LAW AND EQUITY ON APPEAL

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Most lawyers know that the Federal Rules of Civil Procedure merged the divergent trial procedures of the common law and of equity, but fewer are familiar with the development of federal appellate procedure. Here too there is a story of the merger of two distinct systems. At common law, a reviewing court examined the record for errors of law after the final trial judgment. In the equity tradition, an appeal was a rehearing of the law and the facts that aimed at achieving justice and did not need to await a final judgment. Unlike the story of federal trial procedure, in which we can identify a date of merger (1938, with the Federal Rules) and a winning side (equity), the story of federal appellate procedure laid out in this Article reveals a merger that occurred fitfully over two centuries and yielded a blended system that incorporates important aspects of both traditions.

In addition to revealing the complicated roots and hybrid character of current federal appellate practice, this Article aims to show that an appreciation of the history can explain some current pressures in the system and open our minds to the possibility of reform. Some odd developments in the appellate courts can be understood as suppressed features of equity practice reasserting themselves. With regard to the potential reforms, the suggestion is not that we resurrect the bifurcated procedure of the past. Nonetheless, there are circumstances in which today's federal courts could benefit from recovering features of the equitable model of appeal.

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INTRODUCTION

Something seems to be out of whack in the federal appellate system. Extremely consequential questions of national policy on matters like immigration and abortion are being decided through emergency motions on the Supreme Court's "shadow docket."[1] In other instances, the Court has added cases to its regular docket through the formerly rare mechanism of "certiorari before judgment," in which the Court takes a case straight from a district court, skipping over the court of appeals.[2] The mechanism of certiorari before judgment has been used more than twenty times in the last few years after being used only a few times in the preceding three decades.[3] These changes in the Court's practices are partly the product of changes in the behavior of the lower courts, particularly the proliferation of nationwide injunctions through which district judges set aside national policies for everyone everywhere all at once. Leaders in the Biden Department of Justice, like those in the Trump Administration before them, have criticized these district judges for overstepping the proper role of a trial court.[4] Joining the chorus, Justice Elena Kagan said in a public

1. See, e.g., Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting) (criticizing "'shadow-docket' decisions [that] may depart from the usual principles of appellate process").

2. Stephen I. Vladeck, A Court of First View, 138 Harv. L. Rev. (forthcoming 2024) (manuscript at 3, 17–18), https://ssrn.com/abstract=4726492 [https://perma.cc/J6ZF-5Y48].

3. Id. (manuscript at 18); e.g., Biden v. Nebraska, 143 S. Ct. 2355, 2365 (2023).

4. E.g., Application for a Stay of the Judgment at 5, United States v. Texas, 143 S. Ct. 51 (2022) (No. 22A17), 2022 U.S. S. CT. BRIEFS LEXIS 3000 (stating that suits by states seeking nationwide relief "allow single district judges to dictate national policy, nullifying decisions by other courts and forcing agencies to abruptly reverse course while seeking review of novel and contestable holdings"); see also William P. Barr, U.S. Att'y Gen., Remarks to the American Law Institute on Nationwide Injunctions (May 21, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-american-law-institute-nationwide [https://perma.cc/X4F2-6MDL] ("Giving a single district judge such outsized power is irreconcilable with the structure of our judicial system.").

appearance that "[i]t just can't be right that one district judge can stop a nationwide policy in its tracks and leave it stopped for the years that it takes to go through the normal process."[5]

Yet while one criticism is that district courts are acting too much like national policy setters, thereby mucking up the normal appellate process, another criticism is that the Supreme Court is acting too much like a trial court. In April 2021, a United States Senate committee held a hearing on "Supreme Court Fact-Finding and the Distortion of American Democracy."[6] Senator Sheldon Whitehouse, the hearing's organizer, led off with a fiery statement in which he condemned the Supreme Court's handling of facts in several high-profile cases, particularly the *Shelby County* decision limiting the Voting Rights Act and the campaign-finance blockbuster *Citizens United*.[7] According to Senator Whitehouse, the outcomes in those cases turned on factual findings about matters such as whether the expenditures at issue in *Citizens United* posed a risk of corruption and, in *Shelby County*, whether conditions in the South and other jurisdictions had changed such that the Voting Rights Act's preclearance rules were no longer needed.[8] Not only were the Court's conclusions on those points "provably wrong,"[9] but, Senator Whitehouse said, the Court had overstepped its proper appellate role in making factual findings in the course of reaching its decisions.[10]

Evaluating whether things are amiss at either the top or the bottom of the appellate hierarchy requires a conception of the proper roles of different courts. Like many others, Senator Whitehouse refers to the proper role of appellate courts and their relationship to trial courts as if the roles were obvious. But we can improve our understanding of current happenings, and the range of potential responses to them, if we expand our view and question some assumptions about the "proper" or

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5. Josh Gerstein, Kagan Repeats Warning that Supreme Court Is Damaging Its Legitimacy, Politico (Sept. 14, 2022), https://www.politico.com/news/2022/09/14/kagan-supreme-court-legitimacy-00056766 [https://perma.cc/YHP6-PQB7] (internal quotation marks omitted).

6. Supreme Court Fact-Finding and the Distortion of American Democracy: Hearing Before the Subcomm. on Fed. Cts., Oversight, Agency Action, and Fed. Rts. of the S. Comm. on the Judiciary, 117th Cong. (2021), https://www.judiciary.senate.gov/committee-activity/hearings/supreme-court-fact-finding-and-the-distortion-of-american-democracy (on file with the *Columbia Law Review*) [hereinafter Fact-Finding Hearing].

7. Id. at 16:30 (statement of Sen. Whitehouse); see also Shelby County v. Holder, 570 U.S. 529 (2013); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

8. Fact-Finding Hearing, supra note 6, at 19:00, 23:45 (statement of Sen. Whitehouse).

9. Id. at 24:20.

10. See id. at 16:57 (stating that "[a]ppellate courts aren't supposed to do factfinding . . . [except for a] limited, limited appellate role"); id. at 26:25 (referring to the Supreme Court's "sacrifice[]" of a "rule against appellate fact-finding"). Senator Whitehouse expanded on his criticisms, again invoking the traditional appellate role, in a subsequent article. See Sheldon Whitehouse, Knights-Errant: The Roberts Court and Erroneous Fact-Finding, 84 Ohio St. L.J. 837, 842–43, 883 (2023).

"traditional" appellate function. That is not because history should necessarily confine us; it might instead broaden our horizons.

This Article engages in such an investigation of the history of appellate procedure. Things are more complicated than one might guess from facile invocations of the appellate role. If one looks into the past, one finds two very different traditions of appellate review, one from the common law and one from equity. The distinction between law and equity is well known when it comes to trial litigation: The common law had juries and damages, while equity had the chancellor and injunctions.[11] But we used to have two separate systems for appellate review too.[12] At common law, after the jury found the facts, the court entered a final judgment upon them, and then (and only then) the higher court reviewed the record for errors of law, using the writ of error.[13] In the other tradition, that of equity, an appeal was a rehearing of the law *and* the facts aimed at achieving justice, and the appeal did not need to wait until a final judgment.[14] One of our best early jurists, Justice James Wilson, concluded that the Constitution entrenched these divergent practices, such that the Supreme Court was required to engage in a wide and deep review of the facts in equity cases.[15] Wilson was in the minority,[16] but the dispute should warn us away from easy invocations of *the* traditional appellate role.

Widening the lens beyond appeals for a moment, an important recent development is the revival of interest in the doctrines and practices traditionally associated with courts of equity. For the most part, the interest has centered on certain bodies of substantive law associated with equity (e.g., the law of fiduciaries)[17] or remedies characteristic of equity.[18] There also has been some interest in expanding the reach of, or at least recovering the memory of, certain aspects of equity's characteristic trial procedure. For example, Professor Samuel Bray has argued for a new interpretation of the Seventh Amendment jury right that would take some categories of litigation away from juries because the cases were traditionally part of equity's jury-free jurisdiction.[19] Professor Amalia Kessler has argued that many of the ills of our current system of civil justice

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11. Any 1L Civil Procedure text will explain. E.g., Richard D. Freer, Wendy Collins Perdue & Robin J. Effron, Civil Procedure: Cases, Materials, and Questions 16–18 (9th ed. 2024).

12. See infra Part I (describing these differences in detail).

13. See infra note 118 and accompanying text.

14. See infra notes 73–76 and accompanying text.

15. See infra notes 242–244 and accompanying text.

16. See infra notes 242–244 and accompanying text.

17. E.g., Henry E. Smith, Why Fiduciary Law Is Equitable, *in* Philosophical Foundations of Fiduciary Law 261, 261 (Andrew S. Gold & Paul B. Miller eds., 2014).

18. E.g., Samuel L. Bray, The System of Equitable Remedies, 63 UCLA L. Rev. 530 (2016); Caprice L. Roberts, Remedies, Equity & *Erie*, 52 Akron L. Rev. 493 (2018).

19. Samuel L. Bray, Equity, Law, and the Seventh Amendment, 100 Tex. L. Rev. 467, 497 (2022) [hereinafter Bray, Seventh Amendment].

result from the thoughtless mixture of equitable tools like liberal discovery and joinder on the one hand with the adversarial, party-driven model of the common law on the other.[20] Improvements could come, she argues, from reviving some of the quasi-inquisitorial, court-controlled features of the equity model.[21] In the Supreme Court, the interest in equity has mostly concerned remedies, with some Justices deploying a form of "equity originalism" that in practice has served to restrict injunctive remedies in public-law cases on the ground that they lack a footing in Founding-era English practice.[22] Other Justices have argued for a more "dynamic" approach to injunctive remedies, drawing on the remedial flexibility associated with equity.[23]

Neglected so far in the new debates over old equity is the role that the equity tradition might play in advancing our understanding of modern appellate procedure and, possibly, improving that system's workings. It is time that the revival of equity enriched the law of appellate procedure.

In an effort to advance our understanding, Part I of the Article reveals the origins of modern federal appellate procedure and the choices that shaped it. When it comes to trial procedure, it is routine to speak of the Federal Rules of Civil Procedure of 1938 as merging law and equity, with equity prevailing.[24] When it comes to appeals, the story is less known and more complicated. There is no equivalent to the civil rules' epoch-marking opening declaration that the new rules "govern . . . all suits of a civil nature whether [formerly] cognizable as cases at law or in equity."[25] Instead, through a series of decisions spread across two centuries, a blended appellate system has emerged: one that partly follows the model of the common law but in some ways retains the spirit and forms of the equitable

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20. See Amalia D. Kessler, Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial, 90 Cornell L. Rev. 1181, 1251–54 (2005) [hereinafter Kessler, Our Inquisitorial Tradition].

21. Id. at 1270, 1274–75.

22. E.g., Whole Woman's Health v. Jackson, 142 S. Ct. 522, 535 (2021) (declining to enjoin unnamed private persons from enforcing a state law because the "equitable powers of federal courts are limited by historical practice"); Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, 527 U.S. 308, 327–33 (1999) (noting that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence"); see also James E. Pfander & Jacob P. Wentzel, The Common Law Origins of *Ex Parte Young*, 72 Stan. L. Rev. 1269, 1357 (2020) (describing and criticizing this development); Asaf Raz, The Original Meaning of Equity, 102 Wash. U. L. Rev. (forthcoming 2024) https://ssrn.com/abstract=4800000 [https://perma.cc/YSN9-TWAK] (manuscript at 12–19) (developing an originalist account of equity that is not static).

23. See, e.g., *Grupo Mexicano*, 527 U.S. at 336–38 (Ginsburg, J., concurring in part and dissenting in part).

24. See infra notes 30–34 and accompanying text. As the discussion there acknowledges, the common understanding about trial-level merger neglects some nuances.

25. Fed. R. Civ. P. 1 (1938).

appeal. There is a certain functional logic to the mixture, albeit with some path dependency thrown in too.

Having illuminated the current system's blended character in Part I, the Article proceeds in Part II to show that an appreciation of equity's appellate system can explain some current pressures in the judicial system, shed light on novel proposals, and suggest some potential improvements. Calls for more opportunities for interlocutory appeal, for example, reflect the logic of equity reasserting itself in a respect in which the common law submerged it.[26] And the federal courts would likely benefit from such reemergence in other aspects of their procedure too, such as through more searching appellate review of high-stakes decisions like national injunctions.[27] To be very clear, however, Part II does not call for resurrecting the bifurcated appellate procedure of ages past. Many old practices and distinctions have been abolished for good reason.[28] *Bleak House*, with its interminable, ruinous Chancery case of *Jarndyce v. Jarndyce*, is not a how-to guide for legal reformers.[29] Nonetheless, there are some circumstances in which the equitable model of appeal—review of the facts, reweighing of the equities, tolerance of interlocutory appeals, an orientation toward concluding a matter with full justice—still makes sense today. That is, there are good *functional* reasons for nonantiquarians to appreciate aspects of the equitable model of appeal. One way of using history is to fix meaning or close off possibilities, but in this instance history instead illustrates the range of possibilities open before us.

I. THE CURRENT SYSTEM'S BLENDED MERGER AND HOW IT GOT THAT WAY

The 1938 Federal Rules of Civil Procedure famously unified the trial procedures of law and equity, providing that the new rules governed "all suits of a civil nature whether cognizable as cases at law or in equity" and that henceforth there would be only "one form of action to be known as a 'civil action.'"[30] So solid is the fusion of law and equity that the rulemakers'

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26. See infra section II.B.

27. See infra section II.C.

28. For example, have you ever heard of the old appellate procedure of "summons and severance"? If not, count yourself lucky. Rule 74 of the 1938 Federal Rules of Civil Procedure abolished it, and we have never looked back. See Fed. R. App. P. 3 advisory committee's note on subdiv. a (1967) (but I wouldn't, honestly).

29. Charles Dickens, Bleak House 13–15 (Oxford World Classics 1998) (1853).

30. Fed. R. Civ. P. 1, 2 (1938); see also Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283 (1988) (referring to "the merger of law and equity, which was accomplished by the Federal Rules of Civil Procedure"). It is a bit of an oversimplification to say that merger happened only and entirely in 1938. For example, the methods of taking evidence at trial—traditionally, through live testimony at common law and via written depositions in equity—first merged, then unmerged, and finally merged again all well before 1938. See infra text accompanying notes 181–192 (describing these events). Further, it is worth remembering that some states harmonized procedure much earlier than did the federal courts. On movements toward fusion in the states, including through the Field Code,

2007 restyling project dropped Rule 1's express reference to unifying law and equity because "[t]here is no need to carry forward the phrases that initially accomplished the merger."[31]

The merged trial procedure is not a mixture in equal measures. Rather, as set out in Professor Stephen Subrin's classic article, it is generally said that equity procedure "conquered" the common law.[32] Most of the Federal Rules of Civil Procedure can be traced to procedures of equity. This is true of the joinder rules and discovery provisions, for example, and more generally of the Rules' emphasis on pretrial proceedings over jury trial.[33] It is true as well of the Rules' philosophical orientation toward judicial discretion.[34]

Subrin's article, like the Federal Rules of Civil Procedure it addresses, almost entirely concerns trial procedure, not appeals. What about modern federal appellate procedure—does it reflect the triumph of equity as well, or is it something else?

As with trial procedure, federal appellate practice has largely merged the two old systems of law and equity into one track.[35] Indeed, the fusion is more complete in the sense that appellate procedure has no lingering distinction so glaring as the jury trial, which is the largest remaining difference between law and equity in trial procedure, a distinction that is constitutionally hardwired into the system.[36] But in the appellate-level merger, neither system clearly prevailed. As the following sections will explain, we have a system of appellate procedure that mixes the traditions in a way that preserves important aspects of each.

The mixed merger of appellate procedure is more complicated than the merger of trial procedure for another reason too, namely that one

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see Amalia D. Kessler, Inventing American Exceptionalism 112–50 (2017) [hereinafter Kessler, Inventing American Exceptionalism]; John H. Langbein, Renée Lettow Lerner & Bruce P. Smith, History of the Common Law: The Development of Anglo-American Legal Institutions 383 (2009); Kellen Funk, The Union of Law and Equity: The United States, 1800–1938, *in* Equity and Law: Fusion and Fission 46, 47 (John C. P. Goldberg, Henry E. Smith & P. G. Turner eds., 2019).

31. Fed. R. Civ. P. 1 advisory committee's note on 2007 Amendment.

32. Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 973 (1987). To be sure, the "conquest" account elides some complications. Before 1938, federal equity had already borrowed some features of the common law, particularly when it came to modes of proof at trial, such that the equity practice that the Rules mostly adopted in 1938 was not the equity practice of centuries past. See Kessler, Our Inquisitorial Tradition, supra note 20, at 1225; Langbein et al., supra note 30, at 390.

33. See Subrin, supra note 32, at 922–25.

34. Id. at 922–25, 1001.

35. There is of course admiralty practice too. Like equity, it used the appeal. See infra note 51. For simplicity, this Article will refer mostly to law and equity, with the understanding that admiralty usually mirrors the latter when it comes to appellate review.

36. See U.S. Const. amend. VII (preserving the right to jury trial "[i]n Suits at common law").

cannot so readily identify the merger with a single event like the promulgation of the Federal Rules of Civil Procedure in 1938. One might look to the 1967 promulgation of the Federal Rules of Appellate Procedure as such an event, but that would be a false cognate. The appellate rules did not play a large role in fusing the distinct appellate procedures of law and equity, and they will appear very rarely in the pages that follow. The appellate rules do not have any pretensions toward anything so dramatic as the declarations in the original versions of Rules 1 and 2 of the Federal Rules of Civil Procedure that banished the forms of action and the distinction between law and equity. They instead largely address matters that might be described as procedure in the narrow sense: deadlines, required contents of briefs, and the like.[37] The defining features of today's mixed federal appellate procedure are instead the result of many different enactments and shifts in judicial practices, some going back to the Judiciary Act of 1789 and some coming as recently as 1985, though the events of 1985 were not understood in terms of merger.[38]

The following sections reveal the blended nature of our current system and explain how it came to be. Each section considers one dimension of appellate review (standard of review, timing of review, goals of review, etc.) and explains how our current federal system chose the path of equity or common law, a blend of the two ideal types, or something new.

One venerable rendering of the law–equity divide deserves mention at the outset because it will *not* play a significant role in what follows. That is the contrast, which goes back to antiquity, in which equity provides a flexible, situation-specific corrective to the harshness that may result from strict adherence to general laws.[39] Despite its importance for other purposes, that rendering of the law–equity divide is not very helpful in characterizing our appellate procedure. For one thing, the contrast between rigid generality and flexible specificity has not mapped onto the Anglo-American legal categories of law and equity for centuries at least. Long before merger and even before American independence, equity had been hardening into general rules, and the law was not always without flexibility.[40] Further, although one can feasibly assess whether some aspect

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37. See, e.g., Fed. R. App. P. 28 (governing appellants' briefs).

38. See infra text accompanying notes 211–217 (describing the 1985 amendments to Federal Rule of Civil Procedure 52).

39. See Aristotle, Nicomachean Ethics bk. V, at 142 (Martin Ostwald trans., Bobbs-Merrill Co. 1962) ("And this is the very nature of the equitable, a rectification of law where law falls short by reason of its universality."); 1 Joseph Story, Commentaries on Equity Jurisprudence 4–5 (4th ed. 1846) (discussing this definition of equity).

40. See 3 William Blackstone, Commentaries *433–444 (contrasting the discretionary system of justice that chancellors had foresworn a century before with the contemporary system in which courts of law and equity are "equally artificial systems, founded in the same principles of justice and positive law"); 1 James Kent, Commentaries on American Law 456 (New York, O. Halsted 1826) (observing that "there are now many settled rules of equity

of our appellate practice (such as the timing of review or standards of review) draws more from one historical model of procedure than the other, it is hard to say whether our appellate procedure, as a whole, more embodies rigid generality or instead ameliorative flexibility. If one were forced to choose, the latter probably has the stronger claim. For support, consider that Federal Rule of Appellate Procedure 2 allows suspension of most rules for good cause,[41] that appellate courts may recall their mandates to prevent injustice,[42] and that some norms of appellate procedure are subject to exceptions that, to leave no doubt about their presumed origins, are expressly described as "equitable."[43] At the same time, there is plenty of rigidity in appellate procedure too, such as in some of the rules about the time for filing an appeal.[44] But none of that—neither the case-specific standards nor the unforgiving rules—seems particularly revealing of the character of federal appellate procedure.[45] At the very least, a general orientation toward rigidity or flexibility would not be as diagnostic of the system's character as the features that are addressed in the following sections.

Onward, then, to those defining features of the character of federal appellate procedure.

A. *The Name*

What's in a name? In the case of "appeal," rather a lot of history. It was in no way preordained that "appeal" would become our most common mode of review. History furnished a number of alternatives.

The appeal as a mechanism of reviewing the decision of an inferior court came to England through the Roman legal tradition.[46] Appeals were used within England's hierarchically ordered ecclesiastical court system,

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which require to be moderated by the rules of good conscience, as much as the most rigorous rules of law did before the chancellors interfered on equitable grounds").

41. Fed. R. App. P. 2(a).

42. E.g., Bennett v. Mukasey, 525 F.3d 222, 224 (2d Cir. 2008) (Newman, J., in chambers) (reinstating petition to reopen removal proceedings and recalling mandate because it would be "unfair to penalize the client" for his lawyer's neglect of obligations).

43. E.g., Staley v. Harris County, 485 F.3d 305, 310–12 (5th Cir. 2007) (considering whether the "equities" of the case justified the "extraordinary remedy of vacatur" (emphasis omitted) (internal quotation marks omitted) (quoting U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 26 (1994))).

44. E.g., Bowles v. Russell, 551 U.S. 205, 214 (2007) (deeming a deadline jurisdictional and not waivable for excusable neglect).

45. But see Joseph J. Gavin, Comment, The Subtle Birth of Activism: The Federal Rules of Appellate Procedure, 2004 Mich. St. L. Rev. 1101, 1122–24 (describing the Federal Rules of Appellate procedure as embodying equity's discretion and promoting judicial activism).

46. See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327–29 (1796) (opinion of Ellsworth, C.J.) (noting the civil law roots of the appeal); Mary Sarah Bilder, The Origin of the Appeal in America, 48 Hastings L.J. 913, 923–42 (1997) [hereinafter Bilder, The Origin of the Appeal in America] (describing the appeal's origins and early development).

which had a broad jurisdiction over many topics considered secular today, such as family law and probate.[47] "*Appellatio*," Sir Edward Coke accordingly wrote in the *Institutes*, "is a removing of a cause in any ecclesiastical court to a superior . . . ."[48] In the ecclesiastical courts, an appeal ran from lower-level church bodies to higher levels and in principle all the way to the Pope—or, later, after Henry VIII's break from Rome, to the king as head of the Church of England.[49] (Indeed, one of the actions that constituted the break with Rome was the 1533 "Act for the Restraint of Appeals,"[50] such that one could say with some justification that a law about appellate jurisdiction kicked off the English Reformation!)

Later on, the term "appeal" was used in Chancery (itself led by churchmen and staffed by canon lawyers in the early days), with the term coming into consistent usage there by the early seventeenth century.[51] Still later, when the House of Lords established the power to review decisions from Chancery in the seventeenth and eighteenth centuries, the name "appeal" was used for those proceedings.[52] The appeal was also the traditional mode of review in the Scottish judiciary, though by the time of American independence the Scottish supreme civil court, which melded law and equity, had rejected appeals in favor of other devices more in the nature of supervisory writs.[53]

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47. 1 R.H. Helmholz, The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s, at 348–53 (2004); Bilder, The Origin of the Appeal in America, supra note 46, at 929–32.

48. 2 Edward Coke, The First Part of the Institutes of the Laws of England § 500, at 287 (Legal Classics Library 1985) (1628). There was another, very different sense of "appeal" in medieval English criminal procedure, namely the "[a]ppeale of felonie." Id. Here the appeal was an accusation against a wrongdoer, a means of commencing prosecution; it was not the review of one court's decision by another court. See John Cowell, The Interpreter: Or Booke Containing the Signification of Words (1607) (calling this meaning drawn from criminal law more common than the other meaning involving removing a case to a superior court "as appeale to Rome"); Langbein et al., supra note 30, at 29–35 (describing appeal of felony).

49. 1 William Holdsworth, A History of English Law 603–04 (7th ed. 1956) (1903); Thomas J. McSweeney, Priests of the Law: Roman Law and the Making of the Common Law's First Professionals 73–74 (2019); Bilder, The Origin of the Appeal in America, supra note 46, at 929–32.

50. 24 Hen. 8 c. 12; 25 Hen. 8 c. 19; 6 John Baker, The Oxford History of the Laws of England: 1483–1558, at 246–47 (2003) [hereinafter Baker, Oxford History].

51. 1 Holdsworth, supra note 49, at 410–11; Langbein et al., supra note 30, at 196, 279–80; Bilder, The Origin of the Appeal in America, supra note 46, at 935–36. The appeal was also used in admiralty, another system of justice with civilian roots. On the history of appeals in admiralty, see John Baker, Introduction to English Legal History 131–33 (5th ed. 2019) [hereinafter Baker, English Legal History]; Selden Soc'y, Select Cases in Chancery: A.D. 1364 to 1471, at 124 (William Paley Baildon ed., 1896).

52. Baker, English Legal History, supra note 51, at 151–52; Louis Blom-Cooper & Gavin Drewry, Final Appeal: A Study of the House of Lords in Its Judicial Capacity 18–22 (1972); Bilder, The Origin of the Appeal in America, supra note 46, at 935–36.

53. See Lord Kames, Historical Law-Tracts 265–83 (Edinburgh 3d ed. 1776); see also James E. Pfander & Daniel D. Birk, Article III and the Scottish Judiciary, 124 Harv. L. Rev.

Colonial Americans were familiar with another use of the appeal that derived specifically from the context of empire. This was the appeal from colonial courts or legislatures (sometimes the same thing, in that era) to the king's Privy Council.[54] As legal historian Mary Sarah Bilder explains, this mechanism was used to check colonial laws for consistency with the laws of England, and this appeal bolstered the development of domestic judicial review of statutes for repugnance to the state and national constitutions.[55]

But all of this leaves out the modes of review within the courts of the common law. In England's system of common law, the ordinary vehicle for review of civil and criminal judgments, such as it was, was the writ of error.[56] The writ of error was not just another name for the same thing as appeal but was instead a more limited device with a different theory behind it. As the following sections will explain in more detail, the writ of error was conceived of as a separate suit limited to review of legal errors on the record of a prior judgment. The writ of error made its way to this country, finding an important place in the Judiciary Act of 1789, which provided for appeals in some situations and writs of error in others.[57] The courts understood the Act to preserve the traditional distinctions between the vehicles, such as whether the facts were reviewable, except where Congress expressly overrode those distinctions.[58] Some mainstays of the 1L curriculum came to the Supreme Court through the writ of error, thereby puzzling students with terminology like "plaintiff in error" for the party initiating the error proceeding.[59]

The writ of error was banished from federal practice by legislation in 1928,[60] but this did not effect anything like the merger of trial practice

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1613, 1638–42 (2011) (documenting Kames's influence on James Madison, James Wilson, and others).

54. Mary Sarah Bilder, The Transatlantic Constitution: Colonial Legal Culture and the Empire 73–90 (2004).

55. Id. at 186–96.

56. This summary skips over archaic devices like "attaint" and "false judgment," which conceived of the jury's or trial judge's errors as personal faults to be punished. See Baker, English Legal History, supra note 51, at 146–47 & n.12; 1 Holdsworth, supra note 49, at 200–01; Lester Bernhardt Orfield, Criminal Appeals in America 15–17, 22–23 (1939) [hereinafter Orfield, Criminal Appeals]. Besides the writ of error, there were mechanisms available at some times and in some circumstances to provide a form of collegial review, including informal discussion among the judges or decision of motions for new trials in the en banc court. See infra text accompanying notes 131–133.

57. Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 845–87.

58. See, e.g., Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.) ("[The terms 'appeal' and 'writ of error'] are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to controul, modify, or change, the fixed and technical sense which they have previously borne.").

59. E.g., Plessy v. Ferguson, 163 U.S. 537, 549 (1896); Pennoyer v. Neff, 95 U.S. 714, 719 (1877); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 317 (1819).

60. Act of Jan. 31, 1928, ch. 14, 45 Stat. 54; Act of Apr. 26, 1928, ch. 440, 45 Stat. 466.

brought about through the 1938 Federal Rules. For while the name disappeared in 1928, in substance the writ of error lived on. Congress provided that the class of proceedings that used to be called error would continue to mimic the old ways of the writ of error, and the courts continued to distinguish between different kinds of appeals (as they were now all called) based on whether the case was one of common law or of equity.[61] As sections below will explain, some features of our current system of review still mimic the writ of error.[62] But as far as nomenclature goes, the advantage today goes to equity.

Modern federal practice has other mechanisms for review besides error and appeal, most notably certiorari, which deserves a brief mention if only to note its odd path. Certiorari is a word with many meanings. Today, certiorari is familiar as the discretionary device by which the Supreme Court hears almost all of its cases.[63] Historically, certiorari was not the usual mode of appellate review in either the courts of common law or of equity; rather, the royal courts at different times used different forms of certiorari for various and sundry purposes including to supervise local courts, to bring criminal indictments before them, or to control justices of the peace and what we would now call administrative agencies.[64] Certiorari has come a long way since the days it could be used to review fines imposed by the sewer commissioners.[65]

Compared to the modern form of certiorari, mandamus remains closer to its roots. In modern federal practice, appellate courts use mandamus to correct "usurpation" of jurisdiction or other "clear abuses,"

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61. See Bengoechea Macias v. De La Torre & Ramirez, 84 F.2d 894, 895 (1st Cir. 1936) (explaining that the statute substituting the appeal for the writ of error did not enlarge the scope of review); 8 William J. Hughes, Federal Practice §§ 5423, 5425, 5693, 5816 (1931) (noting that the legislation "merely changed the name and form of the procedure for obtaining an appellate review, without changing any substantial right to such a review or the scope of the appellate jurisdiction").

62. See infra section I.D (discussing the final-judgment rule).

63. E.g., 28 U.S.C. §§ 1254(1), 1257(a) (2018).

64. See Baker, English Legal History, supra note 51, at 153–54, 159–60 (describing various uses of certiorari in English courts); 1 Holdsworth, supra note 49, at 213 (describing use of certiorari to remove criminal cases to the court of King's Bench in the fifteenth and sixteenth centuries). Looking centuries further back, before the King's Bench was fully formed as a judicial body separate from the monarch, the court *coram rege* used writs with "certiorari" in the title to bring records of prior proceedings before it, "the closest thing one could find to an appeal in thirteenth-century English law." McSweeney, supra note 49, at 155. In our federal courts, the common-law writ of certiorari was not used as a removal device or as a vehicle for appellate review, but still another manifestation of the common law writ of certiorari, which the Supreme Court did use, as an auxiliary writ that could enlarge or cure defects in the record in a case already being reviewed in a superior court through another vehicle. See Am. Constr. Co. v. Jacksonville, Tampa & Key W. Ry. Co., 148 U.S. 372, 380 (1893); Reynolds Robertson & Francis R. Kirkham, Jurisdiction of the Supreme Court of the United States ch. 34, §§ 281–82, at 531–33 (1936).

65. See Baker, English Legal History, supra note 51, at 159–60 (noting the use of certiorari in the seventeenth century to review fines imposed by bodies like sewer commissions).

typically in interlocutory postures that cannot be reviewed through the "ordinary" channel of appeal after final judgment.[66] It is ironic that our federal courts today use the royal judges' prerogative writ of mandamus as a corrective to the rigidities of a system of "appeal," the traditional appeal in equity not being limited to final decrees at all.[67]

When the American colonists got the chance to make their own legal institutions, it was not obvious that the colonists, or at least the more rebellious and dissenting of them, would happily embrace the appeal as a mode of review within their court systems. For many colonists, the common law meant the cherished rights of Englishmen, while courts of equity were objects of suspicion due to their association with the crown and colonial governors.[68] As for the equitable appeal more specifically, it "embodied all that the Puritan colonists despised—Rome, the Anglican ecclesiastical system, the king."[69] Yet the appeal took root on this side of the Atlantic, eventually becoming the name for the workaday vehicle of review in most American courts. Despite its baggage, the appeal had a powerful connection to a compelling vision of justice.[70] The next section explores that vision's attractions by considering the purposes of appellate review.

B. *The Goal*

Appellate review has multiple potential goals. Today, commentators tend to emphasize two of them: correcting error and developing the law.[71] Historically, the common law and equity had distinct ideas about the goals of review, ideas that do not exactly map onto our familiar categories of error correction and law development.[72] Nonetheless, the balance of the

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66. See, e.g., Cheney v. U.S. Dist. Ct., 542 U.S. 367, 380 (2004); In re Depuy Orthopaedics, Inc., 870 F.3d 345, 350–53 (5th Cir. 2017); DeMasi v. Weiss, 669 F.2d 114, 117 (3d Cir. 1982).

67. See infra section I.D (discussing equity's allowance of interlocutory appeals).

68. Kessler, Inventing American Exceptionalism, supra note 30, at 19; Stanley N. Katz, The Politics of Law in Colonial America: Controversies Over Chancery Courts and Equity Law in the Eighteenth Century, *in* 5 Perspectives in American History: Law in American History 257, 257–58 (Donald Fleming & Bernard Bailyn eds., 1971).

69. Bilder, The Origin of the Appeal in America, supra note 46, at 943; see also Gerhard Casper, The Judiciary Act of 1789 and Judicial Independence, *in* Origins of the Federal Judiciary: Essays on the Judiciary Act of 1789, at 281, 288–90 (Maeva Marcus ed., 1992) (describing the Anti-Federalists' complaints about excessively powerful courts, which among other things exerted foreign equity powers over the common law and juries).

70. Bilder, The Origin of the Appeal in America, supra note 46, at 967–68 (describing the colonists' "culture of appeal," which "ironically was based on a procedural device that was linked to institutions they despised . . . but with a set of meanings that held forth a promise of justice nonexistent in England").

71. See, e.g., Daniel John Meador, Appellate Courts in the United States 2–3 (2d ed. 2006) [hereinafter Meador, Appellate Courts in the United States]; J. Dickson Phillips, Jr., The Appellate Review Function: Scope of Review, 47 Law & Contemp. Probs. 1, 2 (1984).

72. Compare infra notes 73–75 and accompanying text, with infra notes 76–78 and accompanying text.

evidence shows that today's federal courts are leaning toward a version of the common law's vision of the function of review.

The divergence between law and equity is clearest when one considers how the two traditions approach error correction. In fact, even to speak of "error correction" begs the question in favor of the law side. In equity, the function of an appeal is not to identify a lower court's errors and, upon finding error, annul the proceedings. Rather, the goal of an appeal in equity is the same as the goal of the original proceedings: to bring all the affected parties together and render a just resolution of the whole dispute.[73] As one state court put it, the question in an appeal in equity is, "Did [the trial court] seek equity and do it?"[74] And if the trial court fell short of that duty, the appellate court should fulfill it. Doing so might mean hearing evidence not presented below or allowing amendment of the pleadings to join new parties.[75] One might think that doing complete equity and correcting error sound like two ways of saying a similar thing, but the common law itself makes it very clear that they are not the same at all. As one expert on appellate procedure puts it, with admittedly a bit of exaggeration, appellate review in the common-law system "had *nothing* to do with whether justice was done."[76]

A major reason the common law's appellate courts could not do justice, nor even correct all errors, was because they traditionally could not

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73. See Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 828–29 (Mich. 1889) (detailing how Michigan law empowered appellate courts in equity to "make the final disposition such as it should have been in the first place" rather than remand for a new trial); 9 W.S. Holdsworth, A History of English Law 336, 338 (1926) (noting that in equity, "the court considered the whole circumstances of the case . . . and tried to make a decree which would give effect to the rights of all the parties"); Henry L. McClintock, Handbook of Equity 11, 15–16, 23 (1936) ("[T]he question presented [in an appeal] is, not whether error was committed by the lower court, but whether the decree rendered was that which should have been rendered in light of the entire case as disclosed by the record." (footnotes omitted)); see also Diffenderffer v. Winder, 3 G. & J. 311, 348 (Md. 1831) (stating that "[u]pon [a] reversal, we are called on to exercise, as it were, an original equity jurisdiction–to give that decree on the record before us, which the [lower court] ought to have given").

74. Lee v. Lee, 167 S.W. 1030, 1032 (Mo. 1914).

75. See The Marianna Flora, 24 U.S. (11 Wheat.) 1, 38 (1825) (noting "the constant habit of the Circuit Courts" in admiralty appeals to allow amendments adding new counts to pleadings); Smith v. Chase, 22 F. Cas. 478, 479 (C.C.D.D.C. 1828) (No. 13,022) (stating that in an appeal, "the cause commences de novo in the appellate court"); 3 Edmund Robert Daniell, A Treatise on the Practice of the High Court of Chancery 74–76 (London, I.G. M'Kinley & J.M.G. Lescure 1846) (describing circumstances in which new evidence is allowed and stating that "the Court will give the plaintiff leave to amend, by adding parties in the same manner as upon an original hearing"). Appeals from Chancery to the House of Lords were more limited, as new evidence was not allowed. 3 Daniell, supra, at 88–89.

76. Robert J. Martineau, Appellate Justice in England and the United States 6 (1990) (emphasis added); see also Edson R. Sunderland, The Proper Function of an Appellate Court, 5 Ind. L.J. 483, 485 (1930) ("The question never arose as to whether the judgment was just or unjust, nor did the proceeding ever involve an inquiry as to what the true judgment ought to be.").

review the facts.[77] For them, correcting error meant correcting errors of law, and only those errors of law that appeared on the record, which did not report the whole proceedings.[78] Although the trial judge could comment on the evidence and grant a new trial to nullify verdicts that were clearly wrong on the facts, for a long time the trial court's decision on whether to grant a new trial based on a verdict against the weight of the evidence was subject to minimal or no further review.[79] In any event, the power of a higher court to order a do-over of an unfounded verdict falls short of the power of ordering a just and complete resolution, much less directly instating one.

It was not only that the common-law writ of error fell short of doing justice by reversing too little, for it could also reverse too much! The rules of common-law pleading and procedure were notoriously technical, and missteps by counsel and court were therefore frequent.[80] And while modern reviewing courts look for prejudice and use doctrines like harmless error to affirm decisions that fall short of the ideal,[81] it was hard to deem a mistake immaterial in an era in which the minimalistic nature of the trial record in cases at law—in particular the absence of a transcript

77. For more on the scope of review, see infra section I.E.

78. Martineau, supra note 76, at 6. Unlike a modern record that often includes a verbatim transcript of all proceedings, the record of old contained little, essentially just the pleadings, the question for the jury and its verdict, and the judgment. The record could be expanded through a bill of exceptions, in which a party would ask the trial judge to set down in writing his ruling on some matter to which the party objected, such as a refused jury instruction. 1 Holdsworth, supra note 49, at 215, 223–24; Martineau, supra note 76, at 2. Although it is generally true to say that the common-law courts governed by the writ of error did not allow reversal for errors of fact, a more precise statement would acknowledge that certain matters of collateral fact extrinsic to the record were cognizable, such as the death or infancy of a party. This factual contention could then be put to trial so as to become a matter of record that would nullify the original proceedings. Baker, Oxford History, supra note 50, at 406; John Palmer, The Practice in the House of Lords, on Appeals, Writs of Error, and Claims of Peerage 131–32 (London, Saunders & Benning 1830).

79. For the federal practice, which barred review until the second half of the twentieth century, see Fairmount Glass Works v. Cub Ford Coal Co., 287 U.S. 474, 480–83 (1933); Hannis Taylor, Jurisdiction and Procedure of the Supreme Court of the United States 662–64 (1905); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2819 (3d ed. 2012). For the early practice in the states, some of which forbade review and others of which permitted it in narrow circumstances, see 3 Thomas W. Waterman, A Treatise on the Principles of Law and Equity Which Govern Courts in the Granting of New Trials in Cases Civil and Criminal ch. XV.I.b, at 1213–31 (New York, Gould, Banks & Co. 1855). On judicial comment on the evidence as a sort of pre-emptive substitute for the lack of appeal, see Renée Lettow Lerner, How the Creation of Appellate Courts in England and the United States Limited Judicial Comment on Evidence to the Jury, 40 J. Legal Pro. 215, 220–23 (2016).

80. 1 Holdsworth, supra note 49, at 223–24.

81. See 28 U.S.C. § 2111 (2018); Fed. R. Civ. P. 61.

of the testimony—made it hard to know whether an error affected the outcome.[82]

Which of these things, correcting error or doing justice, does our federal system pursue today? There is no uncontestable answer to such a question, but the better view is that our system tilts toward the old legal model of correcting errors of law on the record. It is true that we now have some appellate review of the facts, though it is deferential to the trial court.[83] The conclusion that the courts come out in favor of the law side is based more on the apparent aversion to justice-seeking seen in today's appellate courts, an aversion that permeates even their review of questions of law. Consider as an example the way appellate courts handle changes in law that occur during the pendency of an appeal. If new law applies immediately to all pending cases, as changes in decisional law usually do and statutes sometimes do, the official doctrine is that the appellate court should reverse if the new law would change the judgment, even though the lower court may have proceeded correctly under the old, "wrong" law.[84] Yet today's courts will strain to avoid that result, eagerly applying doctrines like forfeiture or waiver to avoid upsetting judgments.[85] Likewise, and although there are certainly exceptions, appellate courts resist expanding the record or reversing for reasons not preserved in the court below.[86] That may be the right approach, all things considered, but it elevates other values above the just resolution of each case.

Although the divergence between the mindsets of law and equity stands out most clearly when it comes to the error-correction function of review, it is worth briefly mentioning the law-clarifying function as well, which is the other most frequently cited purpose of appellate review. At first, one might think equity had little need for developing the law. On the classical understanding, equity is meant to respond to the particularities of the situation in a way that categorical rules of law cannot.[87] And if one

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82. See Blom-Cooper & Drewry, supra note 52, at 47 (noting that "[p]oints arising outside the narrow confines of the 'record' were unimpeachable, while many sensible decisions were quashed on a mere verbal quibble resulting from a slip of the clerk's pen"); Lester B. Orfield, Appellate Procedure in Equity Cases: A Guide for Appeals at Law, 90 U. Pa. L. Rev. 563, 564 (1942) [hereinafter Orfield, Appellate Procedure] (describing the limited scope of common-law pleadings in error); Sunderland, supra note 76, at 485–87 (same).

83. See infra section I.E.

84. Aaron-Andrew P. Bruhl, Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change, 96 Cornell L. Rev. 203, 210–12 (2011) [hereinafter Bruhl, Deciding When to Decide]; see also, e.g., The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (applying changed law to pending case).

85. Bruhl, Deciding When to Decide, supra note 84, at 212–14.

86. See Meador, Appellate Courts in the United States, supra note 71, at 2, 37 (emphasizing that appellate courts rarely go beyond the record created at trial); see also Thomas B. Marvell, Appellate Courts and Lawyers: Information Gathering in the Adversary System 160 (1978) (quoting an anonymous appellate judge as saying, "I can't think of anything more fundamental than [sticking to the record]").

87. See supra note 39.

believed the detractors who complained that the substance of equity was whim, its only measure the chancellor's foot,[88] then one would not see much value in writing down precedents. But by the time of American independence, a characterization of equity as a zone of individual caprice would have been a slander.[89] The systems are not vastly different on that score.

Nonetheless, while not poles apart, even today there may be some reasons for the lawmaking role to have somewhat greater importance in the context of common law than of equity. The need to control juries by expanding the zone of law at the expense of fact may require devoting more effort to expounding a huge body of detailed rules than is needed in a system exclusively administered by judges.[90] And there may be enduring reasons for the substantive law of equity to feature more standards and more discretion, such as equity's role as a "backup" system that exists to police clever, rule-evading opportunism.[91] But these are relatively modest differences between the two systems, and so it is hard to say that today's federal courts follow one model rather than the other on this point.

The biggest difference in how courts in today's system wield the lawmaking function does not involve the nature of the case as legal versus equitable. Rather, it tracks positions in the appellate hierarchy. The Supreme Court, with its small, self-selected docket, tends to favor bright-line rules that settle issues, while the courts of appeals mostly issue unpublished decisions that do not make binding law at all.[92] That divergent behavior has more to do with differing institutional roles and vastly different caseloads than with the law–equity divide.[93]

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88. John Selden, Equity, *in* The Table Talk of John Selden 60, 61 (Samuel Harvey Reynolds ed., 1892) (1689) ("Equity is a roguish thing. . . . One chancellor has a long foot, another a short foot, a third an indifferent foot; 'tis the same thing in the chancellor's conscience.").

89. See 3 Blackstone, supra note 40, at *429–435 (disagreeing with Selden's assessment); see also 1 Holdsworth, supra note 49, at 468–69 (describing the growth of precedent and case reporting in Chancery); James Wilson, Of the Judicial Department, *in* 2 Collected Works of James Wilson 922–26 (Kermit L. Hall & Mark David Hall eds., 2007) (stating that "precedents and rules govern as much in chancery as they govern in courts of law").

90. On the theme of rule elaboration as a tool for narrowing jury discretion, see Langbein et al., supra note 30, at 448–50.

91. See generally Henry E. Smith, Equity as Meta-Law, 130 Yale L.J. 1050, 1076–77 (2021) (emphasizing the role of equitable doctrines like constructive fraud and unconscionability in combating opportunism).

92. On the Supreme Court's approach to lawmaking, see Tara Leigh Grove, The Structural Case for Vertical Maximalism, 95 Cornell L. Rev. 1, 11–21, 53–57 (2009). On the lower courts and unpublished opinions in particular, see William M. Richman & William L. Reynolds, Injustice on Appeal: The United States Courts of Appeals in Crisis 10–41 (2013).

93. See Richman & Reynolds, supra note 92, at 22–94 (describing mechanisms such as unpublished opinions and reductions in oral argument as ways of dealing with increased caseloads in the courts of appeals).

Returning to error correction, on which our courts have more clearly taken a side, and to sum up this section: The federal courts of appeals see their role as correcting error on the record, particularly errors of law, rather than doing what is necessary to justly resolve the parties' dispute. In that respect, they follow the model of the writ of error and call it appeal. To gain confidence in that tentative assessment, we can consider other dimensions of our modern appellate system. Let's turn to appellate remedies, which are closely tied to the goals of review.

C. *Appellate Remedies*

We ordinarily think about remedies as what the plaintiff wants from the defendant through the trial court: money, an injunction, a declaratory judgment, or perhaps something more exotic like an equitable accounting. But appellate courts grant remedies of a sort too—"remedies for losers," we might call them. A modern appellate court has an abundance of remedial options at its disposal. The appellate court might reverse and remand for a new trial, or it might reverse with instructions to enter judgment for one party or the other, or it might leave the lower court to decide whatever further proceedings seem appropriate.[94] It might not remand at all but might instead respond to error by "affirming as modified," altering the judgment to give greater or lesser relief, with no need for further proceedings in the lower court.[95] As with other features of the appellate system, we can associate the two historical traditions with different attitudes toward appellate remedies and then see where the modern federal courts fit.

A generous menu of remedial options is not a universal, timeless feature of appellate justice. On the contrary, flexibility of remedial options is characteristic of the equity approach. As explained above, the goal of a court of equity, at trial or on appeal, is to render a just resolution of the whole dispute.[96] That requires significant authority and flexibility. With both the law and the facts before it, its own equitable conscience to satisfy, and no jury rights to worry about, an appellate court in equity often could wrap up the case on its own by entering the decree the lower court should

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94. In criminal cases, the options are fewer because the Fifth and Sixth Amendments prevent the courts from, among other things, directing a guilty verdict or finding that a not-guilty verdict is factually insufficient. See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993) (holding that the Sixth Amendment bars such review); Burks v. United States, 437 U.S. 1, 17–18 (1978) (holding the same for the Fifth Amendment).

95. See Aaron-Andrew P. Bruhl, The Remand Power and the Supreme Court's Role, 96 Notre Dame L. Rev. 171, 173–74 (2020) [hereinafter Bruhl, Remand Power] (describing these and similar options for appellate courts).

96. See Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 829 (Mich. 1889) ("[T]he necessities of justice and equity require that all persons and all things concerned in the controversy shall be brought before the court to have their respective interests charged or protected, and to end the controversy once for all."); McClintock, supra note 73, at 11, 15–16, 23.

have entered or, if complete resolution were not advisable, telling the lower court exactly what proceedings to conduct on remand.[97]

An appellate court at common law was much more limited in its remedial options. A reviewing court could not determine questions of fact on its own, so errors in jury instructions or admission of evidence or the like often required a new trial to see what an untainted jury would find.[98] And even aside from the need to protect jury rights, the writ of error was understood to contain some remedial restrictions that may strike the modern reader as bizarre. The proceedings in error were, of old, regarded not as a continuation of the original case but rather as a separate case—a conception perhaps traceable to the lingering intellectual influence of even older proceedings like "attaint" or "false judgment," which were quasi-criminal actions aimed at the wrongdoing of juries and judges, respectively.[99] Since the reviewing court was not charged with continuing and correctly resolving the original case, the court's options were limited. Traditional practice disallowed complex dispositions like modifying the judgment or affirming in part and reversing and remanding in part for further proceedings as directed.[100] For example, if a judgment was valid and even uncontested as against one defendant but legally deficient as against another defendant due to some incapacity or immunity, the reviewing court could not affirm as to the one defendant and reverse as to the other, nor order the lower court to enter the correct judgment.[101] A new trial was required to (hopefully) set things aright.

In the federal system, the choice from the start was for the more flexible, equitable approach to appellate remedies. The original Judiciary Act provided:

> [W]hen a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the Supreme Court shall do the same on reversals therein, except when the reversal is in favour of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be

97. See *Brown*, 42 N.W. at 828–29; McClintock, supra note 73, at 23; Bruhl, Remand Power, supra note 95, at 191–95.

98. Sunderland, supra note 76, at 485–87.

99. See 1 Holdsworth, supra note 49, at 213–14, 337–40; Roscoe Pound, Appellate Procedure in Civil Cases 25–27, 39–40, 72 (1941).

100. See, e.g., Griffin v. Marquardt, 17 N.Y. 28, 31–32 (1858) (distinguishing between appellate remedies in law and in equity and explaining the unifying effect of the Field Code); Wyne v. Atl. Coast Line R.R. Co., 109 S.E. 19, 20–21 (N.C. 1921) (describing the former practice in the state, which had been superseded by new statutes and the merger of law and equity).

101. See, e.g., Gaylord v. Payne, 4 Conn. 190, 196 (1822); Richards v. Walton, 12 Johns. 434, 434 (N.Y. Sup. Ct. 1815); Swearingen v. Pendleton, 4 Serg. & Rawle 389, 396–97 (Pa. 1818). But see Wilford v. Grant, 1 Kirby 114, 116 (Conn. Super. Ct. 1786) (acknowledging that "[t]he common-law rules of England are indeed against a reversal in part only, in a case like this," but departing from the English rule).

> decreed, are uncertain, in which case they shall remand the cause for a final decision.[102]

As the last part of the quoted provision shows, remands were sometimes necessary, especially when a jury would need to determine damages, but the general idea was for the appellate court to conclude the case by entering the correct judgment or decree when practicable. The need to respect jury rights meant that this function could be performed more easily in equity cases, of course, but the statute did not limit itself to equity cases.

The current federal statute governing appellate remedies, though little remarked upon, follows in the path of the Judiciary Act by providing just about all the remedial flexibility an appellate court could want. The statute, which has been essentially the same since 1872, provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.[103]

When it comes to appellate remedies, has the federal system therefore chosen the ways of equity? Yes and no. Courts of appeals sometimes make use of the broad authority granted by statutes like those above. For example, courts of appeals often modify judgments, occasionally enter their own injunctions, and may resolve the merits of a case on an interlocutory appeal raising another issue.[104] In the rare circumstance in which the district court has earned distrust, courts of appeals deploy their authority particularly aggressively.[105] In one otherwise unremarkable case that is eyebrow-raising only because it invoked the old law–equity distinction thirty-five years after the supposed merger, a court of appeals observed: "This is an equity case, and it is well established that in such a case, although a reviewing court will usually decide only those issues which are necessary to dispose of an appeal, an interlocutory appeal brings the entire case before the court."[106] The court accordingly dismissed the case

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102. Judiciary Act of 1789, ch. 20, § 24, 1 Stat. 73, 85.

103. 28 U.S.C. § 2106 (2018); see also Bruhl, Remand Power, supra note 95, at 191–95 (describing the statute's history). This broad grant of authority is of course subject to some limitations, notably jury rights. See Bruhl, Remand Power, supra note 95, at 209–10.

104. See, e.g., 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3921.1 (3d ed. 2012) (citing examples).

105. See, e.g., In re United States, No. 24-684, slip op. at 4–5 (9th Cir. May 1, 2024) (granting mandamus for failure to follow previous mandate and ordering the district court to "dismiss the case forthwith for lack of Article III standing, without leave to amend"); Hall v. West, 335 F.2d 481, 485 (5th Cir. 1964) (granting mandamus, admonishing the district judge for delay, and prescribing the proper desegregation decree).

106. Aerojet–Gen. Corp. v. Am. Arb. Ass'n, 478 F.2d 248, 252 (9th Cir. 1973).

on the merits rather than stopping with dissolving the preliminary injunction.[107]

Yet despite the broad power the federal courts enjoy and occasionally deploy, the workaday practice of the federal courts, and their current habit of mind, departs substantially from the equitable model of appellate remedies. Modern federal appellate courts seem reluctant to wrap up cases on their own, even when no obstacle like jury rights or an underdeveloped factual record stands in the way of doing so.[108] They find error and then remand for further proceedings in cases involving legal questions such as whether a complaint states a sufficient claim,[109] whether the record is sufficient to withstand summary judgment,[110] and whether a statute is constitutional.[111] They find error in the district court's interpretation of a statute, refrain from giving the correct interpretation, and remand for the district court to give it another shot.[112] In one recent case involving an appeal from the denial of a preliminary injunction against a private employer's vaccine mandate, the court of appeals reversed and remanded, based on its conclusion that the district court had erred in finding the plaintiffs did not satisfy the irreparable-harm prong—without contesting the dissent's convincing arguments that the plaintiffs' case failed for several other reasons apparent on the record.[113]

It is understandable that the modern Supreme Court, which has a limited docket and has assumed a paramount function of law-clarifying and lawmaking, would tend to focus its energies on the aspect of a case that led it to grant certiorari, rather than attempting to wrap up the case itself.[114] The federal courts of appeals appear to be modeling their use of appellate remedies on the Supreme Court's practices, leading to

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107. Id. at 253. The case involved the venue of a commercial arbitration.

108. See Bruhl, Remand Power, supra note 95, at 184–85.

109. E.g., Adkisson v. Jacobs Eng'g Grp., Inc., 790 F.3d 641, 649 (6th Cir. 2015); Gustafson v. U.S. Bank N.A., 618 F. App'x 921, 922 (9th Cir. 2015).

110. E.g., Jerri v. Harran, 625 F. App'x 574, 578–79 (3d Cir. 2015); Giraldes v. Roche, 357 F. App'x 885, 886 (9th Cir. 2009); see also Mason v. Lafayette City-Par. Consol. Gov't, 806 F.3d 268, 285 (5th Cir. 2015) (Higginbotham, J., dissenting) (criticizing the majority for failing to resolve the legal issue of qualified immunity).

111. E.g., Sanchez v. United States, 247 F. App'x 194, 196 (11th Cir. 2007).

112. See, e.g., Vaughn v. Phoenix House N.Y. Inc., 722 F. App'x 4, 6 (2d Cir. 2018) (directing the district court to reinterpret the Fair Labor Standards Act in light of a precedent it failed to address).

113. See Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *13 (5th Cir. Feb. 17, 2022) (Smith, J., dissenting).

114. This Article does not address the legality of the Supreme Court's modern practice of deciding only small parts of a case, sometimes limiting its review to only a subset of the issues the petitioner requested. Professor Benjamin Johnson has recently called the legality of that practice into question. Benjamin Johnson, The Origins of Supreme Court Question Selection, 122 Colum. L. Rev. 793, 803–04 (2022). As explained in the main text, that practice coheres with the Supreme Court's self-conception. Even if the practice is permissible for the Supreme Court, it is not the only way an appellate court can act.

unnecessary remands to the district courts for further proceedings when the court of appeals could as a matter of law and should as a matter of efficiency just resolve the case.[115] The federal judiciary today features a sharp differentiation between trial and appellate courts, and the courts of appeals are choosing to emulate the most appellate court of them all. This differentiation of functions across courts contrasts with the equitable tradition, in which trial and appeal were merely earlier and later stages of one proceeding in search of a just and comprehensive disposition.[116]

In short: When it comes to appellate remedies, the federal courts are empowered to act like the Chancellor but generally choose the path of identifying error and then leaving the resolution to someone else.

D. *Timing of Review*

When it comes to the timing of review—whether an appellant must wait until a final judgment or may act earlier through interlocutory appeal—the practice in the federal courts defies the usual historical pattern, in which procedures start out as disparate and move toward uniformity. Here, the federal courts started by using the common law's approach for all cases, some variation then reemerged, and today we have ended up with what many call a mess[117] in which review is mostly limited to final judgments but with many exceptions.

The mess surrounding the timing of review can be rendered more comprehensible if one understands the historical differences and why it has been hard to suppress them. As just stated, the timing of review in federal courts initially followed the law model. Specifically, the 1789 Judiciary Act provided for review of *final* judgments and decrees only, regardless of the nature of the case as legal or equitable.[118] Limiting review to final decisions matched the common-law model under the writ of error, while English equity practice allowed interlocutory appeals.[119]

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115. See, e.g., Utah v. Su, 109 F.4th 313, 319–21 (5th Cir. 2024) (remanding for the district court to consider a question of law based on new precedent when neither party had so requested); United States v. Houston, 792 F.3d 663, 665 (6th Cir. 2015) (explaining its decision to remand by pointing out that the Supreme Court had done the same thing under similar circumstances).

116. See supra text accompanying notes 73–75.

117. See Rowland v. S. Health Partners, Inc., 4 F.4th 422, 428 (6th Cir. 2021) (describing the courts' "disjointed approach to appellate review" and the vagaries of the finality requirement); Bryan Lammon, Finality, Appealability, and the Scope of Interlocutory Review, 93 Wash. L. Rev. 1809, 1810 (2018) ("The law of federal appellate jurisdiction is widely regarded as a mess.").

118. Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–85.

119. See, e.g., Smith v. Vulcan Iron Works, 165 U.S. 518, 523–24 (1897); Carleton M. Crick, The Final Judgment as a Basis for Appeal, 41 Yale L.J. 539, 547–49 (1932). Some states had already taken this step by limiting appeals in law and equity to final decisions. Senator (and later Chief Justice) Oliver Ellsworth, chief architect of the Judiciary Act, may have been influenced by the practice in his state of Connecticut, where the writ of error was used for

Now, that is admittedly a simplification. To complicate the distinction between the timing rules in law and equity, recall some details of pre-merger English practice. It is basically correct to say that equity allowed interlocutory appeals and law did not, but one needs to guard against anachronism. In thinking about the timing and availability of review, it is natural to imagine a pyramid composed of functionally distinct bodies like "trial courts" and "appellate courts." But that image is misleading when thinking about interlocutory review in Chancery, for Chancery did not have separate trial and appellate bodies. Indeed, before the nineteenth century, there was just one judge, the Lord Chancellor himself, who was assisted by a deputy (the Master of the Rolls) and masters and others.[120] An initial hearing might lead the Chancellor to refer an issue to a master for factual inquiry or for an accounting (with testimony gathered by yet other officials and set down in writing for the master), followed by a hearing on the aggrieved party's exceptions to the master's report; more referrals to a master for more inquiry on some other topic; multiple decrees from time to time addressing various parts of the case; then more hearings and rehearings at which the evidence is read and read again—all leading, eventually, to a final decree of the Chancellor.[121]

As legal historian Michael Lobban puts it, "[A]lthough the work [of Chancery] was delegated downwards, there were endless appeals upwards. Dissatisfied parties could turn from the chief clerk to the master and, if unhappy with the master, up to the court. No decision of fact was final: it might always go back to the Chancellor."[122] The back-and-forth was not, however, an appeal from one court to another in the familiar sense; it was more that one responsible official was overseeing the work of his agents.[123]

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review in both law and equity. See 1 Julius Goebel, History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, at 458–59, 479 (1971); Crick, supra, at 548–49.

120. The Master of the Rolls was given the authority to make his own decrees by a 1729 statute (3 Geo. 2, c. 30), but only when the Chancellor was away, and his decrees remained subject to appeal to the Chancellor. See Baker, English Legal History, supra note 51, at 120; 3 Blackstone, supra note 40, at *450. It was not until the nineteenth century that Chancery become a genuinely multimember court with several vice-chancellors acting as first-instance judges. See Baker, English Legal History, supra note 51, at 122; 1 Holdsworth, supra note 49, at 442–44; Langbein et al., supra note 30, at 370. Under this new system, a decree could be reheard before the rendering judge and appealed to the Lord Chancellor. 3 Daniell, supra note 75, at 65–67. For our purposes, we can ignore local courts of equity, such as the chancery courts of the counties palatine, which had their own chancellors. See 1 A General Abridgment of Cases in Equity 137 (London, Lintot 1756); W.J. Jones, The Elizabethan Court of Chancery 348–77 (1967).

121. 9 Holdsworth, supra note 73, at 360–69; 3 Blackstone, supra note 40, at *454.

122. Michael Lobban, Preparing for Fusion: Reforming the Nineteenth-Century Court of Chancery (pt. 1), 22 Law & Hist. Rev. 389, 394 (2004).

123. Orfield, Appellate Procedure, supra note 82, at 574–75 ("It was natural that the Chancellor would review all interlocutory decrees and orders since at first he was the only chancery judge, the masters being regarded as clerks rather than as judges.").

Equity procedure, as Professor John Langbein memorably describes it, was not just a nonjury procedure but an extended "nontrial" procedure.[124]

In addition to referrals and rehearings within Chancery, which were certainly interlocutory but also intramural, something more recognizable to modern eyes as an appeal to a separate, higher court did eventually develop. The House of Lords firmly established appellate jurisdiction over Chancery cases in the seventeenth and eighteenth centuries.[125] Here too, as within Chancery, interlocutory appeal was allowed.[126] That was the opposite of the practice in cases at law, where the Lords reviewed final judgments by writ of error.[127] Commentators recognized that the reason for interlocutory appeal in equity was that interlocutory decisions could effectively decide important questions on the merits and that immediate appeal could therefore benefit the litigants.[128] Likewise, when New York, one of the states with a separate court of equity, created new equity judges to aid the chancellor, the new system provided for interlocutory appeals to the chancellor.[129]

To be fair, there is also a bit of simplification involved in saying that the common-law courts did not allow interlocutory review. True, a writ of error would lie only after a final judgment.[130] But before the time of American independence, the English common-law courts had developed both formal and informal mechanisms for trial judges to receive legal guidance before a final decision. Judges hearing cases outside of the capital could adjourn cases and reserve questions for consideration by the en banc court in Westminster, a procedure that was functionally similar to interlocutory review even though it all happened within the same court.[131] Special verdicts on the facts could be given, subject to the court's later resolution of a point of law.[132] Judges from one of the central benches

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124. John H. Langbein, The Disappearance of Civil Trial in the United States, 122 Yale L.J. 522, 529, 540 (2012).

125. Baker, English Legal History, supra note 51, at 151; Blom-Cooper & Drewry, supra note 52, at 18–22; 1 Holdsworth, supra note 49, at 372–75.

126. 1 Holdsworth, supra note 49, at 374–75.

127. 3 Daniell, supra note 75, at 77 (distinguishing the practice in the two systems).

128. Id.; Palmer, supra note 78, at 1.

129. N.Y. Const. art. V, §§ 1, 5 (1821); David Graham, Jr., A Treatise on the Organization and Jurisdiction of the Courts of Law and Equity, in the State of New York 579–80, 587–90, 611 (1839).

130. See supra note 119 and accompanying text.

131. See Baker, English Legal History, supra note 51, at 92, 148–51 (describing the common-law courts' practice of withholding judgment until points of law could be discussed); 1 Holdsworth, supra note 49, at 282 (noting that *nisi prius* cases could be adjourned to the central courts); see also Orfield, Criminal Appeals, supra note 56, at 27 (describing the practice of reserving questions in criminal cases).

132. 3 Blackstone, supra note 40, at *377–378.

could go across the hall to consult with colleagues from another court or consult with counsel at meals in the inns of court.[133]

This is the background against which the 1789 Judiciary Act operated when it limited review, whether in law *or* equity, to final judgments and decrees.[134] In that regard, Congress chose the legal model. But the law's dominance would not endure, as equity reasserted itself.

The most important reassertion came in 1891, with the creation of the modern courts of appeals, but there was some erosion of the final-judgment rule well before that. In 1802, Congress created the mechanism of the certificate of division, whereby a question of law that divided the two circuit judges in a case within their original jurisdiction could be certified to the Supreme Court, an early form of interlocutory review that was available in law and equity.[135] More notably for present purposes, the *Forgay* doctrine, which grew out of suits in equity involving the disposition of property, allowed appeals of interlocutory decrees dispossessing an owner, even if further proceedings such as an accounting before a master were contemplated.[136] The dispossession and risk of subsequent transfer constituted an irreparable injury to the plaintiff, such that the decree was made immediately appealable even though it was not final in the ordinary sense.[137]

The big legislative departure from the final-judgment rule, which came in the 1891 statute creating the federal courts of appeals, reinstated some of the Chancery tradition that the first Judiciary Act had discarded. The enactment, written in the era before the trial-level fusion of law and equity, provided for interlocutory appeals "where, upon a hearing *in equity* in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree."[138] In 1900, the

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133. Baker, English Legal History, supra note 51, at 148–51.

134. Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–85.

135. Amendatory Act of 1802, ch. 31, § 6, 2 Stat. 156, 159; see also Jonathan Remy Nash & Michael G. Collins, The Certificate of Division and the Early Supreme Court, 94 S. Cal. L. Rev. 733, 740 (2021).

136. See Forgay v. Conrad, 47 U.S. (6 How.) 201, 203–04 (1848) (enslaved persons at issue); Ray v. Law, 7 U.S. (3 Cranch) 179, 180 (1805) (deeming a decree ordering the sale of mortgaged property an appealable final decree); see also 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3910 (3d ed. 2022) (describing the *Forgay* "hardship" exception to finality without noting its roots in equity cases). But see Barnard v. Gibson, 48 U.S. (7 How.) 650, 657–58 (1849) (refusing to extend *Forgay* to a patent case in which a permanent injunction had been issued and the matter referred to a master for ascertainment of damages; suggesting in dicta that the court below should stay the injunction until entry of a final judgment assessing the damages).

137. *Forgay*, 47 U.S. at 204–05.

138. Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828 (emphasis added) (codified as amended at 28 U.S.C. § 1292 (2018)). For the first few years, interlocutory appeals were available for grants of injunctions but not for denials. Provision for interlocutory appeal of denials was provided in 1895, removed (perhaps inadvertently) in 1900, then restored in 1901. S. Rep. No. 56-2206, at 1–2 (1901); H.R. Rep. No. 56-2849, at 1–2 (1901).

statute was amended to add interlocutory appeals of the appointment of receivers, receiverships being another traditional element of equity practice.[139] Then Congress added a third category of interlocutory appeals for admiralty, another subject that was outside of the common-law procedural tradition.[140] In England, admiralty had its own court, with practices inspired by the civil law and without juries, and in this country admiralty cases retained their own trial-level procedural rules well after the promulgation of the Federal Rules.[141] Looking at these exceptions to the final-judgment rule, then-Professor Armistead Dobie could write in 1928 that the exceptions involve "three classes of equitable proceedings which rather drastically control a litigant's conduct."[142] Like the *Forgay* doctrine, these allowances for interlocutory appeal reflected practical considerations of hardship, not just worship of the past.[143]

Some later allowances for interlocutory appeal derive from procedural mechanisms associated with equity's jurisdiction over complex litigation.[144] Notable in this regard are Rule 23(f), which allows interlocutory appeals of class certification orders (and replaces prior

139. Act of June 6, 1900, ch. 803, 31 Stat. 660 (codified as amended at 28 U.S.C. § 1292(a)(2)).

140. Act of April 3, 1926, ch. 102, 44 Stat. 233 (codified as amended at 28 U.S.C. § 1292(a)(3)).

141. See Baker, English Legal History, supra note 51, at 131–32 (describing the High Court of Admiralty and its procedure); 4 Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, Federal Practice and Procedure § 1014 (4th ed. 2015) (describing unification of admiralty practice).

142. Armistead M. Dobie, Handbook of Federal Jurisdiction and Procedure 798 (1928).

143. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955) (stating that "the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence").

144. See Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 511 (1950) ("The liberalization of our practice to allow more issues and parties to be joined in one action and to expand the privilege of intervention . . . [increases] the danger of hardship and denial of justice through delay if each issue must await the determination of all issues as to all parties . . . ."). A few words about bankruptcy are in order. Countless courts have said that bankruptcy courts are courts of equity. E.g., Ex parte Foster, 9 F. Cas. 508, 512 (C.C.D. Mass. 1842) (No. 4,960) (Story, J.). The field has statutes authorizing interlocutory appeals and uses more flexible understandings of finality. See 16 Wright et al., supra note 104, § 3926. In that respect, bankruptcy fits the pattern of finding interlocutory appeals in equitable jurisdictions. But the nature and history of bankruptcy defies easy categorization. In England, the Lord Chancellor himself had bankruptcy jurisdiction from 1571, but it was exercised through commissioners, and the proceedings were not considered proceedings of the Court of Chancery. See 1 Holdsworth, supra note 49, at 470–72; John C. McCoid, II, Right to Jury Trial in Bankruptcy: *Granfinanciera, S.A. v. Nordberg*, 65 Am. Bankr. L.J. 15, 29–32 (1991). In the nineteenth century, Parliament created a court of bankruptcy that was described as a court of law and equity. 1 Holdsworth, supra note 49, at 443–44, 473. Early U.S. bankruptcy statutes provided for procedures that followed the equity model in some respects but provided for jury trials on some questions, likely beyond what the Seventh Amendment required. See Douglas G. Baird, The Seventh Amendment and Jury Trials in Bankruptcy, 1989 Sup. Ct. Rev. 261, 263; see also McCoid, supra, at 28–29, 33–34, 39 (tracing the history and concluding that a bankruptcy court is a court of both law and equity).

shortcuts like "death knell" finality and mandamus, which had achieved only limited success),[145] and Rule 54(b), which permits appeals when the district court enters a final judgment as to some but not all claims or parties.[146] (Conspicuously absent is a provision expressly allowing interlocutory appeals as of right in multidistrict litigation (MDL) under section 1407, which bears some functional similarity to class actions, though pretrial rulings in MDLs can sometimes be reviewed by mandamus.[147])

It would be an exaggeration to say that the old lines between law and equity exactly dictate when the modern federal courts allow interlocutory appeals. The statute authorizing interlocutory appeals of controlling issues of law in the discretion of the court of appeals is agnostic as between law and equity.[148] So too is the collateral-order doctrine, which allows appeals of various sorts of pretrial decisions without regard to the historical nature of the case as legal or equitable.[149] Even so, it is worth pointing out that some of the *need* for immediate review in cases that sound in law stems from features of post-merger litigation that themselves reflect the importation of extended, equitable procedures.[150]

Nonetheless, we can sum up this section by saying the following: that we now have a system that incorporates aspects of both traditions; that the exceptions to the final-judgment rule tended to arise first in areas within the traditional equity jurisdiction; and that, even today, the need for interlocutory appeal (or mandamus or other mechanisms) is largely driven by complexity and extended pretrial, which were defining features of equity as opposed to common law. If one is trying to determine whether an interlocutory appeal is permitted in a federal court today, one could do worse than looking to seventeenth- and eighteenth-century English practice for guidance.

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145. Fed. R. Civ. P. 23(f); see also In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1294–95, 1304 (7th Cir. 1995) (denying appellate jurisdiction over class certification but granting a writ of mandamus based on extraordinary circumstances).

146. See, e.g., Fed. R. Civ. P. 54 advisory committee's note on subdiv. (b) (1937) (stating that Rule 54(b) "provides for the separate judgment of equity and code practice").

147. E.g., In re Nat'l Prescription Opiate Litig., 956 F.3d 838, 845–46 (6th Cir. 2020) (granting writ of mandamus due to MDL court's plainly erroneous decision to permit late amendment of the pleadings).

148. See 28 U.S.C. § 1292(b) (2018).

149. See generally 15A Wright et al., supra note 136, § 3911 (describing the doctrine).

150. See, e.g., Behrens v. Pelletier, 516 U.S. 299, 308 (1996) (explaining that interlocutory appeal of orders denying qualified immunity is necessary in order to avoid not just liability or trial but the burdens of pretrial matters like discovery).

E. *Scope and Standard of Review*

The scope of review and standards of review also define the character of an appellate system.[151] The *scope* of review refers to which issues are subject to review. For purposes of comparing law and equity, the main question regarding scope of review is whether the facts as well as the law are reviewable. The *standard* of review then concerns how closely decisions are scrutinized for error.

The scope of review in today's federal courts encompasses both law and fact, but the standards of review for the two kinds of questions are very different. Federal appellate courts review questions of law de novo, without deference to the lower court.[152] Review of the facts is lighter, with the degree of scrutiny depending on who found them. For facts found by a jury, the Seventh Amendment limits review by prohibiting "reexamination" of the facts by either the trial court or appellate courts, although this bar on reexamination has long been understood to permit trial courts to order new trials and, more recently, to allow appellate courts to overturn a verdict and enter the opposite judgment based on a "legal" decision about what verdicts a rational jury could reach.[153] For facts found by judges, such as in a hearing on a preliminary injunction or in a bench trial, the review is more searching. Rule 52, in keeping with the Rules' transsubstantivity and merger of law and equity, provides a single standard of review for judge-made findings of fact in all cases regardless of their legal or equitable character.[154] That standard is "clear error": The trial judge's findings may not be set aside unless they are not merely wrong but *clearly wrong*.[155] A finding is clearly erroneous when the reviewing court is "left with the definite and firm conviction that a mistake has been committed."[156]

What is the provenance of this merged standard of clear error—is it a product of law, equity, or something else? The 1937 Advisory Committee Note states that the clear-error standard "accords with the decisions on the

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151. See Harry T. Edwards & Linda A. Elliott, Federal Courts Standards of Review: Review of District Court Decisions and Agency Actions, at vii–viii (2007) (stating that "[s]tandards of review may not be everything, but they are critically important in determining the parameters of appellate review and in allocating authority" between different courts).

152. See Salve Regina Coll. v. Russell, 499 U.S. 225, 231–32 (1991).

153. See, e.g., Balt. & Carolina Line v. Redman, 295 U.S. 654, 656–61 (1935) (upholding constitutionality of appellate entry of judgment for defendant after verdict for plaintiff); Baker, English Legal History, supra note 51, at 92–93 (discussing the development of the motion for a new trial in English courts of common law). For discussion of the historical development of new trials, directed verdicts, and judgments notwithstanding the verdict, see generally Renée Lettow Lerner, The Rise of Directed Verdict: Jury Power in Civil Cases Before the Federal Rules of 1938, 45 Geo. Wash. L. Rev. 219 (2013).

154. Fed. R. Civ. P. 52(a)(6).

155. Id.

156. United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

scope of the review in modern federal equity practice."[157] Notice that it refers to what was then the "modern" practice, as Rule 52 did not purport to reestablish the historical practice in equity. But Rule 52's standard does not exactly reflect the then-modern equity practice the rulemakers claimed to codify. Rule 52's clear-error standard represents a point between the two traditions, which themselves had changed over time in response to shifting modes of proof and court structures. To appreciate how the current standard combines the traditions and, in an important respect, defies them, it will be necessary to begin with the English practices and trace important developments in the federal courts stretching from 1789 to 1985.

The traditional Chancery practice was that an appeal was a rehearing of the law and facts, without deference to prior factual findings.[158] So it should be, given that the appeal was, "as it were, an original equity jurisdiction" aimed at doing justice, notwithstanding whatever had happened below.[159] Full reconsideration of the case on appeal may sound nightmarish to a modern reader making assumptions about institutional competencies, but it makes sense when one considers the structure of the Chancery, its traditional factfinding procedures, and its mindset. There was no jury in Chancery, of course, but there was no modern bench trial either.[160] The Chancellor generally did not watch witnesses testify, observe them under the pressure of cross-examination, or preside over what we would recognize as a trial at all, and neither did his deputy or the masters in equity to whom matters were referred for preliminary decision.[161] Rather, examination of witnesses was generally delegated to still other officials or ad hoc commissioners who asked the witnesses, in private, a series of questions written by counsel ahead of time and then recorded the testimony in writing.[162] Later on, a master would read the testimony of the witnesses (or have it read aloud), but his findings had no demeanor-based claim to deference from his boss. The Chancellor could read or listen to a

157. Fed. R. Civ. P. 52 advisory committee's note (1937).

158. See Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.); 9 Holdsworth, supra note 73, at 368–69.

159. Diffenderffer v. Winder, 3 G. & J. 311, 348 (Md. 1831); see also supra section I.B (describing the goal of the equitable appeal).

160. See Langbein et al., supra note 30, at 299 (discussing the nature of the hearing in a contested Chancery proceeding).

161. See 9 Holdsworth, supra note 73, at 353–54; Langbein et al., supra note 30, at 298–99.

162. 2 Edmund Robert Daniell, A Treatise on the Practice of the High Court of Chancery 466–67, 474–75, 489–90 (London, J. & W.T. Clark. Lescure 1838); 9 Holdsworth, supra note 73, at 353–54; Langbein et al., supra note 30, at 291–92, 297–99, 372; see also 4 St. George Tucker, Blackstone's Commentaries *437 n.8, *448 n.24 (Philadelphia, Birch & Small 1803) (comparing English and early Virginia practice regarding examination of witnesses).

reading of the same depositions and other materials. With reaching a just decision the goal, he could hardly defer to someone else's conscience.[163]

One might wonder how such a system could deal with a real factual dispute, such as when witnesses disagree over who did what. Such factual disputes might not come within the equitable jurisdiction as often as they came before the courts of law, but if there was a closely contested question of fact, that question (not the whole case) could be sent out for a jury trial in the law courts, the answer to be returned to Chancery.[164] That is, equity could recognize the weakness of its mode of factfinding and turn elsewhere for help.

Turning to the legal tradition, appellate review runs up against the fact of the jury and the limited nature of the writ of error. Recall that the writ of error was for review of errors of law on the record, and that the record was not a modern verbatim transcript containing the trial proceedings.[165] The goal of a writ of error was to affirm or set aside a judgment for legal error evident on the record, not to get things right, and certainly not to get things right on the facts of the matter.

The Constitution permitted but did not require the persistence of these divergent practices. When the Constitution gave the Supreme Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make,"[166] that provision contemplated the permissibility of de novo rehearing in suits in equity. The chief objection to the Court's appellate jurisdiction from the Constitution's doubters was that conferring appellate jurisdiction "as to . . . Fact" permitted interference with jury verdicts even in cases at common law, especially given that civil juries were not safeguarded anywhere in the original document.[167] Supporters of the Constitution

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163. See 3 Daniell, supra note 75, at 68 (explaining that the Chancellor is not "a mere ministerial officer, oblig[ed] . . . to affix his signature to a decree of an inferior Judge, whether he approves of it or not").

164. Using the device of the "feigned issue," parties would make a fictitious wager on the disputed fact and try this case by jury in one of the courts of common law. See 9 Holdsworth, supra note 73, at 357; Stephen E. Sachs, The Feigned Issue in the Federal System 6 (Nov. 26, 2007) https://ssrn.com/abstract=1032682 [https://perma.cc/73E8-3BHY] (unpublished manuscript). The chancellor or masters could, on rare occasions, order live examination before them on some contested point. Jones, supra note 120, at 253–54.

165. See supra note 78 and accompanying text.

166. U.S. Const. art. III, § 2.

167. See Luther Martin, The Genuine Information Delivered to the Legislature of the State of Maryland Relative to the Proceedings of the General Convention Lately Held at Philadelphia, *in* 2 The Complete Anti-Federalist 19, 70–71 (Herbert J. Storing ed., 1981); Essays of Brutus XIV, *in* The Complete Anti-Federalist, supra, at 358, 431–33; Letters from the Federal Farmer to the Republican XV, *in* The Complete Anti-Federalist, supra, at 223, 319–22. Brutus also complained that if the Supreme Court would exercise its jurisdiction over the facts by holding its own successive jury trial, that would be almost as bad, as it would require parties and witnesses to travel to the seat of government for the retrial. See Brutus XIV, *in* The Complete Anti-Federalist, supra, at 433–37.

responded that the Constitution did not by itself abolish civil juries and that Congress could be trusted to preserve jury trials and safeguard verdicts when appropriate.[168] They did not deny that the Supreme Court's appellate jurisdiction in equity cases could, as far as the Constitution was concerned, extend to the traditional full rehearing; the position was rather that Congress could limit the extent of appellate review in equity if it found it expedient to do so.[169]

The Seventh Amendment, adopted in response to continuing criticisms of the Constitution and jealousy of jury rights, protected jury verdicts against reexamination except as permitted by common law.[170] It said nothing about the scope of appeals in equity or the standards of review to be used in them. The outcome, then, was that the Constitution as amended both preserved the constricted model of review for the common law and permitted full rehearing for suits in equity.[171]

The first Congress departed in multiple respects from the English model of divided, distinctive benches. The same federal judges would hear cases sounding in common law, equity, and admiralty, plus criminal cases, eliminating a personnel-based support for the persistence of differentiated procedures.[172] The inferior courts Congress created enjoyed significantly greater relative status vis-à-vis their superiors than had the masters and the other functionaries of the English Chancery. Recall that the Chancery was a one-judge court until the nineteenth century, with the various masters and others merely supporting the Chancellor's work toward his decree.[173] In such a system, frequent intervention by the judge into his functionaries' acts is understandable.[174] But in Article III courts, all of the judges from top to bottom have the same tenure protections, guaranteed pay, and

168. The Federalist No. 81, at 488–91 (Alexander Hamilton) (Clinton Rossiter ed., 1961); John Marshall, Remarks to the Virginia Ratifying Convention (June 20, 1788), *in* Debates and Other Proceedings of the Convention of Virginia 391, 397–99 (Richmond, Enquirer-Press 2d ed. 1805); James Wilson, State House Yard Speech (Oct. 6, 1787), *in* 1 Collected Works of James Wilson, supra note 89, at 171, 172–73.

169. The Federalist No. 81, supra note 168, at 490 (Alexander Hamilton); James Wilson, Remarks of James Wilson in the Pennsylvania Convention to Ratify the Constitution of the United States, *in* 1 Collected Works of James Wilson, supra note 89, at 178, 250.

170. U.S. Const. amend. VII; see also United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (Story, J.) (explaining that the Seventh Amendment was adopted to address concerns that the Supreme Court would be permitted to retry the facts through its appellate jurisdiction).

171. On whether the Constitution not only permits the equity appeal but requires it, see infra section II.A.

172. See Judiciary Act of 1789, ch. 20, §§ 9, 11–12, 1 Stat. 73, 76–80 (conferring jurisdiction on the inferior federal courts over law, equity, admiralty, and criminal cases).

173. See supra note 120 and accompanying text.

174. See Crick, supra note 119, at 547–48 (making the connection between the staffing of Chancery and Chancery's lack of the common law's final-judgment rule).

presidential commission.[175] The judges of one level are not appointed by, and do not work for, those at the level above.[176]

Beyond those structural features that tended to dampen differentiation, Congress legislated directly on the modes of appellate review, often siding against equity practices even when the substantive law derived from equity. Congress authorized appeals from the district courts to the circuit courts in limited circumstances, and this was understood to allow trial de novo.[177] But the Judiciary Act provided for the Supreme Court to use the writ of error when reviewing cases from state or federal courts without drawing any evident distinction among heads of jurisdiction.[178] Buttressing this provision, the Act called for the circuit courts in equity and admiralty cases to set out the facts upon which their decrees were based, as opposed to transmitting a decree and a mass of potentially conflicting depositions and other documents said to support it.[179] From these features of the Judiciary Act, the Supreme Court drew the conclusion that Congress had departed from tradition and had limited the Supreme Court's review to errors of law alone, even in admiralty and equity cases.[180]

Further, the First Congress regulated trial practice in a way that undermined the basis for the traditional appellate rehearing. Specifically, the Judiciary Act provided that the federal courts would take live testimony

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175. U.S. Const. art. II, § 2; id. art. III, § 1.

176. Id. art. II, § 2. The practice from the start has been that judges of the inferior courts are, like Supreme Court Justices, appointed by the President with the advice and consent of the Senate. For the argument that inferior-court judges are "inferior officers" whose appointment may be vested elsewhere, see Tuan Samahon, The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent, 67 Ohio St. L.J. 783, 841–47 (2006).

177. See Judiciary Act of 1789, ch. 20, § 21, 1 Stat. 73, 83–84 (authorizing appeals from district courts in admiralty and maritime cases, where the disputed sum exceeded three hundred dollars); Irvine v. The Hesper, 122 U.S. 256, 266 (1887) ("[A]n appeal in admiralty from the district court to the circuit court . . . is tried *de novo* in the circuit court."); The Lucille, 86 U.S. (19 Wall.) 73, 74 (1873) (similar).

178. See Judiciary Act of 1789, ch. 20, §§ 22, 25, 1 Stat. 73, 84–87.

179. See id. § 19, 1 Stat. at 83.

180. See Blaine v. Ship Charles Carter, 4 U.S. (4 Dall.) 22, 22 (1800) (holding that the removal of cases of any nature to the Supreme Court requires a writ of error); Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) (opinion of Ellsworth, C.J.); see also 8 The Documentary History of the Supreme Court of the United States, 1789–1800, at 314–19 (Maeva Marcus ed., 2007) (discussing *Blaine*). For Ellsworth, lead author of the Judiciary Act, it made sense to make the lower court's version of the facts conclusive in the Supreme Court. The lower courts were certainly competent to find the facts, while the special contribution of the Court's appellate jurisdiction was to "preserve unity of principle, in the administration of justice throughout the United States." *Wiscart*, 3 U.S. (3 Dall.) at 329–30. Plus, the traditional appeal would involve the "private and public inconveniency" of the Court reviewing a huge pile of materials and witnesses traveling to the capital. Id. Justice Wilson dissented and would have permitted the traditional appeal in equity. Id. at 326–27 (Wilson, J., dissenting); see also infra section II.A (evaluating Wilson's argument).

in open court in all cases.[181] This early but important attempt at procedural merger again favored the common law by departing from the historic practice of Chancery, in which the court received evidence in written form.[182]

As had happened with the timing of review, equity practice soon began reasserting itself. An 1802 statute provided that the trial court in equity could, in its discretion and upon the request of either party, fall back on the chancery practice of written depositions in those states that adhered to that traditional practice.[183] A year later, Congress returned to the historical norm by providing for appeals to the Supreme Court from the circuit courts in equity and admiralty cases, though it left in place the writ of error for review of cases coming from the state courts.[184] This switch from error to appeal opened up the facts as well as the law, so the Supreme Court received evidence along with the record; the statute even allowed the introduction of new evidence in the Supreme Court in admiralty and prize cases.[185] Equity's rehearing had made a partial comeback.

In the following decades, distinctions between the scope of review in law and in equity remained and, in some respects, intensified. Through the 1822 Equity Rules, the Supreme Court reinforced the return to out-of-court examinations yielding depositions for the court's use.[186] More generally, the Court's rules and its case law sought national uniformity in federal equity practice, with the High Court of Chancery serving as the model.[187] The advent of waiver of jury trials in cases at common law might

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181. Judiciary Act of 1789, ch. 20, § 30, 1 Stat. 73, 88–90 ("That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law.").

182. See Charles Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49, 100 (1923) (calling this early decision "a great triumph for the anti-chancery party").

183. Act of Apr. 29, 1802, ch. 31, § 25, 2 Stat. 156, 166. Some states shifted to live in-court testimony very early, others much later. See, e.g., Act of Mar. 20, 1930, ch. 132, 1930 Va. Acts 346 (Virginia); Elias Merwin, The Principles of Equity and Equity Pleading 575–78 (H.C. Merwin ed., 1895) (Massachusetts); Kellen Funk, Equity Without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846–76, 36 J. Legal Hist. 152, 162 (2015) (New York).

184. Act of Mar. 3, 1803, ch. 40, § 2, 2 Stat. 244, 244. The changes were originally made in the short-lived Act of Feb. 13, 1801, ch. 75, 2 Stat. 89. The retention of the writ of error for state cases meant that review remained limited to law regardless of whether the state case was in its nature equitable or legal. Egan v. Hart, 165 U.S. 188, 189 (1897).

185. Act of Mar. 3, 1803, § 2, 2 Stat. at 244; see also The San Pedro, 15 U.S. (2 Wheat.) 132, 142 (1817) (describing the change in the scope of review of equity and admiralty cases brought about by 1803 Act). The Court eventually decided that it would not hear new evidence absent good cause. See The Mabey, 77 U.S. (10 Wall.) 419, 420 (1870).

186. The New Federal Equity Rules 40–41 (Hopkins ed. 1913) (1822 Equity Rules 25, 26, and 28).

187. See Kristin A. Collins, "A Considerable Surgical Operation": Article III, Equity, and Judge-Made Law in the Federal Courts, 60 Duke L.J. 249, 272–74 (2010); see also Kellen

have provided an opportunity to align appellate review of those cases with review in equity cases, but it did not. The 1865 statute authorizing bench trials in law cases instead provided that the judge's findings would have the same effect as a jury verdict.[188] In other words, the standard of review followed the old law–equity line rather than diverging based on the identity of the decisionmaker.[189]

The expectation of a full rehearing of the law and facts eroded in the late nineteenth century. An 1875 statute, aimed at relieving the Supreme Court's heavy workload and worrisome backlog, preserved the opportunity for retrial in the circuit court but limited the Supreme Court's review to questions of law, essentially returning to the system of the first Judiciary Act.[190] That statute did not apply to cases in equity, but the Court was indirectly undermining rehearing in that jurisdiction as well. An 1893 amendment to the Equity Rules permitted trial courts in their discretion to take oral testimony in open court,[191] and Rule 46 of the Equity Rules of 1912 made in-court testimony the norm.[192]

Even without any formal change to the standards of review or switch between appeals and writs of error, the change in the mode of taking testimony meant that appellate review would have to fall short of a de novo rehearing. As Dobie's 1928 treatise put it, Equity Rule 46 did "not impair

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Funk, Equity's Federalism, 97 Notre Dame L. Rev. 2057, 2059 (2022) (describing the antebellum Supreme Court's efforts to wall off federal equity from state-level attempts at fusion).

188. Act of March 3, 1865, ch. 86, § 4, 13 Stat. 501, 501; see also Dirst v. Morris, 81 U.S. 484, 490–91 (1871) (distinguishing between review in jury-waived cases and equity review). In one way, the trial judge's findings had greater effect than a jury verdict, as a verdict was subject to review by the trial judge on a motion for a new trial. William Wirt Blume, Review of Facts in Non-Jury Cases, 20 J. Am. Judicature Soc'y 68, 70–71 (1936).

189. See Lumbermen's Tr. Co. v. Town of Ryegate, 61 F.2d 14, 15–16 (9th Cir. 1932); 8 Hughes, supra note 61, § 5816. Likewise maintaining the law–equity divide, but from the other direction, when a court in equity empaneled an advisory jury, that jury's findings did not bind the court but served only "to inform the conscience of the Chancellor." Watt v. Starke, 101 U.S. 247, 252 (1879); see also Basey v. Gallagher, 87 U.S. (20 Wall.) 670, 680 (1874) (stating that "all information presented to guide [the judge's decision in an equity case], whether obtained through masters' reports or findings of a jury, is merely advisory").

190. Act of Feb. 16, 1875, ch. 77, § 1, 18 Stat. 315, 315–16; see also The "Abbotsford", 98 U.S. 440, 445 (1878) (observing that the statute "relieve[s] us from the great labor of weighing and considering the mass of conflicting evidence which usually filled the records in this class of cases"); Munson S.S. Line v. Miramar S.S. Co., 167 F. 960, 964 (2d Cir. 1909) (explaining that the statute preserved retrial in the circuit court); Felix Frankfurter & James M. Landis, The Business of the Supreme Court at October Term, 1929, 44 Harv. L. Rev. 1, 26–35 (1930) (explaining the motives behind the statute). Even before the statute was enacted, the Court had taken steps to protect itself from resolving factual disputes. It adopted a "two-court rule" under which it would not upset a factual finding concurred in by both courts below except on the strongest showing of error. See The Marcellus, 66 U.S. (1 Black) 414, 417 (1861).

191. Fed. R. Equity 67 (as amended by the Supreme Court, 149 U.S. 793 (1893)); The New Federal Equity Rules, supra note 186, at 121.

192. Fed. R. Equity 46 (1912); The New Federal Equity Rules, supra note 186, at 173; Robert E. Bunker, The New Federal Equity Rules, 11 Mich. L. Rev. 435, 449 (1913).

the power of appellate courts to review findings of facts by the lower court; but doubtless such finding is now more binding, and will be less frequently disturbed, in view of the trial judge's opportunity to have the witnesses before him and to see and hear them."[193] To similar effect, Clark wrote that the switch to live testimony "remov[ed] . . . one of the most important arguments for the separate scope of review in equity."[194] He continued:

> [T]he fact that in equity cases the usual method of taking testimony had been by deposition, which being in written form could be examined by the appellate court as fairly and easily as by the trial court, had been at the base of the contention that in equity suits the review should proceed as a rehearing upon the written documents, since it did not involve questions as to the credibility or behavior under examination of witnesses.[195]

By the early twentieth century, therefore, federal courts of appeals hearing equity cases had begun recalibrating their standards of review, deferring more heavily when findings were based on conflicting witness testimony.[196]

A similar shift happened regarding trial courts' review of masters' reports. The federal rules of equity that the Supreme Court issued and revised during the nineteenth century did not address the standard of review applicable to a master's report.[197] Nonetheless, the standard that the courts actually applied depended on how the master received evidence, and deference increased during the nineteenth century, as masters increasingly heard live testimony rather than reading depositions.[198]

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193. Dobie, supra note 142, at 717; see also Am. Rotary Valve Co. v. Moorehead, 226 F. 202, 203 (7th Cir. 1915) (per curiam) ("[I]f the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration of the evidence de novo is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand." (citing Espenschied v. Baum, 115 F. 793 (1902))).

194. Charles E. Clark & Ferdinand F. Stone, Review of Findings of Fact, 4 U. Chi. L. Rev. 190, 204 (1937).

195. Id.

196. Id. at 207–08; 8 Hughes, supra note 61, § 5817; see also, e.g., The Coastwise, 68 F.2d 720, 721 (2d Cir. 1934) (noting that deference to the trial court was less justified when conflicting witness testimony had been taken by deposition); Rown v. Brake Testing Equip. Corp., 38 F.2d 220, 223–24 (9th Cir. 1930) (same); Hamburg-Amerikanische Packetfahrt AG v. Gye, 207 F. 247, 253 (5th Cir. 1913) (same in admiralty cases).

197. Kessler, Our Inquisitorial Tradition, supra note 20, at 1241–42. Providing a standard of review for a master's report first happened shortly before the promulgation of the Federal Rules, with the 1932 promulgation of Equity Rule 61½, which treated the master's report as presumptively correct, subject to revision "when the court in the exercise of its judgment is fully satisfied that error has been committed." Id. at 1242 (quoting Fed. R. Eq. 61½ (1932)).

198. Dobie, supra note 142, at 744–45; Kessler, Our Inquisitorial Tradition, supra note 20, at 1241; see also Tilghman v. Proctor, 125 U.S. 136, 149–50 (1888) ("[T]he conclusions of the master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly

Although the old equity rehearing had been much diminished, the standard of review of facts in equity nonetheless remained more searching than the standard in cases at law.[199] While jury verdicts could be reviewed for the "legal" matter of the sufficiency of the evidence, that meant that they should stand so long as merely some evidence could be found in support of the verdict.[200] And recall that the findings in jury-waived common-law cases were, by statute, given the same effect as jury verdicts, effectively preserving the law–equity divide on appeal regardless of the identity of the factfinder.[201] Even the 1928 statute formally abolishing the writ of error in favor of appeals failed to dislodge the traditional distinction between the factual review available in law versus equity.[202]

That brings us to the eve of the birth of the Federal Rules of Civil Procedure. Since the Federal Rules would largely merge trial practice, with the exception of jury rights properly invoked, commentators thought that cementing the merger required rationalization of appellate standards on terms other than the historic and resilient law–equity divide.[203] In the opinion of Charles Clark, leading rulemaker and future judge, "Probably the greatest obstacle to this union, next to the question of jury trial, is the traditional difference in method of review of equity and law cases."[204] But how to bridge that divide?

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appears to have been error or mistake on his part."); cf. John G. Henderson, Chancery Practice 726–32 (1904) (describing, primarily with reference to state practices, deference as varying according to the mode of proof).

199. See 8 Hughes, supra note 61, §§ 5816–18 (explaining that while appellate courts may "make findings of fact determinate of the controversy" in equity cases, "[i]t was expressly provided by statute that there shall be no reversal . . . upon a writ of error, for any error of fact" in suits at law).

200. See Balt. & Carolina Line v. Redman, 295 U.S. 654, 658–61 (1935) (holding sufficiency of the evidence is a question of law); Lancaster v. Collins, 115 U.S. 222, 225 (1885) ("This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered."); Boatmen's Bank v. Trower Bros. Co., 181 F. 804, 806 (8th Cir. 1910) (stating that a jury's finding of fact may be examined by a court only if there is "no substantial evidence to sustain it"); Taylor, supra note 79, at 695–97 (same).

201. 28 U.S.C. §§ 773, 875 (1925) (superseded by Fed. R. Civ. P. 38, 46, 52); McCaughn v. Real Est. Land Title & Tr. Co., 297 U.S. 606, 608 (1936); see also supra text accompanying notes 188–189.

202. See supra text accompanying notes 60–61.

203. See Advisory Comm. on Rules for Civ. Proc., Proposed Rules of Civil Procedure for the District Courts of the United States 149–50 (1937), https://www.uscourts.gov/sites/default/files/fr_import/CV04-1937.pdf [https://perma.cc/2MLF-ZQVY] (explaining that "a large measure of the advantage of that union [of law and equity] will thus be lost by retaining a divided practice on appeal").

204. Charles E. Clark, Power of the Supreme Court to Make Rules of Appellate Procedure, 49 Harv. L. Rev. 1303, 1319 (1936).

Clark wanted to apply the jury standard to everything, but that put him in the minority.[205] Disagreeing with Clark, the rulemaking committee instead chose a clear-error standard for all judge-made findings, as follows: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[206] The committee said that this standard "accords with the decisions on the scope of the review in modern federal equity practice."[207] Whether that was true depends on how the rule is interpreted, which is difficult because the rule and its commentary are both susceptible of different constructions. On the one hand, and unlike then-prevailing equity practice, the rule does not expressly provide different standards for findings based on (for example) documentary evidence versus conflicting oral evidence. On the other hand, the reference to "due regard" suggests heightened deference when the trial judge assessed witness credibility. The committee's note is not especially helpful. After claiming that the rule accorded with then-prevailing equity practice, it stated that the clear-error standard applied to all kinds of findings.[208] Yet some of the cases it cited said that the clear-error standard did not apply to documentary or undisputed evidence.[209] A previous proposed version of the rule had provided that "[t]he findings of the court . . . shall have the same effect as that heretofore given to findings in suits in equity,"[210] which did not expressly articulate a standard but at least made clear the aim of continuing with existing law.

The rule was evidently not clear enough to stamp out the previously prevailing distinctions based on the nature of the evidence.[211] In the early decades after promulgation of the rules, some courts of appeals continued to treat findings based on depositions or other documents or findings

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205. Clark & Stone, supra note 194, at 191–92, 217; see also 5 Advisory Comm. on Rules for Civ. Proc., Proceedings of Meeting of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States 1225–34 (1936), https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-february-1936-vol-v (on file with the *Columbia Law Review*) (reporting debate on this point).

206. Fed. R. Civ. P. 52 (1938).

207. Id. advisory committee's note (1937).

208. Id. ("[The standard] is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a fact deduced or inferred from uncontradicted testimony.").

209. The note cites several cases in support of its claim that contemporary equity practice had deferential review, all of which involved disputed testimony. The note then uses a "compare" signal and cites Kaeser & Blair, Inc., v. Merchs.' Ass'n, 64 F.2d 575, 576 (6th Cir. 1933), and Dunn v. Trefry, 260 F. 147, 148 (1st Cir. 1919), which said that the clear-error standard did not apply to documentary evidence or inferences from undisputed facts, respectively. It would have been easy enough for the note to expressly preserve or reject those cases and the underlying distinctions, but it did neither. Fed. R. Civ. P. 52 advisory committee's note (1937).

210. Fed. R. Civ. P. 68 (Preliminary Draft 1936).

211. See supra notes 193–196 and accompanying text.

based on undisputed testimony as worthy of little or no deference, with some even saying Rule 52's standard was inapplicable.[212] Indeed, the Supreme Court itself hinted at such a distinction, while officially denying it.[213] Distinguished commentators could be found on either side, with Professor Charles Alan Wright contending that the rule required clear-error review for all findings and Professor James William Moore adhering to the old distinctions based on the nature of the evidence.[214]

The rulemakers sought to snuff out differentiated review, and so they amended Rule 52 in 1985. The amended rule modified "findings of fact" with the phrase "whether based on oral or documentary evidence."[215] As the rulemaking committee explained, its goal in amending the rule was to eliminate conflicting interpretations and bring practice into line with "the standard of review as literally stated in Rule 52(a)"—that is, clear error for all findings, including those based on documents.[216] They succeeded, at least in terms of the formal doctrine, as courts that previously adopted the variegated approach recognized that it had been repudiated.[217] So, today the standard of review is clear error, and clearly so, at least in theory.

To sum up, merger came late to the standard of review, and neither side totally won. Today's clear-error review of judge-found facts is not the rational-jury standard of the common law. But neither is it the de novo retrial of the law and facts that traditionally characterized the appeal. Nor is it, despite what the rulemakers claimed, a continuation of the pre-1938 equity practice, which differentiated between kinds of evidence and lingered on for decades until the rulemakers came back to put it down in 1985.

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212. See, e.g., Stevenot v. Norberg, 210 F.2d 615, 619 (9th Cir. 1954); Orvis v. Higgins, 180 F.2d 537, 539–40 (2d Cir. 1950); Pac. Portland Cement Co. v. Food Mach. & Chem. Corp., 178 F.2d 541, 548 (9th Cir. 1949); Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry. Co., 154 F.2d 450, 452 (6th Cir. 1946); Himmel Bros. Co. v. Serrick Corp., 122 F.2d 740, 742 (7th Cir. 1941); Carter Oil Co. v. McQuigg, 112 F.2d 275, 279 (7th Cir. 1940); United States v. Mitchell, 104 F.2d 343, 346 (8th Cir. 1939).

213. Compare United States v. Gen. Motors Corp., 384 U.S. 127, 141 n.16 (1966) (stating in dicta that the rationale for deferential review had little application to findings in a "paper case"), with United States v. U.S. Gypsum Co., 333 U.S. 364, 394 (1948) (explaining that Rule 52's "clear error" standard applies to inferences from documents and undisputed testimony).

214. See Note, Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 516–36 (1963) (discussing contending interpretations).

215. 471 U.S. 1157, 1158 (1984); Fed. R. Civ. P. 52, advisory committee's note on 1985 Amendment. In the 2007 restyling of the rules, the reference to "oral or documentary evidence" became the "oral or other evidence" of today's rule, a change meant to be stylistic only. Advisory Comm. on Rules for Civ. Proc., Report of the Civil Rules Advisory Committee 141–42 (2006), https://www.uscourts.gov/sites/default/files/fr_import/CV06-2006.pdf [https://perma.cc/7Y8E-T76Y].

216. Fed. R. Civ. P. 52, advisory committee's note on 1985 Amendment.

217. See, e.g., Zervos v. Verizon N.Y., Inc., 252 F.3d 163, 170–71 (2d Cir. 2001).

F. *Summary: Blended Merger*

Time to take stock. Compared to federal trial practice—which can be pretty fairly described as "equity procedures that are structured toward culminating in a jury trial that will almost never occur"—federal appellate practice is harder to characterize. As the discussion above has shown, some aspects of it mostly follow the model of equity, other aspects mostly follow the common law, and still others reflect an intermediate position or follow one model in theory and the other in practice.

Some prior commentators have identified modern appellate practice with one model or the other because they have focused too much on just one dimension. Consider the timing of review, for example. The baseline in the federal system is that appellate review awaits a final judgment.[218] If one emphasizes that feature, one would see an equity-based trial procedure coupled to a common-law appellate system.[219] The timing of review is indeed an important determinant of a system's character, and our general rule of timing follows the law model, but once one gets into the appellate courts, categorizations become hard. The standard of review for judicial factfinding in Rule 52 is officially described as following premerger equity practice—though, as we have seen, the rule does not exactly do that, instead following a standard in between law and equity.[220] Some error being found, the remedies available to appellate courts follow the flexible equity model rather than the constricted legal model.[221] With authority over facts and law, a full record (including transcripts) to review, and full remedial power, the federal appellate courts come close to possessing the power to do comprehensive justice, which had been the goal of the equitable appeal.[222] Yet the courts often seem reluctant to exercise all of that power, instead finding error and leaving it to others to sort out, thus recreating a limitation of the writ of error.[223]

Even when it comes to the timing of review, the dimension along which the common law shows the strongest influence, today's system is not pure. Despite the 1789 Judiciary Act's limitation of review to final judgments, the rules regarding the timing of review have managed to work themselves into a state of complexity. Certain categories of interlocutory orders are, either by statute or by rule, reviewable as of right or at the appellate court's election, often in situations that fall within the traditional

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218. See 28 U.S.C. § 1291 (2018); supra section I.D.

219. See, e.g., Melissa A. Waters, Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era, 80 N.C. L. Rev. 527, 591–93 (2002). But cf. Gavin, supra note 45, at 1122–24 (emphasizing the procedural discretion granted by the Federal Rules of Appellate Procedure to reach the conclusion that the system is primarily equitable).

220. See supra section I.E.

221. See supra section I.C.

222. See supra section I.B.

223. See supra text accompanying notes 108–113.

equity jurisdiction.[224] Moreover, with the judicially developed collateral-order doctrine, the courts have breached the final-judgment rule in needful cases of all sorts.[225] And mandamus (a prerogative writ, of all things) stands in reserve for a small yet ill-defined category of special cases.[226] No one could have designed this patchwork of practices and mismatched labels.

To conclude this assessment, consider an intangible way in which modern appellate procedure, or rather the operations of the federal appellate machinery, resembles the ways of Chancery: in its slide into bureaucracy. In the courts of appeals there are now clerks, staff attorneys, and appellate mediators arrayed around the judges, facilitating their work.[227] True, none of these assistants have formal decisionmaking power, but then neither did the masters in chancery and other staff who swelled chancery's ranks: All decrees ultimately came before the Chancellor, the keeper of the monarch's conscience, for approval.[228] The tension between, on the one hand, the aspiration to individualized justice tailored to the parties and dispensed by a real person and, on the other hand, the bureaucratic administration of justice, marks a feature shared by the present federal appellate system and traditional equity practice.

II. PATHWAYS FOR EVOLUTION

By exploring the roots of current federal appellate practice and identifying which aspects of it come from which tradition, Part I is not meant to provide a roadmap for "unmerging" appellate practice. But appreciating the way things used to be, the reasons for the old practices, and why the practices changed can nonetheless puncture any notion that our system's current resting point is inevitable. Kessler puts the matter well in her article on rehabilitating equity's tradition of inquisitorial trial procedure. "Because our sense of history shapes our sense of the possible," she explains, "history can offer the best antidote to the dangerous tendency to view reform—precisely because it changes the status quo—as 'alien.'"[229]

An example of how an appreciation of the past can make the seemingly strange more familiar comes from Professor Adam Zimmerman's recent proposal for "appellate class actions."[230] Today's

224. See supra section I.D.

225. See supra text accompanying note 149.

226. See supra text accompanying notes 66–67.

227. See Richman & Reynolds, supra note 92, at 97–114; see also Diane P. Wood & Zachary D. Clopton, Managerial Judging in the Courts of Appeals, 43 Rev. Litig. 87, 103 (2023) (describing staff attorneys as part of the "court bureaucracy").

228. See supra text accompanying notes 120–124.

229. Kessler, Our Inquisitorial Tradition, supra note 20, at 1193.

230. Adam S. Zimmerman, The Class Appeal, 89 U. Chi. L. Rev. 1419, 1426 (2022).

federal courts are strongly differentiated across levels of the hierarchy, such that "appellate class actions" seem anomalous, but that differentiation is a choice. In equity, the trial and appellate stages were not very distinct: Appellate courts in equity not only aimed at a just resolution of the whole dispute but could pursue that goal through new factfinding, amendments of the pleadings, and joinder of parties.[231] To be clear, Zimmerman's proposal for appellate class actions would not necessarily require courts of appeals to do all of those "trial-like" things themselves; they might instead initiate the class action and then transfer matters to district courts or agencies for factfinding, for example. But courts and commentators should hesitate before rejecting appellate class actions as "[in]compatible" with the "appellate mode of proceeding."[232]

In addition to fostering a sense of possibility, appreciating the former divergence between the appellate procedures of law and equity can reveal the functional value of some of those now-submerged distinctions. To be sure, historical accident explains plenty that logic cannot; the English court system was not for rationalists.[233] But some of the procedures developed or persisted for good functional reasons, and not all of those functional reasons disappeared even once the old law–equity distinction failed to track them. At the trial level, it is still the case that lay jurors would have trouble sorting out a complicated matter of accounting for trust profits, which is why a rational judicial system otherwise attracted to juries would give such matters to judges or masters in chancery, not ordinary jurors.[234] So too in appellate procedure, it may be that some abandoned practices were well founded. History can therefore suggest reforms that may be attractive today, and not just to antique hunters.

Furthermore, and aside from any suggestions of reform, the functional logic that used to underlie divergent appellate procedures can help to explain certain phenomena in today's federal judicial system. Just as equity practice reasserted itself in certain ways in the past, we can understand some present-day phenomena as reassertions of equity's logic.

With those prefatory comments in mind, this Part will present a few ways in which an understanding of the two formerly distinct traditions of

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231. See supra sections I.B, I.E.

232. Burns v. U.S. R.R. Ret. Bd., 701 F.2d 189, 191 (D.C. Cir. 1983); see also Zimmerman, supra note 230, at 1466 (critiquing *Burns*).

233. Bentham, as so often, can be counted on to state the matter with flair. See Jeremy Bentham, Bentham Manuscripts, box 168, folio 200, Univ. Coll. London, https://ucl.primo.exlibrisgroup.com/discovery/delivery/44UCL_INST:UCL_VU2/12359599080004761 (on file with the *Columbia Law Review*) (explaining that the division of law and equity did not reflect "any rational cause" but rather the "stupidity" of the English judges).

234. See Fed. R. Civ. P. 53(a)(1)(B)(ii) (permitting the appointment of a master to hold trial proceedings on the calculation of damages or to perform an accounting); Langbein et al., supra note 30, at 273–74 (describing responses to the weaknesses of jury factfinding in the early years of the rise of Chancery).

appellate procedure either suggests a potential pathway for change or helps to explain current pressures in the system. The common-law tradition could inspire certain reforms—such as stripping the Supreme Court of review of the facts,[235] which would be a throwback to the writ of error, albeit one motivated by contemporary concerns about the Court's power. But a greater appreciation of the equity tradition appears to offer more insight at the present time, and so the following material focuses on it.

A. *Constitutionalizing Equity's Appeal? A Path Not Taken and a Door Left Open*

Given the revival of interest in equity, we might start with the boldest potential claim for its revival in appellate procedure: that the Constitution not only permits but *requires* the equitable appeal with its rehearing of the law and the facts.[236] Put differently, this is the claim that Rule 52's clear-error standard of review, and maybe other restrictions as well, are unconstitutional when they are applied to appeals in equity.

Note that the present claim is more aggressive than Bray's argument that certain cases currently thought to fall within the Seventh Amendment's jury guarantee actually fall outside of its scope because they use procedures that were used by courts of equity.[237] Devices for aggregation of claims and parties were tools of chancery, and so, on Bray's account, the modern damages class action is not a "Suit[] at common law" for which the Seventh Amendment jury right is "preserved."[238] But Bray's argument does not *forbid* jury trial in such cases; the legislature could provide jury rights by statute even when the Seventh Amendment does not.[239] A closer analogue to the present argument that the equity appeal is constitutionally required would be the argument that certain cases are so complex that they not only fall outside of the Seventh Amendment jury guarantee but actually demand non-jury procedure in order to afford due process.[240] The argument on the table here is the appellate analogue: The Constitution sometimes demands the old-fashioned equity appeal.

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235. See Joseph Blocher & Brandon L. Garrett, Fact Stripping, 73 Duke L.J. 1, 12–13 (2023) (proposing limitations on the Supreme Court's jurisdiction over facts).

236. See supra text accompanying notes 17–23 (discussing revival of interest in equity); cf. Owen W. Gallogly, Equity's Constitutional Source, 132 Yale L.J. 1213, 1277 (2023) (describing equitable remedies as stemming from Article III rather than from statutes); Brooks M. Chupp, Note, "A Sword in the Bed": Bringing an End to the Fusion of Law and Equity, 98 Notre Dame L. Rev. 465, 467, 482–89 (2022) (urging the reestablishment of separate courts of equity at the trial level).

237. Bray, Seventh Amendment, supra note 19, at 497 (discussing interpleader and class action suits as falling outside of the Seventh Amendment's jury guarantee).

238. Id. at 499 (alteration in original) (quoting U.S. Const. amend. VII).

239. See id. at 507 ("The policy goal of increasing use of the jury could be achieved through legislation since there is no right not to have a jury trial.").

240. For a rare endorsement of this argument, see In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069, 1086, 1089 (3d Cir. 1980) (noting that a court should deny jury trial

Despite its boldness, this claim is not as wild as it sounds. No less an authority than Justice (and framer) James Wilson endorsed it, albeit in dissent. And some states endorsed it as a matter of state law.[241] The argument merits a brief hearing before we reject it.

Wilson's endorsement came in *Wiscart v. Dauchy*, in which the majority interpreted the 1789 Judiciary Act's provision for the writ of error in equity and admiralty to mean that the Court could review only errors of law on the record.[242] The Judiciary Act thereby departed from traditional practice that provided for appeals on the law and facts in equity and admiralty.[243] Dissenting from the Court's approval of this innovation, Wilson insisted on the appeal. His dissent relied primarily on a traditionalist argument to the effect that Congress had not legislated clearly enough to banish the appeal. After that, however, he added this: "Even, indeed, if a positive restriction existed by [the statute], it would, in my judgment, be superseded by the superior authority of the constitutional provision" that endowed the Court with jurisdiction of law and fact.[244]

Wilson's single sentence of constitutional analysis does not furnish much to go on—"cavalier in the extreme," Professor David Currie called it[245]—but one can gather more about Wilson's concerns from elsewhere in the opinion and from his other writings. He was a defender of the jury trial, calling it superior to any other mode of trial, but only "in cases to which [jury trial] is applicable."[246] In particular, he was worried about the risk that juries, or at least unreviewable juries, posed to the fledging country's foreign relations, which were often at issue in admiralty cases.[247] "Would it not be in the power of a jury, by their verdict, to involve the whole Union in a war?" he asked at the Pennsylvania ratification convention. "They may condemn the property of a neutral, or otherwise infringe the law of nations; in this case, ought their verdict to be without

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on due process grounds "only in exceptional cases when the court, after careful inquiry into the factors contributing to complexity, determines that a jury would be unable to understand the case and decide it rationally").

241. See infra notes 250–252 and accompanying text.

242. Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327–28 (1796). Enslaved people were some of the property in dispute in the case.

243. See supra text accompanying notes 178–180.

244. *Wiscart*, 3 U.S. (3 Dall.) at 325 (Wilson, J., dissenting); see also U.S. Const. art. III, § 2. Justice William Paterson later indicated that he had agreed with Wilson's conclusion, for he would have "give[n] the most liberal construction to the act"; he did not address Wilson's constitutional proposition. The Perseverance, 3 U.S. (3 Dall.) 336, 337 (1797).

245. David Currie, The Constitution in the Supreme Court: The First Hundred Years, 1789–1888, at 28 (1985).

246. James Wilson, Remarks in Pennsylvania Convention, *in* 1 Collected Works of James Wilson, supra note 89, at 270–71.

247. *Wiscart*, 3 U.S. (3 Dall.) at 327 ("[I]t is of moment to our domestic tranquility, and foreign relations, that causes of Admiralty and Maritime jurisdiction, should, in point of fact as well as of law, have all the authority of the decision of our highest tribunal . . . .").

revisal?"[248] Wilson's views may have been right as a matter of policy, as Congress restored the traditional appeal in equity and admiralty cases several years after *Wiscart*.[249]

Although Wilson's view of a constitutionally enshrined appellate procedure represents a path not taken in the federal system, some state courts found protections for the equitable appeal under their own constitutions. The Michigan Supreme Court thought that the "essential nature" of equitable rights required equitable procedures, and it rejected a "radical" legislative attempt at fusion in 1889.[250] "The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury," the court wrote.[251] Several other state courts in the nineteenth century, relying on the appellate jurisdiction conferred by their state constitutions, also invalidated state legislative attempts to interfere with the full equitable rehearing.[252]

As a matter of federal constitutional law, though, Wilson was in dissent. And the *Wiscart* majority's view of congressional power to regulate the scope of review was reaffirmed a century later when Congress once again limited the Court's appellate jurisdiction in admiralty cases to review of the law only.[253] So two centuries of judicial precedent and congressional practice are firmly against Wilson's view.

In addition, the *Wiscart* majority's view of congressional power is persuasive on the merits. The Constitution conferred on the Court "appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."[254] The reference to "appellate Jurisdiction" is, so far as one can tell, a generic term for review, not a reference specifically to the vehicle of the equitable appeal and an exclusion of the writ of error or other vehicles.[255] As Chief Justice Oliver

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248. James Wilson, Remarks in Pennsylvania Convention, *in* 1 Collected Works of James Wilson, supra note 89, at 270–71. He appealed as well to the delegates' own experiences: "Those gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would have had when those vessels were taken in their states and tried by juries, and in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries." Id. at 250.

249. See supra note 184 and accompanying text.

250. Brown v. Kalamazoo Cir. Judge, 42 N.W. 827, 828–31 (Mich. 1889).

251. Id. at 830.

252. See, e.g., Sherwood v. Sherwood, 44 Iowa 192, 194–95 (1876); Carolina Nat. Bank v. Homestead Bldg. & Loan Ass'n, 33 S.E. 781, 786 (S.C. 1899) (Pope, J., dissenting); Catlin v. Henton, 9 Wis. 476, 492–93 (1859); see also M.T. Van Hecke, Trial by Jury in Equity Cases, 31 N.C. L. Rev. 157, 171–73 (1953) (addressing state constitutional rulings protecting non-jury trial in equity); Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176, 1178–79 (1961) (addressing state protections for equity procedure at the trial level).

253. The "Francis Wright", 105 U.S. 381, 384–87 (1881).

254. U.S. Const. art. III, § 2, cl. 2.

255. The Federalist No. 81, at 489 (Alexander Hamilton) (Clinton Rossiter ed., 1961); William Rawle, A View of the Constitution of the United States of America 226–27 (Philadelphia, H.C. Carey & I. Lea 1825).

Ellsworth explained in *Wiscart*, restricting or removing appellate review of the facts could be regarded as an exception to appellate jurisdiction like the amount-in-controversy requirement for appellate review, a requirement the first Congress also imposed.[256] Whatever limits there may be on congressional power to restrict the Court's appellate jurisdiction, removing appellate review of the facts does not violate them.[257] As regards the lower federal courts' powers of review, those courts and any appeals between them need not exist at all.[258] And this is not even to mention the realist hunch that the courts, being sensitive to their workloads, would have little interest in reinvigorating review of the facts as a categorical constitutional imperative (as opposed to occasional sub rosa scrutinizing).

Any remaining vitality in the argument that the Constitution enshrines the equitable appeal founders on the Seventh Amendment. One of the sharpest objections to the Constitution was that it did not expressly provide for jury trial and even implied, through the Supreme Court's appellate jurisdiction as to "Law *and Fact*," that verdicts were at risk.[259] In response, the Seventh Amendment then "preserved" civil juries and the force of their verdicts as at common law.[260] There was no corresponding public demand for constitutional protection of equity procedures like the rehearing on appeal. Some Founding-era states used juries in equity and restricted appellate review,[261] so it is not as if nobody could have conceived of a role for an equity-preserving amendment that was the inverse of the Seventh Amendment.

The best view of all of this, in sum, is that the Constitution does not entrench the equitable appeal. Put another way, the Constitution allowed separate systems of review, but it also allowed fusion, as lawmakers prefer. There is therefore room for creative thinking about what appeals should look like.

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256. Judiciary Act of 1789, ch. 20, §§ 21–22, 1 Stat. 73, 83–85; Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327–29 (1796) (opinion of Ellsworth, C.J.); see also Judiciary Act § 25 (conferring Supreme Court jurisdiction over state judgments against federal rights but not for judgments in favor of them).

257. For an overview of the doctrine and literature on congressional authority, see Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 295–345 (7th ed. 2015); see also Blocher & Garrett, supra note 235, 28–40 (proposing to strip the Supreme Court of review of the facts in certain categories of cases).

258. See U.S. Const. art. III, § 1 (referring to "such inferior Courts as the Congress may from time to time ordain and establish").

259. Id. § 2, cl. 2 (emphasis added); see also supra text accompanying notes 166–169 (describing this objection).

260. U.S. Const. amend. VII.

261. See Van Hecke, supra note 252, at 158–61 (describing provisions for jury trials in equity in the 1770s to 1790s); supra note 119 (describing Ellsworth's experience with Connecticut's use of the writ of error in equity cases).

B. *Explaining Pressures: Interlocutory Review*

As described in section I.D above, the federal system's basic rule about the timing of review—no appeal until a final judgment—follows the legal model rather than the equitable model. Yet as also explained there, our system has nonetheless come to tolerate quite a lot of interlocutory appeals and other exceptions, including in those circumstances that would have fallen within the traditional jurisdiction of equity. This section explains how an understanding of equity's tolerance of interlocutory review can help to make sense of some current pressures within the system of federal appellate procedure.

Equity's traditional tolerance for interlocutory review had a couple of supports. One structural support, that Chancery for a long time had just one judge and lots of functionaries doing his bidding,[262] is not much applicable to the federal judiciary, which is a genuine multilevel court system.

But other considerations also supported the tolerance for interlocutory appeals, namely that equity cases involved, in contrast to the concentrated, trial-focused procedure of the common law, a protracted pretrial (or, better, nontrial) procedure in which highly consequential rulings could come at any point along the long and winding way to a final decree.[263] Interlocutory appeal could therefore relieve erroneously imposed hardships and even promote efficient resolution of cases. "[T]he permitting of an Appeal in an early stage of the Proceedings [in equity,]" an early-nineteenth-century authority wrote, "frequently saves the Expence of prosecuting a suit further, which is often very considerable."[264] Save for the oddities of capitalization, a modern writer concerned with efficiency could write the same thing.

Modern federal practice on the timing of appeal has become a motley admixture, as functional considerations forced exceptions to the Judiciary Act's attempt to limit review to final judgments and decrees.[265] But the system may not be resting at an optimal point, as changes in the litigation landscape can require new balances of the competing interests. This observation has a specific form and a more general form.

First for the specific form. If one looks around the current landscape of federal procedure with an eye toward identifying unmet needs for interlocutory appeals, one's gaze is likely to land on multidistrict litigation (MDL).[266] An MDL has the look and feel of a proceeding in equity, with its multiplicity of parties and interests, risk of third-party impacts, and

262. See supra text accompanying notes 120, 173–174.

263. See supra text accompanying notes 120–124.

264. Palmer, supra note 78, at 1.

265. See supra section I.D.

266. See 28 U.S.C. § 1407 (2018) (authorizing transfer and consolidation of similar cases pending in different districts).

frequent use of adjuncts like special masters to oversee discovery or administer claims.[267] Transfer to an MDL court for consolidated pretrial proceedings is usually the start of an extended *nontrial* procedure for case resolution.[268] The MDL judge makes highly consequential rulings, but except for those decisions that dispose of some or all claims, the rulings are generally not appealable when made or—if the case settles, as so many do—ever.[269] Not dissimilar reasoning motivated the adoption of Rule 23(f), providing interlocutory appeals for class certifications.[270] Given these features of MDL practice, and the similarity to class actions, it is not surprising that many thoughtful observers—and not just the Chamber of Commerce—have identified the value of expanding the opportunities for interlocutory review in MDL cases.[271]

At least for now, the Civil Rules Advisory Committee has decided against promulgating a rule authorizing interlocutory appeals in MDL cases.[272] One of the Committee's reasons for not doing so was the availability of other mechanisms under current law, including certification under section 1292(b), mandamus, and Rule 54.[273] Given the pressures for interlocutory review in MDL, one suspects those tools to get a workout, much the same way that litigants' forum shopping and judges' forum selling made an industry of mandamus petitions seeking transfers of venue out of small-town East Texas and the Waco Division of the Western District of Texas.[274]

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267. See Elizabeth Chamblee Burch & Margaret S. Williams, Judicial Adjuncts in Multidistrict Litigation, 120 Colum. L. Rev. 2129, 2153–62 (2020) (describing the use of masters, claims administrators, and other adjuncts in MDL).

268. See Abbe R. Gluck & Elizabeth Chamblee Burch, MDL Revolution, 96 N.Y.U. L. Rev. 1, 16 (2021) (noting that more than ninety-seven percent of cases transferred to an MDL court are resolved there).

269. Id. at 20; see also Elizabeth Chamblee Burch, Remanding Multidistrict Litigation, 75 La. L. Rev. 399, 400–02, 410 (2014) (noting ubiquity of settlements in MDLs).

270. Fed. R. Civ. P. 23 advisory committee's note on 1998 Amendment.

271. See, e.g., Gluck & Burch, supra note 268, at 59–60; Andrew S. Pollis, The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation, 79 Fordham L. Rev. 1643, 1685 (2011); Waters, supra note 219, at 591–93. Another approach, which recalls a solution to another instance of vesting extreme power in a single trial judge, is to assign MDLs to multijudge panels. See Brian T. Fitzpatrick, Many Minds, Many MDL Judges, 84 Law & Contemp. Probs. 107, 108–09, 115–19 (2021).

272. See Memorandum from Hon. John D. Bates, Chair, Comm. on Rules of Prac. & Proc., to Hon. Robert M. Dow, Jr., Chair, Advisory Comm. on Civ. Rules 15 (Dec. 9, 2020), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_december_2020_0.pdf [https://perma.cc/KLE9-9A2L].

273. Id. at 19.

274. See J. Jonas Anderson, Paul R. Gugliuzza & Jason A. Rantanen, Extraordinary Writ or Ordinary Remedy? Mandamus at the Federal Circuit, 100 Wash. U. L. Rev. 327, 333–34 (2022) (discussing how "judge shopping" has resulted in patent cases clustering in certain Texas jurisdictions); see also Daniel Klerman & Greg Reilly, Forum Selling, 89 S. Cal. L. Rev. 241, 242–43 (2016) (describing the phenomenon of "forum selling," in which judges make their courts magnets for particular kinds of litigation).

Now for the more general version of what equity's approach to the timing of review can illuminate about pressures in today's system. It turns out that MDL is like other modern federal litigation, only more so. In today's federal courts, only a tiny percentage of cases go to trial, and so the procedure of "trial courts" is largely a "pre-(non-)trial" procedure in which a judge manages a case toward settlement.[275] Limiting review to final judgments therefore has an entirely different impact than it would have in a system in which final judgments came fast. Professor Stephen Yeazell is especially instructive on how modern federal procedure creates the need for appeal but withholds the opportunity for it:

> [T]he power of the final judgment rule depends on the structure of the process preceding appeal. During eras in which a substantial proportion of trial court rulings produced judgments, the rule yielded prompt appellate review and tight appellate control. . . .
>
> Keeping the final judgment rule in place as the Rules provided for several new stages of pretrial proceedings, the Rules created a new procedural layer that extended the length of a lawsuit while creating the opportunity for important judicial rulings. The result was a set of lower court rulings that, while often significant, were as likely as not to be unreviewable. Creating such a set of rulings while holding appellate review constant effectively allocated more power to trial courts.[276]

As litigation in general becomes more like the temporally extended nontrial procedure of equity, the pressure for interlocutory appeal mounts, and so the question becomes when and where to let the pressure out. Hence the current patchwork of exceptions and safety valves and constant efforts at evasion of the final-judgment rule.[277]

Many scholars have presented ways to expand early access to appellate courts. Some such proposals work within the grooves of existing law, such as by creating a new category of appealable interlocutory orders.[278] But—and here it is useful to recall the classical definition of equity as the corrective to the law's generality—categorical approaches have trouble accommodating life's variety. Depending on the case, the crucial moment

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275. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 Harv. L. Rev. 924, 925–29 (2000) (noting that "judges are increasingly steering litigants away from seeking decisions and towards negotiated agreements").

276. Stephen C. Yeazell, The Misunderstood Consequences of Modern Civil Process, 1994 Wis. L. Rev. 631, 632–39, 660–61.

277. A popular appellate blog frequently covers attempts to create final judgments through "manufactured finality," despite what looked like the Supreme Court's attempt to terminate the tactic with prejudice. See, e.g., Bryan Lammon, The Ninth Circuit Limits *Baker*, Preserves Manufactured Finality, Final Decisions (Apr. 19, 2022), https://finaldecisions.org/the-ninth-circuit-limits-baker-preserves-manufactured-finality/ [https://perma.cc/Y46W-9NWB].

278. See, e.g., Pollis, supra note 271, at 1685–93 (suggesting a limited right of appeal from interlocutory legal rulings in MDL proceedings).

for review could come with different rulings (on jurisdiction, choice of law, discovery, or *Daubert*); and MDL, a problem area, lacks the single crucial decision point equivalent to class certification. Other approaches therefore deserve attention too. These include expanding opportunities for discretionary review—and lodging the discretion in the court of appeals, not the district court under review[279]—while avoiding abuses by harnessing the parties' own information. One might allow parties one request for interlocutory appeal at a time of their choosing, for example, and impose fee-shifting if it is unsuccessful.[280]

C. *A Modest Equity-Inspired Reform: Less Deference to Trial-Judge Findings (Herein of Nationwide Injunctions)*

This section suggests a modest change to appellate standards of review in certain kinds of cases. The reason to change is not that courts of equity used to do things differently. The choice of a standard of review is a complex matter with multiple inputs. The history is useful because it illuminates functional reasons that still apply today and dispels the sense of foreignness or impropriety that may be the first reaction to a proposed change.

Rule 52, which governs appellate review of judicial factfinding, makes no special provision for a case's posture, importance, or the nature of the evidence before the court. As revised in 1985 in an effort to drive home the point that the clear-error standard applies broadly, it states that the district judge's "[f]indings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."[281]

Rule 52's broad, simple standard masks some complexity in the doctrine as applied, for the confining clear-error standard exerts pressure on the line between the things subject to it and things that are instead freely reviewable. Some courts have held that Rule 52's deferential standard applies only to adjudicative facts, not to legislative facts, which are generalized facts about the world that bear on policy formation.[282] The

279. See Pabellon v. Grace Line, Inc., 191 F.2d 169, 180–81 (2d Cir. 1951) (Frank, J., concurring) (proposing such a statutory amendment); 16 Wright et al., supra note 104, at iii (proposing discretionary interlocutory appeal for extraordinary cases, in place of mandamus); Waters, supra note 219, at 591–602 (urging broader use of mandamus).

280. See, e.g., Bryan Lammon, Three Ideas for Discretionary Appeals, 53 Akron L. Rev. 639, 652–53 (2019) (proposing ways to expand interlocutory review while controlling workload, such as to give each party one opportunity to petition for discretionary appeal).

281. Fed. R. Civ. P. 52(a)(6); see supra section I.E (explaining the background of the amendment).

282. See, e.g., Doe v. Prosecutor, 705 F.3d 694, 697 n.4 (7th Cir. 2013) (stating that "only adjudicative facts are entitled to the clearly erroneous standard of review"); United States v. Singleterry, 29 F.3d 733, 740 (1st Cir. 1994) (same). For a summary of judicial

old line between adjudicative and legislative facts is now coming under another round of pressure due to the growing importance—importance mandated by the Supreme Court's new emphasis on originalism—of facts about the past in judging the present constitutionality of matters such as regulation of guns and abortion.[283] As well, the courts have created the doctrine of "constitutional facts," which requires nondeferential appellate review of certain facts, whether found by a judge or a jury, that bear on the contours of constitutional rights.[284] Still other things that might look like facts are deemed to be questions of law reviewed de novo, largely for functional reasons such as uniformity and third-party effects.[285] In addition, there is of course the "mixed question of law and fact," which gets different levels of appellate scrutiny depending on the features of the question and various functional considerations surrounding it.[286] What the doctrines and disputes above have in common is the urge to apply different standards of review depending on the nature of the factual question or the systemic consequences of its resolution.

An appreciation of the ways of the equitable appeal suggests the wisdom of tailoring the standards of review in light of a different factor: the form of the evidence that gives rise to a finding of fact. Equity's old de novo rehearing and its evolution in the nineteenth and early twentieth centuries into a range of different standards of review responded to whether findings came from conflicting live testimony or instead derived from papers or inferences.[287] The appellate judges who continued to make those distinctions after 1938's merger of law and equity were not in thrall to outmoded historical curiosities; they were relying on functional, competence-based considerations that happened to remain valid. One leading decision championing differential standards for different kinds of evidence was *Orvis v. Higgins*, which was authored by realist icon Jerome Frank and joined by the eminently authoritative Augustus Hand, a

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approaches and a proposed new approach to legislative facts, see generally Haley N. Proctor, Rethinking Legislative Facts, 99 Notre Dame L. Rev. 955 (2024).

283. See United States v. Rahimi, 144 S. Ct. 1889, 1899–901 (2024) (describing the English and early American history of firearms regulation); Ryan C. Williams, Historical Fact, 99 Notre Dame L. Rev. 1585, 1602 (2024) (explaining that the historical facts relevant to originalist inquiries fit awkwardly into the traditional adjudicative–legislative divide).

284. See Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 n.27 (1984); id. at 515 (Rehnquist, J., dissenting); see also United States v. Friday, 525 F.3d 938, 949–50 (10th Cir. 2008) (extending *Bose* to religious free exercise).

285. See, e.g., Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 436 (2001) (amount of punitive damages); Markman v. Westview Instruments, Inc., 517 U.S. 370, 384–91 (1996) (construction of patent claims).

286. See, e.g., Miller v. Fenton, 474 U.S. 104, 109–18 (1985) (voluntariness of a confession); Arctic Cat Inc. v. Bombardier Recreational Prods. Inc., 876 F.3d 1350, 1358 (Fed. Cir. 2017) (obviousness of invention).

287. See supra text accompanying notes 162–163, 181–198.

combination that should cover all the bases.[288] *Orvis* explained that "[w]here a trial judge sits without a jury, the [standard of review] varies with the character of the evidence: . . . If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding."[289] Other courts made the same point, either rejecting de novo review or "glossing" Rule 52 so as to make a finding of clear error easier to reach or harder to reach depending on the nature of the evidence.[290]

Some courts applied the *Orvis* approach to interlocutory appeals of preliminary-injunction rulings that had been decided without live testimony. Here, it was another Second Circuit luminary, Judge Henry Friendly, who had "been hammering away at this point for years," urging that the court of appeals may exercise "full review" in such appeals.[291] Acknowledging the general rule that grants or denials of preliminary injunctions were reviewed deferentially, the Second Circuit departed from that rule when appropriate: "[When] there was no evidentiary hearing in the District Court and the injunction was granted on a paper record containing only the affidavits, the pleadings and the briefs, we are . . . 'in as good a position as the district judge to read and interpret the pleadings, affidavits and depositions.'"[292]

These judges were adhering to a tradition of tailoring standards of review to the circumstances, and that tradition still makes sense. An important consideration in determining a standard of review is the relative abilities of trial judges and reviewing judges.[293] The chancellors of old did not use terms like "comparative institutional competence," but they understood the idea that the trial judge had little or no advantage over a

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288. 180 F.2d 537, 538 (2d Cir. 1950). On the authority of Augustus Hand and his more famous cousin Learned, see Robert H. Jackson, Assoc. Justice, U.S. Sup. Ct., Address, Why Learned and Augustus Hand Became Great, Robert H. Jackson Ctr. (Dec. 13, 1951), https://www.roberthjackson.org/wp-content/uploads/2020/06/why-learned-and-augustus-hand-became-great.pdf [https://perma.cc/F7KH-2UUA] ("[I]f I were to write a prescription for becoming the perfect district judge, it would be always to quote Learned and always to follow Gus.").

289. *Orvis*, 180 F.2d at 539.

290. See Note, supra note 214, at 516–36 (describing the different approaches); supra notes 196, 212 (citing cases).

291. Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979).

292. Id. (quoting Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972)).

293. Chad M. Oldfather, Appellate Courts, Historical Facts, and the Civil-Criminal Distinction, 57 Vand. L. Rev. 437, 444–45 (2019); see also Adam Perry, Plainly Wrong, 86 Mod. L. Rev. 122, 123–24, 137–38 (2023) (explaining that a factual finding is "plainly wrong" when the appellate court is more confident that the finding is wrong than that the trial judge is an epistemic superior, and that one generalizable factor bearing on the latter is the form of the evidence); Adam N. Steinman, Rethinking Standards of Appellate Review, 96 Ind. L.J. 1, 20, 24, 27 (2020) (arguing that optimizing accuracy requires consideration of generalizable institutional advantages of different courts, such as the ability to observe witnesses, and case-specific indicia of reliability).

reviewing judge in reading depositions.[294] If anything, a panel of a federal court of appeals is likely in a better position than a single judge to correctly discern the law *and the facts and the balance of the equities* in a paper case.[295] Three judicial heads are generally better than one, whether due to the opportunity for deliberation or due to the simple mathematics of the Jury Theorem.[296]

Whatever Rule 52 may say, the functional considerations that balance differently across cases will strain for ways to express themselves. Thus, in *Bose Corp. v. Consumers Union of U.S., Inc.*, decided shortly before the 1985 amendment, the Supreme Court wrote that although "[t]he same 'clearly erroneous' standard applies to findings based on documentary evidence as to those based entirely on oral testimony, . . . the presumption [of correctness] has lesser force in the former situation than in the latter."[297] Pointing in particular to the case's First Amendment setting, the Court opined that "[r]egarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the judgment of the trier of fact."[298] The advantage of the lower court was low and the stakes were high; therefore, nondeferential review prevailed.

Whether or not one agrees with its particular choices for prioritization, *Bose Corp.* is not aberrational in tailoring deference to

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294. See, e.g., Delorac v. Conna, 46 N.W. 255, 261 (Neb. 1890) (stating that a trial court "has a decided advantage over a reviewing court" when assessing live testimony but that deferential review "has not the same application in a case tried upon depositions").

295. Maybe not only in paper cases. The main justification for deference to findings based on live testimony, which is the trial judge's opportunity to observe demeanor, faces some real challenges from modern social science. The supposed value of seeing the witness in order to judge credibility is at best wildly overstated. People are actually bad at judging credibility from appearances. Devoting some time to the study of a transcript may well be better. See Oldfather, supra note 293, at 451–59 ("[T]he largely oral nature of trials can lead juries to evaluate the evidence in a manner that is inconsistent with the rigorous, logical ideals of the legal system."); Olin Guy Wellborn III, Demeanor, 76 Cornell L. Rev. 1075, 1075 (1991) (citing empirical evidence showing that "observation of demeanor diminishes rather than enhances the accuracy of credibility judgments"). In the future, any on-the-scene demeanor-based advantages as may exist are likely to shrink in light of developments like video and, probably before long, high-fidelity holographic records. See Robert C. Owen & Melissa Mather, Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review, 2 J. App. Prac. & Process 411, 412 (2000); McGlothlin Courtroom, Wm. & Mary L. Sch. Ctr. for Legal & Ct. Tech., https://legaltechcenter.net/about/mcglothlin-courtroom/ [https://perma.cc/743L-R7GC] (last visited Sept. 24, 2024) (reporting first known use of holographic testimony). But see State v. S.S., 162 A.3d 1058, 1065–70 (N.J. 2017) (overruling a prior case that had established a de novo standard for review of findings based solely on video evidence).

296. Cf. Chad M. Oldfather, Universal De Novo Review, 77 Geo. Wash. L. Rev. 308, 328–30 (2009) (citing both of these rationales, and identifying their limitations, for why three heads are better than one in the context of review of questions of law).

297. 466 U.S. 485, 500 (1984) (citation omitted).

298. Id. at 501 n.17.

variety. Even beyond the official exceptions to deferential review, there are doubtless many instances in which appellate courts, sub rosa, give a factual finding more searching scrutiny than the official standard permits or less than it requires.[299] As one well-placed commentator explains, "While clear error must be found to reverse, it is easier for an appellate court to find clear error when it has the same materials for decision as were available to the trial court."[300]

Relative competence is not the only factor that goes into standards of review, of course. Given that the calculus of relative competence, which long distinguished between different kinds of evidence, is unlikely to have changed in 1985, it is worth asking what factor *did* change in the period leading up to the rulemakers' flattening of the standard of review. What was different, it seems, was the "crisis of volume."[301] The federal courts of appeals faced particularly acute challenges at that time, and a wide range of reforms were entertained, from adding judges to restricting jurisdiction to changing internal procedures.[302] A major part of the problem for the courts of appeals was an increasing propensity to appeal, not just increasing filings in the trial level.[303] One way to dampen an increasing propensity to appeal is to make appeal less attractive to trial-court losers, and one way to do that is to make appeals less likely to succeed by using affirmance-friendly standards of review.[304] Indeed, the advisory committee

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299. See Edward H. Cooper, Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review, 63 Notre Dame L. Rev. 645, 645 (1988) (praising the clear-error standard because it "has no intrinsic meaning" but is instead "elastic, capacious, malleable, and above all variable"). There are, of course, downsides to the flexibility of the standard. See, e.g., Bryan L. Adamson, Federal Rule of Civil Procedure 52(a) as an Ideological Weapon, 34 Fla. St. U. L. Rev. 1025, 1067–75 (2007) (describing the risk that judges will manipulate the standard to pursue ideological preferences).

300. Cooper, supra note 299, at 654.

301. For prominent sources using the phrase, see, e.g., Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume (1974); Report of the Federal Courts Study Committee 109–10 (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf [https://perma.cc/5YBY-C2J2] [hereinafter, FCSC Report]. Writing on the eve of the 1985 amendment, Professor Judith Resnik observed a broader tendency to vaunt finality and reduce opportunities for further review across a range of fields, including in the Supreme Court's cases on habeas corpus. Judith Resnik, Tiers, 57 S. Cal. L. Rev. 837, 957–63 (1984); see also Warren E. Burger, Year-End Report on the Judiciary 1–10 (1981) (lamenting rising caseloads and proposing ways to reduce them).

302. See FCSC Report, supra note 301, at 109–31 (offering a formula for determining needed appellate judgeships and describing major structural alternatives to the appellate system to help alleviate the caseload crisis); Thomas E. Baker, Rationing Justice on Appeal: The Problems of the U.S. Courts of Appeals 106–286 (1994) [hereinafter Baker, Rationing Justice on Appeal] (describing "intramural" judge-made procedural reforms and "extramural" structural reforms that Congress could enact).

303. See FCSC Report, supra note 301, at 110.

304. See Paul D. Carrington, Daniel J. Meador & Maurice Rosenberg, Justice on Appeal 129–32 (1976) (noting that rational actors will appeal less if their chances of success are reduced by altering standards of review); Charles Alan Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 780–81 (1957) ("We may be sure that the

identified the reduction of appeals as a benefit of the amendment.[305] Furthermore, for appeals that do occur, less searching review of the facts probably takes less appellate effort than determining the true state of the facts. (Perhaps that is what the advisory committee meant when it cited "judicial economy" as a benefit of the change.[306]) The 1985 amendment of Rule 52 can therefore be understood as a rational response on the part of the judiciary to the appellate crisis of volume.

But times change, and the crisis of volume has abated. Caseloads in the federal courts of appeals are now lower than they were two decades ago.[307] The flood of filings that led to the perception of crisis was managed through reductions in oral argument, widespread use of nonprecedential opinions, and creation of a corps of staff attorneys, changes that have remained in place even after the high water receded.[308] Some observers have called this "rationing" or have said that it creates a "two-track" system of justice,[309] but we do better by thinking about the problem as one involving, to use Professor Marin Levy's terminology, the allocation of the scarce resource of judicial attention across a large and heterogeneous body of cases.[310] It may be that more judgeships should be created,[311] but, whatever the size of the pie, devoting equal effort to every case should not be the goal. All litigants merit respect, but not all cases have equal claims on appellate resources.

Given this understanding of the problem of judicial-resource allocation, the task is to decide which cases merit the most appellate attention. Or, put differently, *to what end* are we triaging? The answer is that the courts of appeals should deploy their resources where they will do the most good. Again, that is a complicated, multifactored analysis. But some generalizations are possible. From the perspective of accuracy,

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broadened scope of appellate review we have seen will mean an increase in the number of appeals.").

305. Fed. R. Civ. P. 52 advisory committee's note on 1985 Amendment.

306. Id.

307. See Judicial Caseload Indicators - Federal Judicial Caseload Statistics 2023, U.S. Cts., https://www.uscourts.gov/judicial-caseload-indicators-federal-judicial-caseload-statistics-2023 [https://perma.cc/26HF-JN2T] (last visited Aug. 15, 2024) (reporting changes since 2014); see also Federal Judicial Caseload Statistics, U.S. Cts. (March 31, 2009), https://www.uscourts.gov/statistics/table/jci/federal-judicial-caseload-statistics/2009/03/31 [https://perma.cc/P3YR-UU2D] (reporting data going back to 2000).

308. See Wood & Clopton, supra note 227, at 114 (noting the "incredible staying power" of streamlining mechanisms introduced in response to docket pressures).

309. See, e.g., Baker, Rationing Justice on Appeal, supra note 302, at ix; Richman & Reynolds, supra note 92, at xii, 117, 119–20.

310. Marin K. Levy, Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals, 81 Geo. Wash. L. Rev. 401, 405 (2013).

311. See generally Merritt E. McAlister, Rebuilding the Federal Circuit Courts, 116 Nw. U. L. Rev. 1137 (2022) (calling for an increase in circuit judgeships in a way that will more evenly distribute judicial capacity across circuits).

searching review has more value in paper cases than in those featuring conflicting testimony.[312] Within the category of paper cases, not all cases are equally strong candidates for expending the extra effort. The best candidates are likely to be cases with particularly high stakes (leaving that term vague for the moment), for several reasons. Correctness matters more in those cases. And the high stakes mean appeals are likely to be filed anyway, such that the standard of review will not induce more. Finally, the preexisting high likelihood of appeal also limits the damage to the more abstract goal that the district court remain "the main event."[313] These benefits come at a cost, of course, notably including the incremental effort of three judges engaging in careful rather than deferential review, though the reallocation could be done in a way that is neutral with regard to overall effort.[314]

Without attempting to assess every kind of case, and limiting the discussion to civil cases, it is worth highlighting one kind of high-stakes case in which searching review of paper-based decisions is especially likely to be beneficial on net.[315] By now it should not come as a surprise that the category would fit within the traditional equity jurisdiction. The category is appellate review of so-called "nationwide" (or national or universal) injunctions.[316]

The practical problems associated with nationwide injunctions stem in part from a structural feature of the federal judiciary. England had but one Chancellor, though even there appeals of his decrees to the Lords

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312. See supra notes 294–296 and accompanying text.

313. Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985) (internal quotation marks omitted) (quoting Wainwright v. Sykes, 433 U.S. 72, 90 (1977)).

314. There are any number of ways to offset increases in judicial effort here through reductions elsewhere. For example, reinvigorating doctrines of deference to agencies, doctrines that are currently deteriorating, would save the lower courts' time. See Aaron-Andrew P. Bruhl, Hierarchically Variable Deference to Agency Interpretations, 89 Notre Dame L. Rev. 727, 760–61 (2013) (arguing that courts toward the top of the judicial hierarchy should be less deferential than lower courts in administrative cases). Another small time-saver would be to limit defendants asserting qualified immunity to one interlocutory appeal per case. See Bryan Lammon, Reforming Qualified-Immunity Appeals, 87 Mo. L. Rev. 1137, 1201 (2022) (proposing this and other potential limitations).

315. For a consideration of other areas where more searching review is likely to be beneficial, with particular consideration of criminal cases, see, e.g., Oldfather, supra note 293, at 469–94. Different features of criminal cases point in different directions with regard to the benefits of heightened review. Serious criminal cases have high stakes and already have high rates of appeal, but fewer are paper cases, and acquittals on the facts are constitutionally unappealable.

316. The most common term used, "nationwide injunction," is misleading. The potentially problematic aspect of the injunctions (or declaratory judgments, for that matter) is not their geographic scope but the way they effectively extend relief against a law or policy to all potential challengers rather than limiting relief to the plaintiff(s). See Howard M. Wasserman, Concepts, Not Nomenclature: Universal Injunctions, Declaratory Judgments, Opinions, and Precedent, 91 U. Colo. L. Rev. 999, 1006 (2020) (identifying the problem as involving "who" rather than "where").

were found necessary once the system matured, as "it has been thought too much, that the chancellor should bind the whole property of the kingdom, without appeal."[317] But having a single decisionmaker at least had countervailing virtues of preventing inconsistent decisions and forum shopping. Rather than having just one court (or just one person) with injunctive power, we have a system in which every one of our seven hundred district judges is the Lord Chancellor and acts with only loose oversight.[318]

Even short of an outright ban, there are many ways to ameliorate the problems with national injunctions. Congress could limit forum shopping through amendments to the venue statutes,[319] and the judiciary itself could limit the phenomenon of judge shopping by changing case-assignment procedures.[320] More novel is Sam Heavenrich's proposal to amend the Federal Rules of Civil Procedure so that only a court of appeals (or the Supreme Court) could issue a national injunction against federal law.[321] Fewer courts of chancery, in other words. As compared to reinvigorating the institution of the three-judge district court, Heavenrich's proposal has the advantage of retaining the normal hierarchical structure and avoiding the many practical problems that led Congress to largely eliminate the three-judge district courts.[322] True, it would be unusual to differentiate the

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317. Geoffrey Gilbert, The History and Practice of the High Court of Chancery 191 (London, Henry Lintot 1758).

318. See Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 420 (2017) ("[I]n the federal courts of the United States, every judge is a 'Chancellor' in the sense of having power to issue equitable relief.").

319. See Amanda Frost, In Defense of Nationwide Injunctions, 93 N.Y.U. L. Rev. 1065, 1105 (2018); Kate Huddleston, Nationwide Injunctions: Venue Considerations, 127 Yale L.J. Forum 242, 245 (2017), https://www.yalelawjournal.org/pdf/Huddleston_8xcy32or.pdf [https://perma.cc/7GKM-ELR4]. Venue is regulated by statute, and legislation would therefore be required for major changes such as limiting venue to the District of Columbia for suits challenging federal statutes or regulations. See, e.g., 28 U.S.C. § 1391(e)(1) (2018) (providing venue rules for suits against agency heads in their official capacity).

320. The courts acting in their administrative capacity can go a long way toward preventing judge-shopping. See id. § 137(a) (giving district judges and the chief judge authority to divide work among the judges within a district); Jud. Conf. Comm. on Ct. Admin. & Case Mgmt., Guidance for Civil Case Assignments in District Courts (Mar. 2024), https://aboutblaw.com/bdc9 [https://perma.cc/FA29-HB89] (providing new nonbinding policy for case assignment).

321. Sam Heavenrich, An Appellate Solution to Nationwide Injunctions, 96 Ind. L.J. Supp. 1, 3 (2020), https://ilj.law.indiana.edu/articles/Heavenrich_An_Appellate_Solution_to_Nationwide_Injunctions.pdf [https://perma.cc/SBW5-NDLR]. Heavenrich's proposal would work by amending Rule 65. Id. at 10. There are other ways of getting similar results through judicial decisions, such as creating a presumption in favor of an automatic stay. See Ronald M. Levin, Vacatur, Nationwide Injunctions, and the Evolving APA, 98 Notre Dame L. Rev. 1997, 2027 (2023).

322. For prominent lamentations of the extreme complexity of the procedures surrounding the three-judge district courts, see David P. Currie, The Three-Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 13–77 (1964) (canvassing the many interpretive difficulties that had arisen under the three-judge statutes); Report of the Study

remedial powers of courts in this way, but it is not unprecedented.[323] Reducing the number of bodies with the authority to grant certain injunctions would in fact be consistent with the equitable tradition.

A modest doctrinal reform, which is both consistent with the equitable tradition described in this Article and (not coincidentally) also sensible on functional grounds, is to institute tougher appellate review of nationwide injunctions. Today, the usual standard of review for injunctions is abuse of discretion, with the supporting factual findings being reviewed only for clear error.[324] Yet a deferential standard of review is a poor fit for the reality of national injunctions. What is supposed to be a balancing of the equities often involves competing presumptions rather than factual specificities.[325] When the injunction is issued hastily, either because it is preliminary or because the court has advanced the decision on the merits to the preliminary hearing in light of some exigency,[326] the district judge cannot be said to have the advantage of "living with the case" and getting to know its factual nuances. What is more, many of the findings of fact supporting nationwide injunctions do not emerge from conflicting testimony but instead come from documents or reflect inferences from undisputed testimony.

Consider a few recent examples of the character of the "factfinding" that has supported national injunctions. One comes from the litigation in the Southern District of Texas challenging President Biden's vaccine requirement for federal employees.[327] The court held a telephone hearing

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Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 596–602 (1972) (recommending the abolition of three-judge courts because of the burdens they impose and the complexities of their processes).

323. See 8 U.S.C. § 1252(f)(1) (2018) (providing that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of [this part of the immigration statutes]").

324. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2962 (3d ed. 2013); see also City of Chicago v. Barr, 961 F. 3d 882, 918–20 (7th Cir. 2020) (treating the geographic scope of the injunction as a matter within the district court's discretion); E. Bay Sanctuary Covenant v. Garland, 994 F.3d 962, 974, 988 (9th Cir. 2020) (same); Rodgers v. Bryant, 942 F.3d 451, 457–58 (8th Cir. 2019) (same for defendant-oriented injunction against state law); Milan D. Smith, Jr., Only Where Justified: Toward Limits and Explanatory Requirements for Nationwide Injunctions, 95 Notre Dame L. Rev. 2013, 2018 (2020) ("[A] three-judge appellate panel is limited in the extent to which it can reevaluate the equities of a nationwide injunction absent clear legal standards by which the district court failed to abide.").

325. See Samuel L. Bray, The Purpose of the Preliminary Injunction, 78 Vand. L. Rev. (forthcoming 2025) (manuscript at 10–13), https://ssrn.com/abstract=4922379 [https://perma.cc/3354-77AN] (explaining that preliminary injunctions in public-law cases have come to focus on a prediction of the merits with little attention to the equities, in part due to rules that constitutional violations are irreparable and there is no public interest in the enforcement of unlawful policy).

326. See Fed. R. Civ. P. 65(a)(2).

327. Feds for Med. Freedom v. Biden, 581 F. Supp. 3d 826 (S.D. Tex. 2022), aff'd, 63 F.4th 366 (5th Cir. 2023) (en banc), vacated, 144 S. Ct. 480 (2023).

with no live witnesses (although with many affidavits and other documents submitted) and granted a nationwide preliminary injunction; the short section of the court's opinion addressing the balance of hardships cited just one piece of evidence, a press release.[328] Another recent example is the suit initiated by certain states against the Biden Administration's priorities for immigration enforcement.[329] Here the district court made 135 findings of fact in a lengthy opinion.[330] That sounds like some genuine factfinding, and indeed the court had before it thousands of pages of documents and declarations—and yet only three witnesses testified, all on the states' side, after expedited proceedings.[331] For a third example, the district judge that "stayed" the twenty-year-old FDA approval of mifepristone had before him many pages of documents but heard no live testimony from experts or fact witnesses.[332]

Requests for national injunctions are the kind of thing that merits use of the capacity that courts of appeals have freed up through dispensing with argument and published opinions for the bulk of their cases. From a competence perspective, three judges are as good or better than one at reviewing documentary evidence, drawing inferences from uncontested testimony, and weighing generalized equities derived from the same. Inducing more appeals through the prospect of reversal is not much of a risk for nationwide injunctions, given the high stakes. And a larger bench evens out judge shopping and individual idiosyncrasy.[333] Here, the history had it right.

From a rule-of-law perspective, formal amendment of Rule 52 or other enactments is the best approach to bringing about more searching review. Without that, it is predictable that evasions of the clear-error standard will occur in needful cases sub rosa or that more purported findings of fact will be categorized as something outside of Rule 52, such as legislative facts, mixed questions of law and fact, or the like.

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328. Id. at 836; see also Corrected Telephonic Hearing, *Feds for Med. Freedom*, 581 F. Supp. 3d 826 (No. 3:21-cv-356) (S.D. Tex. Jan. 21, 2022), ECF No. 31.

329. Texas v. United States, 606 F. Supp. 3d 437 (S.D. Tex. 2022), rev'd 143 S. Ct. 1964 (2023). More precisely, this case involved a universal vacatur of a policy on the grounds it was unlawful, not an injunction against the policy. Id. at 498–502.

330. Id. at 451–66.

331. Transcript of Proceedings at 29–47, *Texas*, 606 F. Supp. 3d 437 (No. 6:21-CV-00016), ECF No. 200. This was a final order, but it was entered after the court consolidated the decision on the merits with the request for preliminary relief. *Texas*, 606 F. Supp. 3d at 451 n.3.

332. Transcript of Telephonic Status Conference at 16–17, All. for Hippocratic Med. v. Fed. Drug Admin., 668 F. Supp. 3d 507 (N.D. Tex. 2023) (No. 2:22-cv-00223-Z), ECF No. 133; see also Fed. Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 1540, 1552 (2024) (determining that the doctors challenging the FDA approval lacked standing, without discussing the standard of review).

333. Cf. Elizabeth Thornburg, (Un)Conscious Judging, 76 Wash. & Lee L. Rev. 1567, 1570 (2019) (explaining that judicial inferences are often shaped by individual experience and the application of heuristics).

Note that it does not necessarily follow that the Supreme Court must apply the same searching standard as the court of appeals. For better or worse, the Court has acquired a distinctive role in our system, in which the law-declaring (or -unifying or -making) function predominates,[334] and there is accordingly a high opportunity cost to it engaging in factual review, at least of honest-to-goodness case-specific facts. The Court's specialization toward deciding important questions of federal law is reflected most significantly in the Court's certiorari criteria, which deprecate factual review,[335] but it also shows up in merits cases via devices like the "two-court rule" for factual findings[336] and deference to regional circuits on state law.[337]

D. *Using the Equitable Remedial Authority that Congress Has Given: Wrapping Up Cases on Appeal*

It only makes sense to end with appellate remedies. Recall the discussion of the differing goals of appellate review in the two traditions and the remedies that courts could wield to effectuate them.[338] To simplify, a court hearing an appeal in equity aimed at the same thing as the trial court: to reach a just resolution of the whole dispute. A court entertaining a writ of error, by contrast, reviewed the (skimpy) record for legal error and either affirmed or reversed, and, because of jury rights and the difficulty of assessing prejudice, the remedy for error was often a new trial. In crafting the remedial authority of the federal courts, Congress chose the equity path, empowering federal appellate courts to affirm, reverse, modify, or remand, as justice may require.[339] The chief limit on that power remains jury rights, but the Seventh Amendment is read to allow appellate courts to render judgments that rational juries would have to give, and

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334. See Paul D. Carrington, The Function of the Civil Appeal: A Late-Century View, 38 S.C. L. Rev. 411, 419–23 (1987) (explaining that discretionary jurisdiction shifted the Court's attention away from the details of cases and toward the resolution of public controversies); Arthur D. Hellman, The Shrunken Docket of the Rehnquist Court, 1996 Sup. Ct. Rev. 403, 429–38 (describing the Court's turn from "rectifying isolated errors in the lower courts" to "provid[ing] doctrinal guidance for the resolution of recurring issues").

335. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

336. See Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

337. See Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014).

338. See supra sections I.B–.C.

339. 28 U.S.C. § 2106 (2018).

extensive transcripts and other materials facilitate such determinations.[340] As a result, there are relatively few limitations on an appellate court's power to resolve a case fully and correctly, especially when there is no jury.

And yet despite having all of this authority, federal courts of appeals too often do not use their power to wrap up cases by entering or directing a final judgment.[341] They instead remand cases involving legal disputes that do not require further development of a factual record or implicate any jury rights, such as resolution of whether a complaint fails to state a claim.[342] Another recurring scenario involves interlocutory appeals from decisions granting or denying preliminary injunctions.[343] Suppose that when entertaining such an appeal, the court concludes that the plaintiff's claim underlying the request for preliminary relief is legally unsound. This conclusion should lead the court of appeals to reverse a grant of a preliminary injunction or affirm the denial of one, as the case may be, as a plaintiff with a faulty claim cannot show the requisite likelihood of success on the merits.[344] But going a step further, may the court of appeals hearing an interlocutory appeal of a preliminary injunction also order a final disposition of the case, such as dismissal of the plaintiff's case for failure to state a claim? The history of appellate procedure in equity says it may.[345] To be clear, dismissal on the merits will not be possible in every appeal of a preliminary injunction, including those with unresolved material facts. But today some courts of appeals refuse resolution of the whole case even when doing so is possible, relying on a broad reading of the final-judgment rule, a stingy reading of the doctrine of pendent

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340. See Fed. R. Civ. P. 50(e); Weisgram v. Marley Co., 528 U.S. 440, 457 (2000) ("[T]he authority of courts of appeals to direct the entry of judgment as a matter of law extends to cases in which, on excision of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict.").

341. See supra section I.C.

342. See supra text accompanying note 109.

343. See 28 U.S.C. § 1292(a) (authorizing such appeals).

344. See, e.g., Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 8, 20–24 (2008) (describing the standard for obtaining preliminary injunction).

345. E.g., Smith v. Vulcan Iron Works, 165 U.S. 518, 525 (1897); Dobie, supra note 142, at 797, 801; 8 Hughes, supra note 61, § 5831; see also Joan Steinman, The Scope of Appellate Jurisdiction: Pendent Appellate Jurisdiction Before and After *Swint*, 49 Hastings L.J. 1337, 1427 (1998) [hereinafter Steinman, Appellate Jurisdiction] (stating that "the interpretation of § 1292(a)(1) to empower the appellate courts to hear issues outside the literal scope of the injunctive matters described there has a very long pedigree"). The venerable old *Smith* case involved an appellate court ordering final judgment for the defendant, which would be the typical case. See *Smith*, 165 U.S. at 525. Directing judgment for the *plaintiff* is permissible as well, although it would be the unusual case in which the proceedings at the interlocutory stage would show the plaintiff's conclusive entitlement to prevail on the merits. See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 755–57 (1986); Hurwitz v. Directors Guild of Am., Inc., 364 F.2d 67, 70 (2d Cir. 1966); Dobie, supra note 142, at 801–02.

appellate jurisdiction, or the view that they should not be "courts of first view."[346]

The narrow approach was taken to an extreme in the Fifth Circuit's recent decision involving a challenge by some airline employees to their employer's vaccine requirement.[347] The district court had denied the employees' request for preliminary injunctive relief due to a lack of irreparable harm, one of the necessary elements for a preliminary injunction. A divided panel of the court of appeals reversed and remanded because it found that the district court had erred in failing to find in the plaintiffs' favor on the irreparable-harm issue.[348] In so doing, the majority did not dispute the dissent's convincing arguments that the plaintiffs' case failed for other reasons apparent on the record. The majority reasoned that since the grant or denial of preliminary relief is "within 'the sound discretion of the trial court,' the better course is to allow the district court to consider the other factors in the first instance."[349] That is, the district court should get the first shot at the whole preliminary-injunction analysis, which would then come up on appeal again (barring settlement, mootness, or some other eventuality). The majority's determination mixes up a deferential standard of review—abuse of discretion, though legal error itself constitutes an abuse—with a duty to give the district court the first crack at issues that are already in front of the court of appeals.[350]

Scenarios like those described in the preceding paragraphs do not implicate the Seventh Amendment or other limitations on appellate authority, so the justification for failing to wrap up such cases would need to draw on considerations of prudence and judicial economy. There are

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346. Compare OFC Comm Baseball v. Markell, 579 F.3d 293, 298–300 (3d Cir. 2009) (taking the broad view of the scope of appeal), with Sambrano v. United Airlines, Inc., No. 21-11159, 2022 WL 486610, at *6 n.11, *9 n.17 (5th Cir. Feb. 17, 2022) (taking the narrow view and citing the "review, not first view" principle), and Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1043–44 (7th Cir. 2017) (taking the narrow view due to the risk of "swallow[ing] the final-judgment rule"). Some of the courts of appeals' reticence may stem from the Supreme Court's denial of pendent appellate jurisdiction in a collateral-order appeal in Swint v. Chambers Cnty. Comm'n, 514 U.S. 35 (1995), but Steinman persuasively explains that a broad reading of *Swint* would clash with precedent and impair judicial economy. Steinman, Appellate Jurisdiction, supra note 345, at 1393–428.

347. See *Sambrano*, 2022 WL 486610; supra section I.C.

348. *Sambrano*, 2022 WL 486610, at *1.

349. Id. at *9 n.17 (quoting White v. Carlucci, 682 F.2d 1209, 1210 n.1, 1211 (5th Cir. 1989)). When further factual development is necessary, remand is appropriate, but the dissent provided alternative grounds for affirmance that were *legal* in nature.

350. Cf. Sec. Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88 (1943) (distinguishing between situations in which it would be "wasteful" to remand because the case may be decided "on another ground within the power of the appellate court to formulate" and those in which decisionmaking authority is restricted to a jury or an administrative agency).

too many factors to address all of them here,[351] but it is possible to highlight a recurring mistake that leads the courts of appeals to wrap up too few cases. This is the troublesome proposition, cited in a number of unnecessary remands, that the courts of appeals are "court[s] of *re*view, not first view."[352] Taken one way, it is just a truism about being an appellate court. Taken in the sense in which the courts of appeals often use it—as preventing them from resolving any issue not decided below—it is an invasive transplant from its origin in the Supreme Court.[353] The Supreme Court has come to have a special role of unifying and superintending federal law, and it has been given (or, to some degree, has seized) tools of discretionary jurisdiction and question selection to facilitate that narrow but important task, the ordinary judicial activity of dispute resolution having been left far behind.[354] That is not a model for the courts of appeals, whose jurisdiction is largely mandatory and extends to the judgment under review rather than a single question it picks; for them, the case-resolution function plays a relatively greater role.[355] So when these courts can resolve a case on appeal, as when factfinding is not required and the parties have been heard on the matter, they presumptively should.

There are any number of ways one could (re)enforce the duty to resolve, including ways that distinguish between courts at different levels. The Texas Rules of Appellate Procedure, for instance, provide that the intermediate courts of appeals "must render the judgment that the trial court should have rendered" except when a remand is necessary, while allowing the state supreme court the flexibility to remand "in the interest of justice . . . even if a rendition of judgment is otherwise appropriate."[356]

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351. For a thorough consideration of the many factors that bear on whether a court of appeals should decide an issue in the first instance, see Joan Steinman, Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance, 87 Notre Dame L. Rev. 1521, 1602–16 (2012).

352. Utah v. Su, 109 F.4th 313, 318 (5th Cir. 2024); see also *Sambrano*, 2022 WL 486610, at *9 n.17 (quoting Montano v. Texas, 867 F.3d 540, 546 (5th Cir. 2017)).

353. The brocard originated in Cutter v. Wilkinson, 544 U.S. 709, 718 n.7 (2005), though of course the sentiment preceded *Cutter*.

354. See Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 Colum. L. Rev. 1643, 1704–13, 1730–37 (2000) (describing the rise of discretionary aspects of the Court's jurisdiction and the decline of its dispute-resolution function); see also Hellman, supra note 334, at 429–38 (describing the Court's "Olympian" tendencies and self-conception); Johnson, supra note 114 (questioning the legality of the Court's practice of selecting questions for review rather than cases).

355. See Meador, Appellate Courts in the United States, supra note 71, at 17 (describing the differing primary roles of intermediate and supreme courts); Bruhl, Remand Power, supra note 95, at 184–85, 245–46 (observing that the courts of appeals are improperly emulating the Supreme Court by moving toward a law-declaration model). Given the different roles of the Supreme Court and courts of appeals, the claim that the courts of appeals are overusing the "court of review" mantra is not inconsistent with Vladeck's claim that today's Supreme Court is too often failing to honor it. Vladeck, supra note 2, at 2.

356. Tex. R. App. P. 43.3, 60.3.

CONCLUSION

Let's return to where we started. Things are strange in the appellate hierarchy: national injunctions all over, the shadow docket and certiorari before judgment, the Supreme Court being criticized for making factual findings. A natural tendency is to respond by looking backwards for a proper understanding of the roles of different courts. Consider again Senator Whitehouse's comments, in which he criticized the Supreme Court's factfinding as contrary to traditions of appellate practice.[357] Well, yes and no. There are multiple traditions, and they do not stand still. The Supreme Court's actions in the cases that Whitehouse criticized may have been wrong, but when we look for guidance from traditional practice, we find not simple answers but complexity and possibility.

Sections II.C and II.D suggested a few reforms to federal appellate practice but did not claim that tradition or original understanding compels them. Something like that would have been Justice Wilson's position in *Wiscart*.[358] Better is to say that the law permits rather than requires the changes and that history shows some of their wisdom. As the great historian of English law Frederic William Maitland said of the study of legal history, its utility lies in liberating us from preconceptions and teaching us "that [we] have free hands."[359] Whether the changes addressed here are desirable depends mostly on whether they are desirable in our current circumstances.

357. See supra text accompanying notes 6–10.

358. See supra section II.A.

359. Letter from F.W. Maitland to A.V. Dicey (c. 1896), *in* 2 The Letters of Frederic William Maitland 104, 105 (P.N.R. Zutshi ed., 1995).