

Contractual Choice of Law and the Prudential Foundations of Appellate Review

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Within the past decade, professional organizations interested in making the law better suited to commercial transactions have begun to advocate the proposition that contracting parties should have almost unlimited power to choose the law to govern their relationship. The new choice-of-law framework resulting from these reform efforts will provide parties with an expanded menu of legal regimes from which to choose when drafting their contract and, in turn, will lead to a more frequent use of choice-of-law clauses. Indeed, some have even suggested that omitting such a clause may soon become malpractice for the commercial lawyer. Given both the trend toward permitting unlimited contractual choice of law and the growing popularity of these clauses, it is worth pausing to examine how the judicial system might appropriately respond. In particular, this Article addresses a problem that has thus far been overlooked by both courts and commentators. That problem involves the gains and losses of appellate review of trial court rulings on the law of another state or nation. What, exactly, does judicial review of unsettled questions of foreign law accomplish? What is its price? These questions are of both considerable theoretical interest and immense practical importance. Their resolution calls for an inquiry into the allocation of judicial authority and in its production of outcomes in the real world. The purpose of this Article is to provide an answer to these and other questions. This Article suggests an approach to judicial review that will improve the operation of appellate courts while appropriately distributing authority among all levels of the judiciary.

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*The moving Finger writes, and having writ, moves on. But it may be that having written, what we write is soon erased.*¹

I. INTRODUCTION

A. Historical Background

The principle of “freedom of contract,” popular among contract theorists in the nineteenth and early twentieth centuries, rests on the belief that respect for personal autonomy is a necessary complement to both the liberal political state and a free-market economy.² More precisely, if the government enforces private agreements voluntarily entered into by parties seeking to order their business and personal affairs, then individual liberty is preserved,³ equality of opportunity is ensured,⁴ and the maximization of societal wealth can be achieved.⁵

1. *Ford Motor Co. v. Mathis*, 322 F.2d 267, 269 (5th Cir. 1963) (citation omitted).

2. See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1769 (1997) (asserting that the principle of freedom of contract is supported by both “the liberal-individualistic moral ideology and the utilitarian-economic ideology”). For a complete analysis of this subject, see generally P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979).

There is also a constitutional dimension to the notion of freedom of contract. Article I of the United States Constitution provides that “[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts.” U.S. CONST. art. I, § 10, cl. 1. Activist courts of the early twentieth century used freedom of contract to strike social legislation on substantive due process grounds; the seminal case in the area is *Lochner v. New York*, 198 U.S. 45 (1905) (holding unconstitutional a statute that prohibited a contract between employer and employee requiring an employee to work over sixty hours per week and ten hours per day). For a modern application of this doctrine in a context not involving the validity of legislation, see *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974), and *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972). See also G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431 (1993).

It should be specified, too, that freedom of contract is a principle with two component parts. Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 828 (1992). One part is the freedom to contract, the more common notion that people should be free to enter into whatever agreements they mutually desire. *Id.* The second, less familiar part, is freedom from contract. *Id.* This aspect dictates that courts should not impose contractual obligations on parties without their consent. See *id.* For another discussion of this dichotomy, see also Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COM. 193 (1982).

3. See Zamir, *supra* note 2, at 1769 (“According to deontological liberalism, every person is the best judge of her own aims, and of the means by which they are to be achieved. Society should respect the autonomy of every individual and refrain from dictating any conception of ‘the good life.’”).

4. *Id.* (“Contrary to regimes in which power and wealth are distributed according to social or political status, a free-market regime provides equality of opportunity for each person to make any contract she wishes and thereby improve her position.”).

5. *Id.* at 1770 (“The rules of supply and demand bring about an optimal allocation of resources precisely when individuals seek their own utility and wealth.”).

Notwithstanding its waning acceptance,⁶ freedom of contract has been offered as an appropriate foundational approach to legislation as diverse as the Uniform Computer Information Transactions Act ("U.C.I.T.A."),⁷ the National Labor Relations Act of 1935,⁸ and state limited liability acts.⁹

6. Freedom of contract never meant that courts could not intervene to protect parties from the consequences of unfortunate or unfair transactions. Doctrines such as fraud, duress, and undue influence have always been available to shield individuals from the ill effects of their acts. In fact, the inappropriate use of these devices is what led Karl Llewellyn and the drafters of Article 2 of the Uniform Commercial Code ("U.C.C." or "the Code") to codify for the first time the concept of unconscionability.

[Section 2-302] is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance, or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. [Section 2-302] is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein. . . .

U.C.C. § 2-302 cmt. 1 (2002).

Now more than ever, though, courts are inclined to consider public policy and societal context tending to hem in the freedom to bargain. See RESTATEMENT (SECOND) OF CONTRACTS §§ 178-99 (1981) (stating that a court may decline to enforce a contract or term on public policy grounds as well as setting forth those clauses and contracts that are superseded by societal interests); Eric T. Freyfogle, *The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser*, 62 N.Y.U. L. REV. 293, 311 (1987) (suggesting that "it is appropriate for courts to weigh the social context of the contract as heavily as the exact contract language"). G.H.L. Fridman wrote:

The tendency of the modern law. . . is away from the principle of freedom of contract. . . . The nineteenth and early twentieth centuries produced the golden age of contract. Are we seeing a gradual decline in the importance of contractual relations, a revulsion from the supremacy of the individual and the individual's will?

Mark Pettit, Jr., *Freedom, Freedom of Contract, and the 'Rise and Fall'*, 79 B.U. L. REV. 263, 266 n.9 (1999) (quoting G.H.L. Fridman, *Freedom of Contract*, 2 OTTAWA L. REV. 1, 22 (1967) (arguing that modern law has moved away from freedom of contract)).

Also not without restriction is freedom from contract. For example, U.C.C. section 4-103(b) departs from the rule that a contract between two parties cannot bind a third party by stating: "Federal Reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements . . . whether or not specifically assented to by all parties interested in items handled." U.C.C. § 4-103(b) (2002).

7. U.C.I.T.A. resulted from the aborted project to draft a new Article 2B of the U.C.C. This article would have governed all contracts for the sale, licensing, development, distribution, maintenance, documentation, and support of computer software. Instead of incorporating this uniform law within the U.C.C. as originally planned, the National Conference of Commissioners on Uniform State Laws ("N.C.C.U.S.L.") decided in 1999 that it would be more appropriate to promulgate it as a freestanding statute for adoption by the states. For a brief history of Article 2B and the reasons why the project was transformed into U.C.I.T.A., see Fred H. Miller & Carlyle C. Ring, *Article 2B's New Uniform: A Free-Standing Computer Information Transactions Act*, U.C.C. BULL., June 1999, at 1, 2-4. The Prefatory Note to U.C.I.T.A. makes clear that its underlying principle is freedom of contract. It states that the statute "adheres to the norm of [U.S.] commercial law: freedom of contract is the philosophy of commerce." U.C.I.T.A., Prefatory Note (1999); see also U.C.I.T.A. § 1-106 (1999). The full text of U.C.I.T.A. is available online. See Carol A. Kunze, *UCITA Online: Uniform Computer Information Transactions Act*, at <http://www.ucitaonline.com/> (last visited Nov. 23, 2002).

Even more generally, freedom of contract means that parties should be free to choose, as a strategic matter, the legal rules they consider to be most beneficial given their interests.¹⁰ The most familiar example of this strategy is a contract term that specifies that the parties' bargain is to be governed by the positive law of a given jurisdiction.¹¹ However, the fact that a policy in favor of enforcing contractual choice-of-law clauses might have significant instrumental value for realizing the right to personal autonomy and other core

8. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69 (1994)). The Supreme Court has recognized freedom of contract as one of the fundamental policies on which the Act is grounded. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970); see also 29 U.S.C. § 158(d) (2000) (stating:

[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . .)

9. See, e.g., DEL. CODE ANN. tit. 6, § 18-1101(b) (1999) ("It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements."). Indeed, scholars describe the Delaware version as based on freedom-of-contract principles. See Martin I. Lubaroff & Paul M. Altman, *Delaware Limited Liability Companies*, 6 No. 11 INSIGHTS 32 (1992).

[A] fundamental principle underlying the [Delaware] Act is that of freedom of contract. The Act's basic approach is to permit members to have the broadest possible discretion in drafting their limited liability company agreements and to furnish answers only in situations in which the members have not expressly made provision in their limited liability company agreement.

10. On several occasions, the Supreme Court has made the point that parties should be able to choose for themselves the law that will govern their contract. See, e.g., *Pritchard v. Norton*, 106 U.S. 124, 136-37 (1882) ("The law we are in search of, which is to decide upon the nature, interpretation, and validity of the engagement in question, is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation."); *Wayman v. Southard*, 23 U.S. 1, 48 (1825) ("[I]n every forum a contract is governed by the law with a view to which it was made.").

11. A typical choice-of-law clause might read: "This agreement shall be governed by, and construed in accordance with, the law of the State of New York." Leandra Lederman, Note, *Viva Zapata! Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U. L. REV. 422, 423 n.10 (1991). U.S. courts have also condoned contractual depechage, which permits parties to agree that the law of different states will apply to different potential issues in a single case. See, e.g., *Joseph L. Wilmotte & Co. v. Rosenman Bros.*, 258 N.W.2d 317, 328 (Iowa 1977).

Apart from choice-of-law clauses, there are alternative strategies that parties may use to choose the "law" that governs their relationship. They could, for example, choose a body of commonly accepted principles or rules such as the *Principles of International Commercial Contracts*, drafted by the International Institute for the Unification of Private Law ("UNIDROIT") in 1994. They could also incorporate by reference written trade rules codified by national or local trade associations. This Article is concerned only with the parties' choice of positive law.

elements of liberalism¹² does not necessarily mean that courts will recognize and protect the parties' choice without restrictions.¹³ In fact, their unwillingness to do so has had a long history. Indeed, early-twentieth-century commentators attacked the very concept of party autonomy in choice of law as unacceptable "private legislation."¹⁴ After all, they wondered, how could private individuals "displace the law of the place where their acts are done by exercise of any choice of their own?"¹⁵ This recognition of territorial sovereignty accounts for the absence of any provisions in the *Restatement (First) of Conflict of Laws*, addressing the freedom of contracting parties to choose the law that will govern their relationship.¹⁶

In this light, the decision by the drafters of the U.C.C. to include a general choice-of-law provision that provides for limited

12. For a brief overview of many of the benefits of enforcing contractual choice of law, see Larry E. Ribstein, *Choosing Law by Contract*, 18 J. CORP. L. 245 (1993). Moreover, as this Article will explain, choice-of-law clauses will grow in importance as the twenty-first century unfolds. See *infra* notes 38-56 and accompanying text.

13. Most writers who have supported party autonomy have argued for some type of geographic limitation. The following is an apt summary of the reasons why:

One important objection to giving the parties this broader choice is that it would place upon the court which tried the case the additional burden of ascertaining the foreign 'law' (domestic rule) in question. Another is that there would be in many types of situations a greater likelihood that the selection made by the parties would infringe upon the 'public policy' of the states with which the transaction has substantial connections. This would clearly be true in the usury cases, and there are accordingly decisions invalidating a choice by the parties of the 'law' of a state with which the transaction in question had no substantial connection The reasons for limiting the choice of the parties to the 'law' of states with which the transaction has some 'substantial connection' are purely practical: to allow a wider choice would place a possibly inconvenient burden on the courts of the forum and perhaps too often lead to a clash with the public policy of the states concerned.

WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 412, 418 (1942).

14. See Ribstein, *supra* note 12, at 261.

15. H. GOODRICH, *CONFLICT OF LAWS* 232 (1927). Judge Learned Hand put it this way:

People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can. But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps. Some law must impose the obligation, and the parties have nothing whatever to do with that; no more than with whether their acts are torts or crimes.

E. Gerli & Co. v. Cunard S.S. Co., 48 F.2d 115, 117 (2d Cir. 1931).

16. Joseph Beale, the Reporter for the First Restatement, left little doubt that he shared Learned Hand's concern that permitting party autonomy in choice of law would give "permission to the parties to do a legislative act." Joseph H. Beale, *What Law Governs the Validity of a Contract?*, 23 HARV. L. REV. 260, 260 (1910); see also Richard J. Bauerfeld, Note, *Effectiveness of Choice-of-Law Clauses in Contract Conflicts of Law: Party Autonomy or Objective Determination*, 82 COLUM. L. REV. 1659, 1674 (1982).

party autonomy can be seen as a major innovation in the law.¹⁷ Nevertheless, it was entirely consistent with the drafters' own embrace of freedom of contract as a fundamental Code principle.¹⁸ Section 1-105 provides, subject to eight exceptions,¹⁹ that "when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."²⁰

Yet for those who seek guidance from the Code on what constitutes a "reasonable relation," it provides little in the way of an answer. Beyond maintaining that "the law chosen must be that of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs,"²¹ the drafters left

17. See U.C.C. § 1-105 (2002) (setting forth the territorial application of the Act and the parties' power to choose applicable law). The drafters also included in this section a rule that would govern in circumstances where the parties had not or could not agree on applicable law. § 1-105(1). In such cases, the law of the forum state is to be applied to "transactions bearing an appropriate relation to" the forum state. § 1-105(1). This provision, however, was not greeted with open arms. Critics voiced two major objections: (1) making the law of the forum state applicable to transactions with only the slightest factual connection to that state violated the Due Process Clause of the Fourteenth Amendment; and (2) even if the general choice-of-law rule was constitutional, its selection would result in a blatant type of forum-shopping. A number of law professors who taught conflict of laws went so far as to pass a resolution stating that section 1-105 was "unwise and should be omitted from the Code." See Max Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 114, 115 (1951) (reproducing the resolution). The New York Law Revision Commission also recommended the deletion of section 1-105. See LEGISLATURE OF THE STATE OF NEW YORK, REPORT OF THE LAW REVISION COMMISSION FOR 1956, at 34-35 (1956). Despite the inhospitable reception, however, the drafters stuck to their guns, and the choice-of-law section remains a part of the Code.

18. See U.C.C. § 1-102(3) (2002) (stating that "[t]he effect of provisions of this Act may be varied by agreement"). The official comment to this section also emphasizes that "freedom of contract is a principle of the Code." § 1-102 cmt. 2.

19. § 1-105(2) (enumerating the eight exceptions). They cover transactions involving rights of creditors against sold goods, leases, bank deposits and collections, funds transfers, letters of credit, bulk sales, investment securities, and secured transactions. § 1-105(2). To the extent that the foregoing transactions are governed by rules located in other articles of the Code, those rules supersede any law selected by the parties. In most cases, this limit on party autonomy is necessary to protect the rights of third parties.

20. § 1-105(1). Party autonomy initially was only recognized in contracts involving foreign trade. It was not until the 1952 draft that parties were given the ability to stipulate the applicable law in a purely domestic transaction. The development of section 1-105 is traced in WILLIAM D. HAWKLAND, 1 UNIFORM COMMERCIAL CODE SERIES § 1-105:2 (1982), and Robert A. Leflar, *Conflict of Laws Under the U.C.C.*, 35 ARK. L. REV. 87 (1981).

21. § 1-105 cmt. 1. The drafters also indicate in this comment that "[i]n general, the test of 'reasonable relation' is similar to that laid down by the Supreme Court" in *Seeman v. Phila. Warehouse Co.*, 274 U.S. 403 (1927). § 1-105 cmt. 1. The *Seeman* case, however, did not involve a choice-of-law clause; the only question before the Court having been whether Pennsylvania's usury statute governed a transaction between a New York borrower and a Pennsylvania lender. *Seeman*, 274 U.S. at 404. Nevertheless, the following language from the Court's opinion is instructive:

the matter to judicial decision. The only certain proposition is that the parties' choice will not be upheld unless there is some geographic nexus between the state or country whose law is selected and the events leading to the contract's making or the acts involved in its performance.²²

Emboldened by the legislative success of the Code,²³ the American Law Institute (the "A.L.I.") similarly incorporated freedom of contract in choice-of-law matters into the Restatement (Second) of Conflict of Laws ("the Restatement"),²⁴ emphasizing that "the demands of certainty, predictability and convenience dictate that . . . the parties should have power to choose the applicable law."²⁵ The "private legislation" objection to party autonomy was no longer theoretically persuasive. It should be plain that the driving idea here is that the parties alone are not making a legislative choice for the courts but, rather, that the privilege of party autonomy is ultimately being recognized by the applicable choice-of-law rule of the forum.²⁶ Notwithstanding the skepticism Learned Hand had counseled,²⁷ the shift by the drafters of the U.C.C. and the Restatement toward acceptance marked the emergence of a more sophisticated and deferential legal stance generally toward contractual choice of law.

[T]he parties must act in good faith. . . . The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject.

Seeman, 274 U.S. at 408.

22. Even if such a nexus exists, however, there is no guarantee that a court will not choose to strike the clause on some other basis. For example, a court may conclude that the clause or its method of procurement is unconscionable, especially in a consumer setting. Also, the public policy of the forum may place a limit on the power of the parties to select their applicable law. *See, e.g.*, *United Wholesale Liquor Co. v. Brown-Forman Distillers Corp.*, 775 P.2d 233, 235 (N.M. 1989). *But see* EUGENE SCOLES & PETER HAY, *CONFLICT OF LAWS* § 18.12, at 677 (1992) (concluding that section 1-105 has no public policy exception).

23. After the Code's initial adoption by Pennsylvania in 1953, nationwide enactment was temporarily halted when the Code was criticized by the New York Law Revision Commission and temporarily rejected by that state. *See* Walter D. Malcolm, *The Uniform Commercial Code*, in *UNIFORM COMMERCIAL CODE HANDBOOK* 1, 5-6 (American Bar Ass'n, 1964). It was not until Massachusetts enacted the 1957 Official Text of the Code that its prospects brightened. *See id.* at 7-8. Today the Code, in one form or another, is the law in all fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands.

24. *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* § 187 (1971).

25. § 187 cmt. e.

26. § 187 cmt. e; Ribstein, *supra* note 12, at 261 ("The 'private legislation' argument has been criticized on the ground that the contract leaves the ultimate decision with the court based on the parties' choice of law and other factors.").

27. *See supra* note 15.

Once released from the constraints of an outdated conception of party autonomy, the difficult issue for theorists became the appropriate scope of the parties' power to choose the applicable law. In this regard, the drafters of the Restatement conceptualized the matter quite differently than had the drafters of the U.C.C. Where the latter adopted and proceeded from a unitary view under which the law chosen by the parties is uniformly applicable to all the terms of the contract and aspects of the relationship, the A.L.I. identified two separate categories of contractual provisions. These consist of: (1) those addressing issues, such as sufficiency of performance and excuse, that are and always have been within the contractual capacity of the parties to determine;²⁸ and (2) those addressing issues, such as capacity to contract and the statute of frauds, which are governed by immutable state law and are therefore of such a character that the parties could not have resolved them by explicit provision in their agreement.²⁹ The A.L.I. believed that choice-of-law clauses would fare better and prove less troublesome if guided by recognition of this duality, which is not only more faithful to our conflicts history but also squarely confronts the interests at stake when a single contract has a connection to two or more states.³⁰ The drafters of the Restatement therefore thought it critical to reject what they considered to be the harmful illusion that all contractual issues are similar.

As to the first category of issues, those traditionally resolved by contractual terms, the Restatement provides that the state law chosen by the parties will always be applied.³¹ In such a situation, no countervailing policy is implicated, because the parties could have accomplished the same thing by drafting a clause mimicking the attributes of the chosen law.³² By contrast, when the issue concerns a

28. § 187 cmt. c. The Restatement also cites "rules relating to construction [and] to conditions precedent and subsequent" as examples. § 187 cmt. c.

29. § 187 cmt. d. Also included would be questions involving other "formalities and substantial validity." § 187 cmt. d.

30. Courts and commentators have always felt more comfortable with the proposition that parties should be free to choose the law that governs the interpretation of their contract, but should not be free to select the law that will govern the validity of their contract. See Ernest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 YALE L.J. 565, 655 (1921); Robert Szold, *Comments on Tentative Draft No. 6 of the Restatement (Second), Conflict of Laws-Contracts*, 76 HARV. L. REV. 1524, 1525 (1963).

31. § 187(1).

32. This is not to suggest that incorporation of a term by reference to the law of another jurisdiction will always have the same practical effect as an explicit statement in a contract of the desired term. For one thing, determining what the parties intended by the language of their agreement is often a question of "fact" for the jury with its concomitant limited scope of appellate review. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 212(2) (1986) (explaining that a question of interpretation of an agreement is one of fact if it "depends on the credibility of extrinsic evidence or a choice among reasonable inferences to be drawn from extrinsic evidence").

matter not amenable to regulation by contract, the Restatement significantly curtails the parties' autonomy.³³ In such cases, the parties' choice will not be effective if:

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties.³⁴

Underlying this less generous grant of party autonomy is the drafters' reluctance to diminish the benefits that certain state policies were meant to ensure,³⁵ as well as their desire to make certain that the parties had a legitimate reason for their choice of law.³⁶ In effect, by rejecting the conceptual framework of the Code, the drafters of the Restatement have created a test that is both broader and narrower than the Code formulation. As one commentator has noted:

It [is] broader in two ways. First, the parties' choice of law [is] in no way limited if the issue [is] one that the parties could have resolved in their contract. Second, although there [is] a requirement that the choice be reasonable, there [is] no requirement that the relationship between the transaction and the chosen law be reasonable. . . . The Restatement test [is] narrower, however, in that it provide[s] for a limitation on even a reasonable choice of law if there [is] a conflict with a fundamental policy of a state with a materially greater interest in the issue.³⁷

B. The Debate Revisited

Several decades have passed since the Code and the Restatement shifted toward a more favorable view of party

In contrast, determining the law of another jurisdiction is a job that properly belongs to the court and is reviewable on appeal on a plenary basis. *See infra* notes 82-95 and accompanying text. Moreover, the substance of a written clause will not change over time unless amended by agreement of the parties. Query: What happens if the law of the chosen jurisdiction changes after the parties execute their agreement? Should the court apply the law as it existed when the parties made their choice or as it exists at the time of decision?

33. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971). Ironically, when the validity of the parties' contract is on the line (an issue outside their ability to predetermine), choice of law "matters most." *See Ribstein, supra* note 12, at 262.

34. § 187(2).

35. *See* § 187 cmt. g ("Fulfillment of the parties' expectations is not the only value in contract law; regard must also be had for state interests and for state regulation.").

36. § 187 cmt. f. For example, "[t]he forum will not . . . apply a foreign law which has been chosen by the parties in the spirit of adventure or to provide mental exercise for the judge." § 187 cmt. f.

37. Amelia Boss, *The Jurisdiction of Commercial Law: Party Autonomy in Choosing Applicable Law and Forum Under Proposed Revisions to the Uniform Commercial Code*, 32 INT'L LAW. 1067, 1074-75 (1998).

autonomy,³⁸ and the future of choice-of-law clauses has once again become the center of a major policy debate. This change has occurred in part because codification has increasingly become the preferred method of shaping the development of commercial law.³⁹ Aside from the process of periodic adjustments in existing U.C.C. articles to reflect fundamental changes in society,⁴⁰ on several occasions supplementary articles have been enacted as formal amendments to the Code.⁴¹ In addition to these efforts to keep the Code responsive to contemporary needs, legislatures have also enacted auxiliary statutes covering limited subjects that are not consolidated into the Code.⁴² These drafting projects have stimulated the debate over contractual choice by creating an opportunity for those who have been critical of restraints on party autonomy to voice their displeasure and lobby for change, and for others who see party autonomy as a problem rather than a solution to advocate for greater statutory protections for those upon whom choice-of-law clauses are likely to be imposed (i.e., consumers and small businesses). At no time has the debate been more heated than it was during the drafting of U.C.I.T.A.

From the very beginning, the drafts of U.C.I.T.A. (and its forerunner, proposed U.C.C. Article 2B) contained a powerful endorsement of party autonomy that exceeded the contents of section

38. See *supra* notes 17-37 and accompanying text.

39. To be sure, codification is not an altogether new phenomenon. The Code supplanted uniform acts that were drafted and approved by N.C.C.U.S.L. over the course of half a century, including the Negotiable Instruments Law, the Uniform Sales Act, the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act, the Uniform Stock Transfer Act, the Uniform Conditional Sales Act, and the Uniform Trust Receipts Act. See U.C.C. general cmt., at 21 (2002).

40. Within the past decade, N.C.C.U.S.L. and the A.L.I. have revised Articles 1 (2001), 3 (1990), 4A (1989), 5 (1995), 6 (1989), 8 (1994), and 9 (2001). See U.C.C. preface, at III. Drafting committees are currently revising or amending Articles 2, 2A, 7, and, once again, Articles 3 and 4. Although the particular impetus for each revision project has been somewhat different, the basic objective has always been to prevent the Code from becoming outdated. For example, since the promulgation of the *1957 Official Text of the Code*, Article 2 (Sales) has remained virtually unchanged. The same cannot be said, however, of commercial and consumer law generally and the technological environment in which many transactions now take place. Some of the more obvious changes include the common-law development of a theory of strict products liability that overlaps the Code, the enactment of a "hodgepodge of [federal and state] consumer product legislation," and the growing use of electronic methods of contracting. Edith Resnick Warkentine, *Article 2 Revisions: An Opportunity to Protect Consumers and "Merchant/Consumers" Through Default Provisions*, 30 J. MARSHALL L. REV. 39, 78 (1996). Thus, when one also considers the vast number of judicial opinions that have revealed weaknesses in the current statutory structure, it would not be unreasonable to conclude that Article 2 may be in need of revision.

41. See, e.g., U.C.C. arts. 2A, 4A.

42. For example, recognizing that inappropriate law could hinder the development of electronic commerce and that the impact of new technologies extends beyond the scope of the Code to other types of transactions, N.C.C.U.S.L. completed the Uniform Electronic Transactions Act in 1999. Another recent effort to statutorily preempt burgeoning case law is U.C.I.T.A. See *supra* note 7.

1-105 of the Code and the Restatement.⁴³ Perhaps the most fundamental point is that the new framework created by the drafters of the U.C.C. and the Restatement called into question the need for any restrictions at all on the enforcement of choice-of-law clauses in commercial transactions.⁴⁴ The U.C.I.T.A. drafting committee saw complete party autonomy as a necessary guarantor of the successful development of electronic commerce. Because the Internet recognizes no geographic borders, the committee concluded that the approach embodied in section 1-105 and the Restatement had to be rejected if electronic commerce was to flourish.⁴⁵ In other words, the drafters of U.C.I.T.A. sought to leave nothing to judicial decision on the theory that, unless the parties selecting a jurisdiction to provide the governing law could be certain that their choice would be given effect, the unfortunate result would be that “even the smallest business would be subject to the law of all fifty States and all countries in the world.”⁴⁶

It was inevitable that this hyperbolic claim would ultimately draw into question the drafters’ notion that U.C.I.T.A. transactions were somehow different from ordinary commercial transactions and that the environment of cyberspace required special rules to govern the enforcement of choice-of-law clauses.⁴⁷ Indeed, many argued that U.C.I.T.A. was so flawed in its structure and in many of its individual

43. See Boss, *supra* note 37, at 1091 (“From the very outset, the drafts of Article 2B have contained broad choice-of-law (and choice of forum) provisions.”).

44. The discussion in the text ignores the special rules included in Article 2B governing consumer transactions. See Boss, *supra* note 37, at 1093 (“[U]nlike prior law (such as current section 1-105 or the Restatement) where no distinction was drawn between transactions based on the nature of the parties, Article 2B was introducing a distinction between consumer and commercial transactions.”).

45. See U.C.I.T.A. § 109 cmt. 2(a) (2001).

The information economy accentuates [the importance of contractual choice-of-law clauses] because communications capabilities allow remote parties easily to enter into and perform contracts through systems spanning multiple jurisdictions and in circumstances that do not depend on the physical location of either party or of the information. Many computer information transactions occur in cyberspace, rather than in definable, fixed locations.

Id.; see also WHITE HOUSE, A FRAMEWORK FOR GLOBAL ELECTRONIC COMMERCE (July 1, 1997) (“The U.S. should work closely with other nations to clarify applicable jurisdictional rules and to generally favor and enforce contract provisions that allow parties to select substantive rules governing liability.”).

46. § 109 cmt. 2.

47. Not everyone believes that electronic commerce and the Internet are as “different” as the drafters of U.C.I.T.A. claim. See, e.g., Memorandum from William J. Woodward, Jr., to Members, American Law Institute Regarding Motion to Delete Section 2B-107(a) from Draft UCC Article 2B (May 6, 1998), available at <http://www.ali.org/ali/Woodward1.htm>.

provisions that the entire project should be scrapped.⁴⁸ The A.L.I. itself eventually withdrew from the project in the aftermath of this controversy. Nevertheless, U.C.I.T.A. was eventually approved by N.C.C.U.S.L. and sent to the states for adoption as a statute external to the Code. The provision on choice of law states:

The parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply . . . in the absence of the agreement.⁴⁹

Thus, at least in commercial cases governed by U.C.I.T.A., no relationship between the state law chosen and the geographic location of the transaction is at all necessary.

Of equal significance to the party autonomy debate are the recent revisions to U.C.C. Article 1.⁵⁰ Here, too, significant changes to traditional choice-of-law doctrine outside the context of conventional consumer transactions are in the offing.⁵¹ Deference will be accorded to the parties' agreement when domestic law is selected,⁵² except to the extent that their choice is contrary to a fundamental policy of the

48. See, e.g., Lawrence Lessig, *Sign It and Weep*, *INDUSTRY STANDARD*, ¶ 2 (Nov. 20, 1998), at <http://www.thestandard.com/article/0,1902,2583,00.html> (last visited Oct. 24, 2002) ("The current draft represents little more than the narrow commercial interests of the major software companies. It's an embarrassment to its sponsors, who ought to dump the draft and leave the topic alone.")

49. U.C.I.T.A. § 109 (1999).

50. In 1996, N.C.C.U.S.L. and the A.L.I. appointed a drafting committee to undertake two tasks. One was to revise Article 1; the other, to harmonize the various other Code drafting projects to the extent appropriate. The discussion in the text is limited to Revised Article 1. Revised Article 1 received full N.C.C.U.S.L. and A.L.I. approval in 2001. So far, it has only been adopted by the Virgin Islands. This Article refers to sections in "former" Article 1 as U.C.C. § 1-xxx (1998) and to provisions in "new" or "revised" Article 1 as Rev. § 1-xxx (2001). All other provisions of the Code, not changed by Revised Article 1, shall be cited as U.C.C. § x-xxx (1998). Revised Article 1, unlike other provisions of limited application, will apply to every Code-covered transaction unless displaced elsewhere. However, Revised Article 1 is by no means the only article of the Code in which one can find major changes in choice-of-law philosophy. For example, revised Article 9 provides for maximum party autonomy in choosing the law that will govern security interests in bank accounts. See § 9-304. The official comments to section 9-304 make clear that "[t]he parties' choice is effective, even if the jurisdiction whose law is chosen bears no relationship to the parties or the transaction." § 9-304 cmt. 2. This choice-of-law provision, however, only applies to questions of perfection and priorities. It does not permit a bank to opt into another state's version of Article 9 or to choose the law that will govern attachment of the security interest. See also §§ 4A-507, 5-116, 8-110.

51. If one of the parties to the transaction is a consumer, a choice-of-law agreement is not effective to deprive the consumer of the protection of a nonvariable consumer protection rule of the jurisdiction where either (1) the consumer resides or (2) where both the contract and delivery were made. See U.C.C. Rev. § 1-301(e) (2001).

52. § 1-301(a)(2). If the law chosen is that of a country other than the United States, the drafters curiously require that the transaction bear a reasonable relationship to a foreign jurisdiction (but not necessarily to the chosen jurisdiction). § 1-301(c)(2).

jurisdiction whose law would otherwise govern in the absence of a contractual designation.⁵³ Under this approach, the key issue ceases to be the existence of a “reasonable relation” (as in former Article 1) and becomes whether a conflicting policy is “fundamental” or something less. This distinction is not always sharp, and it will call for an exercise of judgment. In the vast majority of cases, however, it should be easily administered, and the parties’ choice given effect.⁵⁴

A general conclusion emerges from the discussion and developments to date: The new choice-of-law framework resulting from these reform efforts will provide parties with an expanded menu of legal regimes from which to choose when selecting the law that will govern their contract. That flexibility will in turn lead to more frequent use of contractual choice-of-law clauses.⁵⁵ Indeed, some have suggested that omitting such a clause may soon be considered malpractice by the commercial lawyer.⁵⁶

Given both the trend toward permitting unlimited contractual choice of law and the growing popularity of these clauses, it is worth pausing to examine how the judicial system might appropriately

53. § 1-301(f).

54. More precisely, this prediction assumes that courts will heed the admonition in the official comment:

Under the fundamental policy doctrine, a court should not refrain from applying the designated law merely because application of that law would lead to a result different than would be obtained under the local law of the State or country whose law would otherwise govern. Rather, the difference must be contrary to a public policy of that jurisdiction that is so substantial that it justifies overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally.

§ 1-301 cmt. 6.

There is no indication in Revised Section 1-301 whether the forum court is to decide for itself what constitutes a fundamental policy of the state whose law would otherwise govern or whether the forum court is bound by the answer the other state has given, or would give if presented with such an opportunity. It has been suggested that the constitutionality of section 1-103 may depend on the answer. See Richard K. Greenstein, *Is the Proposed U.C.C. Choice of Law Provision Unconstitutional?*, 73 TEMP. L. REV. 1159, 1180 (2000).

55. U.C.I.T.A. and the changes to Article 1 are only part of a more general trend to expand party autonomy in the choice-of-law area. Various nonuniform state statutes and international instruments also provide for expanded freedom to choose the law of the contract in transactions. See, e.g., N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 2001) (providing that in transactions over \$250,000 New York law can be selected even if New York is an unrelated state); TEX. BUS. & COM. CODE ANN. § 35.51(c) (Vernon 2002) (stating that in transactions involving \$1 million or more the parties can select the law of any unrelated jurisdiction); European Communities, *Convention on the Law Applicable to Contractual Obligations*, in CONTRACT CONFLICTS, THE E.E.C. CONVENTION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS: A COMPARATIVE STUDY 348 (P.M. North ed., 1982).

56. See, e.g., Letter from the Co-Chairs and Vice-Chairs of the Subcommittee on Information Contracting of the Uniform Commercial Code Committee of the American Bar Association Section of Business Law to the National Conference of Commissioners on Uniform State Laws (July 8, 1999), available at <http://www.2bguide.com/docs/7899bls.html>.

respond. In particular, this Article addresses a problem that has been overlooked by both courts and commentators: How should a forum state's appellate court determine issues not directly addressed by the law of the foreign⁵⁷ jurisdiction whose law has been contractually chosen? As the discussion below will show, in this situation the appellate courts of the forum state ought to accept reasonable trial court interpretations of the law of the foreign jurisdiction. This Article will suggest that, in the face of ambiguity, trial court interpretations should be allowed to prevail so long as they are reasonable. Here, the relationship of choice of law to judicial administration should be neither acquiescence nor hostility, but instead adaptation. Some may find this idea quite jarring in view of the basic and often-repeated principle that when issues of law are appealed, appellate courts use a de novo standard of review by which the trial court's conclusions may be set aside freely.⁵⁸ On the other hand, the notion is strikingly reminiscent of the enthusiasm created by *Erie Railroad Co. v. Tompkins*⁵⁹ for affording limited appellate review of state law rulings in federal court—at least until that enthusiasm was dampened by the Supreme Court.⁶⁰ Perhaps this former federal practice has something to teach us about mediating the relationship between trial and appellate courts in an entirely different context.

What are the advantages and disadvantages of appellate review of trial court rulings on issues of foreign law? What exactly does judicial review of unsettled questions of foreign law accomplish? What is its price? These questions are of considerable theoretical interest and immense practical importance. Their resolution calls for inquiries into the allocation of judicial authority and in its production of outcomes in the real world.

The discussion proceeds first by briefly describing in Part II some of the causes and effects of the steadily increasing caseloads in appellate courts. After demonstrating that these caseloads may soon become unmanageable, Part II examines the two essential functions of appellate review and the justification for the conventional standards of review applied by appellate courts.

Part III turns to the more complex matter of appellate review of issues of foreign law. It finds that neither of the functions served by appellate courts can provide a sound foundation for the de novo

57. Here and elsewhere, when I use the term "foreign," the meaning is not limited to matters concerning the laws of other nations, but also includes matters concerning the law of any jurisdictional system other than that of which the forum court is a part.

58. See *infra* notes 82-95 and accompanying text.

59. 304 U.S. 64 (1938).

60. See *infra* notes 116-26 and accompanying text.

standard of review normally applied when issues of law are involved and urges a rethinking of the standard in light of the modern developments discussed above.

Part IV accordingly addresses the normative question of whether *de novo* review should be abandoned when issues of foreign law are reviewed. This portion of the Article devotes attention to the private and institutional costs of *de novo* review and seeks to identify the potential harm, if any, to litigants that would result if the standard were changed. The discussion concludes that a deferential standard of review would offer litigants a fair means of dispute resolution and potentially mitigate the crisis of volume that has afflicted the appellate system.

Finally, Part V discusses and critiques two alternative procedures for dealing with foreign law issues. The analysis shows that a deferential standard of review is a more theoretically satisfying way to protect the interests of litigants and to cope with rising dockets.

II. THE WORK—AND WORKLOAD—OF APPELLATE COURTS

Although the right to appeal to a higher judicial authority is of ancient lineage⁶¹ and widely accepted,⁶² it still engenders a multitude of problems related to the dramatic increase in the workload of appellate courts. The issues associated with this development are both complex and important; they merit comprehensive development and exposition beyond the breadth of a single article.⁶³ However, this

61. A form of appellate review can be found as far back as 4000 B.C.E. in ancient Egypt. See 1 JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* 11-13, 28-34 (1928). For a general description of the development of the concept of appellate review from its inception in the early civilizations that bordered the Mediterranean Sea to more recent developments in the United States, see ROBERT J. MARTINEAU, *MODERN APPELLATE PRACTICE* 2-15 (1983).

62. Notwithstanding the generally held belief that "[t]he opportunity to take one's case to 'a higher court' as a matter of right is one of the foundation stones of both our state and federal court systems," FRANK M. COFFIN, *THE WAYS OF A JUDGE* 16 (1980), such review is not required as a matter of due process. See, e.g., *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 43 (1954).

63. Consider the following statistics:

In the federal courts, appellate filings increased 300% (four-fold) from 1961 to 1974. In California, there was an increase from 3,872 in 1964 to 9,186 in 1973. In Illinois, there was an increase in appellate filings from 1,338 in 1965 to 3,020 in 1972. In Michigan, there was an increase from 1,475 in 1966 to 3,076 in 1973. In New Jersey, there was an increase from 1,230 in 1964 to 3,870 in 1973. In New York, there was an increase from 3,967 in 1965 to 5,675 in 1973. Similar increases have been experienced in almost every populous state for which figures are available.

PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 4-5 (1976) (citations omitted). Since these figures were gathered, conditions have steadily worsened. See, e.g., Gerald F. Uelmen, *Creating an Appetite for Appellate Reform in California*, 45 *HASTINGS L.J.* 597, 598 (1994) ("During 1992,

Article focuses upon one method of dealing with the problem of an ever-expanding appellate caseload that would decrease the number of cases commenced by inducing litigants to appeal less frequently.⁶⁴

A. Appellate Court Bloat

About seventy years ago, Dean Leon Green addressed the staggering growth in the volume of appellate cases, distilling the essence of its underlying causes:

Probably the strangest chapter in American legal history is how in the short period of the last fifty years or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system.⁶⁵

One-half century later, Judge Joseph R. Weisberger stated the effects of this judicial power grab most dramatically:

The appellate structure of our judicial system resembles a great full-rigged ship, some of whose seams have been opened below the waterline by the incessant pounding of the seas. The crew has vigorously manned the pumps in order to prevent the vessel from foundering. However, try as they may, with might and main, the crews of appellate judges are able to do no more than maintain a precarious balance between sinking and sailing.⁶⁶

This point needs to be constantly reiterated to those who cling to the antiquated notion that appellate courts are necessary to achieve the ends of justice; that they represent an order of courts superior to the trial courts. Perhaps this claim to judicial superiority held true

there were approximately twenty-three civil appeals for every 100 contested civil cases tried in superior courts, compared with an average of twenty during the preceding four years—a jump of fifteen percent.”).

64. The basic thrust of the proposals for dealing with appellate bloat has been to increase the number of judges or quasi-judicial officers who participate in the disposition of cases and to reduce the amount of time devoted to a case. For a valuable collection of the articles, books, and reports that have been devoted to the reform effort, see THOMAS MARVELL & CARLISLE MOODY, *STATE APPELLATE COURT ADAPTATION TO CASELOAD AND DELAY PROBLEMS* (1988).

65. LEON GREEN, *JUDGE AND JURY* 380 (1930). A discussion of four devices by which appellate courts have managed to control the ultimate outcome of litigation and diminish the importance of trial courts may be found in Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957). According to Professor Wright, these devices are:

[R]eview by the appellate court of the size of verdicts; orders for a new trial where the verdict is thought to be contrary to the clear weight of the evidence; refusal to be bound by findings of fact of the trial judge based on documentary evidence; and expanded use of the extraordinary writs of mandamus and prohibition to control the trial court in its discretionary actions as to the procedure by which a case is to be handled.

Id. at 751-52. For a discussion of several other reasons for appellate court congestion, see CARRINGTON ET AL., *supra* note 63, at 5-7.

66. Joseph R. Weisberger, *Appellate Courts: The Challenge of Inundation*, 31 AM. U. L. REV. 237, 237 (1982).

years ago, before the number of appellate cases soared, but it is certainly not true today. At one time appellate judges were able to devote sufficient time and energy to the decisionmaking process.⁶⁷ They would carefully read the briefs and the trial transcript in preparation for oral argument and hold conferences to consider precedents and other authorities.⁶⁸ The writing of the opinion was never hurried, but would go through several drafts.⁶⁹ The hallmark of the entire process was collegiality: ideas were constantly being shared by the judges with one another and with their clerks.⁷⁰ It should come as no surprise, therefore, that appellate court decisions were viewed as more likely to be just than the "heat of battle" decisions made by trial judges lacking the opportunity for leisurely reflection.⁷¹

If the foregoing description paints an inaccurate picture of appellate practice, what might be a more accurate depiction? It is apparent from the way judges themselves have described the consequences of increasing caseloads that the collegial atmosphere of an earlier day has been replaced by an "assembly line" model of justice.⁷² Associate Justice Winslow Christian of the Court of Appeal for San Francisco, California, has written:

Judgeships have been added to the point that the larger appellate courts cannot function as collegial bodies, and doctrinal consistency is hard to maintain; courts have created central staffs of research attorneys, increased the number of law clerks, and moved in the direction of long-tenure research attorneys in place of the traditional new-graduate law clerk, and much of the writing issued in the court's name is not done by judges at all. A general speed-up creates pressure to eliminate or curtail oral argument,

67. See, e.g., Arthur D. Hellman, *Central Staff in Appellate Courts: The Experience of the Ninth Circuit*, 68 CAL. L. REV. 937, 938 (1980).

68. See *id.*

69. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* vii-viii (1928); John Bilyeu Oakley & Robert S. Thompson, *Law Clerks in Judges' Eyes: Tradition and Innovation in the Use of Legal Staff by American Judges*, 67 CAL. L. REV. 1286 (1979). Appellate Judge Winslow Christian has put it this way:

A law teacher, a legislator, or even a newly appointed appellate judge may hold quaint ideas about what goes on inside an appellate court: The judges are supposed to give thoughtful attention to full-scale oral argument; they supposedly consider the cases thoroughly in conference; and then a judge (assisted by an admiring young clerk in the role of apprentice) studies the record, collects the authorities, and goes through several drafts before presenting his colleagues with an opinion embodying the collegial conclusion of the judges. It is a charming and reassuring picture. But that picture is contrary to fact in every appellate court that I know about.

Winslow Christian, *Appellate Bloat Threatens Our Courts*, 19 JUDGES' J. 27, 27 (1980).

70. See Christian, *supra* note 69, at 27; see also Oakley, *supra* note 69, at 1287.

71. See *infra* notes 86-88 and accompanying text.

72. See, e.g., WARREN BURGER, *YEAR END REPORT OF THE JUDICIARY* 2 (1981) (observing that courts are moving "towards an assembly line model" to deal with the large number of appellate cases); CARRINGTON ET AL., *supra* note 63, at 7 ("Changes which are characteristic of any shift from individually crafted works to mass production methods can be seen to be occurring in appellate processes and institutions.")

to shorten or slight the judicial conference and to make it hard for the judges to find time for reading, reflection, and careful writing demanded by difficult cases. A present-day appellate judge works in an atmosphere not of scholarly deliberation but of anxious response to pressure to produce an ever increasing volume of dispositions.⁷³

How are the growth of appellate cases and the new process of judging to be appraised? Does such growth, and the process it dictates, preserve the essential functions of appellate adjudication? Resolution of these questions is critical. The legal profession should be willing to weigh dispassionately the appellate system on the scales of justice, measuring the values it is intended to currently promote against the countervailing need for an efficient judicial system. If the privilege of appeal is necessary or strongly desirable in our system of justice, its importance would seem to preclude sacrificing its values to concerns about efficiency. On the other hand, if the privilege of appeal has, at least in certain cases, little functional importance, the failure to recognize this fact and differentiate among types of cases can perpetuate appellate bloat and undermine the legitimate rationale for an appellate system. It seems appropriate, therefore, to analyze the consequences of an expanding caseload against the core functions of appellate review.

B. *The Essential Functions of Appellate Review*

Discussions of the essential functions of appellate review have been dominated by the distinction between error correction and law development, a distinction that has been the keystone upon which our whole system of appellate courts has been built.⁷⁴ In jurisdictions

73. Christian, *supra* note 69, at 27. Others have made similar observations. See, e.g., Robert S. Thompson & John B. Oakley, *From Information to Opinion in Appellate Courts: How Funny Things Happen on the Way Through the Forum*, 1986 ARIZ. ST. L.J. 1, 10 (1986):

Only the naïve can believe that an appellate judge ostensibly required to give painstaking consideration to briefs of counsel, trial court records, relevant precedent, and on occasion, philosophical and scientific discourse, and then to construct an opinion synthesizing these items for testing by vigorous dialectic with colleagues, has truly done so while producing opinions at the rate of over one per day.

This output level stands in stark contrast to the number of opinions produced by the Second Circuit during Learned Hand's tenure. Then, each three-judge panel was responsible for an average rate of 125 opinions per year, not all of which were lengthy or involved difficult issues.

MARVIN SCHICK, *LEARNED HAND'S COURT* 68, 312-13 (1970).

74. Although one might construct an argument that additional functions are served by appellate review, see, e.g., Philip B. Kurland, *Jurisdiction of the United States Supreme Court: Time for a Change?*, 59 CORNELL L. REV. 616, 618 (1974), further reflection strongly suggests that these are little more than variations on the traditional dual-purpose themes. See, e.g., CARRINGTON ET AL., *supra* note 63, at 2 ("In the received tradition, the function of appellate adjudication are two-fold."); MARTINEAU, *supra* note 61, at 19 ("Although some commentators

where there is an intermediate appellate court, it is assumed that its primary responsibility will be to correct errors in the trial court, while the supreme court can concentrate on developing a useful body of law.⁷⁵ Of course, in jurisdictions where there is no intermediate appellate court, the supreme court will necessarily have to perform both functions. Moreover, where intermediate courts exist but review by the supreme court is discretionary, the intermediate courts necessarily play a key role in developing the law.⁷⁶

With respect to error correction, appellate courts see to it that inferior tribunals obey the law, thereby promoting the perception of legitimacy by ensuring that the ultimate outcome of litigation is based on impersonal and reasoned judgments.⁷⁷ Further, the expectation by lower court judges that many, though not all, of their decisions will be reviewed, can help to prevent error by encouraging those judges to exercise greater caution in performing their duties.⁷⁸

As for the law development function, sometimes called "institutional" review,⁷⁹ appellate review actually serves two main objectives. First, appellate review provides the means by which the common law can evolve to reflect the changing needs of society.⁸⁰

identify other functions, these other purposes are usually aspects of either error correction or law development.").

75. See CARRINGTON ET AL., *supra* note 63, at 4 ("Many states now have intermediate court structures comparable to that of the federal system, and most have established, at least in some degree, a difference of function for the two levels of appellate courts, based on this duality."); Richard Henry Mills, *Caseload Explosion: The Appellate Response*, 16 J. MARSHALL L. REV. 1, 3-4 (1982) (noting that the intermediate appellate court "is assigned the function of correcting mistakes," while the supreme court has "the obligation of law development") (internal citations omitted). Indeed, the federal court of appeals, added by the Evarts Act of 1891, was envisioned as an error-correcting court. See Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 21 (1996).

76. See Dragich, *supra* note 75, at 22-23.

77. See CARRINGTON ET AL., *supra* note 63, at 2 ("[T]he review for correctness serves to reinforce the dignity, authority and acceptability of the trial, and to control the adverse effects of any personal shortcomings of the basic decision-makers.").

78. Appellate review can also serve as an "error prevention" system in that the possibility of an appeal may prevent a judge from consciously acting in a manner that would constitute reversible error. The possibility of review may even cause a judge to exercise greater caution to prevent unintentional error. MARTINEAU, *supra* note 61, at 20.

79. *Id.*

80. See, e.g., *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (observing that "judges do and must legislate"); Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545, 548 (1899) (recognizing that "judicial legislation . . . is inherent in the strict performance of judicial duty"); Kurland, *supra* note 74, at 618 (observing that the ability of courts to make law "is the genius of the common law system that we inherited from our English forebears"). Justice Cardozo's cognizance of the lawmaking role of courts is evident in the following excerpt from his essays on the craft of judging:

I was much troubled in spirit, in my first years upon the bench to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and

Second, appellate review helps avoid the unpredictability of legal rules that might otherwise result from the contradictory decisions of independent courts. Only with a hierarchy of courts providing a uniform judicial interpretation of federal and state law is it possible to secure the values associated with judicial consistency.⁸¹

C. Standards of Appellate Review

In any appraisal of the impact of today's caseload on appellate decisionmaking, the standards of review used by appellate courts, and their underpinnings, are pertinent to the discussion. The applicable standard determines whether the relationship among the courts in any judicial system is maintained or altered. Care must be exercised to differentiate between cases in which an appellate court reviews on a plenary basis (*de novo* review) and cases in which an appellate court employs a "clearly erroneous" or deferential standard of review. In the former, the court decides for itself how the issues presented ought to be resolved, while in the latter the reviewing court can inquire into the rational basis of challenged lower court findings, upholding them if they are found to be reasonable.

A caveat should perhaps be interposed here. Although the reviewing court in a *de novo* review is not *required* to give the reasoned conclusions of the lower court any particular weight, one has to assume that in the majority of cases these conclusions are at least given the weight of a well-written law review article and may prove to be quite helpful, if not persuasive. Moreover, an appellate court employing the "clearly erroneous" standard will not reverse merely because the lower court's finding is not one the appellate court would have made had it been the initial adjudicator; rather, the finding will be overturned only where the appellate court finds it to be unreasonable. Thus, in both cases, but especially in clearly erroneous reviews, the trial court's opinion carries significant weight.⁸²

disheartened when I found that the quest for it was futile. I was trying to reach land, the solid land of fixed and settled rules As the years have gone by . . . I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery but creation.

BENJAMIN N. CARDOZO, *Adherence to Precedent: The Subconscious Element in the Judicial Process*, in *THE NATURE OF THE JUDICIAL PROCESS* 142, 166 (1931). Recent events have taught us that, at least in one context, a change in law by a state court is prohibited by federal statutory and constitutional law. See *Bush v. Gore*, 531 U.S. 98 (2000).

81. For a discussion of what those values are, see *infra* notes 89-93 and accompanying text.

82. "A finding is 'clearly erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

This discussion leads us to the question of how a court decides which standard of review is appropriate in a particular case. Traditionally, questions of law are reviewed de novo and questions of fact are reviewable only on a clearly erroneous basis.⁸³ Although questions of law and fact are not always easily distinguishable, and while there may be shades of gray between the black and white, the traditional division is nevertheless important.⁸⁴ For one thing, the courts employ these terms.⁸⁵ More importantly, though, there is historical justification for the theory of review grounded upon the law-fact distinction. It rests upon the belief that different tiers of courts possess different decisionmaking skills and that this distinction recognizes the particular competence of each.

We have seen that at one time appellate courts were not "processing institutions,"⁸⁶ but rather were collegial institutions with sufficient time and manpower to provide the study and reflection that complex legal issues deserve.⁸⁷ By contrast, trial courts have always been what modern appellate courts have now become: high-volume, fast-paced purveyors of justice. Given this and other historical differences between trial and appellate courts, it is not surprising that there has been widespread and persistent belief that appellate judges

83. See 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2585, at 729, § 2588, at 749-50 (1977); see also Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417, 430 (1968) ("[T]he conventional fact-law distinction . . . is the purported foundation of appellate review, the archpremise which has woven review into the fabric of the administration of justice since the fifteenth century.")

84. The difficulty involved in applying the distinction between "law" and "fact" in particular cases can be seen in connection with so-called mixed questions of law and fact. See, e.g., *United States v. McConney*, 728 F.2d 1195, 1202 (9th Cir. 1984) (suggesting that, in most cases, a mixed question of law and fact should be reviewed de novo). Appellate courts have also departed from the usual law-fact distinction in cases involving so-called constitutional facts. See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); see also *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (noting that the law-fact distinction "is often not an illuminating test and is never self-executing"); Wilner, *supra* note 83, at 431 ("It requires a good deal of pretending to suppose that the theory of appellate review, presupposing a relatively tight segregation of fact from law, is as valid today as it was a century ago . . ."). Just recently, the Supreme Court held that "the level of punitive damages is not really a 'fact' tried by the jury" and appellate courts should, therefore, reconsider the award in a de novo review. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001).

85. See, e.g., *Tupman v. Haberkern*, 280 P. 970, 973 (Cal. 1929) (stating that questions of fact are decided by the trial court and that questions of law are decided by the appellate court). The law-fact distinction has also found its way into the *Federal Rules of Civil Procedure*. For example, Rule 52(a) provides that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses." FED. R. CIV. P. 52(a). Implicit in Rule 52(a) is the principle that legal questions should receive independent review. See *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

86. Robert H. Bork, *Dealing with Overloads in Article III Courts*, 70 F.R.D. 231, 233 (1976).

87. See *supra* notes 67-70 and accompanying text.

are more likely to generate the correct answers to questions of law than are their brethren below who oversee the trial and provide the initial answers to all legal questions, both simple and difficult.⁸⁸ Another reason exists for allowing appellate courts to retain the ultimate responsibility for deciding questions of law. Under the doctrine of precedent,⁸⁹ appellate rulings of law are the principle means of assuring some semblance of legal certainty and uniformity, without which the legal system would descend into chaos.⁹⁰ It is commonly understood not only that adherence to precedent increases efficiency⁹¹ and predictability,⁹² but that justice itself requires that

88. The United States Supreme Court has stated that:

District judges preside alone over fast-paced trials: of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. Similarly, the logistical burdens of trial advocacy limit the extent to which trial counsel is able to supplement the district judge's legal research without benefit of "extended reflection [or] extensive information."

Courts of appeals, on the other hand, are structurally suited to the collaborative judicial process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues. As questions of law become the focus of appellate review, it can be expected that the parties' briefs will be refined to bring to bear on the legal issues more information and more comprehensive analysis than was provided for the district judge.

Salve Regina Coll. v. Russell, 499 U.S. 225, 231-32 (1991) (citation omitted).

89. Precedent is best known as *stare decisis et non quieta movere*, meaning "let the decision stand and do not disturb things which have been settled," John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 1 n.2 (1983) (quoting Justice Arthur Goldberg), or "stand by the precedents and do not disturb the calm." *Id.* (quoting Justice Stanley Reed).

90. See, e.g., CARRINGTON ET AL., *supra* note 63, at 147 (stating that uniformity is "one of the imperatives of appellate justice"); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 911 (1984) ("Although the uniformity-assuring function of the Court does not strike me as a constitutionally mandated one, as a matter of policy, our system—any system—would be poorer and less coherent in the absence of a single, ultimately authoritative court at the apex of the judicial hierarchy.");

91. The use of precedent dispenses with the need for a judge to reinvent the law in each and every case. Justice Cardozo made this point when he stated that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him." BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921).

92. Predictability is the most common justification for precedent. See David Lyons, *Formal Justice and Judicial Precedent*, 38 VAND. L. REV. 495, 496 (1985) ("The reason most often given for the practice of precedent is that it increases the predictability of judicial decisions."); Earl Maltz, *The Nature of Precedent*, 66 N.C. L. REV. 367, 368 (1988) ("The most commonly heard justification for the doctrine of *stare decisis* rests on the need for certainty in the law."). Without predictability, individuals would be unable to plan their affairs—business or otherwise—with any degree of legal certainty. See Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, N.Y. ST. B.J., July 1990, at 15, 18 (noting that predictability of outcome "is especially important in cases involving property rights and commercial transactions").

like cases be treated alike.⁹³ Thus, limited appellate resources should be concentrated on that which matters most to the system as a whole—the promotion of uniformity and the development of a coherent body of laws.⁹⁴ These considerations do not apply to the judicial review of the factual issues arising from trial court determinations. Such decisions have no precedential value and only affect those parties that are currently before the court. Thus, the advantages of expertise are with the trial judge who is closest to the “action” and, consequently, is in a much better position to evaluate and weigh the evidence.⁹⁵

III. THE LIMITS OF DE NOVO REVIEW IN A FOREIGN LAW SETTING

Thus far the discussion of appellate practice has proceeded as if the nature of the particular question of law before the court did not matter—that is, as if the de novo standard of review were always justified whenever the trial court’s decision rests on a particular conception of the applicable law. But even if it is agreed that the institutional and structural advantages of appellate courts generally justify de novo review of legal questions, the considerations marshaled thus far may not necessarily be decisive in every case. In some cases countervailing considerations justify and may even demand a rejection of de novo review. The clearest cases are those in which courts apply the substantive law of a foreign jurisdiction. Indeed, it is in this ever-expanding context that a significant rethinking of the allocation of authority among courts is most urgently demanded.

93. The justice argument can be summarized as follows: “[L]ike cases must be treated alike or else someone is being treated unfairly; therefore, decision makers must treat the parties in the instant case the same as parties in earlier cases were treated.” Theodore M. Benditt, *The Rule of Precedent*, in PRECEDENT IN LAW 89, 90 (Laurence Goldstein ed., 1987).

94. See, e.g., *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) (“[V]aluable appellate resources are conserved for those issues that appellate courts are best situated to decide.”).

95. See STANDARDS RELATING TO APPELLATE COURTS § 3.11, at 23 (1977) (recognizing that the “trial judge, unlike the appellate court, is regularly engaged in resolving issues of fact and is primarily responsible for doing so”); see also David P. Leonard, *The Correctness Function of Appellate Decision-Making: Judicial Obligation in an Era of Fragmentation*, 17 LOY. L.A. L. REV. 299, 301 (1984) (stating that “[t]rial courts are at the front lines of fact-finding . . . [and] therefore, do not exist for the purpose of making law”); *McConney*, 728 F.2d at 1201 (noting that the application of FED. R. CIV. P. 52(a)’s clearly erroneous standard “emphasizes . . . the trial court’s opportunity to judge the accuracy of witnesses’ recollections and make credibility determinations”). When Rule 52(a) was revised in 1985, the rules advisory committee justified the rule as follows: “To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.” FED. R. CIV. P. 52(a) advisory committee’s note.

A. *The Error-Correcting Function of Appellate Courts Revisited*

We might begin by generalizing the discussion of the error-correcting function of appellate courts by supposing that the question at issue is whether legal error can ever be identified or, for that matter, ever defined.⁹⁶ Some commentators have suggested that it cannot.⁹⁷ The question can be made more vivid by examining some characteristic sources of difficulty in the process of statutory interpretation. To begin with, even the most skillfully drafted statute can not anticipate every contingency. Moreover, the best drafters realize that even if one could, there would be perils associated with writing in too particular terms.⁹⁸ For example, it is clear that the drafters of the U.C.C. understood that codification sometimes fails because of the excessive rigidity of statutory commands. To address this phenomenon, and in light of the wide variety of contexts in which the Code was to be applied, the drafters aimed to craft the Code to provide a desirable degree of flexibility in implementation.⁹⁹ In

96. See, e.g., Robert S. Thompson, *Legitimate and Illegitimate Decisional Inconsistency: A Comment on Brilmayer's Wobble, or the Death of Error*, 59 S. CAL. L. REV. 423, 424 (1986) (commenting that Professor Brilmayer's article provides the significant insight that "[j]udicial opinions and legal literature have failed to recognize the multiple meanings attached to the term 'legal error' and hence have failed to develop a comprehensive definition").

97. See RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 118-23 (1977); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 197-203 (1990); Wilner, *supra* note 83, at 418 ("[T]here is not objective criterion, either theoretical or practical, whereby it may be demonstrated that the pronouncement of the reviewing court is necessarily the 'correct' legal evaluation of the transaction or occurrence upon which it passes judgment."). Even the current Chief Justice of the United States Supreme Court has his doubts. See W. REHNQUIST, *THE SUPREME COURT, HOW IT WAS, HOW IT IS* 291 (1987) ("There is simply no demonstrably 'right' answer to the question involved in many of our difficult cases.").

98. Apart from the inevitable indeterminacy of statutory formulations, see Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991), inherent in any piece of legislation is what Professor Hart has called an "indeterminacy of aim." H.L.A. HART, *THE CONCEPT OF LAW* 125 (1961). To make this point, Hart posits an ordinance barring vehicles from a public park. *Id.* at 126. Although it may be clear that, if the purpose of the law is to maintain peace and quiet, then the legislature intended to banish cars, buses, and motorcycles; it is, however, unclear what other "vehicles" it intended to exclude:

We have initially settled the question that peace and quiet in the park is to be maintained at the cost, at any rate, of the exclusion of these things. On the other hand, until we have put the general aim of peace in the park into conjunction with those cases which we did not, or perhaps could not, initially envisage (perhaps a toy motor-car electrically propelled) our aim is, in this direction indeterminate. We have not settled, because we have not anticipated, the question which will be raised by the unenvisaged case when it occurs: whether some degree of peace in the park is to be sacrificed to, or defended against, those children whose pleasure or interest is to use these things.

Id.

99. This point is made by Grant Gilmore with considerable force:

addition, interpretation is sometimes made difficult by new technological developments and evolving business practices,¹⁰⁰ creating genuine problems for those who must apply the Code.¹⁰¹ Finally, the interpretative task can be confounded by the legislature's use of undefined terms.

Consider the "basis of the bargain" requirement for an express warranty under U.C.C. section 2-313. Under the Uniform Sales Act, which was the precursor to Article 2 of the U.C.C., actual reliance by the buyer on a statement or other representation concerning the goods was a necessary element in a warranty case.¹⁰² By contrast, U.C.C. section 2-313 omits any reference to reliance, instead requiring in each instance that the representation be a "part of the basis of the bargain between buyer and seller."¹⁰³ Was this substitution intended as a means of avoiding the requirement that the buyer show reliance in

[I]t is a matter of vital importance that the Code as a whole be kept in terms of such generality as to allow an easy and unstrained application of its provisions to new patterns of business behavior. Commercial codification cannot successfully overparticularize: the penalty for being too precise is that the statute will have to keep coming in for repairs (and amendment is a costly, cumbersome, and unsatisfactory process) or else become a dead-letter.

Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1355 (1948). From its inception, the Code was perceived by its drafters to be "a semi-permanent piece of legislation." U.C.C. § 1-102 cmt. 1 (2002). In particular, we are told that the drafters intended "to make it possible for the law embodied in this Act to be developed by the courts in the light of unforeseen and new circumstances and practices." § 1-102 cmt. 1.

100. For a catalogue of the commercial innovations that have arisen since the adoption of the Code, see John F. Dolan, *Changing Commercial Practices and the Uniform Commercial Code*, 26 LOY. L.A. L. REV. 579 (1993).

101. For example, in the course of assessing the ability of existing paper-based legal requirements to accommodate technological change, a number of difficult issues arise. One is whether the electronic message can be brought within the definitions of "written" or "writing," see § 1-201(46), and "signed," see § 1-201(39), in order to satisfy the Statute of Frauds of section 2-201. There seems too little consensus on the proper disposition. For a collection of views, see Sharon F. DiPaolo, Note, *The Application of the Uniform Commercial Code Section 2-201 Statute of Frauds to Electronic Commerce*, 13 J.L. & COM. 143 (1993). This uncertainty has led the Article 2 Drafting Committee to revise the statute to make it medium neutral. Instead of a signed writing, the statute may be satisfied by an authenticated record. See U.C.C. § 2-201 (Interim Draft April 2001).

102. An affirmation of fact or promise created an express warranty under the *Uniform Sales Act* only "if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon." Uniform Sales Act § 12 (1906).

103. U.C.C. § 2-313(1) (2002). Under section 2-313(1), express warranties can be created in several ways: (1) by an affirmation of fact or promise; (2) by a description of the goods; and (3) by a sample or model of the goods. Regardless of how the warranty is said to arise, no obligation is imposed on the seller unless the statement, description, or sample or model is "part of the basis of the bargain." § 2-313(1).

every breach of express warranty case?¹⁰⁴ If a buyer need not rely on the seller's representation (made by promise, affirmation, description, model, or sample) to recover, then section 2-313 has indeed worked a revolution in the law. The nature of related case law can best be ascertained, however, by considering the following statement:

It would be less than accurate to characterize the case law as manifesting a split of authority between those cases which insist upon a showing of reliance and those which reject that requirement. The confusion is much deeper [S]ome courts initially state that reliance is required, only to later suggest that in fact it is not or may not be required. Other courts initially state that reliance is not required, but proceed to suggest that it is required, either expressly or through some kind of inducement. Moreover, these cases may very well cite each other as authority.¹⁰⁵

It is not my purpose here to explore what the drafters intended;¹⁰⁶ rather, I invoke the confused state of the law on this issue simply to demonstrate that in some cases, there is no "right" answer to the question posed. Sometimes legislative views cannot plausibly be ascertained in a way that cleanly resolves issues of statutory interpretation, many of which were unforeseen when the statute was enacted. Similarly, the resolution of common law issues may not be susceptible to a clear decision one way or the other. The choice of rules or their application must often make reference to considerations of both fact and policy on which reasonable minds may differ.

For these reasons, it would at least be plausible to suggest that the process of appellate review, under the best of circumstances, cannot be defended as a necessary check on the correctness of lower

104. What the drafters of the Code intended by the phrase "basis of the bargain" has been a source of perpetual confusion. See, e.g., JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 9-5 (5th ed. 2000).

The extent to which the law has so been changed is thoroughly unclear. It is possible that the drafters did not intend to change the law, or that they intended to remove the reliance requirement in all but the most unusual case, or that they intended simply to give the plaintiff the benefit of a rebuttable presumption of reliance.

Id.; see also 1 STATE OF N.Y. LAW REVISION COMM'N REPORT: STUDY OF THE UNIFORM COMMERCIAL CODE 393 (reprint ed. 1980) ("[B]asis of the bargain' does not convey a definite meaning.").

105. John E. Murray, Jr., *"Basis of the Bargain": Transcending Classical Concepts*, 66 MINN. L. REV. 283, 304 (1982).

106. I do think, however, that it is vital to an intelligent interpretation of the basis-of-the-bargain requirement that one consider the comments to section 2-313. Comment 3 states that "no particular reliance on [affirmations of fact] need be shown in order to weave them into the fabric of the agreement." U.C.C. § 2-313 cmt. 3 (2002). Comment 7 also argues against the need to prove reliance. § 2-313 cmt. 7. It provides that "[t]he precise time when words of description or affirmation are made or samples are shown is not material. . . . If language is used after the closing of the deal . . . the warranty becomes a modification." § 2-313(1). By recognizing the possibility that warranties can arise after the sale has been completed, this comment takes a position which is presumably inconsistent with the idea that a buyer is required to show some sort of reliance on the seller's statements.

court decisions. After all, if several possible outcomes could result from a judicial determination, given certain contingencies, does this not undermine the claim that the right to an appeal helps to assure litigants that their case was decided by the proper application of the correct legal principle? If there is no "right" answer to legal questions, then would it not be foolish to assume that any one court is more or less capable as a decisionmaker than any other court? And if, as the result of the increased number of appellate cases, these same courts cannot devote the same level of judicial energy to each as they once did, is that not another reason to be skeptical of the likelihood that appellate courts are performing a valuable correcting function?¹⁰⁷

Nevertheless, there are at least three objections to the view that error correction is no longer a proper function of an appellate court. First, even if one were to accept the idea that legal outcomes are neither right nor wrong in absolute terms, a defender of appellate review might contend that possible outcomes could be ranked along a continuum, such that one can be seen as "better" or "worse" than a competing outcome.¹⁰⁸ The law-defining function of the appellate court calls into play a competence that is distinctly structural, one that does not require us to hew to an idealized vision of appellate practice. Even in its modern guise, the fact remains that "three heads are better than one" and that "nine heads are better than three."¹⁰⁹

107. See CARRINGTON ET AL., *supra* note 63, at 6-7.

These heavy increases in workload threaten the ability of the appellate courts to perform their functions. Adequate performance of the correcting function requires personal involvement and attention to detail by the judges which cannot be provided by judges whose attentions and energies are divided among too many cases. In many different ways a wasting process is set in motion. The process can for the moment be termed a trend toward bureaucratization. Changes which are characteristic of any shift from individually crafted works to mass production methods can be seen to be occurring in appellate processes and institutions. Projected to their conceivable extremes, these changes would leave an appellate process which gives little or no assurance to individual litigants that the appeal has served the correcting function.

Id.

108. See, e.g., Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 845 (1994) ("[L]egal questions admit of 'better' and 'worse' answers."); Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 920 n.128 (1989) ("[O]ur society properly believes that one legal outcome in actual cases is as a rule superior to others. If this were not true, courts could resolve legal disputes by coin flip.").

109. According to Professor Caminker, this conclusion is statistically mandated:

Assuming (quite reasonably) that each individual judge has a greater than fifty percent of arriving at the "correct" answer in any given legal dispute, then the larger the panel the greater the likelihood that a majority of them will reach the correct result, even if each judge decides independently without consulting the others. . . . Of course at some point increased size can frustrate collaboration and creativity. But at current staffing levels, my sense is that collegial deliberation within larger courts marginally adds to the purely numerical argument that nine heads are better than three heads are better than one.

Second, the charge that appellate judicial outcomes are arbitrary, subject to manipulation, or meaningless ignores the potential palliative effect of the right to an appeal for litigants who may harbor concerns that the system is somehow rigged against them. Viewed in this way, recourse to at least one higher tribunal is a powerful antidote to the crisis of confidence that might otherwise result from having one's case ultimately settled by a single individual, whose decision may be perceived as the product of personal attitudes and values.¹¹⁰ Indeed, such a perception finds support in the predominant model of judicial decisionmaking, which rests on the assumption that judges, like most other decisionmakers in political institutions, render their decisions based on their attitudes and values.¹¹¹ Thus, the notion that behavior is predicated solely on external legal stimuli is explicitly rejected.¹¹² By contrast, review by an appellate court has the comparative virtue of a multipartite effort that generally finds expression in a written opinion.¹¹³ Understood in this way, it becomes apparent that outcomes are not all that matter; the process by which those outcomes are achieved is important as well.

Caminker, *supra* note 108, at 847.

110. See, e.g., CARRINGTON ET AL., *supra* note 63, at 2 ("The availability of the appellate process assures . . . litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system."); MARTINEAU, *supra* note 61, at 19 ("Error correction is intended to protect [litigants] from the arbitrariness in the administration of justice.").

111. See James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 912 (1978) ("There is little question that the predominant paradigm of judicial decision making places judges' attitudes in the center of the process. Indeed, it is not an overstatement to assert that attitudinal approaches have become the traditional nontraditional mode of judicial analysis.").

112. See, e.g., Glendon Schubert, *Judicial Attitudes and Voting Behavior: The 1961 Term of the United States Supreme Court*, 28 LAW & CONTEMP. PROBS. 100, 135 (1963) ("[V]ariance in the voting behavior of the [J]ustices during the 1961 Term can be adequately accounted for by the differences in their attitudes towards the fundamental issues of civil liberty and economic liberalism."); Joseph Tanenhaus, *The Cumulative Scaling of Judicial Decisions*, 79 HARV. L. REV. 1583, 1583 (1966) ("[V]alue structure leads to judicial attitudes, to predispositions toward deciding given types of cases in particular ways. A judge may, for example, be predisposed to support—or to deny—legal claims by labor unions, criminal defendants, racial minorities, federal regulatory agencies, or state and local authorities."). The recent presidential election has, no doubt, had the unfortunate consequence of persuading many people that legal decisions are motivated by partisan interests rather than legal propriety.

113. A published opinion is the primary way that a court informs the parties and the public that the outcome was not tyrannically imposed, but was reached for rational reasons. See Thompson & Oakley, *supra* note 73, at 28 ("The primary purpose of an opinion of no precedential value is to inform the parties and counsel of the reasons for the appellate decision, and to signify that the result has been reached by a rational process.").

Finally, the error-correcting function may derive value from the causal relationship between possible appellate review and the behavior of lower-court judges. Assuming that a judge deciding a case—like anyone making a decision—would not relish the thought of being told that she was wrong, the possibility of having her decision reversed on appeal imposes a cost and becomes a consideration in rendering judgments. In theory, lower-court judges, as a result, would be more likely to choose outcomes solidly based on legal justifications traceable to past decisions or statutes. Thus, appellate review enhances the rationality of lower court decisionmaking by introducing the prospect of institutional censure: certain judicial choices can be constrained by the fact that some options have already been ruled out, or are likely to be ruled out, by a higher court.¹¹⁴

All of these concerns might suggest that appellate review of issues involving the law of foreign jurisdictions should be handled in the same fashion as issues of local law. The question is somewhat more complex, however, than the discussion thus far suggests. Standards of appellate review are best defended in part as a sensible response to the comparative advantages of the various tiers of courts.¹¹⁵ Appellate courts defer to decisions of the trial court as to matters within the trial court's competence and should only review independently those matters not so situated. The line between independent review and deference, then, should turn on relative competence. If so, a trial court decision based on local law would not warrant deference; there the expertise resulting from continual exposure of the appellate court to the law of the forum state may render the appellate court the more competent body to decide legal issues. By contrast, this special expertise may not be a factor when the law that must be applied is the law of a foreign jurisdiction with which the appellate court is not as familiar. In the latter instance, the case for the application of a *de novo* standard of review may not be quite as compelling.

To make this idea concrete, consider whether a federal district court's resolution of an unsettled state law issue is entitled to special deference on appeal. For a number of years following the Supreme Court decision in *Erie Railroad Co. v. Tompkins*¹¹⁶ this question bedeviled federal courts of appeals, especially after the Supreme Court made it clear in *Meredith v. Winter Haven*¹¹⁷ that the state law issue

114. See, e.g., MARTINEAU, *supra* note 61, at 20.

115. See *supra* notes 82-95 and accompanying text.

116. 304 U.S. 64 (1938) (requiring a federal judges sitting in diversity to apply the substantive law of the forum state).

117. 320 U.S. 228 (1943).

had to be resolved one way or another—i.e., that a court could not avoid its responsibility under *Erie* by abstaining from hearing the case.¹¹⁸ The first elaboration of the view that there may be something inherently different about difficult state law determinations emerged when Justice Frankfurter, in *Railroad Commission v. Pullman Co.*,¹¹⁹ delivered an opinion that expressly acknowledged that the standard of review must take into account the relative legal competence of the trial and appellate courts:

Reading the Texas statutes and the Texas decisions as outsiders without special competence in Texas law, we would have little confidence in our independent judgment regarding the application of that law to the present situation. . . . [The decision below] represents the view of an able and experienced circuit judge of the circuit which includes Texas and of two capable district judges trained in Texas law. Had we or they no choice in the matter but to decide what is the law of the state, we should hesitate long before rejecting their forecast of Texas law.¹²⁰

Underlying this more restrictive grant to appellate courts of power to substitute their judgment for that of a lower court is the Supreme Court's belief that the superior expertise rationale for a strict de novo standard of review is diminished by the reviewing court's lack of familiarity with the applicable law.

In the aftermath of the *Pullman* case, courts of appeals endeavored to balance the de novo standard of review and its traditional withholding of deference to district court legal views with a concern that appellate judges may have less experience in local law matters than district court judges and that this inexperience would increase the likelihood of an incorrect answer to the question posed.¹²¹

118. *Id.* at 234 (“[T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.”).

119. 312 U.S. 496 (1941).

120. *Id.* at 499. Because the Court ultimately held that the three-judge district court should have abstained from resolving the issue until it had been considered by the Texas state courts, Justice Frankfurter's words are no more than dicta. *Id.* at 499-500.

121. This belief was also expressed in *Salve Regina Coll. v. Russell*, 499 U.S. 225, 241 (1991) (Rehnquist, C.J., joined by White, J., and Stevens, J., dissenting) (“That the experience of appellate judges should lead them to rely, in appropriate situations, on the experience of district judges who have practiced law in the state in which they sit before taking the bench seems quite natural.”), and in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 204 (1956) (“Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is.”). Another good example of this point of view is the dissenting opinion of Judge Schroeder in *In re McLinn*:

[D]ifferences exist between the appellate and district courts in their respective relationships to the law of a particular state. As a practical matter district judges hear a great number of cases involving the law of their home states. This court's appellate jurisdiction, on the other hand, encompasses nine states, and questions of state law arise from all of them.

Focusing on this concern, a majority of these courts afforded considerable deference to district judge state law rulings.¹²² More recently, however, the Supreme Court ended this practice in *Salve Regina College v. Russell*.¹²³ In a strongly worded opinion, the Court underscored its belief that *Erie* foreclosed the possibility of treating issues of state law differently from issues of federal law:

[D]eferential appellate review invites divergent development of state law among the federal trial courts even within a single State. . . . Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum. . . . Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled with the commands of *Erie*.¹²⁴

[T]he proposition that a district court judge is better able to "intuit" the answer to an unsettled question of state law is foreclosed by our holding in *Erie*.¹²⁵

Even so, the *Russell* Court would not indict *all* decisions to reallocate judicial authority among courts in cases involving particular legal issues.¹²⁶ Surely, for example, *Erie* does not preclude a state appellate court from concluding that a different appellate process is warranted when reviewing a trial court's determination of foreign law.¹²⁷ In this context, however, an exception to the traditional standard of de novo review would rest not on the perceived expertise of the trial judge but on the recognition that there is no "expert" decisionmaker. If comparative legal expertise is what triggers de novo review, then it makes sense to let the lower court's decision stand unless it is clearly in error.

Finally, the realities of the appellate system make actual error correction much less likely than the abstract theory suggests. Recent empirical evidence suggests that the congested calendar of appellate

739 F.2d 1395, 1405 (1984).

122. For a circuit-by-circuit review of the rule of deference, see Coenen, *supra* note 108, at 963-1021.

123. 499 U.S. 225 (1991).

124. *Id.* at 234.

125. *Id.* at 238.

126. Notwithstanding the fact that the Court also relied on other factors, *Russell* is best viewed as an *Erie* case, plain and simple. Once the Court concluded that the principle in *Erie* was inconsistent with the deferential standard of review, these other factors were no longer relevant.

127. Although there are no cases directly on point, it can be argued that if the state law claim is litigated in federal court, the *Erie* doctrine dictates that state law, not federal law, will control the standard of review and other related issues. See Coenen, *supra* note 108, at 955, 957-58.

courts not only adversely affects their competence to properly decide cases,¹²⁸ but also profoundly affects their willingness even to try.¹²⁹

In summary, just as it has long been considered inefficacious for federal courts to apply a de novo standard of review for questions of state law, so, too, would it be inefficacious to use that same standard when state courts are called upon to resolve questions of foreign law. Once the error-correcting function of appellate review is seen to involve not just the questionable belief in the comparative legal expertise of higher courts, but also the unfortunate effects of overcrowded dockets, the case for continuing to treat all issues of law the same, whether based on local or foreign law, unravels. As a practical matter, the costs of a uniform appellate process outweigh its benefits.¹³⁰

B. *The Law Development Function of Appellate Courts Revisited*

Some have argued that, although the error-correcting function may be one reason courts of appeal exist, the essence of appellate review lies in serving the institutional function of law development.¹³¹ No one has emphasized this function more than Judge John Parker:

The judicial function in its essence is the application of the rules and standards of organized society to the settlement of controversies, and for there to be any proper administration of justice these rules and standards must be applied, not only impartially, but also objectively and uniformly throughout the territory of the state. This requires that decisions of trial courts be subjected to review by a panel of judges who are removed from the heat engendered by the trial and are consequently in a position to take a more objective view of the questions there raised to maintain uniformity of decisions throughout the territory.¹³²

128. See generally Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542 (1969) (describing problems in the administration of appellate courts, and arguing that the volume of cases may hinder their ability to reach proper decisions).

129. See, e.g., Matthew E. Gabrys, *A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals*, 1998 WIS. L. REV. 1547, 1582-83 (1998) (examining the affirmance and reversal rates over the past twenty years and concluding that "the court of appeals becomes more of a 'rubber stamp' as the number of cases in its docket grows").

130. For a discussion of some of the costs of appellate review, see *infra* notes 137-49 and accompanying text.

131. The institutional function is discussed *supra* text accompanying notes 79-81.

132. John Parker, *Improving Appellate Methods*, 25 N.Y.U. L. REV. 1, 1 (1950). Professor Charles Alan Wright has explored at length what he describes as the philosophical question of what is the proper function of an appellate court. Wright, *supra* note 65, at 779.

From the earliest times appellate courts have been empowered to reverse for errors of law, to announce the rules which are to be applied, and to ensure uniformity in the rules applied by various inferior tribunals. . . . The controversial question is whether

It is tempting to say that, even if de novo review of issues of foreign law cannot be justified by a need to correct the mistakes committed by lower courts, such review certainly remains necessary to advance the twin institutional goals of achieving uniform judicial interpretation of state law and permitting the common law to evolve to correct for a world of changing conditions. The fact that people consider these institutional goals to be important, though, does not mean that a de novo standard is the optimal or appropriate framework for accomplishing them.

Here, the doctrine of stare decisis is again relevant. In common circumstances, a court should adhere to its own precedent and is absolutely required to rule consistently with a superior court's precedent.¹³³ This fundamental principle is crucial to the institutional goals of appellate review, which would be unobtainable if courts could freely exercise their autonomy when deciding individual cases. Suppose it were legally permissible for each state court to behave according to its own best view of what the law is, unbound by all prior precedent. No one would seriously doubt that if such a legal regime existed, even intrastate uniformity and predictability would be unattainable, and the creative development of the law would inevitably sputter from case to case. To the extent that the institutional ends of appellate review are normatively compelling, the requirement of fidelity to precedent is normatively warranted as well.

In light of this, appellate decisions involving the law of a foreign jurisdiction are least likely to have any lasting effect beyond the effect on the parties to the case. In other words, there is no institutional value in these decisions. Consider, for example, a case filed in Virginia involving an unsettled issue of California law. Given that Virginia rulings do not bind state courts outside of Virginia, the decision in this case would be unlikely to result in any real contribution to uniformity or predictability. A California court, when

appellate courts have a second function, that of ensuring that justice is done in a particular case.

Id. Skeptical that decisions by reviewing courts are necessarily "correct" and cognizant that appeals can be costly, Wright concludes:

There is no way to know for sure whether trial courts or appellate courts are more often right. But in the absence of a clear showing that broadened appellate review leads to better justice, a showing which I think has not been made and probably cannot be made, the cost of increased appellate review, in terms of time and expense to the parties, in terms of lessened confidence in the trial judge, and in terms of positive injustice to those who cannot appeal, seems to me clearly exorbitant.

Id. at 782.

133. Some have used the term stare decisis to describe the first obligation only, and refer to the second as "hierarchical precedent." See, e.g., Caminker, *supra* note 108, at 818 n.1. In this Article, I use the former term broadly to capture both obligations.

subsequently presented with the identical issue, is permitted—indeed, must—decide for itself what the law of its own state is or should be. Since California courts would necessarily be more familiar with California's jurisprudence, and would therefore be in the best position to have the knowledge needed to decide the issue in question, one might reasonably expect that this comparative advantage would increase the possibility of a substantive disagreement with the Virginia court. Indeed, if the federal courts' track record as to rulings on state law is any indication, there is every reason to believe that the California courts would give the Virginia ruling little, if any, weight.¹³⁴

Even in Virginia, the ruling would have little institutional value. Properly understood, the decision rendered by the Virginia court was no more than a prophesy of what the result would have been had the case been decided in California. It was not necessarily an expression of the court's actual preference for a particular result. This fact is an unavoidable by-product of the *Erie*-type analysis the Virginia court must perform in a choice-of-law context.¹³⁵ Therefore, no Virginia court would consider itself bound to resolve the issue in the same way in a later case involving Virginia law. Thus, the absence of any precedential value at a minimum fails to contribute to, and may even undercut, uniformity and predictability. As a result, we are left with a decision that provides none of the benefits normally associated with the institutional justification for appellate review.¹³⁶

134. An empirical illustration is provided by the way in which Judge Brown relates the poor reception with which Fifth Circuit decisions have been received by state courts:

Though our decisions survive the discretionary review of certiorari, most of the time because they are really not "certworthy," . . . many of them do not fare so well when they are tested in the place that really counts—the highest, or first-writing court, of the State concerned. . . . Within the very recent past, both Texas and Alabama have overruled decisions of this court, and the score in Florida cases is little short of staggering.

United Servs. Life Ins. Co. v. Delaney, 328 F.2d 483, 486 (5th Cir. 1964) (Brown, J., concurring), *cert. denied*, 377 U.S. 935 (1964). For a small sampling of federal decisions interpreting state law that were rebutted by subsequent state court decisions, see *Food Fair Stores, Inc. v. Trusell*, 131 So.2d 730 (Fla. 1961) (rejecting *Pogue v. Great Atl. & Pac. Tea Co.*, 242 F.2d 575 (5th Cir. 1957)); *Arrington v. N.Y. Times*, 55 N.Y.2d 433 (1982) (rejecting *Birnbaum v. United States*, 588 F.2d 319 (2d Cir. 1978)); *Truck Ins. Exch. v. Seelbach*, 161 Tex. 250 (1960) (rejecting *Nat'l Sur. Corp. v. Bellah*, 245 F.2d 936 (5th Cir. 1957)).

135. When a federal court is confronted with unsettled state law, Judge Frank suggested that the appropriate question to ask is "[w]hat would be the decision of reasonable intelligent lawyers, sitting as judges of the highest [state] court, and fully conversant with the [state's] 'jurisprudence.'" *Cooper v. Am. Airlines, Inc.*, 149 F.2d 355, 359 (2d Cir. 1945). In short, the court's job is to predict a result, not to break new ground according to its own preference.

136. This critique of the institutional benefits of appellate review of foreign law should not be confused with the values or institutional justifications underlying review of applications of otherwise inapplicable local law chosen by the parties to govern their relationship. Consider the case in which the parties to a transaction that is not governed by the U.C.C. decide to opt into

IV. REJECTING THE DE NOVO STANDARD OF REVIEW IN A FOREIGN LAW SETTING

Having examined the functions of appellate adjudication, the ways in which the traditional standards of review advance—or fail to advance—the purposes of appellate courts, and the particularly ineffective application of appellate review to questions of foreign law, the framework is now in place to argue that when appellate review is viewed in the broader context of resource allocation and the problems caused by bloated caseloads, decisions implicating foreign law should be reviewed under a deferential standard. This part identifies the ways in which use of the deferential standard can conserve judicial resources and demonstrates that its use poses no more potential harm to the parties than is realized in other contexts in which judicial review is limited.

A. *The Conservation of Judicial Resources*

My main purpose here is to show that standards of review deeply influence the *fiscal* resources consumed by the appellate process. Identification of the totality of costs is best left for others, but the following discussion sketches a few of the potential costs that would surely be affected by a change in the applicable standard.

To begin with, the states' strong incentives to mitigate the growing caseload pressure on appellate courts¹³⁷ arise not only from the adverse effects of the overload of cases on the quality of appellate justice,¹³⁸ but also from the fact that appeals are always expensive. Not only are financial costs incurred by the parties in prosecuting and defending the appeal, but valuable institutional resources must be devoted to dealing with crowded appellate dockets. Moreover, overall costs cannot be accurately captured through a model of appellate practice that treats the appeal itself as the only significant event. This perspective excludes what might be called consequential costs—

the U.C.C. See, for example, U.C.C. § 3-104 cmt. 2 (2002): "Moreover, consistent with the principles stated in Section 1-102(2)(b), the immediate parties to an order or promise that is not an instrument may provide by agreement that one or more of the provisions of Article 3 determine their rights and obligations under the writing." Since the appellate court would be applying the law of its own state, traditional notions of precedent would not be out of place in these contexts.

137. There are no signs that the current rate of increase in the number of cases is likely to subside in the near future. See CARRINGTON ET AL., *supra* note 63, at 127 ("If forced to speculate, our intuition is that the number of appeals will continue to rise episodically in the foreseeable future.").

138. See *supra* notes 67-74 and accompanying text.

namely, the costs incurred as a result of the particular outcome of the appeal. For example, if the decision of the trial court is reversed, the initial appeal may be followed by a remand, a second trial, and further appeals.¹³⁹ The true price we must pay for appeals is more fully revealed when the post-appeal period of further litigation is considered.

Some writers blame the current crisis in caseload volume on the appellate courts themselves, claiming that they have taken bold steps to expand their jurisdiction deliberately.¹⁴⁰ These commentators charge that appellate courts increased their power by the simple expediency of recasting issues traditionally considered factual as issues of law.¹⁴¹ This recasting made it possible for appellate courts to review matters that had long been decided by trial courts and juries without appellate intervention.¹⁴² The problem is not limited to the broadened scope of appellate review; it also encompasses the inability or unwillingness of appellate courts to deal directly with their caseloads in a way that would not result in unacceptable sacrifice. In this vein, Dean Uelmen aptly articulates where the fault for the current situation lies and who bears primary responsibility for finding a solution.¹⁴³ He explains:

[J]udges who accommodate overload by publishing fewer opinions, delegating more decisions to their staff, and generally allowing the quality of their work product to decline are their own worst enemies. They should be in flashing armor, leading the march of reinforcements over the hilltop. They should be the loudest voices calling for appellate reform, instead of the ardent defenders of the status quo. When it comes to the broth of appellate reform, our judges must be the chefs. And the broth will not be spoiled by too many chefs.¹⁴⁴

How, then, are appellate courts to reduce the amount of appellate litigation? One response is to create a more efficient judicial system by reducing the number of cases that make their way to the courts. With fewer cases entering the system, there would logically be a corresponding decrease in the volume of appeals. There are essentially three possible methods by which this could be accomplished: (1) reform substantive law to make rights more

139. See Jeffrey C. Alexander, Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEX. L. REV. 157, 183 (1985) (discussing the costs associated with de novo review of federal district court determinations of state law, the author points to "the resources consumed in the remand and retrial of actions . . . as well as the time required to hear additional appeals").

140. See *supra* note 65 and accompanying text.

141. *Id.*

142. *Id.*

143. Uelmen, *supra* note 63, at 603.

144. *Id.*

certain;¹⁴⁵ (2) stem the creation of new substantive rights;¹⁴⁶ and (3) direct disputes to nonjudicial agencies.¹⁴⁷ We need not now assess the relative strengths of these solutions. Nor need we evaluate whether they would have socially desirable consequences or attempt to fashion other methods of inhibiting the urge to litigate without deterring other valuable goals. None of this discussion is necessary to understand the more central point: Appellate courts can reduce congestion by decreasing the incentives to appeal. The cleanest way to achieve this result would be to limit reversals to serious errors of law.

Any change in the applicable standard of review that reduces a litigant's chances of a successful appeal has the potential to decrease appellate litigation. Simply put, litigants can be expected to appeal less frequently if they face a lower, or no, expected financial payoff.¹⁴⁸ Thus, if the practice of appellate courts were to uphold routinely trial court determinations of foreign law with little scrutiny, so long as they had some rational basis, losing parties would be far less willing to pay for the opportunity to argue for reversal. Conversely, if appellate courts continue to evaluate such verdicts with a *de novo* review, then there is no reason to anticipate any reduction in the number of cases. Consequently, choices among multiple standards of review can directly affect the size of the appellate docket.

Another factor militating for use of a deferential standard of review in this area is the potential for increased efficiency in deciding those appeals that are, in fact, taken. Costs would be saved by creating a setting in which judicial involvement in appeals is sharply curtailed by turning problematic issues into routine affirmances. Of course, this justification for altering the standard of review lacks empirical demonstration. If we believe that appellate courts are best situated to judge for themselves what the probable effects would be, though, we can certainly anticipate that at least some savings will be achieved. For example, the Ninth Circuit has proclaimed in the context of reviewing state law determinations by district courts that

[i]t can hardly be disputed that application of a nondeferential standard of review requires a greater investment of appellate resources [than] does application of the clearly erroneous standard. Appellate courts could do their work more quickly if they applied the clearly erroneous standard in most circumstances, because the courts then

145. See CARRINGTON ET AL., *supra* note 63, at 124 (“[L]egislators may remove the core of conflict from established types of dispute by simply redefining the right in terms so absolute that it is placed beyond serious challenge.”).

146. See *id.* at 125 (suggesting that “lawmakers should study the impact of new legislation on the courts”).

147. See *id.* at 122-23.

148. See *id.* at 133-34 (observing that one way to “reduce the rate of appeal is to increase the costs, financial or non-economic, of the appeal”).

need only determine if the lower court's decision is a reasonable one, not substitute their own judgment for that of the trial judge.¹⁴⁹

A plausible argument can be made that the consumption of institutional resources per appeal would be sharply reduced if a stricter standard of review were adopted.

The approach that I have in mind is illustrated by the analysis adopted by the Supreme Court in *Leavitt v. Jane*.¹⁵⁰ In *Leavitt*, the Court confronted a decision by the Tenth Circuit that invalidated a provision of a Utah statute that regulated abortions ending pregnancies of more than twenty weeks.¹⁵¹ The Tenth Circuit based its decision not on the unconstitutionality of this particular provision, but rather on the unconstitutionality of a companion provision regulating earlier abortions.¹⁵² The lower court reasoned that the two provisions were not severable, even though the statute contained a clear statement that the legislature intended otherwise.¹⁵³ In the view of the court of appeals, severing the provisions would have frustrated the statute's overarching purpose to prohibit most abortions.¹⁵⁴

The Supreme Court disagreed.¹⁵⁵ Rebuking the court of appeals for giving too little weight to the language of the statutory savings clause, the Court left little doubt that severability is a product of the legislature's implicit or explicit instructions.¹⁵⁶ Here the state legislature had directly addressed the precise question at issue.¹⁵⁷ In addition, nothing in the statute or its history suggested that its purpose would be undermined if only part of the statute were

149. *United States v. McConney*, 728 F.2d 1195, 1201 n.7 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1984).

150. 518 U.S. 137 (1996).

151. *Id.*

152. *Id.* at 138.

153. *Id.* The Utah statute provided as follows:

If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence clause, phrase, or word be declared unconstitutional.

Id. at 139-40 (quoting UTAH CODE ANN. § 76-7-317 (1995)).

154. *Id.* at 140.

155. *Id.*

156. *Id.* at 141-42.

157. *Id.* at 140 ("The Court of Appeal's opinion not only did not regard the explicit language of § 317 as determinative—it did not even use it as the point of departure for addressing the severability question.")

invalidated.¹⁵⁸ These considerations were sufficient for the Court to dispose of the question.

At the same time, *Leavitt* is in tension with the deeply ingrained principle that the Supreme Court normally refrains from reviewing decisions grounded in state law. Indeed, the Court itself recognized that this time-honored principle remains valid and entitled to respect.¹⁵⁹ Nevertheless, the Court held that a lower court's views about state law will not be permitted to stand, or perhaps more generally, that a court's view will not warrant deference, when it is clearly wrong.¹⁶⁰ In a decision peppered with extraordinarily strong language—including “plainly error,”¹⁶¹ “unsupportable,”¹⁶² “blatant federal-court nullification of state law,”¹⁶³ “overreaching,”¹⁶⁴ and “plainly wrong”¹⁶⁵—the Court sharply criticized the Tenth Circuit's opinion and pronounced its willingness to review state law cases with especially serious mistakes.¹⁶⁶ The Court's effort to explain its decision to review the case can be seen as part of the continuing and much larger enterprise of sorting out the relationship among courts in the federal system.

For the reasons suggested above, state courts should endorse the principle of appellate court restraint—and the limitations on that principle embodied in *Leavitt*—where foreign law must be applied in the forum jurisdiction.¹⁶⁷ It is not necessary, however, to conclude, as a matter of civil procedure, that rulings on foreign law are findings of

158. *Id.* at 142.

159. *Id.* at 144 (“To be sure, we do not normally grant petitions for certiorari solely to review what purports to be an application of state law . . .”).

160. *Id.* at 144-45.

161. *Id.* at 144.

162. *Id.*

163. *Id.* at 145.

164. *Id.*

165. *Id.*

166. *Id.* at 144-45.

167. Indeed, this form of appellate court restraint would not be altogether new in some jurisdictions. Current U.C.C. section 1-102(2)(c) and Revised U.C.C. section 1-103(a)(3) both state that one of the Code's underlying purposes and policies is “to make uniform the law among various jurisdictions.” U.C.C. § 1-102(2)(c) (2002); Rev. U.C.C. § 1-103(a)(3) (2001). One way for courts to promote the goal of uniformity, especially when deciding issues of first impression in the forum jurisdiction, is to follow decisions elsewhere on the issues considered unless those decisions are considered clearly wrong. *See, e.g., In re Webster Kreling v. First Nat'l Bank & Trust Co. of Mich.*, 20 U.C.C. Rep. Serv. 802, 805 (Bankr. W.D. Mich. 1976) (noting that to keep the law uniform, a decision from a foreign jurisdiction should be followed unless that decision “is clearly wrong”). It would certainly be ironic if deference were given to foreign law in this context where the foreign law is adopted and becomes the law of the forum jurisdiction, but to not give deference where foreign law is applied pursuant to a contractual choice-of-law provision and would have no effect whatsoever on the law of the forum.

fact under the state law counterparts to Rule 52 of the Federal Rules of Civil Procedure and thus automatically reviewable under a clearly erroneous standard.¹⁶⁸ At least in the analogous context of state law determinations by federal courts, the deference standard was never dependent upon the application of Rule 52(a).¹⁶⁹ Instead, it was the result of an inquiry into questions of both policy and principle. Thus, for example, it was said by the Tenth Circuit that district court decisions involving issues of state law should or must be reviewed on the basis of an assessment of whether the ruling was "clearly erroneous,"¹⁷⁰ "clearly wrong,"¹⁷¹ or "clear error,"¹⁷² or on appeal was entitled to "extraordinary force,"¹⁷³ "extraordinary weight,"¹⁷⁴ "great weight,"¹⁷⁵ "substantial weight,"¹⁷⁶ "great deference,"¹⁷⁷ or "deference."¹⁷⁸ All this raises doubts as to whether any verbal formulation will be completely helpful, relying as it must on terms infused with subjective content. Nevertheless, perhaps this rule will suffice: If plausible support exists for the trial court's legal decision, that decision should be accorded validity, whether or not the

168. See, e.g., GA. CODE ANN. § 9-11-52(a) (1993); KY. R.C.P. Rule 52.01; N.D.R.C.P. Rule 52(a). To be sure, a few cases have held that where the legal evidence is conflicting, laws of other states must be proved as facts are proved and, in a trial by jury, left to the jury to decide as a fact. See, e.g., *Ufford v. Spaulding*, 30 N.E. 360 (Mass. 1892); *Bondi Bros. v. Holbrook Grocery Co.*, 118 A. 486 (Vt. 1922). Most other cases, however, point in the opposite direction, holding that the law of a foreign country or sister state is a question of law to be determined by the court. See, e.g., *Cable Co. v. McElhoe* 108 N.E. 790 (Ind. Ct. App. 1915); *Slaughter v. Metro. St. Ry. Co.* 23 S.W. 760 (Mo. 1893). Of course, the factors that determine whether the issue initially should go to judge or jury do not necessarily dictate the scope of review. See, e.g., *Ram Constr. Co. v. Am. States Ins. Co.*, 749 F.2d 1049, 1053 (3d Cir. 1984) (stating that "assignment to judge or jury does not of itself determine the standard of review to be applied on appeal").

169. At least one commentator thought that the clearly erroneous standard of Rule 52 did embrace state law determinations. See *Alexander*, *supra* note 139, at 180-86. *But see Coenen*, *supra* note 108, at 919-20 (concluding that "the language of the 'clearly erroneous' rule—limiting its application specifically to 'findings of fact'—provides the surest signal that the rule's drafters intended neither in fact nor in spirit to construct a standard of review for state law determinations").

170. See, e.g., *King v. Horizon Corp.*, 701 F.2d 1313, 1315 (10th Cir. 1983).

171. See, e.g., *Mendoza v. K-Mart, Inc.*, 587 F.2d 1052, 1057 (10th Cir. 1978).

172. See, e.g., *Smith v. Equitable Life Assurance Soc'y*, 614 F.2d 720, 722 (10th Cir. 1980).

173. See, e.g., *Campbell v. Joint Dist.* 28-J, 704 F.2d 501, 504 (10th Cir. 1983).

174. See, e.g., *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807, 816 (10th Cir. 1977).

175. See, e.g., *Land v. Roper Corp.*, 531 F.2d 445, 448 (10th Cir. 1976).

176. See, e.g., *Glenn Justice Mortgage Co. v. First Nat'l Bank*, 592 F.2d 567, 571 (10th Cir. 1979).

177. See, e.g., *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 561 F.2d 202, 204 (10th Cir. 1977).

178. See, e.g., *Taxpayers for the Animas-La Plata Referendum v. Animas-La Plata Water Conservancy Dist.*, 739 F.2d 1472, 1477 (10th Cir. 1984).

reviewing court would otherwise accept the trial court's view as correct.

B. *The Absence of Harm to Litigants*

If a more restrictive standard of review for decisions implicating foreign law would help reduce or control appellate caseloads, would it necessarily serve the best interests of society? The efficient use of appellate resources is, to be sure, one important goal. But it is not the only such goal, and the overzealous pursuit of efficiency could seriously undermine the achievement of other equally important goals. Society needs a system for resolving disputes that inspires public confidence that cases will be decided correctly and justice achieved. Litigants must understand themselves to be protected from judicial arbitrariness and caprice. If one goal is allowed to eclipse the others, the justice system will suffer. Hence, the question is whether a modified standard of review in limited circumstances is likely to interfere with these other goals. Undesired practical consequences are always a risk when law is changed. For at least the following four reasons, however, it seems quite unlikely that this proposal would cause harm.

First, a reasonably veridical picture of the actual (rather than the assumed or asserted) consequences of a strict standard of review can be gleaned from the experience of the federal courts before *Salve Regina College v. Russell*, when substantial deference was accorded to district court determinations of state law.¹⁷⁹ The Supreme Court ended this practice because appellate deference was inconsistent with its decision in *Erie Railroad Co. v. Tompkins*, not because of concerns that the justice system was somehow suffering.¹⁸⁰ In fact, having applied the deferential standard for several decades in diversity cases, some members of the Court still considered it to be a "well-functioning approach."¹⁸¹ Apparently, the district courts were doing a satisfactory job of deciding cases prior to *Russell* and there had been no discernable adverse influence on the perceived legitimacy of the appellate process. Surely, had there been evidence of undesirable consequences, the Court would have bolstered its decision further by noting in its opinion that these ill effects would also be eliminated as a result of its holding. In short, what was *not* said in *Russell* hints at

179. See *supra* notes 122-26 and accompanying text.

180. See *supra* notes 124-26 and accompanying text.

181. See, e.g., *Salve Regina Coll. v. Russell*, 499 U.S. 225, 242 (1991) (Rehnquist, C.J., joined by White, J., and Stevens, J., dissenting).

minimal consequences to the litigation system of a standard of greater deference.

Second, notwithstanding that appellate review in a civil case has never been held to be a constitutional requirement of due process, it is widely recognized that appeals are an integral part of the litigation system.¹⁸² Accordingly, almost every state recognizes the right of each litigant to have the trial court judgment reviewed by at least one appellate court. In those jurisdictions where there is no intermediate appellate court hierarchically situated between the trial court and supreme court,¹⁸³ the highest state court will hear appeals from the trial court without significant discretion in deciding which cases to consider.¹⁸⁴

Virginia is the only state where there is no appeal as of right in most civil cases.¹⁸⁵ There, the intermediate appellate court hears primarily criminal cases, and the supreme court has the flexibility to determine its own docket.¹⁸⁶ Historically, however, discretionary review by the Supreme Court of Virginia was never exercised in such a way as to leave standing a decision that was in error. A description of the error-correcting role of the supreme court was well put by the court itself almost a century ago in *McCue v. Commonwealth*:

We have no such practice as an absolute right of appeal in civil or criminal cases. But the law requires a petition, accompanied by a transcript of the record, to be presented to the court, or one of its judges, whose duty it is to examine the errors assigned and to grant or refuse a writ, as may seem proper. It is as much the duty of the court, or judge, to deny the petition when of the opinion that the decision complained of is plainly right as it is to grant it when any doubt exists as to the propriety of the decision. The statute in its present form is found in the Code of 1849. Just when it took its place in the statute we are not informed, but the uniform practice of this court, and of the General Court, its predecessor, as an appellate tribunal in criminal cases has been in accordance with the letter and spirit of that statute.¹⁸⁷

182. See *supra* notes 62-63 and accompanying text.

183. There are now eighteen such jurisdictions: Connecticut, Delaware, the District of Columbia, Maine, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, and Wyoming. MARLIN O. OSTHUS, *STATE INTERMEDIATE APPELLATE COURTS* 26-50 (2d ed. 1980). Since the foregoing was written, an intermediate appellate court was created in Virginia to hear criminal appeals and a narrow range of civil cases. See Richard B. Hoffman & William M. Lucianovic, *Long Range Planning: A Reality in the Judicial Branch*, 44 AM. U. L. REV. 1599, 1608 (1995).

184. See STEPHEN L. WASBY ET AL., *VOLUME AND DELAY IN STATE APPELLATE COURTS: PROBLEMS AND RESPONSES* 58 (1979).

185. See COMMISSION ON THE FUTURE OF VIRGINIA'S JUDICIAL SYSTEM, *COURTS IN TRANSITION* 37-38 (1989).

186. See Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis in Virginia?*, 57 VA. L. REV. 3, 6-11 (1971).

187. 49 S.E. 623, 632 (Va. 1905).

Thus, discretionary review was not truly discretionary in practice. At the time, the court articulated this broad conception of its statutory duty, although it was not overburdened by the number of cases it was called upon to adjudicate.

Today things are quite different in Virginia. No longer does the court's workload permit it to scrutinize every case for the presence of prejudicial error and to perform its error-correcting function routinely.¹⁸⁸ It has been suggested, in light of the available statistical information, that the Supreme Court of Virginia has moved from a "merits" determination of which cases to hear to a determination based on the societal importance of the issues presented.¹⁸⁹ This insight suggests that a significant number of potential appellants with valid grounds to appeal never initiate an appeal or, if they do, have their petitions denied.¹⁹⁰ This development would cry out for inquiry and change if the judicial system were no longer accomplishing its purposes or if there were a gap between expectations and actual performance of the system. Yet the matter has not received serious attention. One can infer that the system is doing a reasonable job of providing compensation to those who have a right to be compensated and denying it to those who do not. Because having essentially no opportunity to appeal is unquestionably worse for the aggrieved party than being able to appeal under a less favorable standard of review, it is reasonable to assume that the recommended change would produce benefits that would outweigh its costs.

Third, evidence suggests that voluntary commercial arbitration is a growth industry.¹⁹¹ Parties in commercial contexts may elect

188. See Lilly & Scalia, *supra* note 186, at 10 ("The unavoidable conclusion . . . is that the Supreme Court of Appeals is laboring under a much greater caseload than it bore twelve years ago. There is, of course, even a greater disproportion between the volume of its present business and the volume envisioned in 1928, when its present structure and its operating procedures were established.")

189. *Id.* at 15 ("It is in any event beyond question that the Court is now declining to review cases in which it once would have considered that a substantial possibility of error existed.")

190. *Id.* at 57 ("The ability to deny review has enabled the Court to . . . discourage filing petitions for appeal.")

191. See, e.g., Stephen A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 79 (Feb. 1985) (stating that American Arbitration Association's use of arbitration has doubled in the last decade). The American Arbitration Association's President, Robert Coulson, observed that "more commercial claims are arbitrated than tried before a jury." *Id.* Moreover, commercial arbitration

is not confined to traditional commercial transactions such as the sale and purchase of commodities and manufactured goods, and issues in the maritime field. It is also used to decide controversies arising out of building and engineering contracts, agency and distribution arrangements, close corporation and partnership relations, separation agreements, individual employment contracts, license agreements, leases, estate matters, contracts of government agencies and municipal bodies with private firms for construction work, stock exchange transactions and controversies in the broad insurance field, reinsurance arrangements, inter-insurance company subrogation

arbitration either at the inception of their contractual relationship (by including an arbitration clause in their contract) or when a particular dispute arises.¹⁹² Why would they choose to settle their disputes by arbitration rather than conventional litigation? They do so principally because arbitration is faster, cheaper, and less structured than litigation.¹⁹³ Considerations favoring arbitration of commercial disputes swell to their acme in jurisdictions where courts are overwhelmed by ever-expanding caseloads.¹⁹⁴

It is critical to appreciate, though, that the key to achieving the benefits of arbitration is the expertise of the arbitrator.¹⁹⁵ Regardless of how she is selected, the arbitrator will typically be someone with special commercial knowledge rather than the general knowledge possessed by a judge or a lay jury.¹⁹⁶ Because the arbitrator is familiar with commercial realities, she is better able to decide the case in a way that accords with commercial expectations, practices, and needs, even if this means "playing fast and loose" with specific substantive law.¹⁹⁷ As one court eloquently put it, when parties choose arbitration they "leave the issues to be determined in

claims, and in still newer areas such as uninsured motorist accident claims, as well as those involving medical malpractice.

1 GABRIEL M. WILNER, *DOMKE ON COMMERCIAL ARBITRATION* § 1:01, at 3 (rev. ed. 2001).

192. See WILNER, *supra* note 191, § 1:01, at 1-2. It is fundamental that arbitration must be agreed upon. See, e.g., *Gen. Drivers Local Union No. 509 v. Ethyl Corp.*, 68 F.3d 80, 83 (4th Cir. 1995); *Moss v. Am. Int'l Adjustment Co.*, 947 P.2d 371, 375 (Haw. 1997); *Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795-96 (Minn. 1995).

193. See, e.g., *State v. P.G. Miron Constr. Co.*, 512 N.W.2d 499, 504 (Wis. 1994) (noting that the advantage of arbitration over court actions "lies in the avoidance of formalities, delay, and expense of litigation").

194. See WILNER, *supra* note 191, § 3:01, at 1. Specifically:

The burden on the courts caused by expanding caseloads and increasingly complex issues in the commercial marketplace has lengthened the process of dispute resolution in the courts. The delays inherent in judicial proceedings are often unacceptable to those involved in modern commercial transactions and a simpler, faster method of dispute resolution is required. Commercial arbitration is becoming the most widely utilized alternative.

Id.

195. See *id.* § 20:00, at 301 ("The arbitrator is the decisive element in any arbitration. His ability, expertness, and fairness are at the base of the arbitration process. The success or failure of an arbitration will largely depend on him."); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 277 (1982) ("A skilled arbitrator, acting as the trier, can digest evidence at his own time and pace without the expensive panoply of the judicial process.").

196. See WILNER, *supra* note 191, § 20:00, at 301 ("Arbitrators may be selected by various methods ranging from appointment under the rules of an agency administering arbitration, selection by the parties themselves, or designation by the court.").

197. See *id.* § 25:01, at 331 ("It is often said that the parties do not expect the arbitrators to make their decision according to rules but rather, especially when the arbitrators are not lawyers, on the basis of their experience, knowledge of the customs of the trade, and fair and good sense for equitable relief.").

accordance with the sense of justice and equity that they may believe reposes in the breasts and minds of their self-chosen judges.”¹⁹⁸

It was inevitable that the incentives for using arbitration would ultimately lead to limits upon the right of a party to challenge the arbitral award in court proceedings. Although judicial review of arbitrators’ decisions might be perceived, at least initially, as a valuable safeguard against the misapplication of legal principles, it seemed to defeat the goal of providing parties with a speedy, inexpensive, and equitable alternative to litigation.¹⁹⁹ Courts, therefore, sharply circumscribed their own power of review by giving deference to the arbitrator’s factual findings *and* legal conclusions.²⁰⁰ The idea that arbitrators, and not courts, are primarily responsible for the rules of decision won legislative endorsement through the enactment of the Federal Arbitration Act²⁰¹ and in many state

198. *Spectrum Fabrics Corp. v. Main St. Fashions, Inc.*, 139 N.Y.S.2d 612, 617 (N.Y. App. Div. 1955), *aff’d*, 128 N.E.2d 416 (N.Y. 1955); *see also* *Freydberg Bros. v. Corey*, 31 N.Y.S.2d 10, 11 (1941) (“It is well settled that arbitrators are not bound by rules of law in determining issues submitted to them, in the absence of an express contrary direction in the contract or submission.”).

199. *See, e.g.*, *Nat’l Wrecking Co. v. Int’l Bhd. of Teamsters Local 731*, 990 F.2d 957, 960 (7th Cir. 1993) (“Judicial review of arbitration awards is narrow because arbitration is intended to be the final resolution of disputes.”); *Richmond, Fredericksburg & Potomac R.R. v. Transp. Communications Int’l Union*, 973 F.2d 276, 282-83 (4th Cir. 1992) (“Nothing would be more destructive to arbitration than the perception that its finality depended upon the particular perspectives of the judges who review the award.”); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n*, 790 F.2d 611, 614 (7th Cir. 1986) (noting that “an extremely low standard of review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution . . .”).

200. *See, e.g.*, *WILNER*, *supra* note 191, § 33:06, at 26 (“The law is well settled that a court may not review any of the finding of facts or application of law by the arbitrators, since they involve matters of judgment, and it would be contrary to the intent of an arbitration agreement for a court to interfere.”).

201. Most arbitration claims, whether they are brought in federal or state court, are governed by the Federal Arbitration Act (“FAA”). Section 10(a) of the FAA permits vacatur:

- (1) Where the award was procured by corruption, fraud, or undue means.
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

9 U.S.C.A. § 10(a)(1)-(5) (West 1999).

statutes modeled on the Uniform Arbitration Act.²⁰²

This approach reflects a sound recognition that there are considerations which may warrant limiting the extent to which a party adversely affected by an arbitral decision may have that decision reviewed. A principle of deference is especially appropriate in the context of commercial arbitration because, (1) the parties impliedly consented to a limited scope of review when they agreed to submit their dispute to arbitration;²⁰³ (2) the initial decisionmaker's competence to render an "accurate" judgment is at least equal to that of the reviewing court; and (3) the decision in the case will have no precedent-building character. The same considerations arise when applying the principle of deference to issues of foreign law.

Finally, although parties seeking appellate review are ubiquitous, the problem with lower court error may not be as severe as the number of appellate cases would suggest. There is reason to believe that many decisions are reversed on appeal not because the lower court misunderstood or misapplied the controlling legal principle, but precisely because the judgment was correct as a matter of law. In these cases it is misleading to speak of "error of law" as the ground for reversal. The lower court is reversed because it properly obeyed hierarchical precedent and followed the decisions of a court directly above it at a time when that court thought it appropriate to diverge from precedent and devise a new rule.²⁰⁴ In short, this is the type of "error" that a multitiered adjudicatory process will inevitably generate if courts are to remain responsive to technological developments and changes in business practices.

Appropriate de novo review of lower court decisions is essential to the long-term development of the law because it creates the opportunity for appellate courts to revisit and revise their own rulings. Even so, this view does not justify de novo review when the law being considered is the law of a foreign jurisdiction, the development of which the reviewing court has no power to control. It is true that de

202. Thirty-five states have adopted the Uniform Arbitration Act ("U.A.A."). The grounds for challenging an arbitration award under the U.A.A. are generally the ones set forth in the FAA. See UNIFORM ARBITRATION ACT § 12, 7 U.L.A. 280 (1997).

203. See, e.g., *Allstate Ins. Co. v. Fioravanti*, 299 A.2d 585, 589 (Pa. 1973) ("[M]istakes of judgment and mistakes of either fact or law are among the contingencies parties assume when they submit disputes to arbitration.").

204. See WILNER, *supra* note 83, at 419 (citing K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 305 (1960)):

In constitutional and statutory interpretation and in the application of common law principles, reversals of the decisions of lower courts result rarely for error. As Karl Llewellyn observed, most reversals occur because the rule applied, sound enough in its day, is no longer deemed to be of utility. Judgments are set aside not because they fail to apply existing rules, but because they do.

novo review of foreign law decisions may contribute to a valuable continuing dialogue among judges from different jurisdictions. As discussed above, however, the costs of judicial review are not insignificant, and they provide a strong countervailing argument that de novo review should be curtailed with respect to issues of foreign law.²⁰⁵

V. TWO ALTERNATIVE METHODS OF DEALING WITH ISSUES OF FOREIGN LAW

A policy of appellate deference would help relieve docket pressure; yet even so, whether such a policy can be justified as a suitable method of determining unsettled issues of foreign law turns, in part, on whether there are more attractive alternatives. This part of the Article identifies and evaluates two such alternatives and concludes that neither supports prevailing doctrine. In short, a deferential standard of review provides a better balance of the parties' interests with the need to relieve appellate court burdens.

A. Application of the Local Law of the Forum

Rather than attempting to sort out the law of foreign jurisdictions, a more fruitful alternative might be for the courts of the forum state to do what they do best and decide cases in accordance with local law. Exemplifying this approach is *ROC-Century Associates v. Guinta*.²⁰⁶ In *Guinta* the secured creditor brought suit in Maine to obtain a deficiency judgment against the debtor's estate.²⁰⁷ The probate court enforced a provision in the promissory note calling for the application of New York law and entered judgment for the secured party notwithstanding its finding that the disposition of the collateral was commercially unreasonable.²⁰⁸ The court did so in the apparent belief that New York had adopted the "rebuttable presumption" rule to govern whether, and if so how, a secured party's noncompliance with the enforcement provisions of Article 9 of the U.C.C. affects that party's right to recover a deficiency.²⁰⁹

205. See *supra* notes 137-39 and accompanying text.

206. 658 A.2d 223 (Me. 1995).

207. *Id.* at 225.

208. *Id.*

209. See *id.* Prior to the 1998 revision of Article 9, jurisdictions were split three ways as to the effect of the secured creditor's failure to dispose of the collateral in a commercially reasonable manner on its right to recover a deficiency judgment: either (1) the creditor was permitted to recover the deficiency, but the recovery was subject to a reduction for any damages provable by the debtor under section 9-507; or (2) the creditor was absolutely barred from any recovery; or (3)

On appeal, the Maine Supreme Judicial Court affirmed but did not base its decision on New York law.²¹⁰ Citing lower New York court decisions advocating each of the three competing positions regarding the remedial consequences of a commercially unreasonable sale,²¹¹ the court concluded that there was simply no way to divine how New York's highest court would resolve the issue if given the chance.²¹² Because New York law was uncertain, the court looked instead to the unsettled law of Maine as the forum state and was persuaded to adopt the "rebuttable presumption" rule.²¹³

The strongest argument against the ROC court's approach to unresolved issues of foreign law is that it fails to properly take account of the parties' expectations.²¹⁴ Imagine, for example, the following scenario: Parties to a computer information transaction choose by contract to have their relationship governed by the law of Virginia. They do so solely because Virginia is one of only two states thus far to have enacted U.C.I.T.A.²¹⁵ Sometime later, suit is brought in a

recovery was permitted to the extent that the creditor was able to overcome a rebuttable presumption that the collateral's value equaled the amount of the debt. Robert M. Lloyd, *The Absolute Bar Rule in UCC Foreclosure Sales: A Prescription for Waste*, 40 UCLA L. REV. 695, 721-24 (1993). The 2001 version of Article 9 partially resolves the controversy by adopting the "rebuttable presumption" rule for commercial transactions. See U.C.C. § 9-626(a) & cmt. 3 (2001). Revised Article 9 is silent on the appropriate rule for consumer transactions.

210. *Id.* at 226.

211. *Guinta*, 658 A.2d at 226 n.1.

212. *Id.* at 226.

213. *Id.* In concluding that the parties' choice-of-law agreement should be disregarded in favor of the forum state's law, the supreme court relied on the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971). Comment h suggests the propriety of applying local law when the party requesting the application of foreign law "has provided no information, or insufficient information, about the foreign law." § 136 cmt. h.

214. Even the section 136 recognizes the paramount importance of the parties' expectations. It provides in pertinent part:

The forum will . . . not apply its local law in situations where insufficient information has been provided about the foreign law if such application would not be in the interests of justice. One factor that may induce the forum to refuse to apply its local law is the likelihood that the foreign law differs from the local law of the forum and that the parties relied on the foreign law in planning their transaction. . . . Another factor that may induce the forum to refuse to apply its local law is the fact that the applicable local law rule of the forum imposes a peculiar obligation.

§ 136 cmt. h.

215. VA. CODE ANN. §§ 59.1-501.1 to -509.2 (Michie 2001). The other state is Maryland. MD. CODE ANN. COM. LAW §§ 22-103 to -409 (2000). In the future, the parties may be able to use Revised U.C.C. section 1-301 to validate their choice of U.C.I.T.A. or other foreign law. But that section would apply only if their contract would otherwise be subject to the Code. See Rev. U.C.C. § 1-102 (2001) ("This article applies to a transaction to the extent that it is governed by any other article of the [Uniform Commercial Code]"). So, for example, if the court were to refuse to characterize the particular software contract as a sale of goods, see *infra* notes 216-17 and accompanying text, section 1-301 would have no application. Clearly, if Article 2 did not cover the underlying contract, no other article would. Today, an argument could be made that under

non-U.C.I.T.A. state. The courts of that state refuse to apply U.C.I.T.A. because application of the particular provision at issue is uncertain and an authoritative Virginia source of statutory interpretation is nonexistent. In that scenario, what law would be applied? The answer depends upon the court's characterization of the transaction. One possibility, assuming one party is required to deliver something tangible to the other party (e.g., a computer diskette), would be to treat the transaction as a sale of goods. Viewed this way, the parties' relationship would be governed by Article 2 of the U.C.C.²¹⁶ Alternatively, the transaction could be viewed as a license of intellectual property rights, with perhaps an incidental goods component. If so, the applicable law would be the federal law of intellectual property and the common law of licenses.²¹⁷ No matter which alternative the court embraced, by refusing to enforce the Virginia choice-of-law clause and apply U.C.I.T.A., the court would be dragging the parties into a legal regime they clearly intended to avoid. By agreeing to have their claims resolved under U.C.I.T.A., the parties endorsed the values embodied in that statute—to provide clear, consistent, and uniform rules governing the transition from a goods-based economy to an information-based economy.²¹⁸ U.C.I.T.A.

the current version of the Code, the parties are free to have their relationship governed by U.C.I.T.A. if they so choose. See Rev. U.C.C. § 1-302(a) (“[T]he effect of provisions of [the Uniform Commercial Code] may be varied by agreement . . .”). However, at least one state, Iowa, has made itself a “U.C.I.T.A.-free zone” by enacting a statute “which declares voidable a choice of law clause if the state law selected was UCITA.” U.C.I.T.A. Online, *What's Happening to UCITA in the States*, at <http://www.U.C.I.T.A.online.com/whathap.com> (last visited Nov. 23, 2002). Worries that suit might be filed in Iowa or in some other state where U.C.I.T.A. has been held to be against fundamental public policy could presumably be addressed by coupling the choice-of-law clause with a forum selection clause.

216. For examples of cases that have applied Article 2 to software contracts, see *Step-Saver Data Sys. Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991); *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991); *Hosp. Computer Sys., Inc. v. Staten Island Hosp.*, 788 F. Supp. 1351 (D.N.J. 1992); *Sys. Design & Mgmt. Info., Inc. v. Kan. City Post Office Employees Credit Union*, 788 P.2d 878, 881 (Kan. Ct. App. 1990); *Dreier Co. v. Unitronix Corp.*, 527 A.2d 875 (N.J. Super. Ct. App. Div. 1986).

217. For examples of cases that have refused to apply Article 2 to software contracts, see *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086 (N.D. Cal. 2000); *Berthold Types Ltd. v. Adobe Sys., Inc.*, 101 F. Supp. 2d 697, 699 (N.D. Ill. 2000); *Architronics, Inc. v. Control Sys., Inc.* 935 F. Supp. 425, 431 (S.D.N.Y. 1996).

218. As Raymond T. Nimmer, the reporter for the U.C.I.T.A. drafting committee, described it:

[I]n addition to the basic concept of contract choice, there is a special need in the field of computer information transactions to allow the parties to clarify the source of contract law within which their agreement should be handled. While UCITA provides needed uniformity and coherence for these transactions, there may be cases in which uncertainty arises about when and in what manner it, common law, or Article 2 governs. The ability to contractually choose allows the parties to avoid the cost and uncertainty that would otherwise exist in such cases.

represents a complex array of choices, promoting certain values while subordinating others. These choices were the background that shaped the parties' bargaining and from which they intended any default rules to be drawn.

Since permitting the parties to determine by agreement what contract law will govern their relationship increases net welfare by ensuring the application of a legal framework that is consistent with their expectations, needs, and understandings, it matters little that the non-Virginia court is forced to "guess" at how Virginia's highest court would apply U.C.I.T.A. in the circumstances. In choosing a U.C.I.T.A. state's law, the parties consciously decided to gamble on the resolution of any unsettled legal issue that might arise regardless of where the case might be pending. At least if their choice-of-law provision is honored, the general principles of U.C.I.T.A. will, to the extent possible, guide the decisionmaking process. Thus, if courts are predisposed to apply their own law when faced with uncertain foreign law, this forum bias may indeed produce rules that do not fit the realities of the transactions they govern.²¹⁹ On balance, then, though the application of the law of the forum may provide the court with the comfort of its own familiar law, this benefit is more than counterbalanced by the cost to parties who can no longer use choice-of-law clauses to facilitate planning, enhance certainty, and assure the application of friendly law.

Moreover, forum bias where foreign law is uncertain produces decisions with precedential value, so a deferential standard of review would not be warranted.²²⁰ The additional costs of appellate review may therefore weigh heavily in the analysis, providing another reason to apply foreign law notwithstanding its uncertainty.

B. Interstate Certification

Another, and perhaps more promising, alternative approach to deciding unsettled questions of foreign law is interstate certification. This device, which can be traced directly to the Supreme Court's decision in *Erie Railroad v. Tompkins*,²²¹ is "an issue-avoidance,

Raymond T. Nimmer, *Through the Looking Glass: What Courts and UCITA Say About the Scope of Contract Law in the Information Age*, 38 DUQUESNE L. REV. 255, 316 (2000).

219. Suppose, for example, that the court nullifies the parties' choice of U.C.I.T.A. as their source of law and instead applies Article 2. As one commentator has bluntly put it: "Applying Article 2 to a software transaction . . . is a disaster." Lorin Brennan, *Why Article 2 Cannot Apply to Software Transactions*, 38 DUQUESNE L. REV. 459, 579 (2000).

220. See *supra* notes 130-37 and accompanying text.

221. 304 U.S. 64 (1938). English law has long recognized certification. See British Ascertainment Act, 1859, 22 & 23 Vict., c. 63 (Eng.) (9 HALSBURY'S STATUTES OF ENGLAND 582

decision-ducking technique” that empowers a court in one jurisdictional system to obtain authoritative answers to unclear or unresolved questions of foreign law from the highest court of the relevant foreign jurisdiction.²²² In the immediate aftermath of *Erie*, when state law was unclear, many federal courts, rather than risking incorrect determinations, chose to abstain from exercising their jurisdiction until the state court was given an opportunity to resolve the state law issue.²²³ Although this practice of abstention helps to solve the problem of ascertaining state substantive law, it was not without serious drawbacks. In a nutshell, abstention inevitably caused excessive delay and a substantial increase in the costs of litigation²²⁴ and was widely criticized for these (and other) reasons.²²⁵

Certification was conceived as an alternative to abstention.²²⁶ Although forty-three states, Washington, D.C., and Puerto Rico have

(2d ed. 1949) (permitting certifications within the British Empire); the Foreign Law Ascertainment Act, 1861, 24 & 25 Vict. c. 11 (Eng.) (9 HALSBURY'S STATUTES OF ENGLAND 584 (2d ed. 1949) (permitting certifications to foreign states).

222. See Paul A. LaBel, *Legal Positivism and Federalism: The Certification Experience*, 19 GA. L. REV. 999, 1003 (1985).

223. See, e.g., *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 484-85 (5th Cir. 1964) (en banc), cert. denied, 377 U.S. 935 (1964). The abstention doctrine was first recognized by the Supreme Court in *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941) (recognizing that abstention is appropriate if resolution of the state law issue could avoid the need to decide an issue of federal constitutional law) and subsequently reaffirmed in *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959) (stating that abstention is appropriate if the dispute “intimately involve[s] . . . [the state’s] sovereign prerogative”). For a discussion of how abstention works in practice, see C. WRIGHT, *THE LAW OF FEDERAL COURTS* § 52 (4th ed. 1983).

224. When a federal court abstains, the parties are forced to bring what amounts to a separate, concurrent suit in the state court system. See WRIGHT, *supra* note 223; John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 VAND. L. REV. 411, 416 (1988) (concluding that “abstention imposes duplicative litigation on federal and state trial courts and also imposes a tax on the public treasury”); Richard B. Lillich & Raymond T. Mundy, *Federal Court Certification of Doubtful State Law Questions*, 18 UCLA L. REV. 888, 890 n.22 (1971). It is therefore not surprising that this practice can delay final resolution of the case for many years. See, e.g., *England v. La. State Bd. of Med. Exam'rs*, 384 U.S. 885 (1966) (delayed six years); *Spector Motor Serv. v. O'Connor*, 340 U.S. 602 (1951) (delayed seven years).

225. See, e.g., *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 227 (Douglas, J., dissenting). Justice Douglas made a point to give “renewed protest to [the] practice of making litigants travel a long, expensive road in order to obtain justice.” *Id.*; see also Memorandum from the New York Law Revision Commission Relating to Certification of Questions of Law, to the Court of Appeals 6 (1984) (“The expense and delay caused by proceeding through the lower state courts up to the highest state court can make abstention an onerous burden on litigants.”); see generally Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of “Democracy Bashing,”* 40 CASE W. RES. L. REV. 1023 (1990). Abstention has also been criticized as violating the separation of powers doctrine. See Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. CAL. L. REV. 1237, 1254-56 (1989).

226. See *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 669 (W. Va. 1979) (“The growth of the Uniform Certification of Questions of Law Act has largely been a response to the Abstention Doctrine, which was a necessary outgrowth of *Erie Railroad v. Tompkins*.”). Some of the commentators who have praised certification as a more efficient alternative to abstention

adopted some form of certification procedure,²²⁷ only twelve states permit certification from one state to another.²²⁸ It is not immediately apparent why most states chose not to include an explicit provision for interstate certification in their certification statutes. It is clear, though, that certification between state courts has rarely, if ever, been used.²²⁹ That the practice is so much more prevalent in federal courts points to several characteristics of certification that make it more suitable there and less likely ever to play a significant role in the state-to-state context.

For one thing, certification between states does not produce as much value as certification for federal courts. The main value of certification in any context is that a definitive answer to an uncertain question of law is given by a court with final authority to determine the substance of that law. The nature of federal court dockets tends to magnify the importance of certification. Since federal courts deal primarily with federal law issues, they are more likely to rely on and benefit from certification than are state courts with existing expertise in matters of state law generally.²³⁰

Further, certification is said to promote a "cooperative judicial federalism" by allowing states to develop their own substantive law without federal court interference.²³¹ Interference by another state

include LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 201 n.18 (2d ed. 1988); John A. Scanelli, Note, *The Case for Certification*, 12 WM. & MARY L. REV. 627, 639 (1971); J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 325 (1967).

227. See JONA GOLDSCHMIDT, *AMERICAN JUDICATURE SOCIETY, CERTIFICATION OF QUESTIONS OF LAW: FEDERALISM IN PRACTICE* 15-24 (1995).

228. See Corr & Robbins, *supra* note 224, at 431 n.95 (noting that "most legislatures that have enacted certification statutes have excised the language of the [Uniform Certification of Questions of Law Act] that permits courts of other states to certify questions").

229. See *id.* ("Even in the jurisdictions that will hear certified questions from another state, however, there are no published opinions indicating that any use has been made of the opportunity.").

230. Corr and Robbins surmise that this may be one explanation as to why interstate certification has not been used.

[Perhaps] state courts feel less need to certify questions because they perceive themselves as having greater expertise in another state's law than a federal court is likely to have. State courts, after all, routinely deal in matters of state law, and so are likely to know more about state law generally than would federal courts, in which federal questions predominate on the docket. Such familiarity might increase a state court's confidence in its ability to divine the law of another state without resorting to certification.

Id. at 431-32.

231. See, e.g., *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (stating that certification "helps build a cooperative judicial federalism"); Philip B. Kurland, *Toward a Co-Operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481, 490 (1960) (stating that certification is "a demonstration of cooperative judicial federalism which would justify those of us who think that the federal form of government has a contribution to make toward the

court does not threaten a state's sovereignty in matters of local law to the same degree. When a State A court opines on the law of State B, in other words, it is doubtful that anyone would rely on that opinion as correctly stating the law of State B. Federal court opinions, however, are probably not taken with the same grain of salt.²³²

Finally, certification permits an authoritative determination of state law and promotes federalism. Although both certification and abstention serve these purposes well, abstention, because of its costs, is not quite as efficient.²³³ Permitting federal courts to certify questions of a state's law directly to its highest court undercuts to a great degree the need for federal courts to rely on the less efficient abstention doctrine. In the state-to-state context, there is no alternative practice comparable to federal court abstention. However, a kind of bias in favor of local law sometimes appears when state courts are faced with difficult questions of foreign law.²³⁴ If certification tends to check this bias, it is valuable.²³⁵ Yet the fact that certification has not been used in these situations even when permitted suggests that if we wish to find a palliative against forum bias, we should look elsewhere. Indeed, whatever the true value of certification, one point may be made: The value is not likely to be large in the context of state-to-state certification. Though in general certification is quite beneficial, it rests on an array of supporting factors, not one of which is likely to have equal weight outside the context of federal-to-state certification.

preservation of justice in this country"); Gerald M. Levin, Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial Federalism*, 111 U. PA. L. REV. 344, 350 (1963) (certification "represents a more perfect attempt at cooperative judicial federalism, since concern for state sovereignty is implemented through a more efficient and simpler proceeding.").

232. Consider the observations of the Ohio Supreme Court:

The state's sovereignty is unquestionably implicated when federal courts construe state law. If the federal court errs, it applies law other than Ohio law, in derogation of the state's right to prescribe a "rule of decision." "By allocating rights and duties incorrectly, the federal court does both an injustice to one or more parties, and frustrates the state's policy that would have allocated the rights and duties differently. The frustration of the state's policy may have a more lasting effect, because other potential litigants are likely to behave as if the federal decision were the law of the state. In that way, the federal court has, at least temporarily, *made* state law of which the state would have disapproved, had its courts had the first opportunity to pass on the question."

Scott v. Bank One Trust Co., 577 N.E.2d 1077, 1080 (Ohio 1991) (citations omitted).

233. See *supra* notes 223-24 and accompanying text.

234. See *supra* notes 206-13 and accompanying text.

235. See Corr & Robbins, *supra* note 224, at 458 (suggesting that "when a state court's choice-of-law rules might normally direct the court to apply the law of another state, certification can discover what the foreign law is and thus can be a strong and useful disincentive to the inappropriate application of forum law—i.e., forum bias").

In contrast to its value, the public and private costs of certification are constant, regardless of whether the device is employed in the federal or state context. As to litigants, the costs are obvious: they arise because certification brings the litigation to a temporary halt in one court system and shifts the action to another court system, where litigants must brief and argue the case before returning to the original court system to resume the litigation.²³⁶ There is no question that using two court systems to resolve one case has the effect of generating additional expense and delay.²³⁷ But how much? At least two empirical studies show that certification generally delays the final resolution of cases longer than one year.²³⁸

The private costs alone caution restraint by courts in the exercise of certification procedures, but there is also a public cost: each time a question is certified, it adds another case to already overburdened state supreme court dockets.²³⁹ To be sure, the data do not suggest that federal court certifications have made it difficult for state courts to do their jobs effectively. But the bulk of the data shows that certified questions do comprise a regular component of their caseloads.²⁴⁰ That being so, it has been suggested that a state

236. See *In re Elliot*, 446 P.2d 347, 371 (Wash. 1968) (Hale, J., dissenting).

237. See, e.g., Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. REV. 2123, 2137-38, 2143-45 (1999) (recognizing that one of the most significant objections to certification is "the additional cost and delay it imposes on the parties"); Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 332-33 (1994) (discussing the delay that results from certification); Corr & Robbins, *supra* note 224, at 429-30 ("Perhaps the best way to approach the significant problems of delay and corresponding expense in certification is to recognize that they are inherent in the process . . .").

238. See Brian Mattis, *Certification of Questions of State Law: An Impractical Tool in the Hands of the Federal Courts*, 23 U. MIAMI L. REV. 717, 726 (1969) (indicating a delay of more than one year); David L. Shapiro, *Federal Diversity Jurisdiction: A Survey and a Proposal*, 91 HARV. L. REV. 317, 326-27 (1977) (noting that certification causes an average delay of fifteen months). *But see* CARROLL SERON, *CERTIFYING QUESTIONS OF STATE LAW: EXPERIENCE OF FEDERAL JUDGES* 15-16 (Fed. Judicial Ctr. 1983) (finding a median time period of 6.36 months from certification to obtaining the state court's answer); Corr & Robbins, *supra* note 224, at 453 (in a survey of six state supreme court clerks, four indicated a response time of three to six months; one clerk indicated that the time period was six to nine months; and one clerk indicated that the time period was nine to twelve months).

239. See, e.g., Smith, *supra* note 237, at 2145 (indicating that "certification proposals have been met with concern that federal courts will be quick to employ the procedure and that the resulting flood of cases will inundate and overburden the state's highest court"); Yonover, *supra* note 237, at 322 ("Perhaps the fact that such populous states as California, Pennsylvania, and New Jersey have not yet adopted certification procedures can be explained by the relatively large number of federal district court filings and an unwillingness to add to already overburdened state supreme court dockets.").

240. See, e.g., Corr & Robbins, *supra* note 224, at 452 (explaining that a survey of six supreme court clerks indicated "that certification increases the highest state court's caseload by less than five percent a year"); Smith, *supra* note 237, at 2146 ("In Florida, for example, . . . the

supreme court can always choose not to answer the question certified if its docket is overburdened.²⁴¹ But this suggestion misses the point, because in each case, the highest court would nevertheless be burdened by the necessity of having to decide whether to make that choice.

By now, it seems clear that the costs of certification are considerable and that while it is viewed as a better procedure than its main alternative, abstention,²⁴² its use has its greatest value in the federal-to-state context. In any case, the overall potential value of certification in the state-to-state context is at least an open question. Even if state court use of the device were to grow, its effect on the workloads facing state appellate courts would not alone be sufficient to eliminate the problem. A deferential standard of review would still be a very plausible method of resolving questions of foreign law that are either not certified at all or, although certified, remain unanswered.

VI. CONCLUSION

It is only within the past decade or so that professional organizations interested in making the law better suited to commercial transactions have begun to advocate the proposition that contracting parties should have broad power to choose "unrelated" law to govern their relationships. One consequence of permitting almost unlimited contractual choice of law is likely to be that a much larger percentage of appellate court caseloads will be comprised of matters involving issues of foreign law. Further, in light of their expanding dockets, these same appellate courts have been compelled to operate under conditions that are anything but conducive to the best administration of justice. Faced with these developments, and in view of the essential functions of appellate adjudication, appellate courts should strive for greater efficiency in handling their caseloads by modifying the standard of review generally applicable to pure questions of law. A standard of deference when the law is foreign to the forum jurisdiction would improve the operation of appellate courts while appropriately distributing authority among all levels of the

number of cases certified to the Florida Supreme Court ranged . . . from one to ten, with an average of 4.875 cases per year.").

241. See M. Bryan Schneider, "But Answer Came There None": *The Michigan Supreme Court and the Certified Question of State Law*, 41 WAYNE L. REV. 273, 297 (1995) ("[T]he power to answer the certified question is [within] the answering court's discretion under every certification provision, [and therefore] the state supreme court can simply refuse to answer the question if its docket is overburdened.").

242. See *supra* note 226.

judiciary. To be sure, such reform is not a panacea for docket pressure; nevertheless, it has promise as a means for improving appellate court justice in the near term. In the broadest view, it would be a manifestation of the need for our legal institutions to grow and adapt to the changing legal landscape without sacrificing the public's confidence in the ability of our courts to provide litigants with a fair trial.