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Law, Fact, and Appellate Review

Adam N. Steinman
Texas A&M University School of Law, steinman@law.tamu.edu

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ABSTRACT: For centuries, courts have been called upon to distinguish between law and fact. That distinction played a key role in recent Supreme Court decisions on two critical components of appellate review. Dupree v. Younger *considered an important question regarding what a party must do at trial to preserve an issue for appellate review. And* Google LLC v. Oracle America, Inc. *addressed how to select and apply the standard of appellate review—specifically, whether and how the appellate court must show deference to particular decisions made at the trial level.*

Both decisions were partially right. Dupree *correctly focused on whether certain early rulings are unreviewable on appeal because they are "overcome" by proceedings at trial.* Google *properly recognized that an appellate court must defer to the jury as to underlying findings jurors may have made in reaching the ultimate verdict. But both decisions went awry in concluding that the appellate court could further increase its review power simply by characterizing certain issues as "legal" rather than "factual." A close analysis of the* Dupree *and* Google *decisions themselves—and a sound understanding of the structure of appellate decision-making—reveals that the labels of law and fact are ill-suited to assessing questions of issue preservation and appellate deference.*

This Article details those shortcomings and argues for a more coherent approach to both questions. Rather than characterizing the "issue" being appealed, courts should focus on the decisional "outcome" for that issue. Regarding issue preservation, courts should inquire whether the outcome of a pretrial ruling had conclusively resolved an issue such that there is no need for a further decision on that issue at trial. If so, that ruling may be appealed regardless of whether the party took additional steps at trial to reassert its position. With respect to appellate deference, what matters is the analytical

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outcome reached by the appellate court in conducting its review. The appellate court can always articulate generalizable principles independently when those principles are part of its decisional analysis. But where it would merely impose a different ultimate result than the trial judge or jury, reversal should require heightened justification.

INTRODUCTION

The distinction between questions of law and questions of fact is ubiquitous. It plays a role in numerous aspects of procedure and jurisdiction—especially for appellate courts.[1] Scholars, however, have long critiqued and deconstructed the line between law and fact.[2] And jurists at the highest levels have called the

1. *See infra* notes 31–40 and accompanying text.

2. *See generally* Ronald J. Allen & Michael S. Pardo, *The Myth of the Law–Fact Distinction*, 97 NW. U. L. REV. 1769 (2003); Walter Wheeler Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416 (1921); Jabez Fox, *Law and Fact*, 12 HARV. L. REV. 545 (1899); Nathan

distinction "vexing,"[3] "elusive,"[4] and "slippery,"[5] even as they continue to invoke and apply it.

Two recent Supreme Court decisions on appellate review illustrate the law–fact distinction's prominence—and its problems. In *Dupree v. Younger*, the Court addressed what a party must do at trial to preserve an issue for appellate review.[6] In *Google LLC v. Oracle America, Inc.*, the Court considered the extent to which an appellate court must show deference when reviewing particular decisions made at the trial level.[7] In both cases, the Court placed heavy emphasis on the law–fact distinction.

This Article argues that the Court's focus on the difference between questions of law and questions of fact in *Dupree* and *Google* was misguided and can lead to real confusion and adverse consequences for litigants and the operation of the legal system. These missteps could have been avoided, moreover, without fundamentally altering the Court's analysis and ultimate conclusions in those cases. Although parts of the Court's reasoning in *Dupree* and *Google* were sound, the Court strayed in embracing a broader framework that tethers the breadth and depth of review to whether the appellate court characterizes particular issues as "legal" or "factual." This Article develops a more coherent approach to both issue preservation and appellate deference that does not place such emphasis on the law–fact distinction.[8]

Last term's *Dupree* decision revisited the recurring question of when a party's failure to raise an issue in a motion *at trial*—typically under Federal Rule of Civil Procedure 50 ("Rule 50")—blocks the party from seeking

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Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1 (1922); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303 (1942); James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147 (1890); Stephen A. Weiner, *The Civil Jury Trial and the Law–Fact Distinction*, 54 CALIF. L. REV. 1867 (1966) [hereinafter Weiner, *The Civil Jury Trial*]; Stephen A. Weiner, *The Civil Nonjury Trial and the Law–Fact Distinction*, 55 CALIF. L. REV. 1020 (1967) [hereinafter Weiner, *The Civil Nonjury Trial*].

3. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

4. Miller v. Fenton, 474 U.S. 104, 113 (1985).

5. Thompson v. Keohane, 516 U.S. 99, 111 (1995).

6. Dupree v. Younger, 598 U.S. 729, 736 (2023).

7. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 23–24 (2021).

8. There are some issues, of course, where the governing positive law refers explicitly to questions of law or questions of fact. *See, e.g.*, U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."); 8 U.S.C. § 1252(a)(2)(D) (2018) (allowing federal courts of appeals to review "constitutional claims or questions of law" relating to orders of removal); FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous . . . ."). And those provisions can prompt questions of statutory interpretation that courts must resolve. *See, e.g.*, Guerrero-Lasprilla v. Barr, 589 U.S. 221, 234 (2020) (holding that "the statutory term 'questions of law' [in § 1252(a)(2)(D)] includes the application of a legal standard to established facts"). In both *Dupree* and *Google*, however, the Supreme Court incorporated the law–fact distinction into doctrinal frameworks of its own creation.

appellate review of an earlier, *pretrial* ruling regarding that issue.[9] In *Dupree* and earlier cases, a party had presented an issue in a summary-judgment motion, that motion was denied, and the case proceeded to trial.[10] The party failed to raise the issue during trial, but it argued on appeal that the appellate court could still grant relief by reviewing the trial court's earlier summary-judgment decision.[11] Justice Barrett's opinion for the Court in *Dupree* held that the availability of appellate review in this scenario depends on whether the issue decided at the summary-judgment phase was "purely legal."[12] A purely legal issue could be raised on appeal despite the failure to assert it at trial; other issues could not, because they are "overcome" by the developments during the trial.[13]

The *Dupree* Court properly recognized that some pretrial decisions should not be reviewable on appeal because they are effectively displaced by the later proceedings at trial.[14] It was mistaken, however, in instructing that the crucial inquiry for making that determination was whether the earlier ruling was "purely legal."[15] As an initial matter, the *Dupree* approach requires courts to undertake the fraught challenge of identifying whether a particular issue is "legal" (as opposed to "factual").[16] But even as to issues that are more easily categorized along the law–fact spectrum, the *Dupree* approach has the potential to be both overinclusive and underinclusive.

This Article argues that the optimal inquiry for deciding whether parties must renew, at trial, arguments they made earlier in the litigation is whether the court's pretrial ruling on those arguments was sufficiently *conclusive* that it removed the issue from what had to be decided at trial.[17] This approach avoids the workability problems inherent in a framework that is rooted in the problematic law–fact distinction. And it aligns with the longstanding recognition that a full trial is the gold standard for adjudicating disputed issues. As long as an issue remains viable at trial, therefore, parties should be required to air the issue as part of that superior procedural vehicle. Appellate review can then occur with the benefit of that higher-quality process, rather than a lower-quality proceeding such as a summary-judgment motion that lacks important features like live witness testimony, cross-examination, and others.

In *Google*, the Supreme Court considered the framework for deciding whether a de novo or deferential standard of appellate review governs a

9. *See Dupree*, 598 U.S. at 731 ("The question presented in this case is whether this preservation requirement extends to a purely legal issue resolved at summary judgment. The answer is no.").

10. *See id.* at 731–33.

11. *Id.* at 732–33.

12. *Id.* at 735; *see infra* notes 110–17 and accompanying text.

13. *Dupree*, 598 U.S. at 734; *see infra* notes 104–08 and accompanying text.

14. *Dupree*, 598 U.S. at 734.

15. *Id.* at 731.

16. *Id.* at 734–35.

17. *See infra* Section II.E.

particular issue. The *Google* litigation involved the "fair use" defense under federal copyright law, and the Court concluded that appellate courts may review de novo the ultimate question of whether a defendant's use of copyrighted material was exempt from liability.[18] Justice Breyer's majority opinion reasoned that the standard of appellate review for a given issue hinges on whether deciding the issue "'entails primarily legal or factual work.'"[19] Copyright fair use entailed "legal" work—according to Justice Breyer—because past Supreme Court decisions in copyright cases had provided "legal interpretations" and "general guidance" regarding the fair use provision.[20]

Despite that top-line endorsement of de novo review, Justice Breyer's review of the fair-use verdict in *Google* showed considerable *deference* to the jury's verdict—and correctly so. He instructed that an appellate court must identify "subsidiary factual questions" that may have been implicit in the jury's verdict and that it must accept the jury's answers to those questions unless they are unreasonable.[21] This deference is entirely warranted given the Seventh Amendment's right to a civil jury trial,[22] Rule 50,[23] and the inherent advantages a trial-level decision-maker has in evaluating and weighing the testimony and other evidence presented there.[24] The problem with the *Google* Court's approach, however, is its need to distinguish between those implicit, "subsidiary factual" issues (for which review is deferential)[25] and the "ultimate" question of fair use (for which review is de novo).[26] As in *Dupree*, this approach mistakenly requires appellate courts to police the slippery boundary between law and fact. And as in *Dupree*, a better alternative exists.

The key insight is that no issue is inherently one that does—or does not—entail legal work. The "legal interpretations" and "general guidance" that prompted Justice Breyer to select de novo review for the "ultimate"[27] fair use question do not stem from the fundamental nature of a particular issue; they stem from how the appellate court *decides* an appeal involving that issue. And deferential review has always allowed appellate courts to provide—independently—generalizable principles and guidance relating to a particular issue.[28] This Article argues for a universal standard of appellate review that does not fixate on characterizing the issues decided by the court below; rather, it focuses on how the appellate court chooses to decide the issue

18. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 2 (2021); *see infra* Section III.B.
19. *Google*, 593 U.S. at 24; *see infra* note 195 and accompanying text.
20. *Google*, 593 U.S. at 24; *see infra* notes 197–201 and accompanying text.
21. *Google*, 593 U.S. at 24.
22. *See infra* notes 211–17 and accompanying text.
23. *See infra* notes 218–25 and accompanying text.
24. *See infra* notes 261–72 and accompanying text.
25. *Google*, 593 U.S. at 24–25.
26. *Id.* at 23–24.
27. *Id.* at 24.
28. *See infra* notes 236–47 and accompanying text.

on its merits.[29] The appellate court may declare de novo any rules, tests, principles, or standards that govern a particular issue. But once that generalizable guidance has run out, there is no justification for giving appellate courts carte-blanche power to flip the result merely because it would have reached a different ultimate answer than the trial court. At that point, deference should be required. This deference is not absolute, of course. Reversal would be permitted, for example, if the appellate court identifies particular deficiencies in the trial court's reasoning or process.[30]

This Article proceeds in four Parts. Part I briefly summarizes the significance of the law–fact distinction in a variety of doctrinal contexts, along with a sampling of scholarly critiques. Part II turns to appellate issue preservation, examining the case law leading to the *Dupree* decision and the *Dupree* decision itself. It then analyzes what was right and wrong about the Court's reasoning in *Dupree* and argues for an alternative approach to issue preservation that does not depend on the law–fact distinction. Part III addresses the standard of appellate review, describing the Court's general framework for deciding whether a deferential standard is required and how the Court deployed that framework in *Google*. Although the ultimate result in *Google* was justified, the Court's heavy reliance on the law–fact distinction was misguided and placed unnecessary emphasis on a need for de novo review to clarify the law for future courts; this Part proposes a more coherent approach that avoids those shortcomings. Part IV explains how this Article's proposals regarding both issue preservation and appellate deference highlight the importance of appreciating the *outcomes* of decisions rather than seeking to characterize the *issues* that were decided.

I. A BRIEF HISTORY OF THE LAW–FACT DISTINCTION

The distinction between law and fact has been with us for centuries, informing a range of procedural and jurisdictional questions. It can affect which issues are decided by a jury and which issues are decided by a judge,[31] the relationship between courts and administrative agencies,[32] the relationship between appellate courts and trial courts,[33] federal habeas review of state

29. Although the *Google* case involved a jury verdict, this Article's proposal would apply regardless of whether the decision below is made by a judge or jury. *See infra* notes 277–79 and accompanying text. This Article will use the term "trial court" to cover decisions made by either a trial judge or a trial jury.

30. *See infra* notes 274–76 and accompanying text.

31. *See, e.g.*, Weiner, *The Civil Jury Trial*, *supra* note 2, at 1867.

32. *See, e.g.*, Ray A. Brown, *Fact and Law in Judicial Review*, 56 HARV. L. REV. 899, 900 (1943); *see also* CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 98–105 (1990).

33. *See, e.g.*, Weiner, *The Civil Nonjury Trial*, *supra* note 2, at 1021; *see also* FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). For a more detailed discussion of the law–fact

court criminal proceedings,[34] appellate jurisdiction over governmental immunity defenses,[35] judicial review of immigration removal orders,[36] the admissibility of certain kinds of evidence,[37] and the preclusive effects of judgments on subsequent litigation,[38] to name a few. Rule 52 of the Federal Rules of Civil Procedure—which governs federal bench trials—codifies the distinction explicitly, demanding that "the court must find the facts specially and state its conclusions of law separately."[39] The law–fact distinction was even on the minds of the Framers when they created the federal judiciary, with Article III of the Constitution providing that "the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact."[40]

It is no surprise, then, that the law–fact distinction has attracted considerable attention from scholars.[41] That attention, more often than not, has been quite critical. Commentators have written that the line between law and fact "has long caused perplexity,"[42] "that there is no logical distinction,"[43] and that "[t]he importance of the law–fact distinction is surpassed only by its mysteriousness."[44] They have called out "the illusion that there is a clear and easily discernible difference between propositions of law and propositions of fact,"[45] "the utter futility of the rough classification of questions as questions of law and of fact,"[46] and "[t]he naive assumption that law and fact stand naturally apart."[47] Judges, for their part, recognize these concerns. Even though the law–fact distinction is an established feature of various legal doctrines, the

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distinction's role in determining whether appellate review is deferential or de novo, see *infra* notes 165–79 and accompanying text.

34. *See* 28 U.S.C. § 2254(d)–(e); *see also* Thompson v. Keohane, 516 U.S. 99, 102 (1995) (applying the federal habeas statute).

35. *See* Johnson v. Jones, 515 U.S. 304, 307 (1995).

36. *See* 8 U.S.C. § 1252(a)(2)(D) (preserving judicial review of "questions of law" raised in immigration proceedings); *see also* Wilkinson v. Garland, 601 U.S. 209, 212 (2024) (applying this provision).

37. *See* Allen & Pardo, *supra* note 2, at 1789 (discussing the law–fact distinction's relevance to Federal Rule of Evidence 201).

38. *See, e.g.*, Montana v. United States, 440 U.S. 147, 162 (1979).

39. FED. R. CIV. P. 52(a)(1).

40. U.S. CONST. art. III, § 2, cl. 2.

41. *See* sources cited *supra* note 2.

42. Monaghan, *supra* note 2, at 232.

43. Cook, *supra* note 2, at 417; *see also* JOHN DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 55 (1927) ("In truth, the distinction between 'questions of law' and 'questions of fact' really gives little help in determining how far the courts will review; and for the good reason that there is no fixed distinction.").

44. Allen & Pardo, *supra* note 2, at 1769.

45. Isaacs, *supra* note 2, at 11.

46. *Id.*

47. Morris, *supra* note 2, at 1304; *see also* Weiner, *The Civil Jury Trial*, *supra* note 2, at 1867–68 ("None of these statutes . . . attempt[] to define what is meant by a question of law or a question of fact. Nor have the courts shown any inclination to fashion definitions which can serve as useful guidelines." (footnote omitted)).

jurists who must apply those doctrines regularly express doubts about its meaning and workability.[48]

This is not to say that the distinction is wholly incoherent. Recent Supreme Court precedent has recognized, for example, that the "legal test" for deciding any particular issue clearly presents a question of law.[49] Squarely in the factual category, by contrast, are "questions of who did what, when or where, how or why."[50] Such a "recital of external events" involves what the Court has called "basic, primary, or historical facts."[51]

The boundary quickly begins to blur, however. The Supreme Court has identified "mixed questions" of law and fact,[52] which ask "whether the rule of law as applied to the established facts is or is not violated,"[53] or "whether the historical facts found satisfy the legal test chosen."[54] And there are additional categories such as "constitutional fact[s],"[55] "legislative facts,"[56] or "social facts"[57]—which may require distinctive approaches depending on the particular function the law–fact distinction is called upon to perform.[58]

It is not the goal of this Article to provide an exhaustive account of the role of the law–fact distinction. The distinction has, however, played an especially prominent role with respect to appellate practice and procedure.[59] And it has continued to do so in the two recent Supreme Court decisions—*Dupree* and *Google*—that address issue preservation and appellate deference.

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48. *See, e.g.*, Miller v. Fenton, 474 U.S. 104, 113 (1985) ("[T]he appropriate methodology for distinguishing questions of fact from questions of law has been, to say the least, elusive."); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law."); Thompson v. Keohane, 516 U.S. 99, 110–11 (1995) ("[T]he proper characterization of a question as one of fact or law is sometimes slippery."); Artvale, Inc. v. Rugby Fabrics Corp., 363 F.2d 1002, 1005 (2d Cir. 1966) (Friendly, J.) ("The common approach seeking to dichotomize all decisions as either 'law' or 'fact' is too simplistic . . . .").

49. *E.g.*, U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC, 583 U.S. 387, 393–94 (2018).

50. *Id.* at 394.

51. *Thompson*, 516 U.S. at 110.

52. *U.S. Bank*, 583 U.S. at 395–96; *Thompson*, 516 U.S. at 110; *Pullman-Standard*, 456 U.S. at 290 n.19.

53. *Pullman-Standard*, 456 U.S. at 289–90 n.19.

54. *U.S. Bank*, 583 U.S. at 394.

55. *See* Monaghan, *supra* note 2, at 230–31.

56. *See generally* Robert E. Keeton, *Legislative Facts and Similar Things: Deciding Disputed Premise Facts*, 73 MINN. L. REV. 1 (1988) (analyzing courts' use of legislative and premise facts).

57. *See generally* Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013) (examining courts' approaches to social facts).

58. *See, e.g.*, Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 508 n.27 (1984) (discussing "questions of 'constitutional fact'"); Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 42–44 (2020) [hereinafter Steinman, *Rethinking*] (noting the judiciary's inconsistent treatment of "legislative facts" and "social facts").

59. *See supra* notes 33, 39 and accompanying text.

II. LAW, FACT, AND ISSUE PRESERVATION

The Court's 2023 decision in *Dupree* is the latest in a line of important Supreme Court cases on issue preservation. This Part first describes the doctrine and case law leading to *Dupree* and then summarizes the *Dupree* Court's reasoning.[60] Next, it critically analyzes Justice Barrett's opinion for the Court in *Dupree*, highlighting both its strengths and weaknesses.[61] It then proposes an alternative approach to issue preservation that avoids the pitfalls of *Dupree*'s reliance on the law–fact distinction.[62]

A. *BEFORE* DUPREE

In the line of recent Supreme Court cases on appellate issue preservation, the potential failure to preserve has been a party's failure to raise an issue in a motion for judgment as a matter of law under Rule 50. Some background on Rule 50, therefore, is helpful. Rule 50 allows the court, after "a party has been fully heard on an issue during a jury trial," to assess whether "a reasonable jury" would have "a legally sufficient evidentiary basis to find for the party on that issue."[63] If there is *not* a legally sufficient evidentiary basis, then the court may conclusively "resolve the issue against the party."[64] And if a particular claim or defense "can be maintained or defeated *only* with a favorable finding on that issue," then the court may render "judgment as a matter of law *against* the party on [that] claim or defense."[65]

Rule 50 also sets forth a two-step procedure parties must follow to invoke that provision. Under Rule 50(a), a party may move for judgment as a matter of law "at any time before the case is submitted to the jury."[66] If the court grants the motion at that point, then it will render judgment on the relevant claim or defense—the jury will not be asked to decide.[67] If the court denies the Rule 50(a) motion, however, Rule 50(b) permits the party seeking judgment as a matter of law to renew that motion after the jury's verdict.[68] If the jury ultimately decides *for* that party, then no post-verdict Rule 50(b)

60. *See infra* Sections II.A–.B.

61. *See infra* Sections II.C–.D.

62. *See infra* Section II.E. The final Section offers courts and litigants two practical suggestions to implement this Article's proposal. *See infra* Section II.F.

63. FED. R. CIV. P. 50(a)(1).

64. *Id.* at 50(a)(1)(A).

65. *Id.* at 50(a)(1)(B) (emphasis added).

66. *Id.* at 50(a)(2).

67. *See* JACK H. FRIEDENTHAL, ARTHUR R. MILLER, JOHN E. SEXTON, HELEN HERSHKOFF, ADAM N. STEINMAN & TROY A. MCKENZIE, CIVIL PROCEDURE: CASES AND MATERIALS 1111 (13th ed. 2022) ("Rule 50(a) permits the judge, after the witnesses have testified and the evidence has been presented, to withhold the case from the jury and instead to enter judgment as a matter of law . . . .").

68. FED. R. CIV. P. 50(b).

motion is necessary.[69] But if the jury decides *against* that party, the party may renew its preverdict motion and ask the court to override that verdict.[70]

Over time, the Supreme Court has imposed a number of issue-preservation requirements onto Rule 50's procedural structure. A party that wishes to make a post-verdict Rule 50(b) motion for judgment as a matter of law must first make a Rule 50(a) motion for judgment as a matter of law before the case is submitted to the jury.[71] The standard by which the trial court evaluates these motions is the same at each stage.[72] After all, the trial record itself does not change between the jury beginning its deliberation and rendering its verdict. But in terms of issue preservation, it has long been clear that a party must file a preverdict Rule 50(a) motion to preserve its right to seek judgment as a matter of law after the verdict is rendered.[73]

More recently, the Supreme Court has clarified other issue-preservation requirements for parties challenging jury verdicts in civil cases. In *Unitherm Food Systems, Inc. v. Swift-Eckrich, Inc.*, the defendant in an antitrust case believed that the evidence at trial was legally insufficient to support a liability verdict against it.[74] Prior to the case being submitted to the jury, the defendant filed a motion for judgment as a matter of law under Rule 50(a), arguing that the evidence was insufficient.[75] But after the court denied that motion and

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69. *See id.*

70. *Id.*

71. *See, e.g.*, 9B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2521, at 221–22 (3d ed. 2008) ("As a Rule 50(b) motion is merely a renewal of the preverdict motion, it only can be granted on the grounds raised in the earlier motion.").

72. *See id.* § 2524, at 233–34 ("[T]he standard in passing on that question is the same whether it arises in the procedural context of a motion for judgment as a matter of law prior to the submission of the case to the jury under Rule 50(a) or in the context of a renewed motion for judgment as a matter of law after the jury has returned a verdict under Rule 50(b)."). Even though the standards are the same, there are good reasons why a judge who denied a Rule 50(a) motion before the verdict might nonetheless grant a Rule 50(b) after the verdict is rendered. First, the jury may come back with a verdict for the party who filed the Rule 50(a) motion. If so, the judge who might have been inclined to compel a judgment for the moving party will not need to intervene, because the jury itself has reached the same conclusion. Second, a judge who grants a Rule 50(a) motion will thereby end the case without any jury verdict being returned. If that Rule 50(a) ruling is reversed on appeal, there will be no jury verdict to reinstate, and the only remedy will be an entirely new trial. *See generally id.* § 2533, at 517 ("[I]t usually is desirable to take a verdict, and then pass on the sufficiency of the evidence on a post-verdict motion.").

73. *See supra* note 71; *see also* Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321 (1967) ("This procedure is consistent with decisions of this Court rendered prior to the adoption of the Federal Rules in 1938."). Those earlier decisions to which the *Neely* Court referred suggest that this two-step structure may be necessary to comply with the Seventh Amendment. *See* Balt. & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657–59 (1935) (distinguishing Slocum v. N.Y. Life Ins. Co., 228 U.S. 364 (1913)). For a further discussion of the constitutional implications, see generally 9B WRIGHT & MILLER, *supra* note 71, § 2522, at 226–29.

74. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 398 (2006).

75. *Id.*

the jury returned a verdict for the plaintiff, the defendant failed to file a renewed motion for judgment as a matter of law under Rule 50(b).[76]

In a 7–2 ruling, the Court in *Unitherm* held that the defendant's failure to file a renewed post-verdict motion under Rule 50(b) prevented appellate review of whether the evidence was legally sufficient.[77] Accordingly, the appellate court could not order judgment for the defendant—which it would otherwise be entitled to do if the district court had incorrectly denied a post-verdict Rule 50(b) motion.[78] And the appellate court was likewise blocked from ordering a new trial based on the lack of legally sufficient evidence. Even though the defendant presented its argument regarding evidentiary insufficiency in its preverdict Rule 50(a) motion, it had failed to preserve that issue on appeal because it had not renewed the argument after the verdict.[79]

Five years later came *Ortiz v. Jordan*, a § 1983 civil rights case brought by a plaintiff who was sexually assaulted while incarcerated.[80] The defendants—two Ohio prison officials—moved for summary judgment based on qualified immunity.[81] The district court denied summary judgment, the case proceeded to trial, and the jury rendered verdicts for the plaintiff against both defendants.[82] As in *Unitherm*, the defendants moved for judgment as a matter of law under Rule 50(a)—prior to the jury's deliberation—but failed to renew that motion under Rule 50(b) after the jury's verdict.[83] The defendants in *Ortiz* had a different argument, however, than the defendant in *Unitherm*: The *Ortiz* defendants urged that, regardless of their failure to preserve the issue at trial, the appellate court could review the district court's pretrial denial of their summary-judgment motion.[84]

In a unanimous decision, the Supreme Court found that the summary-judgment denial could not be reviewed on appeal.[85] As Justice Ginsburg put

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76. *Id.* The defendant also failed to challenge the liability verdict in a motion for a new trial under Rule 59, although it did seek a new trial with respect to damages. *Id.* at 398 n.2.

77. *Id.* at 406–07.

78. *Id.* at 406 ("[T]he District Court's denial of respondent's preverdict motion cannot form the basis of respondent's appeal, because the denial of that motion was not error. It was merely an exercise of the District Court's discretion, in accordance with the text of the Rule and the accepted practice of permitting the jury to make an initial judgment about the sufficiency of the evidence.").

79. *Id.* at 405 ("The text of Rule 50(b) . . . provides that a district court may only order a new trial on the basis of issues raised in a preverdict Rule 50(a) motion when 'ruling on a renewed motion' under Rule 50(b). Accordingly, . . . [the district court] was without the power to do so under Rule 50(b) absent a postverdict motion pursuant to that Rule.").

80. Ortiz v. Jordan, 562 U.S. 180, 182 (2011).

81. *Id.* at 184, 187–89, 187 n.4.

82. *Id.* at 183, 188.

83. *Id.* at 192.

84. *Id.* at 187–89.

85. Justice Ginsburg authored the majority opinion on behalf of herself and five other justices. Justice Thomas authored a separate concurrence, which was joined by Justices Scalia and Kennedy. *See id.* at 181.

it in her majority opinion: "We granted review to decide a threshold question on which the [c]ircuits are split: May a party . . . appeal an order denying summary judgment after a full trial on the merits? Our answer is no."[86] She explained that "[o]nce the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion."[87] The qualified immunity issue "does not vanish" when the court denies a defendant's attempt to prevail on that defense at the summary-judgment phase.[88] It "remains available to the defending officials *at trial*," but it then "must be evaluated in light of the character and quality of the evidence" presented at the trial.[89]

The *Ortiz* Court did gesture toward a potential exception to the general rule barring appellate review of summary-judgment denials after a trial on the merits. Even if "[q]uestions going to the sufficiency of the evidence are not preserved for appellate review by a summary judgment motion alone,"[90] the defendants in *Ortiz* contended that their qualified immunity defense presented "a purely legal issue" and that pure legal issues *are* "preserved for appeal by an unsuccessful motion for summary judgment."[91] The Supreme Court in *Ortiz* declined, however, to resolve whether a route to appellate review existed for such legal issues, finding that the qualified immunity defense in that case hinged on disputed facts rather than "neat abstract issues of law."[92] But the discussion set the table for last term's Supreme Court decision in *Dupree*.[93]

B. THE DUPREE *DECISION*

Dupree v. Younger, like *Ortiz*, was a prisoner § 1983 case.[94] Kevin Younger alleged that he was subjected to unconstitutionally excessive force when he was attacked by corrections officers at a Maryland state prison.[95] The

86. *Id.* at 183–84 (citation omitted).

87. *Id.* at 184.

88. *Id.*

89. *Id.* (emphasis added); *see also id.* ("'[O]nce trial has been had,' . . . 'the availability of official immunity should be determined by the trial record, not the pleadings nor the summary judgment record.'" (alteration in original) (quoting 15A C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3914.10 (1992))).

90. *Id.* at 190.

91. *Id.*

92. *Id.* at 190–91 (quoting Johnson v. Jones, 515 U.S. 304, 317 (1995)).

93. For scholarship analyzing questions of issue preservation in the wake of *Ortiz*, see generally Jesse Leigh Jenike-Godshalk, *Appealed Denials and Denied Appeals: Finding a Middle Ground in the Appellate Review of Denials of Summary Judgment Following a Full Trial on the Merits*, 78 U. CIN. L. REV. 1595 (2010); Luke Meier, *The Reviewability of Denied* Twombly *Motions*, 84 U. CIN. L. REV. 1145 (2016); Bradley Scott Shannon, *Why Denials of Summary Judgment Should Be Appealable*, 80 TENN. L. REV. 45 (2012); and Joan Steinman, *The Puzzling Appeal of Summary Judgment Denials: When Are Such Denials Reviewable?*, 2014 MICH. ST. L. REV. 895.

94. Dupree v. Younger, 598 U.S. 729, 732 (2023).

95. *Id.* at 731.

defendant, Neil Dupree, moved for summary judgment on the grounds that Younger had not exhausted his administrative remedies.[96] The district court denied the motion, finding that "there was 'no dispute' that the Maryland prison system had internally investigated Younger's assault" and that "this inquiry satisfied Younger's exhaustion obligation."[97]

At trial, the jury returned a verdict awarding Younger $700,000 in damages.[98] Dupree presented no evidence during trial regarding his exhaustion defense, and he did not assert that defense in a Rule 50 motion.[99] On appeal, Dupree challenged the district court's denial of his summary-judgment motion, arguing that summary judgment was proper based on Younger's failure to exhaust administrative remedies.[100] Under Fourth Circuit precedent, however, Dupree's failure to file a Rule 50 motion regarding the alleged failure to exhaust foreclosed appellate review; the general rule from *Ortiz* applied "even when the issue is a purely legal one."[101] Enter the Supreme Court, which granted certiorari to resolve "a conflict among the Courts of Appeals over whether a purely legal challenge resolved at summary judgment must be renewed in a post-trial motion in order to preserve that challenge for appellate review."[102]

In a unanimous opinion by Justice Barrett, the Supreme Court began by recognizing the "general rule" that, on appeal from a final judgment, "claims of district court error at any stage of the litigation may be ventilated."[103] Although this usually allows appellate review of interlocutory district court rulings, some decisions "are unreviewable after final judgment because they are overcome by later developments in the litigation."[104] That notion explained *Ortiz*'s rule for denials of summary judgment on sufficiency-of-the-evidence grounds.[105] Such a summary-judgment motion, according to Justice Barrett, was a "[f]actual challenge[]"—and the parties will "develop and clarify"

96. *Id.* Although exhaustion of administrative remedies is not ordinarily required for § 1983 claims, see Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled in part by* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658 (1978), the Prison Litigation Reform Act ("PLRA") imposes an exhaustion requirement for claims like Younger's. 42 U.S.C. § 1997e(a).

97. *Dupree*, 598 U.S. at 732 (citing Younger v. Green, No. 16-3269, 2019 WL 6918491 (D. Md. Dec. 19, 2019)).

98. *Id.*

99. *Id.* Dupree did file a preverdict Rule 50(a) motion on another basis, but that motion was denied, and he did not renew the motion following the jury's verdict. *See id.*

100. *Id.* at 733; *see also* Younger v. Dupree, No. 21-6423, 2022 WL 738610, at *1 (4th Cir. Mar. 11, 2022) ("Dupree pursues a single issue on appeal: that the district court erred in rejecting his contention that Younger's lawsuit is barred because he failed to exhaust his available administrative remedies, as required by the Prison Litigation Reform Act . . . .").

101. *Dupree*, 598 U.S. at 733 (citing Varghese v. Honeywell Int'l, Inc., 424 F.3d 411, 422–23 (4th Cir. 2005)).

102. *Id.*; *see also id.* at 733 n.2 (citing conflicting decisions by the federal courts of appeals).

103. *Id.* at 734 (quoting Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996)).

104. *Id.*

105. *Id.* (citing Ortiz v. Jordan, 562 U.S. 180, 184 (2011)).

those facts "as the case progresses from summary judgment to a jury verdict."[106] Accordingly, "the full record developed in court supersedes the record existing at the time of the summary-judgment motion."[107] *Ortiz* forbids appellate review of the earlier denial of summary judgment because "after trial, a district court's assessment of the facts based on the summary-judgment record becomes 'ancient history.'"[108] Put another way: Once the case reaches trial, "a district court's factual rulings based on the obsolete summary-judgment record are useless."[109]

Dupree held that this same logic does not apply to appellate review of "pure questions of law resolved in an order denying summary judgment."[110] Justice Barrett defined those "purely legal issues" as ones "that can be resolved without reference to any disputed facts."[111] Such legal conclusions "are not 'supersede[d]' by later developments in the litigation."[112] Therefore, they "merge into the final judgment, at which point they are reviewable on appeal."[113]

Justice Barrett rejected the critique that an exception to *Ortiz* for pure legal issues would be problematic because of the long-running difficulty in distinguishing between factual and legal questions.[114] She wrote that this concern "overstates the need for a bright-line rule in this area," noting "the experience" of those circuits that had already recognized that exception for purely legal issues.[115] Interestingly, however, the Supreme Court declined to take on that challenge itself. While holding that "[t]he Fourth Circuit was wrong to hold that purely legal issues resolved at summary judgment must be renewed in a post-trial motion," the Supreme Court refused to decide whether the exhaustion issue raised by Dupree *was* "purely legal."[116] Instead, it ordered the Fourth Circuit to evaluate that question on remand.[117]

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106. *Id.*

107. *Id.* (quoting *Ortiz*, 562 U.S. at 184).

108. *Id.* (quoting Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc., 831 F.3d 815, 823–24 (7th Cir. 2016)).

109. *Id.* at 736.

110. *Id.* at 735 ("Younger urges us to extend *Ortiz*'s holding to cover pure questions of law resolved in an order denying summary judgment. We decline the invitation.").

111. *Id.*

112. *Id.* (alteration in original) (quoting *Ortiz*, 562 U.S. at 184).

113. *Id.* (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996)).

114. *Id.* at 737–38 ("Younger predicts that a separate preservation rule for legal issues will prove unworkable because the line between factual and legal questions can be 'vexing' for courts and litigants." (quoting Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982))); *see also supra* notes 41–48 and accompanying text (itemizing critiques of the law–fact distinction).

115. *Dupree*, 598 U.S. at 738.

116. *Id.*

117. *Id.* On remand, the Fourth Circuit ultimately decided that Dupree could appeal the summary-judgment ruling notwithstanding his failure to present his exhaustion argument in a post-trial motion, reasoning "that the PLRA exhaustion contention is indeed a purely legal issue." Younger v. Dupree, No. 21-6423, 2024 WL 3025121, at *2–3 (4th Cir. June 17, 2024) (citing Younger v. Crowder, 79 F.4th 373, 378–79 (4th Cir. 2023)).

C. *What* Dupree *Gets Right*

Much of the Court's reasoning in *Dupree* is sound. Some pretrial decisions become unreviewable on appeal because they are overcome by later proceedings in the district court. The summary-judgment denial in *Ortiz* is a perfect example of this. The paper record presented to the court at the summary-judgment phase is no longer dispositive once evidence and testimony are presented live at trial.

Another good example—which the reasoning of *Dupree* brings into greater clarity—is the denial of certain kinds of motions to dismiss under Rule 12(b)(6), particularly in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*[118] and *Ashcroft v. Iqbal*.[119] *Twombly* and *Iqbal* have invited greater scrutiny of the factual and evidentiary allegations in a plaintiff's complaint by empowering courts to assess whether the plaintiff's ultimate allegations regarding the defendant's conduct are sufficiently "plausible."[120] These decisions have been strongly criticized,[121] but the upshot for many litigants has been that motions to dismiss have come to resemble summary-judgment proceedings—albeit before the discovery process and without consideration of actual evidence and testimony.[122]

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118. *See generally* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

119. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009).

120. *Id.* at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting *Twombly*, 550 U.S. at 570)); *Twombly*, 550 U.S. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."). Although it is not clear that the reasoning of *Twombly* and *Iqbal* compel this heightened scrutiny, see, for example, Swanson v. Citibank, N.A., 614 F.3d 400, 404 (7th Cir. 2010); and Adam N. Steinman, *Notice Pleading in Exile*, 41 CARDOZO L. REV. 1057, 1071–80 (2020), empirical studies suggest that they have increased the likelihood of dismissals at the Rule 12(b)(6) phase. *See, e.g.*, Christina L. Boyd, David A. Hoffman, Zoran Obradovic & Kosta Ristovski, *Building a Taxonomy of Litigation: Clusters of Causes of Action in Federal Complaints*, 10 J. EMPIRICAL LEGAL STUD. 253, 254 (2013); Jonah B. Gelbach, *Locking the Doors to Discovery? Assessing the Effects of* Twombly *and* Iqbal *on Access to Discovery*, 121 YALE L.J. 2270, 2306–07 (2012).

121. *See, e.g.*, Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 831–50 (2010); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 18–53 (2010); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 528–36 (2010); Sheldon Whitehouse, *Restoring the Civil Jury's Role in the Structure of Our Government*, 55 WM. & MARY L. REV. 1241, 1260–61 (2014).

122. *See, e.g.*, Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 339 (2013) [hereinafter Miller, *Deformation*] ("[B]y empowering district judges to use subjective factors, such as judicial experience and common sense, and to evaluate possible innocent explanations for the defendant's conduct to determine plausibility, the motion to dismiss begins to merge with summary judgment . . . ."); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 LEWIS & CLARK L. REV. 15, 17 (2010) ("[T]he 12(b)(6) dismissal standard is converging with the standard for summary judgment.").

To illustrate the appealability question, suppose the district court *denies* a defendant's Rule 12(b)(6) motion to dismiss—because it finds that the plaintiff's allegations *are* sufficient to plausibly suggest a meritorious claim. If the case proceeds to a final judgment at trial and the defendant loses, can it appeal the earlier denial of its Rule 12(b)(6) motion on the basis that the allegations in the complaint were *not* sufficient under *Twombly* and *Iqbal*? All appellate courts to consider the question have rejected the argument.[123] Just as the summary-judgment record is effectively superseded by the trial record in the *Ortiz* context, the factual or evidentiary allegations in a plaintiff's complaint are effectively superseded by the facts and evidence that are uncovered through the discovery process and presented at trial. There is no reason for the appellate court to fly-speck the complaint once the discovery process has unearthed actual evidence. The concerns regarding the defendant receiving adequate notice at the pleading stage "dissipate" once the complaint's allegations "have been litigated and adjudicated in a full-blown trial."[124] If any concerns *do* exist with respect to the validity of the ultimate judgment, they must be examined through the lens of the trial record and asserted in compliance with Rule 50.

Dupree's encapsulation of *Ortiz* and its ramifications for the appealability of other pretrial rulings are commendable. The problem with *Dupree*—as the next Section will explain—is the Court's turn to the law–fact distinction.

D. WHAT DUPREE *GETS WRONG*

The core misstep of the Supreme Court's reasoning in *Dupree* is in framing the issue-preservation inquiry in terms of whether the court's pretrial ruling was "purely legal."[125] That move is problematic for a number of reasons. One is that, as the Court recognizes, the border between law and fact is difficult to demarcate.[126] More importantly, however, it is a mistake to hinge the availability of appellate review on whether a pretrial ruling was "purely legal." That inquiry is both overinclusive and underinclusive—potentially blocking appeals of pretrial rulings that should be reviewed and allowing appeals of pretrial rulings that should not.

123. *See, e.g.*, Carrizosa v. Chiquita Brands Int'l, Inc., 47 F.4th 1278, 1339 (11th Cir. 2022); Hisert *ex rel.* H2H Assocs., LLC v. Haschen, 980 F.3d 6, 8 (1st Cir. 2020); ClearOne Commc'ns, Inc. v. Biamp Sys., 653 F.3d 1163, 1172 (10th Cir. 2011); Bennett v. Pippin, 74 F.3d 578, 585 (5th Cir. 1996); Nolfi v. Ohio Ky. Oil Corp., 675 F.3d 538, 545 (6th Cir. 2012). *But see* Meier, *supra* note 93, at 1219 (arguing for appellate review of denied motions to dismiss regardless of the facts and evidence that are presented at later stages in the litigation).

124. Fin. Info. Techs., LLC v. iControl Sys., USA, LLC, 21 F.4th 1267, 1273 n.2 (11th Cir. 2021).

125. Dupree v. Younger, 598 U.S. 729, 731 (2023).

126. *Id.* at 737–38; *see also supra* notes 41–48 and accompanying text (summarizing critiques of the law–fact distinction).

1. Underinclusive

In *Dupree*, the Supreme Court remanded the case to assess whether the district court's summary-judgment ruling was—or was not—"purely legal."[127] And if it was not "purely legal," then *Ortiz* compelled the conclusion that Dupree's failure to raise the failure-to-exhaust defense in a Rule 50 motion at trial precluded appellate review. As explained below, however, a careful examination of what happened in *Dupree* suggests that appellate review should be available even if the district court's ruling was *not* purely legal. The district court's summary-judgment decision in *Dupree* was quite different from the district court's summary-judgment decision in *Ortiz*—and not because of the law–fact distinction. In *Ortiz*, the district court's denial of the prison official's qualified immunity defense left that issue to be resolved at trial.[128] But in *Dupree*, the district court's denial of Dupree's summary-judgment motion was effectively a partial *grant* of summary judgment *against* Dupree.[129] As the Supreme Court recognized, the district court "observed that there was 'no dispute' that the Maryland prison system had internally investigated Younger's assault" and that this internal investigation was sufficient to satisfy Younger's duty to exhaust.[130] That ruling was more than just a rejection of Dupree's argument that he should prevail on his exhaustion defense at the summary-judgment phase. It was a conclusive ruling that Dupree's exhaustion defense failed. Accordingly, it would have made no sense for Dupree to assert the exhaustion defense at trial (and then, perhaps, to file a Rule 50 motion arguing that the defense entitled him to judgment as a matter of law). The district court had already ruled—before trial—that his defense was without merit.

And yet, the Supreme Court's remand suggests that Dupree's failure to assert the defense at trial and to file a Rule 50 motion *would* preclude appellate review if the lower court's ruling on the exhaustion defense was *not* "purely legal." But why should that make a difference? Suppose the district court's summary-judgment ruling hinged on an issue of evidentiary sufficiency—say, that Dupree (who bore the burden of production with respect to any affirmative defense[131]) had failed to provide sufficient evidence that no internal investigation of the assault occurred. That ruling would be just as conclusive as one that is based on a "purely legal" issue. In either

127. *Dupree*, 598 U.S. at 731.

128. *See supra* notes 82–85 and accompanying text.

129. The Fourth Circuit recognized this aspect of the district court's ruling in a decision it issued after the Supreme Court's *Dupree* opinion. *See* Younger v. Crowder, 79 F.4th 373, 379 n.8 (4th Cir. 2023) ("[T]he district court effectively granted partial summary judgment to Younger.").

130. *Dupree*, 598 U.S. at 732 (quoting Younger v. Green, No. 16-3269, 2019 WL 6918491, at *10 (D. Md. Dec. 19, 2019)).

131. *See, e.g.*, Surles v. Andison, 678 F.3d 452, 455 (6th Cir. 2012) ("A prisoner's failure to exhaust his intra-prison administrative remedies prior to filing suit is an affirmative defense under the PLRA. . . . Accordingly, Defendants bore the burden of proof on exhaustion." (internal quotation marks, brackets, and citations omitted)).

situation, that summary-judgment ruling would be dispositive regarding the defense. Whether that ruling is right or wrong, there is no reason to require a reassertion of that issue at trial. It should not matter whether the district court's conclusive pretrial ruling against Dupree was based on a purely legal issue, evidentiary sufficiency, or something else.

A case like *Dupree* might have been different, of course, if the court's denial of summary judgment for Dupree was *not* conclusive on Dupree's exhaustion defense. Perhaps, for example, the district court denied the motion simply because it found that there *was* a genuine dispute regarding whether Younger had exhausted his administrative remedies. In that case, the denial of summary judgment would mean that a trial on the defense was necessary. Both sides could then present evidence regarding the exhaustion defense during trial, at which any genuine disputes can be properly resolved.[132] But so long as the district court's summary-judgment ruling conclusively resolves an issue, appellate review should be available regardless of where the ruling falls on the law–fact spectrum.

2. Overinclusive

The inquiry into whether a pretrial ruling was "purely legal" also has the potential to be overinclusive—allowing appellate review of precisely the kinds of issues that the Court in *Ortiz* correctly deemed to be waived unless properly raised at trial. Put another way, even purely legal pretrial rulings might still be superseded by later proceedings at trial. Indeed, the suggestion that "purely legal" issues and "evidentiary sufficiency" issues lie at opposite ends of a spectrum is mistaken. Evidentiary sufficiency can be governed by "purely legal" tests that apply with equal force at trial and summary judgment. When those purely legal rulings remain relevant to issues that will be adjudicated at trial, the imperative should remain for parties to assert those arguments as part of the trial process.

Consider the following example from the realm of employment discrimination law. Federal courts have disagreed about whether discrimination claims will *lack* a legally sufficient evidentiary basis if the plaintiff *fails* to provide evidence of a "comparator" employee who was treated more favorably.[133] And federal courts have disagreed about whether discrimination claims will

132. For some issues, a judge rather than a jury will be the ultimate decision-maker at trial. Indeed, a failure-to-exhaust defense like the one in *Dupree* might not be subject to a jury trial. *See generally* 9 WRIGHT & MILLER, *supra* note 71, § 2316, at 220 n.32 (noting authority holding that there is no jury right for such defenses). When a case involves some issues to be decided by a jury and others by the judge, a single trial may be held "with the jury rendering a verdict on the jury issues and the trial judge making findings on the nonjury issues." *Id.* § 2337, at 364.

133. *See, e.g.*, EEOC v. LHC Grp., Inc., 773 F.3d 688, 695 (5th Cir. 2014) (noting cases that require—and ones that do not require—evidence of an employee who was treated more favorably).

necessarily *have* a legally sufficient evidentiary basis if the plaintiff *does* provide evidence of a comparator employee who was treated more favorably.[134]

Both of these propositions—one that would dictate a conclusion that sufficient evidence exists, and one that would dictate a conclusion that sufficient evidence is lacking—involve "purely legal" issues as the *Dupree* Court defines them; their truth or falsity "can be resolved without reference to any disputed facts."[135] Yet each "purely legal" proposition helps to answer a question of evidentiary sufficiency. A district court judge who adopts the more plaintiff-friendly version of either proposition might, therefore, deny a defendant's motion for summary judgment based on that proposition. That ruling, however, would leave the ultimate question of an employer's discriminatory intent to be resolved at trial. That is, it would *not* conclusively resolve any issue in a way that would affect the course of the trial. It would fly in the face of *Ortiz* to conclude that a defendant who fails to challenge the sufficiency of the evidence at trial via Rule 50 may still appeal the earlier denial of its summary-judgment motion simply because a "purely legal" issue was involved.

E. A Better Approach to Issue Preservation

A sound framework for addressing the scenario presented in cases like *Dupree* and *Ortiz* should appreciate why it matters whether a party raises an issue through a motion at trial rather than solely at a pretrial phase, such as summary judgment. One foundational premise of our civil justice system is that trial is the gold standard for deciding the merits of issues on which the substantive right to a judicially enforceable remedy depends.[136] Whether the trial is by a jury or by a judge,[137] it is superior to pretrial devices like pleading motions or motions for summary judgment. A trial involves live testimony from witnesses, the cross-examination of those witnesses, and the opportunity to assess the weight and credibility of those witnesses in real time.[138] The

134. *Compare, e.g.*, Humphries v. CBOCS W., Inc., 474 F.3d 387, 406–07 (7th Cir. 2007) ("A single comparator will do; numerosity is not required."), *with* Almodovar v. Cross Fin. Corp., No. 20-cv-01179, 2022 WL 1810132, at *10 (D. Conn. June 2, 2022) ("[T]he weight of the authority in this Circuit suggests that a single comparator is not sufficient, absent anything more, to defeat summary judgment.").

135. *Dupree*, 598 U.S. at 735.

136. *E.g.*, Miller, *Deformation*, *supra* note 122, at 289–90 ("Philosophically, the gold standard of federal civil dispute resolution was a trial.").

137. *See infra* notes 212–14 and accompanying text (discussing when the Seventh Amendment guarantees a right to a jury trial).

138. *E.g.*, Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1133 (2003) ("[The] opportunity to present one's case in a complete and live format is absent in the pretrial context.").

"paper trial" that unfolds in the context of motions to dismiss or for summary judgment lacks these key features.[139]

This is not to reject entirely the value of such pretrial motions. Trials are costly, and motions to dismiss or for summary judgment—when properly used[140]—can gauge whether those costs are justified.[141] In the *Dupree* scenario, however, the costs of trial have already been incurred. At that point, it makes no sense to ignore that higher-quality proceeding (trial) because of a ruling made in connection with a lower-quality proceeding (a pretrial motion without live witness testimony). Accordingly, it is quite sensible that—as the Supreme Court itself has noted—the summary-judgment record is "obsolete" once a case reaches trial.[142] Issue-preservation rules can ensure that, for purposes of appeal, the relevant issues are evaluated through the lens of the higher-quality process of trial.

The law–fact distinction is a poor gatekeeper for serving this function. Rather, the inquiry should be whether the pretrial ruling was sufficiently conclusive to *remove* a particular issue from consideration at trial (whether by the judge or the jury). If the earlier district court decision conclusively resolved an issue that otherwise would have been presented and decided at trial, then it can be reviewed on appeal; there is no need to reassert the argument at trial or via a Rule 50 motion seeking judgment as a matter of law. But if the district court decision did not conclusively resolve the issue—meaning that the issue *will* be subject to adversarial testing at trial—then the issue-preservation framework should require the party to raise the issue in that context.

Dupree's mistake, in essence, was to reverse the relationship between the "purely legal" inquiry and the conclusiveness inquiry. A "purely legal" ruling may be more likely to lead to a conclusive ruling at the pretrial or summary-judgment stage because such a ruling is unlikely to leave any issues for the jury to resolve. Consider, for example, a defendant who seeks dismissal or summary judgment by arguing that the substantive law does not provide a private cause of action for a particular legal violation that the plaintiff

139. *E.g.*, *id.* at 1062–72 ("The frequently voiced and long-standing distrust of paper trials or trials by affidavit."). *But cf.* Mark Spottswood, *Live Hearings and Paper Trials*, 38 FLA. ST. U. L. REV. 827, 828 (2011) (extolling many of the virtues of live trials but recognizing some categories of cases for which a paper record is appropriate).

140. Although such pretrial motions can play a valid role, many scholars have expressed concern that they are overused, leading to the wrongful rejection of potentially meritorious claims. *See, e.g.*, Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 CORNELL L. REV. 193, 195–204 (2014); Miller, *Deformation*, *supra* note 122, at 310–12, 331–47; A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 366–71 (2010).

141. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (noting the role that summary judgment can play in securing "the just, speedy and inexpensive determination of every action" (quoting FED. R. CIV. P. 1)).

142. Dupree v. Younger, 598 U.S. 729, 736 (2023).

alleges.[143] If the court denies a pretrial motion making that argument, the practical consequence of that decision would be that the case would proceed to trial to determine whether the underlying legal violation occurred. But the trial would not address whether there *is* a cause of action for that violation, because the pretrial ruling was conclusive as to that particular issue. By contrast, a summary-judgment ruling that there is a genuine dispute about a potentially dispositive issue will likely *not* be conclusive. Such a decision is necessarily *in*conclusive, as it leaves for the jury (or the judge at a bench trial) the question of how to resolve the dispute.[144]

This Article's focus on conclusiveness is consonant with the notion that an earlier ruling will not be reviewable when it is "overcome" by later proceedings, as in a case like *Ortiz*. It states the point, however, from the opposite perspective. The trial evidence "overcomes" the summary-judgment record precisely because the summary-judgment ruling in a case like *Ortiz* does not *conclusively* resolve the issue. Therefore, the party must take steps during the trial—such as filing a Rule 50 motion—to preserve those arguments for appellate review.

F. A Brief Aside: Two Ways to Clarify Issue Preservation

To better implement an issue-preservation framework that is properly focused on the conclusiveness of the pretrial ruling, courts and litigants should pay greater attention to two areas that are sometimes overlooked. The first is to appreciate the limits of summary judgment, even as to issues for which no right to a jury trial exists. As explained earlier, the denial of summary judgment in *Dupree* was quite unusual as compared to the denial of summary judgment in *Ortiz*.[145] Typically—as in *Ortiz*—the denial of summary judgment means that the issue has *not* been resolved;[146] the motion is denied because there *is* a genuine dispute that must be resolved at trial. In *Dupree*, however, the district court's reasoning in denying the defendants' summary-judgment motion may have effectively been a partial grant of summary judgment in

143. *See, e.g.*, Industria De Alimentos Zenu S.A.S. v. Latinfood U.S. Corp., 679 F. Supp. 3d 53, 73 (D.N.J. 2023) (rejecting defendant's argument that the Inter American Convention for Trademark and Commercial Protection does not provide a private cause of action); Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 592 F. Supp. 3d 568, 587–78 (E.D. Tex. 2022) (rejecting defendant's argument that plaintiffs lacked a private cause of action to challenge the constitutionality of a statute limiting the President's ability to remove certain executive officers), *rev'd and remanded on other grounds*, 91 F.4th 342 (5th Cir. 2024); Hand v. Beach Ent. KC, LLC, 456 F. Supp. 3d 1099, 1125 (W.D. Mo. 2020) (rejecting defendants' argument that plaintiff lacked a private right of action for violations of federal regulations under the Telephone Consumer Protection Act).

144. The same logic applies to a district court's denial of a Rule 12(b)(6) motion to dismiss. *See supra* notes 118–24 and accompanying text. That ruling leaves the merits of the claims that were targeted by the motion to later evidentiary development and testing via summary judgment or trial.

145. *See supra* notes 127–31 and accompanying text.

146. *See supra* notes 85–89 and accompanying text.

favor of the plaintiff—even though the plaintiff had never moved for such a partial judgment.[147]

It may be that a partial grant of summary judgment was entirely appropriate for the exhaustion defense in *Dupree*. If, as the record indicated, there was "no dispute" regarding the prison's internal investigation of the assault[148]—and such an investigation was sufficient to comply with the PLRA's exhaustion requirement—then the standard for summary judgment would have been met, and there would be no need for a trial. But then it should be the *plaintiff* moving for partial summary judgment regarding the defense.[149]

One possible explanation for the district court's approach may be the mistaken assumption that summary judgment is *always* an appropriate mechanism to resolve issues for which there is no right to a jury trial.[150] Indeed, the prevailing view is that the Seventh Amendment does not apply to a defendant's exhaustion defense under the PLRA.[151] But this is a misuse of summary judgment. The "genuine dispute" standard in Federal Rule of Civil Procedure 56 applies regardless of whether the ultimate decision-maker at trial would be the judge or a jury.[152] Even when there is no right to a jury trial for a particular issue, the judge should adjudicate the merits of disputed matters like exhaustion through a bench trial.[153]

Potentially, then, the district court judge in *Dupree* might have resolved the exhaustion defense via a bench trial *prior to* the jury trial on the substance

147. *See supra* notes 129–31 and accompanying text (describing the district court's summary-judgment ruling in *Dupree*).

148. *See supra* note 97 and accompanying text.

149. The federal rules do authorize a court to grant summary judgment in favor of the party who opposed the summary-judgment motion, although it requires the court to provide "notice and a reasonable opportunity to respond." FED. R. CIV. P. 56(f)(1) ("After giving notice and a reasonable time to respond, the court may . . . grant summary judgment for a nonmovant.").

150. *See, e.g.*, Patton v. MFS/Sun Life Fin. Distribs., Inc., 480 F.3d 478, 484 (7th Cir. 2007) (discussing the role of summary judgment in ERISA cases for which no jury trial right exists).

151. *See supra* note 132; *cf.* Richards v. Perttu, 96 F.4th 911, 920, 923 (6th Cir. 2024) (recognizing the general rule that "[a] judge, rather than a jury, can ordinarily decide disputed facts with regard to the PLRA's [exhaustion] requirement," but deciding as a matter of first impression that a jury trial is required if "resolution of the exhaustion issue under the PLRA would also resolve a genuine dispute of material fact regarding the merits of the plaintiff's substantive case"), *cert. granted*, No. 23-1324, 2024 WL 4394132 (Oct. 4, 2024) (mem.).

152. *See* FED. R. CIV. P. 56(a) (making no distinction between cases for which a right to a jury trial exists and those for which it does not). Rule 50, by contrast, applies only to issues that are "heard . . . during a jury trial." FED. R. CIV. P. 50(a)(1).

153. *See, e.g.*, O'Hara v. Nat'l Union Fire Ins. Co. of Pittsburgh, 642 F.3d 110, 116 (2d Cir. 2011) ("Although there is no right to a jury trial in a suit brought to recover ERISA benefits, and thus the district court would have been the factfinder at trial, the district court's task on a summary judgment motion—even in a nonjury case—is to determine whether genuine issues of material fact exist for trial, not to make findings of fact." (citation omitted)); *see also* Tekmen v. Reliance Standard Life Ins. Co., 55 F.4th 951, 961 (4th Cir. 2022) ("The Federal Rules of Civil Procedure already provide a mechanism for district courts to resolve disputed facts and render a judgment, and that mechanism was employed by the district court here: a Rule 52 bench trial. We see no reason to contort the traditional summary-judgment analysis to fill a nonexistent procedural void.").

of the plaintiff's constitutional claims.[154] That would have clarified the conclusive nature of the judge's rejection of the exhaustion defense, making it unnecessary for the defendants to reassert that defense through a Rule 50 motion at the close of the jury trial. And it would have eliminated the uncertainty inherent in the odd posture of *Dupree*, by which the district court may have buried a conclusive rejection of a defense in a *denial* of summary judgment.

A second insight that can facilitate the issue-preservation inquiry this Article proposes involves Federal Rule of Civil Procedure 16, which governs pretrial orders in federal civil litigation.[155] Rule 16 empowers the district court to hold pretrial conferences and, following any such conference, to issue a pretrial order that "controls the course of the action unless the court modifies it."[156] This includes a "final pretrial conference," at which the court may "formulate a trial plan."[157] The underlying policy is to "limit[] the trial to those issues that are actually in dispute."[158] And the court can require the parties to file a memorandum or statement in connection with the conference that reveals "the issues counsel believes are in contention."[159]

Thus, Rule 16 provides a ready mechanism to confirm—prior to trial—whether certain issues have been conclusively resolved based on some pretrial action (such as a summary-judgment motion). If so, then it will be clear that the party aggrieved by that resolution will not need to reassert that argument either during the course of the trial or via a Rule 50 motion.[160] That inquiry will be dispositive, regardless of whether or not that pretrial ruling was based on "purely legal" grounds (as *Dupree* suggested).

In *Dupree* itself, the Rule 16 process could have clarified whether the district court's summary-judgment ruling conclusively resolved the failure-to-exhaust defense. Whatever uncertainty may have flowed from the fact that the court made that decision in the context of a ruling denying summary judgment could be eliminated by a pretrial order on that point. If the trial plan revealed that the failure-to-exhaust defense remained to be resolved at

154. *See* FED. R. CIV. P. 42(b) ("For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims."). When the Constitution guarantees a jury trial right as to some issues, a bifurcated trial plan must ensure that the result of the bench trial will not have preclusive effect regarding issues that the jury must decide. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 508–11 (1959); 9 WRIGHT & MILLER, *supra* note 71, § 2302.1, at 28–32 (discussing *Beacon Theatres*).

155. FED. R. CIV. P. 16.

156. *Id.* at 16(d).

157. *Id.* at 16(e).

158. 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1527, at 380 (3d ed. 2010).

159. *Id.* § 1524, at 344.

160. *See supra* notes 63–70 and accompanying text (describing Rule 50's procedure for seeking judgment as a matter of law both before the jury begins to deliberate and after the jury renders its verdict).

trial, then it would be clear that the defendants must take the steps required by Rule 50 to preserve the issue for appellate review.

III. LAW, FACT, AND APPELLATE DEFERENCE

Another important aspect of appellate practice that has found itself on the Supreme Court's front burner is how to select and apply the standard of appellate review for particular issues. The high-stakes litigation between Google and Oracle was noteworthy for a host of reasons. Many of these reasons are specific to technology and intellectual property law.[161] But a key part of the Supreme Court's decision in the case is the guidance the Court provided on standards of appellate review. The *Google* decision is the latest in a line of Supreme Court cases on this topic, and it again places great emphasis on the distinction between questions of law and questions of fact.

This Part argues that *Google* highlights even more clearly than its predecessors the pitfalls, downsides, and shortcomings of the current approach. It first sets forth the Supreme Court's general framework for standards of appellate review and describes how the Court deployed that approach in *Google*.[162] It then examines the positive and negative aspects of Justice Breyer's reasoning for the *Google* majority.[163] Finally, it urges a universal approach to appellate review that dispenses with the need to characterize the issues being reviewed as "legal" or "factual."[164]

A. CHOOSING THE STANDARD OF APPELLATE REVIEW

A key threshold question for any appeal is whether the appellate court may review the issue on appeal de novo—that is, independently of how the issue was decided below—or must review that issue with deference to how that issue was resolved by the trial judge or jury.[165] The Supreme Court has devoted

161. *See, e.g.*, Peter S. Menell, *Rise of the API Copyright Dead?: An Updated Epitaph for Copyright Protection of Network and Functional Features of Computer Software*, 31 HARV. J.L. & TECH. 305, 307 (2018); Pamela Samuelson, *Functionality and Expression in Computer Programs: Refining the Tests for Software Copyright Infringement*, 31 BERKELEY TECH. L.J. 1215, 1252–58 (2016); Nick Wingfield & Quentin Hardy, *Google Prevails as Jury Rebuffs Oracle in Code Copyright Case*, N.Y. TIMES (May 26, 2016), https://www.nytimes.com/2016/05/27/technology/google-oracle-copyright-code.html (on file with the *Iowa Law Review*).

162. *See infra* Sections III.A–.B.

163. *See infra* Sections III.C–.D.

164. *See infra* Section III.E.

165. There are a range of "verbal formulas" for such deferential review—including "clearly erroneous, abuse of discretion, substantial evidence, arbitrary and capricious, some evidence, reasonable basis, presumed correct, and maybe others." United States v. Boyd, 55 F.3d 239, 242 (7th Cir. 1995) (Posner, J.). There may be gradations among these deferential standards, although some have suggested that "there are operationally only two degrees of review, plenary (that is, no deference given to the tribunal being reviewed) and deferential." *Id.* For scholarly discussions of how courts select and apply standards of appellate review, see, for example, Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 48–51, 62–77 (2000); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 748–54, 762–73 (1982);

considerable attention in recent decades to selecting the standard of appellate review for particular issues.[166] In some cases, the standard of review has been gleaned by various tools of interpretation, with the governing rules, statutes, or constitutional provisions dictating (or implying[167]) an intended standard.[168] In most cases, however, the Court has relied on its own judicially-created framework.

One particularly influential restatement of the Court's approach appeared in Justice Kagan's majority opinion for a unanimous Court in *U.S. Bank National Association v. Village at Lakeridge, LLC*.[169] Justice Kagan's *U.S. Bank* opinion noted that any lower court ruling may have three components: "the first purely legal, the next purely factual, the last a combination of the other two."[170] In the first category is the "legal test" or "standard" that governs the issue.[171] That presents an "unalloyed legal . . . question[]" that is reviewed de novo, "without the slightest deference."[172] The second category comprises questions of "'basic' or 'historical' fact"—that is, "who did what, when or where, how or why."[173] They are subject to deferential review.[174] The third—and most uncertain—category

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Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 250–66 (1991); Monaghan, *supra* note 2, at 229–39; Chad M. Oldfather, *Universal De Novo Review*, 77 GEO. WASH. L. REV. 308, 312–38 (2009); Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 183–93, 206–18; Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 645–54, 660–65 (1971); Steinman, *Rethinking*, *supra* note 58, at 4–8; and Kenji Yoshino, *Appellate Deference in the Age of Facts*, 58 WM. & MARY L. REV. 251, 255–65 (2016).

166. *See, e.g.*, Monasky v. Taglieri, 589 U.S. 68, 83–84 (2020); U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC, 583 U.S. 387, 393–98 (2018); McLane Co. v. EEOC, 581 U.S. 72, 79–85 (2017); Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93, 107–10 (2016); Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 324–29 (2015); Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563–64 (2014); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 431–40 (2001); United States v. Bajakajian, 524 U.S. 321, 336–37 & n.10 (1998); Gasperini v. Ctr. for Humans., Inc., 518 U.S. 415, 435 (1996); Ornelas v. United States, 517 U.S. 690, 695–700 (1996); Elder v. Holloway, 510 U.S. 510, 516 (1994); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 403–05 (1990); Salve Regina Coll. v. Russell, 499 U.S. 225, 231–39 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279–80 (1989); Pierce v. Underwood, 487 U.S. 552, 557–63 (1988).

167. *See, e.g.*, *Highmark*, 572 U.S. at 564 ("[T]he text of the statute 'emphasizes the fact that the determination is for the district court,' which 'suggests some deference to the district court upon appeal.'" (quoting *Pierce*, 487 U.S. at 559)).

168. *See, e.g.*, FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous."). The Supreme Court has also interpreted the Seventh Amendment to require deferential appellate review of a trial court's denial of a motion for a new trial based on an excessive verdict. *Gasperini*, 518 U.S. at 435.

169. *U.S. Bank*, 583 U.S. at 388.

170. *Id.* at 393.

171. *Id.*

172. *Id.*

173. *Id.* at 394.

174. *Id.*

is "the so-called 'mixed question' of law and fact."[175] Such mixed questions target "whether the historical facts found satisfy the legal test chosen."[176]

To select the standard of appellate review for a particular mixed question of law and fact, the Court's approach doubles down on the law–fact distinction; the standard of review hinges on whether answering the mixed question "entails primarily legal or factual work."[177] If the mixed question "require[s] courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard," then the appellate court should typically apply de novo review.[178] Deference is required, by contrast, when the "mixed question[] immerse[s] courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address . . . 'multifarious, fleeting, special, narrow facts that utterly resist generalization.'"[179]

The Supreme Court has repeatedly been asked to select the standard of appellate review for mixed questions of law and fact. Over the last decade, on a wide range of issues, the Court has typically found that deferential review was required.[180] The recent *Google* decision is notable not only because it is the Court's most recent foray into this doctrinal framework, but also because it is the first case in decades to select de novo review for the question at issue. In doing so, however, *Google* highlighted important shortcomings with an approach that places such great weight on the law–fact distinction.

B. THE GOOGLE *DECISION*

In *Google LLC v. Oracle America, Inc.*, the Supreme Court was called upon to decide the standard of appellate review for whether a party's use of

175. *Id.*

176. *Id.*

177. *Id.* at 396; *see also* Monasky v. Taglieri, 589 U.S. 68, 83–84 (2020) (quoting *U.S. Bank*, 583 U.S. at 396).

178. *U.S. Bank*, 583 U.S. at 396.

179. *Id.* (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)). This quotation derives from the work of Professor Maurice Rosenberg. *See Pierce*, 487 U.S. at 561–62 (quoting Rosenberg, *supra* note 165, at 662).

180. *See Monasky*, 589 U.S. at 83–84 (requiring a clear-error standard of review for where a child's "habitual residence" is for purposes of the Hague Convention on the Civil Aspects of International Child Abduction); *U.S. Bank*, 583 U.S. at 393–98 (requiring a clear-error standard of review for whether a creditor is a nonstatutory insider for purposes of the Bankruptcy Code); McLane Co. v. EEOC, 581 U.S. 72, 79 (2017) (requiring an abuse-of-discretion standard of review for whether to enforce a subpoena from the Equal Employment Opportunity Commission); Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93, 107–08 (2016) (requiring an abuse-of-discretion standard of review for whether to award enhanced damages in a patent case); Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 326–28 (2015) (requiring a clear-error standard of review for subsidiary factual matters made during patent construction); Highmark Inc. v. Allcare Health Mgmt. Sys., Inc., 572 U.S. 559, 563–64 (2014) (requiring an abuse-of-discretion standard of review for whether to award attorney fees under section 285 of the Patent Act).

copyrighted information constituted "fair use."[181] The Oracle–Google litigation involved Oracle's copyright in a computer program, Java SE, that was developed by Sun Microsystems (Oracle's predecessor) and used Sun's Java programming language.[182] Google had copied "roughly 11,500 lines of code from the Java SE program" as part of Google's Application Programming Interface ("API") for Google's Android smartphones.[183] Google's purported goal was to allow "millions of programmers, familiar with Java, to be able easily to work with its new Android platform" in developing applications for Android phones.[184]

One of Google's defenses to Oracle's copyright claim was that this constituted "fair use" of Oracle's copyrighted material.[185] The litigation lasted more than a decade, with multiple rounds of trials and appeals.[186] Eventually, the jury rendered a verdict for Google, finding that Google had shown fair use.[187] The Federal Circuit reversed the jury's fair use verdict and remanded for a trial on damages.[188] But the Supreme Court granted Google's petition for certiorari,[189] ultimately reversing the Federal Circuit and ruling in favor of Google on its fair use defense.[190]

Writing for a six-justice majority,[191] Justice Breyer began by recognizing that fair use is "a mixed question of law and fact."[192] Consistent with Justice Kagan's guidance in *U.S. Bank*, he noted that "a reviewing court should try to break such a question into its separate factual and legal parts," reviewing factual issues with deference and legal issues de novo.[193] Then, when the issue

181. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 6–7 (2021).

182. *Id.* at 6–8.

183. *Id.* at 8–9.

184. *Id.* at 9.

185. Google also argued that the portion of code it used was not copyrightable. *See id.* at 6–7. The Supreme Court did not address that issue in its decision. *Id.* at 20 ("We shall assume, but purely for argument's sake, that the entire Sun Java API falls within the definition of that which can be copyrighted.").

186. *See id.* at 14 ("The case has a complex and lengthy history."); *see also id.* at 14–16 (summarizing the litigation).

187. *Id.* at 16 ("The court instructed the jury to answer one question: Has Google 'shown by a preponderance of the evidence that its use in Android' of the declaring code and organizational structure contained in the 37 Sun Java API packages that it copied 'constitutes a "fair use" under the Copyright Act?' After three days of deliberation the jury answered the question in the affirmative.").

188. *See id.*

189. *Id.*

190. *See id.* at 40 ("Google's copying of the Sun Java API was a fair use of that material as a matter of law. The Federal Circuit's contrary judgment is reversed, and the case is remanded for further proceedings in conformity with this opinion.").

191. Justice Thomas authored a dissenting opinion, which was joined by Justice Alito. *See id.* at 43 (Thomas, J., dissenting). Justice Barrett did not participate in the decision.

192. *Id.* at 24 (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985)).

193. *Id.*; *see also* U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC, 583 U.S. 387, 393 (2018) (noting that a decision may comprise "three kinds of issues—the first purely legal, the next purely factual, the last a combination of the other two. And to assess the

"can be reduced no further,"[194] the ultimate standard of review should be selected based on whether answering the mixed question "entails primarily legal or factual work."[195]

Justice Breyer concluded that the "ultimate 'fair use' question" should be reviewed de novo because it "primarily involves legal work."[196] He noted that previous Supreme Court decisions in copyright cases "provide legal interpretations of the fair use provision" and that "those interpretations provide general guidance for future cases."[197] More specifically, Justice Breyer pointed to Supreme Court decisions "describing kinds of market harms that are not the concern of copyright,"[198] clarifying that the "scope of fair use is narrower with respect to unpublished works,"[199] and indicating that "wholesale copying aimed at creating a market substitute is presumptively unfair."[200] He concluded that "[t]his type of work is legal work," citing *U.S. Bank*'s instruction that de novo review is appropriate "[w]hen applying the law involves developing auxiliary legal principles for use in other cases."[201]

Before moving on, however, Justice Breyer emphasized once again the need to identify "subsidiary factual questions" that might be relevant to that ultimate fair use determination.[202] Those factual questions could include, for example, "'whether there was harm to the actual or potential markets for the copyrighted work' or 'how much of the copyrighted work was copied.'"[203] Even if de novo review applied to the "ultimate" question of fair use, the reviewing court must defer to the jury's findings of those underlying facts.[204]

The obligation to review subsidiary facts deferentially played a crucial role in the Supreme Court's assessment of fair use in *Google*. In stating the majority's conclusion, Justice Breyer writes that "where Google reimplemented a user interface, taking only what was needed to allow users to put their

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judge's decision, an appellate court must consider all its component parts, each under the appropriate standard of review").

194. *Google*, 593 U.S. at 24.

195. *Id.* (quoting *U.S. Bank*, 583 U.S. at 396).

196. *Id.* The dissenting Justices appeared to agree with the majority on this issue. *See id.* at 49–50 (Thomas, J., dissenting) (deploying a de novo standard).

197. *Id.* at 24.

198. *Id.* (citing Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 592–93 (1994)).

199. *Id.* (quoting Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985)).

200. *Id.* (citing Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984)).

201. *Id.* (quoting U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC, 583 U.S. 387, 396 (2018)).

202. *Id.*

203. *Id.* (quoting Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1196 (Fed. Cir. 2018)).

204. *Id.* at 23–24 (agreeing with the Federal Circuit's reasoning that "reviewing courts should appropriately defer to the jury's findings of underlying facts"); *id.* at 24–25 (noting that an appellate court, under "the fact/law principles we set forth in *U.S. Bank*," must "leav[e] factual determinations to the jury"). Justice Breyer reasoned that the deference required for such factual findings meant that appellate review was consistent with the Reexamination Clause of the Seventh Amendment. *Id.* at 25 ("The Reexamination Clause is no bar here.").

accrued talents to work in a new and transformative program, Google's copying of the Sun Java API was a fair use of that material as a matter of law."[205] One of the key premises in this statement—that Google had taken "only what was needed to allow users to put their accrued talents to work"—comes directly from the Court's deference to a factual finding that it found to be implicit in the jury's verdict. As Justice Breyer explained:

> Google's basic objective was not simply to make the Java programming language usable on its Android systems. It was to permit programmers to make use of their knowledge and experience using the Sun Java API when they wrote new programs for smartphones with the Android platform. In principle, Google might have created its own, different system of declaring code. But *the jury could have found* that its doing so would not have achieved that basic objective.[206]

In the end, then, the Supreme Court's ostensibly "de novo" review of the jury's fair use verdict hinged in large part on its need to defer to a purportedly factual finding, which the Court found was *implicit* in the jury's verdict.[207] The *Google* decision, therefore, is significant not only for what it says about selecting the standard of appellate review, but also for what it says about how such standards are applied. As the next two Sections will explain, its handling of these issues is correct in some ways but misguided in others.

C. *WHAT* GOOGLE *GETS RIGHT*

As argued in greater detail below, the Supreme Court's top-line declaration that "the ultimate 'fair use' question"[208] should be reviewed de novo is problematic.[209] In its actual analysis, however, the Court's affirmance of the jury's fair use verdict showed considerable deference to findings that the jury could reasonably have made in reaching that verdict.[210] That deference was justified in light of the jury's central role in our civil justice system,[211] as enshrined in both the Seventh Amendment and the governing Federal Rules of Civil Procedure.

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205. *Id.* at 40.

206. *Id.* at 34–35 (emphasis added).

207. *See infra* notes 229–34 and accompanying text.

208. *Google*, 593 U.S. at 24.

209. *See infra* Section III.D.2.

210. *See supra* notes 202–07 and accompanying text.

211. *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–89 (1991) (describing founding era views of the civil and criminal jury); Alexandra D. Lahav, *The Jury and Participatory Democracy*, 55 WM. & MARY L. REV. 1029, 1030 (2014) ("Our constitutional legacy and collective self-understanding has included a place for citizen adjudicators."); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 381 (1982) (stating that "those who drafted the Constitution" sought "to vest substantial adjudicatory power in the people" by giving "a principal role to the jury in both civil and criminal trials" (footnotes omitted)).

The Seventh Amendment governs both the right to have a jury trial and the ability of judges to displace a jury's verdict once rendered. It provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.[212]

Because the text of the Seventh Amendment "preserve[s]" the jury right that existed at common law, the Supreme Court has endorsed a "historical test" for determining what the Seventh Amendment demands.[213] Thus, the Seventh Amendment looks to the jury trial right that existed under the English common law in 1791, when the Seventh Amendment was adopted.[214]

With respect to judicial review of jury verdicts, the Supreme Court has read the relevant historical reference points to permit some displacement of jury verdicts.[215] But courts must show significant deference to the jury's decision before doing so. The Seventh Amendment permits a party only "to challenge the legal sufficiency of the opposing case,"[216] and the judge must

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212. U.S. CONST. amend. VII.

213. Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996) (noting the Court's "longstanding adherence to this 'historical test'" (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 640–43 (1973))).

214. *See, e.g.*, Curtis v. Loether, 415 U.S. 189, 193 (1974) ("[T]he thrust of the Amendment was to preserve the right to jury trial as it existed in 1791 . . . ."). Some have argued that the Seventh Amendment's historical test does not guarantee a jury trial on the issue of copyright fair use. Earlier in the *Google* litigation, the Federal Circuit suggested as much, criticizing courts that "have continued to accept the fact that the question of fair use may go to a jury." Oracle Am., Inc. v. Google LLC, 886 F.3d 1179, 1194 (Fed. Cir. 2018). Neither Google nor Oracle, however, objected to a jury deciding Google's fair use defense. *Id.* at 1195 ("[A]ll aspects of Google's fair use defense went to the jury with neither party arguing that it should not."). The Supreme Court's *Google* decision did not conclusively resolve whether the Seventh Amendment applies to copyright fair use, and it gave somewhat mixed signals. Justice Breyer did state that Google was *not* "correct that 'the right of trial by jury' includes the right to have a jury resolve a fair use defense," noting that the Supreme Court has described contemporary fair use doctrine "as an 'equitable,' not a 'legal,' doctrine." Google LLC v. Oracle Am., Inc., 593 U.S. 1, 25 (2021). Although this reasoning could support the view that there is no right to a jury trial on copyright fair use, Justice Breyer's ultimate conclusion was merely this: "We have found no case suggesting that application of *U.S. Bank* here would fail 'to preserve the substance of the common-law [jury trial] right as it existed in 1791.'" *Id.* (quoting *Markman*, 517 U.S. at 376). Applying the *U.S. Bank* framework for appellate review of fair use decisions is not fundamentally inconsistent with a right to have a jury—rather than a trial judge—decide fair use in the first instance.

215. *See, e.g.*, Galloway v. United States, 319 U.S. 372, 389 (1943) ("If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."). *But see* Suja A. Thomas, *Why Summary Judgment Is Unconstitutional*, 93 VA. L. REV. 139, 166–73 (2007) (criticizing the Supreme Court's rationale for upholding the constitutionality of judgment as a matter of law).

216. *Galloway*, 319 U.S. at 393.

make "due allowance for all reasonably possible inferences favoring the party whose case is attacked."[217]

This deference is also codified in Rule 50. A judge may displace a jury's verdict only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[218] This standard demands significant deference to the jury's role in our civil justice system.[219] As long as a "reasonable jury" could make a particular finding, the judge cannot override that determination. In clarifying this notion, the Supreme Court has explained that "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[220] The judge "must view the evidence most favorably to the party against whom the motion for judgment as a matter of law is made."[221]

Thus, the deference required by Rule 50 aligns with the deference required by the Seventh Amendment because it tests only the legal sufficiency of the evidence and requires the judge to sustain any verdict that is reasonable in light of that evidence.[222] "The fundamental principle is that there must be a minimum of judicial interference with the proper functioning and legitimate province of the jury."[223]

The deference Rule 50 requires when a trial judge considers displacing a jury's verdict applies with equal force to appellate courts. After a jury trial, the appellate court is not reviewing the jury's verdict directly. Rather, it is reviewing the trial judge's ruling on the verdict-loser's Rule 50 motion for

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217. *Id.* at 395; *see also, e.g.*, Connelly v. County of Rockland, 61 F.4th 322, 325 (2d Cir. 2023) ("When deciding a Rule 50 motion, the district court must view the evidence in a light most favorable to the nonmovant and grant that party every reasonable inference that the jury might have drawn in its favor." (brackets and internal quotation marks omitted)).

218. FED. R. CIV. P. 50(a)(1). As explained *supra* notes 66–70 and accompanying text, the judge may grant judgment as a matter of law either before submitting the case to the jury or after the jury renders its verdict (if the jury decides against the moving party). *See* FED. R. CIV. P. 50(a)(2), (b).

219. 9B WRIGHT & MILLER, *supra* note 71, § 2524, at 248 (noting that judgment as a matter of law "deprives the party opposing the motion of a determination of the facts by a jury" and therefore "is to be granted cautiously and sparingly by the trial judge").

220. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).

221. 9B WRIGHT & MILLER, *supra* note 71, § 2524, at 298, 306.

222. *See* Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321 (1967) ("[I]t is settled that Rule 50(b) does not violate the Seventh Amendment's guarantee of a jury trial."); Galloway v. United States, 319 U.S. 372, 393 (1943) (holding that the Seventh Amendment does not deprive litigants of "the right to challenge the legal sufficiency of the opposing case"); 9B WRIGHT & MILLER, *supra* note 71, § 2522, at 226 ("[T]he standard for a judgment as a matter of law only deprives the losing party of the possibility of an unreasonable verdict, a possibility not protected by the Constitution.").

223. 9B WRIGHT & MILLER, *supra* note 71, § 2524, at 366–68.

judgment as a matter of law.[224] Accordingly, the appellate court must also treat the jury's verdict with the deference required by Rule 50.[225]

Interestingly, Justice Breyer's logic in *Google* suggests that an appellate court should defer to subsidiary factual findings even in the context of a bench trial. That is because this part of his opinion does not rely on Rule 50 or the Seventh Amendment notions underlying it.[226] Rather, he finds the deference obligation to be inherent in the *U.S. Bank* structure that governs rulings by trial judges as well.[227] As explained in greater detail below, a properly conceived form of deferential review is also desirable with respect to judicial findings. On this point too, then, the deference reflected in Justice Breyer's actual review of fair use in *Google* is laudable. The key mistake, as the next Section will show, was insisting nonetheless that a de novo standard governs the "ultimate 'fair use' question."[228]

D. WHAT GOOGLE *GETS WRONG*

There are two central defects in the *Google* Court's approach to selecting and applying standards of appellate review. The first is the inconsistency between (a) the Court's conclusion that the "ultimate" fair use question is subject to de novo appellate review and (b) the reality that its review of the fair use verdict for Google was highly deferential. It is, in effect, de novo review in name only—which is likely to create considerable confusion for courts going forward. The second shortcoming is in the Court's mistaken premise that de novo review is needed for areas where the appellate court will need to clarify the governing law. Properly understood, a deferential standard of review fully empowers appellate courts to provide any generalizable guidance that is justified and desirable with respect to any particular issue.

1. De Novo Review in Name Only

One problem with the *Google* decision is the mismatch between what Justice Breyer claims is "de novo" review of the jury's ultimate fair use verdict and what is, in practice, a form of review that mandates judicial deference to implicit, subsidiary, "factual" findings that the jury *may* have made in reaching its ultimate verdict. What *Google* gets right—the deference to the jury regarding those crucial subsidiary issues[229]—means this is a very strange kind of de novo review.

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224. *See, e.g.*, *Reeves*, 530 U.S. at 148–54 (examining the appellate court's reversal of a judgment based on a jury's verdict in terms of whether the Rule 50 standard was met).

225. If anything, it could be argued that an appellate court should show greater deference to the jury's verdict than a trial court should. *See* Adam N. Steinman, *Appellate Courts and Civil Juries*, 2021 WIS. L. REV. 1, 30–34.

226. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 24–25 (2021).

227. *Id.* (noting "the fact/law principles we set forth in *U.S. Bank*").

228. *Id.* at 24.

229. *See supra* Section III.C.

Justice Breyer's analysis in *Google* reveals that it was deference to the jury's verdict—not de novo review—that established the key premise for the Court's ultimate conclusion regarding fair use. Recall some of the crucial implicit findings to which Justice Breyer deferred: Google had taken from Oracle's code "only what was needed to allow users to put their accrued talents to work" on Google's Android platform;[230] and Google could not have achieved its "basic objective" if it had "created its own, different system of declaring code."[231]

Now, imagine how different Justice Breyer's opinion would have been if the jury's verdict had gone against Google. If the jury could reasonably have found that Google had taken *more* of Oracle's code than was needed, or that Google *could* have achieved its objectives by writing its own code, then Justice Breyer's fair use analysis would have to accept those premises. Might he still have found that Google's copying was fair use? Perhaps, but it would have to be a very different opinion—one that explains why a copyright violation should be excused *even though* the copier had copied too much or could have achieved its objectives without copying.

As this shows, the purportedly factual issues to which the Court required deference are a far cry from the "basic, primary, or historical facts"[232] that lie comfortably on the "fact" side of the law–fact spectrum. They are not about what color the traffic light was, or how fast a car was traveling, or who punched whom first.[233] Rather, they are freighted with normativity. Was the amount of code that was copied more than "what was needed"? Would refraining from copying have been sufficient to achieve Google's objectives? A "no" answer to these questions would be very hard to square with "fair" behavior. Yet—in this hypothetical jury verdict against Google—Justice Breyer would insist that the appellate court infer those "no" answers from the verdict and then review those answers deferentially. This is the exact opposite of de novo review, the crux of which is that the reviewing court's analysis should not be affected by the conclusion that was reached below.[234] Accordingly, to say that courts maintain de novo review of the "ultimate 'fair use' question"[235] creates a problematic cognitive dissonance.

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230. *Google*, 593 U.S. at 40.

231. *Id.* at 34–35.

232. Thompson v. Keohane, 516 U.S. 99, 110 (1995) (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)).

233. *See, e.g.*, Monaghan, *supra* note 2, at 235 (describing "fact identification" as "a case-specific inquiry into what happened here" such as "inquiries about who, when, what, and where" (emphasis omitted)).

234. In this hypothetical, Justice Breyer might find—based on the record at trial—that a reasonable jury could *not* have concluded that Google had copied more than what was needed. But that would be an application of deferential review because the appellate court could displace those implicit findings only if they were unreasonable. *See supra* notes 215–25 and accompanying text (describing the deference owed to jury verdicts under the Seventh Amendment and Rule 50).

235. *Google*, 593 U.S. at 24.

There is a way out of this undesirable situation, however. As the next Section explains, the better path would have been to reject the premise that courts *should* engage in de novo review of mixed questions of law and fact.

2. De Novo Review of "Mixed Questions" Is Unnecessary

The justifications for de novo review of so-called mixed questions of law and fact do not stand up to scrutiny. As discussed above,[236] the Court has instructed that such a mixed question—including the question of fair use that was at issue in *Google*—should be reviewed de novo if answering that mixed question "entails primarily legal . . . work."[237] Thus, a de novo standard applies when the decision will "require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard"[238] as opposed to decisions that will "immerse courts in case-specific factual issues" involving "multifarious, fleeting, special, narrow facts that utterly resist generalization."[239]

This framework rests on a mistaken premise. No issue is inherently one that requires legal "amplifying," "elaborating," or "expound[ing]," rather than one that immerses the decision-maker in "multifarious, fleeting, special, narrow facts that utterly resist generalization."[240] One job the appellate court has is to *decide* whether more generalized expounding is appropriate or desirable. It is perverse to require courts to conduct a speculative, abstract inquiry into whether an issue is susceptible to legal amplification or elaboration that is divorced from the substantive task the court must undertake in deciding the appeal on the merits.[241]

A fuller understanding of how deferential review operates shows that de novo review of mixed questions is not necessary for courts to perform their law-clarifying function. The Supreme Court itself has instructed that even a deferential standard of review requires appellate courts to independently identify and correct legal errors: An appellate court must still "correct any legal error infecting a [lower] court's decision" and "should apply *de novo* review" to such a legal error.[242]

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236. *See supra* notes 177–80 and accompanying text.

237. *Google*, 593 U.S. at 24 (quoting U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. v. Vill. at Lakeridge, LLC, 583 U.S. 387, 396 (2018)).

238. *U.S. Bank*, 583 U.S. at 396.

239. *Id.*

240. *See supra* notes 177–79 and accompanying text.

241. *See* Steinman, *Rethinking*, *supra* note 58, at 14–15 ("The Court's approach puts the cart before the horse by requiring courts to predict in the abstract whether more generalized rules are justified or desirable without considering the actual merits of such rules.").

242. *U.S. Bank*, 583 U.S. at 398 n.7; *see also* McLane Co. v. EEOC, 581 U.S. 72, 81 n.3 (2017) (noting that an abuse-of-discretion standard "does not shelter a district court that makes an error of law"); Koon v. United States, 518 U.S. 81, 100 (1996) ("[A]n abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law."); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402 (1990) (noting that an abuse-of-discretion standard "would not preclude the appellate court's

Accordingly, deferential review does not prevent the court from engaging in meaningful clarification of the law. It may "amplify" and "elaborate" the contours of the law and, having done so, correct de novo lower court or jury decisions that transgress those contours. Deference is never absolute. If the appellate court identifies tangible shortcomings in the lower court's analysis or process, reversal may be required even when a deferential standard of appellate review applies.[243] And the identification of what is problematic about the lower court's decision—or what is supportive of the lower court's decision—will provide clarification for future decision-makers.

Consider some of the examples Justice Breyer's *Google* opinion offers as Supreme Court decisions that had given "general guidance for future cases" regarding copyright fair use.[244] He cites *Campbell v. Acuff-Rose Music, Inc.*[245] as a case "describing kinds of market harms that are not the concern of copyright."[246] This purportedly bolstered his conclusion that fair use should be subject to de novo review. But a deferential standard of review would have permitted the Court to provide exactly the same guidance. If a lower-court judgment or verdict had granted relief based on a market harm that was *not* addressable by copyright law, that would certainly be the kind of "legal error"

correction of a district court's legal errors"); Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc., 456 U.S. 844, 855 n.15 (1982) ("Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard."). To recognize appellate courts' ability to correct such legal errors, of course, invites them yet again to confront the law–fact distinction. In Section III.E, *infra*, this Article offers a workable way to vindicate this notion: by tying any such de novo correction of legal errors to the appellate court's identification of generalizable rules, tests, principles, or standards. *See infra* notes 267–69 and accompanying text.

243. *See, e.g.*, Murthy v. Missouri, 144 S. Ct. 1972, 1988 n.4 (2024) (holding that many of the district court's findings "unfortunately appear to be clearly erroneous" because the evidence on which it relied for those findings was "inapposite"); Horne v. Flores, 557 U.S. 433, 455–56 (2009) (explaining why the district court's refusal to modify an injunction was an abuse of discretion); *Koon,* 518 U.S. at 111 (explaining why an improper consideration relied on by the district court was an abuse of discretion); Wilson v. UnitedHealthcare Ins. Co., 27 F.4th 228, 242 (4th Cir. 2022) ("A district court 'abuses its discretion when it . . . fails to consider judicially recognized factors constraining its exercise of discretion . . . .'" (quoting Newport News Shipbuilding & Dry Dock Co. v. Holiday, 591 F.3d 219, 226–27 (4th Cir. 2009))); United States v. Cruz, 38 F.4th 729, 732 (8th Cir. 2022) ("It can be an abuse of discretion to fail to consider an important factor, give significant weight to an improper or irrelevant factor, or clearly err in the weighing of factors." (internal quotation marks omitted)); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 985 F.3d 1032, 1053 (D.C. Cir. 2021) ("[I]n reviewing for abuse of discretion, we consider whether the decision maker failed to consider a relevant factor, whether he or she relied on an improper factor, and whether the reasons given reasonably support the conclusion." (brackets and internal quotation marks omitted)); United States v. $11,500.00 in U.S. Currency, 710 F.3d 1006, 1011 (9th Cir. 2013) ("A district court abuses its discretion if it does not apply the correct legal standard or if it fails to consider the factors relevant to the exercise of its discretion." (citation omitted)).

244. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 24 (2021); *see also supra* notes 197–201 and accompanying text.

245. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

246. *Google*, 593 U.S. at 24 (citing *Campbell*, 510 U.S. at 592–93).

that can be corrected even under a deferential standard of review.[247] A deferential standard would still permit the appellate court to declare de novo a legal principle regarding the general types of harm that are (and are not) "the concern of copyright." And it would permit reversal if the record reveals that a remedy was provided for the wrong kind of harm.

The same goes for both *Harper & Row Publishers, Inc. v. Nation Enterprises*,[248] which Justice Breyer cites as clarifying that the "scope of fair use is narrower with respect to unpublished works,"[249] and *Sony Corp. of America v. Universal City Studios, Inc.*,[250] which he cites as establishing that "wholesale copying aimed at creating a market substitute is presumptively unfair."[251] A lower-court decision that incorrectly equated published and unpublished works would open itself up for reversal even under a deferential standard of review. As would a lower-court decision that ignored the presumptive unfairness of "wholesale copying aimed at creating a market substitute."[252] And even if the appellate court were reviewing a general jury verdict that lacked explicit reasoning,[253] an appellate court applying Rule 50's deferential standard could—in the *Harper & Row* example—emphasize the significance of the unpublished nature of the work in its analysis of that verdict, thus providing precisely the same guidance to future courts. Likewise, an appellate court applying Rule 50's deferential standard could declare and apply the *Sony* presumption in analyzing the verdict.

In all of these instances, then, an appellate court—including the Supreme Court itself—can provide prospective guidance regardless of whether the "ultimate fair use question" is subject to de novo review. Even a deferential standard requires the appellate court to determine whether each ruling being reviewed is or is not within the realm of permissible decision-making. That provides meaningful guidance whether or not the court explicitly amplifies or elaborates on the legal standard. In one recent case, the Supreme Court held that an appellate court must review a trial court's decision to award enhanced damages in a patent case for abuse of discretion.[254] Yet in reaching this conclusion, the Court emphasized that appellate review under a deferential

247. *See supra* note 242 and accompanying text.

248. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 564 (1985).

249. *Google*, 593 U.S. at 24 (quoting *Harper & Row*, 471 U.S. at 564).

250. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

251. *Google*, 593 U.S. at 24 (citing *Sony*, 464 U.S. at 451).

252. *Id.*

253. *See, e.g.*, Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 781 (1998) ("[C]ourts may not probe into a jury's reasons for the general verdicts it submits."); 9B WRIGHT & MILLER, *supra* note 71, § 2501, at 88 ("Most jury-tried civil cases in federal courts are resolved, and always have been, by a general verdict in which the jury finds for the plaintiff or for the defendant.").

254. Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93, 107 (2016).

standard had "narrowed" the "channel of discretion,"[255] and had "given substance to the notion that there are limits to that discretion."[256]

An even more recent Supreme Court case confirms an appellate court's ability to guide future courts even while reviewing a decision deferentially. In *United States ex rel. Polansky v. Executive Health Resources, Inc.*, the Court considered a district court's order dismissing a *qui tam* action at the government's request over the relator's objection.[257] Such an "order is generally reviewable under an abuse-of-discretion standard," and the Court concluded that an affirmance was required under that deferential standard.[258] The Court added, however, that "in the interest of providing guidance, it might be useful for us to put that standard of review to the side, and simply to say that the District Court got this one right."[259] And it proceeded to explain the various aspects of the record below that supported the ultimate conclusion that dismissal was proper in that case.[260]

With these insights in mind, the question reduces to this: What sort of deference is required in situations where the appellate court opts *not* to do the sort of "legal work" described above?[261] One answer would be that review should be informed by whether the appellate court or the trial court is better positioned to reach the correct result.[262] There are numerous reasons why the trial court would have a comparative advantage in this regard. At trial, decision-makers can better evaluate the credibility of live witness testimony. As the Supreme Court has put it, "the various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are lost on an appellate court later sifting through a paper record."[263] And the trial court can develop a deeper understanding of the case because it presides over "the entirety of a proceeding," as compared to "an appeals court judge who must read a written transcript or perhaps just those portions to which the parties have referred."[264]

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255. *Id.* at 104 (quoting Friendly, *supra* note 165, at 772).

256. *Id.* at 108.

257. United States *ex rel.* Polansky v. Exec. Health Res., Inc., 599 U.S. 419, 423–24 (2023).

258. *Id.* at 438.

259. *Id.* at 438–39.

260. *Id.*

261. The extent to which the appellate court will articulate such generalizable propositions will ultimately be up to the court itself, and it may need to balance various costs in making that assessment. *See, e.g.*, Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 16–19 (1996) (describing the "decision costs" and "error costs" inherent in the judicial declaration of rules).

262. *See, e.g.*, McLane Co. v. EEOC, 581 U.S. 72, 79 (2017) ("[W]e ask whether, 'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" (quoting Pierce v. Underwood, 487 U.S. 552, 559–60 (1988))).

263. Cooper v. Harris, 581 U.S. 285, 309 (2017) (quoting Anderson v. City of Bessemer City, 470 U.S. 564, 575 (1985)).

264. Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 327 (2015) (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 610 (1950)).

Those advantages, indeed, are commonly invoked as justifications for requiring deference to the trial-level decision-maker.[265]

Accordingly, it is hard to imagine any issue for which it can confidently be said that the appellate court is always better positioned than the trial-level decision-maker. Or to state the point more precisely: It is hard to imagine an appellate court advantage when that appellate court has opted *not* to offer any additional, generalizable guidance. As discussed above, an appellate court that does offer such guidance is free to do so even when review is deferential.[266] The next Section will state more precisely how appellate review should operate. As this Section has shown, however, the *Google* Court's emphasis on whether a particular issue *inherently* entails "legal" or "factual" work is misguided.

E. A Better Approach to Appellate Deference

The insights above reveal that the deference owed to a trial court should not seek to identify the fundamental nature—legal or factual—of the issue being reviewed. What matters, rather, is how the appellate court chooses to analyze and resolve the issue. When the appellate court articulates generalizable propositions relating to that issue, it has always been able to do so independently of the trial court.[267] And appellate courts can continue to do so under this Article's proposal. The first step an appellate court should take, therefore, is to identify the rules, tests, principles, or standards that govern a particular issue.[268] That step does not require deference to the trial-level decision-maker, and that step will provide precisely the kind of "elaborat[ion]" or "amplif[ication]"[269] that is a key value of appellate review.

What happens next? How should appellate review operate once the appellate court has articulated the generalizable propositions regarding the issue? Or put another way: Assuming that the trial-level decision-maker did not run afoul of any generalizable principle, what deference is owed the trial court's ultimate conclusion regarding the issue? In *Google*, that ultimate conclusion was whether Google's use of Oracle's Java code was—or was not—"fair use."

Arguably, the Court's logic in *Google* and its other decisions on standards of appellate review would require deference in this situation. Once the appellate court has given all the generalizable guidance it is willing to provide, all that remains are "multifarious, fleeting, special, narrow facts that utterly

265. *See supra* notes 263–64 and accompanying text.

266. *See supra* notes 242–43 and accompanying text.

267. *See supra* notes 242–56 and accompanying text.

268. This first step would include precisely the kind of legal guidance that Justice Breyer's *Google* opinion identified in the context of copyright law. *See supra* notes 244–53 and accompanying text.

269. U.S. Bank Nat'l Ass'n *ex rel.* CWCapital Asset Mgmt. v. Vill. of Lakeridge, LLC., 583 U.S. 387, 396 (2018).

resist generalization."[270] And those are precisely the inquiries for which deferential review is required.[271] Given the inherent advantages that trial courts enjoy with their proximity to the relevant evidence and their immersion in the full trial-level record,[272] such deference makes sense.

That said, the deference that would be required at this second step is not blind deference. Deferential review still permits an appellate court to reverse when it has a "definite and firm conviction that a mistake has been committed."[273] Properly applied, a deferential standard of review can optimally assess whether an appellate court's particularly "firm conviction" outweighs the trial court's institutional advantages.[274] Likewise, reversal may be justified by identifiable problems with the trial court's reasoning or decision-making process; those can indicate to an appellate court that—as to that particular decision—the trial court's structural advantages were compromised by other concerns.[275] But there is no reason to allow the appellate court to substitute its judgment if it can neither (a) clarify the law with generalizable rules, standards, or principles, nor (b) justify reversal based on a higher level of confidence or by identifying particular problems in the lower court's decision.[276]

These two steps offer a workable, coherent methodology that empowers appellate courts to discharge both of their key duties—law clarification and

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270. *Id.* (quoting Pierce v. Underwood, 487 U.S. 552, 561–62 (1988)); *see also supra* note 179 and accompanying text (discussing this language).

271. *U.S. Bank*, 583 U.S. at 396 (stating that when a decision "address[es] what we have (emphatically if a tad redundantly) called 'multifarious, fleeting, special, narrow facts that utterly resist generalization,'" an appellate court should review "with deference" (quoting *Pierce*, 487 U.S. at 561–62)). As argued above, *supra* Section III.D, the Court's key mistake in *Google* and its earlier cases was to suggest that some category of "mixed" questions existed for which de novo review was appropriate *regardless* of whether the appellate court is willing to provide the kind of guidance that will meaningfully clarify the law.

272. *See supra* notes 263–64 and accompanying text.

273. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)).

274. One theoretical model would conceptualize the "firm conviction" required for an appellate court to reverse under a deferential standard of review as the appellate court having a higher than usual level of confidence that counteracts what might otherwise be the trial court's higher likelihood of correctness. Steinman, *Rethinking*, *supra* note 58, at 20–22.

275. *See supra* note 243 and accompanying text.

276. It is possible that other justifications exist for insisting on "pure" de novo appellate review of certain issues. I have argued elsewhere that such an approach can operate to mitigate the likely *costs* of error in situations for which an error in one direction may be more costly than error in another. *See* Steinman, *Rethinking*, *supra* note 58, at 44–48 (discussing asymmetric error costs). That justification, however, is not reflected in the Supreme Court's current doctrine, and its elaboration is beyond the scope of this Article. An added benefit of this Article's proposal is that, in clearing out the misguided underbrush of the law–fact distinction, it may open space for a more coherent way to handle issues that do raise a threat of asymmetric error costs.

error correction[277]—without requiring courts to characterize issues as "legal" or "factual." Moreover, this approach can apply regardless of whether the decision at the trial-court level is made by a judge or a jury. As discussed above, the imperatives of the Seventh Amendment and Rule 50 strengthen the argument for deferential appellate review in the context of jury verdicts.[278] But the underlying justifications for this Article's proposal speak with equal force to decisions by trial-court judges, given their closer connection to the record, evidence, and testimony.[279]

IV. CHANGING THE FOCUS: OUTCOMES, NOT ISSUES

The preceding Parts of this Article have shown the problems with the Supreme Court's use of the law–fact distinction in connection with issue preservation and appellate deference. And they have proposed alternative approaches that are workable, that avoid the uncertainty inherent in the troublesome line between "law" and "fact," and that better vindicate the practical considerations underlying these important facets of appellate review. In this Part, I elaborate on a deeper lesson that can be drawn from a comparison between this Article's proposals and the Court's reliance on the law–fact distinction. The focus should not be on characterizing the *issues* that were decided—say, as "legal" or "factual" issues. Rather, the focus should be on the *outcomes* of the decisions.

As argued in Part II,[280] a better approach to issue preservation would not fixate on whether the issue decided in a pretrial ruling (such as a summary-judgment decision) was legal or factual. It should inquire whether the outcome of that pretrial ruling was conclusive. In many instances, decisions that involve what appear to be quintessentially "legal" issues are more likely to have that conclusive effect. But that correlation is imperfect—leading to an approach to issue preservation that can be both underinclusive and overinclusive. The only thing that should matter from an issue-preservation standpoint is whether the pretrial ruling conclusively resolves the issue such that there is no need for further decisions on that issue at trial.

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277. *See, e.g.*, DANIEL JOHN MEADOR, APPELLATE COURTS IN THE UNITED STATES 3 (2d ed. 2006) ("Error correcting and lawmaking are the core appellate functions."). Indeed, the universal form of deferential review proposed here may more strongly encourage appellate courts to provide concrete clarification of the law going forward. Rather than award appellate courts the power of de novo review based simply on a *prediction* that resolving a particular issue would entail "legal" work, this Article's proposal would make the appellate court actually *do* that legal work. The de novo standard suggested by the *Google* Court, on the other hand, would give appellate courts untrammeled power to second-guess the trial-level decision regardless of whether they perform that law-clarification function. *See* Steinman, *Rethinking*, *supra* note 58, at 13 (describing appellate court decisions that lack substantive reasoning or state explicitly that they will not have precedential effect).

278. *See supra* notes 212–25 and accompanying text.

279. *See supra* notes 262–65 and accompanying text.

280. *See supra* Section II.E.

Likewise, as argued in Part III,[281] it is a mistake to base the extent of appellate deference on whether the issue decided below entails "legal" or "factual" work. What matters is the nature of the outcome reached by the appellate court in conducting its review. When that outcome articulates generalizable principles or identifies features of a lower court decision that either enhance or undermine its soundness, the appellate court may identify and develop those principles and features independently. But where the outcome merely reaches a different ultimate result than the trial judge or jury, some deference is required. As explained above, that deference is not absolute. An especially "firm conviction" by the appellate court can still justify reversal, as can the presence of specific problems with the analysis that led to the lower court decision.[282] The appellate court should not, however, be able to flip the result merely because it would reach a different conclusion.

A proper focus on outcomes—rather than issues—reveals an important but unidentified connection between issue preservation and the standard of appellate review. By definition, a deferential standard of appellate review contemplates the possibility that a trial-level decision-maker might legitimately decide a given issue either way.[283] For example, even on an identical trial record, both a jury verdict for the plaintiff and a jury verdict for the defendant might be "reasonable" results that should be affirmed on appeal.[284]

Issue preservation reflects a similar dynamic. The rulings that trigger concerns about issue preservation are ones where the ruling effectively defers a decision to later in the process. When a trial court denies summary judgment in a case like *Ortiz*,[285] it has concluded that there is a genuine dispute. The issue could legitimately be decided either way, so the court defers to the ultimate decision-maker at trial. In many cases, the jury would decide. But in others, the judge would render judgment based on a bench trial, with live witnesses who may be cross-examined rather than through the "paper trials" that accompany pretrial motions.[286]

This Article's proposals weave together these two threads. First, consider issue preservation. When the outcome of a pretrial decision defers the issue to trial, the party must raise arguments relating to that issue at trial, including through a Rule 50 motion. When the outcome of a pretrial decision does not defer the issue to trial—it resolves the issue conclusively—the issue is preserved

281. *See supra* Section III.E.

282. *See supra* notes 273–75 and accompanying text.

283. *See* Steinman, *Rethinking*, *supra* note 58, at 32 ("Deferential review by its nature tolerates variation—even, potentially, in cases that present similar factual or evidentiary records. If such variation were intolerable, deferential review would never be permissible." (citing Hana Fin., Inc. v. Hana Bank, 574 U.S. 418, 424 (2015))).

284. *See supra* notes 215–25 and accompanying text (describing the deference owed to jury verdicts under both the Seventh Amendment and Rule 50).

285. *See supra* notes 85–89 and accompanying text (discussing the *Ortiz* decision).

286. *See supra* notes 137–39, 153 and accompanying text.

regardless of whether the party raises it again during or after trial. For the standard of appellate review, the approach is as follows: When the outcome of the appellate decision clarifies generalizable issues that are of prospective significance, no deference to the trial court's view of those issues is required. When the outcome would simply reverse a case-specific conclusion by the trial court, however, the appellate court cannot do so de novo. It must show deference to the trial-level decision by identifying concrete reasons why, in this particular case, the trial court's usual advantages of proximity to the relevant evidence and familiarity with the case should not carry the day.

This shift from issues to outcomes avoids a fundamental flaw in the law–fact distinction. As discussed above, no issue is necessarily "legal" or "factual."[287] We can, however, identify the consequence of a decision on a particular issue (for purposes of issue preservation). And we can identify the analytical building blocks that justify a decision on a particular issue (for purposes of determining the extent of appellate deference). As this Article has argued, these inquiries can more effectively address both issue preservation and appellate deference than the approaches endorsed by the Supreme Court's recent decisions in *Dupree* and *Google*.

CONCLUSION

Although the distinction between "legal" and "factual" issues is an ancient one, two very recent decisions from the Supreme Court highlight its shortcomings—at least as a metric for coherently resolving crucial questions of issue preservation and appellate deference. It is more productive to focus on *how* courts decide an issue rather than on the *nature* of the issue itself. This Article has proposed alternative approaches that dispense with the problematic law–fact distinction and that better accomplish the goals that should matter in terms of judicial design.

As to issue preservation, this Article's approach avoids unnecessary relitigation of issues that have been conclusively resolved pretrial, while properly encouraging parties—when trial does occur—to contest unresolved issues through that more robust process. As to appellate deference, this Article urges a universal form of deferential review that emphasizes the appellate court's analysis of the issue, incentivizing the law-clarification function of appellate courts while minimizing unwarranted interference with lower-court decision-makers. On both fronts, moving beyond the law–fact distinction can pave the way toward a more sensible doctrinal framework.

287. *See supra* notes 240–41 and accompanying text.