts—and, if necessary, to their underlying historical facts²⁷⁹—that are fundamental to, or conditions precedent of, constitutional rights.²⁸⁰ It is not limited to administrative determinations, as was its jurisdictional fact precursor,²⁸¹ but includes the find-

274. 285 U.S. 22 (1932).

275. 298 U.S. 38 (1936).

276. *Ben Avon Borough*, 253 U.S. at 289, and *St. Joseph Stock Yards*, 298 U.S. at 46-49, involved allegations that public utility rate orders were so low that they amounted to confiscation of property without due process of law. *Ng Fung Ho*, 285 U.S. at 284-85, involved a deportation proceeding against an alleged alien who claimed he was an American citizen entitled to the full protection of due process. *Crowell*, which arose out of a federal workers' compensation scheme based on the admiralty power, concerned two separate jurisdictional facts: whether the accident occurred on the navigable waters of the United States and thus within the admiralty power and whether the injured claimant was an employee, an erroneous affirmative finding which allegedly deprived the employer of property without due process of law. *Crowell*, 285 U.S. at 54-56; L. JAFFE, *supra* note 3, at 640-43. Professor Jaffe concludes that

all of the cases dealt with a claim that a constitutional limit has been transgressed and they reduce to the premise that the judicial function vested in the courts by Article III encompasses a power—perhaps a duty—to determine de novo the relevant facts in all cases involving constitutional limits.

Id. at 643.

277. Strong, *Persistent Doctrine*, *supra* note 15, at 240-79.

278. Almost any important ultimate fact going to the merits can be "jurisdictional" if it is statutorily derived, or "constitutional" if it is constitutionally derived. Dickinson, *Crowell v. Benson: Judicial Review of Administrative Determinations of Questions of "Constitutional Fact"*, 80 U. PA. L. REV. 1055, 1077-82 (1932). Both designations are possible in the same case if the statutory limit or requirement is derived from or parallels a constitutional one, such as the interstate commerce requirement of many federal statutes or the navigable waters requirement of *Crowell*. See *supra* note 276. In the rate-making cases like *Ben Avon Borough* and *St. Joseph Stock Yards* the constitutional fact was the egregious undervaluation of the utility's property amounting to an unconstitutional taking of property without due process of law. In recent years, federal courts have declined to label statutory questions "jurisdictional" or allegedly egregious results as "confiscatory." Thus, it has been suggested that *Ben Avon Borough* and *St. Joseph Stock Yards* are "going, going, almost gone," even though they have never been specifically overruled. Davis, *Judicial Control of Administrative Action: A Review*, 66 COLUM. L. REV. 635, 671 (1966). The employment issue in *Crowell* also might fit this trend. See *supra* note 276. See W. GELLHORN, C. BYSE & P. STRAUSS, *supra* note 9, at 294-96.

279. See *supra* notes 44 & 46.

280. In *Crowell* the Court spoke of facts whose "existence is a condition precedent to the operation of a statutory scheme." 285 U.S. at 54. Professor Strong speaks of "facts decisive of constitutional issues." Strong, *Persistent Doctrine*, *supra* note 15, at 223.

281. Strong, *Persistent Doctrine*, *supra* note 15, at 223. *Crowell* also suggested that administratively determined jurisdictional facts had to be tried de novo by the reviewing courts, lest the legislation creating the agency be regarded as an invasion of the judicial power. *Crowell*, 285 U.S. at 54-55, 56-57; Monaghan, *supra* note 3, at 254-59. Thereafter, as the Court's fear of administrative adjudication receded, it began to back away from this foolish position, which effectively was put to rest in *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 48-49 (1951). See Strong, *Persistent Doctrine*, *supra* note 15, at 230-40 (discussing the expansion of the constitutional fact doctrine after *Crowell*).

ings of juries²⁸² and trial judges.²⁸³ Because many constitutional facts are determinative of procedural or evidentiary rights,²⁸⁴ they could be subject to free appellate review on that basis alone.²⁸⁵ The remaining constitutional facts affecting the merits are relatively few in number and arise principally out of free speech problems like libel and obscenity²⁸⁶ and equal protection questions like discrimination and political representation.²⁸⁷

It could be argued that the doctrine of constitutional fact is constitutionally required and should not, therefore, be included in discussions of the ways courts and legislatures *choose* to divide responsibility between the trial and the appellate levels.²⁸⁸ This doctrine, which grew out of the policy-based doctrine of jurisdictional fact, is not specifically mentioned in the Constitution and must be implied from its whole text.²⁸⁹ Moreover, because its full scope is debatable,²⁹⁰ its underlying purposes are matters of legitimate inquiry. Thus, even if the doctrine were ultimately found to be constitutionally required, its existence and scope would be defined in large part by policy considerations. Finally, even its existence is arguably not constitutionally mandated. Constitutional rights are obviously at risk when their application to a given set of facts is determined by fact finders whose decisions receive deferential review. In our legal system, however, any exercise of fact finder discretion is already subject to the law-declaring and supervisory powers of the appellate courts.²⁹¹ Consequently, fact finder discretion is not a general threat to the existence of constitutional rights, and the free review of its exercise is hardly a matter of absolute necessity. That does not preclude the judgment that constitutional rights are still too important to be left

282. The free review of any jury determination other than one involving a constitutional fact could amount to an unconstitutional reexamination of the jury's finding in violation of the seventh amendment. See *supra* note 19.

283. *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949 (1984).

284. Most of these are questions of criminal procedure involving the right to counsel, coerced confessions, illegal search and seizure, and arrest procedures. Strong, *Persistent Doctrine*, *supra* note 15, at 244-61.

285. See *infra* text accompanying notes 345-51 for a discussion of the appellate treatment of such important procedural/evidentiary questions.

286. Strong, *Persistent Doctrine*, *supra* note 15, at 261-83.

287. *Brown v. Board of Educ.*, 347 U.S. 483 (1954), and *Baker v. Carr*, 369 U.S. 186 (1962), opened up vast areas of substantive constitutional fact litigation. Cases arising under *Brown* have since been brought under the civil rights acts, and but for the extension of the "one man, one vote" requirement of *Reynolds v. Sims*, 377 U.S. 533 (1964), to local governments, *Avery v. Midland County*, 390 U.S. 474 (1968), there still might be unending litigation under *Baker*.

288. Implicit in Professor Strong's articles and in many of the Supreme Court's opinions, e.g., *Bose Corp. v. Consumers Union of the United States, Inc.*, 104 S. Ct. 1949, 1965 (1984), is the assumption that the doctrine of constitutional fact is constitutionally mandated. Strong, *Persistent Doctrine*, *supra* note 15, at 223-24. In a recently published article Professor Monaghan argues that constitutional fact review is a matter of judicial choice, and in support of that conclusion he presents in greater detail many of the same arguments presented here. Monaghan, *supra* note 3, at 264-71. Professor Monaghan's position means that Congress by statute could abrogate the doctrine of constitutional fact in its entirety, a result I am reluctant to endorse. For my purposes it is enough that there is a substantial policy component to the doctrine's scope, even though its core might be constitutionally mandated.

289. See *infra* text following note 290.

290. See *supra* notes 279-81; see also Monaghan, *supra* note 3, at 244-47, 265-66 (suggesting that there is no clear basis for deciding what is and what is not a constitutional fact).

291. See *infra* notes 336-43 and accompanying text (discussing the nature of appellate courts' discretion).

to the discretion of fact finders. That judgment, however, is as much a policy choice as a constitutional one, reflecting the following reasoning offered by Professor Jaffe:

Our ultimate aim is to provide a reasoned assurance of the existence of the crucial facts upon which the exercise of power is to be conditioned. The now-standard scope of review applied to a finding based on decent administrative procedure will ordinarily provide that assurance. This conclusion does not exclude a judgment that in a given case we may want even greater assurance. In a criminal case, for example, we are not satisfied with the ordinary degree of proof. This drive for uniformity in administrative law should not force it into a straight jacket. If ineluctable theory does not demand that certain facts be given exceptional procedural handling, neither does it exclude it; and when we want extra assurance, we should not forfeit it for doctrinal purity.²⁹²

Although these remarks addressed only administratively determined constitutional or jurisdictional facts, they are equally applicable to judicial proceedings and to those so-called questions of "law" that are similarly given "exceptional procedural handling." The problem is to determine which ultimate facts are so exceptional that they require exceptional handling and what are the underlying considerations in making that classification.

3. Factors Affecting the Exercise of the Classification Power

Free review of ultimate facts in effect permits an appellate court to seize for itself the power to decide the merits in close cases. Such power must tempt appellate courts. Its exercise, however, is a disruptive, time consuming, and potentially unconstitutional departure from normal practice and of necessity must be restricted to those ultimate facts whose outcome somehow is too important to be left to the discretion of fact finders or upon which the abilities, judgment, or fairness of fact finders is suspect. Not surprisingly, many familiar uses of free review through the vehicle of classification seem to reflect the latter considerations. Thus, the legal profession's fear of jurors and their tendency to render a rough cut, ad hoc, and therefore uncertain brand of justice helps to explain why the interpretation of written contracts and the application of many commercial law standards to the facts have traditionally been classified as questions of law.²⁹³ A similar mistrust of local decision makers helps to explain why the United States Supreme Court so assiduously reviews constitutional fact determinations that a book or film is obscene, that a confession was not coerced, or that a search or seizure was reasonable.²⁹⁴ Finally, a fear of local interest may be one of the reasons the Supreme Court is once again in the business of reviewing state

292. L. JAFFE, *supra* note 3, at 635.

293. See *supra* note 264. U.C.C. § 2-302 (1978) makes the unconscionability defense a question of law, presumably not only to achieve whatever certainty and predictability is possible, see Leff, *Unconscionability And The Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 515-16 (1967), but also to eliminate fact finder discretion over this potentially open-ended defense.

294. E.g., *Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (per curiam) (reversing a case involving a "shocking display of barbarism" in procuring a coerced confession approved by the Florida courts without opinion); accord *Monaghan, supra* note 3, at 272-73.

court assertions of personal jurisdiction.²⁹⁵

Some authorities argue that a jury's mere unfamiliarity with various technical ultimate facts is itself a justification for the legal classification of such mixed questions. One proponent of this view, Judge Schwarzer of the United States Court of Appeals for the Ninth Circuit, cites with approval a number of federal cases that classify as "legal" mixed questions involving the application of "predominantly legal standards"—primarily derived from highly technical and complex statutes—to undisputed historical facts.²⁹⁶ The judicial inclination to take from jurors technical mixed questions generally beyond their common experience is understandable, but it is opposed by several weighty considerations.²⁹⁷ These include the virtually settled rule that mixed questions cannot be taken from the jury simply because the historical facts are not in dispute,²⁹⁸ the difficulties involved in implementing such an ad hoc approach to the judge/jury problem,²⁹⁹ and the possible limits imposed by the seventh amendment on such a broad exercise of the classification power.³⁰⁰ Indeed, any approach based solely on the relative fact-finding abilities of judges and jurors renders almost unnecessary and meaningless the current controversy concerning whether the seventh amendment or the due process clause permits a complexity exception to the right of trial by jury.³⁰¹ For these reasons, the narrower, more cautious approach that courts presently seem to follow in classifying technical mixed questions, which allows consideration of, but does not make decisive, the technical nature of the ultimate fact under consideration, is preferable.

In addition to correcting for trial level bias, interest, or relative incompetence, free appellate review permits the correction of wrong, though reasonable, determinations through substitution of the appellate court's judgment for that of the trial level decision maker. Only free review permits appellate courts to perform this substitution of judgment; an appellate court may not substitute its judgment in reviewing facts or any other discretionary determination. At one

295. *Louis*, *supra* note 250, at 407-09, 431-32.

296. Schwarzer, *supra* note 137, at 472-73. The cases cited by Judge Schwarzer involve mostly technical mixed questions created by federal securities, antitrust, patent, and copyright laws, and technical common-law or constitutional matters like defamation and employee restrictive covenants. Few, however, unequivocally state that such technical questions are never for the jury. For example, *Continental TV v. GTE Sylvania, Inc.*, 694 F.2d 1132, 1135 (9th Cir. 1982), *cited in* Schwarzer, *supra* note 137, at 472 n.30, and *A. A. Hoehling v. Universal Studios*, 618 F.2d 972, 977 (2d Cir. 1980), *cited in* Schwarzer, *supra* note 137, at 473 n.36, affirm grants of summary judgment for defendants and arguably hold only that on the undisputed facts no reasonable fact finder could have found for plaintiff. That is a supervisory holding rather than a "law" classification. See *supra* text accompanying notes 176-82.

297. Judge Schwarzer totally ignores these opposing considerations. See Schwarzer, *supra* note 137, at 472-73.

298. See *supra* note 73.

299. See *supra* note 138. In private treble damage actions under the antitrust laws, the jury determines whether defendant's conduct amounted to an unreasonable restraint of trade, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1959), even though the issue is often technical and beyond the experience of the average juror and even though the underlying historical facts sometimes are not in dispute. It is difficult to distinguish this ultimate fact, which creates a jury question, from other technical ultimate facts, which some courts might classify as questions of law under an ad hoc approach.

300. See *supra* note 19.

301. *Id.*

time, to guard against the possibility that trial courts would reach wrong-but-reasonable results, property rights were included in the doctrines of jurisdictional and constitutional fact.³⁰² More recently, despite the difficulty of distinguishing property rights from personal liberties, only the latter have been included in the surviving doctrine of constitutional fact.³⁰³ To justify this special protection for personal liberty, Justice Brandeis observed in *Ng Fung Ho v. White*³⁰⁴ that "to deport one who so claims to be a citizen obviously deprives him of liberty It may also result in loss of both property and life; or of *all that makes life worth living*."³⁰⁵ A wrongful criminal conviction or the discriminatory treatment of persons or whole groups may also result in such a fundamental loss. By contrast, an administrative agency's mistake in fixing utility rates or in finding that an employment relationship exists for compensation purposes ordinarily results only in a loss of money, which in some cases can be made up the next year by higher rates or other financial adjustments. Thus, adjudicative mistakes involving personal liberties will often have a harsh or irremedial impact, the avoidance of which clearly is a major reason for free review.

Although the protection of property rights is no longer a general source of constitutional fact classifications,³⁰⁶ it remains one of the principal sources of the law classification. Thus, many mixed common-law questions traditionally classified as legal involve contractual, commercial, and other property mat-

302. See *supra* note 276. Many of the early "property" cases in which the doctrines of jurisdictional or constitutional fact were invoked were based in part on the arguably strained constitutional theory that if the limits of administrative discretion to fix rates or award workers' compensation were blatantly exceeded, the resulting abuse amounted to an unlawful or confiscatory taking of property without due process of law. *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-86 (1942); see cases cited and described *supra* note 276. This "taking" analysis coincidentally gave the Supreme Court both subject matter jurisdiction and free review. Several factors suggested that free review of administrative "property" cases was unnecessary. First, because the taking analysis was potentially applicable to any substantial administrative assault on private pocketbooks, it challenged the whole idea of administrative adjudicatory discretion. See *supra* note 278; see also *Gudmundson v. Cardillo*, 126 F.2d 521, 524 (D.C. Cir. 1942) (suggesting that almost any statutorily based ultimate fact going to the merits could be classified as a jurisdictional fact). Second, in the few cases in which agencies rendered results egregious enough to raise due process concerns, reviewing courts could correct the errors through the law-declaring and supervisory powers. Moreover, even if all judicial remedies were unavailing, the typically powerful litigants to agency adjudications had political alternatives. Thus, including these kinds of ultimate facts within the doctrine of constitutional or jurisdictional fact was hardly essential to protect property rights and amounted to a judicial effort to cow the then burgeoning and mistrusted administrative process.

303. Strong, *Persistent Doctrine*, *supra* note 15, at 242. Some of the possible reasons for generally excluding property rights from the doctrine of constitutional fact are the rejection of substantive due process notions, the growing acceptance of administrative adjudication and the accompanying diminishing fear of egregious agency results amounting to a confiscation of property, the Warren Court's greater concern with personal liberties, the likelihood that substantial property owners normally can protect their own interests, and the numbers of property cases that might come before the Supreme Court.

304. 259 U.S. 276 (1922).

305. *Id.* at 284-85 (emphasis added). In his concurring opinion in *St. Joseph Stock Yards*, 298 U.S. at 77, Justice Brandeis distinguished *Ng Fung Ho* by stressing the distinction "between the right of liberty of person and other constitutional rights."

306. Some property rights, however, still do receive general constitutional fact protection. *E.g.*, *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (what constitutes a typical taking of property requiring compensation under the fifth or fourteenth amendments is a constitutional fact).

ters.³⁰⁷ A recent example is found in *Hardy v. Toler*,³⁰⁸ in which the court held that the determination for treble damage purposes that an act was "unfair" or "deceptive" within the meaning of the North Carolina version of the Federal Trade Commission Act³⁰⁹ was always a "question of law" for the judges.³¹⁰ The opinion offered no policy justifications for this classification,³¹¹ but one is apparent. The statute's language is so broad and vague that the federal version of the Act provided only for administrative enforcement and primarily for injunctive remedies.³¹² North Carolina's version, however, includes a private treble damage remedy.³¹³ Arguably, the North Carolina Supreme Court took the crucial determination from the jury to control this remedial menace to the pocketbooks of local businesses, many of which doubtlessly were unaware of the Act's full scope, and to achieve consistency in results. Perhaps the court should first have tried to narrow the jury's discretion, but the Act's broad language would have made this kind of control difficult.

Some mixed questions are appropriate for law or constitutional fact classification because their incorrect determination may affect similar conduct unrelated to the litigation. Thus, free review through the doctrine of constitutional fact of questions arising out of police searches, seizures, and interrogations is designed to deter illegal police conduct.³¹⁴ Similarly, free review of constitutional fact questions arising out of the exercise of first amendment rights—whether a book is obscene³¹⁵ or a libel was motivated by actual malice³¹⁶—is designed to avoid the chilling effects of even occasional wrong decisions on the general public's exercise of these important rights. The law classification has also been utilized to avoid such chilling effects. Some states hold that the judge, rather than the jury, must decide the ultimate fact whether a defendant charged with malicious prosecution had reasonable and probable cause to believe that the plaintiff had committed a crime. This law classification was undoubtedly founded on the belief that juries might be more sympathetic to the innocent plaintiff than to the public need for information about crime and would often incorrectly find a lack of reasonable and probable cause, thereby deterring per-

307. See *supra* notes 258 & 264.

308. 288 N.C. 303, 218 S.E.2d 342 (1975). For additional discussion of this case, see *supra* notes 173-75.

309. The state statute, N.C. GEN. STAT. § 75-1.1 (1981), was derived from § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1982).

310. *Hardy*, 288 N.C. at 308-09, 218 S.E.2d at 345-46.

311. The court purported to rely on authority from other jurisdictions, but all the cases cited were clearly distinguishable. See *supra* note 173.

312. The extremely broad scope of this language is considered in *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). On the enforcement of the federal Act, see E. KITCH & H. PERLMAN, *LEGAL REGULATION OF THE COMPETITIVE PROCESS* 245 (2d ed. 1979).

313. N.C. GEN. STAT. § 75-16 (1983).

314. See *United States v. Peltier*, 422 U.S. 531, 551 (1975) (Douglas, J., dissenting) (articulating the deterrent effect of excluding evidence obtained through searches and seizures that violate the fourth and fourteenth amendments).

315. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 119 (1960).

316. See *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

sons with such information from contacting the police.³¹⁷

A question of law is subject to the doctrine of stare decisis and is legally binding in like future cases. The predictability and consistency engendered by a declaration of law encourages certain conduct just as a lack of predictability and consistency chills it. The desire to encourage certain conduct explains why there are so many law classifications in the area of land titles, contracts, and commercial law, where finality and certainty are vital.³¹⁸

Some ultimate facts that have a constitutional nexus and that in theory could be regarded as constitutional facts are not so classified, apparently because the Supreme Court does not feel that free review of these facts is essential. For example, many federal statutes require that an act or omission occur on navigable water³¹⁹ or be in or affect interstate commerce.³²⁰ These statutory requirements are not classified as constitutional facts,³²¹ even though the navigable waters requirement was once classified as a jurisdictional fact,³²² and even though both requirements often mirror the equivalent constitutional provisions.³²³ The federal trial judges and administrators who normally find these ultimate facts generally are not regarded as untrustworthy, and an occasional wrong, though reasonable, finding does not seriously threaten federalism. Moreover, these determinations are generally fact specific and readily distinguishable. Free review, therefore, would not contribute much to consistency or predictabil-

317. Weiner, *supra* note 2, at 1910-16.

318. *Id.* at 1904; accord Pound, *The Theory of Judicial Decision III*, 36 HARV. L. REV. 940, 956-57 (1923) (contrasting the more certain law of property, contracts, and commercial relations with the law of torts, fraud, and fiduciary relations, in which general standards, particularized results, and discretionary authority are more often the dominant legal approach).

319. *E.g.*, Admiralty Jurisdiction Act (Extension) 46 U.S.C. § 740 (1982) ("a vessel on navigable water").

320. *E.g.*, Federal Trade Commission Act § 5, 15 U.S.C. § 45 (1982) ("[u]nfair methods of competition in or affecting commerce").

321. A majority of FELA cases hold that whether a railroad worker was killed or injured in interstate commerce is a jury question. *New York Cent. R.R. v. Marcone*, 281 U.S. 345 (1930); *Southern R.R. v. Lloyd*, 239 U.S. 496 (1916). Some courts have held, however, that when the historical facts are not in dispute, the determination that the act occurred in interstate commerce is a question of law. *Zinsky v. New York Cent. R.R.*, 36 F.R.D. 680 (N.D. Ohio 1964); *Ermin v. Pennsylvania R.R.*, 36 F. Supp. 936 (E.D.N.Y. 1941). These cases, however, are based on the questionable proposition that a court may expropriate the jury's law-applying function whenever the historical facts are not in issue. See *supra* note 73. In antitrust cases under the Sherman Act, the federal courts seem unable to decide whether the commerce question is for the jury. See, *e.g.*, *United States v. Flom*, 558 F.2d 1179, 1184 (5th Cir. 1977) (question for jury); *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 526 n.16 (9th Cir. 1972) (leaving open the extent to which commerce question is for judge or jury), *cert. denied*, 412 U.S. 950 (1973); *Las Vegas Merchant Plumbers Ass'n v. United States*, 210 F.2d 732, 746-49 (9th Cir.) (question for jury), *cert. denied*, 384 U.S. 961 (1954); *United States v. Pennsylvania Refuse Removal Ass'n*, 242 F. Supp. 794, 799 (E.D. Pa. 1965) (question for jury), *aff'd*, 357 F.2d 806 (3d Cir.), *cert. denied*, 384 U.S. 961 (1966). These statutory cases must be distinguished from those setting constitutional limits to state encroachments on the commerce and admiralty powers, which limits are treated as constitutional facts. *E.g.*, *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945).

322. See *Crowell v. Benson*, 285 U.S. 22, 54-55, 56-57 (1932). Although lower federal courts still follow *Crowell* in cases under the Longshoreman's Act involving *Crowell*'s exact facts, *Crowell* apparently otherwise is ignored. Schwartz, *Does the Ghost of Crowell v. Benson Still Walk?*, 98 U. PA. L. REV. 163, 182 (1949); see *Associated Indem. Corp. v. Shea*, 455 F.2d 913, 914 n.2 (5th Cir. 1972).

323. U.S. CONST. art III, § 2 (admiralty jurisdiction); U.S. CONST. art. I, § 8 (interstate commerce power).

ity of results. Like other fact specific ultimate facts going to the merits, these ultimate facts are better left to the discretion of fact finders and, when necessary, to appellate correction through the supervisory and law-declaring powers.³²⁴

Another reason for limiting the number of constitutional fact classifications is the burden this would place on the docket of the United States Supreme Court. In this century the Court has greatly expanded the reach of the Bill of Rights and the fourteenth amendment and in the process has substantially increased the potential number of constitutional facts and cases raising constitutional fact issues on appeal.³²⁵ Free review of all constitutional fact determinations, because such review requires a more careful examination of the whole record, could have overwhelmed the Court or stolen precious time from its paramount role as the oracle of constitutional and federal law.³²⁶ Consequently, the Court had to find ways to reduce the potential burden. One way was to ignore the colorable constitutional fact status of certain questions, at least in their less important manifestations.³²⁷ A second way was to treat cases raising constitutional fact issues, if possible, as falling within the Court's discretionary, certiorari jurisdiction and to deny certiorari in many of them.³²⁸ A final way was to fashion new, more detailed rules of substantive law, narrowing the discretionary scope of the trial level determination and helping to characterize particular results as clearly right or wrong. In recent years the Court has employed the last method in a number of important constitutional areas, including reapportionment,³²⁹ police arrest and interrogation procedures,³³⁰ and limita-

324. In cases determining the applicability of the public accommodations provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6 (1982), however, the Supreme Court will freely review a determination that a facility is not in commerce. See *Daniel v. Paul*, 395 U.S. 298 (1969). In such cases, however, the class impact of the wrongful decision, and the possibility of trial level bias in reaching it, is very high.

325. See Strong, *Dilemmic Aspects*, *supra* note 15, at 325-33.

326. *Id.*; *Sibron v. New York*, 392 U.S. 40, 81-82 (1968) (Black, J., dissenting); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 707 (1968) (Harlan, J., concurring and dissenting); *accord Monaghan*, *supra* note 3, at 246-47.

327. Arguably, this has been the result in federal cases in which an occurrence on navigable waters or in interstate commerce is an essential element of a federal statutory claim. See *supra* notes 319-20 and accompanying text.

328. In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921), the Court held that an appeal of right lies under what is now 28 U.S.C. § 1257(2) (1982), even if the challenge is only to the state statute as applied. That has meant, as Justice Brandeis wisely opined in dissent, "the right to a review will depend, in large classes of cases, not upon the nature of the constitutional question involved, but upon the skill of counsel." *Dahnke-Walker*, 257 U.S. at 298. Furthermore, the Court has been unwilling to excuse those who might have attacked the validity of the statute as applied. *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 650-51 (1942) ("It is not enough that an appellant could have launched his attack on the validity of the statute itself; if he has failed to do so we are without jurisdiction over the appeal."). The impact of all this is predictable. For example, although most contemporary constitutional challenges to an assertion of state judicial jurisdiction involve attacks on a long-arm statute as applied, few such cases reach the United States Supreme Court on appeal because defendants generally fail to challenge the jurisdictional assertion in these specific terms. Instead, defendants usually plead only that the court's assertion of jurisdiction exceeds the limits of due process, an assertion which invokes only the Court's certiorari jurisdiction. *Kulko v. Superior Court*, 436 U.S. 84, 90 n.4 (1978). As a result, from 1958 to 1977 the Supreme Court did not decide a single long-arm case; it consistently denied certiorari. *Louis*, *supra* note 250, at 408-09.

329. Professor Strong suggests that the "one man, one vote" rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), and its extension to local governments in *Avery v. Midland County*, 390 U.S. 474 (1968),

tions on state judicial jurisdiction.³³¹ It is a dangerous approach, however, because the detailed rules chosen could prove too rigid. The alternative for the Court, however, is a Hobson's choice between ignoring constitutionally offensive results rendered by trial level decision makers or hearing a flood of fact specific, supervisory appeals.

V. PROCEDURAL/EVIDENTIARY QUESTIONS

In deciding procedural and evidentiary questions (hereinafter referred to as procedural questions), trial judges and agencies, but never juries, find historical facts, declare the law, and apply it to the historical facts found. As with questions going to the merits, the facts found are ordinarily subject to a narrow scope of review, the law declared to a free or independent review, and mixed facts to one or the other.³³² Those mixed facts that are freely reviewed are called "questions of law"; those that are narrowly reviewed are called "discretionary"³³³ rather than questions of fact, and there is no implied presumption, as with questions going to the merits, that narrow review of mixed questions is preferred.³³⁴ Instead, the choice between discretion and law is made ad hoc for every type of mixed question, ordinarily without explanation but apparently on the basis of several relevant factors.

Before examining the factors that shape this choice, a few general points bear emphasis. Discretion is the power to make choices among legally permissi-

reflected the Court's wise reluctance to decide an endless number of reapportionment cases on the basis of some more general standard. Strong, *Dilemmic Aspects*, *supra* note 15, at 327-32.

330. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964).

331. Louis, *supra* note 250, at 431-32.

332. E.g., *Janzen v. Goos*, 302 F.2d 421, 423-24 (8th Cir. 1962) (reviewing finding of plaintiff's citizenship for diversity purposes).

333. *Id.* Courts employ different terminology to describe the narrow scope of review applicable to procedural discretion. Thus, although ultimate fact-findings going to the merits are reviewable for reasonableness or rational bases, discretionary procedural determinations are reviewable for "abuse" or "manifest abuse" of discretion. See, e.g., *Foman v. Davis*, 371 U.S. 178, 182 (1962) (denial of leave to amend without disclosing a reason is a presumptive abuse of discretion). Moreover, because appellate cases finding an abuse of discretion are comparatively rare, see Louis, *supra* note 35, at 836-38, arguably this narrow scope of review traditionally was somewhat narrower than that for questions going to the merits, even though it is difficult to articulate the difference. See *supra* text accompanying notes 34-39. Discretionary determinations are also freely reviewable for errors of law, which include the use of an incorrect legal standard in making the discretionary determination, *Robbins v. Jordan*, 181 F.2d 793, 794-95 (D.C. Cir. 1950) (the trial court erred in holding that delay of party seeking leave to amend was automatically fatal without regard to whether the delay prejudiced the opposing party or postponed the trial), the failure to disclose a reason for denying a discretionary application, *Foman v. Davis*, 371 U.S. 178, 182 (1962) (denial of leave to amend without disclosing a reason is a presumptive abuse of discretion), and a failure to exercise discretion when appropriate, *Murray v. Benson Aircraft Corp.*, 259 N.C. 638, 642, 131 S.E.2d 367, 371 (1963) (dismissal of action after demurrer sustained without giving plaintiff opportunity to seek leave to amend is error of law).

334. The percentage of procedural/evidentiary determinations that are freely reviewed is apparently much higher than the very small percentage of equivalent determinations going to the merits. Indeed, as the discussion below will show, for those procedural determinations that affect outcome and do not involve subjective considerations, the percentage subject to free review is so high as to amount almost to a presumption in favor of free review. See *infra* text accompanying notes 349-52 & 370-73.

ble, sometimes even conflicting, answers.³³⁵ There are two kinds of discretion: a primary or strong kind, which is largely unreviewable, and a secondary or weaker kind, which is subject to a limited or narrow review.³³⁶ Executive or prosecutorial discretion to investigate or to initiate legal proceedings, for example, is ordinarily primary;³³⁷ adjudicative discretion, with which this discussion is principally concerned, is ordinarily secondary.³³⁸

There are also gradations of secondary discretion.³³⁹ Trial judges, for example, have an almost unreviewable discretionary power under Federal Rule of Civil Procedure 49(a) to grant or deny a party's request to require the jury to render a special verdict,³⁴⁰ but they have a much narrower discretionary power under Rule 15(a) to deny leave to amend.³⁴¹ Perhaps the use of special verdicts is inherently less amenable to governance by appellate courts than is the grant or denial of leave to amend. That the trial level had almost unreviewable discretionary power over leave to amend a half century ago, however, suggests that there is more to the narrower discretion currently accorded leave to amend decisions than its amenability to appellate court governance indicates. Dissatisfaction with the results of the trial level's exercise of this power over leave to amend, particularly with the often unexplained and seemingly unjust denial of such leave, led to particularized rules favoring the grant of leave to amend and condemning its unexplained denial and to more aggressive appellate supervision of the power's exercise.³⁴² Future dissatisfaction with the trial court's exercise of discretionary power over the use of special verdicts could presumably provoke a similar appellate response,³⁴³ despite the unamenability of the question to appellate governance.³⁴⁴

335. As one commentator has noted:

To say that a court has discretion in a given area of the law is to say that it is not bound to decide the question one way rather than another. In this sense, the term suggests that there is no wrong answer to the questions posed—at least there is no *officially* wrong answer.

Rosenberg, *supra* note 230, at 636-37. Arguably, a court or other decision maker has discretion if there are at least two officially right answers, even though there are also legally wrong answers.

336. Rosenberg, *supra* note 230, at 636-37. The Administrative Procedure Act similarly distinguishes between "agency action . . . committed to agency discretion by law," 5 U.S.C. § 701(a)(2) (1982) (the primary kind), and "agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C.A. § 706(2)(A)(1977) (the secondary kind).

337. Rosenberg, *supra* note 230, at 644-45.

338. *Id.* at 637.

339. *Id.* at 650-53.

340. *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54, 66-67 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

341. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

342. FED. R. CIV. P. 15(a) states a presumption in favor of leave to amend. In furtherance of this presumption, the United States Supreme Court held in *Foman v. Davis*, 371 U.S. 178, 182 (1962), that an "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion."

343. Appellate courts might hold that, absent a good reason to the contrary, a trial court should grant a request for a special verdict to avoid potential jury confusion, *see* *United Mine Workers v. Gibbs*, 383 U.S. 715, 729 (1966), or to make possible the clear application of collateral estoppel in subsequent related cases. *See, e.g., Russell v. Place*, 94 U.S. 606, 609-10 (1876) (collateral estoppel assertion rejected because of inability to know which of two claims plaintiff established in a prior action between the parties).

344. *See supra* Part IV B.

As indicated above, the scope of review of procedural mixed facts is not presumptively narrow as it is with questions going to the merits. The reasons for this difference are not difficult to discern. Unlike substantive questions, procedural determinations are not subject to the seventh amendment. An appellate court is also likely to be more expert and reliable in matters of procedure than is a single trial judge³⁴⁵ or agency whose *raison d'être* is the acquisition of substantive expertise. The number of pages in the record relevant to procedural rulings also should ordinarily be fewer than those relevant to determinations going to the merits. Hence, the time required for free review of procedural questions will not ordinarily be as great as for substantive ones. Furthermore, because the number of procedural questions to be classified as discretion or law is much smaller, and because statutes or rules of procedure already classify many of them,³⁴⁶ an ad hoc approach is administratively much easier in the procedural context. Finally, appellate courts may have resolved, consciously or unconsciously, to keep a heavier hand on procedure to make up for their relatively weaker grip on the merits; the questions regarding the latter have always been a partial captive of procedure anyway.³⁴⁷

Although determinations going to the merits are seldom subject to free review, even though they ordinarily affect the outcome of cases, procedural questions that affect or determine the outcome of cases are usually classified as questions of law.³⁴⁸ Thus, the *grant* of almost any motion going to the merits, which grant would ordinarily conclude the case—for example, motions for summary judgment or dismissal—is subject to free review.³⁴⁹ By contrast, the denial of such a motion for the purpose of giving the opposing party another chance is discretionary,³⁵⁰ but in that case the losing party on the motion may

345. Professor Rosenberg has aptly described the concern for the lack of reliability in determinations of lone decision makers as the "feeling that there is safety in numbers." Rosenberg, *supra* note 230, at 642.

346. Procedural rules and statutes often specifically say that a power is discretionary. *E.g.*, FED. R. CIV. P. 4(h), 6(b). More often discretion is implied by words such as "the court may," "for good cause," or "in the interest of justice." Ten sections of the Federal Rules of Civil Procedure use the word "discretion," but thirty others have been found to be discretionary. Rosenberg, *supra* note 230, at 655. Professor Rosenberg warns, however: "Legislatures and rule-drafters scatter the term about with cheery casualness. Even the appellate-court opinions are not remarkably helpful or clear, because they overwork the word or phrase and underwork their opportunity to communicate their reasons or reasoning." *Id.* at 653.

347. Long ago Sir Henry Maine observed that "[s]o great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." H. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1914).

348. For purposes of the rule of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), all substantive law questions, but only some procedural ones, are considered outcome determinative. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

349. In reviewing *grants* of motions to dismiss for failure to state a claim for relief, for summary judgment, for directed verdict, or for judgment notwithstanding the verdict, appellate courts normally exercise independent judgment. *See, e.g., Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-61 (1970) (summary judgment); *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322-26 (1967) (judgment notwithstanding the verdict); *Surrowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (motion to dismiss).

350. For example, in its discretion a court may deny or delay summary judgment under FED. R. CIV. P. 56(f), order a new trial in lieu of directing entry of judgment under FED. R. CIV. P. 50(b), or specify in an order for dismissal under FED. R. CIV. P. 41(b) that it does not operate as an

still prevail at the subsequent or new trial. Despite these justifications for independent review of procedural mixed questions, many such questions are still inherently unsuitable for free review and, therefore, for the law classification. For example, mixed questions concerning requests for extensions of time to file an answer or to make motions or for court continuances or recesses involve mere housekeeping choices with insignificant effects on case outcomes. Other mixed questions are unsuitable because they are quite fact specific, dependent on a number of variables, or dependent on an intimate "feel" for all the circumstances of the case that only a trial level fact finder has.³⁵¹ Consequently, such procedural questions may not be amenable to appellate declaration of specific legal rules of decision or to the making of independent appellate judgments.

Not even all potentially outcome-affecting procedural determinations are deemed questions of law. The grant or denial of leave to amend a pleading, for example, is discretionary, despite the potentially harsh impact of an unreasonable denial thereof.³⁵² Under the common law and the Field Code, amendment was not a favorite of the judges and often was denied unfairly.³⁵³ Federal Rule of Civil Procedure 15 changed this bias by requiring that "leave shall be freely given when justice so requires." Although leave to amend remains discretionary, its denial is circumscribed by various rules of decision³⁵⁴ and is also supervised more carefully on appeal.³⁵⁵ Thus, the law-declaring and supervisory powers control this important but essentially discretionary determination.

Although decisions regarding leave to amend are inherently discretionary, the companion determination that an amendment will relate back to the date of filing the original pleading is a question of law.³⁵⁶ This difference in treatment suggests that additional factors are relevant to the classification of a particular mixed procedural question as one of law or discretion. A relation back determination requires the application of a few, easily ascertained historical facts to a simple statutory standard,³⁵⁷ an exercise in logic, experience, and precedent that appellate courts can review readily. Leave to amend, however, may involve the

adjudication on the merits. *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217 (1947) (trial court's discretion to grant new trial or voluntary dismissal in lieu of judgment notwithstanding the verdict); *Williams v. Howard Johnson's, Inc.* 323 F.2d 102, 104-05 (4th Cir. 1963) (discretion to deny technically appropriate motion for summary judgment); *Safeway Stores v. Fannan*, 308 F.2d 94, 99 (9th Cir. 1962) (allowing dismissal without prejudice in the face of a motion for directed verdict); *Eastman Kodak Co. v. Guasti*, 68 Ill. App. 3d 484, 487, 386 N.E.2d 291, 293 (1st Dist. 1979) (discretion to set aside default judgment). Such rulings are obviously discretionary because ordinarily they require *inter alia* a judgment concerning whether the opposing party's pre-motion conduct was unworthy of a second chance. See *infra* note 359. Moreover, the decision on the merits is postponed rather than concluded.

351. Rosenberg, *supra* note 230, at 663. For a more particularized discussion of these factors and their effect on the classification of a procedural question as discretionary, see *infra* notes 356-60 and accompanying text.

352. *Foman v. Davis*, 371 U.S. 178 (1962).

353. Donnici, *The Amendment of Pleadings—A Study of the Operation of Judicial Discretion In the Federal Courts*, 37 S. CAL. L. REV. 529 (1964).

354. See *supra* note 346.

355. E.g., *Foman v. Davis*, 371 U.S. 178, 182 (1962).

356. *Tiller v. Atlantic Coast Line R.R.*, 323 U.S. 574 (1945); *Watts v. State*, 115 Ariz. 545, 566 P.2d 693 (1977).

357. Under FED. R. CIV. P. 15(c), the question is whether the claim or defense asserted in the

assessment and balancing of a number of factors or considerations,³⁵⁸ some of which are subjective and require a special feel for the facts of the case or are based on critical facts or circumstances imperfectly conveyed by the record.³⁵⁹ Consequently, free review thereof would often require substantial appellate effort and the reviewing court would often be at a relative decisional disadvantage to the trial level decision maker.³⁶⁰ In any event, full review by an appellate court would produce a fact specific result that could easily be distinguished. For all these reasons, leave to amend is discretionary, even though the discretion is more carefully circumscribed today.

Relation back and leave to amend are at relatively opposite points on the law/discretion spectrum. The former requires a simple, objective determination; the latter a complex, partially subjective one based on a multitude of factors. Such opposites may not indicate how to classify closer questions, but they do reveal why many similarly paradigmatic procedural questions are readily classified as legal or discretionary.³⁶¹

amended pleading arose out of the same transaction or occurrence set forth in the original pleading. In most cases the court need only read the two pleadings to make the determination.

358. F. JAMES & G. HAZARD, *supra* note 1, at § 4.13.

359. *Id.* The court must consider *inter alia* why the subject matter of the amendment was not included in the original pleading or offered sooner than it was. The reasons for the omission or delay run all the way from inadvertence or excusable neglect to affirmative bad faith. Other such dispensational requests or motions require similar subjective assessments. See Rosenberg, *supra* note 230, at 663 (discussing discretionary allowances of jury trial after a tardy § request under FED. R. CIV. P. 39(b)). In such cases the court may also consider other incidents in the proceedings bearing on the moving party's good faith or lack thereof. Cf. Link v. Wabash R.R., 370 U.S. 626 (1962) (discretionary dismissal for party's failure to attend pretrial conference properly based in part on party's previous pattern of using delay tactics).

360. Rosenberg, *supra* note 230, at 660-63. For other illustrations of discretionary determinations in which the record imperfectly conveys the relevant facts and the appellate court is at a decisional disadvantage, see Atchison, Topeka & Santa Fe Ry. v. Barrett, 246 F.2d 846, 849 (9th Cir. 1957) (affirming the trial judge's denial of a motion to vacate a personal injury award for a faked injury because he had seen plaintiff and the allegedly impeaching motion pictures submitted after the trial and was not convinced that plaintiff had perpetrated a fraud); Pacific Gas & Elec. Co. v. Spencer, 181 Cal. App. 171, 173, 5 Cal. Rptr. 75, 77 (Dist. Ct. App. 1960) (affirming refusal to grant a new trial for prejudicial misconduct of plaintiff's lawyer in his summation to the jury because the trial judge had observed the jury and its stable reaction to the attorney's inflammatory harangue); Schuttler v. Reinhardt, 17 N.J. Super. 480, 484-85, 86 A.2d 438, 440-41 (App. Div. 1952) (on motion for mistrial the trial judge had a better view of whether a weeping, injured female party improperly appealed to the jury's emotions).

361. Questions classified as legal include the following: Whether evidence is protected by the work product and attorney-client privileges, Upjohn v. United States, 449 U.S. 383 (1981); whether there is an adequate showing of good cause to examine a party physically, Schlagenhauf v. Holder, 379 U.S. 104 (1964); whether evidence is hearsay or qualifies under an exception to the hearsay rules, Mutual Life Ins. Co. v. Hillman, 145 U.S. 285 (1892); United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976); whether a rule of procedure is outcome determinative for *Erie* purposes, Byrd v. Blue Ridge Rural Elec. Coop., Inc., 356 U.S. 525 (1958); and whether an act falls within the terms of a long-arm statute, Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Among the many discretionary determinations explainable in terms of the distinctions set forth above are the following listed by Professor Rosenberg:

In proceedings before trial, discretion arises as an issue in connection with changing venue; granting extensions of time; allowing parties to amend; permitting intervention or impleader; holding pretrial conferences; passing upon a late demand for a jury trial; and a host of other matters. During the trial, discretion comes into play with regard to the judge's control of the selection of the jury, the attorney's opening statements, and countless aspects of trial administration. He decides on the sequence of proof, whether demonstrative evidence may be introduced and whether sensory evidence may be exhibited to the

Locating the middle ground is of course more difficult. Some authorities say that a determination is discretionary if the number of relevant considerations is too numerous to frame workable rules of decision or general legal principles directing and narrowing the exercise of the discretion.³⁶² Leave to amend, for example, involves three basic considerations: whether the party offering the amendment has been diligent in locating and disclosing the new facts,³⁶³ whether the amendment is particularly important or drastic,³⁶⁴ and whether or to what extent the new facts will prejudice the opposing party.³⁶⁵ Although any one of these considerations might fall on the "legal" side of the spectrum on the basis of the ease with which it can be reviewed on appeal, it must be compared with, or balanced against, the other two. This final weighing of nonquantifiable factors often makes it difficult, if not impossible, to develop general legal principles wisely guiding and controlling the determination. For this reason a decision regarding leave to amend must be discretionary. Although predictability and appellate control are lost, there is a gain in flexibility which is the essence of discretion:

Flexibility permits more compassionate and more sensitive responses to differences which ought to count in applying legal norms, but which get buried in the gross and rounded-off language of rules that are directed at wholesale problems instead of particular disputes. Discretion in this sense allows the individualization of law and permits justice at times to be hand-made instead of mass-produced.³⁶⁶

Multifactorial determinations are not per se discretionary, however. Rule 19, which governs necessary and indispensable parties, specifically requires the assessment and comparison of a number of factors,³⁶⁷ but the final determination is nonetheless subject to free appellate review.³⁶⁸ Before the adoption of the

jury. He has discretion, as we have seen, in regard to ordering special verdicts or interrogatories. When the occasion arises, he may grant a mistrial, or refuse to do so. He applies the rules of evidence, at times according to fixed criteria of admissibility, at other times in his discretion.

Rosenberg, *supra* note 230, at 657-58. For a discussion of the exercise of discretion in allowing voluntary dismissals, see Note, *Exercise of Discretion in Permitting Dismissals Without Prejudice Under Federal Rule 41(a)*, 54 COLUM. L. REV. 616 (1954); Note, *Voluntary Dismissals by Order of Court—Federal Rules of Civil Procedure Rule 41(a)(2) and Judicial Discretion*, 48 NOTRE DAME LAW. 446 (1972).

362. In *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 71 (2d Cir. 1967), Judge Friendly offered the following reasons for appellate deference to the trial judge's exercise of discretion: "[H]is observation of the witnesses, his superior opportunity to get the 'feel of the case' . . . and the impracticality of framing a rule of decision where many disparate factors must be weighed . . ." (emphasis added); see also *Palliser v. Home Tel. Co.*, 170 Ala. 341, 345, 54 So. 499, 500 (1911) ("A judicial act is said to lie in discretion when there are no fixed principles by which its correctness may be determined.").

363. *F. JAMES & G. HAZARD*, *supra* note 1, at § 4.11; *Donnici*, *supra* note 353, at 535-40.

364. *Donnici*, *supra* note 353, at 544-47.

365. *Id.* at 534. *Donnici* also suggests another factor—the later an amendment is offered, the more likely it will be rejected. *Id.* at 540. That factor, however, may only be a surrogate for other considerations, e.g., whether the opposing party will be prejudiced or surprised by the amendment or whether the amendment is offered in bad faith.

366. Rosenberg, *supra* note 230, at 642.

367. One set of factors determines when a person should be joined, FED. R. CIV. P. 19(a); another set determines whether the action may proceed if that party cannot be joined, *id.* 19(b).

368. *Cf. Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968) (free review of ruling that a party is indispensable).

Federal Rules, there were historical reasons for the free review of this question.³⁶⁹ Today, the potentially harsh impact of an incorrect determination³⁷⁰ and the objective nature of all the factors to be assessed and weighed also support its free review on appeal. For similar reasons, potentially outcome determinative trial level choices of law, which also often require a balancing of objective factors,³⁷¹ are questions of law.³⁷² By contrast, permissive intervention under Rule 24(b), another multifactored determination, is by its own terms discretionary. But an incorrect decision regarding permissive intervention, while perhaps inconvenient to the losing party, is not ordinarily outcome determinative. Moreover, one of the listed statutory factors in Rule 26(b)—“whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties”—may require a special feel for the case and could raise subjective questions about the motives or diligence of the would-be intervenor.³⁷³

Although a determination such as permissive intervention may be discretionary, assessing one or more of its component factors need not be. Deciding, for example, under Rule 24(b) whether the “applicant’s claim or defense and the main action have a question of law or fact in common”³⁷⁴ is a straightforward, objective determination amenable to free review. Analogously, some procedures like summary judgment and impleader, which are often called discretionary,³⁷⁵ are mostly legal. Thus, the principal determination on a motion for summary judgment—whether under Rule 56(c) “there is no genuine issue as to any material fact”—is subject to free review.³⁷⁶ Admittedly, the trial judge’s power under Rule 56(f) to deny or to delay summary judgment when the opposing

369. Originally, in actions at law the question of indispensability turned on whether the rights involved were joint or several, an issue that was a question of law. See generally Reed, *Compulsory Joinder in Civil Actions*, 55 MICH. L. REV. 327 (1957) (discussing the history of compulsory joinder rules). Equity employed a flexible test much like the one set forth today in FED. R. CIV. P. 19, but the chancellor’s determination was freely reviewed on appeal. Cf. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 13.8, at 679 (2d ed. 1977) (determinations of chancellor, except those involving testimonial evidence and considerations of witness credibility, received little or no deference on appeal).

370. A wrongful determination may result in the dismissal of the case or its continuation to the detriment of one of the parties or of the person who should have been joined. FED. R. CIV. P. 19. Of course the potential for harsh results is not conclusive of the scope of appellate review, as noted in the example of leave to amend a complaint. See *supra* notes 363-65 and accompanying text. Although trial level discretion regarding leave to amend questions is somewhat circumscribed, the questions nonetheless are classified as discretionary. *Id.*

371. The choice of law determination normally involves a variety of factors, which include *inter alia* the territorial nexus between the acts involved and the forum state, the relationship of the parties to the forum state, and the forum state’s interest in applying its law to the transaction or occurrence. *Bernhard v. Harrah’s Club*, 16 Cal. 3d 313, 323-24, 546 P.2d 719, 725-26, 128 Cal. Rptr. 215, 221-22, cert. denied, 429 U.S. 859 (1976).

372. *Id.*

373. *E.g.*, *Janousek v. Wells*, 303 F.2d 118 (8th Cir. 1962) (untimely application for intervention rejected under circumstances suggesting that its sole purpose was further delay of the trial).

374. A determination that a permissive joinder of parties is proper, which determination also requires the presence of common questions of law or fact, is freely reviewable. See *Akely v. Kinnicutt*, 238 N.Y. 466, 144 N.E. 682 (1924) (discussing permissive joinder of parties, noting that common questions of law and fact must be present); 6 C. WRIGHT & A. MILLER, *supra* note 53, § 1659, at 317 (discussing generally the discretion of the court in allowing third-party claims).

375. *Farmers & Merchants Mut. Fire Ins. Co. v. Pulliam*, 481 F.2d 670 (10th Cir. 1973) (impleader); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders*, 424 F.2d 25 (1st Cir. 1970) (summary judgment); *Southern Ry. v. Fox*, 339 F.2d 560 (5th Cir. 1964) (impleader).

376. *E.g.*, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159-61 (1970).

party is unable to present affidavits showing a genuine issue of material fact is discretionary,³⁷⁷ but that is a relatively rare antecedent determination, in effect, a discretionary tail occasionally wagging what is essentially a legal dog. Similarly, a trial court has very little discretion to dismiss a timely³⁷⁸ and proper third-party complaint.³⁷⁹ In its discretion the court may order a separate trial under Rule 42(b) if the third-party action would confuse or prejudice the original one,³⁸⁰ but this option is available for every kind of permissive joinder³⁸¹ and hardly amounts to a discretionary trial level veto power over the basic joinder right. Once again, the legal nature of the basic question is not changed by the existence of an antecedent, exceptional discretionary power.

In short, it may be more accurate to divide certain complex procedural determinations into their component parts and to characterize the scope of review of the parts separately. Such a division has already occurred in some statutes.³⁸² Under the Federal Rules of Evidence, for example, relevancy, as defined by Rule 401, is a narrow, objective determination readily subject to free appellate review.³⁸³ Under Rule 403, however, there is a discretionary power to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."³⁸⁴ Prior to this statutory division, relevancy, or "legal relevancy" as it sometimes was called, was classified as a discretionary matter,³⁸⁵ to the confusion of those who failed to recognize the separability of the issues of relevancy from the issue whether the probative value of relevant evidence was outweighed by other factors.

Designating a procedural determination as discretionary results in a limited scope of review on appeal, few reversals, a reduced number of appeals, and, therefore, trial level hegemony over the question. The designation, however, is

377. *Williams v. Howard Johnson's, Inc.*, 323 F.2d 102, 104-05 (4th Cir. 1963).

378. "Timely" means a third-party complaint filed not later than ten days after the service of the answer. FED. R. CIV. P. 14(a). Thereafter, to file a third-party complaint, defendant must obtain leave of court, which leave is discretionary.

379. In a personal injury action against an employer for the negligence of its driver, the employer's third-party complaint against the driver was dismissed because the employer's insurance policy presumably covered the employee and the third-party action apparently was designed to evoke a false jury sympathy for the employee. *Goodhart v. United States Lines Co.*, 26 F.R.D. 163 (S.D.N.Y. 1960); *accord* *List v. Roto-Broil Corp.*, 40 F.R.D. 31 (M.D. Pa. 1966). Even this rare instance of a discretionary dismissal is questionable because the court could have achieved an equivalent result by ordering a separate trial under FED. R. CIV. P. 42(b).

380. 6 C. WRIGHT & A. MILLER, *supra* note 53, § 1443, at 210-15.

381. F. JAMES & G. HAZARD, *supra* note 1, § 9.1, at 462.

382. The divisions between FED. R. CIV. P. 56(c) and 56(f) text accompanying have already been noted. *See supra* text accompanying notes 376-77. A similar division occurs in FED. R. CIV. P. 20(a) and 20(b). Section (a) sets a legal standard for permissive party joinder; § (b) authorizes a discretionary separation for trial of parties properly joined under § (a).

383. FED. R. EVID. 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. J. THAYER, *supra* note 138, at 269; Dolan, *Rule 403: The Prejudice Rule in Evidence*, 49 S. CAL. L. REV. 220, 267 (1976).

384. FED. R. EVID. 403.

385. This history is discussed in the first edition of C. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 152, at 320-21 (1954).

applied primarily to the less important questions. The more important procedural questions tend to be classified as questions of law. This turnabout from the merits, in which only a few, supremely important mixed questions are subject to free review, is understandable,³⁸⁶ though arguably somewhat inconsistent and consumptive of precious appellate time. Fortunately, only a small portion of all procedural rulings are actually appealed,³⁸⁷ and most of these are disposed of by the intermediate appellate courts. Thus, the highest courts may not yet perceive a need to narrow or restrict the scope of review of these mixed procedural questions to save time.

VI. CONCLUSION

The foregoing study shows, perhaps not unexpectedly, that adjudicative authority is divided between the trial and appellate levels along rational, if somewhat random, historically evolving lines and that the principal areas of contention between the two levels have remained relatively constant. The source of most contention is the process of law application, which, on questions going to the merits, is now committed principally to the discretion of the fact finders. Of the three traditional exceptions to this commitment—constitutional facts, so-called questions of law, and ultimate fact-findings by trial judges—only the first, principally for substantive reasons, is flourishing. Finally, although the appellate courts could have employed their law-making power to offset their loss in adjudicative authority, thus far they have failed to do so.

Appellate courts, however, have surrendered none of their traditional authority over trial level procedural and evidentiary determinations. Indeed, in a few instances they even have foresworn their historical propensity to treat some discretionary procedural determinations as virtually unreviewable.³⁸⁸ Moreover, appellate courts tend to classify the most important of these determinations—those that could terminate or affect the outcome of the litigation—as freely reviewable questions of law. Thus, the appellate level has retained the lion's share of procedural adjudicative authority and shows no inclination to surrender it. Nevertheless, under the pressure of their swollen dockets the appellate courts will no doubt be compelled to give shorter shrift to minor or less hotly contested procedural errors.

The growing demands on the time of appellate judges and their consequent need to limit their areas of responsibility are the most significant reasons for the growing shift in power from the appellate courts to trial level decision makers. This shift in power inevitably will lead to greater uniformity in appellate treat-

386. See *supra* text accompanying notes 345-47.

387. One reason for this small number of appeals is that many questionable procedural rulings are annulled by subsequent case developments such as settlement or a jury verdict for the party aggrieved by the error. Furthermore, attorneys may regard appeals asserting a spate of procedural errors as unpromising if there also are not substantive law questions. Even if there are substantive assignments of error, if these assignments fail, the remaining procedural issues sometimes will be disposed of summarily by general language to the effect that other assertions of error are without merit.

388. See *supra* note 36.

ment of the various fact finders, even though appellate opinions will doubtlessly continue to recite varying degrees of deference in justification of particular results. The growing uniformity may finally allow legal scholarship to concentrate more on the process of adjudication itself than on its separate systems and the historical and institutional differences among them. Academic attempts to integrate the courses in civil and criminal procedure and administrative law and to treat these heretofore separate subjects as facets of a single process reflect this growing uniformity.³⁸⁹ As a result, comparative procedural studies, cross-fertilization among procedural systems, and growing uniformity in approach are a much greater possibility than before.

389. See, e.g., R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* iii-vi (1979).

